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The Responsible Mind in South African Criminal Law

PhD Thesis

By James Grant

Supervised by Andrew Paizes

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- *S v Chretien* 1981 (1) SA 1097 (A)
- Jonathan Burchell *Principles of Criminal Law* 3rd Revised ed (2006)
- CR Snyman *Criminal Law* 5th ed (2008)
- F. Rumpff. 'Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters.' 1967

Burchell and Snyman are the leading texts on criminal law in South Africa. The Rumpff Commission Report formed the basis for the defence of insanity and, with the *Chretien* case, for the defence of non-pathological incapacity.

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Referencing Style

The SALJ referencing style is adopted as a basic template. However, it is deviated from in respect of the use of cross references in footnotes, with the exception of a cross-reference to a source cited immediately before, where 'ibid' is used. For other cross references the entire reference (except for the initials of the author/s) is repeated to avoid confusion and save the reader the trouble of continually refer back to a previous footnote. Furthermore, a complete bibliography including all sources, arranged alphabetically, is included at the end (starting on page 280).

Dedication

I dedicate this PhD to my father, John Grant, and my mother, June Grant, for their love and support throughout, but in particular, for the purposes of this PhD, for making me wonder about responsibility. They were both wonderful parents, but my mother seemed to always know right from wrong intuitively, while my father did not. This made me question the appropriateness of attaching responsibility to anyone's conduct - a question which this PhD attempts to solve.

Declaration

I declare that this thesis is my own, unaided work. It is being submitted for the Degree of Doctor of Philosophy in the University of the Witwatersrand, Johannesburg. It has not been submitted for any degree or examination in any other university.



James Grant

9 September 2011

Part I: Introduction

1 Introduction

1.1 Introduction

South African criminal law has accepted that it is only fair to punish those who are responsible and blameworthy for doing wrong.[1] Responsibility – that the accused must be blameworthy – finds expression in several specific requirements of South African criminal law: voluntariness, fault,[2] and in particular, capacity.

In this chapter, I begin by introducing the concept of responsibility and discuss the basic requirements for criminal liability. I then set out the history and development of the law relating to responsibility in South Africa. In chapter 2, I introduce and describe the motivation, objectives, and methodology of the empirical research that was conducted to illuminate questions relating to responsibility. The chapters that follow (Part II: chapters 3-7) present a critical analysis of the law as it is relating to responsibility in criminal law in South Africa – with reference to the results of the empirical research, as follows:

[1] Jonathan Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 358; CR Snyman *Criminal Law* 5th ed (2008) 149. 'To be criminally accountable, a perpetrator's mental faculties must be such that he is legally to blame for his conduct.' (*S v Laubscher* 1988 (1) SA 163 (A) 166-7 from J. C. De Wet *Strafref* 4 ed (1985) 110; endorsed in *S v Wiid* 1990 (1) SACR 561 (A) 563 and *S v Calitz* 1990 (1) SACR 119 (A) 126).

[2] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 179 & 358; Snyman *Criminal Law* 5th ed (2008) 149. Snyman notes that if an accused lacks intention, s/he also lacks culpability (ibid 149).

1) The concept of 'mental illness or defect', required for a successful insanity defence remains officially undefined. The guidance offered by the unofficial definition in the Stellmacher[3] case is either unhelpful or, I submit, misguided. Ultimately, it would appear that dangerousness is the real concern. I argue that dangerousness of an otherwise innocent person is not the business of the criminal law, but of the civil law of commitment.
2) The two abilities that are required for capacity also present problems. The theoretical problem around the concept of capacity – the ability to do otherwise – is introduced and discussed. I note also that the model of responsibility, upon which our law is currently based, is indeterministic. The two capacities required are problematic in their current form:
   a) The ability to appreciate wrongfulness – this is central to capacity and yet it is unclear whether it is a reference to the abstract prohibition, to unlawfulness (in the sense of the absence of justification), or to immorality;
   b) The ability to conduct oneself in accordance with an appreciation of wrongfulness is necessarily unclear because the central concept is unclear. It is also problematic because it is apparently identical to the requirement of voluntariness, and yet it is distinguished. The problem with voluntariness, or any conative impediment, is not so much that our law has no definition for it – it is that it has too many. Up to five or six different definitions may be discerned and the problem is to know which one to adopt.

It is only by considering what model of responsibility the law should adopt that one may make the correct choice. This is the subject of part III/chapter 8: Philosophy of Mind: Responsibility.

I will presume, as an uncontroversial premise, that people cannot be responsible to the extent that indeterminism operates within and upon them. The model of responsibility that will be proposed here is the very opposite of the current indeterministic model upon which our law is currently based. The model I will propose regards human conduct based upon indeterminism as, necessarily,

[3] *S v Stellmacher* 1983 (2) SA 181 (SWA).

arbitrary and capricious, and, as such, holds that indeterminism is an unsound basis for responsibility. Instead it is proposed that people are responsible to the extent that determinism operates (in a particular way) upon them. It will be argued that determinism operates in the right sort of way when people are reason-sensitive. That is, their reasons determine their conduct and their reasons are not only the reasons they would want to have, but they are the reasons that arise appropriately out of the way the world is: they are the reasons we would want them to have.

In part IV/chapter 9, I address the question whether the proposed shift in theoretical paradigm can be reconciled with current requirements, or whether new requirements are necessary. This is followed by some examples of how it might work.[4] Ultimately a suggestion for statutory reform is included in an appendix,[5] which will give effect to the proposed model of fault and responsibility.

1.2 Responsibility

Responsibility concerns the credit or blameworthiness of a person. That is, whether it makes sense to praise or blame a person for his/her conduct. It is concerned with whether the conduct or state of mind of the accused person may be attributed to the accused, irrespective of their conduct or actual state of mind.

The concept of 'responsibility' is used in this thesis to refer to whether any individual satisfies basic conditions which make it proper to regard him/her as worthy of praise or blame for his/her conduct. As it is used here, it does not complete the enquiry of whether any person is appropriately and ultimately to blame, but only whether s/he is a worthy candidate. This is the question of 'agent responsibility' as opposed to 'moral responsibility' which is concerned with whether the agent is responsible for his/her conduct *in the circumstances*. This thesis is primarily concerned with agent responsibility as the necessary conditions for blame. How these conditions may be integrated into

[4] See 9.6.5 Examples on page 239ff and 9.6.6 Difficult Cases on page 244ff.
[5] 15 Appendix E: Recommendation for Law Reform on page 275ff.

concerns with ultimate blame and moral responsibility, that is what are sufficient conditions for blame, are addressed towards the end.[6]

The concept of responsibility is sometimes used, in law, to mean the equivalent of liability[7] - that the accused is, all things considered, guilty. What is generally required under South African law for a finding of guilt will be discussed briefly below.[8] However, this is not the sense in which it is employed here. Instead, the more restrictive philosophical meaning of blameworthiness, often recognised in our law,[9] is adopted.

[6] See the discussion on page 201. How the ultimate question of blame may be integrated with what will be proposed here for agent responsibility is addressed under the heading 9.2 Fault on page 209ff.

[7] As Stephen indicates regarding judge's instructions to juries: 'Is this person responsible, in the sense of being liable, by the law of England as it is, to be punished for the act which she has done' (J. F. Stephen *A History of the Criminal Law of England* Vol II (1883) 127).

[8] See on page 19ff.

[9] Burchell uses the terms criminal capacity and criminal *responsibility* interchangeably as a mental requirement though distinct from fault (intention or negligence) (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 359).
Visser and Maré regard liability as a different enquiry from accountability which they regard as the question of criminal capacity concerned with the accused mental state (PJ Visser & MC Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 305-6). It would appear that they use the term accountability in the sense in which responsibility is employed here.
The Rumpff Commission report of 1967 was entitled: 'Report of the Commission of Inquiry into the *Responsibility* of Mentally Deranged Persons and related Matters' (emphasis added; F Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967)); The commission regards the fundamental requirement of *mens rea* in South African criminal law as underpinned by considerations of *responsibility*. Further, it regarded this requirement as comprised of two components – both concerned with responsibility. The first is a foundational component, the question of whether an individual accused can be held responsible 'i.e. whether his mental faculties are of such a nature as to render him accountable for his act under the law. Like infants, lunatics have since ancient times been held not to be responsible.' (para 2.2) They continue that where an individual is found responsible, the question then arises as to what form of responsible mental state s/he acted with, that is, intention or negligence. (para 2.2).
The case which finally formulated the defence of insanity pending the revision by the Rumpff commission, *R v Koortz*, framed the test in the language of responsibility (*R v Koortz* 1953 (1) SA 371 (A) 375).
The M'Naghten rules which set out the English insanity defence, are framed as an enquiry into responsibility:

> ' … every man is to be presumed to be sane, and to possess a sufficient degree of reason to be *responsible* for his crimes, until the contrary be proved to their satisfaction and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.' (emphasis added, *M'Naghten's case* 1843 (8) ER 718; Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) 8)

I will begin by setting out briefly what is required, under South African criminal law, for a finding of guilty.

1.3 Criminal Liability: General Requirements

One is generally only criminally liable and subject to punishment if the following requirements are met.[10] It must be proved that, on the part of the accused, there was *wrongful conduct* which coincided in time[11] with a *culpable mental state*. Please see 'Figure 1' for a diagrammatic

Neustatter clearly regards the concept of criminal responsibility as the question of sanity – determined by the English McNaughten Rules (W. L. Neustatter *Psychological Disorder and Crime* (1953) 15).

Clarkson and Keating, writing on the English criminal law, note that blame and punishment is only justifiable where individuals possess freedom of will. They state that '[t]he insanity defence thus seeks to distinguish the responsible from those lacking responsibility.'(CMV Clarkson & HM Keating *Criminal Law: Text and Materials* 5th ed (2003) 369)

Whitlock's text in which she explains that retribution requires responsibility on the part of the offender is entitled 'Criminal *Responsibility* and Mental Illness' (emphasis added; F. A. Whitlock *Criminal Responsibility and Mental Illness* (1963) 70).

The statutory provisions regulating incapacity due to mental illness/defect state that if this is established, the accused 'shall not be criminally responsible…' (s 78(1) of the Criminal Procedure Act 51 of 1977)

Susan Wolf argues that the McNaughten rules, which set out the English defence of insanity – may provide a sound foundation for responsibility (Susan Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Robert Kane (2002).

Responsibility is also contrasted with liability in *S v Mahlinza* 1967 (1) SA 408 (A); *S v Mnyanda* 1976 (2) SA 751 (A).

Hart distinguishes four types of responsibility: role, causal, liability and capacity responsibility (HLA Hart *Punishment and Responsibility* (1968) 211ff). Liability capacity is the form of responsibility concerning the ultimate question of guilt, whereas capacity responsibility is the form of responsibility that is the concern of this thesis.

[10] Other ways of grouping requirements exist (Snyman *Criminal Law* 5th ed (2008) 33ff). However, this method is consistent with practice and captures all that is necessary. Snyman argues that a separate requirement of 'compliance with the definitional elements' is required since each crime prohibits particular conduct, not just any conduct (ibid 30 & 4). He is obviously correct. However, the enquiry into conduct must necessarily concern itself with conduct that is prohibited, and not just any conduct. When one enquires into whether conduct may be attributed to the accused, the question is – necessarily – whether the accused did what is prohibited under some crime. As Visser and Maré note '*conduct* in the criminal law refers not only to action or inaction, but to such action or inaction in all the relevant circumstances of the particular proscription in question' (Visser & Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 46).

Snyman also prefers to combine the requirements of capacity and fault under the heading of culpability – though they remain separate requirements. De Wet and Swanepoel (De Wet *Strafref* 4 ed (1985) 110; endorsed in *S v Calitz* 1990 (1) SACR 119 (A); *S v Laubscher* 1988 (1) SA 163 (A); *S v Wiid* 1990 (1) SACR 561 (A)) are of the view that capacity forms a separate independent requirement within *mens rea*. These views are apparently reconcilable within the framework proposed above.

[11] Known as the requirement of contemporaneity (See *R v Chiswibo* 1961 (2) SA 714 (FC); *S v Masilela* 1968 (2) SA 558 (AD) See also *S v Goosen* 1989 (4) SA 1013 (A) though the judgement has been subjected to devastating criticism

representation of these requirements. A more detailed discussion of the various general requirements follows. The depth of the discussion is determined by the relevance of the requirement to matters of criminal responsibility, or at least, to informing the model and approach to responsibility that our law ought to adopt.

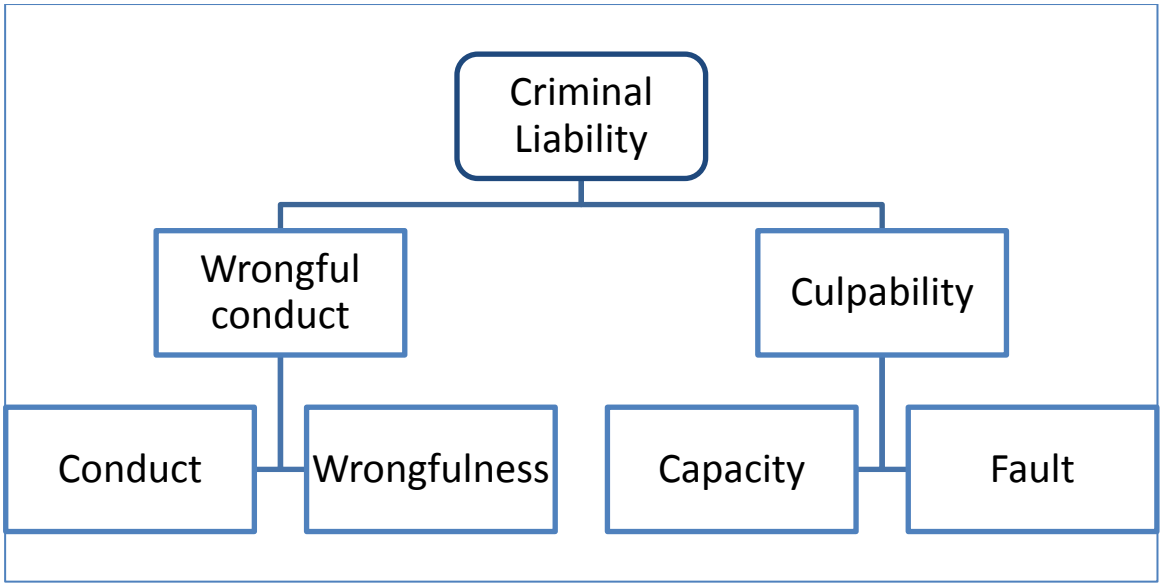


Figure 1: Framework of Criminal Liability

1.3.1 Unlawful Conduct

Wrongful/Unlawful[12] *conduct* (also known as the *actus reus*) requires conduct, in the form of an act or omission, which is voluntary and is wrongful/unlawful.

that it confused mistakes relating to causal sequence with mistakes relating to causal acts (Andrew Paizes "Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ).

[12] In criminal law the term 'unlawful' is used instead of 'wrongful'. However the term wrongful will sometimes be used here to assist in conveying the meaning of 'unlawful conduct'.

1.3.1.1 Unlawfulness

Conduct is judged unlawful according to the court's conception of the legal convictions of the community, as informed by the Bill of Rights in the Constitution.[13] It is under this requirement that conduct, which may ordinarily be prohibited as unlawful, may be permitted as justified in the circumstances. Several grounds of justification have been recognised, including private defence (which includes self-defence),[14] necessity (better known as duress),[15] and consent.[16]

South African criminal law punishes omissions only where the accused has failed to act in the face of a *legal* duty to act. Whether a legal duty to act exists in a particular circumstance is also a question of unlawfulness to be determined, again, by the court's conception of the legal convictions of the community, as informed by the Bill of Rights in the Constitution. [17]

1.3.1.2 Voluntariness

Conduct must be voluntary. Involuntary conduct is also known as automatism – from the notion of an automaton. So fundamental is this requirement that if it is absent the enquiry into liability ends – the accused cannot be liable.[18] 'In the context of a person who acts involuntarily there is no need to proceed any further in determining liability because such person will inevitably also lack

[13] Constitution of the Republic of South Africa 108 of 1996. See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).
[14] *Ex parte Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A); *S v De Oliveira* 1993 (2) SACR 59 (A); *S v Mokonto* 1971 (2) SA 319 (A).
[15] *S v Goliath* 1972 (3) SA 1 (A).
[16] *Clarke v Hurst NO* 1992 (4) SA 630 (D); *S v Collett* 1978 (3) SA 206 (RA); *S v Robinson* 1968 (1) SA 666 (A).
[17] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).
[18] *R v Kemp* [1957] 1 QB 399 at 407; SHC 18; *R v Schoonwinkel* 1953 (3) SA 136 (C); *R v Victor* 1943 TPD 77; *S v Chretien* 1981 (1) SA 1097 (A); *S v Johnson* 1969 (1) SA 201 (AD).

capacity and, incidentally, *mens rea* as well. No-one doubts the all-embracing nature of the defence of automatism that swallows up all other defences.'[19]

The requirement that conduct must be voluntary appears straightforward. However, as will be discussed, it is difficult to define. The problem with the requirement of voluntariness is not that definitions are not available, but that too many contradictory definitions are available, some of which, as we shall see, require a perplexing conception of a split personhood.

1.3.1.3 Causation

In addition to the above, causation is required for consequence crimes.[20] These are crimes where the conduct which is prohibited is the *causing* of some prohibited consequence. For instance, for murder,[21] the prohibited conduct is the *causing* of the death of another human being. In contrast, other crimes, known as circumstance crimes,[22] prohibit a particular state or circumstance, such as the possession of drugs. Notice the essential distinction is that, for consequence crimes, the conduct in question must cause some prohibited consequence whereas for circumstance crimes, this is not true. There is no need for anything to be caused by the possession of the drugs for that conduct requirement to be satisfied.

When an accused is charged with a consequence crime, the prosecution must prove that the conduct of the accused *caused* the prohibited consequence. Our courts adopt a two-phase enquiry[23] into causation. The first stage is an enquiry into factual causation, by means of the *conditio sine*

[19] J Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 36. See also *S v Chretien* 1981 (1) SA 1097 (A).
[20] Also known as materially defined crimes (Snyman *Criminal Law* 5th ed (2008) 79).
[21] Defined as the unlawful intentional killing of another human being.
[22] Also known as formally defined crimes (Snyman *Criminal Law* 5th ed (2008) 79).
[23] *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34; *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA) para 17; *S v Daniëls* 1983 (3) SA 275 (A) 324-5 & 31; *S v Mokgethi* 1990 (1) SA 32 (A) 39.

qua non test.[24] The second stage is an enquiry into 'legal causation', based on policy considerations of reasonableness, fairness, and justice, as informed by various specific tests of legal causation.[25]

The *conditio sine qua non* test may be literally translated from the Latin to ask 'condition without which not?', or more understandably, without the condition [in question, would the consequence] not [have occurred]. The test has become known as the 'but for' test, or more technically correct, as the 'but for ... not' test. It follows our intuitions and requires that we hypothetically vary the suspected cause by imagining it away, and consider whether the consequence in question would also vary appropriately.

This arguably throws the net of liability too widely by implicating, for instance in a death by shooting, the gun metal manufacturer, and even the parents of the shooter by virtue of their responsibility for the very existence of the shooter. For that reason it is now supplemented (and the causes implicated narrowed) by a limiting second stage enquiry into legal causation.[26]

1.3.2 Culpability

A *culpable mental state* (also known as *mens rea*) requires, on the current law, at least '*capacity*' and – at least for all serious crimes – some form of fault.

[24] *Minister of Police v Skosana* 1977 (1) SA 31 (A) 33-5, & 43-4; *S v Daniëls* 1983 (3) SA 275 (A) 324 & 31; *S v Haarmeyer* 1971 (3) SA 43 (A) 47; *S v Mokgethi* 1990 (1) SA 32 (A) 39.

[25] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A); *S v Mokgethi* 1990 (1) SA 32 (A). *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) para 18 per Corbett CJ: 'factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice'. *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA) paras 17– 9; *Smit v Abrahams* 1994 (4) SA 1 (A).

[26] *S v Daniëls* 1983 (3) SA 275 (A); *S v Mokgethi* 1990 (1) SA 32 (A).

1.3.2.1 Capacity

Capacity is the ability to appreciate the wrongfulness of one's conduct and to act in accordance therewith. It is discussed in detail below.[27]

1.3.2.2 Fault

Most crimes, certainly all serious crimes, also require some form of '*fault*'. Fault may take the form of either intention or negligence. Crimes that require no form of fault are known as 'strict liability offences'. Strict liability offences are offences for which no form of fault is required, that is, neither intention nor negligence is required.[28] Certain traffic offences are strict liability offences. It is not that fault is excluded but rather that fault is just irrelevant. Strict liability only affects whether fault is required and does not affect the requirements of conduct or capacity.

Fault in the form of intention is required for all common law crimes, except culpable homicide[29] and contempt of court by a newspaper editor,[30] for which negligence is sufficient. Intention in South African criminal law is widely defined to include *dolus eventualis* - constructive intention. *Dolus eventualis* exists when an accused foresees that his/her conduct poses a real or reasonable risk that the prohibited consequence could occur (or a prohibited circumstance could arise), reconciles him/herself to the risk, and persists.[31]

[27] See chapters 4 and 5.
[28] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 545; Snyman *Criminal Law* 5th ed (2008) 245.
[29] The unlawful *negligent* killing of another human being.
[30] *S v Harber* 1988 (3) SA 396 (A).
[31] *S v De Bruyn* 1968 (4) SA 498 (A); *S v Ngubane* 1985 (3) SA 677 (A). Academics have however been critical of this conception (E M Burchell, J R L Milton & J M Burchell *South African Criminal Law and Procedure: General Principles of Criminal Law* 2 ed Vol 1 (1983) 147ff; Paul T. Smith 'Recklessness in Dolus Eventualis' (1979) 96 SALJ; R C Whiting 'Thoughts on dolus eventualis' (1988) 1 SACJ).

Negligence is judged by the reasonable person test. An accused is adjudged to have been negligent if his/her conduct deviates from the standard of conduct of a hypothetical reasonable person in the circumstances of the accused.[32] The test for negligence in criminal law is derived from the civil law of delict case of *Kruger v Coetzee*.[33] In *Kruger v Coetzee*, Holmes JA (for a unanimous court) framed the test for negligence, for the purposes of delict, as follows:

> 'For the purposes of liability *culpa* arises if -
>
> *(a)* a *diligens paterfamilias* in the position of the defendant -
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> *(b)* the defendant failed to take such steps.'[34]

He went on to observe that the test for negligence had been conceived in these terms for the past fifty years.[35] This test for negligence, as stated by Holmes JA, has been translated from the civil law of delict, into criminal law, and remains the test for negligence in criminal law today.[36]

Various adaptations have been required to translate the test from delict into criminal law. These reflect that:

1. Negligently causing harm and patrimonial loss is not punishable in criminal law;[37]
2. Foresight of the actual prohibited consequence is required in criminal law.[38] For instance, on a charge of culpable homicide,[39] it is required that the reasonable person would foresee the death of the victim, and not mere injury;[40]

[32] *Kruger v Coetzee* 1966 (2) SA 428 (A); *R v Mbombela* 1933 AD 269; *S v Ngubane* 1985 (3) SA 677 (A).
[33] *Kruger v Coetzee* 1966 (2) SA 428 (A) 430.
[34] Ibid 430.
[35] Ibid 430.
[36] Jonathan Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 482; Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 525; Snyman *Criminal Law* 5th ed (2008) 209.
[37] Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 482.

3. In addition to punishing the unlawful causing of a prohibited consequence (such as death), criminal law also punishes an accused for, unlawfully and negligently, *being* in a prohibited circumstance;[41]
4. Furthermore, criminal law requires, for negligence, that the reasonable person must have foreseen that his/her conduct is proscribed, that is, prohibited in law.[42]

To account for these differences, the test for negligence, for the purposes of the criminal law, must read as follows:

For the purposes of liability negligence arises if -

(a) A reasonable person, in the circumstances of the accused, -

(i) would foresee the reasonable possibility of his/her conduct causing a consequence which is prohibited in law, or that being in those circumstances is prohibited in law;[43] and

(ii) would take reasonable steps to guard against such occurrence; [44] and

(b) the accused failed to take such steps.[45]

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[38] Ibid 482.
[39] The negligent unlawful killing of another human being.
[40] *S v Van As* 1976 (2) SA 921 (A).
[41] Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 482; Snyman *Criminal Law* 5th ed (2008) 209; Roger Whiting 'Negligence, Fault and Criminal Liability' (1991) 108 SALJ 433.
[42] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 525; *S v De Blom* 1977 (3) SA 513 (A).
[43] It appears possible to reduce this requirement to the question of whether the reasonable person would foresee the reasonable possibility (as is currently the case) that his/her conduct is prohibited in law. This would capture both the factual requirement – that the reasonable person would foresee the fact that a consequence may follow or what his or her circumstances are; but also the required knowledge of law – that the consequence or circumstance is prohibited. Nevertheless, the extended formulation is most familiar to South African criminal law and will be adopted for the purposes of discussion (see 9.2 Fault on page 209ff and further under 9.3 Capacity on page 211ff).
[44] I omit any adaptation regarding negligence in respect of prohibited circumstances (where the reasonable person, in the circumstances of the accused would foresee the reasonable possibility that his/her circumstances may be prohibited (see Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 525; Snyman *Criminal Law* 5th ed (2008) 209) on the basis that further enquiries (regarding reasonable steps) appear to be redundant (Whiting 'Negligence, Fault and Criminal Liability' (1991) 108 SALJ 433n15).
[45] See Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 525; Snyman *Criminal Law* 5th ed (2008) 209-10.

The standard of the reasonable person is objective and does not take account of any disabilities on the part of the accused. The test is only 'subjectivised' in the accused's favour,[46] by considering what the reasonable person would do *in the same circumstances* in which the accused found him/herself.[47] It is only the *external* circumstances of the accused that may be attributed to the reasonable person and not any 'internal' circumstances.[48] This test has been subjected to criticism for setting a standard that is unattainable for some.[49] For many the solution lies in taking account of the more subjective personal 'internal' attributes of the accused and attributing them to the reasonable person.[50] However, the more the subjective attributes of the accused are attributed to the reasonable person, the more like the accused the reasonable person becomes. The more like the accused the reasonable person becomes, the less unreasonable his/her conduct appears. Taken to its logical end, if all characteristics of the accused are attributed to the reasonable person, the reasonable person becomes identical to the accused. Where the reasonable person is identical to the accused, their conduct would necessarily coincide and the accused's conduct is rendered, necessarily, reasonable.[51] In effect, there would be no standard against which to compare the conduct of the accused/defendant. On the other hand, some account must be taken of the characteristics or circumstances of the accused/defendant so that his/her conduct is not compared with some impossible standard.

[46] That is, that the standard is lowered.
[47] *R v Mbombela* 1933 AD 269; *S v Ngubane* 1985 (3) SA 677 (A); *S v Southern* 1965 (1) SA 860 (N).
[48] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 531; Cf *S v Ngema* 1992 (2) SACR 651 (D).
[49] See in particular the judgment in *S v Melk (NCO)* 1988 (4) SA 561 (A): that an illiterate person cannot be judged on the standard of the literate person and a shepherd's conduct cannot be judged on the standard of a university professor. See also DA Botha 'Culpa - A form of mens rea or a mode of conduct' (1977) 94 SALJ; Burchell *Principles of Criminal Law* 3rd Revised ed (2006); R Louw 'S v Ngema 1992 (2) SACR 651 (D) The Reasonable man and the tikoloshe' (1993) 6; Whiting 'Negligence, Fault and Criminal Liability' (1991) 108 SALJ.
[50] DA Botha 'Culpa - A form of mens rea or a mode of conduct' (1977) 94ibid; De Wet *Strafref* 4 ed (1985); Louw 'S v Ngema 1992 (2) SACR 651 (D) The Reasonable man and the tikoloshe' (1993) 6; Whiting 'Negligence, Fault and Criminal Liability' (1991) 108 SALJ. [Insert space before ibid; and after Louw]
[51] Lord Hobhouse noted: 'if one adds all the characteristics of the defendant to the notional reasonable man, the reasonable man becomes "reincarnated" in the defendant' (*R v Smith* [2000] 4 All ER 289, [2000] Crim LR 1004, HL). See also CMV Clarkson *Understanding Criminal Law* (2005) 128; Snyman *Criminal Law* 5th ed (2008) 214.
This view is echoed in South African law regarding the standard of the reasonable person. See *R v Mbombela* 1933 AD 269; Snyman *Criminal Law* 5th ed (2008) 211-2.

This solution – of balancing objective and subjective attributes - inevitably involves a double compromise. It requires a compromise on the standard that we demand of everyone in society, and also on the extent to which we are prepared to take account of what we can expect of any individual accused.

Even Whiting's powerful motivation for a subjective standard of the reasonable person retains a degree of objectivity – 'the good citizen'.[52] However much we may wish to subjectivise the standard, we must maintain a degree of objectivity. We must maintain an objective standard in order that there exists a standard which we must aspire to and against which we may be judged. This cannot be compromised. Yet, it is unfair to judge a person by this objective standard if s/he cannot observe the standard. This is a double bind. Louw states that '[w]hatever future progressive modifications there may be, the objective test ... will always lead to an unsatisfactory compromise because the accused will always be judged against someone else's standards'.[53]

An alternative possible solution to subjectivising the standard of the reasonable person is to make it subject to an enquiry into capacity.[54] This is the basis upon which the test of the reasonable

[52] Whiting 'Negligence, Fault and Criminal Liability' (1991) 108 SALJ 449.

[53] Louw 'S v Ngema 1992 (2) SACR 651 (D) The Reasonable man and the tikoloshe' (1993) 6 364. Snyman observes: 'Before X can be blamed for his failure to comply with the required standard, his personal knowledge and abilities must be taken into consideration. He can be blamed only if one could have expected of him as an individual to comply with the required standard, and this will be the case only if X, taking into account his personal abilities, knowledge and experience, *could* have complied with the required standard.' (original emphasis; Snyman *Criminal Law* 5th ed (2008) 210).

[54] Jonathan Burchell & John Milton *Principles of Criminal Law* 2nd ed (1997) 360-3. Regrettably, in the latest edition of Principles of Criminal Law, Burchell adopts the view that capacity is to be tested partly objectively – in light of his interpretation of *S v Eadie* 2002 (1) SACR 663 (SCA). As discussed below, (under the heading 7.4 Eadie – The End of Non-pathological Incapacity? on page 144ff) there appears nothing in the judgment in *Eadie* to indicate that capacity is at all objective. The court - as Burchell himself appears to appreciate – cautioned that claims of subjective incapacity must be treated carefully with reference to the objective considerations.
Burchell's is clearly of the view that capacity, subsequent to *Eadie*, is objective in more ways than by the application of ordinary rules of drawing inferences from the objective evidence. He expresses the view that some instances of lack of subjective self-control should not be recognised, such as where the lack of self-control is due to a hot temper or road rage. (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 533 apparently following Tadros (ibid 440n71 & 1; Victor Tadros 'The Characters of Excuse' (2001) 21 Oxford Journal of Legal Studies). This begs the question of how it may be fair to blame someone who cannot – however hard s/he may try – avoid being hot tempered or easily enraged. On what basis shall we discriminate between someone who is stupid and someone who is easily enraged? I

person may be made fair and just. We cannot subjectivise the standard because an objective standard is required. The answer appears to lie in whether the accused can be expected to observe the standard. However, as I will argue throughout, the test of capacity itself must be reconceptualised.

It is not the objective of this thesis to resolve the problem of the standard of the reasonable person in the context of negligence. However, the standard of conduct set by this test together with the criticisms of its objectivity will be drawn upon in constructing a solution to problems relating to questions of responsibility. In turn, this solution appears to address the problem of an unattainable standard under negligence.[55]

Beyond the problem of the objective standard of the reasonable person, Paizes has noted the anomaly that there is no requirement for intention that the accused must have acted unreasonably.[56] He notes that a finding of negligence, a lesser form of fault than intention, requires that the accused acted unreasonably. However, there is no equivalent requirement for intention. It is therefore conceivable that one may be convicted of murder even where one's conduct is reasonable. That is, you may be convicted of murder in circumstances in which the reasonable person would also have killed,[57] and despite the fact that you cannot be convicted of the lesser crime of culpable homicide. Paizes argues correctly that this ought not to be possible and that unreasonableness ought to be included in the requirements for intention.

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do not believe that this is a valid basis to distinguish who should be blamed or excused. Instead I propose that the distinction lies in the question of whether the accused was reason-sensitive as discussed in chapter 8 Philosophy of Mind: Responsibility.

[55] Discussed later under 9.2 Fault on page 209ff and 9.3 Capacity on page 211ff. Burchell endorses the approach that a subjective requirement of responsibility may justify an objective test of negligence (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 358-9).

[56] Andrew Paizes 'Unreasonable Conduct and Fault in the Criminal Law' (1996) 113 SALJ.

[57] Ibid 239-42. Paizes offers several circumstances in which a reasonable person *may* commit unlawful conduct, including killing an abusive spouse (ibid 248); killing another innocent person to save one's own life (per Goliath (ibid 239); killing in defence of property (per *Ex parte Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A); Paizes Paizes 'Unreasonable Conduct and Fault in the Criminal Law' (1996) 113 SALJ 242).

This approach provides the basis for an excuse type defence in cases where an accused has killed an innocent third party under a threat to his/her own life. A justification accepts responsibility for conduct but denies that it is wrong, whereas an excuse accepts that the conduct was wrong but denies responsibility.[58] Our current law, under the leading case of *Goliath*,[59] does not impose liability for killing under compulsion.[60] The court in *Goliath* recognised that we cannot expect more of any person than we would of a reasonable person, and that a reasonable person would not sacrifice his/her life for another.[61] However, it is not clear whether the defence it recognised was a justification or an excuse.[62] It is arguable that this scenario should not be recognised as a ground of justification because it attributes more value to the life of the accused than the accused's victim,[63] and the victim is prohibited from acting in private defence.[64] It is arguable that killing under compulsion should be recognised as an excuse instead.[65] However, it was never clear how this

[58] L Austin *Philosophical Papers* (1970); G P Fletcher *Rethinking Criminal Law* (1978); Hart *Punishment and Responsibility* (1968) 13-4.

[59] *S v Goliath* 1972 (3) SA 1 (A).

[60] This is contrary to the position under English law (*R v Dudley and Stephens* (1884) 14 QBD 273; *R v Howe* [1987] 1 All ER 771 (HL)).

[61] *S v Goliath* 1972 (3) SA 1 (A) 11 & 25. While the court in the English case of *Howe* took the view that duress (necessity) could not operate as a defence to killing under compulsion, its view seems to follow from the notion that the reasonable person would sacrifice his/her life for another innocent third person (*R v Howe* [1987] 1 All ER 771 (HL) 780) – that to do otherwise would be cowardly. Nevertheless, the court unanimously endorsed the view that the standard by which the defence of duress (necessity) is to be judged, is that of a person of reasonable fortitude (Jonathan Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 164; *R v Howe* [1987] 1 All ER 771 (HL)). Thus it appears that, even under the English law, the standard of conduct required of anyone is that of a reasonable person – although, the English require more of the reasonable person – '[imposing] on men the moral [duty], not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk' (*R v Dudley and Stephens* (1884) 14 QBD 273; cited in Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 232).

[62] Rumpff JA (with Ogilvie Thompson CJ, Jansen JA, and Trollip JA concurring) specifically left open the question of whether the defence they recognised was a justification excluded unlawfulness or an excuse (*S v Goliath* 1972 (3) SA 1 (A) 11 & 25). Wessels JA gave a separate judgment in which he argued that it would be more appropriate to treat any such defence as an excuse – relating to the blameworthiness of the accused (ibid 38). See also *S v Bailey* 1982 (3) SA 772 (A).

[63] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 279; Snyman *Criminal Law* 5th ed (2008) 118.

[64] Because the attack on him/her (if justified) is lawful. It seems that the court in *R v Howe* treated the defence being claimed as a justification – as it would be if it '…withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection on the coward …' (*R v Howe* [1987] 1 All ER 771 (HL) 780). It is less clear whether the court in *Dudley & Stephens* received the defence as a claim to a justification rather than an excuse – or at least, that an excuse is distinct from a justification.

[65] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 277-9; Snyman *Criminal Law* 5th ed (2008) 118. To the extent that the English decisions in *Dudley & Stephens* and *Howe* treated the defences claimed to be a justification

could be accommodated within our present *mens rea* requirements.[66] This problem is solved on Paizes' approach - by requiring unreasonableness for intention so that both intention and negligence require that the accused acted unreasonably. Where the accused has acted reasonably, no fault can be attributed to him/her. Thus, for any form of fault, the standard of the reasonable person ought to be the standard of conduct expected of everyone.

However, our law also should not penalise those who do not observe this standard because – however hard they try - they cannot. It is unfair to judge a person by this objective standard if s/he cannot observe the standard.[67] Botha endorses the view that it is manifestly unfair and unjust to inflict punishment upon an accused for failing to act as a reasonable person if s/he could not act as a reasonable person.[68] Louw argues that an accused can only be measured against what would be reasonable for him/her to do, given his/her own capabilities.[69] Hart notes: [I]n a civilised system only those who *could have* kept the law should be punished.'[70]

Therefore, the position adopted here is that, while every person may be expected to observe the standard of conduct of a reasonable person, no person is liable unless that person acted unreasonably, provided further that the person *could* act reasonably. This provides the starting

based on what the reasonable person would do and that doing so makes it the right thing to do – what I am proposing is different. I am proposing, following, amongst others, Burchell and Snyman, that killing under compulsion should be regarded as an excuse, which can be accommodated by the further revisions proposed.

[66] For instance, it is not clear that an accused who killed under compulsion could claim that s/he lacked capacity: could not appreciate that it was wrong or conduct him/herself accordingly. As discussed above in chapter 4 Capacity to Appreciate the Wrongfulness of One's Conduct, it is not at all clear what is mean by 'wrong' in this context. Furthermore, in the absence of a sustainable distinguish between voluntariness and capacity for self-control (discussed above under the heading 5.5 Distinction? on page 77ff) a conative impediment may not readily be recognised. This is particularly so because these are cases of *vis compulsiva* rather than *vis absoluta* (in which case involuntariness would be recognised; see on page 83).

It is also unclear how a partial excuse could be recognised (contemplated in *S v Goliath* 1972 (3) SA 1 (A)) which would result in a conviction of culpable homicide and not murder. The problem is that if the accused has acted reasonably s/he cannot – by definition – be convicted of culpable homicide, which requires unreasonable conduct.

[67] This normative imperative appears equally applicable to strict liability offences.

[68] Botha 'Culpa - A form of mens rea or a mode of conduct' (1977) 94 SALJ.

[69] Louw 'S v Ngema 1992 (2) SACR 651 (D) The Reasonable man and the tikoloshe' (1993) 6 363 & 4

[70] Original emphasis Hart *Punishment and Responsibility* (1968) 189.

point from which the model of responsibility proposed will be integrated into the requirements of criminal law.

1.4 History and Development

The notion that young children and insane people are not responsible for their conduct may be traced back to Roman Law.[71] However, the modern history of the requirement of responsibility and blameworthiness began in 1843 in England. Both South Africa and the United States of America (US) derive their respective insanity defences from the English case of M'Naghten[72] of 1843.[73]

1.5 M'Naghten Rules

Daniel M'Naghten laboured under the paranoid delusion that he was being persecuted by the British government or its agents. He believed that the then British Prime Minister, Sir Robert Peel, was somehow responsible and M'Naghten tried to kill him. Instead, he killed Peel's secretary, Edward Drummond, mistaking Drummond for Peel. M'Naghten was charged with murder but found not guilty on the ground of insanity. This acquittal provoked controversy. It was debated in the House of Lords, which referred the matter, in the form of a number of questions, to the judiciary (Justices of the Queen's Bench) for consideration. The response became known as the 'M'Naghten rules' and is regarded as a comprehensive statement of the insanity plea in England

[71] D 29.5.14, D 11.8.14, respectively. See Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 359.
[72] The spelling of this name is reported variously as M'Naghten (ibid 371; Wayne R. LaFave *Criminal Law* Abridged 4 ed (2003); Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 3.2), McNaghten (*R v Kemp* [1957] 1 QB 399 at 407; SHC 18 408), and McNaughton, amongst others; the spelling 'M'Naghten' will be adopted here for convenience and consistency, unless reflecting a direct quote.
[73] *M'Naghten's case* 1843 (8) ER 718.

since 1843.[74] The rules set the test for a defence of insanity as follows:

> ... to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.[75]

The M'Naghten test may be described as a test of ignorance in that disordered defendants are excused on the basis that they were ignorant of the nature, quality, or wrongfulness of their conduct.[76]

1.6 South Africa

In South Africa the insanity defence derived from the M'Naghten Rules of England,[77] but was supplemented with an 'irresistible impulse' test.[78]

In 1953 the South African insanity defence was authoritatively[79] stated in *R v Koortz*:

> A person is not punishable for conduct which would in ordinary circumstances have been criminal if, at the time, through disease of the mind or mental defect –
>
> a) he was prevented from knowing the nature and quality of the conduct, or that it was wrong; or

[74] *R v Sullivan* [1984] AC 156, [1983] 2 All ER 673; P. J. Richardson *Criminal Pleading, Evidence and Practice* (2009); J. A. Smith *Criminal Law* 8th ed (1996) 201.
[75] Smith *Criminal Law* 8th ed (1996) 202.
[76] R. F. Schopp *Automatism, Insanity, and the Psychology of Criminal Responsibility* (1991) 28.
[77] *R v Booth* 1878 Kotze 50; Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 3.19.
[78] *Reg v Hay* 1899 (16) S.C. 290; Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 3.24
[79] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 3.25.

b) he was the subject of an irresistible impulse which prevented him from controlling such conduct.[80]

The defence underwent some reform however when on 6th September 1966, Demitrio Tsafendas stabbed then Prime Minister Hendrik Verwoerd to death in parliament. Verwoerd was the grand architect of apartheid. Tsafendas claimed to have been acting under the command of a tapeworm. His mental condition was enquired into and he was found not fit to be tried.[81]

In the wake of the Tsafendas case, the Rumpff Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (hereinafter referred to as the Rumpff Commission) was formed. It was charged with inquiring into the criminal responsibility of 'persons alleged to be suffering from some form of mental derangement'.[82] The Commission's report formed the basis of the statute that was promulgated to regulate the criminal responsibility of persons 'suffering from some form of mental derangement'.[83] This provision represents – subject to some minor amendments[84] - the South African insanity defence until today. It states:

> A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable-
>
> a) of appreciating the wrongfulness of his or her act or omission; or
> b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

[80] *R v Koortz* 1953 (1) SA 371 (A) 375.
[81] See Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 4.14-4.38 Tsafendas was never tried and died in detention in Sterkfontein Mental Hospital in 1999.
[82] Ibid 1.
[83] Ibid 1.
[84] Making provision for omissions (s 5 (a) of Criminal Matters Amendment Act 68 of 1998).

shall not be criminally responsible for such act or omission.[85]

Various parallels may be observed between the South African test of criminal responsibility and its English roots and present counterpart:

1. In respect of an insanity plea, where South African law refers to a 'mental illness or defect', English law refers to a 'disease of the mind'.
2. The accused's impairment in English law, in respect of criminal responsibility generally, is 'a defect of reason ... as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong'; the South African equivalent is an impairment which renders one 'incapable of appreciating the wrongfulness of [one's] act or omission.'

The tests are incompatible in three main respects:

1. M'Naghten requires knowledge, whereas the South African test requires an 'appreciation'.
2. The English reference to knowledge of the 'nature and quality' of one's conduct has been removed from South African law.
3. The 'conative' (volitional) component in the South African insanity test of the incapacity to 'act in accordance with an appreciation of the wrongfulness of [one's] act or omission' has no equivalent in the M'Naghten test. Instead, the English have restricted concerns with conation to their voluntariness requirement – as a requirement for wrongful conduct.

The similarities and differences will be discussed in subsequent chapters as informing the South African position.

[85] s 78(1) of the Criminal Procedure Act 51 of 1977. The full text of s 78 is attached as 'Appendix C' (on page 268ff) for ease of reference.

Further developments have taken place in South Africa that – in certain instances - have stripped the mental disorder requirement from a claim to non-responsibility. Currently, in South Africa, criminal incapacity may arise not only out of mental illness or defect (the insanity defence). It may also arise out of youth,[86] and since 1981[87] it has been recognised in the absence of both youth and mental illness/defect. The latter instance (in the absence of both youth and mental illness/defect) is referred to as non-pathological incapacity. It has been recognised to result from severe emotional stress (due to adverse circumstances or provocation[88]) or intoxication.[89] An accused who succeeds with such a defence receives a complete acquittal and is unconditionally released. This development is not found in other jurisdictions and is somewhat controversial. It will be discussed at length below.[90]

[86] Incapacity for youth is governed by arbitrary age limitations such that a child younger than ten is irrebuttably, and a child between ten and fourteen is rebuttably, presumed to lack capacity (ss 7 & 11 of the Child Justice Act 75 of 2008).
[87] *S v Chretien* 1981 (1) SA 1097 (A).
[88] *S v Arnold* 1985 (3) SA 256 (C); *S v Campher* 1987 (1) SA 940 (A); *S v Van Vuuren* 1983 (SA) SA 12 (A); *S v Wiid* 1990 (1) SACR 561 (A).
[89] *S v Chretien* 1981 (1) SA 1097 (A).
[90] See discussion under the heading 7.4 Eadie – The End of Non-pathological Incapacity? on page 144ff.

2 Empirical Research

2.1 Introduction

Defences of criminal incapacity and involuntariness involve questions of the workings of the human mind. Our courts appear hesitant to decide on these matters without the assistance of expert witnesses, particularly in the context of the insanity defence.[91] In line with general principles of the law of evidence, expert evidence is admissible if the witness's special knowledge and skill enable her/him to assist a court in deciding on the facts in issue.[92] Our courts have therefore come to rely

[91] *S v Henry* 1999 (1) SACR 13 (SCA) 20-1; *S v Mahlinza* 1967 (1) SA 408 (A); Snyman *Criminal Law* 5th ed (2008) 57. The Rumpff Commission Report stated: 'When the question of insanity or mental disease arises, i.e. of any pathological disturbance of the mental faculties, the judge has to be assisted by the psychologist and the psychiatrist.' (Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.4)

In respect of incapacity for self-control/involuntariness in the absence of mental illness or defect, it is clear that the accused must adduce expert psychiatric or psychological evidence to establish a reasonable doubt. In *S v Trickett* 1973 (3) SA 526 (T) it was suggested that the accused could only meet the burden if he or she led medical or other expert evidence. This would appear especially necessary in the light of the 'natural inference' which assists the prosecution - *S v Cunningham* 1996 (1) SACR 631 (A) 635-6 (cited with approval in *S v Henry* 1999 (1) SACR 13 (SCA)):

> In discharging the onus upon it the State … is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged actus reus and, if involuntary, that this was attributable to some cause other than mental pathology. See *S v Trickett* (supra at 532G-533A, 537D-F). It follows that in most if not all cases medical evidence of an expert nature will be necessary to lay a factual foundation for the defence and to displace the inference just mentioned.

As Slovenko recognises, in relation to the concept of the US equivalent of mental illness/defect, that while the courts there also insist that the concept is a legal one, it is reliant upon psychology and psychiatry to inform the notion:

> During the past two centuries, the courts have often said that the term "disease of the mind" or "mental disease or defect" in the test of criminal responsibility is a legal, not a medical term. At the same time, however, because medical or psychiatric opinion is necessary to give meaning to the term, it becomes a fusion of legal and medical components. No rule of law can be reliable when absolutely dependent on another discipline; but without input from other areas, the law would be an arid system. (R. Slovenko *Psychiatry and Criminal Culpability* (1995) 53)

Contrast however *S v Kalogoropoulos* 1993 (1) SACR 12 (A) in which it was stated that it is now well accepted that in cases in which a mental illness or defect is not raised, the court is well within its field of expertise to consider matters of voluntariness and self-control.

[92] *R v Vilbro and Another* 1957 (3) SA 223 (A); D. P. van der Merwe 'Evidence' In *The Law of South Africa* edited by W. A. Joubert, J. Faris, L. T. C. Harms and P. J. Rabie (1996); DT Zeffertt & AP Paizes *The South African Law of Evidence* 2nd ed (2009) 309ff.

upon the opinions of psychologists and psychiatrists – known as 'forensic' psychologists and psychiatrists.[93]

In order to understand the defences of criminal incapacity and involuntariness it seemed necessary to consult and ascertain the opinions of these experts. Furthermore, it seemed necessary to consider how these opinions are formulated and how they are explained. To that end a representative sample of forensic psychologists and psychiatrists was consulted in order to establish their opinions and how they explain these opinions. These interviews took place prior to the *Eadie*[94] decision which introduced a great deal of uncertainty in our law regarding the continued existence of the defence of non-pathological incapacity.[95] As discussed below,[96] the better view appears to be that *Eadie* did not change our law. The law is no different from what it was prior to *Eadie*, except for the confusion that *Eadie* has introduced. Therefore the views of forensic experts prior to the *Eadie* decision are best placed to indicate what they understand the law to be.[97] Recently[98] however, the findings of this research and proposals arising out of this thesis were discussed with several of the original interviewees in follow-up interviews. The results of these follow-up interviews are reported below under the recommendations.[99] Significantly, of those who were available to be re-interviewed and who continued to practice in the field, everyone agreed the law had not changed in any substantive respect since the original interviews, despite the judgment in *Eadie*.

[93] Though there is technically no recognised qualification of 'forensic' psychologist/psychiatrist in South Africa.
[94] *S v Eadie* 2002 (1) SACR 663 (SCA).
[95] See discussion under the heading 7.4 Eadie – The End of Non-pathological Incapacity? on page 144ff.
[96] Idem.
[97] As it was prior to *Eadie* and as it is now - by virtue of the argument that the law has not changed even though there is confusion on this point.
[98] From 26 April 2011-13 June 2011.
[99] Discussed under the heading 9.6.3 Expert evidence on page 235ff.

2.2 Stages and Data Collection

The research was originally undertaken in the form of observation and semi-structured interviews. This began on 18th May 1998 and ran for about four months. Basic semi-structured interviews were conducted with forensic psychologists and psychiatrists at Sterkfontein and Weskoppies Mental Hospitals. Also, the researcher attended and observed forensic observations at Sterkfontein hospital and Krugersdorp prison, and some court proceedings where expert forensic opinions were given.

Unfortunately, due to the context, the range of issues that were addressed was very limited. Furthermore, because the observations could not be structured or standardised, comparison of opinions could not be compared. This led to the conclusion that more structured research was required. By elimination, questionnaire or interview research remained as possible methods for the collection of data. The method generally adopted by South African courts for the submission of the evidence of a witness, and thus of a forensic expert witness, is that of oral question-and-answer.[100] This is comparable with an interview and prompted the adoption of an interview technique. Further reasons for the use of the interview technique were, *inter alia*, that they allow for the complexity of the issues to be addressed.[101] Clarifications and complete answers can be elicited. Interviews enjoy a relatively higher return rate.[102] Longer and more tedious questions can be asked[103] and a respondent's demeanour can also be observed.

[100] 'All testimony of witnesses at [a] trial must normally be given orally.' (Zeffertt & Paizes *The South African Law of Evidence* 2nd ed (2009) 892)
[101] L. B. Bourque & V. A. Clark 'Processing Data: The Survey Example' In *Research Practice: International Handbook of Quantitative Applications in the Social Sciences* edited by M. S. Lewis-Beck 1-88 (1994); J. R. Craig & L. P. Metze *Methods of Psychological Research* 2 ed (1986); E. J. Pedhazur & L. P. Schmelkin *Measurement, Design, and Analysis: An Integrated Approach* (1991).
[102] Bourque & Clark 'Processing Data: The Survey Example' In *Research Practice: International Handbook of Quantitative Applications in the Social Sciences* edited by Lewis-Beck 1-88 (1994); Craig & Metze *Methods of Psychological Research* 2 ed (1986).
[103] W. A. Schweigert *Research Methods & Statistics for Psychology.* (1994); B. Sommer & R. Sommer *A Practical Guide To Behavioral Research: Tools and Techniques* 3rd ed (1991).

Ultimately, the need to address complex issues, to probe responses, and the nature of the possible questions seemed to require the adoption of a semi-structured interview format[104] with primarily open-ended questions.[105]

The interview schedule employed four vignettes which are directed at addressing the areas of concern. Each vignette describes a factual matrix upon which the expert's opinion was sought in a series of questions.[106] The preliminary study informed the choice of issues to raise in the interview schedule. The questions were carefully designed to be clear, concise and as straightforward as the issues in question permitted.[107] Experts were consulted during the drafting of the interview schedule concerning the appropriateness of the issues raised and it was revised to give effect to comments received. The interview schedule with vignettes and questions is attached.

It was decided to run the interviews in a simulated court situation. The venue chosen was a room at the School of Law at the University of the Witwatersrand which is designed and used for this purpose. The researcher sought to simulate, to the extent possible, the circumstances of a real trial in which a person's criminal responsibility is in issue. The researcher assumed the role of counsel (a lawyer) before the simulated court, and posed the questions. An expert in criminal law[108]

[104] J. A. Smith 'Semi-Structured Interviewing and Qualitative Analysis' In *Rethinking Methods in Psychology* edited by J. A. Smith, R. Harré and L. Van Langenhove (1995).

[105] While the unstructured and open ended nature of these interviews allowed for the collection of rich data, it limited the control and comparability of responses. This had to be recognised as a possible source of error since interpretation of the data was required.

[106] See ' Appendix A: Interview Vignettes and Question Schedule' on page 257ff.

[107] S. L. Chow *Research Methods in Psychology: A Primer* (1992); J. M. Converse, & Presser, S. *Survey Questions: Handcrafting the Standardized Questionnaire.* (1986); W. Foddy *Constructing Questions for Interviews and Questionnaires: Theory and Practice in Social Research* (1993); J. J. Foster & I. Parker *Carrying out Investigations in Psychology: Methods and Statistics* (1995); W. Lawrence Neuman *Social Research Methods: Qualitative and Quantitative Approaches* 4th ed (2000); Pedhazur & Schmelkin *Measurement, Design, and Analysis: An Integrated Approach* (1991); Schweigert *Research Methods & Statistics for Psychology.* (1994); Smith 'Semi-Structured Interviewing and Qualitative Analysis' In *Rethinking Methods in Psychology* edited by Smith, Harré and Van Langenhove (1995); Sommer & Sommer *A Practical Guide To Behavioral Research: Tools and Techniques* 3rd ed (1991).

[108] The following experts in criminal law presided over the hearings: Wits Professor of Law Andrew Paizes PhD, Advocate of the High Court of South Africa; Wits Adjunct Professor of Law Stephen Tuson, Attorney of the High Court of South Africa; and former Wits Professor of Law Angelo Pantazis.

presided as the Judge. The presiding officer adopted a procedural function initially - during the course of the standard questions being asked of the respondent. However, the judge assumed a more active role after and sometimes during the standard interview, depending on what the respondent said, as he engaged the expert in a request for clarity or completeness. Interviews were videotaped to bring a further sense of formality to the interviews and to allow for precise transcription later.

The vignettes and question schedule was piloted before its ultimate use in July and August 1999. Dr Frans Korb, a forensic psychologist and psychiatrist, acted as the forensic expert and Judge Borchers of the then Witwatersrand Local Division of the High Court of South Africa[109] presided.

The vignettes on which the respondents were questioned were sent to each respondent about two weeks in advance of their interviews to allow them to study the facts and prepare themselves as they would ordinarily. The vignettes were accompanied by a request that forensic experts not consult each other in preparation for the interviews.

The final stage of the research took the form of follow-up interviews with all original experts who were available. These interviews were conducted in person or, in the case of one who now lives in Grahamstown, by telephone. The format was informal semi-structured. All interviews were recorded, with the consent of the experts, for record purposes alone. The interviews began with a brief report back on the findings of the research and progressed to discussing the proposals that made in this thesis, to the extent that they would alter the role of a forensic expert.

[109] Now known as the High Court for South Gauteng.

2.3 Sample

The sample included psychiatrists and psychologists who had, by the commencement of the interview (July 1999), testified at least once on matters pertaining to criminal responsibility. As a further filter mechanism,[110] only those who expressed competence to address the issues raised by this research were included.

In order to allow for a claim of representivity and generalisability[111] throughout South Africa, cluster sampling was adopted. Cluster sampling allows one to address a subgroup within the population of interest on the reasonable expectation that the cluster (subgroup) is representative of the population.[112] The cluster of forensic experts operating in Gauteng was addressed on the reasonable expectation that they are representative of these experts throughout the country.

The sources of psychiatric experts were the two main forensic psychiatric hospitals in Gauteng and the two private psychiatrists in Gauteng who - at that time – did forensic work regularly. The source of forensic psychologists was determined by those psychologists who – at that time - regularly did forensic work some of whom were members of the Private Practitioners Association of Gauteng. This was informed by the PsySSA List of Psychologists in Private Practice, published by the Psychological Society of South Africa. This list indicates which psychologists do forensic work, by province. The Private Practitioners Association of Gauteng, to which many forensic psychologists are associated, assisted in contacting them and motivating their participation. To that end, a notice was published in the Private Practitioners newsletter and the researcher addressed a meeting of the Association on 28 April 1999 to invite and motivate participation.

[110] Foddy *Constructing Questions for Interviews and Questionnaires: Theory and Practice in Social Research* (1993).
[111] That the sample represents the population so that the data produced by the sample may be regarded as data that would be produced by the population. This allows one to generalise one's findings from the sample to the entire population.
[112] Schweigert *Research Methods & Statistics for Psychology.* (1994).

In the main interviews, a sample size of six forensic psychologists and seven forensic psychiatrists was achieved. This size allowed for sufficient representivity of the sampling frame to allow for generalisability, but also restricted the amount of data that was produced.

For the final stage of follow-up interviews, all experts that were available were re-interviewed. Of the total of thirteen experts originally interviewed, three had emigrated and could not be contacted and another two had retired. The remaining eight were contacted and made themselves available for a follow-up interview.

2.4 Data Analysis

The main interviews produced a large amount of data. They were carefully transcribed and analysed. Answers that were limited in their possible responses were pre-coded and were easily processed. However, the bulk of each interview attracted open-ended responses. These responses were analysed by means of a quantitative thematic content analysis in which the categories into which the responses could be allocated were determined by their emergence from the text.[113] The method adopted was one in which the data was read and themes which emerged were selected as categories and then carefully defined into a coding manual. The coding was done using a computer program known as Atlas.[114] The entire text was then coded according to the defined common themes.[115]

The presentation of the analysed data and the statistics derived from the data are descriptive and supplemented by qualitative descriptions.

[113] R. P. Weber 'Basic Content Analysis.' In *Research Practice: International Handbook of Quantitative Applications in the Social Sciences* edited by M. S. Lewis-Beck 251-338 (1994).
[114] Atlas.ti: The Knowledge Workbench Version Win 4.2.
[115] H. Coolican *Research Methods and Statistics in Psychology* (1990); M. Lewin *Understanding Psychological Research: The Student Researcher's Handbook* (1979); Sommer & Sommer *A Practical Guide To Behavioral Research: Tools and Techniques* 3rd ed (1991).

The follow-up interviews were coded according to whether the original participant agreed or disagreed with the proposals and the results of this are presented in a descriptive format under the recommendations.[116]

2.5 Limitations

The coding and analysis of the main interviews proved to be enormously time consuming.[117] However, this was off-set by the richness of the data gathered and the insights gained. The possible source of error inherent in interpreting and coding open-ended interview responses was addressed by employing an independent rater/coder and ensuring an inter-rater reliability of the coding manual of above 80 per cent.[118]

2.6 Ethical Considerations

The ethic of informed consent was strictly observed. Respondents were informed expressly of the research objectives and procedure. Further, anonymity was offered to respondents in respect of the research report and any publication arising out of this research.

2.7 Conclusion

In the chapters that follow (3-6), I will critically discuss the requirements of criminal law that are most directly associated with questions of responsibility, with reference to the relevant results of the empirical research – derived from the main interviews. Despite the argument that *Eadie*

[116] See '9.6.3 Expert evidence' on page 235ff.
[117] Bourque & Clark 'Processing Data: The Survey Example' In *Research Practice: International Handbook of Quantitative Applications in the Social Sciences* edited by Lewis-Beck 1-88 (1994); Sommer & Sommer *A Practical Guide To Behavioral Research: Tools and Techniques* 3rd ed (1991).
[118] As recommended by Lewin *Understanding Psychological Research: The Student Researcher's Handbook* (1979).

brought confusion to our law,[119] I do not mean to suggest that the law prior to *Eadie* and by extension, the law as it is, is not confused. This is clearly borne out by the degree of contradiction amongst forensic opinions. Also, in honour of the undertaking of anonymity, the witnesses are identified as 'W' 1-13 and references to gender do not necessarily correctly identify the gender of the witness. As will be noted from the results, on most questions the experts were split. They gave opinions that contradicted their colleagues and, at times, even themselves.

[119] Discussed above on page 38.

Part II: Criminal Responsibility: the law as it is

3 South African Criminal Law of Responsibility: Conceptual Framework

3.1 Introduction

Questions of responsibility have manifested most directly under the requirement of capacity, but also under the closely associated requirement of voluntariness.[120] The discussion that follows will therefore focus on the requirements of capacity and voluntariness.

Rumpff[121] stipulates the functions which are possessed by 'normal'[122] people and which render them responsible for their conduct:

> Two psychological factors render a person responsible for his voluntary acts: firstly, the free choice, decision and voluntary action of which he is capable, and secondly, his capacity to distinguish between right and wrong, good and evil, (insight) *before* committing the act.[123]

As indicated above, the South African criminal law requirement of capacity is that the accused must, at the time of the offence, have been able to appreciate the wrongfulness of his/her conduct, and to act in accordance with that appreciation of wrongfulness. [124] The capacity to appreciate the

[120] Indeed, one of the tasks of this thesis will be to consider the extent to which capacity and voluntariness can be distinguished at all.
[121] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967).
[122] 'Society—and the jurist—proceed on the assumption that a "normal" person is criminally responsible. Thus Gardiner and Lansdown state in their work *South African Criminal Law and Procedure* 6th ed. vol. 1. p. 87 "Where through disease or defect of intellect a person has been deprived of the power of bringing to bear upon his conduct the functions of a normal rational mind, there can be no criminal responsibility."' (ibid 6 para 2.5)
[123] Ibid 45 par 9.30 original emphasis.
[124] J M Burchell *South African Criminal Law & Procedure: General Principles* Vol 1 (1997); Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 358; Rumpff *Report of the Commission of Inquiry into the Responsibility of*

wrongfulness of one's conduct is known as the capacity for insight. The capacity to act in accordance with an appreciation of wrongfulness is known as the capacity for self-control. Capacity is present only when the accused possessed both capacities. That is, capacity requires the ability both to appreciate the wrongfulness of one's conduct, *and* the ability to act in accordance with an appreciation of the wrongfulness of one's conduct.

South African criminal law now accepts four sources or bases for incapacity: youth,[125] mental illness or defect,[126] intoxication,[127] and severe emotional stress.[128] The defence of incapacity due to mental illness or defect is known as the insanity defence. The defence of incapacity due to severe emotional stress has come to be known as the defence of non-pathological criminal incapacity.[129]

I will begin with a critical analysis of the concept of capacity itself. I will then in the succeeding chapters, critically analyse each of the two capacities required (chapters 4 & 5) and turn to critically consider the sources for incapacity accepted in our law (chapters 6 & 7).

Mentally Deranged Persons and Related Matters (1967). These capacities are derived from the insanity plea contained in s 78 of the Criminal Procedure Act 51 of 1977 (Ronald Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 200).

[125] Children under the age of 10 years are irrebuttably presumed to lack criminal capacity and cannot be prosecuted for any offence (s7(1) Child Justice Act 75 of 2008). Children between 10-14 years of age are rebuttably presumed to lack criminal capacity – the state may rebut this presumption (s7(2) ibid).

[126] s 78 of the Criminal Procedure Act 51 of 1977.

[127] *S v Chretien* 1981 (1) SA 1097 (A).

[128] *S v Eadie* 2002 (1) SACR 663 (SCA); *S v Wiid* 1990 (1) SACR 561 (A).

[129] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 424ff; *S v Eadie* 2002 (1) SACR 663 (SCA) para 26.

3.2 Capacity – to do otherwise

The very concept of capacity is complicated, even controversial. It poses the question whether the accused could have done otherwise.[130] It appears simple enough, but its apparent simplicity allows one to talk nonsense without realising it.

3.2.1 Fact and Capacity

First we must observe that capacity can only really be in question – as a true question of *capacity* rather than a question of fact – where the accused did not, in fact, appreciate the wrongfulness of his/her conduct or act accordingly. This is because if the accused *did* appreciate the wrongfulness of his/her conduct or act accordingly, the *capacity* to do so would be obvious and would not be in issue. What is perhaps even more difficult to grasp is that whereas the fact that an accused did show a particular ability reveals that s/he has that ability; if the accused does not show the ability, that does not mean that s/he cannot. If I tie my shoelaces, I reveal that I am able to do so; if I do not tie my shoelaces, this does not reveal that I am unable to. What we are concerned with is always what the accused could do – but did not do. Therefore we must note that what the accused did do does not solve difficult questions of capacity – what the accused does not do, but *could* do.

But there is more complexity here. An apparent statement of fact can sometimes be a statement of capacity. This is where it is said that an accused did not do something (a statement of fact) because of some reason – that is that an accused was prevented by some impediment from doing so. Where one explains a state of fact (such as that my shoelaces are untied) by implicating some impediment (I am wearing hand mitts), the statement transforms into one of capacity: My shoelaces are untied because I am *unable* – given that I am wearing hand mitts - to tie them. This is the form of the

[130] '[T]he capacity to act differently ...' (See also Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 43; Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 358, 9, & 440; Tadros 'The Characters of Excuse' (2001) 21 Oxford Journal of Legal Studies).

M'Naughten rules where the state of fact (the ignorance of the accused) is attributed to a disease of the mind.[131] There is no mention of capacity in the M'Naghten rules, and yet it is clearly a question of capacity.

3.2.2 Incomplete

A major problem with the concept of capacity is that it is incomplete. One cannot have a capacity to do something in isolation from any other consideration. That is, it is an incomplete question to ask in isolation whether an accused had a particular ability. This is because whether an accused has a particular ability depends on the context in which the ability is to be exercised. This question is susceptible to two possible interpretations: We may wish to know whether the accused had a particular ability unconditionally. That is, in his/her precise circumstances, given his/her exact choices, and reasons for those choices. Alternatively, we may wish to know if the accused had a particular ability conditionally – that is, *if* the circumstances, the accused's choices or reasons were different. We must bear this in mind as we approach the question of capacity in criminal law.

3.2.3 Current Model of Responsibility

The philosophical assumption underlying our current law is one that requires – for an accused to be responsible – that the accused must have been able to do otherwise unconditionally. That is, in the precise circumstances in which the accused found him/herself. This follows from the indeterministic model of responsibility that our law currently adopts. It is a model which presumes that people are not responsible to the extent that they are determined by their environments or genetic endowment. The Rumpff Commission report declared that human beings are responsible

[131] See below 4.3 M'Naghten Rules on page 54ff.

because they may *indeterministically* direct their conduct.[132] This model of responsibility persists in our law.[133] Snyman notes:

> If one adopts a strictly deterministic point of view, accepting that all man's actions are predetermined by, for example, his genetic and biological make-up, or by the social or climatic milieu in which he grew up, there can be no place for the requirement of culpability: one must then accept that man's conduct is the result of blind causal processes. If this view were adopted, there would be no point in praising someone for meritorious conduct; there would similarly be no point in reproaching him for misconduct. The whole basis of criminal law would collapse: one would then have to accept that a person's commission of a crime was something over which he had no more control than he had over his contracting a disease. Just as one would not reproach him for catching a disease, one would not blame him for committing a crime. It would be as senseless to punish somebody for a crime as it would be to punish him for being ill.
>
> Whether man's will is indeed free is a philosophical question. Whatever answers philosophers might have given or may still give to this question, the view of most modern writers on criminal law is that, for the purposes of determining criminal liability, *one simply has to accept that man's will is free*, despite the fact that this assumption is not susceptible of empirical proof. Without such an assumption there is no room for culpability and criminal liability.[134]

Contrary to Snyman, I am of the view that the philosophical foundation for responsibility can and must be engaged with.

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[132] 'Criminal law adopts the point of view of indeterminism …' (Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 2.4).

[133] Burchell states: 'Modern western philosophy derives the notion of individual responsibility from the doctrine of free will. This holds that all humans are born with the ability *freely to choose* between different courses of action. Having this freedom, the individual can justifiably be held responsible for the consequences of his or her chosen actions.' (emphasis added; Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 179). The reference to free choice here must presumably be interpreted to mean a choice which is – in line with the general model of responsibility – indeterminate.

More revealingly, Burchell also states: 'It is the capacity to act differently *in the circumstances* that provides the essential element of subjective blameworthiness' (emphasis added; ibid 358). The notion of doing otherwise *in the circumstances* is an unconditional interpretation of capacity and an indeterministic perspective to responsibility.

[134] Emphasis added; Snyman *Criminal Law* 5th ed (2008) 151.

3.2 South African Criminal Law of Responsibility: Conceptual Framework/Capacity – to do otherwise

The law's model of responsibility holds that we are free and responsible because indeterminism operates in and upon us. This is generally known as the libertarian view. It holds that people are free and responsible because they can act independently of their reasons, choices, and circumstances. They must be able to do otherwise unconditionally - in their actual circumstances, given their actual choices, reasons, and the bases upon which they hold their reasons.

The indeterministic model of responsibility permits – even requires – the question of capacity to be asked unconditionally. It follows then that the question of capacity appears in an unqualified form in both the statutory law[135] and the common law.[136] Where the question of capacity appears in its unqualified form, one may presume that no variation in the circumstances is proposed so that an unconditional interpretation is implied. That is, we may presume that the enquiry is whether an accused has a particular ability unconditionally – in the precise circumstances, given his/her exact

[135] s 78 of the Criminal Procedure Act 51 of 1977.

[136] Virtually no judgments can be found in which some variation in the accused's circumstances, reasons or choices, is hypothetically imposed in order to judge the capacity of the accused. Instead, one may find the question of capacity stated in its unqualified form: whether the accused could have done otherwise, presumably, as is (*R v K* 1956 SA 353 (A); *S v Chretien* 1981 (1) SA 1097 (A); *S v F* 1989 (1) SA 460 (ZH); *S v Kavin* 1978 (2) SA 731 (W); *S v Mnyanda* 1976 (2) SA 751 (A); *S v Wiid* 1990 (1) SACR 561 (A). Note in particular the unconditional nature of the test of capacity adopted from De Wet and Swanepoel (De Wet *Strafref* 4 ed (1985) 110) in *S v Laubscher* 1988 (1) SA 163 (A) 166-7 and following *Laubscher* in *S v Calitz* 1990 (1) SACR 119 (A) 126; *S v Wiid* 1990 (1) SACR 561 (A) 563 – discussed on page 70ff. See also the judgment of Navsa JA in *Eadie* (*S v Eadie* 2002 (1) SACR 663 (SCA)) where Navsa, cites Burchell with approval to the effect that 'all humans are born with the ability *freely* to chose between different courses of action' (emphasis added; referred to above footnote 133). Navsa goes on to endorse this view unequivocally: 'One has *free* choice to succumb to or resist temptation' (emphasis added; para 61). As noted above (footnote 133), the reference to *free* choice here must presumably be interpreted to mean a choice which is – in line with the general model of responsibility – indeterminate.
One notable exception appears in the case of *R v Von Zell* 1953 (3) SA 303 (A) in which the court engaged with questions of what the accused would have done *if* he had seen a policeman standing by or *if* he was suddenly confronted by the fact that his wife would not come back to him. These questions are conditional – they vary the circumstances in which the accused found himself or the reasons the accused had. This is inconsistent with an indeterministic model of responsibility which finds responsibility in the ability of the agent to do otherwise in precisely the same circumstances in which s/he finds himself, and given the exact reasons and choices the agent has made.

reasons and choices. This is the form in which we find references to capacity in both the statutory law and the common law.[137]

3.3 Conclusion

Therefore, we must note that a statement of fact that an accused did not do something because of some reason is a statement of incapacity.[138] Further, we must note that what the accused did do does not solve difficult questions of capacity – what the accused does not do, but *could* do.

We must also note that both the statutory and common law, and the underlying indeterministic model of responsibility, direct that an unconditional interpretation of capacity be adopted. The implications of this will be discussed below, under the philosophy of responsibility.[139]

[137] See footnotes 135 and 136.
[138] Discussed under 3.2.1 Fact and Capacity on page 48.
[139] *Part III: The Philosophy of Responsibility*/Philosophy of Mind: Responsibility on page 158ff.

4 Capacity to Appreciate the Wrongfulness of One's Conduct

4.1 Introduction

Our law has not yet decided what it means by the term 'appreciation of wrongfulness.[140] It is not clear whether it refers to a moral standard or to a legal standard. If it refers to a moral standard, then it is not clear to what or whose standard of morality it refers. If it is a legal standard, it is not clear whether it refers to the general prohibition of particular conduct (*illegality*), or to whether, though it is generally prohibited, it remains in the specific circumstances, *unlawful*.

The case of James Hadfield in 1800 offers the clearest and most common example of implications of these different possible interpretations.[141] Hadfield, who had suffered head trauma, came to believe that he could save the world if he died a martyr. In his mind, suicide was forbidden as a sin. He therefore shot at King George III, in the knowledge that an attempt on the King's life was a capital offence for which he expected to be executed. He would therefore die a martyr and save the world. Clearly Hadfield knew that his conduct was illegal, but his purpose was to save the world, and thus his objective was ultimately, at least from his perspective, moral. Hadfield was found not guilty.

Hadfield's case poses the epitome of the dilemma: he knew it was illegal; indeed it was because it was illegal that he did it. Yet he believed he was acting morally, that he was saving the world. Our intuitions seem to indicate that it does not seem fair to punish Hadfield.[142] His case illustrates the importance of some clarification being given to the phrase 'knowledge/appreciation of

[140] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 378; A Kruger *Mental Health Law in South Africa.* (1980); Snyman *Criminal Law* 5th ed (2008). As discussed below (see on page 61), English law is guided by one obiter (*R v Windle* [1952] 2 All ER 1 1 & 2). The position in the US is not yet resolved (LaFave *Criminal Law* Abridged 4 ed (2003) 384).

[141] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 378; F. McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 20-1; Slovenko *Psychiatry and Criminal Culpability* (1995) 47-8.

[142] This intuition appears to underlie the prominence of the case in discussions on the matter.

wrongfulness', since if a legal interpretation is given to the phrase, if (and when) another Hadfield confronts us, he will be responsible, whereas under a moral interpretation, he would not be responsible.

4.2 Does it matter what it means?

The ability to appreciate the wrongfulness of one's conduct is central to all of capacity. It is not only central to the requirement that an accused must be able to appreciate the wrongfulness of his/her conduct. It is also central to the capacity for self-control: the capacity to *act* in accordance with an appreciation of wrongfulness. Thus any lack of clarity or incoherence on this matter will permeate both sub-requirements of capacity. Some[143] have expressed the view that this question is of little if any practical importance because virtually all cases of incapacity due to mental illness/defect are decided based upon the second leg of capacity: the capacity to act in accordance with an appreciation of wrongfulness.[144] However, we cannot pretend that we need not finally determine what we mean by an 'appreciation of wrongfulness' because few, if any, cases have turned on whether an accused had the capacity to appreciate the wrongfulness of his/her conduct.[145] In order to judge whether an accused had the capacity to act in accordance with an appreciation of wrongfulness, we must be clear what we mean by the term. Regrettably, it would seem that the law is not at all clear on what it requires.

4.3 M'Naghten Rules

The M'Naghten rules themselves, which are at the foundation of the English, US and South

[143] For instance Snyman *Criminal Law* 5th ed (2008) 173.
[144] Ibid 173. Snyman's qualification regarding mental illness or defect does not seem to restrict the general logic of his argument to pathological incapacity only. As noted (see text on page 54) few, if any cases of any claim to incapacity have turned on the first leg: the capacity to appreciate the wrongfulness of one's conduct.
[145] The judgement in *Wiid* is a notable exception where some doubt was expressed by Goldstone AJA as to the accused's capacity to appreciate the wrongfulness of her conduct (*S v Wiid* 1990 (1) SACR 561 (A)). However, the court seems to finally conclude the matter based on a lack of capacity for self-control (and/or involuntariness).

4.3 Capacity to Appreciate the Wrongfulness of One's Conduct/M'Naghten Rules

African formulations of the wrongfulness element, are somewhat ambiguous on what is meant by the requirement of knowledge of wrongfulness. There is a clear contradiction in the rules – perhaps as a prelude to the confusion that would follow:

At first, the judges state:

> [W]e are of opinion that notwithstanding the accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, *he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.*[146]

Here the rules appear to offer a legalistic approach - if the accused knew he was offending the law, he is punishable.[147] However, they go on to stipulate the core of the M'Naghten test and then appear to contradict the notion that knowledge of wrongfulness refers only to illegality:

> [I]t must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.... *If the accused was conscious that the act was one that he ought not to do* ***and*** *that act was at the same time contrary the law of the land, he is punishable ...*[148]

Here knowledge of wrongfulness is given another meaning: that an accused would only be punishable if he knew his act was contrary to law (the legalistic approach), and that '*the act was*

[146] Emphasis added; Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) 8.
[147] Ormerod shares this interpretation (David Ormerod *Smith & Hogan Criminal Law* (2005) 263).
[148] Emphasis added; Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) 8.

one that he ought not to do'. The rules themselves contain an internal conflict.[149] They therefore offer no guidance except perhaps a warning to expect confusion to follow.

4.4 Moral Standard?

The law regarding criminal capacity in South Africa, together with several of the prominent tests for criminal responsibility in the US,[150] have opted for the word 'appreciation' instead of the word 'knowledge' of the M'Naghten rules. This may be taken to mean that a more emotional understanding is required, and therefore, that the requirement of appreciation of wrongfulness is a reference to a moral standard.[151]

The problem here is somewhat trite: morality is complex, multilayered and relative. Of course, individual morality may differ from that of the community within which s/he lives, which may in turn differ from the morality of the larger society within which both are located.

Discrete groups within societies may maintain their own notions of right and wrong (conduct

[149] Ormerod does not appear to note this as a contradiction (Ormerod *Smith & Hogan Criminal Law* (2005) 263) while is seems plain to LaFave (LaFave *Criminal Law* Abridged 4 ed (2003) 384).

[150] The American Law Institute Model Penal Code: 'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to *appreciate* the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.' (American Law Institute *Model Penal Code* (1962) § 4.01).
The federal test: a) It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense. (18 U.S.C. § 17)

[151] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 381. It appears from the Rumpff Commission Report that 'appreciate' was meant as a cognitive criteria, to refer to an accused's ability to understand the difference between right and wrong, (Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) paras 9.30-9.1), where cognition 'include[s] perceiving, thinking, reasoning, remembering, insight, conceiving' (ibid para 9.). The American Law Institute's Model Penal Code adopts the word 'appreciate' in contradistinction to the previous 'know' which indicates a departure from a strict cognitive element to take account of an accused's personality and emotional state at the relevant time (D. Hall *Criminal Law and Procedure* (1992) 253). It may also be said to relate to an accused's conative capacities (R. Sadoff 'Legislation in the United States' In *Principles and Practice of Forensic Psychiatry* edited by R. Bluglass and P. Bowden (1990) 308).

norms[152] or focal concerns[153]) which are in conflict with those of the dominant culture. Research on homicidal violence by Wolfgang prompted him to note:

> Our analysis implies that there may be a subculture of violence which does not define personal assaults as wrong or antisocial; in which quick resort to physical aggression is a socially approved and expected concomitant of certain stimuli. [154]

Control theories in criminology represent the prospect that while individuals may generally be committed to rules, they may employ neutralisation techniques to strip their conduct of wrongfulness.[155] Such techniques may include denial of responsibility, condemning the agents of social-control, and an appeal to higher loyalties.[156] It is even possible that no one does anything that he or she can truly appreciate to be wrong. The research of Donald McCabe in 1992[157] seems to indicate that people may never consider their conduct to be wrongful since they justify their conduct by reference to neutralisation strategies – they consider their conduct to be somehow justified, entitled or excused. The notion that he was somehow exempt from ordinary morality by virtue of a higher purpose was what permitted Dostoevsky's Raskolnikov to murder in *Crime and Punishment.*[158]

Theoretically much of the complexity of moral reasoning may be understood in terms of Lawrence Kohlberg's theory of moral development. This theory has arguably dominated concerns with morality within psychology since the late 1960's and it still dominates the field in the guise of neo-

[152] Thorsten Sellin *Culture, Conflict and Crime* Vol Bulletin no. 41 (1938).
[153] Walter Miller 'Lower Class Culture as Generating Milieu of Gang Delinquency' (1958) 14 Journal of Social Issues.
[154] M.E. Wolfgang *Patterns in Criminal Homicide* (1958/1975)??.
[155] Stephen E Brown, Esbensen Finn-Aage & Gilbert Geis *Criminology: Explaining Crime and Its Context* 4 ed (2001) 349.
[156] GM Sykes & D Matza 'Techniques in Neutralization: A Theory of Delinquency' (1957) 22 American Sociological Review.
[157] Donald L. McCabe 'The infuence of situational ethics on cheating among college students.' (1992) 62 Sociological Inquiry reported in Neuman *Social Research Methods: Qualitative and Quantitative Approaches* 4th ed (2000) 22.
[158] Fyodor Dostoevsky *Crime and Punishment* (1866/1987).

Kolhbergian theory.[159] Even if I understand that what I am doing is wrong on one level, I may consider it to be right on another level. I might steal, knowing that it is wrong to violate another's property rights, or to break the formal law of the land, but still think I am entitled and right because I am poor and, though I have tried, I am unable to care for myself and those who are dear to me. This is the conflict that was set by Lawrence Kohlberg[160] in the now classic *Heinz* dilemma:

> In Europe, a woman was near death from a special kind of cancer. There was one drug that the doctors thought might save her. It was a form of radium that a druggist in the same town had recently discovered. The drug was expensive to make, but the druggist was charging 10 times what the drug cost him to make. He paid $400 for the radium and charged $4 000 for a small dose of the drug. The sick woman's husband, Heinz, went to everyone he knew to borrow the money and tried every legal means, but he could only get together about $2 000, which is half of what it cost. He told the druggist that his wife was dying, and asked him to sell it cheaper or let him pay later. But the druggist said, 'No, I discovered the drug and I'm going to make money from it.' So having tried every legal means, Heinz gets desperate and considers breaking into the man's store to steal the drug for his wife.[161]

Kohlberg's research showed that people reason about moral problems at different levels of cognitive complexity. From the responses received to moral dilemmas such as that of Heinz, he constructed a six-stage theory of moral reasoning subdivided by three levels. Lower stages reflect the reasoning of a child's initial morality in which the orientation is egocentric and dependent upon

[159] S. J. Thoma 'Research on the Defining Issues Test' In *Handbook of Moral Development* edited by M Killen and Smetana (2006). 'The most extended explication of the developmental perspective [comprising most psychological explanations of morality] is the theory of moral judgment advanced by the late Harvard psychologist Lawrence Kohlberg ...' (L. S. Wrightsman, M. T. Nietzel & W. H. Fortune *Psychology and the Legal System* 3 ed (1994) 52).

[160] L. Kohlberg 'Development of Moral Character and Moral Ideology' In *Review of Child Development Research* edited by M. Hoffman and L. Hoffman (1964); L. Kohlberg 'Moral Development' In *International Encyclopedia of the Social Sciences.* 489-94 (1968); L. Kohlberg 'Stage and Sequence: The Cognitive Developmental Approach to Socialisation' In *Handbook of Socialization, Theory and Research.* edited by D. A. Goslin (1969); L. Kohlberg & K. Kauffman 'Theoretical Introduction to the Measurement of Moral Judgment.' In *The Measurement of Moral Judgment.* edited by A. Colby and L. Kohlberg (1987).

[161] L. Kohlberg & D. Candee 'The Relationship of Moral Judgment to Moral Action' In *Essays on Moral Development* edited by L. Kohlberg (1984); Kohlberg & Kauffman 'Theoretical Introduction to the Measurement of Moral Judgment.' In *The Measurement of Moral Judgment.* edited by Colby and Kohlberg (1987) 1.

others. Later stages become less egocentric and more independent.[162]

Kohlberg's theory reveals that something might be right on one level, such as that it is in the interests of one's family, and yet wrong on another level, such as that if one were caught one may be punished. Indeed, it may be right and wrong even within the same level of reasoning – based on different reasons. For instance, it might be right to steal to save one's wife, but wrong because one may dishonour one's family, or be unable to provide further for them if one is caught and punished.[163] Obeying the law may be motivated by a desire to avoid punishment, maintain law and order, or to observe someone's human rights.

Consider the real life dilemma of unemployed Joseph Coyle who found $1.2 million lying in bags on a street. The bags had fallen out of a security truck. Coyle became manic: he gave $900 000 away, went on a spending spree and hid $105 000 in his boots. Diagnosed as suffering bi-polar disorder, he was found not guilty by reason of insanity. He had been unable to decide whether it

[162] Due to its prominence (see footnote 159) a brief summary of the theory follows: Each level comprises two stages which describe a sequence of moral development within each level. Morality in level one is referred to as 'preconventional/premoral morality' in which morality resides externally, is imposed from above and is dependent upon consequences. The first stage (stage one) within level one is the obedience and punishment orientation (or heteronomous morality) in which observation is compelled by the threat of punishment. The second stage (stage two) within level one is the stage of individualism, instrumental purpose and exchange and is determined by what serves the interests of the self; how one can attain reward as opposed to avoid punishment.
The second level is referred to as the level of conventional/role conformity morality in which moral values reside in performing the right role and maintaining the social order. The first stage within this level (stage three) is that of mutual interpersonal expectations, relationships and interpersonal conformity (alternatively referred to as the good-boy/good-girl) orientation in which morality is determined by an attitude of approval seeking. The second stage within level two (stage four) is that of the social system and conscience (or authority and social-order-maintaining) orientation which is directed by a sense of the value for maintaining the social system as a duty.
Level three is the level of postconventional/principled morality in which individuals reason upon the basis of principles underlying rules and laws. Morality becomes internal and autonomous. The first stage of level three (stage five) is that of social contract or utility and individual rights in which norms of right and wrong are defined in terms of laws or institutionalised rules for their apparent rational basis. The second stage of level three (stage 6) is the morality of universal ethical principles in which morality is directed by self-chosen ethical principles which are assumed to found the law, but which predominate where the law conflicts with these personal principles (James Grant 'Kohlberg's Theory of Moral Reasoning' In *Developmental Psychology* edited by Derek Hook, Jacki Watts and Kate Cockroft (2002); Kohlberg & Kauffman 'Theoretical Introduction to the Measurement of Moral Judgment.' In *The Measurement of Moral Judgment.* edited by Colby and Kohlberg (1987)). Stage six's existence as a separate stage above and beyond the scope of stage five is, however, questionable (ibid).

[163] Reasons both ways here are notably family based and would probably fall within stage three reasoning. See footnote 162.

was right or wrong to return the money. For him, there were two wrongs and two rights - it was both wrong and right to return the money, and wrong and right to keep it.[164]

The point is that it makes little sense to speak of whether a person can appreciate the wrongfulness of their conduct. The person may very well appreciate that it is wrong, but also appreciate that it is right – on another level – upon which basis s/he decides to operate. Even at its most abstract level, one must recognise that there may well be a vast difference between what any individual understands/appreciates to be wrong by society's standards, and his/her own.[165]

To the extent that the test of capacity is subjective,[166] if the term 'appreciation of wrongfulness' is regarded as a moral standard, the test becomes virtually ineffectual. It may reduce to asking whether an accused could appreciate that what he or she is doing is morally wrong. Considering that it is entirely possible that no one ever truly appreciates – or even 'knows' – at every (moral) level, that what they are doing is wrong, a moral standard may offer no standard at all – or at least, no standard against which anyone would appear responsible.

It would seem therefore that some objectivity must be introduced into the standard against which the criminal law tests responsibility. We must consider whether a legal standard would not solve the problem.

[164] Slovenko *Psychiatry and Criminal Culpability* (1995) 72.
[165] *R v Chaulk supra* 1991 (1991) 1 CRR 1 (SCC); Schopp *Automatism, Insanity, and the Psychology of Criminal Responsibility* (1991) 43. See also the case of *Stapleton* which held that the ability to understand the difference between right and wrong may be understood as whether the accused could understand this distinction as a reasonable person would. This is consistent with the ultimate standard proposed (see 9.3 Capacity on page 211ff). However, to the contrary, the *Stapleton* court also held that the standard may sometimes be whether the accused could understand that his/her conduct is prohibited in law (*Stapleton v R* (1952) 86 CLR 358 374-5).
[166] Though at least the veracity of the claim will be determined by reference to objective considerations (*S v Eadie* 2002 (1) SACR 663 (SCA)). See discussion below under the heading 7.4 Eadie – The End of Non-pathological Incapacity? on page 144ff.

4.5 Legal Standard?

Possibly the most forceful argument in favour of a legal interpretation was made in *Windle* in which Lord Goddard CJ pronounced:

> Courts of law can only distinguish between that which is in accordance with the law and that which is contrary to law ... The law cannot embark on the question and it would be an unfortunate thing if it were left to juries to consider whether some particular act was morally right or wrong. The test must be whether it is contrary to law...
> In the opinion of the court there is no doubt that in the M'Naghten Rules 'wrong' means contrary to law and not 'wrong' according to the opinion of one man or of a number of people on the question whether a particular act might or might not be justified.[167]

This statement however has only guiding force even in England because it was made obiter.[168] The argument made by Goddard CJ is compelling. It may be supplemented with the argument that a legal interpretation set a concrete standard which would permit for certainty.[169] Furthermore that a moral interpretation would prevent the criminal law from holding an accused accountable whose conduct was pursued as a personal moral project.

> Legal norms are binding even though they may not be regarded as being buttressed by a moral norm. This is the reason why a person may be legally culpable even when he does not feel that he has done anything blameworthy. People who regard their private religious, political or moral

[167] *R v Windle* [1952] 2 All ER 1 1 & 2.
[168] An inessential component of a judgment which does not form part of the reasons for the judgment (*obiter dictum*) and is therefore not binding on other courts as precedent.
[169] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 379.

> convictions as more important than the provisions of the law and who knowingly transgress these provisions, cannot escape liability on the ground of their personal convictions.[170]

This approach may fit neatly with the acceptance in South African law of the defence of ignorance of the law,[171] contrary, in general, to the English[172] and US[173] law. Mistakes of fact and mistakes relating to the factual basis of unlawfulness had long been recognised in our law.[174] However, in 1977 our Appellate Division[175] recognised that mistakes or ignorance of the law (the abstract prohibition) would be treated the same as mistakes of fact. Thus, if appreciation of wrongfulness was interpreted to require knowledge of the abstract prohibition, capacity for this would integrate neatly.

Nevertheless, the problem of Hadfield's case must be recalled.[176] On a purely legal standard, Hadfield would be punished and that simply does not seem right. Snyman himself shares this intuition – contrary to the view just quoted.[177] The neat fit between the requirement of knowledge of the abstract prohibition and the capacity for it does not solve the problem. Hadfield not only had the capacity for this, he actually knew it was proscribed in law. Thus it seems that to construe appreciation of wrongfulness to refer to a legal standard is inappropriate, and the opposite – a moral standard also seems inappropriate. At least, an unqualified moral standard seems inappropriate not only because it lacks clarity and certainty, but also the degree of objectivity that is required to make it a standard. Is there a standard that provides all that is required?

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[170] Snyman *Criminal Law* 5th ed (2008) 152. Regrettably Snyman also expresses the contrary view elsewhere (ibid 173).
[171] *S v De Blom* 1977 (3) SA 513 (A). This case recognised the defence of ignorance or mistake relating to the abstract prohibition.
[172] David Ormerod *Smith & Hogan Criminal Law* 12th ed (2008) 318.
[173] LaFave *Criminal Law* Abridged 4 ed (2003) 290; *Posters 'N' Things, Ltd. v. United Satets* 511 U.S. 513, 114, S.Ct. 1747, 128 L.Ed.2d 539 (1994).
[174] *R v Mbombela* 1933 AD 269; *S v De Oliveira* 1993 (2) SACR 59 (A).
[175] *S v De Blom* 1977 (3) SA 513 (A).
[176] Discussed above on page 53.
[177] Snyman *Criminal Law* 5th ed (2008) 173.

4.5 Capacity to Appreciate the Wrongfulness of One's Conduct/Legal Standard?

One final possibility should be observed. It may be argued that the standard should not relate to the abstract prohibition but to its unlawfulness.[178] That is, it should not refer to an abstract general standard but rather take account of the actual situation in which the accused finds him/herself (unlawfulness). While there exists authority for the proposition that wrongfulness refers to the abstract prohibition,[179] it may be understood as a reference to unlawfulness; indeed, even the M'Naghten rules may be understood to have meant this.[180]

Murder, for instance, is prohibited as the *unlawful* intentional killing of another human being. Unlawfulness forms a requirement and relates to whether, in a given situation, an intentional killing of another human being may be permitted as *justified* and therefore lawful. For instance, it is well recognised that, subject to specific requirements, one may intentionally kill another human being in self defence, particularly in defence of one's life.[181] This is ultimately judged by the standard of the legal convictions of the community as informed by the values in the Constitution.[182] This may bridge the excessive relativity of a purely moral standard and avoid the undesirable consequences in cases such as Hadfield's. It sets the standard as an objective moral standard – that of the society within which one lives. As Burchell notes, '[f]ew would dispute that the criminal law, both common and statute law, should reflect the values and consensus of society.'[183]

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[178] In the sense described above (on page 53).

[179] In the M'Naghten rules (see footnote 146) and *Windle* (see footnote 167).

[180] Slovenko argues that the M'Naghten rules do not require that an individual know right from wrong generally: '... it asks whether he knew what he was doing was wrong or, perhaps, thought he was right in doing it—that is, using the example of self-defense, whether he was under a delusion that he was legitimately acting in self-defense.' (Slovenko *Psychiatry and Criminal Culpability* (1995) 20). He bases his argument on the requirement within the M'Naghten rules, in reference to 'partial delusions', that the lawbreaker 'must be considered in the same situation as to responsibility as if the act in respect to which the delusion exists were real' (ibid 20). Correctly he notices that this requirement appears to be asking whether the accused knew that s/he was without a ground of justification - that is had no knowledge of unlawfulness.
Burchell even makes reference to the test as 'the capacity to appreciate the *unlawfulness* of conduct' (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 443 emphasis added), though it would appear that he meant it as 'appreciation of illegality' (per De Blom (*S v De Blom* 1977 (3) SA 513 (A)).

[181] *R v K* 1956 SA 353 (A); *R v Patel* 1959 (3) SA 121 (A); *R v Zikalala* 1953 (2) SA 568 (A); *S v Jackson* 1963 (2) SA 626 (A)

[182] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Clarke v Hurst NO* 1992 (4) SA 630 (D); *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *S v Chretien* 1981 (1) SA 1097 (A); *S v Gaba* 1981 (3) SA 745 (O).

[183] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 228.

However this standard is determined objectively – as a question of law and fact[184] – based on an *ex post facto* analysis of facts. The *ex post facto* analysis may include facts of which the accused was mistaken and even facts that s/he cannot possibly have known, and certainly facts which the accused cannot be expected to know.[185] For instance, it remains unlawful to kill someone in self-defence where they were pointing a gun at you and told you they were going to shoot you, where it transpires that the assailant's gun was a toy – a carefully constructed replica gun. Therefore, though this standard is a normative standard and takes account of the circumstances of the accused, its perspective is one that is independent of what may, in fairness, be expected of any particular accused. It would ask whether an accused had the capacity to know/appreciate a standard that is determined by factors that the accused may be unable to know/appreciate. It is therefore self-contradictory, and would set an incoherent standard. It does not make sense to ask whether an accused could know that it was unlawful even if it would be unlawful based on what s/he could not know.

4.6 Expert opinions

The views of the forensic experts did not resolve the problem. Experts' opinions were coded, based on whether they regarded knowledge of illegality as sufficient to constitute an appreciation of wrongfulness or insufficient – that is whether some other factor was required such as a mental illness or defect or that it referred to immorality (in either a personal or community sense. An instance of the notion that knowledge of illegality is sufficient to constitute an appreciation of wrongfulness is expressed by W8:

> **Witness 8**: … I suppose at the end of the day if I am going to be true to what I said about the law being exact that I have to say that if he… knew that he would be punished… he knew that it was wrong.

[184] James Grant 'The Double Life of Unlawfulness: Fact and Law' (2007) 20 SACJ.
[185] *S v De Oliveira* 1993 (2) SACR 59 (A); *S v Goliath* 1972 (3) SA 1 (A); *S v Motleleni* 1976 (1) SA 403 (A); *S v Ntuli* 1975 (1) SA 429 (A).

> **Counsel**: Well he knew it was illegal.
> **Witness 8**: He knew it was illegal.
> **Judge**: But not necessarily wrong.
> **Witness 8**: Well, from his framework it was - he knew it was illegal uhm then to me he is a criminally accountable.

The notion that knowledge of illegality is insufficient, such that the accused must know the immorality of his/her conduct or must suffer with a mental illness or defect or lack rationality is expressed, for example, by W6:

> **Witness 6**: I think there is something sort of deceptive you know for me about the sort of notion that he knew that it was illegal, because if I were to think of it by analogy, you know I might know that it is illegal to murder but I might called upon you know in a sort of sanctioned way to become a soldier, so as it were what in a sense the higher order truth for him is, is in fact the one that is his delusion.
> **Counsel**: Yes. So you would say that if I could put it in a different way, the mere knowledge for him that his conduct was illegal as contemplated by the law in the circumstances is not sufficient for you to say that he therefore appreciated the wrongfulness of his conduct?
> **Witness 6**: Yes.

Ultimately every one of the experts considered it insufficient to establish capacity for an appreciation of wrongfulness that an accused knew that his/her conduct was illegal. Yet, astonishingly 69 per cent simultaneously expressed the contrary view – that it was sufficient. Thus there was a 69 per cent contradiction rate.

4.7 Conclusion

An appreciation of wrongfulness may therefore refer to some standard of immorality, to the abstract prohibition of conduct, or to unlawfulness. Yet none of these appears entirely suitable. The

ambivalence in the setting of this standard is perhaps understandable. It will be argued that the standard for responsibility should not turn on any of these possibilities, but rather on a standard that expresses what the law can legitimately expect of each of us. What this standard ought to be will depend upon what we ought to regard as the conditions for responsibility. This is discussed below.[186]

[186] See chapter 8 Philosophy of Mind: Responsibility on page 158ff.

5 Capacity to Conduct oneself in accordance with an Appreciation of Wrongfulness and Voluntariness

5.1 Introduction

The problem with the requirement of the capacity to conduct oneself in accordance with an appreciation of wrongfulness is to know what this is and what it is not. In particular, how our law does or may distinguish it from the requirement of voluntariness is exceedingly unclear.

The Rumpff Commission report distinguished three categories of human functions:[187]

1. Cognitive (intellectual, mental);
2. Conative (volitional - according to which humans are capable of controlling their behaviour by exercising their will); and
3. Affective (feelings and emotions).

In the view of the Commission, these functions are generally integrated[188] but sometimes disintegrated under certain circumstances.[189]

It is notable that the M'Naghten rules contain no reference to a conative impediment. The M'Naghten test may be described as a test of ignorance on the basis that disordered defendants are

[187] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) paras 9.7 & 9..
[188] Ibid para 9.10.
[189] Ibid paras 9.11-9.29.

excused for being ignorant of the nature, quality, or wrongfulness of their conduct.[190]

The English law – following M'Naghten - did not and still does not take account of a conative deficit under its insanity defence. Questions of conative function are dealt with under the requirement of voluntariness – though if a mental disorder is implicated the accused is found to be insane.[191]

The Rumpff report,[192] which established the parameters of our insanity defence, gave expression to a conative deficiency defence (previously in the guise of the irresistible impulse defence).[193]

A necessary question is whether this requirement may be distinguished from voluntariness.

5.2 Logic of this discussion

What follows is a complex discussion which requires some guidance as to what to expect. The logic of the discussion that follows is to attempt to establish what the capacity to conduct oneself in accordance with an appreciation of wrongfulness (the capacity for self-control) means and how it may be distinguished from voluntariness. To achieve this I will:

1. Consider how the capacity for self-control has been described;

[190] Schopp *Automatism, Insanity, and the Psychology of Criminal Responsibility* (1991) 28.
[191] *Bratty v Attorney General for Northern Ireland* [1963] AC 386, [1961] 3 All ER 523 (psychomotor epilepsy); *R v Kemp* [1957] 1 QB 399 at 407; SHC 18 (arteriosclerosis); *R v Sullivan supra* 1984 [1984] AC 156, [1983] 2 All ER 673 (psychomotor epilepsy).
[192] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967).
[193] *R v Koortz* 1953 (1) SA 371 (A). Our law had come to recognise that a conative deficiency need not manifest in impulsive conduct (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 382; Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.90; *S v Kavin* 1978 (2) SA 731 (W)).

2. Consider what we might mean by the requirement of voluntariness;
3. Discuss how the capacity for self-control is supposed to be distinguished from the other conative function requirement (voluntariness) and conclude that it cannot be sustainably distinguished - unsurprisingly, because the concept of voluntariness remains elusive; and
4. Examine the appropriateness of various factors which have been regarded as indicating the presence of conative functioning.

I will conclude that we have resorted to relying on a forbidden meaning of self-control, the concept of voluntariness remains elusive, that there does not appear to be any sustainable basis to distinguish between the capacity for self-control and voluntariness and that only one conative function may be discerned. Furthermore, I will conclude that we must be careful not to confuse this conative requirement with a cognitive requirement, not to obfuscate matters by employing the term 'consciousness', and not to mistake goal-directedness and the absence of a 'trigger' as indicating proper conative functioning.

5.3 Capacity for self-control defined?

In formulating the requirements for responsibility, the Rumpff Commission report indicates what should be understood by the requirement of capacity for self-control:

> By self-control is to be understood a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and set up a counter-motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive.[194]

[194] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.33.

5.3 Capacity to Conduct oneself in accordance with an Appreciation of Wrongfulness and Voluntariness/Capacity for self-control defined?

One may recall that the irresistible impulse test was dropped in favour of this new conative test of 'capacity to act in accordance with an appreciation of wrongfulness' because our law does not require sudden impulsive conduct.[195] However, this understanding has certainly prevailed in conceptions of the capacity for self-control as conduct that an accused could not resist[196] or was unable to refrain from committing.[197] This is also the conception of De Wet and Swanepoel which has been adopted in numerous Appellate Division decisions starting with *Laubsher*.[198] Crucially, the question of whether an accused had capacity for self-control is answered by reference to his/her '*weerstandskrag*' – literally meaning: power of resistance.[199]

Joubert in *Laubscher* stated:

> Om strafregtelik aanspreeklik te wees, moet 'n dader onder andere ten tyde van die pleeg van die beweerde misdaad toerekeningsvatbaar wees. Toerekeningsvatbaarheid is derhalwe 'n voorvereiste vir strafregtelike aanspreeklikheid. Die leerstuk van toerekeningsvatbaarheid is 'n selfstandige onderafdeling van die skuldleer, volgens De Wet en Swanepoel *Strafreg* 4de uitg op 110. Om toerekeningsvatbaar te wees, moet 'n dader se geestesvermoëns of psigiese gesteldheid sodanig wees dat hy regtens vir sy gedrag geblameer kan word. Die erkende psigologiese kenmerke van toerekeningsvatbaarheid is:
>
> 1. Die vermoë om tussen reg en verkeerd te onderskei. Die dader het die onderskeidingsvermoë om die regmatigheid of onregmatigheid van sy handeling in te sien. Met ander woorde, hy het die vermoë om te besef dat hy wederregtelik optree.
>
> 2. Die vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die *weerstandskrag* (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te

[195] See footnote 193.
[196] *S v Kavin* 1978 (2) SA 731 (W) 741.
[197] *S v McBride* 1979 (4) SA 313 (W) 319.
[198] *S v Laubscher* 1988 (1) SA 163 (A).
[199] Author's translation. Note however that Burchell and Milton translate this as 'the power to refrain from acting unlawfully' and differently later as 'the capacity for self-control'. (Translation by Jonathan Burchell & John Milton *Cases and Materials on Criminal Law* 2nd ed (1997) 315-6; See footnote 200.)

> weerstaan. Met ander woorde, hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil.
>
> Ontbreek een van hierdie twee psigologiese kenmerke dan is die dader ontoerekeningsvatbaar, bv waar hy nie die onderskeidingsvermoë het om die ongeoorloofdheid van sy handeling te besef nie. Insgelyks is die dader ten spyte daarvan dat hy wel die onderskeidingsvermoë het tog ontoerekeningsvatbaar waar sy geestesvermoë sodanig is dat hy nie die *weerstandskrag* het nie.[200]

This conception was subsequently adopted and endorsed – for unanimous courts - by Goldstone AJA in *Wiid*[201] and Eksteen JA in *Calitz*.[202]

It would seem therefore that capacity for self-control is understood in our law to refer to whether the accused could resist or refrain from the conduct in question. Yet it is not clear what this means. What is it that must be wrong? One may note from the attempts at defining voluntariness that at least some description of the relevant impediment is offered.

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[200] Emphasis added; *S v Laubscher* 1988 (1) SA 163 (A) 166-7: 'To be criminally liable, a perpetrator must inter alia at the time of the commission of the alleged offence have criminal capacity. Criminal capacity is therefore a prerequisite for criminal liability. The doctrine of criminal capacity is an independent subdivision of the concept of *mens rea*, according to De Wet and Swanepoel *Strafreg* 4th ed at 110. To be criminally accountable, a perpetrator's mental faculties must be such that he is legally to blame for his conduct. The recognised psychological characteristics of criminal capacity are:

> '1. The ability to distinguish between right and wrong. The perpetrator has the capacity to distinguish between the wrongfulness or otherwise of his conduct. In other words, he has the capacity to appreciate that his conduct is unlawful.
>
> 2. The capacity to act in accordance with the above appreciation in that he has the power to refrain from acting unlawfully; in other words, that he has the ability to exercise free choice as to whether to act lawfully or unlawfully.
>
> If either one of these psychological characteristics is lacking, the actor lacks criminal capacity, eg where he does not have the insight appreciate the wrongfulness of his act. By the same token, the perpetrator lacks criminal capacity where his mental powers are such that he does not have the capacity for self-control.' (Translation by Burchell & Milton *Cases and Materials on Criminal Law* 2nd ed (1997) 315-6).

[201] *S v Wiid* 1990 (1) SACR 561 (A) 563.

[202] *S v Calitz* 1990 (1) SACR 119 (A) 126.

5.4 Voluntariness Defined?

Cross and Jones comment that voluntariness is best explained by illustration, by what has been recognised as instances of involuntariness. [203] This is also the approach of the American Law Institute.[204] Conditions which have been recognised to produce involuntary movements include sleep and sleepwalking,[205] epileptic seizures,[206] and conduct in which the accused is subjected to overwhelming force,[207] 'blackout',[208] dissociation,[209] cerebral tumour,[210] arteriosclerosis,[211] concussion,[212] hypoglycaemia (low blood sugar),[213] and intoxication.[214] The concept of automatism[215] is often used as a reference to an instance of involuntariness, but it carries an indistinguishable meaning.

Despite the importance of voluntariness, it remains an elusive concept, without definition, at least

[203] Rupert Cross & Philip Asterley Jones *An Introduction to Criminal Law* 3rd ed (1953) 34-5.
[204] Denno (Deborah W. Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review 287) notes that the voluntariness requirement of the US Model Penal Code is not specifically defined, but that four instances of involuntariness are offered to illustrate that voluntariness is 'conduct that is within the control of the actor' (American Law Institute *Model Penal Code* (1985) § 2.01 at 215): '(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual' (ibid § 2.01(2) at 212).
[205] American Law Institute *Model Penal Code* (1985) § 2.01; *R v Dhlamini* 1955 (1) SA 120 (T); *Rex v Nhete* 1941 S.R. 1.
[206] Cross & Jones *An Introduction to Criminal Law* 3rd ed (1953) 34-5; De Wet *Strafref* 4 ed (1985) 17-8; *R v Mkize* 1959 (2) SA 260 (N); *R v Schoonwinkel* 1953 (3) SA 136 (C); Snyman *Criminal Law* 5th ed (2008) 55.
[207] Such as from another stronger person (Clarkson *Understanding Criminal Law* (2005) 36; De Wet *Strafref* 4 ed (1985) 17-8; JWC Turner *The Mental Element in Crimes at Common Law: The Modern Approach to Criminal Law* (1936) 204) or from forces of nature (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 181; De Wet *Strafref* 4 ed (1985) 17-8).
[208] *R v Du Plessis* 1950 (1) SA 297 (O).
[209] *S v Mahlinza* 1967 (1) SA 408 (A).
[210] *R v Charslon* [1955] 1 All ER 859.
[211] *R v Kemp* [1957] 1 QB 399 at 407; SHC 18.
[212] *R v Byrne* [1960] (2) QB 396; *R v Smit* 1950 (4) SA 165 (O).
[213] *S v Bezuidenhout* 1964 (2) SA 651 (A); *S v van Rensburg* 1987 (3) SA 35 (T).
[214] Involuntary intoxication: *S v Johnson* 1969 (1) SA 201 (AD); Voluntary intoxication: *S v Chretien* 1981 (1) SA 1097 (A).
[215] From the notion of an automaton, that is, something acting as a robot.

in the sense that no one definition enjoys acceptance.[216] Clarkson in his *Understanding Criminal Law* laments that '[t]he real problem ... has been to define the term "voluntary"'.[217] Morse notes:

> Although many forensic psychiatrists and psychologists (and lawyers) assume that they possess a good account of involuntariness and of so-called pathologies of the will and volition, no satisfactory and surely no uncontroversial account of any of these topics exists in the psychiatric, psychological, philosophical, or legal literatures. Indeed, most articles on such topics offer no genuine empirical or philosophical theory of the will, voluntariness, or the other central variables in the argument.[218]

The problem is not that no definition has been proposed. It is rather that too many divergent definitions have been proposed. Some appear similar at first but a closer look shows them to be quite different. Many refer to phenomena that are scarcely discernible, or at least require a relationship between components of oneself that would require a strange array of entities inhabiting one's person.

At least four distinct definitions may be discerned from the literature and common law. They are distinguishable primarily by whether they hold voluntariness to be a question of capacity or of fact,[219] and whether the required relationship must exist between the person and his/her will, or between the person's will and his/her conduct.

I will begin with a definition that holds that conduct is voluntary when it is controlled by the accused's will. This definition is not peculiar in our law. It was adopted by Rumpff CJ in

[216] Scott and Jones *An Introduction to Criminal Law* (3rd ed. p. 34-35, cited in *R v Mkize* 1959 (2) SA 260 (N)); Andrew Skeen 'Criminal Law' In *The Law of South Africa* edited by W. A. Joubert and T. J. Scott (1996).
[217] Clarkson *Understanding Criminal Law* (2005) 36.
[218] S. J. Morse 'Causation, Compulsion, and Involuntariness' (1994) 22 Bulletin of the American Academy of Psychiatry and the Law 166. Petty observes from a psychological perspective, '... no comprehensive 'meta'-model for understanding self-control deficits as yet exists.' Chris Petty 'The Psychopathology Of Self-Control In The Context Of Criminal Capacity In South African Law' (unpublished Master's dissertation University of Stellenbosch 1998) 10.
[219] In the sense distinguished under Fact and Capacity on page 48.

Chretien.[220] It is also the definition of Austin,[221] and endorsed by Ashworth.[222] It is also Burchell's first offering: conduct actually controlled by the accused's will.[223] This would appear to be reconcilable with his conception of voluntariness as conduct '*subject* to the accused's conscious will'.[224] Louw adopts this definition on voluntariness: 'Conduct is voluntary where it is subject to the conscious will of the accused and, therefore, involuntary when not subject to the conscious will.'[225] Denno also endorses this formulation: 'Voluntary acts ...constitute conduct subject to an individual's control'.[226]

But other prominent definitions exist. The second, also adopted by Burchell,[227] may be regarded as a variation on the first. Whereas the first relates to whether the accused's conduct was – in fact – controlled by his/her will, the second frames this as a question of capacity: could the accused direct his/her conduct in accordance with his/her will? Snyman frames the test as follows: 'whether the person concerned was capable of subjecting his bodily movements or his behaviour to the control of his will.' [228] One problem here is the distinction drawn between the accused and his or her will and conduct. It sets the accused apart from them, as if s/he was something apart from them. This is difficult to conceive.

Visser and Maré offer a slight variation on this: conduct is voluntary where the accused's will is

[220] *S v Chretien* 1981 (1) SA 1097 (A) 1104.
[221] '[M]ovement of the body which follows our volition' (J Austin *Lectures on Jurisprudence* 3rd ed (1869) 426, reported in W. Wilson *Criminal Law: Doctrine and Theory* (1998) 220).
[222] An act is voluntary if it is willed (Andrew Ashworth *Principles of Criminal Law* 2nd ed (1997) 96-7).
[223] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 180. Burchell includes the qualification 'conscious' will. However, as discussed below (under 5.6.2 Consciousness on page 88), this concept can only cloud one's understanding. This qualification is therefore overlooked where it is employed.
[224] Ibid 179 emphasis added. This interpretation reads the words 'subject to' as a matter of fact. If this is wrong and it refers instead to a capacity, these instances are reconcilable with the second definition: conduct which could be controlled by the will.
[225] Ronald Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 207.
[226] Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review.
[227] Voluntariness refers to 'the *ability* to act … in accordance with [one's] conscious will …'Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 437 emphasis added.
[228] Snyman *Criminal Law* 5th ed (2008) 56.

able to exercise effective control. Here the will is directly responsible for exercising the capacity to control conduct. This is perhaps the closest conception to that which appears to prevail in respect of capacity for self-control: whether the accused could - was able to - resist or refrain from the conduct in question.[229]

This seems to address the problem inherent in the definition above, which distinguishes the accused from his/her will and conduct. But it proposes that conduct is voluntary even where it did not follow the will of the accused – so long as the will could compel it to obey. This seems to contemplate that, so long again as the will could prevail, conduct should be regarded as voluntary even where it is completely contrary to the accused's will. It seems most odd to call conduct voluntary where an accused does something which s/he has no reason to do or even has reasons to the contrary, on the basis that s/he would have done so if s/he had a good reason to do so.[230] If an accused can act independently of his or her will, then what is it that guides his/her conduct? Responsibility requires that we do what we want, not that we do what we might want or might do what we want.[231]

Botha JA defined voluntariness in *Johnson*[232] as the ability to make a decision. There are several points of concern with this definition. In addition to what was argued above regarding the capacity for control by the will, which is equally applicable here, there is the problem of the place of decisions in voluntary conduct. Presumably we are concerned with whether the conduct of an accused follows upon what s/he has chosen to do. Even if the accused did choose a particular course of action, that choice would not make his/her conduct voluntary. It is the exercise of the choice that makes it voluntary. Here we find the notion that conduct is voluntary where the

[229] See above under the heading 5.3 Capacity for self-control defined? on page 69ff.
[230] See under 8.6.1 Voluntariness on page 188.This should be contrasted with the capacity test in which we concern ourselves with the relationship between the accused's will and the world (see 8.6.2 Circumsense on page 191ff). There we wish to know whether the accused's will stands in the appropriate relationship to the world.
[231] See under 8.6.1 Voluntariness on page 188.
[232] *S v Johnson* 1969 (1) SA 201 (AD).

accused is able to choose a course of action, even though this choice may exert no control over his/her conduct.

Burchell offers another two possible definitions. His third offering is that conduct is voluntary if an accused controlled his conscious will.[233] This is also evident in his discussion of the impact of *Eadie*[234] – where he states that 'the voluntariness enquiry is focused on whether the accused *actually did* act voluntarily i.e. control his or her conscious will.'[235] Here we find the notion that conduct is voluntary where the accused – as some entity separate from his/her will – controls his/her will, even though his or her will exerts no control over his/her conduct.

Burchell's fourth definition frames voluntariness as the capacity for what is required in his third offering (control over his conscious will) - that voluntariness consists in 'the subjective *capacity* of the accused to control his conscious will (i.e. act voluntarily)'.[236] The problems that plague the second and third definitions are again applicable here. Responsibility requires that we do what we want, not simply that we do want or that we are able to want.[237]

It appears that voluntariness is plagued by too many divergent definitions and that the concept remains elusive. I turn next to consider whether anything may be gleaned from attempts to distinguish capacity for self-control from voluntariness.

[233] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 280 & 436. Here Burchell is distinguishing between involuntariness and impossibility, noting that an accused may avail him/herself of the defence of impossibility even where s/he is voluntary – in that s/he has control over his/her conscious will.
[234] *S v Eadie* 2002 (1) SACR 663 (SCA).
[235] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 436 original emphasis.
[236] Ibid 438 emphasis added. At this point he is in the company of Paizes: '"Involuntariness" describes a state in which one is unable to control one's conscious will.' (Paizes "Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ 511fn37.)
[237] See under 8.6.1 Voluntariness on page 188.

5.5 Distinction?

One possible basis for distinction is in terms of basic foundational elements of liability.[238] Traditionally voluntariness is required as part of the conduct requirement under the wrongful conduct requirement (*actus reus*). On the other hand, capacity for self-control is part of capacity which is traditionally regarded as falling under the wrongful mental state requirement (*mens rea*). Therefore, on this traditional categorical approach, the requirements are distinct because they fall under different elements. The point of this argument would presumably be to attribute different criteria to each. For instance, one may then wish to argue that because voluntariness falls under the *actus reus* that it is a question of objective fact whereas capacity for self-control would be a question of subjective mental state.[239] But it is not clear that even if this is so, that it ought to be so – that is, whether it is correct to attribute these abstract characteristics to the different elements or, if so, whether the requirements have not been miscategorised. That is, if upon analysis of the two requirements it appears that they cannot be given these divergent attributes, then their categorisation must fall into question rather than illuminating their differences. For instance, Denno considers voluntariness to be a 'crucial first step in establishing *mens rea*',[240] and the US Model Penal Code takes voluntariness to be 'a preliminary requirement of culpability'.[241]

Navsa in *Eadie* states: 'In my view the insistence that one should see an involuntary act unconnected to the mental element, in order to maintain a more scientific approach to the law, is with respect, an over-refinement.'[242] Snyman dismisses the argument with contempt:

[238] See under Criminal Liability: General Requirements on page 19ff.
[239] On the basis that unlawful conduct is concerned with object considerations related to the 'act', whereas culpability relates to personal considerations relating to the 'actor' (Snyman *Criminal Law* 5th ed (2008) 32).
[240] Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review 289.
[241] American Law Institute *Model Penal Code* (1962) 1985 2.01 216.
[242] *S v Eadie* 2002 (1) SACR 663 (SCA) para 58.

> How can the "mental element", that is, the requirement of culpability form part of the requirement of the act? One has to wonder whether the learned judge understands the basic building blocks of criminal liability – the difference between wrongdoing and culpability, [footnote omitted] or to use the term favoured by the courts, between *actus reus* and *mens rea*.[243]

However it seems that Navsa is quite right – if we understand that, as discussed below,[244] what makes conduct voluntary is that it is controlled by the person's will. It is not peculiar to regard conduct as voluntary where the accused does what s/he wants. This requires a clear relationship and overlap or connection between the accused's conduct and his/her 'mental element'.

Another possible basis for distinction may be the proposition that voluntariness is an *absolute* all-encompassing conative impediment, whereas the incapacity for self-control is *relative* and only relates to some particular act. This distinction may appear from examples of involuntariness where a person is struck on the head and rendered comatose – apparently lacking *all* bodily control and is therefore involuntary. [245] On the other hand, a kleptomaniac or a young child for instance lacks control only in respect of his/her various acts of taking without paying. [246] An attempt may be made to distinguish these scenarios on this basis alone – that the taking without paying shows only a lack of capacity to act in accordance with an appreciation of wrongfulness.[247] However it is clear that, by definition, the kleptomaniac or young child acts involuntarily – at least in respect of the act of taking. The kleptomaniac or child *must* be unable to control some part of his/her body with which the conduct in question is committed. The only possible basis left for this distinction to succeed is if voluntariness is an *absolute* all-encompassing conative impediment whereas the incapacity for self-control is *relative* and only relates to some particular act.

[243] Snyman *Criminal Law* 5th ed (2008) 168-9.
[244] Under the heading 8.6.1 Voluntariness on page 188.
[245] *R v Du Plessis* 1950 (1) SA 297 (O).
[246] Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 36; Snyman *Criminal Law* 5th ed (2008) 167n68.
[247] Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 36; Snyman *Criminal Law* 5th ed (2008) 167.

However there is no reason to insist that involuntariness must be absolute, while incapacity for self-control must be relative and restricted. We would not say that someone whose leg goes into spasm only lacks capacity for self-control. If my hand is grasped by a stronger person and I am forced by overwhelming force to strike another person with my hand, we say I was acting involuntarily even though I had full control of my body except my arm.[248] Snyman endorses the view that a person, who is chained to a pole and therefore unable to move from the pole, is involuntary.[249] Thus voluntariness clearly requires that conduct be entirely voluntary. If some part – at least any part forming the conduct in question – is involuntary, we regard the accused's conduct as involuntary. Therefore this basis for distinction appears to fail.

The most prominent attempts at distinguishing the two concepts (voluntariness and capacity for self-control) appear in the leading texts on criminal law, Burchell[250] and Snyman.[251]

5.5.1 Burchell

Burchell argues:

> Strictly speaking, there are two stages in assessing the requirement of voluntariness. First, is the accused capable of controlling his or her conscious will, and secondly, was the conduct in question in fact controlled by his or her conscious will? If the first question is answered in the negative there is no need to examine criminal liability any further. The first question involves an aspect of the enquiry into criminal capacity which is defined as the ability to appreciate the wrongfulness of conduct (the cognitive element) and the ability to act in accordance with this appreciation (the

[248] See footnote 207.
[249] Snyman *Criminal Law* 5th ed (2008) 167n68.
[250] Burchell *Principles of Criminal Law* 3rd Revised ed (2006).
[251] Snyman *Criminal Law* 5th ed (2008).

> conative element). [footnote omitted] It is this latter aspect of capacity which is in issue here.[252]

Burchell's submission appears – at first – simple. Voluntariness concerns whether the accused's conduct was – in fact – controlled by his/her will;[253] whereas capacity for self-control concerns whether the accused had this capacity – that is, did the accused have the ability to control his/her conduct in accordance with his/her will. Voluntariness is a question of fact, whereas capacity for self-control is a question of ability: whether the accused could control his or her conduct. But Burchell's formulation is susceptible to so many variant interpretations that it is not at all clear what Burchell takes each concept to mean[254] and therefore his distinction is most unclear.[255]

Nevertheless, taking Burchell's distinction at face value, is this valid or helpful? On this distinction, it would hold that even though an accused's conduct may be voluntary, the accused may nevertheless have lacked the capacity for self-control. To put it more plainly: the fact that the accused did not control him/herself, does not mean that s/he *could* not control him/herself.

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[252] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 183.

[253] Discussed as the first of Burchell's definitions of voluntariness ibid 180 – see under the heading 5.4 Voluntariness Defined? on page 74.

[254] As discussed under the heading 5.4 Voluntariness Defined? particularly on on page 74ff.

[255] A closer analysis reveals a perplexing lack of clarity in this distinction and what is meant by either voluntariness and involuntariness, and capacity and incapacity for self-control. It seems that six options are available on Burchell's argument (the second level assumption (discussed below) is italicised):

1. That the accused could control his/her conscious will:
    a. *His conscious will could control his/her conduct*;
        i. and his/her conscious will controlled his/her conduct;
        ii. but his/her conscious will did not control his/her conduct;
    b. His conscious will could not control his/her conduct and therefore did not.
2. That the accused could not control his/her conscious will:
    a. *His conscious will could control his/her conduct*;
        i. and his/her conscious will controlled his/her conduct;
        ii. but his/her conscious will did not control his/her conduct.
    b. *His conscious will could not control his/her conduct and therefore did not*.

It is unclear what Burchell means by someone controlling their conscious will - it appears to contemplate a plethora of mental phenomena in precarious, if any, relationship with one another - a sort multiple personality perhaps. It proposes that I am different from my conscious will and I sometimes control it, whereas sometimes it is controlled by something else. So perplexing is the distinction that Louw refers to the precise pages on which this distinction appears in Burchell and Milton (the previous edition of Burchell (*supra*)) for authority that the two concepts are *indistinct*. (Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 211)

However, if conduct was not – in fact – controlled by the accused's will, it is involuntary and the accused has no capacity. If the conduct is voluntary – it is controlled by the accused's will and therefore the accused must, necessarily, have this capacity. These two concepts cannot be separated. Why is this? Questions of fact and capacity are not always inter-related, or at least, not identical.[256] But there is a reason why they are so inter-related in this context that they are inter-dependent. It is because one cannot incur liability without voluntariness. The moment voluntariness is absent, the enquiry ends – his or her capacity for self-control becomes irrelevant.[257] Thus actual control is always required and actual control in turn reveals that the accused be able to exert such control. If liability could be imposed for the ability to control one's conduct alone, then this distinction would be worthwhile. However, it is trite law that it cannot – voluntariness is always required.[258]

Burchell also tries a different line.[259] He submits that the two concepts are not equivalent because of the following example:

> A starving child of 8 years-of-age, who lives in abject poverty, takes a loaf of bread from a café without paying for it. His conduct is apparently purposive (voluntary) and, if he has been told in school that stealing is wrong, his conduct is accompanied by an appreciation of its wrongfulness (the first part of the capacity test). But does the child have the ability to act, not only in accordance with his conscious will, but also in accordance with the perceived wrongfulness of his conduct?[260]

[256] Discussed above, under the heading 3.2.1 Fact and Capacity.
[257] See above under the heading 1.3.1.2 Voluntariness on page 21ff.
[258] *R v Kemp* [1957] 1 QB 399 at 407; SHC 18; *R v Schoonwinkel* 1953 (3) SA 136 (C); *R v Victor* 1943 TPD 77; *S v Chretien* 1981 (1) SA 1097 (A); *S v Johnson* 1969 (1) SA 201 (AD).
[259] Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica.
[260] Ibid 36.

Thus Burchell proposes that the child acts voluntarily but lacks the capacity for self-control in respect of the theft of the loaf of bread. This example appears to operate on the logic of the distinction traditionally drawn by Snyman, discussed below:[261] Voluntariness is about whether the accused has the capacity to control his physical movements, and capacity for self-control is about whether the accused had the capacity to resist temptations to commit a criminal offense.

Regarding Burchell's example, while Burchell reserves the concept of incapacity for self-control for the conative impediment in respect of the bread, one may as easily use the concept of involuntariness in respect of the child's inability[262] to control his/her conduct relative to the bread. All that is required to lift any appearance of distinction here is to recognise that voluntariness must extend to all of the accused's conduct.[263] The child's conduct is involuntarily because s/he cannot control his/her conduct in some respect. As discussed above,[264] where any part of the conduct involved in taking the bread cannot be controlled we must say that the child acted involuntarily in that respect. Furthermore, as argued above,[265] if some part – at least any part forming the conduct in question – is involuntary, we regard the accused's conduct as involuntary. This argument therefore does not disclose any basis for distinction.

Burchell submits yet another argument. He argues that the conative impediment referred to under incapacity for self-control involves a choice on the part of the accused whereas involuntariness does not.[266] The problem with this distinction is that it replicates the distinction between involuntariness and necessity (commonly known as duress). As Burchell himself notes: 'the defence of necessity involves a choice of evils rather than a predicament where compliance with

[261] On page 83ff.
[262] Presuming for the current context only that the relevant conative impediment is an inability – following the example given.
[263] Discussed above, on page 78ff.
[264] On page 78ff.
[265] On page 78ff.
[266] Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 39.

the law is impossible'.[267] Involuntariness is recognised to arise out of absolute force (*vis absoluta*), whereas necessity is a defence that the accused may praise when subject to relative compelling force (*vis compulsiva*) in which the accused nevertheless makes choices – though tough choices.[268] It seems that this distinction is misplaced.[269]

5.5.2 Snyman

Snyman's[270] approach is different to that of Burchell – at least mostly.[271] Voluntariness is about whether the accused has the capacity to control his physical movements and capacity for self-control is about whether the accused had the capacity to resist temptations to commit a criminal offense. Furthermore if someone is incapable of controlling their body, they are also necessarily incapable of resisting committing an offence; the converse is not true however, if someone is incapable of resisting the commission of an offence, they are not necessarily incapable of controlling their bodily movements.

[267] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 257.
[268] *S v Goliath* 1972 (3) SA 1 (A); Snyman *Criminal Law* 5th ed (2008) 55.
[269] Unless Burchell is suggesting – though this is not made explicit – that incapacity for self-control should be treated as identical to instances of necessity. In what follows (see under the heading 8.6.1 Voluntariness on page 188ff), I will argue that voluntariness is present when, essentially, the accused does what s/he wants – following his or her choices. Why s/he wants what s/he wants is another question (see under the heading 8.6.2 Circumsense on page 191ff). The accused may commit the same voluntary conduct for his/her own reasons or because s/he is being compelled – by a threat to his/her life. The conduct remains voluntary and no conative impediment can be implicated – the accused does what s/he wants. The basis for distinguishing the responsibility of the parties concerned is the origin of their reasons – this I have argued is a question of 'circumsense' (see under the heading 8.6.2 Circumsense on page 191ff).
[270] Snyman *Criminal Law* 5th ed (2008) 162 & 7.
[271] In support of Burchell's argument regarding the child stealing the loaf of bread (discussed on page 81ff), Snyman raises 'even more proof': the lifeguard who is chained to a pole and therefore cannot save someone from drowning. (ibid 167n68) The first point that must be derived from this example is that it is even more proof why the first example (of the child and the loaf of bread) fails. In respect of what the lifeguard does – except moving away from the pole, the lifeguard is voluntary. However, the lifeguard is involuntary relating to moving from the pole and yet Snyman renders this as an instance of involuntariness. This reinforces the argument made above that the accused must act entirely voluntarily to be regarded as voluntary for the purposes of the conduct in question. Moving on to address this example, for this reason, it would appear that Snyman correctly identifies this lifeguard as involuntary. However there appears nothing illogical or anomalous to also say that the lifeguard was unable to act in accordance with his/her insights – this seems self-evident.

Is this valid or helpful? It appears not, since that would require that a person who cannot resist the temptation to commit an offence (which must manifest through bodily movement of some form) may yet retain control over their bodily movements. As argued above,[272] one must, in order to commit the wrongful conduct element of a crime (the *actus reus*) do something with one's body. Thus if one cannot resist doing whatever it is that constitutes the *actus reus* with one's body, one necessarily cannot control one's body and one acts involuntarily. As argued above regarding Burchell's example of the child and the loaf of bread – which Snyman endorses[273] - the child's conduct is involuntarily because s/he cannot or does not control his/her conduct in some respect.[274] If some part – at least any part forming the conduct in question – is involuntary, we regard the accused's entire conduct as involuntary. [275]

Hoctor supports the distinction drawn by Snyman, as follows:

> In the landmark case which marked the genesis of the [non pathological incapacity] defence, *S v Chretien* 1981 (1) SA 1097 (A), Rumpff CJ set out the respective elements of criminal liability in unequivocal terms. The learned judge pointed out that where intoxication resulted in involuntary conduct, there was no question of fault or criminal capacity (1104F-G). This distinction was re-emphasized later in the judgment (at 1106E-G):
>
> > 'Na my mening is iemand wat papdronk is en wat onbewus is van wat hy doen, nie aanspreeklik nie omdat 'n spierbeweging in die toestand gedoen nie 'n strafregtelike handeling is nie. Indien iemand 'n handeling verrig (meer as 'n onwillekeurige spierbeweging) maar so besope is dat hy nie besef wat hy doen nie of dat hy die ongeoorloofheid van sy handeling nie besef nie, is hy nie toerekeningsvatbaar nie.'[276]

[272] Discussed above on page 78ff.
[273] Snyman *Criminal Law* 5th ed (2008) 167n68.
[274] Discussed above on page 78ff and on page 81ff.
[275] Discussed above on page 78ff.
[276] In my opinion someone who is soaked-drunk (dead-drunk) and does not know what he is doing, is not responsible because a muscle movement in that condition is not criminally recognised conduct. If someone does something (more than an involuntary muscle movement) but is so drunk that he does not know what he is doing, or does not know the unlawfulness of his conduct, he is not responsible. (Authors Translation)

> This clear exposition of the distinction between the impact of intoxication on voluntariness, as opposed to capacity, set the tone for the bulk of the case law which followed ... [277]

However, it is not at all clear from anything that Rumpff CJ said, in particular the extract cited, that he was distinguishing voluntariness from capacity for self-control. Rumpff CJ said that where involuntariness is established, there can be no question of capacity or fault – these questions become irrelevant. As discussed above,[278] this view (that once involuntariness is recognised the question of capacity becomes irrelevant) does not sustain a distinction between voluntariness and capacity for self-control.

This failure to distinguish is consistent with the Rumpff Commission report where the view is expressed that one has self-control where one is acting voluntarily (that is, not as an automaton).[279]

5.5.3 Judiciary

Perhaps out of recognition that no distinction can be sustained, presently our judicial approach is to treat a claim of incapacity for self-control (incapacity to conduct oneself in accordance with an appreciation of wrongfulness) as a claim to involuntariness, or at least to treat the two concepts as identical. This has been clear in *Wiid*,[280] *Henry*,[281] *Kali*,[282] *Kok*, [283] *Francis*,[284] and *Laubscher*.[285]

[277] Shannon Hoctor 'Road rage and reasoning about responsibility' (2001) 14 SACJ 195.
[278] On page 80.
[279] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.26.
[280] *S v Wiid* 1990 (1) SACR 561 (A). In the case of *S v Wiid*, the court does not clearly distinguish these concepts, in that the two concepts seem to be used interchangeably: 'Na my mening, indien al die feite in ag geneem word, bestaan daar redelike twyfel oor die vraag of die appellante willekeurig opgetree het. Dat sy bewustelik en opsetlik die oorledene wou doodskiet is nie met appellante se persoonlikheid en karaktertrekke te versoen nie. Dit is die effek van haar eie getuienis en word deur Gillmer en Plunkett gestaaf. Haar oorblywende en steeds sterk liefde vir die oorledene rym nie met die doelbewuste doodmaak van die oorledene nie. Die feit dat sy sewe skote geskiet het, is aanduidend van onbeheersde optrede.'(ibid 569) (In my opinion, if regard is had to all the facts of the case, there exists a

Navsa in Eadie also rejects Snyman's distinction as follows:

> The view espoused by *Snyman* and others, and reflected in some of the decisions of our Courts, that the defence of non-pathological criminal incapacity is distinct from a defence of automatism, followed by an explanation that the former defence is based on a loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions, does violence to the fundamentals of any self-respecting system of law.[286]

Navsa concludes by insisting that: 'It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism.'[287]

reasonable doubt as to whether the appellant acted *voluntarily*. A conscious and deliberate desire to kill the deceased cannot be reconciled with the appellant's personality and character. That is the effect of her evidence and it is supported by both Gillmer and Plunkett. Her love for the deceased was still strong and cannot be reconciled with her conscious killing of him. The fact that she fired seven shots bears witness to the fact that she had lost her *self-control*.' (Translation in Burchell & Milton *Cases and Materials on Criminal Law* 2nd ed (1997) 329emphasis added). This failure to distinguish was noted by van Oosten (F. F. W. van Oosten 'Non-pathological Criminal Incapacity versus Pathological Criminal Incapacity.' (1993) 6 SACJ 139fn84).

[281] *S v Henry* 1999 (1) SACR 13 (SCA).

[282] In the Bisho High Court case of *Kali* the court rejected a defence of incapacity for self-control on the basis that the conduct of the accused did not reflect uncontrollable or *involuntary* conduct (*S v Kali supra* 2000 [2000] 2 All SA 1812 Ck 204E-F).

[283] In *Kok* Scott JA (in a unanimous judgment) used the term automatism (involuntariness) and the phrase incapacity for self-control interchangeable. For example, though the defence was 'sane automatism' the court determined that it would examine the claim on the standard appropriate to a claim of non-pathological incapacity (*S v Kok* 2001 (2) SACR 106 (SCA) para7-8).

[284] In the trial court in *Eadie* (*S v Eadie* 2001 (1) SACR 172 (C)) the court was more direct in that, after noting the argument of Snyman that the two defences are distinct, noted that the case of *S v Francis* 1999 (1) SACR 650 (SCA) considered the two defences as equivalent, and endorsed the view of a psychiatrist who failed to distinguish the two as being in impeccable company (*S v Eadie* 2001 (1) SACR 172 (C) 178A-D).

[285] *S v Laubscher* 1988 (1) SA 163 (A). The defence in *Laubser* was lack of voluntariness, which is then immediately accepted by the court as the defence of lack of capacity for self-control (ibid 166).

[286] *S v Eadie* 2002 (1) SACR 663 (SCA) para 60.

[287] Ibid para 70.

5.6 Analysis of Considerations

An examination of cases and literature concerned with conative functioning (voluntariness and capacity for self-control) reveals that our courts and academic authors regard several considerations as indicative of the presence of a conative function. Several of these appear misplaced and require some analysis and discussion.

5.6.1 Conative/Cognitive Requirement?

Of primary concern is the very common trend to mistake cognitive functioning for conative functioning: that a person can think does not show that they can or do execute what they want to do and what they decide to do.[288]

Some of this misconception is explicit. For instance, in *Henry,* Scott JA remarked: It is trite law that a *cognitive or voluntary act* is an essential element of criminal responsibility.[289]

Scott JA also refers to involuntariness as a 'loss of *cognitive* control or *consciousness*' or the 'absence of *awareness* and *cognitive* control.'[290] In *Kok* it is particularly apparent where Scott JA dismisses a claim of involuntariness on the basis that the accused 'knew what he was doing'.[291] Navsa in *Eadie* observes that conative impairment can only be recognised where 'one's cognitive functions are absent...'[292] and not where the accused has shown a 'presence of mind'.[293] Denno notes how - in the US - involuntariness described as unconsciousness refers to thoughtless activity

[288] Ashworth reminds us that voluntariness is not a cognitive concern (Ashworth *Principles of Criminal Law* 2nd ed (1997) 98).
[289] Emphasis added; *S v Henry* 1999 (1) SACR 13 (SCA) 19.
[290] emphasis added; ibid 20.
[291] *S v Kok* 2001 (2) SACR 106 (SCA) 15-6.
[292] *S v Eadie* 2002 (1) SACR 663 (SCA) para 43.
[293] Ibid para 66.

and hence to a cognitive deficiency.[294]

This double existence serves only to further obscure what may qualify as a conative impediment.[295] As will be discussed in what follows, it also often lures courts into finding voluntariness to be present where cognition is present, as if it establishes proper conative functioning. The two are perhaps related, but not equivalent. Cognition is necessary but insufficient for conation.[296] As Snyman notes, voluntariness requires both that an accused 'must be capable of making a decision about her conduct (act or omission) *and* to execute this decision.' [297]

5.6.2 Consciousness

One concept that often appears in definitions of voluntariness is 'consciousness'.[298] But it is problematic because it has a variety of meanings. It may refer to:

1. some form of awareness;[299]
2. awareness of awareness;[300]
3. some level of arousal (in the sense of being asleep or awake);
4. unconscious motivational factors in the psychoanalytic sense;[301]

[294] Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review 283-5.
[295] Ashworth is critical of dwelling on cognition, whereas the essence of automatism is lack of volition. (Ashworth *Principles of Criminal Law* 2nd ed (1997) 98)
[296] Discussed under the heading 8.6.1 Voluntariness on page 188.
[297] Emphasis added; Snyman *Criminal Law* 5th ed (2008) 54.
[298] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 180; Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review; *R v Mkize* 1959 (2) SA 260 (N); *S v Cunningham* 1996 (1) SACR 631 (A) 635; *S v Eadie* 2002 (1) SACR 663 (SCA) para 42; *S v Henry* 1999 (1) SACR 13 (SCA) 20; *S v Johnson* 1969 (1) SA 201 (AD). Navsa JA in Eadie states: '... the State has to prove that the acts which are the basis for the charges against an accused were consciously directed by him. Put differently, the acts must not have been involuntary.' *S v Eadie* 2002 (1) SACR 663 (SCA) para 58.
[299] Denno appears to frame consciousness as awareness (Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review 329).
[300] In the sense of the problem of what is mind. This is what Armstrong submits is lacking in the driver who drives in a state of automatism - the instance of driving for a long period with the result that one is acting automatically (David M. Armstrong 'Nature of Mind' In *Materialism and the Mind-body Problem* edited by David M. Rosenthal (1971) 76).

5. information processing (sensory perhaps) which occurs at a an 'unconscious' preconscious level;
6. the presence of cognition, or self-awareness.[302]

Fenwick frames the conflict well and his observation bears repetition here at length:

> Where the [medical and legal] professions differ is on what constitutes an automatism and what constitutes unconsciousness, and this remains a point of conflict. It should be simple to define unconsciousness from the viewpoint of our experience and our behaviour. On closer examination, however, this whole area is more complex than it appears, because of the different uses of the word 'unconscious'. Since the development of the analytical school at the turn of the century, the psychiatric literature has been filled with references to the unconscious. Indeed, it is part of the

[301] Pollard, a Detroit police officer, was judged not guilty on the basis that he was compelled by unconscious motivations to punish himself for his absence from his home when his wife and child were killed (reported in L. Reznek *Evil or Ill: Justifying the Insanity Defence* (1997) 104).
Bromberg testified as a forensic expert psychiatrist in defence of a man who gunned down his wife when she rejected his attempts at reconciliation. The killing was witnessed by a taxi-driver who heard the accused say: 'roll her over and see if she is dead'. (W. Bromberg *The Uses of Psychiatry in the Law: A Clinical View of Forensic Psychiatry.* (1979)) The accused explained that he had suffered hallucinations:

> 'While I was seeing babies cut up and so forth, I also saw a man put in a coffin and put in the cement. Some of the men they cut, they, I mean by the gang that was doing all this made them stand over a bucket and bleed in it before putting tape on them.'(ibid 51)

Bromberg offers his psychodynamic interpretation of the accused's mental state:

> 'The theme of fear of passivity, of loss of maleness and being transformed into a woman ("bleed into a bucket"), clearly showed the dynamics behind the murder. Even more significant were his associations as to what the taxi driver witness testified he had heard: "Roll her over and see if she is dead." The accused had no memory of this remark; in fact, he had an amnesia for the shooting. The remark was interpreted as a condensation of two ideas—aggressive impulses towards women and a defense against his unconscious fear of being a woman. In the delirium, the remark meant: "Roll her over and see if she is a woman" (i.e., "Am I a woman?"). The cold tone ascribed to the accused by the taxi driver at the time could be recognized as an isolation of affect, that is, a separation of emotion from the underlying idea. In such situations, the ego cannot stand so revolting an idea and hence shuts off the emotion that ordinarily would accompany the horrifying idea of being turned into a woman.' (ibid 51)

[302] Denno, in a variation to conceiving consciousness as referring to awareness (Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review 329), also considers it 'a term that typically refers to the sum of a person's thoughts, feelings, and sensations, as well as the everyday circumstances and culture in which those thoughts, feelings and sensations are formed'. (ibid 273-4 & 311).
This is the sense in of being that was famously addressed by Nagel in his discussion of 'what it is like to be a bat' (Thomas Nagel 'What is it Like to Be A Bat' (1974) 83 Philosophical Review 160).

> teaching of orthodox psychoanalysis that man has, hidden within his consciousness, unconscious springs of action. Psychology adds another dimension to unconscious processes. It is now recognised that before an experience arises in consciousness, considerable preconscious processing of the sensory information has occurred. Thus, there are degrees of consciousness, but how can we tell at which level the individual should be responsible for his actions, or when they are so confused that they do not know what they are doing? From the psychological point of view, the conscious stands firmly and securely only on the preconscious, and is meaningless without it. If this is truly so, then no satisfactory legal definition of consciousness, which depends on subjective experience and observable behaviour, is possible, as consciousness is layered, and the layers are ill-defined. Indeed, theoretically, is must be impossible to decide at which layer consciousness ends and unconsciousness begins. The medical literature also refers to unconsciousness, but here the definitions are clearer and easier to quantify. For the medical definition is based on our understanding of brain function, and consciousness is quantified according to whether or not the higher functions of mind are obtunded or absent.[303]

It may mean a variety of different things. The use of the concept of consciousness can only lead to confusion.

5.6.3 Goal directedness

An argument is sometimes made that where an accused conducted him/herself in a goal-directed manner, s/he acted with the necessary conative functioning.[304] Goal-directedness has been argued to show conative functioning on the basis that complex apparently goal-directed conduct 'is not easy to reconcile with the hypothesis of automatic involuntary conduct, i.e., with a set of bodily

[303] P. Fenwick 'Automatism.' In *Principles and Practice of Forensic Psychiatry* edited by R. Bluglass and P. Bowden (1990) 271 & 2.

[304] See *S v Eadie* 2002 (1) SACR 663 (SCA) particularly para 66. Louw sets out his conception of voluntariness as premised upon goal-directedness thus: 'There are many instances where conduct may be involuntary but generally these are indicated by a lack of what is termed goal-directed behaviour. In other words, where the accused is able to direct his actions towards specific tasks, his actions must have been subject to his conscious will.' (Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 207)

movements over which the agent has no control.'[305]

Several recent convictions have been based on an accused's apparent goal-directedness at the time of the offence.[306] In *Eadie*[307] Navsa JA confirms the reasoning of the trial judge as having been correct to consider the focused and goal-directed conduct of the appellant as indicating 'presence of mind'.[308] We see here the misdirection that reliance on goal-directedness produces. Navsa observes that a conative impediment can only be recognised where 'one's cognitive functions are absent and consequently one's actions are *unplanned and undirected*'.[309] It is again the mistake of

[305] McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 80.

[306] In the case of *Kensley* in which the accused had been intoxicated and apparently suffered emotional stress upon discovery that he had been or had proposed being intimate with two transvestite men who he took to be women. His defence of non-pathological incapacity failed on the basis that, amongst other things, the court accepted forensic psychiatrist Dr Greenberg of Valkenberg's assertion that the accused had conducted himself in a goal-directed manner during his shooting spree. He shot one friend in the head execution style killing him and wounded another for not warning him that the transvestites were women. He shot and killed another acquaintance in the head, and wounded one of the transvestites. The court concluded that his *goal-directed*, purposeful (conscious) conduct indicated that he did not lack capacity for self-control. (*S v Kensley* 1995 (1) SA 646 (A) 659).
In *S v Els* the accused raised the defence that her conduct was involuntary to a charge of murdering her husband. The facts appeared to indicate that she was subject to spousal abuse and was possibly suffering severe emotional stress and a degree of intoxication. The court rejected her defence of involuntariness on the basis, amongst other things, of complex *goal-directed behaviour* before to the shooting (*S v Els* 1993 (1) SA 723 (O)).
In *Henry* Scott JA (Streicher JA and Ngoepe AJA concurring) dismissed the appellant's claim on the basis that: '... no factual basis was established which served to displace the natural inference of voluntariness arising from the appellant's apparently *goal-directed* behaviour.' (emphasis added; *S v Henry* 1999 (1) SACR 13 (SCA) 24).
See also *S v Potgieter* 1994 (1) SACR 61 (A) 73-4; *S v Kok* 2001 (2) SACR 106 (SCA) per Scott JA (Streicher JA and Navsa JA concurring); and *S v Kali supra* 2000 [2000] 2 All SA 1812 Ck in which apparent goal-directedness on the part of the accused was taken to exclude a claim of involuntariness.
Rumpff Commission (Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967)) expressed the view that goal-directedness somehow showed volition:

> When a man kills his friend in a fit of rage, his behaviour does not spring from any blind. impulsive drive or uncontrollable emotion. He is performing a *goal-directed* act. (emphasis added; para 9.26)

What remains unexplained is how goal-directedness establishes that conduct was indeed controlled or even could be controlled. Rumpff explains that behaviour may be controlled by the exercise of the will - apparently '[t]hrough insight, reasoning and abstract thinking' (para 9.25) – but he does not explain how these abilities and in particular the function of cognition (as evidenced in goal-directedness), permit for the exercise of the will (para 9.7) or the pursuit of one's goal (para 9. 25).

[307] *S v Eadie* 2001 (1) SACR 172 (C); *S v Eadie* 2002 (1) SACR 663 (SCA) para 66.

[308] *S v Eadie* 2002 (1) SACR 663 (SCA) para 66.

[309] Emphasis added; ibid para 43.

taking cognitive functioning to represent conative functioning (voluntariness).[310]

The Rumpff Commission[311] expressed the view that goal-directedness somehow showed volition: When a man kills his friend in a fit of rage, his behaviour does not spring from any blind impulsive drive or uncontrollable emotion. He is performing a *goal-directed* act. [312]

Significantly though, what remains unexplained is how goal-directedness establishes that conduct was indeed controlled or even subject to control. The Commission explains that behaviour may be controlled by the exercise of the will - apparently '[t]hrough insight, reasoning and abstract thinking'.[313] It does not explain how the function of cognition (as evidenced in goal-directedness) permits for the exercise of the will[314] or the pursuit of one's goal.[315]

Also, goal-directedness may not necessarily indicate voluntariness at all since people who suffer epileptic seizures[316] and somnambulists, [317] for instance, may well achieve what may be regarded as goal-directed behaviour and yet they are not regarded as acting voluntarily.

Our courts have sometimes been awake to the prospect that goal-directedness does not necessarily

[310] Discussed above under the heading 5.6.1 Conative/Cognitive Requirement? on page 87.
[311] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967).
[312] emphasis added; ibid para 9.26.
[313] Ibid para 9.25.
[314] Ibid para 9.7.
[315] Ibid para 9.25.
[316] Walsh describes a form of epileptic seizure where goal-directedness may be present: 'Psychomotor attacks where the principal symptoms are confusion and automatic behaviour. Confusional automatisms may be merely a 'mechanical' prolongation of the behaviour in which the patient was engaged at the onset of the attack, or the automatisms may represent new behaviour beginning during the attack. Many forms of automatisms have been given descriptive labels, e.g. ambulatory automatisms, in which the patient may carry out co-ordinated movements of some complexity during the attack and for a varying time after the seizure, verbal automatisms, gestural automatisms, and the like.' (K. Walsh *Neuropsychology: A Clinical Approach.* 3rd ed (1994) 123-4)
[317] Glanville Williams recognises that somnambulism may be accompanied by purposive conduct and cites an instance in which a sleepwalker whose eyes were apparently shut, turned without hesitation when a door was shut, and found another door through which he passed. (Glanville Williams *Criminal Law* 2nd ed (1961) 12fn4).

show voluntariness. The decision of the court in *Nursingh* was premised upon an assumption that goal-directedness did not exclude the possibility of incapacity.[318] Scott JA in *Henry* observed that: The difficulty is that unconscious behaviour may appear to be goal-oriented particularly if the conduct in question is something that the automaton has done repeatedly before.[319]

In the case of *S v Kavin* the accused killed his wife and two children in order to save them from this world with the purpose that they (and he, once he had committed suicide) would be reunited in heaven. Though the court accepted that the killings required careful deliberate and goal-directed conduct, it nevertheless refused to hold that the accused could control his conduct. Accordingly he was found not guilty (though by reason of insanity).[320]

Rumpff CJ, delivering the unanimous judgment of the Appellate Division in *S v Chretien*, after noting that intoxication is a matter of degree commented:

> If one starts with the person who can he described as dead drunk, it is actually still a matter of degree. If he is so drunk that he lies performing involuntary muscle movements with his arm or foot and someone should be hit and injured by such involuntary movement, there would in any event be no question of an act, in the same way as a sleepwalker's movements cannot constitute an act. ... That is one side of the spectrum. The other side, by contrast, would be the situation where an accused consumes a small amount of liquor which has a negligible effect on his mental faculties. In between lies a great variety of cases in which acts were committed under the influence of alcohol, *acts which ostensibly indicate the achievement of a goal or a result*, but which raise the question to

[318] Significantly the court (Squires J) accepted that: '[I]t is a characteristic of [a] dissociated state of mind that it does not affect the motor functions of the person acting under the emotion or impulse.' (*S v Nursingh* 1995 (2) SACR 331 (D) 336).
[319] *S v Henry* 1999 (1) SACR 13 (SCA) 23.
[320] *S v Kavin* 1978 (2) SA 731 (W).

> what extent the intoxicated person realised the seriousness of his conduct and to what extent his inhibitions were diminished.[321]

It is notable that Rumpff CJ framed incapacity for self-control as a substantial disintegration of one's inhibitions.[322] He clearly therefore recognised that a substantial degree of intoxication may impair an accused's conative functioning, despite that s/he may continue to act in a goal directed manner.

Schopp notes:

> Although the paradigmatic cases of automatism are those involving convulsions, reflexes, or other movements that are apparently performed without any conscious direction, *the defense also applies*

[321] In translation by Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 364. The original appears as follows: 'As begin word by iemand wat as "smoordronk" beskryf word, is dit ook eintlik nog 'n kwessie van graad. Is hy so dronk dat hy "papdronk" is en net êrens lê en onwillekeurige spierbewegings met sy arm of voet doen en iemand sou deur so 'n onwillekeurige beweging getref en beseer word, sou daar in elk geval geen sprake wees van 'n handeling nie. Dit sou net so min 'n handeling wees as die liggaamsbeweging van 'n slaapwandelaar. In die strafreg is 'n handeling alleen dan 'n handeling wanneer dit deur die gees beheer word. In die geval van die onwillekeurige spierbeweging van 'n papdronke is daar geen sweem van beheer nie en is dit dus nie eers nodig om oor skuld te filosofeer nie. Daar is net geen plek vir skuld nie. Ook toerekeningsvatbaarheid kom nie hier ter sprake nie. Dit is die een kant van die spektrum. Die ander kant, daarteenoor, sou die geval wees waar 'n beskuldigde 'n geringe hoeveelheid drank gedrink het wat geen noemenswaardige uitwerking op sy geestesvermoëns gehad het nie. Tussenin lê 'n groot verskeidenheid van gevalle waarin wel handelinge plaasgevind het onder invloed van drank, handelinge wat oënskynlik die bereiking van 'n doel of gevolg aandui, maar waarby die vraag ontstaan tot watter mate die besopene die erns van wat hy doen besef het en tot watter mate sy inhibisies verminder is.' (*S v Chretien* 1981 (1) SA 1097 (A) 1104 emphasis added).

[322] It may be noted that Rumpff CJ's conception of incapacity is somewhat untraditional, though it appears nevertheless that it was the various requirements of capacity to which he made reference as indicated by the following: 'It is only when a person, who commits a consequence crime, is so intoxicated that he does not realise that he is acting unlawfully, or that his *inhibitions have substantially disintegrated*, that he can be regarded as lacking criminal capacity.' (translation by Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 365). The original appears as follows: 'Eers dan wanneer 'n persoon, wat 'n gevolghandeling pleeg, so besope is dat hy nie besef nie dat wat hy doen ongeoorloof is, of dat sy inhibisies wesenlik verkrummel het, kan hy as ontoerekeningsvatbaar beskou word.' (*S v Chretien* 1981 (1) SA 1097 (A) 1106).

> *to those who perform complex actions in coordinated, directed fashion*, but with substantially reduced awareness.[323]

Ultimately, it would seem that goal directedness is an inappropriate consideration for establishing proper conative functioning.

5.6.4 Trigger

Our courts have often rejected claims of incapacity due to the apparent absence of a 'trigger' for the alleged episode of involuntariness.[324] In *S v Ingram* the Appellate Division rejected an incapacity defence on the basis that there had been no triggering event - the circumstances which prevailed at the relevant time were not novel in that the accused had endured them previously:

> The appellant had on previous occasions failed to isolate and restrain the deceased. There is no rational reason why on this particular occasion such failure should have operated as a trigger mechanism when it had not done so before. [325]

This reasoning does not address the possibility that the accused may have lacked capacity on the previous occasions but engaged in different conduct on those occasions - it does not establish that s/he possessed capacity on all such occasions.

Furthermore, this requirement does not recognise that a trigger may be a relatively minor event which represents the 'final straw' for an accused in whom tension had built up over a protracted

[323] Emphasis added; Schopp *Automatism, Insanity, and the Psychology of Criminal Responsibility* (1991) 71.
[324] *S v Cunningham* 1996 (1) SACR 631 (A); *S v Eadie* 2002 (1) SACR 663 (SCA); *S v Henry* 1999 (1) SACR 13 (SCA).
[325] *S v Ingram* 1995 (1) SACR 1 (A) 7.

period. This was recognised in *Nursingh*[326] and endorsed by Navsa JA in *Eadie*:[327] 'The trigger was one that apparently had built up from years of physical, emotional and sexual abuse'.

Snyman observes that a long duration of build-up might be required and a trigger may be the equivalent of a drop of water which causes the bucket to overflow:

> The chances of X's succeeding with this defence if he became emotionally disturbed for only a brief period before and during the act, are slender. It is significant that in many of the cases in which the defence succeeded or in which the court was at least prepared to consider it seriously, X's act was preceded by a very long period – months or years – in which his level of emotional stress increased progressively. The ultimate event which led to X's firing the fatal shot can be compared to the last drop in the bucket which caused it to overflow.[328]

Hence it appears that we may never know that previously the equivalent circumstances to those of the alleged offence did not cause an episode of incapacity. We may also never know what may constitute a 'trigger' for any particular accused since it must be recognised that it may be objectively insignificant. The logic therefore of requiring a trigger event therefore does not appear well-founded.

5.7 Expert Opinions

The opinions of forensic experts do not clarify the position. A total of 69 per cent considered the concept of voluntariness to be distinct from capacity for self-control. For instance W6 said:

[326] *S v Nursingh* 1995 (2) SACR 331 (D).
[327] *S v Eadie* 2002 (1) SACR 663 (SCA) para 48.
[328] C. R. Snyman *Criminal Law* 4 ed (2002) 166. This point was not repeated in the latest edition of his text (Snyman *Criminal Law* 5th ed (2008) 162ff), where the discussion is now centred upon the judgement of Navsa JA in *Eadie* (*S v Eadie* 2002 (1) SACR 663 (SCA)). However, there is nothing to indicate that Snyman now disagrees with this statement.

> **Counsel**: Are they equivalent, voluntariness and self-control or the capacity to conduct themselves in accordance with appreciation of wrongfulness?
> **Witness 6**: I think I would suggest that there may well be behaviours that are involuntary but that one may well be able to exert some influence over uhm you know as it were maybe tendencies within the subject.

However 46 per cent considered them to be indistinct or equivalent.

> **Witness 3**: So, one can't separate these two concepts from each other-
> **Counsel**: self-control and voluntariness?
> **Witness 3**: not totally, I can't do it

Three experts (23 per cent) held both mutually exclusive views and contradicted themselves.

Perhaps more troubling is that only eight of the thirteen witnesses were consistent in their claims relative to what they described. That is, while nine (69 per cent) claimed that the concepts were distinct, only six (46 per cent) were consistent in their descriptions of the concepts as distinct – that is, they described the concepts differently. For instance, W3 is inconsistent in that he claims the two concepts to be indistinct, but then, at times, he describes them differently, such as that cognition in itself signifies voluntariness, whereas it is insufficient for capacity for self-control. W12 is inconsistent in his claim that the two concepts are indistinct in that he describes them as distinct: involuntariness as being overwhelmed, while he considers capacity for self-control as being able to guide actual conduct by cognition and being able to resist. W8 also contradicts himself in respect of his claim that the concepts are distinct, but then apparently describe them in equivalent terms. W9 first says he has no opinion on these matters, but then expresses one. W6 is consistent in a peculiar way. He claimed that the two concepts are both distinct and indistinct - which is contradictory; but he describes as much in admitting that he did not know how to discriminate between the two.

5.7 Capacity to Conduct oneself in accordance with an Appreciation of Wrongfulness and Voluntariness/Expert Opinions

Regarding whether it is possible to distinguish a true conative impediment instead of a mere failure of an accused to control him/herself, 62 per cent (including every psychologist, though only 29 per cent of psychiatrists) considered it possible. However only 31 per cent (with no psychologists and 57 per cent of psychiatrists) considering the two to be indistinguishable. For example, W3 argues that it is impossible to distinguish:

> **Judge**: don't you think that it is the psychiatric decision to determine whether the person could not stop himself versus he would not?
> **Witness 3**: I don't know of anybody who can distinguish between those two things. Certainly I as a psychiatrist don't have any indication or any method of deciding whether this is an impulse that is not resisted or an impulse that cannot be resisted. The only one that I have already pointed out is where, there may be to me, some measure of the urgency and the lack of control that one can understand in a case like this, is where the person in the face of danger or injury or something like that, does it and cannot, will resist other people from restraining him, and whether the behaviour is extreme, but further than that I cannot take it.

As noted, the views were deeply divided by profession: psychologists being entirely of the view that the two are distinguishable; whereas psychiatrists (57 per cent) were mostly of the view that the two are indistinguishable.

Some inconsistencies are also evident. Three witnesses (W3, W4, W9) claim that those who cannot as opposed to will not, or do not control themselves, cannot be distinguished, but nevertheless cite factors or criteria which they refer to as informing a distinction. W7 for instance is consistent in that he claims not to be able to distinguish and cites no references for such a distinction. W3, W4 and W9, however, are not consistent. They claim that no distinction is possible and yet refer to factors upon which they would distinguish. For example, W3, as noted above, is clear that no distinction can be made (at least to his knowledge). Yet, he explains that such a distinction may be

based on the criterion of whether the accused placed himself/herself in personal danger or the postponeability or resistability of the conduct.

The forensic experts were evenly split on the question of whether voluntariness/capacity for self-control concerned a cognitive or conative capacity (at 46 per cent), though 15 per cent held both views. This was followed (as factors indicating conation) by the goal-directedness of the conduct – also 31 per cent, though there was some disagreement on this point. While three witnesses (W4, W10, W12) expressed the uncontradicted view that goal directedness signifies conation, one witness (W1) disagreed, while another (W13) held both views and thus contradicted himself. The criterion cited mostly (by 31 per cent of the experts) as a valid basis upon which to distinguish a true conative impediment was the cop-at-the-elbow test, or the apparent resistibility/postponeability of conduct. W11 frames the test concisely in responding to a question concerning whether she would consider the character in vignette three as incapable of self-control:

> Witness 11: No, because as I say if he had arrived at the building and there was a policeman there he would have gone to another building, he didn't have an irresistible urge.

At times the witnesses make no specific reference to the cop-at-the-elbow test (or a variation thereupon) but invoke the general principle of the test.

5.8 Conclusion

In the final analysis, there appears to be no sustainable distinction between voluntariness and capacity for self-control and it seems that only one conative requirement may be discerned. However, it is not at all clear what is required by any requirement of a conative function, certainly it is not clear what it should mean.

5.8 Capacity to Conduct oneself in accordance with an Appreciation of Wrongfulness and Voluntariness/Conclusion

In the search for some meaning we have resorted to relying on a forbidden meaning of capacity for self-control – that of resistibility.[329] Yet it is not clear what it means. Also, the concept of voluntariness remains elusive, and there does not appear to be any sustainable basis to distinguish between the capacity for self-control and voluntariness. Only one conative function may be discerned. Finally we must be careful not to confuse this conative requirement with a cognitive requirement. We must not obfuscate matters by employing the term 'consciousness', and we must be careful not to mistake goal-directedness and the absence of a 'trigger' as indicating proper conative functioning.

[329] See discussion regarding the move away from the 'resistibility' test to the test of whether an accused could conduct him/herself in accordance with an appreciation of wrongfulness on page 70ff.

6 Pathological Non-Responsibility

6.1 Introduction

The defence of non-responsibility, in the US, England and South Africa has traditionally depended upon the youth[330] of an accused, or that the accused suffers from a so-called pathological mental condition. This pathological mental condition in England is known as a disease of the mind, in the US as a mental disease or defect, and in South Africa as a mental illness or defect. Where the defence of non-responsibility is due to a pathological mental condition, it is known as the insanity defence. An insanity defence usually[331] results in a commitment to a mental health institution.

In England and SA, together with a few states in the US,[332] lesser claims to non-responsibility are recognised in the form of diminished responsibility. These claims, if successful, may result in a lesser conviction and sentence. For instance, in England and a few jurisdictions in the US, a successful claim of diminished responsibility would reduce a conviction from murder to manslaughter.[333] In South Africa, a successful claim of diminished responsibility permits a court to take account of this in sentencing.[334]

[330] The criminal responsibility of children is governed by presumptions related to their age. These presumptions may be rebuttable or irrebuttable. A rebuttable presumption is one which the prosecution can 'rebut' or disprove. However, an irrebuttable presumption is one that the prosecution cannot disprove. A child younger than ten is irrebuttably presumed to lack capacity, and a child between ten and fourteen is rebuttably, presumed to lack capacity (ss 7 & 11 of the Child Justice Act 75 of 2008).

[331] Though in SA the court must enquire into the appropriateness of a committal and has a discretion as to disposition, ranging from committal to unconditional release (Criminal Matters Amendment Act 68 of 1998).

[332] Including Hawaii (S v Perez, 976 P.2d 379 (Haw. 1999.)) and Oregon (S v Counts, 816 P.2d 1157 (Or. 1991)) (Joshua Dressler *Understanding Criminal Law* 5th ed (2009) 368 & 73-78).

[333] Ibid 368 & 73-78.

[334] 'If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.' s 78(7) of the Criminal Procedure Act 51 of 1977. See *S v Romer* 2011 (2) SACR 153 (SCA).

South Africa has gone further though. Starting in 1980, deriving from the leading case of *Chretien*[335], South African courts began to recognise that complete non-responsibility may be recognised in the absence of youth and mental illnesses or defect. This defence has become known as non-pathological criminal incapacity and, if successfully raised, results in an acquittal and an unconditional discharge. Non-pathological criminal incapacity may arise out of any non-pathological condition. However, it is usually based upon a claim of provocation, severe emotional stress, intoxication, or a combination of these.

The various sources of non-responsibility require analysis to extract what they mean and the work that they do. Ultimately, it must be considered whether any particular source should be required. This chapter focuses on these various sources, beginning briefly with youth, then 'so-called' pathological criminal incapacity, and then moving on to non-pathological criminal incapacity in the next chapter.[336]

The jurisprudence of the insanity defence in the US, England and South Africa has been driven by assassinations or attempted assassinations of Prime Ministers and Presidents. We have that in common and – to a very large extent – we have the M'Naghten rules of insanity in common.[337]

In all jurisdictions, an insanity defence may only be claimed where some form of mental disorder/pathology may be implicated as having caused an impediment in the functioning of the individual accused or defendant.[338]

[335] *S v Chretien* 1981 (1) SA 1097 (A).
[336] 7 Non-pathological Non-Responsibility.
[337] As discussed under 1.5 M'Naghten Rules on page 32 in respect of the English position. In the US the attempt on the life of Ronald Reagan by John Hinckley prompted the federal government and many states to revert back to a M'Naghten style insanity defence (W. J. Chambliss & T. F. Courtless *Criminal Law, Criminology, and Criminal Justice: A Casebook.* (1992) 157; P. W. Low *Criminal Law* Revised 1st ed (1990) 224; H. J. Steadman, M. A. McGreevy, J. P. Morrissey *et al. Before and After Hinckley: Evaluating Insanity Defense Reform* (1993); *United States v Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981)).
[338] I will adopt the term the South African term the 'accused' instead of the defendant.

I will argue that this requirement of pathology is an (almost) meaningless obstacle placed in the way of a plea of insanity. It serves only to give covert expression to myths, false intuitions, and some valid concerns – but which are better addressed elsewhere. It may be noted that the requirement is also – to a large extent – redundant. We need to consider these concerns and identify which are valid. We then need to consider where the valid concerns may be better addressed. I will take each of these accusations in turn: that the term is (almost) meaningless; that any meaning it has is improper or unfounded; and that it is mostly redundant anyway.

6.2 Meaningless

No formal definition of mental illness or defect exists – neither in the statute[339] that governs the defence of insanity, nor in the common law.

One may expect that what is recognised as a mental disorder[340] for the purposes of the civil law would also count as a mental disorder for the purposes of the criminal law. However, this is not so. A determination of mental disorder in terms of civil law does not translate into a mental illness/defect in the criminal law.[341]

A mental disorder, as required by the criminal law, is an undefined 'legal' concept.[342] The Rumpff Commission explains:

[339] s78 Criminal Procedure Act 51 of 1977.
[340] I use this term as a generic reference to the pathological mental state required under South African, English, and US law.
[341] See *S v Mahlinza* 1967 (1) SA 408 (A) 416-7; *S v Mnyanda* 1976 (2) SA 751 (A); Snyman *Criminal Law* 5th ed (2008) 172; cf *R v Mkize* 1959 (2) SA 260 (N).
[342] *S v Mahlinza* 1967 (1) SA 408 (A) 416: 'suiwer jurisdiese begrippe' (purely legal concepts, Authors' translation). In respect of the English position, particularly, the notion of a Disease of the Mind, see *Bratty v Attorney General for Northern Ireland* [1963] AC 386, [1961] 3 All ER 523 412; Clarkson *Understanding Criminal Law* (2005) 101 & 3; McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 63; Ormerod *Smith & Hogan Criminal Law* (2005) 256-8.

> A source of criticism on the part of psychiatrists is the use in the law of words like 'insanity', 'mental disease', etc. We consider these terms still to be indispensable in law. The law does not attempt to define them, but uses them to denote in a single word a particular condition of the mental faculties of a person which is important from a legal point of view.[343]

Thus, there exists no formal definition of the required threshold criteria. It is a legal concept, independent of medical or scientific considerations. We must trust that judges will know it when they see it. Off course, this is law without any rule or principle for guidance. It is an obvious source of arbitrariness and unequal treatment.

6.3 Improper or Unfounded Concerns

Despite the insistence that these concepts should go undefined, a definition of mental illness/defect[344] has crept into use in South African law.[345]

In the case of *Stellmacher*[346] it was held that a mental illness/defect consists in:

> ... a pathological disturbance of the accused's mental capacity and not a mere temporary mental

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In respect of the US position see J. Dressler *Understanding Criminal Law* 2nd ed (1997); Hall *Criminal Law and Procedure* (1992) 317.

[343] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.73.
Rumpff JA adopted this view in *Mahlinza*: 'By virtue of the fact that a Court has to decide each case on the facts and the psychiatric evidence, it seems to me that it is impossible - and also hazardous - to attempt to identify a general symptom whereby a mental disorder may be diagnosed as a pathological mental disorder.' (*S v Mahlinza* 1967 (1) SA 408 (A) 417; translation by Burchell & Milton *Cases and Materials on Criminal Law* 2nd ed (1997) 272-3).

[344] Burchell distinguishes between mental illness and mental defect on the basis 'that the terms were not used as synonyms in s 78 of the Criminal Procedure Act 1977' (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 377 fn52). Mental defect is regarded as referring specifically to intellectual deficiency (ibid 377; Kruger *Mental Health Law in South Africa.* (1980)). However, the definition offered in *Stellmacher* (discussed below) refers to both mental illness and defect without distinction and it seems therefore that the definition applies to both concepts.

[345] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 375; E. Du Toit, F. J. De Jager, A. Paizes *et al. Commentary on the Criminal Procedure Act* Vol Service 34 (2005); Snyman *Criminal Law* 5th ed (2008) 171-2.

[346] *S v Stellmacher* 1983 (2) SA 181 (SWA).

> confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation.[347]

The *Stellmacher* definition has been recognised as requiring that a mental illness/defect must be a pathology and it must be of endogenous origin.[348]

6.4 Dubious Foundation

Before analysing the value of this definition, it is revealing to trace its foundation which appears to be less than sound. 'Figure 2' (below) is included to assist in tracing the authority for the *Stellmacher* requirements. The definition set out in *Stellmacher* has been adopted in texts on criminal law[349] and, as noted, the authority is cited as the *Stellmacher* case. The *Stellmacher* case adopted the definition out of Hiemstra's *Suid-Afrikaanse Strafproses*[350] which, in turn, only offers authority for the portion of the definition requiring that the mental condition must be a pathology. In this respect Hiemstra cites the Rumpff Commission Report[351] and the *Mahlinza* case.[352] The Rumpff Commission Report, at the paragraph cited,[353] does not provide clear authority for the requirement of pathology, since its emphasis is on the need for a judge to obtain the assistance of a

[347] Ibid (translation by Burchell & Milton *Principles of Criminal Law* 2nd ed (1997) 278).
[348] Burchell *Principles of Criminal Law* 3rd Revised ed (2006); Burchell & Milton *Principles of Criminal Law* 2nd ed (1997); Du Toit, De Jager, Paizes, Skeen & van der Merwe *Commentary on the Criminal Procedure Act* Vol Service 34 (2005); Johann Kriegler & Albert Kruger *Suid-Afrikaanse Strafproses* 6 ed (2002) 215; Snyman *Criminal Law* 5th ed (2008) 171-2. There is some contradiction though in the demand that a mental illness/defect be of endogenous origin, and yet that the cause of it 'does [not] matter' (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 376).
[349] Previously in Burchell & Milton *Principles of Criminal Law* 2nd ed (1997); J. C. Kriegler *Heimstra's Suid-Afrikaanse Strafproses* 5 ed (1993); C. R. Snyman *Criminal Law* 3 ed (1995) and now in Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 375; Du Toit, De Jager, Paizes, Skeen & van der Merwe *Commentary on the Criminal Procedure Act* Vol Service 34 (2005); Kriegler & Kruger *Suid-Afrikaanse Strafproses* 6 ed (2002); Snyman *Criminal Law* 5th ed (2008) 171-2.
[350] V G Heimstra *Suid-Afrikaanse Strafproses* 3rd ed (1981) 174.
[351] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.4.
[352] *S v Mahlinza* 1967 (1) SA 408 (A).
[353] 'When the question of insanity or mental disease arises, i.e. of any pathological disturbance of the mental faculties, the judge has to be assisted by the psychologist and the psychiatrist.' (Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.4).

psychologist and psychiatrist in determining whether an accused suffered from a pathology. However, it is in the introduction that the Rumpff Commission appears to assume its definition[354] of mental illness or defect, there referred to as mental derangement, including the element of pathology.

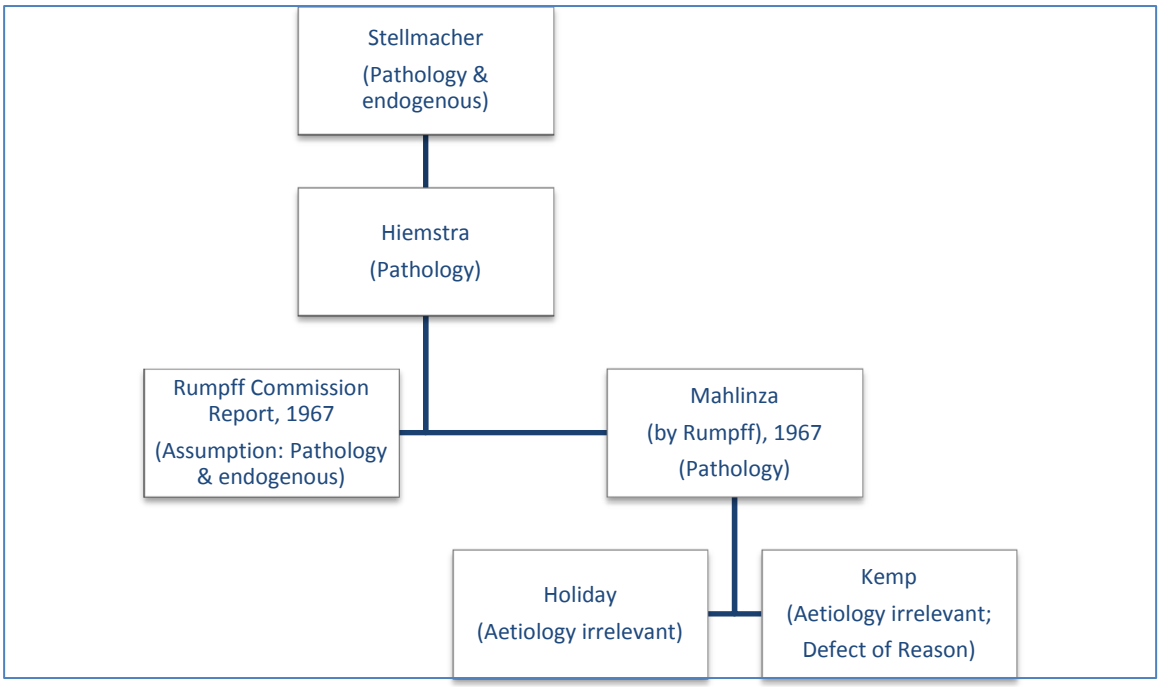


Figure 2: Stellmacher Requirements

As for the authority that may be gleaned from the judgment in the *Mahlinza* case - this was delivered by Rumpff JA[355] at the same time that the learned judge chaired the Rumpff Commission. The Commission cites no authority for the definition of mental illness/defect it adopted and appears to have merely assumed a definition.

[354] Discussed below – see on page 107.
[355] Beyers JA and Ogilvie Thompson JA concurring.

> 'We have taken the expression in the terms of reference 'persons …suffering from some form of mental derangement' to mean persons suffering from a morbid or pathological mental disorder, i.e. some form of mental disease or permanent mental defect. Persons whose mental faculties have been temporarily impaired, for instance by drugs, are therefore not deemed to be included under the terms of reference.' [356]

That the definition is an assumption appears to be declared by the words '[w]e have taken the expression in the terms of reference 'persons …suffering from some form of mental derangement' to mean ...'.[357]

The part of the judgement in *Mahlinza* referred to by Hiemstra notes only, in respect of the requirement of pathology, that it is unwise to attempt to define 'insanity', except that while the cause of the mental disorder is unimportant, the disorder must be pathological.[358] In this respect one is referred to *Holiday*[359] and an extract from the judgement of *Kemp,*[360] to the effect that the law is not concerned with the cause or origin of a disorder, but with the state of mind of the accused. This certainly does not stipulate that 'pathology' is a requirement for a mental illness/defect. Furthermore, further analysis of Devlin J's judgement in *Kemp* reveals that the judge

[356] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) 1.
[357] Ibid 1.
[358] *S v Mahlinza* 1967 (1) SA 408 (A) 418.
[359] *R v Holiday* 1924 250 (AD) 257.
[360] Devlin J framed his conception of a disease of the mind as follows:

> 'It does not matter, for the purposes of the law, whether the defect of reason is due to a degeneration of the brain or to some other form of mental derangement. That may be a matter of importance medically, but it is of no importance to the law, which merely has to consider the state of mind in which the accused is, not how he got there....
> The law is not concerned with the brain but with the mind, in the sense that 'mind' is ordinarily used, the mental faculties of reason, memory and understanding. ... In my judgment the condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable, transitory or permanent. There is no warranty for introducing those considerations into the definition in the McNaghten Rules. Temporary insanity is sufficient to satisfy them.
> Hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on, and so is in my judgment a disease of the mind which comes within the meaning of the Rules.' (*R v Kemp* [1957] 1 QB 399 at 407; SHC 18 408)

regards any condition which caused a defect of reason to be a disease of the mind simply because it caused a defect of reason. The decision in Holiday, at the point cited, also does not specify pathology as a criterion, but instead, contrary to the Stellmacher/Hiemstra definition, states that the cause of the mental disorder is irrelevant such that even voluntary alcohol consumption would not disqualify a disorder from being a mental illness/defect for the purpose of an insanity defence.[361] Thus the judgement in *Mahlinza* provides, in my view, an unsound foundation for the requirement of pathology.

What is particularly noticeable is the similarity between the Rumpff Commission definition and the definition being adopted presently from *Stellmacher*.

Stellmacher	***Rumpff Commission***
... a pathological disturbance of the accused's mental capacity and not a mere temporary mental confusion ...	a morbid or pathological mental disorder, i.e. some form of mental disease or permanent mental defect.
... and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation.	Persons whose mental faculties have been temporarily impaired, for instance by drugs, are therefore not deemed to be included under the terms of reference.

[361] *R v Holiday* 1924 250 (AD) 257. The court was apparently unanimous on this point, Kotzé JA delivering a concurring judgement (see ibid 259-60).

The similarity suggests that the *Stellmacher* definition is little more than a restatement of the unfounded Rumpff commission definition.

Thus the basis for the requirement of pathology is unsound or a mere assumption, and the requirement of an endogenous origin is ultimately contradicted by the authority cited (particularly *Holiday*), or, at best, completely unfounded.

6.5 Pathology

Even if one were to engage with the concept of pathology as a requirement, it is unfortunately little more than a distraction. At first it begs the question: what is a pathology? Neither the Oxford dictionary definition, the law, nor social sciences have any straightforward answer to this question.

6.5.1 In English

The Oxford Dictionary of English[362] defines a pathology as a disease, which is in turn defined as a disorder. A disorder is defined as an illness. Thus an illness or defect must be a pathology, which is a disease, which is a disorder, which is an illness. Ultimately the definition is circular: an illness is pathology, which is an illness.

6.5.2 In Law

It is even arguable that the reference to pathology in the *Stellmacher* definition was really a reference to the origin of the disorder. This may be noted from Burchell's discussion of the

[362] "Oxford Dictionary of English." Oxford University Press, 2003.

criterion of 'pathology': that a disorder is not a pathology where it resulted from 'socio-cultural patterns of behaviour that have been learned or taught ....'[363]

He continues: It would seem to follow that defect of reason caused simply by youth, stupidity or cultural immaturity is not insanity since it is not a result of disease but some social, cultural or temporal condition.[364]

The real concern appears to be with the source of the disorder, and in particular, that it should not be recognised where it arose from environmental (cultural, social, economic) factors. As will be discussed, there appears no basis for this bias.[365]

6.5.3 In the Social Sciences

In the social sciences, the concept of 'pathology' (known as psychopathology) is rather controversial.[366] The main difficulty is that there is no universally accepted norm in respect of psychological functioning. Carson, Butcher, and Mineka observe the following:

> ... But what is the norm? In the case of physical illness, the norm is the structural and functional integrity of the body as a workable biological system; here, the boundary lines between normality and pathology are usually (but not always) clear. For psychological disorder, however, we have no ideal, or even universally 'normal,' model of human mental and behavioral functioning to use as a

[363] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 375.
[364] Ibid 376. It must be observed that the term 'defect of reason' forms part of the English law under the M'Naghten rules and is not required under South African Law.
[365] See 6.6 Endogenous Origin on page 120ff.
[366] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxx; James N. Butcher, Susan Mineka & Jill M. Hooley *Abnormal Psychology* 12th ed (2004); Ronald J. Comer *Abnormal Psychology* 7th ed (2010) 50ff; Ann M. Kring, Sheri L. Johnson, Gerald C. Davison *et al. Abnormal Psychology* 11th ed (2010); World Health Organisation *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (1992); Mark Zimmerman & Robert L. Spitzer 'Classification in Psychiatry' In *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* edited by Benjamin James Sadock, Virginia Alcott Sadock and Pedro Ruiz (2009) 1108ff.

> base of comparison. Thus we find considerable confusion and disagreement as to just what is or is not normal, a confusion aggravated by changing values and expectations in society at large. [367]

The problem is that societal norms are relative. What is regarded as abnormal in one culture may well be regarded as normal in another.[368] Further, what is normal for one gender or age group may be abnormal for another.[369] Thus deviance in itself does not necessarily indicate psychopathology.[370] For South Africa, a heteronymous society, and for criminal responsibility in particular, the realisation that psychopathology is a relative notion is clearly imperative.

6.5.3.1 Deviance, Dysfunction, Distress and Danger

Beyond deviance, a variety of other indicators have been suggested as indicating the presence of a psychopathology.[371] These indicators include dysfunction, distress, and danger.[372] They are regarded, together with deviance, as merely suggestive of the presence of a psychopathology. This is because each of these indicators is itself relative. For instance, people may all be somewhat dysfunctional.[373] A state of distress may signify an appreciation of the human condition. It is distressing that we all will die one day. Many, if not most people, face social and financial hardships. Regarding danger, as we live our lives, we constantly pose danger to others and

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[367] R. C. Carson, J. N. Butcher & S. Mineka *Abnormal Psychology and Modern Life* 10th ed (1998) 6. See also Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 5.

[368] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxiii-xxxiv; David H. Barlow & V. Mark Durand *Abnormal Psychology: An Integrated Approach* 5 ed ed (2009) 3-4; Jeffrey S. Nevid, Spencer A. Rathus & Beverly Greene *Abnormal Psychology in a Changing World* 4th ed (1999) 6.

[369] R Macklin 'Mental Health and Mental Illness: Some Problems and Concept Formation' In *Biomedical Ethics and the Law* edited by J. M. Humber and R. F. Almeder (1979) 139.

[370] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxi; ibid xxii; Nevid, Rathus & Greene *Abnormal Psychology in a Changing World* 4th ed (1999).

[371] Comer *Abnormal Psychology* 7th ed (2010) 2-4; Kring, Johnson, Davison & Neale *Abnormal Psychology* 11th ed (2010) 4-8.

[372] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994); Comer *Abnormal Psychology* 7th ed (2010); World Health Organisation *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (1992).

[373] Given that no recognised standard of proper or normal functioning has been accepted in the social sciences.

ourselves. Driving or being driven, swimming, and exposing oneself to the sun are all mundane activities that are dangerous.

Further, psychopathologists do not agree on the significance of the indicators. For example, Comer[374] refers to the four indicators discussed above as significant, while the WHO[375] and Holmes[376] do not include danger in their list of indicators. Nevid, Rathus, and Greene[377] consider as significant, in addition to the original four discussed, the indicator that 'perception or interpretation of reality is faulty'.[378] Kendall and Hammen consider only the indicator of dysfunction as significant, which they supplement with the applicability of a diagnosis in terms of the Diagnostic and Statistical Manual, 4th edition (DSM-IV), representing 'expert professionals' rules'[379] for diagnosis.[380] The DSM-IV/DSM-IV TR[381] does not include deviance as a significant indicator. While for Zimmerman and Spitzer deviance seems central.[382]

As Comer comments after considering the value of the indicators discussed:

> Efforts to define psychological abnormality typically raise as many questions as they answer. The major difficulty is that the very concept of abnormality is relative, dependent on the norms and values of the society in question. Ultimately a society *selects* the general criteria for defining

[374] Comer *Abnormal Psychology* 7th ed (2010) 2-4.
[375] World Health Organisation *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (1992).
[376] D. S. Holmes *Abnormal Psychology* 3 ed (1997).
[377] Nevid, Rathus & Greene *Abnormal Psychology in a Changing World* 4th ed (1999).
[378] Ibid 6.
[379] P. Kendall & C. Hammen *Abnormal Psychology* (1995) 63.
[380] This is somewhat circular and contradictory since the DSM includes dysfunction in its criteria, but also distress and danger.
[381] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994); American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxi. See definition on page 114.
[382] 'In contrast to most medical disorders, mental disorders are manifested by a quantitative deviation in behavior, ideation, and emotion from a normative concept.' (Zimmerman & Spitzer 'Classification in Psychiatry' In *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* edited by Sadock, Sadock and Ruiz (2009) 1109).

> abnormality and then interprets them in order to judge the normality or abnormality of each particular case.[383]

Definitions of psychopathology are plagued therefore by disagreement and relativity. Disagreement in respect of what may indicate its presence. Relativity in that each definition is based on a different standard or perspective.

6.5.3.2 Diagnostic and Statistical Manual of Mental Disorders

The DSM-IV[384] represents the consensus that does exist on a definition of psychopathology and specific mental disorders to the extent that expert professionals agree:

> [Expert professionals' rules] are stated in the *Diagnostic and Statistical Manual*, 4th Edition (called DSM-IV), which is the most widely accepted system in the United States and around the world for classifying psychological problems and disorders. The World Health Organisation publishes another manual used worldwide, the *International Classification of Diseases* (ICD), in many respects similar to the DSM.[385]

The DSM-IV, now in a text revised (TR) edition,[386] lists the disorders that have crystallised out of its definition referring to distress, dysfunction, and danger. It specifies the mental disorders that are currently generally accepted and provides for each a set of defining criteria. The criteria in the

[383] Emphasis added; Comer *Abnormal Psychology* 7th ed (2010) 4-5.
[384] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994).
[385] Kendall & Hammen *Abnormal Psychology* (1995) 63 original emphasis. See also Tracey-Lee Austin & Alban Burke 'Introduction' In *Abnormal Psychology: A South African Perspective* edited by Alban Burke (2009) 13.
[386] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000). The text revision changed nothing substantial, but sought merely to update the text to keep track of research changes. No new disorders were added nor the criteria for the diagnosis of any disorder changed (ibid xxix). Indeed, so little has changed that, through the preface of, and introduction, the DSM-IV TR, reference is made only to the 'DSM IV' and the use thereof. This may be noted from the extracts of the DSM-IV TR quoted below at notes 403 and 404. It is notable too that Burchell (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 383ff) restricts his attention to the DSM-IV. This style of referring only to the DSM-IV, despite the publication of the DSM-IV TR, will be adopted here.

main comprise symptoms and signs. Symptoms are a patient's subjective description of their disorder. Signs are objective observations that may be made by a diagnostician, either directly or indirectly. Diagnosis of any particular disorder requires that the diagnostician establish the presence of the specified criteria.[387] In respect of the origin of disorders (aetiology),[388] only rarely does it comment, and even then, its approach is atheoretical.[389]

The DSM-IV TR defines mental disorder as follows:

> A clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering, death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioural, psychological, or biological dysfunction in the individual.[390]

Though the DSM-IV represents consensus in the field, it is not uncontested. Various criticisms have been levelled at the DSM-IV of which the primary one relates to the model it has adopted for diagnoses: a categorical model.[391] The model derives from the biomedical model in terms of which disorders are conceptualised as discrete phenomena. These discrete phenomena may be categorised according to the underlying core of each as well as the distinct boundary that is presumed to

[387] Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004).
[388] Aetiology is a technical term used in psychopathology to refer to the source or cause of, or process giving rise to, a disorder.
[389] Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 7. Post Traumatic Stress Disorder (PTSD), is the notable exception (Richard J. McNally 'Posttraumatic Stress Disorder' In *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* edited by Benjamin James Sadock, Virginia Alcott Sadock and Pedro Ruiz (2009) 2650). The DSM postulates that the cause of PTSD is the experience of an extraordinary trauma (American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994); American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) 463 & 7).
[390] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxi.
[391] Ibid xxxi.

separate one disorder from another.[392] Critics have argued that the clinical reality is that the disorders from which people actually suffer are not distinct phenomena.[393] The result is often a diagnosis of several (comorbid) disorders as if the person diagnosed has more than one disorder, instead of one disorder with features that straddle the presently accepted categories.[394]

Another criticism of the DSM-IV diagnostic categories is the potential reification of disorders so that they are regarded as existing in reality rather than being an aid to understanding and communication.[395] A further criticism of the DSM-IV is that it sacrificed validity (reflecting accurately a disorder) for the sake of reliability (inter-diagnostician agreement).[396]

A significant criticism of the authority of the DSM emerges from its treatment of homosexuality as a disorder. Homosexuality was included as a mental disorder in the second edition of the DSM[397] while subsequent editions have declassified it.

Furthermore, after noting that multiple personality disorder was not recognised in the first two editions of the DSM, while it now is, Lewis remarks:

> Diagnosis in psychiatry ... is as trendy as the cut of blue jeans or the length of skirts. The major

[392] Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 130. The American Psychiatric Association denies that it operates on an assumption of discrete disorders 'In DSM-IV, there is no assumption that each category of mental disorder is a completely discrete entity with absolute boundaries dividing it from other mental disorders or from no mental disorder.' (American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994) xxii; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxi).
[393] Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 130.
[394] Barlow & Durand *Abnormal Psychology: An Integrated Approach* 5 ed ed (2009) 91; Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 130.
[395] Barlow & Durand *Abnormal Psychology: An Integrated Approach* 5 ed ed (2009); ibid 92. Lewis describes how '[she] had to fit what [she] saw into the models [she] had been taught.' (Dorothy Otnow Lewis *Guilty by Reason of Insanity: Inside the Minds of Killers* ... (1998) 135).
[396] Barlow & Durand *Abnormal Psychology: An Integrated Approach* 5 ed ed (2009) 91.
[397] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 2 ed (1968).

> difference between diagnosis and fashion is that diagnostic styles take longer to change.[398]

The law does not regard the DSM as indicating which disorders should be recognised as mental illnesses or defects.[399] That is, many disorders recognised in the DSM-IV as mental disorders (such as personality disorders[400] and kleptomania)[401] are not recognised in law as mental disorders for the purposes of an insanity plea. The Washington Supreme Court stated in 1993 that the DSM (referring then to the DSM-III-R) is an evolving and imperfect document, that it is not sacrosanct, and is even in part a political document.[402]

The APA itself warns, in the preface of the DSM-IV, against unconsidered adoption of the various disorders described for forensic purposes. These extracts are repeated at length here due to their importance.

> When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will he misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder,' 'mental disability,' 'mental disease,' or 'mental defect.' In determining whether an individual meets a specified legal standard (e.g., for competence, criminal responsibility, or

[398] Lewis *Guilty by Reason of Insanity: Inside the Minds of Killers* ... (1998) 133.
[399] Burchell notes that only some disorders recognised in the DSM-IV qualify as mental illnesses or defects for the purposes of the insanity defence (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 383).
Slovenko remarks: '… the DSM–in whole or in part–is useful and is a common basis for assessing accountability, but the law is not limited to it in defining mental illness.' (Slovenko *Psychiatry and Criminal Culpability* (1995) 59).
[400] 'These disorders are not a consequence of disturbance of the psychic state but rather patterns of behaviour learned during formative years' (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 386). Psychopathy (Antisocial Personality Disorder) is not recognised as a disease of the mind in the US on the basis that a psychopath differs only insofar as s/he engages in repetitive antisocial or criminal acts and so only in the *quantity* of such conduct rather the *quality* of his or her mental functioning (LaFave *Criminal Law* Abridged 4 ed (2003) 380 citing the *Report of the Royal Commission on Capital Punishment* (1953) §§394-402).
[401] Petty 'The Psychopathology Of Self-Control In The Context Of Criminal Capacity In South African Law' (unpublished Master's dissertation University of Stellenbosch 1998) 7.
[402] *In re Petition of Andre Young* 122 Wash. 2d 1, 857 P.2d 989 (1993).

disability), additional information is usually required beyond that contained in the DSM-IV diagnosis. This might include information about the individual's functional impairments and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.

Nonclinical decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the causes of the individual's mental disorder or its associated impairments. Inclusion of a disorder in the Classification (as in medicine generally) does not require that there be knowledge about its etiology. Moreover, the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

It must be noted that DSM-IV reflects a consensus about the classification and diagnosis of mental disorders derived at the time of its initial publication. New knowledge generated by research or clinical experience will undoubtedly lead to an increased understanding of the disorders included in DSM-IV, to the identification of new disorders, and to the removal of some disorders in future classifications. The text and criteria sets included in DSM-IV will require reconsideration in light of evolving new information.

The use of DSM-IV in forensic settings should be informed by an awareness of the risks and limitations discussed above. When used appropriately, diagnoses and diagnostic information can assist decision makers in their determinations. For example, when the presence of a mental disorder is the predicate for a subsequent legal determination (e.g., involuntary civil commitment), the use of an established system of diagnosis enhances the value and reliability of the determination. By providing a compendium based on a review of the pertinent clinical and research literature, DSM-IV may facilitate the legal decision makers' understanding of the relevant characteristics of mental

> disorders. The literature related to diagnoses also serves as a check on ungrounded speculation about mental disorders and about the functioning of a particular individual. Finally, diagnostic information regarding longitudinal course may improve decision making when the legal issue concerns an individual's mental functioning at a past or future point in time.[403]

And in a further cautionary statement the APA warn:

> The specified diagnostic criteria for each mental disorder are offered as guidelines for making diagnoses, because it has been demonstrated that the use of such criteria enhances agreement among clinicians and investigators. The proper use of these criteria requires specialized clinical training that provides both a body of knowledge and clinical skills.
>
> These diagnostic criteria and the DSM-IV Classification of mental disorders reflect a consensus of current formulations of evolving knowledge in our field. They do not encompass, however, all the conditions for which people may be treated or that may be appropriate topics for research efforts.
>
> The purpose of DSM-IV is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat people with various mental disorders. It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as Pathological Gambling or Pedophilia does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and

[403] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994) xxiii-xxiv; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxii-xxxiii.

> competency.[404]

Nevertheless, social scientists and forensic experts find themselves in a bind. To what shall they refer to inform whether to label a condition a disorder or not, or in particular, a mental illness or defect.[405]

Rosenhan showed, in his now classic studies, that the diagnosis of mental disorder is prone to substantial error.[406] He conducted a study in which eight pseudo-patients (mentally healthy individuals) were presented to mental institutions as disordered. None was detected as faking. Further, he conducted another study in which a mental institution was informed that fake patients would present themselves at that institution and staff were requested to rate the likelihood that any patient presenting him or herself was a fake patient. In this study 21 per cent (41/193) of patients were rated with a high degree of confidence by at least one member of staff, to be fake patients, when actually no fake patients presented themselves.

Haysom, Strous and Vogelman remark:

> If nothing else, the critics of psychiatric diagnosis have served to warn society of the potential manipulation of diagnostic labels, and of the doubt which should exist in their intrinsic heuristic value.[407]

[404] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994) xxvii; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxvii.
[405] This difficulty is revealed in the expert opinions gathered, discussed below under 6.9 Expert opinions on page 129.
[406] D. L. Rosenham 'On Being Sane in Insane Places' (1973) 179.
[407] N. Haysom, M. Strous & L. Vogelman 'The Mad Mrs Rochester' Revisited: The Involuntary Confinement of the Mentally Ill in South Africa.' (1990) 6 South African Journal of Human Rights 358.

6.5.4 Conclusion

The requirement that, for an insanity defence, a mental disorder must qualify as a 'pathology' appears therefore to be unsound or a mere assumption; to beg the question or to be circular; to really be a reference to the origin of a disorder; and ultimately – if taken as a reference to psychopathology – offers no clear uncontested criterion.

6.6 Endogenous Origin

As indicated above, the *Stellmacher*[408] decision introduced the requirement that the mental disorder in question, must have arisen internally. The disorder must be of endogenous origin.[409] It would seem that the social sciences are inevitably best placed to say what is of endogenous origin.

6.6.1 Social Sciences

In the social sciences, the issue of causation, known as aetiology, of psychopathologies is highly contested.[410] Various models have been put forward to explain the causes of psychopathology: bio-medical, psychodynamic, humanistic-existential, behavioural, cognitive, socio-cultural and family systems. Each of these will be briefly surveyed.

It is notable that none of these models, not even the bio-medical model, requires that the (ultimate) cause of psychopathology must come from within a person.

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[408] *S v Stellmacher* 1983 (2) SA 181 (SWA) (translation by Burchell & Milton *Principles of Criminal Law* 2nd ed (1997) 278).

[409] Burchell *Principles of Criminal Law* 3rd Revised ed (2006); Burchell & Milton *Principles of Criminal Law* 2nd ed (1997); Du Toit, De Jager, Paizes, Skeen & van der Merwe *Commentary on the Criminal Procedure Act* Vol Service 34 (2005); Kriegler & Kruger *Suid-Afrikaanse Strafproses* 6 ed (2002) 215; Snyman *Criminal Law* 5th ed (2008) 171-2.
There is some contradiction though in the demand that a mental illness/defect be of endogenous origin, and yet that the cause of it 'does [not] matter' (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 376).

[410] Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004); Comer *Abnormal Psychology* 7th ed (2010).

6.6 Pathological Non-Responsibility/Endogenous Origin

The bio-medical model is concerned with the biological bases of psychology. Mental disorders are attributed to anatomical or neurochemical problems in the brain.[411] For this reason, it is often criticised as being reductionist.[412] Central to this model is the notion that disorders are 'real' phenomena that can be discovered. The model holds that in time science will develop sufficiently so that the physiological cause of all disorders will be discovered. However, even within this model there is no insistence that the (ultimate) cause of a brain problem must arise from within the person. It is well recognised that ingesting chemicals or being struck on the head may well lead to a brain disorder and, in turn, a mental disorder.

The psychodynamic model began with the work of Freud's psychoanalytic approach. Psychoanalysis explains human personality and psychopathologies in terms of early childhood experiences and unconscious forces. Psychoanalysis proposes that pathologies are due to conflicts within one's mind raging out of control.[413] Unresolved intrapsychic conflict ultimately results in psychopathology.[414] However, on the basis that all people experience intrapsychic conflict, Macklin[415] comments that psychoanalysis cannot clearly distinguish those who are pathological from those who are not. For psychoanalysis, everyone is to some degree, disordered.

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[411] Comer *Abnormal Psychology* 7th ed (2010) 51ff.

[412] At the philosophical root of this criticism is that it seems difficult to attribute subjective sensations, such as being conscious, to objective matter. See Nagel 'What is it Like to Be A Bat' (1974) 83 Philosophical Review.

[413] S Freud *Beyond the pleasure Principle* (1920); S Freud *The ego and the id* (1923); Holmes *Abnormal Psychology* 3 ed (1997); W. W. Meissner 'Classical Psychoanalysis' In *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* edited by Benjamin James Sadock, Virginia Alcott Sadock and Pedro Ruiz (2009) 788ff; Jacki Watts & Derek Hook 'Freud's psychoanalytic theory of development and personality' In *Developmental Psychology* edited by Jacki Watts, Kate Cockroft and Norman Duncan (2009) 62-3. In a particularly lucid explanation, Watts states: 'Fixations, at a particular psychosexual stage, result in a particular 'tone' or thematic conflictual pathology. Evidence of fixation indicates a lack of the resolution between the press of the Id and the Ego and Superego's capacities to deal with the press of the Id at that particular psychosexual stage e.g. oral, anal, Oedipal conflicts. The strength of the ego to mediate the conflict is significant. Where psychic functioning is more primitive the Ego has aligned with the Id diminishing the functioning of the Superego. Such functioning results in psychotic states where internal reality predominates and the reality principal is compromised. When the ego and superego align then neurosis characterizes psychic functioning placing severe repression on the Id. Obsessive compulsive states would be an example. Psychopathic states are underpinned by a weak ego which is unable to mediate between the Id and the Superego. The Id impulses hold sway driven by the pleasure principle. Social morality has no meaning and as such sadism may be a source of pleasure for the Psychopath.' (Jacki Watts Personal Communication 2 July 2011)

[414] Kendall & Hammen *Abnormal Psychology* (1995).

[415] Macklin 'Mental Health and Mental Illness: Some Problems and Concept Formation' In *Biomedical Ethics and the Law* edited by Humber and Almeder (1979) 145.

The humanistic-existential model concerns the human potential to rise to philosophical challenges such as self-awareness, values, meaning, and choice, and to incorporate these into one's life. From a humanist perspective, psychopathology results where individuals avoid their responsibility to fulfil their potential. From an existentialist perspective, psychopathology results where individuals fail to face their existence and give meaning to their lives.[416]

The behavioural model regards behaviour as a response to stimuli in one's environment.[417] The probability of the repetition of specific behaviour is governed by the reinforcement of that behaviour. Thus, for the behavioural model, psychopathology results from maladaptive learning.[418]

The cognitive model is concerned with the role of thinking and information processing in explaining human behaviour.[419] The emphasis here shifts from the behavioural perspective of a direct relationship between one's environment and its effect upon one's mind, to recognising the impact of an individual's thoughts.[420] Mental disorder is regarded as arising out of maladaptive thinking, irrational beliefs, and interpretations which may be traced to unexamined beliefs, faulty learning, the drawing of incorrect inferences, and failing to distinguish between imagination and reality.[421]

The socio-cultural model focuses on environmental stresses that an individual may endure.[422] Societal stress such as poverty and discrimination lead to mental disorder. The family systems model proposes that family interaction directs the development of an individual's sense of reality and personal identity. Faulty communication or structural imbalances within a family are regarded

[416] Comer *Abnormal Psychology* 7th ed (2010) 73; Kendall & Hammen *Abnormal Psychology* (1995).
[417] I. G. Sarason & B. R. Sarason *Abnormal Psychology: The Problem of Maladaptive Behavior* 8th ed (1996).
[418] Kendall & Hammen *Abnormal Psychology* (1995).
[419] Nevid, Rathus & Greene *Abnormal Psychology in a Changing World* 4th ed (1999).
[420] D. L. Rosenhan & M. E. P. Seligman *Abnormal Psychology* 2nd ed (1989).
[421] Comer *Abnormal Psychology* 7th ed (2010) 67; Kendall & Hammen *Abnormal Psychology* (1995); Kring, Johnson, Davison & Neale *Abnormal Psychology* 11th ed (2010) 45-8.
[422] Comer *Abnormal Psychology* 7th ed (2010) 75.

as the cause of psychopathology.[423]

Thus, various factors have been implicated as causing mental disorder. These causes range from brain disorder, unresolved intrapsychic conflicts, failures to fulfil one's potential or give meaning to one's life, maladaptive learning, maladaptive thinking and irrational beliefs, to faulty communication and structural imbalances within a family. As noted though, no school of thought regards the cause of a disorder as exclusively 'internal' or 'external'.

A complicating factor is that causes may range along a spectrum from remote to more direct, proximate causes. Some, such as genetic factors, may predispose an individual, placing him/her at risk. Others represent more immediate precipitating factors such as stressors in an individual's environment. All are factors in a causal chain, whether remote or proximate. Although some factors may be regarded as 'external' (meaning presumably environmental factors) they may represent precipitating factors which combine with other predisposing factors to produce a pathology. Butcher, Mineka and Hooley capture the problem well:

> Although understanding the causes of abnormal behaviour is clearly a desirable goal, it is enormously difficult to achieve because human behaviour is so complex. Even the simplest of human behaviours, such as speaking or writing a word, is the product of literally thousands of prior events - only some of which are understood, and then frequently only in the vaguest of ways. Understanding a person's life in causal terms, even an utterly 'adaptive' life, is an incomplete project of enormous magnitude; when the life is a maladaptive one, we can assume the task is even more difficult.[424]

In the social sciences, psychopathologists appear to regard the problem of the origin of any mental

[423] David Sue, Derald Wing Sue & Stanley Sue *Understanding Abnormal Psychology* 9th ed (2010) 56.
[424] Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 56.

condition as a complex interaction of factors[425] and certainly do not seem to be prepared to regard any condition as caused exclusively by 'internal' or 'external' factors.

6.6.2 In Law

The English law requires, for recognition of a 'disease of the mind', that the cause thereof must be 'internal'.[426] Analysis of some prominent English cases reveals the difficulty of adopting this criterion.

In the case of *Quick,*[427] the court held that the accused's condition, hypoglycaemia, was transitory and caused by the external condition of medication. However, the accused had used insulin to treat his diabetes. The problem is this: the insulin may be regarded as 'external', but his need for it, his diabetes, was 'internal'. Wasik,[428] apparently appreciating the complexity of causation, raises the question of what the outcome would have been had the diabetes, as an 'internal' factor, been regarded as the cause. He concludes that insanity would have been the only defence, implying that *Quick's* condition would then have amounted to a disease of the mind.

In the leading case of *R v Sullivan*[429] causation is said not to matter.

> If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent

[425] Barlow & Durand *Abnormal Psychology: An Integrated Approach* 5 ed ed (2009) 25; Sue, Sue & Sue *Understanding Abnormal Psychology* 9th ed (2010) 34ff.
[426] Ormerod *Smith & Hogan Criminal Law* (2005) 258 & 60; *R v Burgess supra* 1991 [1991] 2 QB 92; *R v Quick* [1973] QB 910, [1973] 3 All ER 347; *R v Sullivan supra* 1984 [1984] AC 156, [1983] 2 All ER 673; R v Hennessy [1989] 2 All ER 9, CA.
[427] *R v Quick* [1973] QB 910, [1973] 3 All ER 347.
[428] M. Wasik 'Insanity, diminished responsibility and infanticide: legal aspects.' In *Principles and Practice of Forensic Psychiatry* edited by R. Bluglass and P. Bowden (1990) 257.
[429] *R v Sullivan* [1984] AC 156, [1983] 2 All ER 673.

> or is transient and intermittent, provided that it subsisted at the time of commission of the act.[430]

However, somewhat perplexingly, it is also stated at another place that it does matter if the cause is external. It is not a disease of the mind if the 'impairment ... results from some *external* physical factor such as a blow on the head causing concussion ....'[431]

In 1991, on the reasoning that an internal cause indicates a disease of the mind, the court in *R v Burgess*[432] found a somnambulist (sleepwalker) to be not guilty by reason of insanity holding sleepwalking to be a disease of the mind due to its endogenous origin (and tendency to recur).[433]

Some of the conditions recognised in South African law as constituting mental illnesses/defects do not comply with the requirement of endogenous source. Schizophrenia, which is legally accepted as a 'mental illness'[434] is regarded, within psychology, as the product of environmental socio-cultural factors, psychological factors, and/or biological and genetic factors, but usually as an interaction of all these phenomena.[435] Also, 'reactive' depression – depression due to some external environmental event – has been recognised as a mental illness.[436]

Further, one must ask, would brain injury resulting from a motor vehicle accident be disqualified because its original is external.[437] Also, what if addiction is the cause of the use of alcohol, where is the cause then?

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[430] Ibid 172.
[431] Ibid 172 emphasis added.
[432] *R v Burgess* [1991] 2 QB 92.
[433] Notably, in *Parks* the Supreme Court of Canada held that somnambulism is not rendered a disease of the mind by virtue that it may be regarded as arising internally (*R. v. Parks*, [1992] 2 S.C.R. 871; See Richard Card *Card, Cross and Jones Criminal Law* 19th ed (2010) 658). In the cases of *Parks* and *Luedecke* (*R. v. Luedecke*, 2008 ONCA 716 (CanLII); 236 CCC (3d) 317) the courts were far more concerned with the 'dangerousness' of the offender (see note 451) – discussed below under 6.7 Dangerousness on page 126ff.
[434] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 384-5.
[435] Comer *Abnormal Psychology* 7th ed (2010) 84.
[436] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 385; *S v Kavin* 1978 (2) SA 731 (W).
[437] For this insight I am indebted to Peter Jordi of the School of Law, University of the Witwatersrand, Johannesburg.

Wasik observes that the 'difficulty with the "external factors" doctrine is that it seems to create arbitrary distinctions'[438] while Ormerod states: 'distinguishing between external and internal causes is an unsatisfactory and deficient way of addressing the true mischief – the likelihood of the danger posed by uncontrolled recurrence of the mental condition.'[439]

Thus, the aetiology of psychopathology does not seem to permit causal factors to be regarded as exclusively endogenous or exogenous as the law presently requires and even if it did, the requirement of endogenous source appears to be applied selectively.

There appears therefore nothing in the *Stellmacher* requirements of pathology and endogenous origin to validly and reliably define a mental disorder for the purposes of an insanity defence. If the real issue is dangerousness, then this must be addressed.

6.7 Dangerousness

Analysis of what ultimately drives the insanity plea appears to be the notion of dangerousness.

Lord Denning in the leading English case of *Bratty* made it clear that dangerousness was central to the recognition of a disease of the mind:

> It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than he given an unqualified acquittal.[440]

[438] Wasik 'Insanity, diminished responsibility and infanticide: legal aspects.' In *Principles and Practice of Forensic Psychiatry* edited by Bluglass and Bowden (1990) 257.
[439] Ormerod *Smith & Hogan Criminal Law* (2005) 260.
[440] *Bratty v Attorney General for Northern Ireland* [1963] AC 386, [1961] 3 All ER 523 412.

In McAuley's view, '[t]he fact is that defendants who are abnormally susceptible to shock or stress are dangerous in a way that the normally susceptible defendant is not, and seem naturally to attract the insanity defence for that reason.'[441] Ormerod notes that where a mental condition arises from an 'internal' cause, it is expected to recur more likely.[442] He goes on, as noted above, to criticise the internal/external bases of distinguishing disorders since it obscures the true mischief – the likelihood of danger posed by uncontrolled recurrence of the mental condition.'[443] Clarkson endorses the view that dangerousness is the true mischief: '… illness could cause him to act in the same way again; he is thus regarded as potentially dangerous and perhaps in need of restraint. … The defendant is potentially dangerous and it is important that the courts retain the power to exercise control (for example, hospitalisation) over him. The insanity verdict triggers this power of control.[444]

The American Law Institute holds the view that the insanity plea offers the advantage that it may facilitate commitment when the individual is dangerous to the community because the condition is recurrent.[445] Denno observes: '… [o]ther countries, such as England, consistently classify as insanity violent conduct that may be considered sane but involuntary ... The predominant justification stems from fears about dangerousness.'[446] Milton recognises that in respect of disposal, a mandatory committal[447] to a mental institution triggered by a successful insanity defence is premised on concerns with dangerousness.[448] In *Jones v Unites States*[449] the United States Supreme Court endorsed the notion that insanity acquitees out to be considered

[441] McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 77n48.
[442] Ormerod *Smith & Hogan Criminal Law* (2005) 260.
[443] Ibid 260. See also 261 & 262.
[444] Clarkson *Understanding Criminal Law* (2005) 100-1.
[445] American Law Institute *Model Penal Code* (1985) 219-20. Denno notes of the American Law Institute: 'Certainly, the MPC drafters emphasized concerns about recurring dangerousness as a reason why a defendant's condition might be considered insane rather than sane but involuntary.' (Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review n381).
[446] Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review n381.
[447] Provided for prior to the discretion granted by the Criminal Matters Amendment Act of 1998.
[448] John Milton 'Law Commission Project 89: Declaration and Detention of State Patients' (1998) 11 South African Journal of Criminal Justice 228 &33.
[449] *Jones v. United States* 463 U.S. 354 (1983) 365.

dangerous.[450] The Supreme Court of Canada has held that the purpose of the insanity defence – and thus whether a disorder is a 'disease of the mind' or not – is the protection of society against recurrent danger.[451]

It would appear that dangerousness is the concern underlying the recognition of a mental illness or defect required for an insanity defence. It is therefore the ultimate basis for the distinction between pathological and non-pathological incapacity.

One final point requires to be observed regarding attempts to glean some definition of the mental disorder requirement – that it is, in any event, almost entirely redundant.

6.8 Redundancy

The requirement of a mental disorder is supposed to qualify and distinguish an insanity defence from any other defence of non-responsibility. An insanity defence, as indicated above,[452] requires that the accused suffered from a mental disorder which manifested in various functional impediments –was unable to know the wrongfulness of his conduct or was unable to conduct him/herself accordingly. The structure of the defence is particular. It requires that a mental disorder results in various functional impediments.[453] There is a significant tendency, however, to operate in reverse – to define the mental disorder required by reference to whether the relevant functional impediments presented.

This may be observed in the leading English case of *R v Sullivan:*

[450] Discussed in Stephen J. Morse 'Mental Disorder and Criminal Law' (2011) 101 Journal of Criminal Law and Criminology 960.
[451] *R. v. Parks*, [1992] 2 S.C.R. 871. See also *R. v. Luedecke*, 2008 ONCA 716 (CanLII); 236 CCC (3d) 317 para 6ff.
[452] See Chapters 4 Capacity to Appreciate the Wrongfulness of One's Conduct and 5 Capacity to Conduct oneself in accordance with an Appreciation of Wrongfulness and Voluntariness.
[453] McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 62.

> *If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not* whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act.[454]

In the US this approach is also common.[455] The second part of the M'Naghten test (not knowing the nature and quality or that the deed is wrong) is relied upon to identify the first part (what constitutes a disease of the mind).

In respect of South African law, Burchell's survey of which mental disorders qualify as a 'mental illness or defect' is undertaken by an explicit consideration of whether any particular condition may possibly cause the relevant functional impediments.[456] This approach is circular and renders the requirement of a mental disorder redundant.

6.9 Expert opinions

6.9.1 DSM

Notwithstanding the warnings in the DSM not to rely on the DSM for forensic purposes, the two main forensic psychiatric hospitals in Gauteng are at odds over whether to refer to the DSM-IV in respect of the diagnosis of a mental illness/defect.[457]

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[454] *R v Sullivan* [1984] AC 156, [1983] 2 All ER 673 172 emphasis added.
[455] LaFave *Criminal Law* Abridged 4 ed (2003) 377; *State v. Elsea*, 251 S.W.2d 650 (Mo.1952); *State v. Johnson*, 233 Wis. 668, 290 N.W. 159 (1940). See also A. S. Goldstein *The Insanity Defense* (1967) 87; Slovenko *Psychiatry and Criminal Culpability* (1995) 12.
[456] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 383-9.
[457] The Head of Forensic Psychiatry of one of the two main State Mental Hospitals in Gauteng referred to the warning contained in the DSM-IV to justify his rejection of the document as a basis for diagnosing a condition as a mental illness/defect, interpreting the warnings as an absolute injunction that the DSM is not for use in forensic settings (Personal Communication, 1999). However the Head of Forensic Psychiatry of the other State Mental Hospital in Gauteng asks rhetorically: 'what else can one use?' (Personal Communication, 1999).

6.9 Pathological Non-Responsibility/Expert opinions

The witnesses' responses to questions regarding the relevance of a DSM diagnosis were grouped on the basis of whether they regarded the legal concept of a mental illness/defect as *congruent* or *incongruent* with a DSMIV/ICD 10 diagnosis. Clearly most witnesses are of the opinion that whether an accused suffered with a mental illness or defect cannot be determined by diagnoses in terms of the DSM IV or the ICD 10 (the WHO's equivalent). Only W2, W4, and W12 adopt the view that such a diagnosis is congruent with the notion of a mental illness or defect. For example, when asked whether he would consider impulsive control disorders such as intermittent explosive disorder and kleptomania to be mental illnesses/defects, W12 responded:

> **Witness 12**: I think …we have to say if it occurs in DSM IV, then it would fall under the description of mental illness in terms of the Act.

It is unfortunate that these witnesses (W2, W4, and W12) also expressed views that a DSM IV diagnosis is incongruent with that of a mental illness or defect. For instance, while W12 expresses the view that all DSM IV disorders are mental illnesses or defects, he goes on to say that this is not necessarily so:

> **Judge**: Uh, is there anything in DSM IV with which you would disagree in terms of this classification of something as either being or not being a mental illness?
> **Witness 12**: Oh there may be, but I'd have to then go through DSM IV um
> **Judge**: Yes.
> **Witness 12**: - page by page and and uh see if
> **Judge**: - and see
> **Witness 12**: - I in fact disagree with the compilation of DSM IV.

Therefore the forensic expert opinions were conflicting: 100 per cent opposed to the use of a DSM diagnosis as indicating a mental illness or defect, though 31 per cent held mutually exclusive views

and contradicted themselves.[458]

6.9.2 Source of Mental Disorder

For simplicity, all views were coded on the basis that aetiology (the source of a disorder) is relevant or irrelevant. On this condition, two witnesses (W5 and W7) expressed views that appear irreconcilable. For instance, W5 expresses the view that aetiology is generally relevant or meaningful:

> **Counsel**: …Is it a meaningful language to try and divide the causes of mental disorders, to determine whether a mental illness or defect exists in fact?
> **Witness 5**: I think for our purpose here there definitely is…

However, he also takes the view that the source of the disorder is not really meaningful. He says that all causes are endogenous anyway which appears to mean that source is irrelevant:

> **Witness 5**: ... The nomenclature has changed for good reasons. Because somebody can have say a significant trauma or a significant incident in his life and becomes depressed. But depending on his genetic makeup he can actually develop a major depression together even with psychotic features. Whereas others are just so-to-say normally depressed and then we would call it an adjustment disorder with depressed mood. So to divide it by just whether there was a trigger so-to-say for the depression or there was not, is not really useful. That's more from a treatment point of view.

Which view he confirms elsewhere as follows:

> **Witness 5**: …I don't think the source as such is really that relevant….

Ultimately 77 per cent of the experts considered the origin of a mental condition to be irrelevant, while 38 per cent considered it relevant. As mentioned, two witnesses expressed both mutually exclusive views and thus contradicted themselves.

[458] That is, 31 per cent held both mutually exclusive views.

6.9.3 Capacity

Furthermore, South African forensic experts show a marked tendency to determine whether a mental illness/defect afflicted the accused by whether s/he suffered the relevant incapacities: every expert regarded the incapacities as relevant to determining whether a mental illness/defect was present – though (4/7; 57 per cent) of the psychiatrists were conflicted on the issue. For example, W2 claims that incapacity is a necessary condition for a mental illness or defect in that she excludes personality disorders, alcoholism and premenstrual dysphoric disorder (PMS) from the realm of mental illness or defect on the basis that these conditions do not impair capacity, that is, cognitive or conative functioning. For instance, asked whether she would consider a personality disorder to be a mental illness or defect, W2 adopted the following perspective:

> **Witness 2**: I would not consider that in itself as a mental disorder that would be relevant to s 78.
> **Counsel**: So you wouldn't call that, you wouldn't regard that as a mental illness or defect for the purposes of s 78?
> **Witness 2**: No.
> **Judge**: Could we, could I ask you what your reasons are for that answer, [W2]?
> **Witness 2**: Well, according to the classification that is widely used, DSM IV, uhm there is eh, psychiatric diagnosis that is made on what is called axis 1, it means that is that the core of psychiatric illness, disorder whatever one would like to call it, uhm it is true that a diagnosis on axis 2 also can be made. Now diagnosis of different types of personality disorder are made on axis 2 and the reason why, is that those are not mental disorders in the strict sense of the word, and uhm, according to present opinions in psychiatry as far as criminal responsibility is concerned, they neither restrict in a, in a relevant way the cognitive nor the conative aspects ....

However, despite noting incapacity as relevant to a consideration of the presence of a mental illness/defect, four psychiatrists (W2, W3, W4, and W11) also registered the contrary view: that incapacity is not relevant in respect of a mental illness/defect but is only a subsequent concern to be considered once it has been established that an accused suffered with a mental illness or defect.

For example, W2 and W3, who both subscribe to the view that incapacity is somehow relevant to a consideration of whether the accused suffers with a mental illness or defect, also adopt the view that the matter is irrelevant and only a subsequent concern.

> **Counsel [Questioning W2]**: the accused's capacity to appreciate the wrongfulness of his conduct or to control himself in accordance with that wrongfulness, are those factors relevant for you to a diagnosis of mental illness or defect in terms of s 78?
> **Witness 2**: It's the opposite way, primary is the diagnosis -
> **Counsel**: Right.
> **Witness 2**: - and due to the symptoms of the condition of which the diagnosis is made, due to certain symptoms, those might diminish, or whatever, the capacity to understand wrongfulness.

> **Counsel [Questioning W3]** : would it have any effect in terms of your certainty, if I was to say you could also assume that either/and the accused lacked the capacity to appreciate the wrongfulness of his conduct or lacked the capacity for self-control? Would that make any difference as to your certainty concerning the presence of a mental illness or defect?
> **Witness 3:** This is, what comes first? The hen or the egg? There must be a mental disorder before.
> **Counsel**: Yes
> **Witness 3**: Right. So it must have that effect.

Therefore all experts regard incapacity as somewhat relevant to determining whether a particular condition amounts to a mental illness/defect, though 31 per cent contradicted themselves and held mutually exclusive views.

6.10 Conclusion

Therefore it appears that the requirement of pathology is an (almost) meaningless obstacle placed in the way of a plea of insanity. It serves only to give covert expression to some myths, false intuitions, and is also – to a large extent – redundant.

7 Non-pathological Non-Responsibility

7.1 Introduction

Non-pathological non-responsibility has been recognised as arising out of severe emotional stress (traditionally known as the defence of 'provocation'),[459] intoxication,[460] or a combination of these factors.

The defence consists, in theory, in the absence of either one of the functions required for capacity: the ability to appreciate the wrongfulness of one's conduct and the ability to act in accordance with that appreciation. A common example of a state of severe emotional stress which may exclude responsibility is that of a husband who discovers his wife in an act of adultery.[461]

As may be noted from the discussion regarding the development of the defence,[462] no qualifying mental state is required. 'Non-pathological' criminal incapacity may, supposedly, arise from any

[459] *S v Campher* 1987 (1) SA 940 (A); *S v Van Vuuren* 1983 (SA) SA 12 (A); *S v Wiid* 1990 (1) SACR 561 (A). While the defence is traditionally known as 'provocation', this label is a misnomer. It is rather the *effect* of provocation which is the foundation for this defence and not the provocation itself. Provocation is merely a cause of the state of interest: the state of anger, rage or fear, amongst others. Provocation is often seen to be distinct from severe emotional stress. Provocation is regarded as the offensive behaviour of another person, whilst severe emotional stress is regarded as arising from an adverse environment. No clear distinction exists in this regard in SA law (Burchell & Milton *Principles of Criminal Law* 2nd ed (1997) 288 This point is not addressed in the latest edition of this text (Burchell *Principles of Criminal Law* 3rd Revised ed (2006))). Further it does not appear possible to draw a clear distinction between the conduct of human agents and the environment. People live in environments which seem best understood as composed partly, but inextricably, of other people. Ultimately, since it is the emotional state which is of interest, the source of the state should be regarded as irrelevant (Burchell & Milton *Principles of Criminal Law* 2nd ed (1997) 288). Hence the concept of severe emotional stress will be preferred and employed here to refer to an emotional state, induced by stress of any origin, which may render an individual not responsible. It is this state which has been held by our courts to deprive a person of criminal capacity in certain circumstances.

[460] *S v Chretien* 1981 (1) SA 1097 (A).

[461] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 425; Dressler *Understanding Criminal Law* 2nd ed (1997) 491; Ormerod *Smith & Hogan Criminal Law* (2005) 447, particularly fn 41.

[462] See 7.3 Development of the Defence in South A on page 142ff.

cause or mental state whatsoever. [463]

7.2 'Provocation' in England and the USA

The defence of provocation (as it is known) in England, if successful, reduces a possible murder conviction to one of manslaughter. It is contained in s 3 of the Homicide Act of 1957:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on the reasonable man.

The defence consists of a 'subjective' and an 'objective' element, both of which have proved controversial. The subjective element is that the accused must establish that s/he actually lost his/her self-control due to provocation. The objective element is that a 'reasonable man' would also have been provoked and would have acted, to the same extent, as the accused did.[464]

Before the elements can be discussed, the definition of provocation should be noted as it appeared in the case of *R v Duffy*.[465] Although the *Duffy* definition has been superseded by the definition contained in s 3 of the Homicide Act of 1957, the *Duffy* definition continues to be authoritative. On appeal before the Court of Criminal Appeal in *Duffy*, Lord Goddard CJ endorsed the definition of provocation offered by Devlin J in his jury instruction in the trial court, as follows:

> Provocation is some act, or series of acts, done (or words spoken) which would cause in any

[463] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 428.
[464] Clarkson *Understanding Criminal Law* (2005) 443.
[465] *R v Duffy* [1949] 1 All ER 932.

> reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not the master of his mind.[466]

In the US, the law on provocation (as it is known) refers to a defence which entitles an accused to be convicted of voluntary manslaughter if the killing s/he committed was in the 'heat of passion', was caused by 'adequate provocation', and was committed before a reasonable 'cooling time' had expired.[467] The defence is primarily concerned with excluding 'malice aforethought', the presence of which would lead to a murder conviction. Malice aforethought manifests in a cool deliberate killing which may be excluded by rage.[468] It is a defence which applies '... to those instances in which people act without thinking ...'.[469] As in the English law, the defence includes subjective and objective elements.

7.2.1 Subjective element in England

The subjective element in English law is that the accused must have been provoked and lost her/his self-control. However, under the influence of *Duffy's* case, it is required that the loss of self-control must be 'sudden and temporary'.[470] The *Ahluwalia*[471] and *Thornton*[472] cases, in which this requirement was affirmed, are both cases in which women killed their violent and abusive husbands. The defence seems to have failed (in both cases) because an inference was drawn, based upon the time delay, of deliberation.[473] The cases established that the longer the time period that expires between the provocation and the conduct of the accused, the less likely it becomes that the

[466] Ibid 932.
[467] LaFave *Criminal Law* Abridged 4 ed (2003) 755ff.
[468] D. T. Skelton *Contemporary Criminal Law* (1998) 64.
[469] Hall *Criminal Law and Procedure* (1992) 117.
[470] Clarkson *Understanding Criminal Law* (2005) 124; *R v Ahluwalia* [1992] 4 All ER 889; *R v Thornton (No 2)* [1995] 2 All ER 1023.
[471] *R v Ahluwalia* [1992] 4 All ER 889.
[472] *R v Thornton (No 2)* [1995] 2 All ER 1023.
[473] D. Bloy *Criminal Law: Lecture Notes* 2nd ed (1996) 190; Ormerod *Smith & Hogan Criminal Law* (2005) 448-9.

defence will succeed. Apparently then, to succeed, provocation must have prevented the accused from deliberating. As discussed above,[474] this approach appears to conflate cognitive and conative functioning.

7.2.2 Subjective element in the USA

The requirement that the killing be committed during the 'heat of passion' refers to the emotional disturbance that the accused must have experienced.[475] The accused must, on account of his/her emotional state, have lost control of her/his ordinary restraints. This is a subjective enquiry. The concept of 'passion' is not limited to anger but includes fear,[476] jealousy,[477] and 'wild desperation'.[478] The court in *Borchers* quoted a dictionary, with apparent approval, defining passion to include any 'violent, intense, high-wrought, or enthusiastic emotion.'[479] Also, subjectively, the accused must act before s/he has cooled off.[480] This requirement restricts the defence to acts which are sudden and immediate to the provocation. It has been somewhat relaxed in that it has been accepted that some time may pass between the provocation and the killing. In *Berry*[481] the accused lay in wait in the victim's apartment for some 20 hours after being provoked for the very last time. As noted above,[482] the defence of provocation is restricted '... to those instances in which people act without thinking ...'.[483] Again,[484] the point must be observed that this approach appears to conflate cognitive and conative functioning.

[474] 5.6.1 Conative/Cognitive Requirement? on page 87ff.
[475] LaFave *Criminal Law* Abridged 4 ed (2003) 777.
[476] *LaPierre v State* 734 P.2d 997, 1001 (Alaska Ct App. 1987).
[477] *People v Berry* 556 P. 2d 777, (Cal. 1976).
[478] *People v. Borchers* 325 P.2d 97, (Cal. 1958).
[479] Ibid 102.
[480] Ibid 787-8.
[481] *People v Berry* 556 P. 2d 777, (Cal. 1976).
[482] 7.2 'Provocation' in England and the USA on page 136ff.
[483] Hall *Criminal Law and Procedure* (1992) 117.
[484] 5.6.1 Conative/Cognitive Requirement? on page 87ff.

7.2.3 Objective element: the Reasonable Person

The objective elements of the English and US approaches require that beyond having actually lost self-control, a 'reasonable person' would also have lost control. This requirement is obsolete in our law since it turned away from the English approach in 1971.[485]

This objective standard is concerned with a comparison of the accused's conduct in his/her state of lacking self-control, with a standard of a reasonable person. Padfield asks the obvious and yet profound question: '[W]ho is the reasonable man?'[486] The relevance of the brief discussion that follows is to see that the US and England struggle with the question of how to construct the test of the reasonable person so as to be fair. Notably the discussion continues at the level of what characteristics of the accused to attribute to the reasonable person.

Anglo-American common law identifies the reasonable person as being of average disposition,[487] not exceptionally belligerent,[488] sober,[489] of normal mental capacity.[490] While it appears agreed that the age and sex of the accused will be attributed to the reasonable person,[491] 'mental infirmity' may not be attributed,[492] though the court was not unanimous in this finding. However, in *Humphreys*[493] and *Dryden*[494] the court directed that an accused's traits and characteristics, which may even amount to a psychological illness or disorder, should be attributed to the reasonable person.

[485] Discussed on page 142.
[486] N. Padfield *Criminal Law* (1998) 158.
[487] *Maher v. People* 10 Mich. 212 (1862).
[488] *Mancini v Director of Public Prosecutions* [1941] 3 All E.R. 272.
[489] *Regina v McCarthy* [1954] 2 All E.R. 262.
[490] *Rex v. Lesbini* [1914] 11 Crim. App. 7.
[491] *R v Camplin supra* 1978 [1978] 2 All ER 168;*R v Morhall supra* 1995 [1995] 3 All ER 659.
[492] *Luc v The Queen* [1996] 2 All ER 1033.
[493] *R v Humphreys supra* 1995 [1995] 4 All ER 1008.
[494] *R v Dryden supra* 1995 [1995] 4 All ER 987.

In 2000 in the case of *Smith*,[495] the English House of Lords sought to take a definitive step towards resolving the confusion which reigned in English law. It is debatable whether they succeeded.[496] It came very close to obliterating the objective standard of the reasonable person specified in s 3 of the Homicide Act.[497] The defendant (accused) had killed a friend during a heated quarrel over some stolen tools. The defendant suffered with severe clinical depression. The question arose whether this depression could be attributed to the reasonable person against whose conduct the defendant's conduct was to be compared. The majority of the court held that 'everything' was to be taken into account in that the issue was 'what could reasonably be expected of a person with the accused's characteristics'.[498] On the contrary though, it cautioned that certain characteristics are not to be taken into account: male possessiveness and jealousy, obsession, a tendency to violent rages or childish tantrums, violent disposition, quarrelsome or choleric temperament, drunkenness or other self-induced lack of control, exceptional pugnacity or excitability.[499] Thus, while permitting 'all' characteristics to be taken account of, it excluded from consideration those characteristics which are especially likely to undermine the accused's self-control.[500]

Significantly, in *Weller*[501] the jury was permitted to take account of obsessiveness and jealousy, contrary to the instructions of *Smith*. The court in *Rowland*[502] held that clinical depression could be taken account of, but emphasised that self-intoxication could not; nor could 'an unusually volatile, excitable or violent nature'. Again, the problem is that this attempts to permit a consideration of subjective characteristics of an accused, but excludes a consideration of those which may have a particular bearing on self-control.

Clarkson laments: 'Possibly the only thing that commentators agree upon is that the present law is

[495] *R v Smith* [2000] 4 All ER 289, [2000] Crim LR 1004, HL.
[496] Clarkson *Understanding Criminal Law* (2005) 127.
[497] Ibid 127.
[498] *R v Smith* [2000] 4 All ER 289, [2000] Crim LR 1004, HL per Lord Slynn.
[499] Ibid per Lords Hoffmann and Clyde.
[500] Clarkson *Understanding Criminal Law* (2005) 128.
[501] *R v Weller* [2004] 1 Cr App R 1.
[502] *R v Rowland* [2003] EWCA Crim 3636.

little short of a mess.'[503]

In the US, the defence requires that the provocation be adequate. This is an objective enquiry and is concerned with comparing the accused's conduct with what is expected of a reasonable person. The concern here is with whether the reasonable person would (or may[504]) have lost her/his self-control in the circumstances of the accused at the moment of her/his conduct. The origin of this objective enquiry is the English law which defined adequate provocation as the amount that would excite 'the mind of a reasonable man'.[505] From this standard, US courts distilled a number of fixed categories: aggravated assault or battery, mutual combat, commission of a serious crime against a close relative of the accused, illegal arrest, and, the often-cited instance of a husband catching his wife committing adultery.[506] In some states, only these fixed categories are recognised as presenting 'legal adequacy'.[507] Only if the court finds that legally recognised adequate provocation existed, may it refer the matter to the jury for further deliberation.[508] This rather inflexible approach has been replaced in many states by leaving the matter of what is adequate provocation to the jury to be judged on a standard of what would enrage an ordinary person and deprive him/her of the ability to reflect, deliberate, or judge.[509]

As may be noted from the previous discussion,[510] the problem of the standard of the reasonable person (with which conduct is to be compared) is what characteristics of the accused to attribute to

[503] Clarkson *Understanding Criminal Law* (2005) 129.
[504] Hall *Criminal Law and Procedure* (1992) 117.
[505] *Regina v Welsh* 11 Cox Crim. Cas 336 (1869) 338.
[506] Dressler *Understanding Criminal Law* 2nd ed (1997) 491.
[507] Low *Criminal Law* Revised 1st ed (1990) 342.
[508] Ibid 491.
[509] *Addington v. United States* 165 U.S. 184 (1897) jury instruction apparently approved; American Law Institute *Model Penal Code* (1962); Bloy *Criminal Law: Lecture Notes* 2nd ed (1996); *Fields v. State* 52 Ala. 348 (1875); Hall *Criminal Law and Procedure* (1992); *Maher v. People* 10 Mich. 212 (1862); Skelton *Contemporary Criminal Law* (1998).
[510] Under the heading 1.3.2.2 Fault on page 24.

the reasonable person.[511] This is the same dilemma that faces South African law in respect of the standard of the reasonable person in determining whether an accused was negligent.

7.3 Development of the Defence in South Africa

7.3.1 History of the Defence

South African law before 1971[512] followed an approach to what was known as the defence of provocation, which did not follow general principles. Specific rules were instead developed. These specific rules derived from England and are similar to those which pertain in England at present.

The English approach, discussed below, was imported into South Africa by the enactment of s 141 Transkeian Penal Code of 1886. The material provisions of s 141 read:

> Homicide which would otherwise be murder may he reduced to culpable homicide if the person who causes death does so in the heat of passion occasioned by sudden provocation. Any wrongful act or insult of such a nature as to be sufficient to deprive any ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool. Whether any particular wrongful act or insult, whatever may be its nature, amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact.

The defence consists, as do the English and US defences, in a 'subjective' and an 'objective' element. As discussed above,[513] these requirements proved controversial. The subjective element requires that the accused establish that s/he lost her self-control due to provocation. The objective element is that an 'ordinary person' would also have been provoked and would have lost his/her

[511] *Luc v The Queen* [1996] 2 All ER 1033; *R v Camplin supra* 1978 [1978] 2 All ER 168; *R v Dryden supra* 1995 [1995] 4 All ER 987; *R v Morhall supra* 1995 [1995] 3 All ER 659.
[512] *S v Mokonto* 1971 (2) SA 319 (A).
[513] 7.2 'Provocation' in England and the USA on page 136ff.

self-control. Provocation was a partial defence - it reduced murder to culpable homicide (or in English terminology, it reduces murder to manslaughter).

As mentioned, in 1971, the case of *Mokonto*[514] represented a turning point for the law of provocation. The court confined the Transkeian doctrine (and thus the English conception) of provocation to the territory of Transkei. It adopted a more principled approach to liability where provocation has been raised. That is, where provocation is raised in defence against a murder charge, the court is required to consider whether, on the evidence presented, the prosecution has excluded all reasonable possibilities that the accused laboured under such emotional stress that s/he lacked the intention required. It also cautioned that provocation and emotional stress may prove, rather than exclude intention.

7.3.2 Recent Developments

Until 1981, South Africa only recognised criminal non-responsibility arising out of youth or mental illness or defect (as contemplated in s 78 of the Criminal Procedure Act 51 of 1977).[515] In 1981 the Appellate Division in the case of *Chretien*[516] accepted that criminal incapacity may also arise out of intoxication. This development set the stage for other 'non-pathological' conditions to be regarded as incapacitating.[517]

The first tentative step in this direction was taken by Diemont AJA in *Van Vuuren*.[518] Diemont AJA ventured the following dicta:

> ... I am prepared to accept that an accused person should not be held criminally responsible for an

[514] Confirmed in *S v Bailey* 1982 (3) SA 772 (A) 796; *S v Mokonto* 1971 (2) SA 319 (A).
[515] Attached as 'Appendix C' (on page 268ff) for ease of reference.
[516] *S v Chretien* 1981 (1) SA 1097 (A).
[517] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 428.
[518] *S v Van Vuuren* 1983 (SA) SA 12 (A).

> unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress. *In principle there is no reason for limiting the enquiry to the case of the man too drunk to know what he is doing.* Other factors which may contribute towards the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability. But in every case the critical question is—what evidence is there to support such a conclusion? [519]

By 1990 the Appellate Division, in the case of *S v Wiid*,[520] accepted that criminal incapacity may arise out of severe emotional stress.

7.4 Eadie – The End of Non-pathological Incapacity?

The judgment of Navsa JA in *Eadie*[521] is undoubtedly now the touchstone of the law on non-pathological incapacity.[522] This decision has had a chilling effect on the practical availability of the defence, even though it remains available in theory.[523] Commentators have welcomed the decision, but have rejected the reasoning as unsound.[524]

Navsa does not consider the capacity for the appreciation of wrongfulness but focuses his judgment on the capacity for self-control. He limits claims of incapacity for self-control to

[519] Emphasis added; ibid 17.
[520] *S v Wiid* 1990 (1) SACR 561 (A).
[521] *S v Eadie* 2002 (1) SACR 663 (SCA).
[522] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 429ff.
[523] Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 204; Snyman *Criminal Law* 5th ed (2008) 265ff.
[524] Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 429; Snyman *Criminal Law* 5th ed (2008) 266ff; See, in respect of the trial court decision, Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ.

automatism (involuntariness): 'It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism.' [525]

Snyman and Burchell criticise the judgement for failing to distinguish between capacity for self-control and voluntariness.[526] As discussed above,[527] Snyman and Burchell argue that these two requirements of criminal liability are distinct and must not be confused. Upon analysis however,[528] their submissions do not appear to offer a sustainable distinction. On the other hand, Louw endorses the view that these two requirements are indistinguishable.[529] As Snyman notes though,[530] Navsa is somewhat ambivalent as to the lack of distinction between these two requirements of criminal liability: he regards the two requirements as identical, and yet requires that both are retained. [531]

What appears to be the real problem with Navsa's judgement is that he seems to assume that we are restricted to a defined, limited and rare phenomenon if only automatism is recognised as excluding capacity for self-control. However, Navsa does not observe the fierce controversy that reigns in respect of what signifies an automatism. He insists that anything short of automatism somehow allows for an excuse which would bring the administration of justice into disrepute where an accused has merely succumbed to temptation since '[o]ne has free choice to succumb to or resist temptation'.[532] Navsa's comments merely beg the question - did a particular accused have

[525] *S v Eadie* 2002 (1) SACR 663 (SCA) para 70.
[526] Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica; Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 436-9; C. R. Snyman 'Criminal Justice in a New Society' (2003) Acta Juridica; Snyman *Criminal Law* 5th ed (2008) 166ff.
[527] See under the heading 5.5 Distinction? on page 77ff.
[528] See under the heading 5.5 Distinction? on page 77ff.
[529] Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 202ff.
[530] Snyman *Criminal Law* 5th ed (2008) 168.
[531] *S v Eadie* 2002 (1) SACR 663 (SCA) para 57. Pantazis and Friedman note that Navsa adopts the view that there is no distinction between capacity for self-control and voluntariness, and yet argues that capacity for self-control should not be jettisoned. However, they state: 'The reasoning for the continued usefulness of the second part of the capacity enquiry is not clearly expressed.' (Angelo Pantazis & Adrian Friedman 'Criminal Law' In *Annual Survery of South African Law* (2002) 818). Louw asks rhetorically: 'Why ask the same question twice?'(Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 204).
[532] *S v Eadie* 2002 (1) SACR 663 (SCA) para 60.

'free choice to succumb to or resist temptation'?[533] What is most disappointing is that he does not even recognise the controversy that this question entails - it is the ultimate question of whether any human being, and in particular, the specific accused, has free-will.[534]

Navsa notes how courts have on occasion been too lenient:

> The time has come to face up to the fact that in some instances our Courts, in dealing with accused persons with whom they have sympathy, either because of the circumstances in which an offence has been committed, or because the deceased or victim of a violent attack was a particularly vile human being, have resorted to reasoning that is not consistent with the approach of the decisions of this Court. Mitigating factors should rightly be taken into account during sentencing. When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manoeuvre he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred.[535]

One possible interpretation of parts of the judgement is that Navsa introduced an objective criterion into the enquiry into capacity, which was previously an entirely subjective enquiry.[536] Louw, for instance, identifies the following passage as indicating that 'Navsa JA explicitly introduced an objective test in determining loss of control':[537]

[533] Ibid para 60.
[534] See 8 Philosophy of Mind: Responsibility on page 158ff.
[535] *S v Eadie* 2002 (1) SACR 663 (SCA) 61.
[536] Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica; Burchell *Principles of Criminal Law* 3rd Revised ed (2006); Snyman 'Criminal Justice in a New Society' (2003) Acta Juridica; Snyman *Criminal Law* 5th ed (2008).
[537] Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 202.

> I agree that the greater part of the problem lies in the misapplication of the test. Part of the problem appears to me to be a too-ready acceptance of the accused's *ipse dixit* concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction.[538]

It would seem however that this passage, together with the rest of the judgment, does not introduce an objective requirement. This passage, as Louw himself states, identifies the *misapplication* of the subjective test as the problem.[539] Fortunately Louw does go on to state that a different approach can be argued. That is, that Navsa was concerned here to remind other courts to draw inferences carefully, particularly inferences concerned with an accused's state of mind in which the accused's own account will feature strongly.[540] Burchell refers instead to the passage in which Navsa states – in what appears to beg the question: 'One has a free choice to succumb to or resist temptation.' Burchell notes how this may possibly be interpreted to mean that our courts must now refuse claims of non-responsibility on policy grounds.[541] Instead Burchell, [542] concludes that Navsa was concerned here with how inferences should be drawn. Burchell goes even further:

> The *Eadie* judgement did not, and from the point of view of precedent could not have, blatantly introduced hitherto non-existent objective elements into the defence of lack of capacity.[543]

[538] *S v Eadie* 2002 (1) SACR 663 (SCA) para 64.
[539] Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 202.
[540] Ibid 203.
[541] Louw goes further to argue that Navsa JA clearly saw this as an introduction of an objective test since he realised that he was inviting criticism – by what Louw apparently mistakenly attributes to Navsa: 'Critics may describe this as policy yielding to principle (*sic*)' (ibid 203). Since principle was that the test was hitherto entirely subjective, this statement cannot support the argument made by Louw. If anything, this statement means that the subjective approach shall prevail. What Navsa did say may, at first, appear to support Louw's submission. However, in its full context,it seems little more than a practical guide: 'Critics may describe this as principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence.' (*S v Eadie* 2002 (1) SACR 663 (SCA) para 64).
[542] Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 38; Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 439.
[543] Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 43.

Pantazis and Friedman[544] unequivocally identify Navsa's concern as being that inferences of involuntariness should be carefully drawn. There appears no basis on which to conclude that Navsa intended to introduce any objective test for capacity. However, what is notable is that several commentators have argued that an objective normative component ought to be introduced into concerns with capacity.[545] These arguments will be endorsed and addressed below in the context of the proposed new form that the defence of non-responsibility ought to take.[546]

Ultimately, Navsa's comments reduce to little more than an insistence that courts should not recognise incapacity unless there is incapacity.[547] His judgment begs the question as to when a lack of free will should be recognised. He has also not recognised that involuntariness is a concept which offers no more clarity than incapacity for self-control.[548] The judgment is at best unhelpful.

7.5 Non-pathological Incapacity versus Pathological (Mental Illness/Defect) Incapacity

The defence of non-pathological criminal incapacity is available where an accused lacks any of the relevant functions: the ability to appreciate the wrongfulness of his/her conduct and the ability to act in accordance therewith. As indicated above, the defence is not qualified by the requirement of

[544] Pantazis & Friedman 'Criminal Law' In *Annual Survery of South African Law* (2002) 818.
[545] Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 39ff & 43 following Tadros; Burchell *Principles of Criminal Law* 3rd Revised ed (2006); Sivakalay Pather 'Provocation: Acquittals provoke a rethink' (2002) 15 SACJ; Snyman 'Criminal Justice in a New Society' (2003) Acta Juridica; Snyman *Criminal Law* 5th ed (2008) 166 & 9; Tadros 'The Characters of Excuse' (2001) 21 Oxford Journal of Legal Studies.
[546] See 9 Implications and Recommendations on page 207ff.
The model of responsibility proposed will certainly introduce a normative component but on a different basis to other suggestions.
[547] This seems tautologous and necessarily true, until one notes that there are those who argue that incapacity should sometimes not be recognised even where the accused had no capacity (Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 216; Snyman *Criminal Law* 5th ed (2008) 166).
[548] See chapter 5 Capacity to Conduct oneself in accordance with an Appreciation of Wrongfulness and Voluntariness on page 67ff.

any particular mental disorder or condition.

7.5.1 Defining the 'non-condition'

No specific mental state or condition is required, except that the mental state of the accused must:

1. not constitute a mental illness/defect – as defined by the *Stellmacher* definition;
2. deprive the accused of some functional capacity.

Our courts have accepted that such a condition may consist in an 'emotional storm',[549] 'acting ... subconsciously',[550] or a 'total disintegration of the personality'.[551] The psychological/psychiatric foundation for these concepts is, however, left unexplained. As a result, confusion has followed. Louw notes:

> [P]rior to the intoxication decision of *S v Chretien* 1981 (1) SA 1097 (A), the question of criminal capacity seldom arose in our courts. In fact, it was an inquiry usually limited to the mentally ill and to the very young. In the past 20 years it has shifted from the periphery of our law to a fully developed defence available to those who kill when provoked.
>
> Despite this shift, its precise nature has not been clarified in law. This lack of clarity has been exacerbated by confusing decisions of our courts. This confusion is partly a result of the development of the defence of incapacity, particularly its extension to cases involving provocation and mental stress, and partly a result of its application in practice.[552]

Can some sort of defining criteria be identified?

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[549] *Rex v Kennedy* 1951 (4) SA 431 (A); discussed in Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 4.40ff.
[550] *S v Arnold* 1985 (3) SA 256 (C).
[551] *S v Laubscher* 1988 (1) SA 163 (A).
[552] Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 206-7.

7.5.1.1 Non-pathological

On the basis that the definition of the pathological mental condition required for an insanity defence is unclear, it is to be expected that the boundary between pathological and non-pathological non-responsibility will also be vague. So vague is the boundary that it is possible to conceive of a state of severe emotional stress as a pathological condition, in spite of any attempt to restrict pathological conditions to those arising from within.[553]

The Canadian case of *Rabey v The Queen*[554] illustrates how it is possible to regard a state of severe emotional stress as a disease of the mind (the Canadian equivalent of South Africa's 'mental illness/defect'). The male accused had attacked a fellow female student in whom he had developed a romantic interest. When he discovered that she did not reciprocate his romantic inclinations, he attacked her with a rock and tried to strangle her. He claimed that he had suffered severe emotional shock, was in a dissociative state, and lost control of his behaviour. The question arose whether his state of severe emotional stress constituted a disease of the mind or was to be regarded as a non-pathological condition. The court declared:

> In my view, the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a 'disease of the mind.' To hold otherwise would be to deprive the concept of an external factor of any real meaning. In my view, the emotional stress suffered by the respondent as a result of his disappointment with respect to Miss X cannot be said to be an external factor producing the automatism within the authorities, and the dissociative state must be considered as having its source primarily in the respondent's psychological or emotional make-up. I conclude, therefore, that, in the circumstances of this case, the dissociative state in which the

[553] Merryll Vorster 'An analysis of the amnesias with specific reference to "non-pathological sane automatism" ' University of the Witwatersrand 2002); Merryll Vorster Personal Communication 13 June 2011.
[554] *Rabey v. The Queen* 1980 54 CCC (2d) 1 (SCC).

> respondent was said to be, constituted a 'disease of the mind.'[555]

The judgment seems to turn on the notion of causation (an external or internal cause), which as noted,[556] is quite unhelpful. The condition of the accused constituted a disease of the mind according to the court on the basis that it had 'its source primarily in the respondent's psychological or emotional make-up'. This approach begs the question: where else could the source of a condition of severe emotional stress lay other than (primarily) in an accused's psychological or emotional make-up? One may be reminded of the dilemma posed by the facts of *Quick*.[557] In *Quick*, if one identified his diabetes as the cause of the defendant using insulin, it would appear that a disease of the mind ought to have been recognised – contrary to the decision. Likewise in *Rabey*. If the rejection by his romantic interest was regarded as the cause, it would seem that – on the causation argument – a disease of the mind should not have been recognised. Again we see that the argument regarding the origin of a condition offers no real guidance. While the mental disorder requirement of pathological incapacity remains undefined, no clear distinction can be drawn between pathological and non-pathological non-responsibility.

7.5.1.2 Duration

Popular parlance distinguishes non-pathological from pathological (mental illness/defect) incapacity on the basis that non-pathological incapacity is temporary - hence the expression 'temporary insanity'. However, our law has held the duration of the disorder not to be a relevant consideration in respect of whether a condition constitutes a mental illness/defect.[558] Therefore duration cannot distinguish the legal concepts of non-pathological from mental illness/defect

[555] Ibid 7.
[556] See under the heading 6.6 Endogenous Origin on page 120ff.
[557] *R v Quick* [1973] QB 910, [1973] 3 All ER 347, discussed above on page 124.
[558] *R v Holiday* 1924 250 (AD); *S v Campher* 1987 (1) SA 940 (A) 965; *S v Laubscher* 1988 (1) SA 163 (A) 167; *S v Mahlinza* 1967 (1) SA 408 (A) 417. In respect of the English law, see *R v Sullivan supra* 1984 [1984] AC 156, [1983] 2 All ER 673 172.

incapacity.

7.5.1.3 Dysfunctional and Deviant

Although no specific mental disorder is required, the mental state required must be such that the accused is dysfunctional; that is, lacks either or both of the abilities to appreciate the wrongfulness of his/her conduct, or to act in accordance therewith. This state of dysfunction represents a mental abnormality – on the law's conception of what constitutes normal mental functioning: human beings possess free will and are capable of distinguishing between right and wrong and of resisting temptation to do wrong.[559] It is therefore dysfunctional and deviant. In psychopathology, dysfunction is a prominent consideration in identifying a mental pathology. Yet, our law does not

[559] Snyman states: '...Freedom of will must, for the purposes of criminal liability, be construed as man's ability to rise above the forces of blind causal determinism; that is his ability to control the influence which his impulses and passions and his environment have on him. In this way he is capable of meaningful self-realisation: of directing and steering the course of his life in accordance with norms and values - something which an animal is incapable of doing since it is trapped by the forces of instinct and habit. For the purposes of criminal law in general, and of determining culpability in particular, one should merely be able to say that, in the particular circumstances and in the light of our knowledge and experience of human conduct, X *could* have behaved differently; that, had he used his mental powers to the full, he *could* have complied with the provisions of the law. The normal sane person who is no longer a child may therefore be held responsible for his deeds and be blamed for his misdeeds. This is also the reason why young children and mentally ill people are not punished when they perform unlawful acts.' (bold added; Snyman *Criminal Law* 5th ed (2008) 151).
'Before a person can be said to have acted with culpability, he must have had criminal capacity [footnote omitted] an expression often abbreviated simply to "capacity". A person is endowed with capacity if he has the mental abilities required by the law to be held responsible and liable for his unlawful conduct. It stands to reason that people such as the mentally ill (the "insane") and very young children cannot be held criminally liable for their unlawful conduct, since they lack the mental abilities which *normal adult people* have.' (emphasis added; ibid 159-60).
The Rumpff Commission report notes: 'Society—and the jurist—proceed on the assumption that a "*normal*" person is criminally responsible. Thus Gardiner and Lansdown state ... "Where through disease or defect of intellect a person has been deprived of the power of bringing to bear upon his conduct the functions of a normal rational mind, there can be no criminal responsibility."' (emphasis added; Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) par 2.5).
'Through insight, reasoning and abstract thinking, man is capable of setting himself a goal which he can pursue voluntarily and deliberately. Such a goal may well constitute a far stronger motivating force in his behaviour than any physiological or social drive. Emotions can. of course, influence a person's goals and motivation, but intense emotions are subject to volitional control and are not necessarily blind impulses.' (ibid para 9.25).
'Two psychological factors render a person responsible for his voluntary acts: firstly, the free choice, decision and voluntary action of which he is capable, and secondly, his capacity to distinguish between right and wrong, good and evil, (insight) *before* committing the act.' (original emphasis; ibid para 9.30).

recognise this as mental illness/defect.

Furthermore, as discussed above,[560] this dysfunction is regarded in practice as indicating the presence of a mental illness or defect. However, in theory this is denied.

7.6 Expert Opinions

Every witness (except W4 and W9 who consistently refuse to express an opinion on this matter) expressed the view that rage (or severe emotional stress), can incapacitate, even in the absence of any mental illness or defect. For example, W12's view is as follows:

> **Judge**: Can people ever stop themselves from acting in a situation where there is no mental illness and they are acting in rage or anger or, the way you've just explai- mentioned? Is that, do you think it's possible?
> **Witness 12**: It doesn't have to be a mental illness.
> **Judge**: No, but assuming there is no mental illness? When a person acting out of rage, he sees his his wife in bed with another man, comes home, he has he has a gun, happens to have a gun with him. And in blind rage, as it's called, we use the term "blind rage", he shoots this man, kills him.
> **Witness 12**: That, that's often that's
> **Judge**: - Could he stop himself?
> **Witness 12**: That is often the case that he um would not be able to stop himself.

W8 states as follows:

> **Counsel**: So it appears to me then that you regard rage, or anger or stress as capable of depriving a person of the capacity for appreciation of wrongfulness or self-control. Is that correct?
> **Witness 8**: I do.

[560] See on page 128.

Two witnesses (W5, W11) also express the contrary opinion (though they accept non-pathological incapacity). They express the view that rage (or severe emotional stress) cannot incapacitate an individual. W5, for instance, says that in the absence of a mental illness or defect a person possesses criminal capacity:

> **Judge**: What are your views then [W5] about the number of cases, and there have been quite a few now, which have spoken about non-pathological incapacity, are you deeply suspicious of those cases or do you feel that they are not appropriate?
> **Witness 5**: I feel they are not appropriate. That's my strong feeling. I think it has really nothing to do with psychiatry and but it has in that way, that if they claim that there was a lack of criminal capacity due to one of these conditions like, Advocate Grant mentioned, anger is one. Then I think it is almost our duty to stand up and say this is not so. Because in spite of the emotions and everything a person can very well make rational decisions.
> **Judge**: So an angry person can always stop himself from killing somebody.
> **Witness 5**: Yes, exactly unless he is mentally ill or has has -
> **Judge**: A fully functioning angry person can always stop himself.
> **Witness 5**: Yes.
> **Judge**: There will never be a situation where he can't stop himself.
>
> **Witness 5**: Absolutely, yes and I think that's the only reason why I am still willing to go to these trials is just to state that.

Both (W5 and W11) are inconsistent on the basis that it is clear that they recognise non-pathological incapacity. W5, says as follows:

> **Witness 5**: I think that is, I think we all have times in our lives where we did things out of emotion and we actually knew it was wrong but we still did it because we were so emotional and ja at the time we really couldn't control ourselves ...

W11, while asserting the opposite view, concedes the notion of non-pathological incapacity - incapacity without any mental illness or defect:

Judge: So you accept that people can be provoked to violence, normal people can be provoked to violence in certain circumstances.

Witness 11: Oh, absolutely.

Judge: You say they don't lose their ability to control themselves they just choose not to.

Witness 11: Correct.

Judge: In all circumstances?

Witness 11: Yes.

Judge: They always have the ability -

Witness 11: Except where you have the kind of circumstance where an individual then says to you I don't remember what happened and they participate in a series of actions which could only have been habitual and these can be over a period of minutes or over a period of hours, so that what I say there is that they have entered a state which is different and that those individuals have an underlying susceptibility to enter that kind of state.

Judge: But once in that state they can't control their actions, you say.

Witness 11: Yes.

Judge: Even though they have no mental illness.

Witness 11: They have no awareness of what they are doing they have no memory for it and they engage in a series of complex actions, which are habitual.

Judge: But it's not a mental illness though?

Witness 11: No.

W5, a psychiatrist, commits a further inconsistency though. She clearly has an 'expert' opinion on the matter - indeed she says that it is 'the only reason why [she is] still willing to go to these trials is just to state that ...[a mentally healthy but angry person can always stop himself]' (W5:52 (1085-6)). However, she unreservedly excludes herself from being capable of offering any expert opinion on the matter:

Counsel: … Do you regard inquiries concerned with this sort of scenario as a moral inquiry rather than psychiatric, medical, or psychological one.

Witness 5: Yes.

Counsel: You regard this as a moral question rather?

> **Witness 5**: I think that that election is beyond the limits of psychiatry to decide in cases of non-pathological incapacity. I don't think it has anything to do with psychiatry because we are dealing with healthy persons. So we can only talk about pathology but we cannot talk about general human emotions. I mean the next guy on the street is just as capable of doing that as we are.

And again:

> **Judge**: What are your views then [W5] about the number of cases, and there have been quite a few now, which have spoken about non-pathological incapacity, are you deeply suspicious of those cases or do you feel that they are not appropriate?
> **Witness 5**: I feel they are not appropriate. That's my strong feeling. I think it has really nothing to do with psychiatry ...

W5 is not the only witness who expresses the view that s/he can offer no expert opinion and yet issues an opinion. Six witnesses (46 per cent)[561] claim that they can express no expert opinion, yet do express an opinion. While it is clear that W5's opinion is offered as an expert witness, for the rest,[562] that is not so clear. W2 and W3 are clear that the opinion that they express is not 'expert'. They qualify the one opinion they each express (that rage can incapacitate) as not being 'expert'.

A related issue was the witnesses' views concerning whether the question of non-pathological incapacity was one which is based upon psychiatry or psychology or whether it was rather a normative concern based upon an enquiry into what was reasonable or understandable conduct in the circumstances.

Five witnesses (38 per cent)[563] considered the enquiry as at least partly based in psychiatry or psychology, while the remaining eight witnesses (62 per cent)[564] all regarded the enquiry as normative in nature. No conflict is evident in this respect. What does seem to require some comment is the high degree of concurrence between those who considered themselves unqualified to express an expert opinion and those who hold the view that the enquiry was normative. In

[561] W2,W3,W5,W6,W7,and W10.
[562] Particularly W6, W7 and W10.
[563] W1, W8, W10, W11, W13.
[564] W2, W3, W4, W5, W6, W7, W9, and W12.

general,[565] those who restrict themselves from expressing an 'expert' opinion, do so on the basis that they consider that the matter is normative only, whereas those who do not restrict themselves, consider the matter to be, to some degree, concerned with psychology or psychiatry.

7.7 Conclusion

The English and US defence is a dual subjective objective test. The subjective component appears to conflate conative and cognitive functioning. The objective component appears to be stuck in the double bind regarding how to construct an objective standard (a reasonable person) that remains an objective standard, but is fair.

Following on the failure of our law to define the 'pathological' condition required for an insanity defence,[566] it follows that the distinction between pathological and non-pathological non-responsibility is ill defined. The leading case on non-pathological non-responsibility (*Eadie*) has only focused attention on the problem of when a particular accused lacks responsibility.

A problem that appears to underlie most, if not all, of the problems with our law regarding responsibility is that we do not seem to have a well considered model of responsibility.[567] We cannot continue to assume that human beings are free indeterministically because to contemplate what philosophy tells us may undermine the criminal justice system. We must engage with whether philosophy may hold a better model of responsibility. I will argue – quite contrary to our initial intuitions – that determinism is to be embraced.

[565] With one exception either way: Only one witness (W10) of the eight witnesses who regarded themselves as unable to express an expert opinion on such matters, considered the matter as properly falling, at least to some degree, within the realm of psychology or psychiatry. Those who did express the view that they could offer an expert opinion on the matter - also registered one exception (W12) - who expressed the view that the matter was normative.
[566] Discussed above in chapter 6 Pathological Non-Responsibility on page 101.
[567] Discussed above under the heading 3.2.3 Current Model of Responsibility on page 49.

Part III: The Philosophy of Responsibility

8 Philosophy of Mind: Responsibility

8.1 Introduction

This chapter provides an overview of the central issues in the debate concerning whether human beings have free will and are **responsible** for their conduct. It includes a critical analysis of the model of **responsibility** upon which our law is currently based. It also includes a discussion of various alternatives and proposes a model that our criminal law ought to adopt.

This topic straddles several disciplines and the discussion here is directed at scholars from all disciplines. I have deliberately chosen a style that is simple. It requires no prior knowledge of philosophy, psychology or law. Nevertheless, in order to grasp the topic properly, some rather complex and difficult concepts have to be engaged. Technical terms and jargon will be kept to a minimum. However, because complex ideas cannot continually be explained, some jargon will be adopted where necessary to represent, or as a name for, some complex ideas. For this purpose, a glossary is included, at the end of the chapter, [568] for reference. Words appearing in **bold**, or derivatives thereof, are included in the glossary. Inevitably though, however simply the foundational concepts might be explained, some degree of complexity will arise. In addition I have split the discussion into two parallel parts. The main text sets out the basic argument, while further discussion of some more technical points[569] that may detract from the central argument appears in footnotes.

[568] See para 8.9 on page 203ff.

[569] In particular, a discussion of Honoré regarding the role of luck (footnote 581); Heisenberg regarding the source of uncertainty in quantum physics (footnote 606); Frankfurt's thought experiment regarding the requirement that an agent must be able to do otherwise (footnote 640) and some critical discussion of whether his thought experiment

My arguments are normative arguments that are not prone to mathematical proof. Some, such as Peter Strawson – an eminent and respected philosopher – have argued that **responsibility** may be identified primarily by the indignation we feel, which he calls, our 'reactive attitudes'.[570] My arguments, as do all arguments in this realm of philosophy (metaphysics) appeal to one's intuitions. Furthermore, many of my examples raise classic problems in criminal law which have simple answers elsewhere in the criminal law, perhaps under unlawfulness or **fault**.[571] My focus is **responsibility** and whether we feel that blame is appropriate in the circumstances sketched. It is only by considering these examples and when blame is appropriate that a coherent model of **responsibility** may be built.

Responsibility is concerned with whether people may be praised or blamed for what they do. Further, whether they may be praised or blamed for the sake of it – not because it will produce some possible future benefit for the person concerned or society,[572] but only because they deserve it.[573]

succeeds (footnote 641); and Wolf, regarding the responsibility of an agent who had an adverse experience and the 'abuse excuse' in general (footnote 694).

[570] Christopher Kutz 'Responsibility' In *The Oxford Handbook of Jurisprudence and Philosophy of Law* edited by Jules Coleman and Scott Shapiro (2002); Peter Strawson 'Freedom and Resentment' Paper presented at the Proceedings of the British Academy 1962; Gary Watson 'Responsibility and the Limits of Evil: Variations on a Strawsonian Theme' In *Free Will* edited by Robert Kane (2002).

[571] 1.3 Criminal Liability: General Requirements on page 19ff. Responsibility is a foundational requirement required for all criminal liability. It enquires whether the accused is worthy of blame, irrespective of his/her actual mental state or conduct, as may be identified under the technical requirement of *fault*. Responsibility concerns whether the conduct or state of mind of the accused, may be attributed to the accused.

[572] As is the concern of utilitarianism and the various *forward* looking justifications for punishment: deterrence, prevention, and rehabilitation.

[573] As is the concern of retribution, which in contrast to the forward looking justifications of utilitarianism (see footnote 572), is *backward* looking. It finds its justification in the past. Responsibility in this sense, can only attach to past conduct and fits with the requirement of criminal law that it only punishes conduct, rather than mere thoughts or dispositions (Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 73; Snyman *Criminal Law* 5th ed (2008) 53).

8.1 Philosophy of Mind: Responsibility/Introduction

Responsibility is an essential attribute of being human. It is central to our value as persons. Spurgeon Hall notes:

> … our free will and our reason are the very capacities that constitute our human dignity and confer on us our intrinsic worth as persons.[574]

The problem of whether human beings have free will and are **responsible** is inextricably linked to the effect of **determinism** upon human beings. This is known as **psychological determinism**.[575] Intuitively people may feel that they cannot be both determined – psychologically – and free.[576] This chapter will discuss this intuition and how we may regard ourselves as **responsible**, in spite of or even because we are subject to **psychological determinism**.

We will also encounter another powerful intuition – that we cannot be free or **responsible** if we could not do otherwise than what we actually did. This is the essence of *capacity* and will require that we understand what we must mean when we speak of capacity.

A person's **reasons** for acting will prove central to the discussion that follows. A person's **reasons** for his/her conduct explain why s/he acted.[577] I use the term 'reasons' and the concept of a

[574] Richard A. Spurgeon Hall *The Ethical Foundations of Criminal justice* (2000) 95. See also Ashworth *Principles of Criminal Law* 2nd ed (1997) 26.

[575] Determinism as it operates in and upon human beings, including the effects of genetics, biological and neurological factors, and the environment.

[576] Gazzaniga and Steven note: 'Perhaps the most fundamental implication of 21st-century brain science is that a way may exist to evaluate free will. The logic goes like this: The brain determines the mind, and the brain is subject to all the rules of the physical world. The physical world is determined, so our brains must also be determined. If so, then we must ask: Are the thoughts that arise from the brain also determined? Is the free will we seem to experience just an illusion? And if free will is an illusion, must we revise our conception of what it means to be personally responsible for our actions?'(Michael S. Gazzaniga & Megan S. Steven 'Neuroscience and the Law' *Scientific American Mind* April 2005 1).
Kane states: 'The free will problem arose because people assumed there was some kind of conflict between free will and determinism.' (Robert Kane ed *Free Will* Edited by Steven M. Cahn (2002) 9)
See also Stephen J. Morse 'Reasons, Results, and Criminal Responsibility' (2004) ILL L Rev 430.

[577] A reason is (at least) a pair of desires and beliefs: I *desire* food and *believe* it can be acquired from the shop. Mcginn states that ' ... a reason is a rationally structured combination of desires and beliefs'. (Colin McGinn 'Action

person's 'will' synonymously as a reference to the composite[578] of factors which play a role in the psychological explanation of choice,[579] including a person's beliefs, desires and values.[580] So, for instance, when asked why a person drank water, reference to his/her **reasons** must explain the conduct: s/he was thirsty and believed that drinking the water would quench his/her thirst.

Let me declare at the outset that I will presume as self-evident that **responsibility** cannot arise out of randomness, arbitrariness or capriciousness.[581] I will rely upon this presumption as a *premise*.

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and Its Explanation' In *Philosophical Problems in Psychology* edited by Neil Bolton (1979) 24). To this, one may perhaps add values. See also Stephen J. Morse 'New Neuroscience, Old Problems' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Brent Garland (2004) 159 & 60.

[578] It is recognised that to speak of the *separate* components of the will is admittedly artificial and, if pursued, may easily lead to difficulty. It is not proposed here, except for the sake of convenience and analysis, that the will, that is, a person's reasons, can be treated as independent identifiable entities separate from other mental states.

[579] Susan Wolf 'Asymmetrical Freedom' (1980) 77 Journal of Philosophy 152.

[580] Though I am unable to think of any other possible components (beyond beliefs, desires, and values) I am not proposing that the relevant psychological factors are limited to these particular components. Nevertheless, the argument that follows does not depend on the will being comprised exclusively of these reasons and I do not expect that any additions to this list would alter the argument that follows.

[581] Michael S Gazzaniga & Megan S Steven 'Free Will in the Twenty-first Centaury: A Discussion of Neuroscience and the Law' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Brent Garland (2004) 54-5; Mark Leon 'Responsible Believers' (2002) 85 The Monist 425 & 31; Morse 'New Neuroscience, Old Problems' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Garland (2004) 175-6. Cf Honoré (Tony Honoré *Responsibility and Fault* (1999) 9, 14, 23-4, 34, & 131ff) who apparently asserts that one may be responsible for one's luck. However, there appears some contradiction in the argument of Honoré where, arguing for responsibility based on luck, he notes that action requires intention (conduct for your own reasons), but that somehow, one may nevertheless incur responsibility where for 'those aspects and consequences of our conduct that we did not intend.' However he explains, that this requirement of intentionality is only that the conduct must be caught under some description of intentionality (ibid 143). This is consistent with what is argued above, that action consists in movement for a reason, though any reason. It is clear however, that the responsibility which Honoré seeks to impose based upon luck, would establish merely action as such, and perhaps the *actus reus* of the elements of criminal liability. While one must acknowledge when one has killed someone, even if by accident (ibid 129), or that something else unintended has happened, that does not conclude whether I am responsible, only that 'the person or group in question must accept what has happened as their doing and so open to assessment, favourable or unfavourable. If what has happened was bad, they will have a moral obligation to do something to put it right, for example to acknowledge it and apologise, even though they are not morally to blame' (ibid 133). He distinguishes blame from responsibility such that it is clear that responsibility is restricted to action, which if 'bad', may constitute the *actus reus* of criminal liability. (ibid 127) On this peculiar distinction between responsibility and blame, this thesis is concerned with something other than responsibility, but the terminology of responsibility, will continue to be used for consistency with the general literature on the topic. Nevertheless, he does concede that, for the responsibility that is the focus of this thesis, capacity (of a general variety) is required: 'Before imposing sanctions or attaching blame, law and morality require something more than that the person concerned is responsible for what they have done. One further requirement common to both, we have seen, is that in the circumstances the agent had the capacity to reach a rational decision about what to do.' (ibid 138) The point to be observed is that luck cannot (and is not even suggested to) be a sound foundation for true responsibility.

We do not blame people for accidents,[582] for instance. This is fundamental to the notion of blameworthiness in law and is captured by the Latin maxim *actus non facit reum, nisi mens sit rea*: an act is not wrongful unless it is done with a guilty mind.[583] Alternatively, we do not credit or praise anyone if they throw a double six on a dice.[584] We do not praise them even if they throw a double six, two or even three times in a row. We regard them as having been 'lucky'. But their luck does not make them intelligent or good. Their luck actually says nothing about them. Imagine that an **agent** was able to throw a double six, ten times in a row.[585] We may think one of two things: the **agent** is cheating, or there is something in or about the **agent** that allows him/her to do so. But before we can credit the **agent** with any 'ability' we need to be able to attribute some control to the **agent**, over the dice, which removes the fall of the dice from being simply random. We need to know that the **agent** is not just lucky, but that there is something in or about the **agent** that we can attribute praise or blame to. This is fundamental and will operate as a second premise, related and derived from the first: that we can only attribute **responsibility** to an **agent** when their conduct reflects something in or about them.

What will be argued here is that some thought needs to be given, and possible revision made, to our understanding of some of our most deeply held beliefs and intuitions. I will argue that we are **responsible** only to the extent that we are determined and even if we could not do otherwise – at least, not in the actual circumstances. All of this may seem, at first, outrageously counter-intuitive. I hope to show that, on reflection, it is not. I will argue that not only is this the way the world is, but also that it is the way we would want it to be.

[582] In the sense of 'mere movements' described on page 190.
[583] Stephen *A History of the Criminal Law of England* Vol II (1883) 95.
[584] Used here to represent an instance of randomness – though, as I discuss later (see on page 166), the throw of a dice should be regarded as an instance of *chance* rather than a manifestation of true randomness.
[585] I expect that this is statistically improbable.

8.2 Determinism

Determinism is the doctrine that all events are products of prior causes. It proposes that, given the present state, and the laws of nature, there can be only one possible future state.

Psychological **determinism** has given rise to two schools of thought regarding its implications for **freedom** and **responsibility**: **Incompatibilism**, and **Compatibilism**.[586]

- ***Incompatibilism***: the doctrine that **psychological determinism** and **responsibility** are incompatible; that is, if **determinism** operates upon and in human minds, human beings cannot be **responsible** for their conduct. **Hard-determinism** and **libertarianism** are opposing views within this school of thought.[587]
    - ***Hard-Determinism***: the **incompatibilist** doctrine that **psychological determinism** operates in and upon human beings so that human beings are not **responsible** for their conduct.
    - ***Libertarianism***: the **incompatibilist** doctrine that human beings are **responsible** for their conduct and that therefore **psychological determinism** does not operate in and upon human beings.
- ***Compatibilism***: the doctrine that **psychological determinism** and **responsibility** are compatible; that is, even if **determinism** operates in and upon human minds, human beings are nevertheless **responsible** for their conduct. This may be understood as '**soft-determinism'**, in contrast to **'hard determinism'**.

The various schools of thought may be represented in a diagram (See 'Figure 3') as follows:

[586] Compatibility refers to whether two statements can concurrently be true. If two statements are compatible, the truth of one does not render the other false (exclude it as false), the other statement may be true. If two statements are incompatible, the truth of one renders the other false (excludes it as false). See Elliot Sober *Core Questions in Philosophy: A Text with Readings* 4 ed (2005) 313-4.
[587] Morse 'Reasons, Results, and Criminal Responsibility' (2004) ILL L Rev 431.

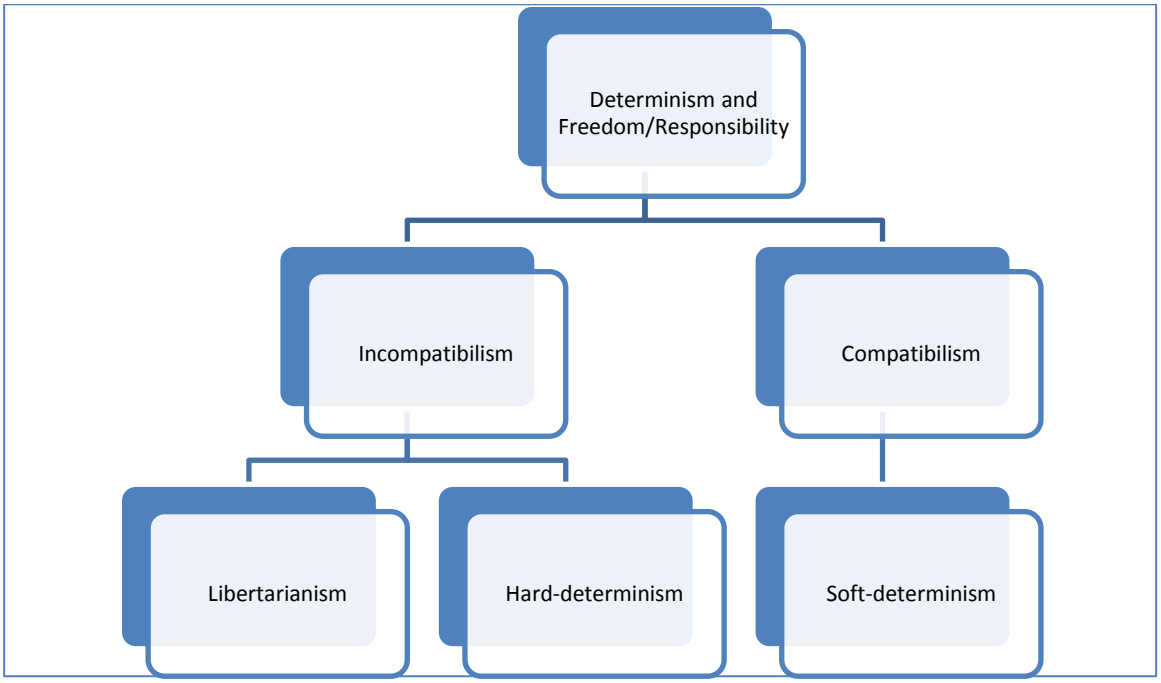


Figure 3: Compatibility of Freedom/Responsibility and Determinism

Libertarians resist the idea that we are determined in our thoughts and actions because they hold that if this were true, humans would amount to little more than, perhaps, complicated clocks. Our minds would be governed by the workings of the little gears and cogs that determine our thoughts and **reasons** and our conduct follows accordingly, as would the hands of a clock. In this conception, there is little scope for **freedom** and **responsibility**.

Social sciences, such as neuropsychology, cognitive, social, systems, behavioural, psychodynamic (including psychoanalytic[588]) psychology,[589] are overwhelmingly deterministic in their explanations of human behaviour. They apply **determinism** to human behaviour embracing

[588] Freudian theory.
[589] With the possible exceptions of humanist and existential psychology.

psychological determinism.[590] Human and Social sciences, particularly neuropsychology and cognitive neuropsychology, with the help of functional brain scans, are showing more and more how our minds work and that they are determined.[591] It seems therefore that we are, to an extent and perhaps to a large extent, **psychologically determined**.

Psychological determinism is often received with a dread, as if it necessarily means that we have no control over what we do and that what we do is inevitable irrespective of what we may want. **Psychological determinism** does not imply inevitability, [592] at least not in the way that would disempower an **agent** or take control of his/her life and conduct. **Determinism** actually demands the opposite: that what the **agent** does must be up to the **agent**; s/he must be in control. It is at this point that the distinction between **determinism** and **fatalism** must be drawn: if **fatalism** prevailed,

[590] Reznek *Evil or Ill: Justifying the Insanity Defence* (1997) 9-10 Redlich and Freedman observe: 'As a technology based on the behavioral and biological sciences, psychiatry takes a deterministic point of view. This does not mean that all phenomena in our field can be explained, or that there is no uncertainty. It merely commits us to a scientific search for reliable and significant relationships. We assume causation - by which we mean that a *range* of similar antecedents in *both* the organism and environment produces a similar *set* of consequences. In general, we follow the procedures of basic sciences and attempt to determine the limits within which a range of antecedents has a high probability of producing similar results. The principles and basic methods of studying normal and abnormal behavior in individuals and in populations, in clinical practice, as well as under experimental conditions, are the same as in other naturalistic sciences.' (F. C. Redlich & D. X. Freedman *The Theory and Practice of Psychiatry* (1966) 79-80).
Several submissions to this effect were submitted to the Rumpff Commission (Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) Ch 5, particularly subparas 28 & 34: 'the scientific or deterministic dogmas of the medical man can never be reconciled with the humanistic and free-will approach of the jurist').

[591] Kane notes: 'While determinism has been in retreat in the physical sciences in the twentieth century, developments in sciences other than physics - in biology, neuroscience, psychology, psychiatry, social and behavioral sciences - seem to have been moving in the opposite direction. They have convinced many persons that more of their behavior is determined by causes unknown to us and beyond our control than previously believed. These scientific developments are many, but they surely include a greatly enhanced knowledge of the influence of genetics and heredity on human behavior. (Note the controversy caused by the recent mapping of the human genetic code which naturally arouses fears of future control of behavior by genetic manipulation.) Other relevant scientific developments include greater awareness of biochemical influences on the brain; the susceptibility of human moods and behavior to drugs; the advent of psychoanalysis and other theories of unconscious motivation; the development of computers and intelligent machines that mimic aspects of human thinking in deterministic ways (like Deep Blue, the chess master computer); comparative studies of animal and human behavior suggesting that much of our motivation and behavior is a product of our evolutionary history; and pervasive influences of psychological, social, and cultural conditioning upon upbringing and subsequent behavior.' (Kane ed *Free Will* Edited by Cahn (2002) 8). See also G. H. Vandenberg *Court Testimony in Mental Health: A Guide for Mental Health Professionals and Attorneys* (1993) 18; Wrightsman, Nietzel & Fortune *Psychology and the Legal System* 3 ed (1994) 364.

[592] Dennet is clear, determinism simply does not imply inevitability. (Daniel Dennett *Freedom Evolves* (2003) 25 & 56) See also Morse 'Reasons, Results, and Criminal Responsibility' (2004) ILL L Rev 439 & 43.

the conduct of an **agent** would occur irrespective of the **agent** and what the **agent** chose and had reason to do, and even irrespective of what the agent does. It is therefore not attributable to the **agent** because it occurs irrespective of the **agent**. The position is otherwise under **determinism**: what the **agent** does is determined by the **agent**'s **reasons** and choices. It is therefore attributable to the **agent** because it is produced by the **agent** – s/he does what s/he wants. [593]

Libertarianism, as noted, adopts the view that **freedom**/responsibility and **determinism** are incompatible. That is, if **psychological determinism** operates within us, we cannot be free and **responsible** for our conduct. It is worthwhile to consider whether **indeterminism,** if it operates upon and in us, would make us **responsible**, or set us free.

8.3 Indeterminism

Indeterminism is the doctrine that what happens in the future is independent or not simply a function of the present. That is, irrespective of the present, there are endless possible futures. **Indeterminism**, in its true sense must be contrasted with mere **chance**. **Indeterminism**, in its true sense, refers to randomness, arbitrariness or capriciousness

To say that something is subject to **chance** does not *necessarily* mean that it is indeterminate. The spin of a dice is subject to **chance**. But it is not, properly understood, an indeterminate event. It is determined by various parameters, including the force and direction exerted upon the dice, and the surface upon which it is thrown. If all parameters were known, the throw of a dice could be perfectly predicted. **Chance** therefore, properly understood, describes a state in which a lack of knowledge (an **epistemological** impediment) makes predicting the future state of something,

[593] It may be objected that in a completely determined world, the ultimate end will be the same whether determinism or fatalism operates. This still does not undermine the causal significance, for a deterministic universe, of the intervening events. They matter and, for human conduct, this means that what we do matters. However, for a fatalistic universe, the intervening events are causally irrelevant; they do not matter at all.

impossible. If the throw of a dice was really indeterminate, it would reveal indeterminacy in the way the world is (an **ontological** impediment).

This thesis will not propose that **indeterminism** does not operate in the world, nor will I attempt to exclude its operation from within the workings of the human mind.[594] What I will argue though is that we are not **responsible** to the *extent* that our conduct is attributable to **indeterminism**. Further, I will argue that we are only **responsible** to the extent that **determinism** is operating upon us in a particular way.

A common conception of **freedom** is that it means, or at least implies a state of indeterminism. On this conception, **freedom** cannot be reconciled with **determinism**. However, this conception is not necessarily correct. While I am not concerned with whether we are free or not, but whether we are **responsible**, it is nevertheless helpful to recognise that **freedom** does not equate with a state of **indeterminism**. **Freedom** may – in line with the common conception – be used to describe a state of **indeterminism**, in contrast to a **determined** state. Thus one may be free as opposed to being **determined**. However one may also be free as opposed to being 'stuck'. This is the sense of

[594] Indeterminism may produce the dynamic nature of the circumstances that we encounter. Yet we are still responsible for our conduct in those circumstances, when we respond to the circumstances in a particular kind of determined way – to be described. This would certainly set our universe apart from one in which a particular end is fated (discussed above on page 165). Thus, despite that our universe may be partly indeterministic, and partly deterministic, what we do matters. We are responsible *to the extent that* determinism operates in and upon us in a particular way.
Even if the circumstances to which we respond are random or arbitrary, that may be altered, through our response, by the way in which we respond. When we respond in a rational or reasonable way, we transform the arbitrariness of the circumstances into something for which we are responsible – something that is a product of ourselves. Metz makes this point in the context of wealth distribution. He argues convincingly that 'causal dependence upon an arbitrary condition for wealth is not sufficient for being one. So, one may coherently accept that endowment [one's genes or various environments into which one is born] has a causal bearing on the effectiveness of one's agency [free-will] and deny that this influence of arbitrary endowment upon the exercise of agency implies that the latter is thereby arbitrary.' (Thaddeus Metz 'Arbitrariness, Justice, and Respect in Social Theory and Practice' (2000) 26 Social Theory and Practice 42). Metz derives his argument from Kant to the effect that the ability to reason, and I would include here, reason-sensitivity, is more valuable than anything, even life itself. (ibid 40). How rationality arises is irrelevant to the respect anyone who has it must be given: 'Whether one can substantially control one's status as a rational agent makes no difference to the moral significance of allocating wealth based upon what rational agents can substantially control.' (ibid 40). Take the following example, if I ask a random number generator for two numbers from which I calculate the sum. The sum, computed by my rational mind, is no longer random.

freedom that one may glean from Sober's weathervane analogy.[595] Sober extracts the two senses in which a weather vane may be free. It is **free** under the common conception where it is undetermined and points capriciously, arbitrarily and randomly in any direction. However it is also **free** where it is not stuck, such as being rusted down. We would not hesitate to say that a weathervane is **free**, as opposed to being stuck, even though it is determined by the direction of the wind. It is **free** where it is not stuck and is functioning properly. The point is that **freedom** may be understood in a way (the common conception) that implies **indeterminism**. On this conception freedom - as **indeterminism** – immediately excludes responsibility. This is because **indeterminism** requires, or at least permits, randomness, arbitrariness or capriciousness. However it may also be understood differently, in a way that does not exclude responsibility. It may be understood to mean that the one is not stuck and that one is functioning properly. This is the sense in which **freedom** is used here.

Many take solace in the argument that while **determinism** may apply to most of nature, humans are somehow exempt. Various strategies are relied upon for this such as **agent-**causation or an appeal to general **indeterminism**. **Agent** causation provides for some form of special exemption from causation for human beings.[596] It sets the **agent** up as the prime mover, unmoved, as if s/he were some sort of god.[597] But it begs the question, upon what basis would, or does, the **agent** decide and initiate conduct. The theory requires that the **agent**'s decision, or the **reasons** for his/her decision, cannot be based upon anything, or at least, not on anything binding.[598] Unfortunately the theory reduces down to little more than a claim that **responsibility** arises out of **indeterminism**.

[595] Sober *Core Questions in Philosophy: A Text with Readings* 4 ed (2005) 322.
[596] Roderich Chisholm 'Human Freedom' In *Free Will* edited by Robert Kane (2002); Roderick. M. Chisholm 'Freedom and Action' In *Freedom & Determinism* edited by Keith Lehrer (1966).
[597] Morse 'Reasons, Results, and Criminal Responsibility' (2004) ILL L Rev 431-6.
[598] Mark Leon 'On the Value and Scope of Freedom' (1999) XII Ratio 166-7. '[Responsibility] does not mean some scarcely intelligible state of affairs, "exemption or partial exemption from causal law" or "breach of causal continuity".' (Kai Nielsen 'Reason and Practice' In *Free Will* edited by Robert Kane (1971/2002) 41).

General **indeterminism** has come to rely[599] upon the claims of quantum physics – that at the most minute level, particles of matter act **indeterministically**.

8.3.1 Quantum physics

In the 1920s it was discovered that subatomic particles appear to defy conventional deterministic laws of physics. Conventional (Newtonian) physics describes and precisely predicts the movement of particles larger than atoms. For instance, how a canon ball will fly and where it will land can be precisely predicted by conventional physics. Every property of the cannon ball (such as its speed, position, and momentum, at any point in its flight) can be precisely calculated, given knowledge of its initial state by an application of the conventional laws of physics. The rather startling discovery of the early 1900s was that subatomic particles do not obey these same laws. Certain rather strange phenomena were observed.[600] Subatomic particles are not really particles at all, or at least only sometimes exhibit the properties of a particle. They also exhibit the properties of waves. This in itself is troubling. Particles have a specific size and location; waves do not - they travel and spread out. What is perhaps most troubling about this, is that whether a subatomic 'particle' behaves as a particle or a wave, depends upon whether it is observed, and perhaps more importantly, how it is observed. To some degree, it would appear that the very observation itself causes the 'particle' to suddenly, become a particle, or at least, start to behave as a particle. Until then, it would appear to behave more as a wave. Until observed, sub-atomic particles are said to occupy a state of 'superpositioning'. They are both waves and particles. Upon observation, they are said to 'collapse' into 'particles' and behave as we would ordinarily expect particles to behave.

Also, where a subatomic particle will land, if fired from some apparatus, cannot be precisely predicted. At best, where it will land can be described only as a probability – subject to ***chance***.

[599] Robert Kane 'Free Will: New Directions for an Ancient Problem' ibid (2002).
[600] David C. Cassidy *Uncertainty: The Life and Science of Werner Heisenberg* (1992); David Deutsch *The Fabric of Reality* (1998); Stephen W. Hawking *A Brief History of Time: From the Big Bang to Black Holes* (1988); Werner Heisenberg *Physics and Philosophy: The Revolution in Modern Science* (1958).

Further, Heisenberg famously described how the momentum and position of a subatomic particle cannot both be known with any certainty.[601] Heisenberg's uncertainty principle describes how the more one knows about the momentum of a subatomic particle, the less one can know about its position; and *vice versa*: the more one knows about the position of a subatomic particle, the less one can know about its momentum.

This strange phenomena and uncertainty was greeted as ultimate vindication by many whose theory of human **freedom** and **responsibility** required **indeterminism**. The prospect of uncertainty in quantum physics was welcomed by a vast industry of 'meta-physicists' who hold it out as evidence for anything from the foundation for alternative therapies to the mystical philosophies:

> Having triumphed within their own profession, [some quantum physicists] now moved outside it, attempting to take their doctrine to other fields. Yet when they announced the doctrine and even attempted to apply it outside their own discipline, they made claims for it that went far beyond its actual meaning and significance within the confines of quantum physics. [footnote omitted] Some … began exploiting the Copenhagen doctrine for vitalist, neoromantic, and even mystical philosophies. Their fundamentally antiscientific and antirationalist attempts continue to this day.[602]

Some argue that this discovery shows that people are free and **responsible** because the human mind may operate **indeterministically**.[603]

However, there is no unanimity as to the **ontological**[604] implications of quantum physics.[605] It may have discovered **chance** operating at a quantum level, but it is unclear whether this discovery is a

[601] Heisenberg *Physics and Philosophy: The Revolution in Modern Science* (1958).
[602] Cassidy *Uncertainty: The Life and Science of Werner Heisenberg* (1992) 254.
[603] Kane 'Free Will: New Directions for an Ancient Problem' In *Free Will* edited by Kane (2002). Kane suggests a peculiar type of 'chaos' that is supposedly 'stirred' up in the brain when one is faced with difficult choices that permit the implications of the supposed indeterminism of quantum physics to provide for free will. He appears however to conflate problems of an epistemological nature with those of an ontological nature – discussed below. Furthermore, as discussed (on page 173ff), indeterminism would also not provide for responsibility.
[604] Relating to the way the world is – as opposed to epistemological implications, relating to knowledge.

discovery of an inherent limitation of our knowledge of the world, or that the quantum world does in fact operate **indeterministically**.[606]

Even Bohr, who may be regarded as the ultimate grandfather of quantum physics,[607] can be interpreted as implying only **epistemological** limitations in the realm of quantum physics. Bohr explained[608] that the source of uncertainty does not lie in the disturbance introduced into an experiment by observation, as Heisenberg contemplates. Instead it is due to the dual particle-wave nature of quantum particles – governed by Bohr's notion of complementarity. Heisenberg rejected this explanation at first but subsequently accepted it.[609] At its essence, Bohr explained that the

[605] Kane ed *Free Will* Edited by Cahn (2002) 7.

[606] Not even Heisenberg, founder of the famous 'Uncertainty Principle', was clear on this. Heisenberg's attempt to address the question seems to demonstrate only why he has been referred to as a poor philosopher. (Cassidy *Uncertainty: The Life and Science of Werner Heisenberg* (1992) 255). He concedes that probability in mathematics or statistics refers to our degree of knowledge of the actual situation – an epistemological deficiency: 'In throwing dice we do not know the fine details of the motion of our hands which determine the fall of the dice and therefore we say that the probability for throwing a special number is just one in six' (Heisenberg *Physics and Philosophy: The Revolution in Modern Science* (1958) 28-9).
Yet, he distinguishes the probability function of quantum physics – here probability means more than a knowledge deficiency – it refers to a tendency for something and introduces 'something standing in the middle between the idea of an event and the actual event, a strange kind of physical reality just in the middle, between possibility and reality.' (ibid 29) A rather mystical reality between possibility and reality.
Further, while conceding that, at least of London, it exists whether observed or not, he wishes to distinguish for quantum physics: 'Objectivity has become the first criterion for the value of any scientific result. Does the Copenhagen interpretation of quantum theory still comply with this ideal? One may perhaps say that quantum theory corresponds to this ideal as far as possible. Certainly quantum theory does not contain genuine subjective features; it does not introduce the mind of the physicist as a part of the atomic event. But it starts from the division of the world into the 'object' and the rest of the world, and from the fact that at least for the rest of the world we use the classical concepts in our description. This division is arbitrary and historically a direct consequence of our scientific method; the use of the classical concepts is finally a consequence of the general human way of thinking. But this is already a reference to ourselves and in so far our description is not completely objective.' (ibid 43-4).
But in this one finds little to distinguish, particularly since for him, the uncertainty of quantum physics derives from the inaccuracies of observation. Yet, even on his own reasoning, if one couldn't observe accurately or at all, the quanta and its properties would still exist. It follows that Heisenberg seems to identify no ontological deficiency in nature – that is – no inherent indeterminism in nature, only an epistemological deficiency. Cassidy goes so far as to attribute to Heisenberg the recognition that the statistical (wave function) of quantum physics enter with the physicist's examination of nature, but that it is not a property of nature itself. (Cassidy *Uncertainty: The Life and Science of Werner Heisenberg* (1992) 234.)

[607] Cassidy *Uncertainty: The Life and Science of Werner Heisenberg* (1992) 250.

[608] Ibid 241.

[609] Bohr attempted to persuade Heisenberg to retract a paper asserting his (Heisenberg's) explanation, but failed. Heisenberg blundered ahead, at times reduced to tears, and was only persuaded later by Klein to publish a postscript accepting Bohr's observations. (ibid 240-3).

uncertainty arises from the choice that is exercised in an experiment to focus on the particle as a particle or as a wave. In so doing, one forfeits ones knowledge of the other properties.[610] This does not necessarily mean that the quantum world is indeterminate, only that we can never know everything about it.

We do not or cannot know everything about quantum particles. This might exceed the problem inherent in the role of a dice (described above[611]). Whereas the parameters necessary to predict the fall of a dice can be known, Heisenberg's uncertainty principle tells us that there are certain properties of a sub-atomic particle, that we cannot know. But that we cannot *know*, does not require **indeterminism**.

Furthermore there is no evidence that quantum physics operates upon anything beyond the sub-atomic world. It may act on electrons and quarks, but is does not affect anything above that sub-atomic level. It does not affect the flight of a cricket ball or spacecraft and there is no reason to expect that it operates on the human brain.[612]

Penrose observes:

> Since there *are* neurons in the human body that can be triggered by single quantum events, is it not reasonable to ask whether cells of this kind might be found somewhere in the main part of the human brain? As far as I am aware, there is no evidence for this. The types of cell that have been examined all require a threshold to be reached, and a very large number of quanta are needed in order that the cell will fire.[613]

[610] Ibid 241-4, 8.
[611] See page 166. If all parameters were known, the throw of a dice could be perfectly predicted.
[612] Kane ed *Free Will* Edited by Cahn (2002) 7; Ivan Semeniuk 'Cat-in-the-box' *New Scientist* 9 March 2002.
[613] Roger Penrose *The Emperor's New Mind: Concerning Computers, Minds and The Laws of Physics* (1990) 517 original emphasis. He does however speculate that if brain cells did exist that are single quanta sensitive, then quantum mechanics would be involved in brain activity.

Thus it would appear that quantum physics is 'for all practical purposes' irrelevant to matters of human conduct.[614]

Beyond that, one must also observe that science is always developing and that the understanding attributed to quantum physics currently might not be the last word. Indeed, it would be arrogant for anyone to claim that we already know the final truth about reality.[615]

Still, as indicated above,[616] this thesis will not attempt to exclude the possibility that **indeterminism** does operate in the world. My point here is only that quantum physics does not seem to show, at least, not uncontroversially, that indeterminism does operate in the world. Certainly it does not show that it operates in and upon the human mind.

8.3.2 The Normative Problem

I have argued that to date there is no evidence that **indeterminism** operates in our world. However, I have conceded that it *may* operate in the world, and in and upon us. The question remains however, whether that would make us **responsible**.

Those who take solace in the prospect of **indeterminism** do so to escape the dreaded implication that, as indicated above,[617] humans are nothing more than complicated clocks. That our minds consist of the workings of cogs and gears that determine what we think and what we do. Instead they argue that we are free and **responsible** because at least to an extent, there is some **indeterminism** that operates in the world, and in and upon humans.

[614] Kane ed *Free Will* Edited by Cahn (2002) 7.
[615] Roy C. Weatherford 'Determinism' In *The Oxford Companion to Philosophy* edited by Ted Honderich (1995)
[616] See on page 167.
[617] See on page 164.

However, we must consider whether this would provide for **freedom** and **responsibility**. If the determined nature of a system deprived it of **freedom** and **responsibility**, would the introduction of **indeterminism** into that system provide for **freedom and responsibility**? I doubt that it could. The indeterministic model of **responsibility** requires that for a person to be **responsible**, s/he must be able to do otherwise, in the exact circumstances in which s/he finds him/herself. It requires that s/he be able to act independently or irrespective of his/her **reasons** or circumstances. This requires random, arbitrary and capricious conduct.

Consider: if we are deprived of **responsibility** because our minds are determined systems of clockwork, of cogs and gears, would the replacement of one of those gears with a little roulette wheel,[618] make us **responsible**? On this conception, our conduct would then be determined by the remaining gears and cogs but our thoughts, **reasons** and ultimately our conduct would be governed by the random result of the roulette wheel. If indeterminism did operate in our minds, then we would not only be slaves to our genes/environments, but also to randomness and caprice.[619]

As Dennett notes:

> The Greeks came up with a desperate and ultimately hopeless idea of introducing randomness. Every now and then the atoms just swerved. The idea that some sort of indeterminism, some sort of

[618] Representing a source of indeterminism. I conceded however that even a roulette wheel is subject only to chance and is not, properly understood a source of indeterminism. If this is indeed a concern for the reader then the reader should substitute for the roulette wheel, a random output device. The ancient Greeks resorted to some random particle loose in the mind. Perhaps a more appropriate device would be a 'random number generator', as recommended by Morse (Stephen J. Morse Personal Communication 14 February 2006; Morse 'Reasons, Results, and Criminal Responsibility' (2004) ILL L Rev).

[619] See Gazzaniga & Steven 'Free Will in the Twenty-first Centaury: A Discussion of Neuroscience and the Law' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Garland (2004) 54; Kane ed *Free Will* Edited by Cahn (2002) 7-8.

> exemption from causation, does the trick goes way back. But it doesn't work. It's like having a roulette wheel in your head: that wouldn't make you free or responsible for your actions.[620]

On this conception, I am surely not **responsible** for my conduct. My conduct reflects nothing in or about me; indeed it reflects nothing at all. Colloquially we may say that such a person has 'a screw loose' or 'has gone off the rails' by which we mean that they are 'crazy' and precisely that they are free,[621] but are not **responsible** for their conduct.

It is important to note that the freedom contemplated by the **incompatibilist** libertarian perspective does not provide for freedom - at least not in a sense that is valuable or which renders one responsible - since it would render one's conduct random, arbitrary or capricious:

> Indeterminism, it has long been recognised would not constitute a solution, for at best it would make our actions random or capricious, not reasonable, given that they would not follow from or be grounded in our reasons. There can be no value in a freedom which comprises the ability to act in a way contrary to or independently of one's best reasons. Or if, inconsistently, the indeterministic account allowed the connection between reasons and actions to be deterministic, while requiring that the reasons themselves be insulated from the deterministic chain, that would in turn make those reasons, if not quite capricious, then, it would seem, altogether arbitrary. [622]

The ultimate point to note here is that even if **indeterminism** operated in and upon us, we would not be **responsible** to the *extent* that the **indeterminism** operated. Some have tried to reduce the influence of **indeterminism** and the consequences just described. They may concede that people are powerfully influenced by their genetic makeup, by the environment in which they grew up, or that they are powerfully influenced by both their genes and the environment in which they grew up. But they will insist that all of this amounts to mere influence, and that the **agent** remains free

[620] Daniel Dennett 'Free will, but not as we know it' *New Scientist* 24 May 2003 2003 39-40 39.
[621] They are not constrained by any sense of appropriate conduct.
[622] Leon 'On the Value and Scope of Freedom' (1999) XII Ratio 165. See also Morse 'Reasons, Results, and Criminal Responsibility' (2004) ILL L Rev 434.

and **responsible** by virtue of an extent of **indeterminism**, to think and choose independently of all influences upon them. Yet the criticism contained in the example of the roulette wheel thought experiment remains: the **agent** lacks **responsibility** *to the extent that* ***indeterminism*** *operates.*

In the context of the criminal law, the law together with its sanctions, are meant to operate as a reason not to offend: 'Law is a system of rules that at least is meant to guide or influence behavior and thus to operate as a potential cause of behavior.'[623] The Rumpff Commission, despite purporting to adopt an indeterministic conception of responsibility, appears to recognise that law must operate as determinant of behaviour:

> Man is controlled by an order, which is embodied in written laws and rules. This order is constituted by so-called moral laws, rules concerning what is right, which man can obey or disobey within the limits of his biological constitution and his social environment.[624]

Yet, if indeterminism interferes with the causal force of the law, it becomes irrelevant, or of no force – to the extent that indeterminism 'frees' the agent from its constraints. A legal system cannot base itself upon a model of responsibility that renders it impotent.

Thus, even if **indeterminism** did operate in and upon us, this would not make us **responsible**. We are **responsible** instead, to the extent to which **determinism** operates in and upon us in a particular way.[625]

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[623] Morse 'New Neuroscience, Old Problems' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Garland (2004) 162.

[624] Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) 9.47.

[625] The particular way will be described, in detail below. However, to provide a brief preview, I will argue that determinism operates in the right sort of way to make us responsible when it operates to make us reason-sensitive, or even further, when we are appropriately responsive to the world in which we live. Determinism operating in the wrong sort of way would be when we cannot respond appropriately to our world, when we are 'stuck'. Someone who is

8.3.3 Neuroscience

Some recent findings in the field of neuroscience seem to indicate that our brains 'decide' matters before we become aware of it.[626] For some, this is evidence that free will and **responsibility** are only an illusion. The concern is these findings seem to confirm that we are merely puppets who are following what their brains decide. Yet, properly understood, these findings show what is to be expected for **freedom** and **responsibility**[627] – that conduct, choices, and reasons are not without foundation, are not capricious, random or arbitrary. These findings show only that, as required – choice is preceded by **reasons**, which one hopes, for **responsibility**, are preceded by an appropriate grounding in the world.[628]

To worry or expect that we should 'direct' our behaviours, top-down,[629] first becoming aware of them, and then issuing instructions, is a possible remnant of Cartesian dualism.[630] However, it is

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suffering an epileptic seizure, is a kleptomaniac, or who is suffering paranoid psychotic delusions that a fire-breathing-dragon is chasing them, represents determinism operating in the wrong sort of way.

[626] Michael S Gazzaniga & JE LeDoux *The Integrated Mind* (1978); Benjamin Libet 'Consciousness vs. Neural Time' (1991) 352 Nature; Benjamin Libet 'Do We Have Free Will' (1999) 6 Journal of Consciousness Studies; MI Platt & PW Glimcher 'Neural Correlates of Decision Making in Parietal Cortex.' (1999) 400 Nature.

[627] Morse notes: 'Discovering a brain correlate or cause of an action does not mean that it is not an action. If actions exist, they have causes, including those arising in the brain' (Morse 'New Neuroscience, Old Problems' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Garland (2004) 167); and '[The studies of Libet] simply demonstrate that nonconscious brain events precede conscious experience, but this seems precisely what one would expect of the mind-brain' (ibid 169; See also Morse 'Mental Disorder and Criminal Law' (2011) 101 Journal of Criminal Law and Criminology 898 & 963ff). Responsibility is not incompatible with causation (Honoré *Responsibility and Fault* (1999) 125). '[W]e tend to assume that *something* determines people's decisions. That nothing determined them would imply that they were not merely unpredictable but inexplicable: a belief that would be truly alarming' (ibid 136 original emphasis, footnote omitted; See also Morse 'Mental Disorder and Criminal Law' (2011) 101 Journal of Criminal Law and Criminology 989ff).

[628] James Grant 'Determinism, Neuroscience, and Responsibility' (2006) 2 International Journal of Law in Context.

[629] Gazzaniga and Steven caution that 'no one knows anything about the "top" in "top-down."' (Gazzaniga & Steven 'Free Will in the Twenty-first Centaury: A Discussion of Neuroscience and the Law' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Garland (2004) 66).

[630] Descartes explanation (Cartesian Dualism) of why mind was distinct from body (including brain) was that, firstly, he adopted the view that what he could conceive of as distinct is, by virtue of that conception alone, distinct; and secondly that he could conceive of his mind and body as distinct. (René Descartes 'Sixth Meditation' In *Meditations on First Philosophy* (1641/1996) reported in Sober *Core Questions in Philosophy: A Text with Readings* 4 ed (2005) 245). However, Descartes held that though the two entities are distinct, they interact. His account is an interactionist account in terms of which mind affects body and body affects mind. But this has created an insurmountable problem. A fundamental flaw in the theory of Descartes was how the metaphysical could interact with the physical. Descartes very thesis that mind is contrary to body (the negative thereof) such that it possesses the opposite qualities of matter (such

certainly a remnant of archaic **libertarianism** – that choice must be **indeterminately** free, free in the sense of an erratic weathervane[631] – which requires arbitrariness, capriciousness, or randomness.[632]

8.4 Could Not Do Otherwise

As alluded to above, we seem to hold a powerful intuition that we cannot be free or **responsible** if we could not do otherwise than we actually did. [633] This requirement is inherent in the very concept of 'capacity' – the capacity to do otherwise.[634] In criminal law, the capacity technically required is the capacity to appreciate the wrongfulness of one's conduct, and to act in accordance with that appreciation.[635]

In philosophy the notion of a person being able to do otherwise has become formalised into the 'Principle of Alternative Possibilities' ('PAP').[636] However, the concept is not uncontroversial and

as that it is non spatial) precludes an explanation of how the body can affect the mind and mind can affect body (Gilbert Ryle 'Descartes' Myth' In *The Concept of Mind* (1949) 21).

[631] Discussed above on page 168ff.

[632] Grant 'Determinism, Neuroscience, and Responsibility' (2006) 2 International Journal of Law in Context.

[633] See Reznek (Reznek *Evil or Ill: Justifying the Insanity Defence* (1997) 6): 'We hold someone responsible for his actions if he could have done otherwise.' See also Ashworth *Principles of Criminal Law* 2nd ed (1997) 26 & 98; Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 440ff; M. Cremona & J. Herring *Criminal Law* 2nd ed (1998) 34; Honoré *Responsibility and Fault* (1999) 18; Kutz 'Responsibility' In *The Oxford Handbook of Jurisprudence and Philosophy of Law* edited by Coleman and Shapiro (2002) 552-3; Michael S. Moore 'Choice, Character, and Excuse' In *Foundations of Criminal Law* edited by Leo Katz, Michael S. Moore and Stephen J. Morse (1999) 316; Roger Scruton *Modern Philosophy: An Introduction and Survey* (2004) 229. In distinguishing an excuse from an explanation, Ashworth relies on the requirement that the agent must have been able to do otherwise to determine whether circumstances such as social deprivation ought to qualify as a valid excuse (Ashworth *Principles of Criminal Law* 2nd ed (1997) 245). Some, such as Judge Bazelon, rely on the requirement as an excuse for ostensibly criminal conduct, on the basis that offenders are supposedly deprived of the capacity to resist criminal conduct (D. Bazelon 'The Morality of the Criminal Law' (1976) 49 S Cal LR).

[634] Capacity is inherently linked with the blame that is required for retribution. (Honoré *Responsibility and Fault* (1999) 138).

[635] Presumably we are concerned with instances in which an accused did not, actually, appreciate the wrongfulness of his/her conduct, or act accordingly. If s/he did, their ability to do so would be obvious: If s/he actually did, they must be able to. Instead we must be concerned with instances where the accused did not, actually, appreciate the wrongfulness of his/her conduct or act accordingly. This is the question of whether s/he *could* have done otherwise.

[636] John Martin Fischer 'Frankfurt-style Examples, Responsibility and Semi-compatibilism' In *Free Will* edited by Robert Kane (2002); Harry Frankfurt 'Alternate Possibilities and Moral Responsibility' (1969) 66 Journal of Philosophy.

must be treated with some caution. This is because **psychological determinism** seems to imply that people cannot do other than what they actually do. That is, if determinism operates in and upon our minds, we are apparently little more than complicated clocks[637] and it would seem that we cannot do other than we actually do. Two apparently distinct strategies seem open to the compatibilist who wants to argue that we are responsible even if we cannot do otherwise. The first is to argue that the principle that we are not responsible unless we could do otherwise is false – as Locke and Frankfurt have done – to be discussed shortly. The alternative, though related, strategy is to note that the condition that an agent 'must be able to do otherwise' is capable of two different meanings and that the answer lies in imposing the appropriate interpretation on the condition.

John Locke,[638] and more recently Harry Frankfurt,[639] proposed ingenious thought experiments to show that the principle is false – we can and do attribute **responsibility** to people even though they could not do otherwise. Frankfurt states: Even though a person is subject to a coercive force that precludes his performing any action but one, he may nonetheless bear full moral responsibility for performing that action.[640]

[637] Discussed on page 164.

[638] John Locke argues that freedom does not require that one be able to do other than what one is doing. He proposed a thought experiment: 'a man be carried whilst fast asleep into a room where is a person he longs to see and speak with, and be there locked fast in, beyond his power to get out; he awakes and is glad to find himself in so desirable company, which he stays willingly in ...' John Locke *An Essay Concerning Human Understanding* Book II, Chapter XI, Sec. 10, reported in Fischer 'Frankfurt-style Examples, Responsibility and Semi-compatibilism' In *Free Will* edited by Kane (2002) 96. Locke concludes from this that one may be acting freely, even when you cannot do otherwise.

[639] Frankfurt 'Alternate Possibilities and Moral Responsibility' (1969) 66 Journal of Philosophy.

[640] Ibid 5. Frankfurt's most powerful proposition is of $Jones_4$ who is subject, unknowingly, to the evil plans of Black (a super-controller – such as, perhaps, a brilliant but evil neuroscientist) as follows - it is replicated here at length due to its importance - it is the leading attempt to show that PAP is not required for freedom and responsibility: 'Suppose someone - Black, let us say - wants $Jones_4$ to perform a certain action. Black is prepared to go to considerable lengths to get his way, but he prefers to avoid showing his hand unnecessarily. So he waits until $Jones_4$ is about to make up his mind what to do, and he does nothing unless it is clear to him (Black is an excellent judge of such things) that $Jones_4$ is going to decide to do something *other* than what he wants him to do. If it becomes clear that $Jones_4$ is going to decide to do something else, Black takes effective steps to ensure that $Jones_4$ decides to do, and that he does do, what he wants him to do. [footnote omitted] Whatever $Jones_4$'s initial preferences and inclinations, then, Black will have his way. What steps will Black take, if he believes he must take steps, in order to ensure that $Jones_4$ decides and acts as he wishes? Anyone with a theory concerning what 'could have done otherwise' means may answer this question for himself by describing whatever measures he would regard as sufficient to guarantee that, in the relevant sense, $Jones_4$ cannot do otherwise. Let Black pronounce a terrible threat, and in this way both force $Jones_4$ to perform the desired

The essence of these thought experiments is that we hold people **responsible** when their conduct reflects on them; when what they do shows something about or in them, despite the fact that they cannot do otherwise.

The significance of these thought experiments is perhaps not what they are otherwise designed to show – that we hold people **responsible** even though they could not do otherwise. There is some controversy on this point.[641] However, the model of responsibility I will propose does not depend

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action and prevent him from performing a forbidden one. Let Black give $Jones_4$ a potion, or put him under hypnosis, and in some such way as these generate in $Jones_4$ an irresistible inner compulsion to perform the act Black wants performed and to avoid others. Or let Black manipulate the minute processes of $Jones_4$'s brain and nervous system in some more direct way, so that causal forces running in and out of his synapses, and along the poor man's nerves determine that he chooses to act and that he does act in the one way and not in any other.' (ibid 6-7 original italics).
Traditionally this concept of an individual, such as $Jones_4$, was considered to lack responsibility. But Frankfurt notes how we may yet hold $Jones_4$ responsible: 'Now suppose that Black never has to show his hand because $Jones_4$ for reasons of his own, decides to perform and does perform the very action Black wants him to perform. In that case, it seems clear, $Jones_4$ will bear precisely the same moral responsibility for what he does as he would have borne if Black had not been ready to take steps to ensure that he do it. It would be quite unreasonable to excuse $Jones_4$ for his action, or to withhold the praise to which it would normally entitle him, on the basis of the fact that he could not have done otherwise. This fact played no role at all in leading him to act as he did. He would have acted the same even if it had not been a fact. Indeed, everything happened just as it would have happened without Black's presence in the situation and without his readiness to intrude into it.' (ibid 8). Frankfurt notes that since $Jones_4$ (hereinafter Jones) would have acted as he did even in the absence of Black and his evil intentions, Black is thus irrelevant to accounting for the action in question and must therefore be irrelevant to an assessment of responsibility. (ibid 8) Ultimately, Frankfurt notes therefore that alternative possibilities are not required for responsibility.

[641] It is arguable that Locke's thought experiment left open the option for the man in the locked room to choose to leave the room or to try to leave the room so that it could not be argued that he had no alternatives (Fischer 'Frankfurt-style Examples, Responsibility and Semi-compatibilism' In *Free Will* edited by Kane (2002) 96). Frankfurt's thought experiment apparently seeks to exclude such alternatives. However it seems that even on Frankfurt's thought experiment, the possibility for an alternative exists – even if the alternative is for Jones merely to show some neurological sign to Black that he is contemplating doing other than what Black wants him to do (ibid 96-7). Fischer has dismissed mere signs of neurological activity that may set Black into motion as mere 'flickers of freedom' of insufficient 'voluntary oomph' to ground an attribution of responsibility (ibid 98). Fischer dispenses with Naylor (Margery Bedford Naylor 'Frankfurt on the Principle of Alternative Possibilities' (1984) 46 Philosophical Studies) for proposing what he regards as a flicker of freedom. Fischer notes that Naylor argues that one is really morally responsible for acting 'on one's own'. But Fischer attributes to Naylor a suggestion that does not seem necessarily to follow. He argues that Naylor must be proposing that the agent has the option of not acting on one's own. Naylor seems to correctly identify what drives our intuitions about the moral responsibility of Jones. However, her position does not necessarily imply that Jones enjoyed any 'real' or valuable ability to do otherwise in the form of not acting on his own.
Nevertheless, it must remain true though, that on the facts of Jones and Black, Jones could have at least started to think about doing otherwise (Fischer 'Frankfurt-style Examples, Responsibility and Semi-compatibilism' In *Free Will* edited by Kane (2002) 97-9). This does not, of course, qualify as being able to *do* otherwise, but Fischer acknowledges that this represents more than a mere 'flicker of freedom' (ibid 99-100 Cf. Stump has argued that a truncated or incomplete mental act of 'starting to think' is no mental act at all and cannot possibly count as a significant alternative (Eleonore

upon Frankfurt being correct that we can and do hold people responsible even though they cannot do otherwise. What does matter and what must be drawn from Frankfurt's thought experiments is that we hold people **responsible** when their conduct reflects on them. That is, we hold people **responsible** for what they do of their own accord, or, when they do what they want, even if they could not do otherwise.[642] Whether they could do otherwise only reveals what is essential to know: whether they did so of their own accord.

It seems then that the condition that an agent 'could not do otherwise' is required. However it is required for a reason other than the purpose it has traditionally served. It is required to reveal whether the agent acted for his/her own reasons.

We are able to identify whether the agent acts for his/her own reasons only when we consider whether the agent could have done otherwise. But we must be careful to ask this question is a way that is not self-defeating. This is because we may formulate the question in one of two ways: unconditionally or conditionally. We may ask the question unconditionally: could the agent do otherwise, in his/her actual circumstances, given his/her precise reasons (beliefs/desires and

Stump 'Dust, determinism and Frankfurt: A Reply to Goetz' (1999) 16 Faith And Philosophy)). Furthermore it has drawn attempts to shut down even this option for Jones. I expect that at best, one may contemplate a restrictive neural harness that will only permit Jones to think what Black wants him to think. For instance, Hunt proposes that all neural passages are blocked except the ones that permit the action desired by Black (David Hunt 'Moral Responsibility and Avoidable Action' (2000) 97 Philosophical Studies) This would seem to shut down all room for Jones to even begin to think about doing otherwise. However, it appears that even on this scenario, it is possible to recognise an alternative for Jones in the form of Jones's neurons bumping against the blockages (Fischer 'Frankfurt-style Examples, Responsibility and Semi-compatibilism' In *Free Will* edited by Kane (2002) 105). Moreover, any thought experiment which would successfully exclude all significant alternatives would simultaneously deprive us of the basis on which we may know whether to attribute blame to Jones or not. We need Jones to have some wriggle room because we can only know that he is responsible if he does not wriggle. It is only if he does not wriggle that he is acting of his own accord.

As I will argue, this shows the value of the Frankfurt's thought experiment. It is not that it shows us that we hold people responsible even though they cannot do otherwise, but that we hold them responsible when we can see (as the though experiment tells us) that someone has acted of their own accord.

[642] Jones acted, in the actual scenario for and because of his own reasons and his responsibility (that we intuitively feel attached to his conduct) is based upon that fact that the agent acts for and because of his reasons and that he would not have done so, but for Black, without those reasons. The intervention of Black in the alternative scenario deprives Jones of responsibility because disjunction will be introduced between the agent's reasons and his conduct. (Michael Smith 'A Theory of Freedom and Responsibility' In *Ethics and Practical Reason* edited by G Cullity and B Gaut (1997) 309-12).

values), and even given the choices that she/he has made? If we ask the question this way, we are asking whether the agent could act independently of his/her choices, reasons and circumstances.[643] We are asking, on this formulation, whether the agent could act randomly, arbitrarily, or capriciously. This is often, perhaps even traditionally, what the condition is taken to require. But paradoxically, as an enquiry into responsibility, the way it is formulated will reveal the opposite of what is intended. It will reveal those who act randomly, arbitrarily, or capriciously as responsible people.

The correct formulation is to frame the question conditionally – by introducing a hypothetical variation: could the agent do otherwise, if his/her circumstances, reasons (beliefs/desires and values), or choices were otherwise. This hypothetical variation is fundamental because it is only by considering the agent's response to the variation that we can see whether the agent was acting for his/her own choices and reasons, taking account of his/her circumstances. So for instance, to identify a responsible person, we must ask whether they could have done otherwise, if, for instance, they had wanted to.[644]

[643] See generally Leon 'Responsible Believers' (2002) 85 The Monist; Wolf 'Asymmetrical Freedom' (1980) 77 Journal of Philosophy. The unconditional account suggests that one's doppelgänger (one's hypothetical clone) in identical circumstances could have done otherwise. It proposes therefore that the doppelgänger would act irrationally, non-rationally, capriciously or arbitrarily since it would require that his/her conduct is unhinged from his/her choices or reasons. (Leon 'Responsible Believers' (2002) 85 The Monist 426). Honoré recognises that this sort of anti-deterministic capacity, to require that an agent could have done otherwise in exactly those internal and external circumstances, cannot exist. (Honoré *Responsibility and Fault* (1999) 15 and 35-6).
In discussions of the reasonable person in criminal law it is often appreciated that if the reasonable person is placed in the precise circumstances of the accused, and given all the attributes and other subjective facets of the accused, the reasonable person would *become* the accused. In discussions of the reasonable person it is often appreciated that if the reasonable person is placed in the precise circumstances of the accused, and given all the attributes and other subjective facets of the accused, the reasonable person would *become* the accused. (See under the heading 1.3.2.2 Fault on page 24ff, especially footnote 51).

[644] Leon 'Responsible Believers' (2002) 85 The Monist 426.

8.4.1.1 Criminal Capacity

As indicated, capacity – in an indeterministic sense – is deeply problematic. This is the sense in which it has manifested in our current law.[645] It requires that a person must be able to do otherwise in the exact circumstances the person is in, with the exact **reasons** for acting that they have. This is a feature of an indeterministic model of **responsibility** and as is often reflected in the unqualified references to capacity in our law.[646]

This sense of capacity must be avoided. As Honoré explains,[647] if you ask me if I can tie my shoelaces, the answer may well be yes *and* no. It may be no, even though I generally know how and even though I tied my shoelaces five minutes ago. The answer may also be yes, I can – generally. The answer to this question can be both yes and no – depending on how it is interpreted. It can, quite defensibly be no, because I am standing and cannot reach my shoes while I am standing. It can be yes – generally – because I can tie my shoelaces under certain conditions, including that I must want to and chose to, and I must be kneeling or sitting. The answer to any such question of capacity may be yes and no – at the same time. This is not because the question is nonsense, but it is incomplete. But so long as it remains incomplete it is nonsense. Thus, when our law asks whether an accused can, or in the past tense as is usually the case, *could* appreciate the wrongfulness of his/her conduct and act in accordance therewith, this question in its unqualified

[645] Discussed above under the heading 3.2 Capacity – to do otherwise on page 48ff.
[646] Discussed above under the heading 3.2.3 Current Model of Responsibility on page 49ff.
[647] Honoré *Responsibility and Fault* (1999) 15, 35-6, and 8 – though his examples generally concern golfing or driving. Honoré speaks however of whether one possess a general or particular capacity: 'A golfer can (general) hole a six-foot putt if he possesses the general capacity to do so; and he possesses that capacity *if it is usually the case that when he tries he succeeds*. It is compatible with his possessing this general capacity that on a given occasion he cannot (particular) hole a putt of six feet or less. If he tries to hole a particular putt and does not succeed that shows that he could not (particular) do so. It will nevertheless be true that he could (general) have holed it, since he possessed the resources physical and mental to succeed.' (ibid 38 emphasis added). It would appear that his notion of general capacity is reconcilable with the imposition of a conditional interpretation on the requirement that a person must be able to do otherwise.[647] Others instances include: 'General capacities can be measured by how people generally perform *when they try* …'. (ibid 38 emphasis added). The conditionality of his conception is reflected by his employment of the concept 'if' (ibid 139, 47, particularly 48ff).'To ascribe responsibility to a competent driver whose attention has lapsed we need not believe that *given all the elements internal and external of the concrete situation* he could, despite his lapse, have swerved and avoided the accident. (ibid 37 emphasis added).

form remains incomplete and as such, is nonsense. Indeed, it can be answered yes or no and as such is extremely dangerous in our law. The question must be qualified by reference to what would appear to be the necessary enabling conditions. It may be completed by qualifying it in one of two ways: by imposing an **unconditional** or **conditional interpretation** on it.

An **unconditional qualification** asks whether I can tie my shoelaces in the very circumstances I am in, including that I have no need or inclination to do so, and am standing. There are two possible answers to this. The first answer is of course not – that is absurd. The other requires that one impose an indeterministic understanding upon this question. People can tie their shoelaces despite that they are standing and have no need or inclination to do so, if they can act irrespective or independently of their circumstances and **reasons**. This is an indeterministic interpretation of this question. It is the interpretation that the model of **responsibility** embraced by our law requires us to impose. This is clearly wrong because it requires arbitrary, random or capricious behaviour as **responsible** behaviour.

As indicated, the question of capacity can be understood only when it is qualified, that is, when it is given a **conditional interpretation**. [648] The question of whether I could tie my shoelaces must be qualified by the conditional 'if I wanted to and I was kneeling or seated'. The question of capacity in our law must be given a **conditional interpretation**.[649]

[648] Nielsen notes: 'Even in a deterministic world we can do other than what we in fact do, since all "cans" are constitutionally iffy. That is to say, they are all hypothetical. This dark saying needs explanation. Consider what we actually mean by saying, "I could have done otherwise." It means, soft determinists argue, "I should have acted otherwise if I had chosen" or "I would have done otherwise if I had wanted to". And "I can do X" means "If I want to I shall do X" or "If I choose to do X I will do X".' (Nielsen 'Reason and Practice' In *Free Will* edited by Kane (1971/2002) 45).

[649] Burchell is inconsistent. He appears to recognise that a conditional interpretation of the requirement that agent must be able to do otherwise is required where, in framing the inquiry of capacity for self-control as 'whether the accused could have acted differently', he states: 'If, *in no circumstances,* could he or she have acted differently, then his or her conduct would inevitably and always be involuntary, or not controlled by the conscious will' (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 440 original emphasis). However, almost immediately he expresses an unconditional interpretation: 'Another way of expressing the test is to inquire whether the accused could reasonably be expected, *in the circumstances*, to have acted differently' (ibid 440 emphasis added).

8.4.1.2 Hypothetical Other Worlds!?

Some may object that what may have occurred in another imagined world cannot possibly matter. But it does. What is crucial is that it must be clear that the **agent** initiated the conduct. It must be clear that the **agent**'s conduct reflects upon him/her. There is nothing peculiar about this. What we need to know is whether there is the appropriate relationship between the conduct in question and the **agent**. We need to know whether the **agent** is the *effective cause* of the conduct. We regularly enquire into whether causal relationships exist between one event or state and another. We do this by hypothetical variation of what we suspect the cause of a consequence in question to have been. We imagine whether, *if* a suspected cause was somehow different, or even absent, the consequence in question would (hypothetically) vary or disappear. We do this in everyday life and this enquiry has become formalised in law into the main, or at least the preliminary,[650] enquiry into causation: *conditio sine qua non*.[651] As noted above,[652] it has become known as the 'but for' test, or more technically correct, as the 'but for ... not' test. It follows our intuitions and requires that we hypothetically vary the suspected cause, by imagining it away, and consider whether the consequence in question would also vary appropriately.

The point here is that hypothetical variation to check for relationships is nothing strange.[653] We do this every day, even subconsciously, as we consider the relationship between the presence, perhaps of a dog and a missing biscuit, or between a gunshot and a bleeding man.

Thus we may conclude that indeterminism does not provide for responsibility. A responsible person is one whose conduct reflects something in or about that person, that is, whether the

[650] *S v Daniëls* 1983 (3) SA 275 (A); *S v Mokgethi* 1990 (1) SA 32 (A). South African law has adopted a two-stage enquiry into causation (see footnote 23).
[651] It may be literally translated from the Latin to ask 'condition without which not?', or more understandably, without the condition [in question, would the consequence] not [have occurred].
[652] Discussed under 1.3.1.3 Causation on page 22ff.
[653] We also engage in a hypothetical enquiry regarding the standard of the reasonable person in the context of the test for negligence (see under the heading 1.3.2.2 Fault 24ff). We enquire whether the conduct of the accused deviated from what the hypothetical reasonable person would have done.

person was the effective cause, as may be revealed by whether the person could have done otherwise.

We turn next to consider what would provide a sound basis for the attribution of **responsibility**.

8.5 Required Conditions

The discussion until now has focused upon what will not provide a sound basis for **responsibility**. I turn now to propose a model that does provide a sound foundation for **responsibility**, at least for the purposes of the criminal law.[654] Criminal law is concerned with the attribution of blame and ultimately punishment. Two requirements of criminal law may be identified as giving expression to concerns with **responsibility**: voluntariness and capacity.[655]

What I will propose is a model of **responsibility** that holds a person **responsible** when his/her conduct reflects upon him/her. This means that a person is taken to be **responsible** when his/her conduct shows something in or about him/her (that is, whether s/he is the effective cause of the conduct in question). Whether this is so, may be revealed by whether the person could have done otherwise.

In what follows I will attempt to show what **responsibility** should be taken to mean, and briefly how the two requirements (of voluntariness and capacity) may be reconciled with the model presented.

[654] There is a point at which the solution proposed here may not be entirely applicable to moral responsibility. This is because the solution I propose depends upon the standard against which we are judged in criminal law. This standard is set, or at least discernable. The proper standard for moral conduct is something that appears – at least to me – less clear, even contentious.

[655] In contrast, fault appears to be concerned with the state of mind or standard of conduct of the accused at the time of the conduct in question. As indicated above (see footnote 571) responsibility concerns whether the conduct or state of mind of the accused, may be attributed to the accused.

The model that I will propose is one of reason-sensitivity.[656] It turns on the **reasons** for a person's conduct: how they arose and whether they are expressed through the person's conduct. It is a **compatibilist** model of **responsibility** and holds that **determinism** and **responsibility** are reconcilable.[657]

In order to propose a complete model of reason-sensitivity, at least for the purposes of the criminal law, we must observe the standard to which the criminal law holds us. This is the standard against which we are ultimately judged. For the purposes of this thesis, it will be presumed that one cannot be judged according to a standard that one cannot observe and attain.[658] As noted,[659] at most our law requires, or ought to require, that we must behave reasonably. In simple terms, we must be able to do what the law requires of us. We must be able to behave reasonably. I will rely on this throughout as a guide to what is required for **responsibility**.

[656] It draws and develops upon Hume's (David Hume *Enquiries concerning Human Understanding* (1748/1993)) notion that free and responsible action is signalled by whether the agent could have done otherwise had he wanted to. Sober (Sober *Core Questions in Philosophy: A Text with Readings* 4 ed (2005) 318) notes that Hume ought not to have confined his model to being conditional upon only the agent's desires (wants), but rather the entire psychological process (including choices, beliefs, values, and desires, and that these beliefs, values and desires must be properly grounded in the world). One may note from an argument made by Morton why the entire process must be taken account of. The developed position - that takes account of the entire psychological process - is well and accessibly stated in Sober (ibid).

[657] While Immanuel Kant considered compatibilism a 'wretched subterfuge' and William James called it a 'quagmire of evasion', Thomas Hobbes, David Hume, and John Stuart Mill endorsed the model (Kane ed *Free Will* Edited by Cahn (2002) 9 & 11) and it is now endorsed by leading legal academics such as Tony Honoré (Honoré *Responsibility and Fault* (1999)), Stephen Morse (Morse 'New Neuroscience, Old Problems' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Garland (2004); Morse 'Reasons, Results, and Criminal Responsibility' (2004) ILL L Rev), and Jonathan Burchell (Burchell *Principles of Criminal Law* 3rd Revised ed (2006)). Certain statements of Tadros appear to endorse a reason-sensitivity approach. He argues that an agent who loses self-control may be regarded as 'no longer responsive' or no longer guided by hi/her reasons. (Tadros 'The Characters of Excuse' (2001) 21 Oxford Journal of Legal Studies 507)

[658] I regard it as somewhat trite that it is only fair that our law can only expect conduct of us that we can perform. There is also good authority for this proposition that appears, most often, in the context of criticisms of the current reasonable person test – to the extent that it is objective and unattainable for any particular accused (discussed under 1.3.2.2 Fault on page 24ff).

[659] Above, under 1.3.2.2 Fault on page 24ff.

8.6 Reason-Sensitivity: Exerting and being controlled

Thus the model that will be proposed here is one that requires that a person is **responsible** mostly by virtue of being in control, but also by being controlled – in the right sort of way.[660] Thus I shall propose that **responsibility** has two components:

1. Exerting control, which I shall refer to as 'voluntariness'; and
2. Being controlled, in the right sort of way,[661] which I shall refer to as 'circumstance-sensitivity' – or 'circumsense'.[662]

I will discuss each in turn.

8.6.1 Voluntariness

To begin, conduct must be controlled by one's will. This requires that one's conduct follows from, and is controlled by, his/her choices. His/her choices must follow from and be controlled by his/her **reasons**. This is illustrated in 'Figure 4' as 'voluntariness' and refers to the controlling relationship of a person's **reasons** over his/her choices and conduct.

[660] Leon 'Responsible Believers' (2002) 85 The Monist 422; Susan Wolf *Freedom Within Reason* (1990); Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002) 154. There appears to be some parallels between this model of responsibility and that of Fischer to the extent that 'guidance control' is required: 'that behavior must issue from one's own mechanism, and this mechanism must be appropriately responsive to reasons' (Fischer 'Frankfurt-style Examples, Responsibility and Semi-compatibilism' In *Free Will* edited by Kane (2002) 108; Cf Leon 'Responsible Believers' (2002) 85 The Monist 433). This fits with the proposal that will follow and with the distinction between exerting control and being controlled.

[661] Discussed later, under the heading of on page 193.

[662] An accusation of inventing words would be perfectly correct. This is my purpose. I wish to invent a name which is free of all baggage. For that reason I propose the concept of circumstance-sensitivity and, in particular, 'circumsense'. I have deliberately chosen not to use the concept of sanity, as Wolf does (Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002) 154ff), in order to avoid any implication of that responsibility can only be excluded (at this point) due to some 'mental' impediment recognised in law, medicine, psychology, psychiatry or otherwise. I employ the term to refer to the appropriate relationship between the agent's reasons and the world, in contrast to the agent's reasons and his/her conduct (which I refer to as voluntariness).

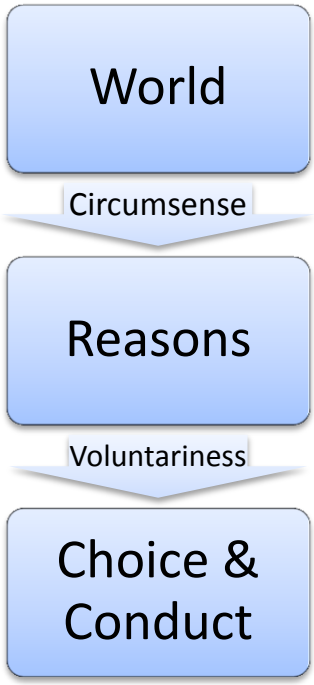


Figure 4: Simplified Model of Reason-Sensitivity. This shows that reasons are the point around which control turns. A person's reasons are controlled by the world, whereas, in turn, the person's reasons control her choice and conduct.

In philosophy, a distinction is observed between mere movement and action/conduct. Mere movement is involuntary and is something that happens to one, whereas action/conduct is voluntary and something that one initiates; it is something that one 'does'.[663] Action (voluntary

[663] McGinn 'Action and Its Explanation' In *Philosophical Problems in Psychology* edited by Bolton (1979) 20. '[A]cting rather than being acted upon.' (George P Fletcher 'Punishment and Responsibility' In *A Companion to Philosophy of Law and Legal Theory* edited by Dennis Patterson (1999) 520). See also Donald Davidson 'Actions, Reasons, and Causes' (1963) 60 The Journal of Philosophy; Honoré *Responsibility and Fault* (1999) 143.
This may be coupled with the authority gleaned from the philosophers working on the problem of free will, who agree that one can only be responsible for voluntary conduct, which is conduct which follows the agent's choice, which choice follows the agents reasons (Leon 'Responsible Believers' (2002) 85 The Monist; Charles Taylor 'Responsibility for Self' In *Free Will* edited by Gary Watson 111-26 (1982); Gary Watson 'Free Agency' (1975) 72 Journal of Philosophy; Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002)).

conduct) is identified as movement for and because of a **reason**. Conduct which is for a **reason** – any **reason** - is action and regarded as voluntary.[664]

There has been some resistance to the notion that reasons can be regarded as causes.[665] However, Davidson points out that it is a requirement of an action that it must in fact be caused by a reason in order for the reason to explain the action.[666] He notes: 'Central to the relation between a reason and an action it explains is the idea that the agent performed the action *because* he had the reason.'[667] Reasons, therefore, by definition, are causally effective.

Conduct that cannot be described as somehow for and because of a reason cannot be described as action. Conduct remains (voluntary) action even if it was mistaken. That is, it remains voluntary conduct even if the reason was mistaken. For instance, shooting a human being might be a mistake when one meant instead to shoot a scarecrow. But it is nevertheless for a reason and therefore voluntary under the description that one discharged the firearm to shoot the scarecrow.[668] If there is no possible description of the movement that links it to some reason, then it is rendered a mere movement (involuntary).

The requirement that conduct must follow from, and be controlled by one's **reasons**, may be recognised as the criminal law requirement of voluntariness such that it may be permissible to say

[664] McGinn 'Action and Its Explanation' In *Philosophical Problems in Psychology* edited by Bolton (1979) 21-2.
[665] R Peters *The Concept of Motivation* (1958); P Winch *The Idea of a Social Science* (1958).
[666] Contrary to the notion that a reason does not inevitably produce the same conduct such that it cannot be regarded as a cause (HLA Hart & AM Honoré *Causation in the Law* (1959)), Davidson explains that the specific conduct is not inevitable following upon the reason, because the reason is merely *a* single reason in the matrix of a complex system of reasons (Davidson 'Actions, Reasons, and Causes' (1963) 60 The Journal of Philosophy 697). Morse observes: 'We have no convincing conceptual reason from the philosophy of mind, even when it is completely informed about the most recent neuroscience, to abandon our view of ourselves as creatures with causally efficacious mental states.' (Morse 'New Neuroscience, Old Problems' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Garland (2004) 167).
[667] Davidson 'Actions, Reasons, and Causes' (1963) 60 The Journal of Philosophy 691; McGinn 'Action and Its Explanation' In *Philosophical Problems in Psychology* edited by Bolton (1979) 26.
[668] See Honoré *Responsibility and Fault* (1999) 143.

that conduct is voluntary if it is subject to the accused's will – as is sometimes seen in definitions of voluntariness in the criminal law.[669]

I expect we would want our conduct to follow from the choices that we make. I expect also that we would want our choices to follow from the **reasons** that we have. To want anything else would be to want to be capricious.

8.6.2 Circumsense

Thus we may say, up to this point, that a person is **responsible**, or at least voluntary, if s/he can do what s/he wants, or as his/her will directs. Some argue that this control must continue: A person must be responsible for his conduct all-the-way-up. That is, a person must be responsible for all antecedents of his/her conduct. [670] Others note,[671] correctly I submit, that one cannot want what one wants. Bertrand Russell noted that one may do what one pleases, but one cannot please as one pleases.[672] The point is, to put it in the language of control, that one cannot control what one wants.[673] We are concerned here with the origin of one's will and the relationship between the

[669] See Snyman (Snyman *Criminal Law* 5th ed (2008)) and some of the conceptions offered by Burchell (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) [p]). As discussed above (5.4 Voluntariness Defined? on page 72ff), the problem with the legal concept of voluntariness is not that it has not yet been properly defined, but that too many definitions have been offered, which, upon analysis, are contrary to one another.

[670] See G Strawson 'The Impossibility of Moral Responsibility' (1993) Philosophical Studies 13: 'To be truly morally responsible for what you do you must be truly responsible for the way you are …'.
See also Peter van Inwagen 'An Essay on Free Will' In *Free Will* edited by Robert Kane (1983/2002).
However, responsibility-all-the-way-up is impossible since at some point back in time the antecedents of conduct must escape the agent's control. Secondly the very first decision of the individual in time, from which responsibility is thereafter to follow, will be completely random, arbitrary, and capricious. (Leon 'On the Value and Scope of Freedom' (1999) XII Ratio 166).

[671] Reznek *Evil or Ill: Justifying the Insanity Defence* (1997) 6.

[672] Reported in John Hospers *An Introduction to Philosophical Analysis* 4th ed (1997) 152.

[673] To this some responded that one can (Harry G. Frankfurt 'Freedom of the Will and the Concept of a Person' (1971) LXVIII Journal of Philosophy; Taylor 'Responsibility for Self' In *Free Will* edited by Watson 111-26 (1982); Watson 'Free Agency' (1975) 72 Journal of Philosophy). Indeed, the 'deep self' view argues that it is this very issue that identifies one as responsible. That is, that one is responsible if and when one wants to want what one (more superficially) wants (and can implement) (Harry G. "Freedom of the Will and the Concept of a Person." Journal of Philosophy LXVIII, no. I (1971): 5). But one cannot control what one wants all the way back. The case of the willing addict illuminates this problem. Ordinarily we think of a drug addict who wants drugs, but does not want to be that way. This is an unwilling addict and the deep self view accounts well for our intuitions that s/he is not responsible.

person, his/her will, and his/her (internal[674] and external[675]) environments. This is the question of whether the person is in touch with 'reality' in the way we need them to be in order to judge them.[676] This is the question of capacity, as it has manifested in South African criminal law, which I will call ''circumstance-sensitivity' or 'circumsense'.[677] .

There is a level at which, however much we might not like this, the way we are and the will or **reasons** we have are beyond our control. Literal self-creation is not possible. Our **reasons** (beliefs, desires and values) *must* come from somewhere. [678] Should this lead to the conclusion that we are ultimately not **responsible**? Fortunately, we are not driven to this conclusion. We may yet be **responsible** if we stand in the appropriate *relationship* to the world; to the various environments (internal and external) to which we are subject. That is, if one's **reasons** have arisen in the right sort of way and are, as a composite, the right **reasons** to have. This is illustrated in 'Figure 4' as 'circumsense' and refers to the controlling relationship of the world over one's **reasons**.

However, the deep self view cannot account for our intuitions that a willing addict is equally not responsible because his/her willingness is actually irrelevant to whether s/he takes the drug. The willing addict wants (2nd order) to desire the drug (1st order – addictive desire) but takes the drug *because* of an addictive desire first order; while his/her higher order desires are irrelevant. Importantly, s/he does not act *because* s/he is willing so that we must notice that his/her willingness is irrelevant (Mark Leon, Personal communication, 2005). This gives effect to our intuitions that an addict is not responsible. A reason responsiveness or conditional capacity account is required (described below).

[674] Such as genetic composition, brain structure and neurotransmitters.

[675] Such as childhood experiences, including for instance, the socio-economic status of the person's family.

[676] Morton notes how, if one considers the example of an individual whose beliefs and desires have been corrupted by another (perhaps by a combination of drugs and hypnotism), one observes an individual acting according to his/her beliefs or desires, but that individual cannot be said to act responsibly (Adam Morton *Philosophy in Practice: An Introduction to the Main Questions* (1996) 398).

[677] Discussed and explained in footnote 662.

[678] This point was well recognised regarding Johan Nel, a young white man, who in January 2008 shot and killed several black people in an apparently racist attack. Jansen notes: 'Unless you believe in the parachute theory of youth development — that Nel dropped out of thin air into a decent, harmonious, raceless society — it is worth thinking about how he became this way. Testimony in the courthouse and the final judgment indicate that Nel learnt to become such a brutalised, troubled child' (Jonathan Jansen 'Hatred reninforced by his experience' *The Times* 27 Nov 2008).

8.6.2.1 Right Sort of Way

As I have indicated above, **determinism operates in the right sort of way** to make us **responsible** when it operates to make us reason-sensitive, and even further, when we are appropriately responsive to the world in which we live. **Determinism operating in the wrong sort of way** would be when we cannot respond appropriately to our world, when we are 'stuck'. For example, someone who is suffering an epileptic seizure, or is a kleptomaniac,[679] or who is suffering paranoid psychotic delusions that a fire-breathing dragon is chasing them.

For **reasons** to have arisen in the right sort of way, they must be functioning properly; they must be sensitive to whatever it is in the environment they are supposed to follow/track. For instance, as may be noted from 'Figure 5',[680] one's beliefs must be sensitive to the truth and the evidence; one's desires must be sensitive to one's needs and best interests and one's values must be sensitive to what is right and good.[681]

[679] Nielsen observes: 'A kleptomaniac cannot correctly be said to be a free agent, in respect to his stealing, because even if he does go through what appears to be deliberations about whether to steal or not to steal, such deliberations are irrelevant to his actual behavior in the respect of whether he will or will not steal. Whatever he resolved to do, he would steal all the same.
This case is important because it clearly shows the difference between the man - the kleptomaniac - who is not free with respect to his stealing and an ordinary thief who is. The ordinary thief goes through a process of deciding whether or not to steal, and his decision decisively effects (sic) his behavior. If he actually resolved to refrain from stealing, he could carry out his resolution. But this is not so with the kleptomaniac. Thus, this observable difference between the ordinary thief and the kleptomaniac, quite independently of the issue of determinism, enables us to ascertain that the former is freer than the latter.' (Nielsen 'Reason and Practice' In *Free Will* edited by Kane (1971/2002) 44).

[680] See on page 195.

[681] Leon notes: 'The point ... is this: whereas an action is [responsible] if it is in the agent's control, a will is autonomous not because it is in the agent's control but because it is properly constituted - the deterministic path follows the appropriate route through the agent's states. … Beliefs, for example, would have to be appropriately grounded in evidence or reason. Desires would have to be appropriately grounded in the agent's needs and interests. And values too would have to be appropriately grounded.' (Leon 'On the Value and Scope of Freedom' (1999) XII Ratio 174).
Wolf adopts a similar position in respect of the appropriate targets of one's beliefs and values, that one's beliefs must be controlled 'by perceptions and sound reasoning that produce an accurate conception of the world'; (Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002) 154) and that one's 'values be controlled by processes that afford an accurate [normative] conception of the world' (ibid 155).

> [Freedom and responsibility] require not only that we, as persons, have the right sort of abilities – the abilities, that is, to direct and govern our actions by our most fundamental selves. It requires as well that the world co-operate in such a way that our most fundamental selves have the opportunity to develop into the selves they ought to be.[682]

Ideally, this means that one's beliefs must be true, ones desires must serve one's needs and best interests, and one must value what is right and good.[683] What the right **reasons** to have are, will be dictated in different contexts, by the standard by which one's conduct will be judged. If **reasonableness** is the standard, as the law requires,[684] such that only reasonable conduct is required of anyone, then, for any person to be **responsible**, his/her reason system must be 'capable' of producing reasonable choices and reasonable conduct. By 'capable' it is meant only that, in appropriate circumstances (as dictated by the appropriate standard), the person *would*[685] choose and do the right thing. If that is not true, s/he cannot be judged by that standard and cannot be blamed for errant conduct.

At its most basic level, this enquiry based on the standard of reasonableness allows us to glean whether the person may be regarded as a reasonable person. It tells us if we may expect the person

[682] Wolf 'Asymmetrical Freedom' (1980) 77 Journal of Philosophy 160.

[683] What is to determine those reasons is where there is some disagreement and I have opted for what I have called, following Wolf, the reason-sensitivity or *sane* deep self view: that one's reasons must arise out of and follow from the way the world is (Leon 'Responsible Believers' (2002) 85 The Monist; Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002)(see footnote 681). The alternative is what is known as the deep self view (see footnote 673). It is the view that one's reasons must be the reasons one wants to have (Frankfurt 'Freedom of the Will and the Concept of a Person' (1971) LXVIII Journal of Philosophy; Taylor 'Responsibility for Self' In *Free Will* edited by Watson 111-26 (1982); Watson 'Free Agency' (1975) 72 Journal of Philosophy. The reason I have opted for the reason-sensitivity view is that the deep self view is only self-referential and cannot account for a person who has been brainwashed for instance or who is otherwise out of touch with reality. To put it differently, as in footnote 673, the deep self view seems to set off an infinite regression concerning whether one can want, and thus control, one's deep self. As noted, at some point in this regression the answer seems to be no.

[684] As discussed on page 187.

[685] The word 'would' here is chosen very deliberately for two reasons. Firstly the word 'would' signals that we must know at least something about the person. That is, that the person, in certain circumstances, would or would not do something. Secondly, it is used instead of the word 'could' which would, once again, require a conditional interpretation. That conditional interpretation may well itself require a further conditional interpretation. There may be no end to this cycle and thus the word 'would' is employed to test what we may claim about the person and also to avoid an endless cycle of conditional interpretations.

to act reasonably. This is imperative if we wish to judge the person against the standard of reasonableness.

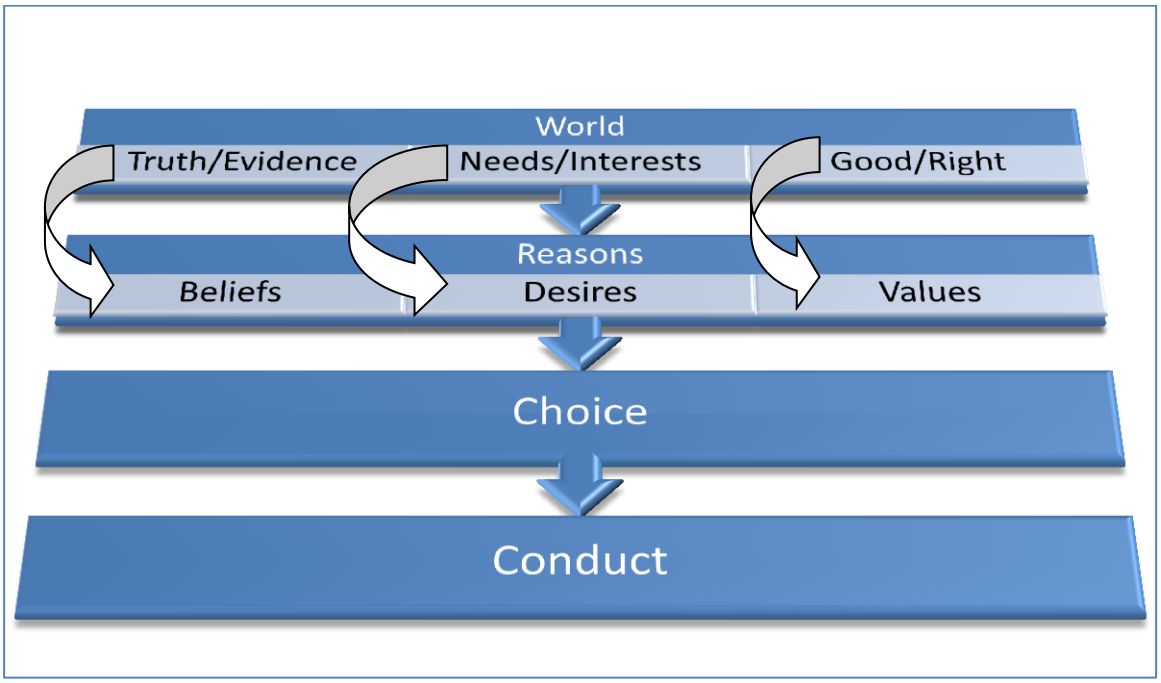


Figure 5 Full Model of Reason-Sensitivity. Here it may be noted that reasons must arise out of a person's environment (world) and be sensitive to that environment.

Adopting this particular criminal law standard also gives content to what should be regarded as proper functioning for the purposes of the criminal law. In the context of the criminal law, in which the standard of the reasonable person is the most that is expected of anyone,[686] one must be capable of being reasonable. A reasonable person's **reasons** (beliefs, desires, and values) are necessarily reasonable. Adopting this standard relieves us from finding some absolute or universal standard of what should be believed, desired, valued.[687] The reasonable person believes, desires

[686] See discussion on page 187.
[687] This question appears to have been answered by Leon in respect of beliefs (Leon 'Responsible Believers' (2002) 85 The Monist). However, the question of what one ought to desire and value appear more elusive (ibid; Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002)).

and values what is reasonable to believe desire and value. This is admittedly a departure from the philosophy of moral **responsibility**. However, this diversion to adopt the standard of conduct imposed under criminal law, permits for a complete model of criminal **responsibility**.

8.6.2.2 Wrong, Mistaken, Inaccurate Reasons

A pertinent question is whether an agent may claim not to be responsible because, for instance, s/he held a mistaken belief or had perverted or corrupted values. Must one's beliefs and values all be correct and accurate before one can be held responsible? Consider for instance, a Nazi general who killed Jewish people under the genuine belief that Jewish people were inferior to the Arian race, or similarly an apartheid era security force officer who tortured and killed black people under the genuine belief that they were inferior to white people. Can the Nazi general and the Apartheid officer now claim that they are not responsible because they were mistaken?

I have argued that responsibility is indicated by the reason-sensitivity of an agent. At the core of the problem of the Nazi General and the Apartheid officer is whether, even though they had mistaken beliefs and therefore erroneous reasons, they remained reason-sensitive? Thus the crux of the problem is whether one may be wrong and nevertheless reason-sensitive. The answer is that it seems entirely possible to hold erroneous reasons, such as a false belief, and nevertheless be reason-sensitive and responsible.

One may be reason-sensitive in that one's beliefs are sensitive to the truth and the evidence, one's desires are sensitive to one's needs and best interests, and one's values may be sensitive to what is right and good. However, even though one may be reason-sensitive and responsible, if one is not exposed to the truth or the evidence one may harbour false beliefs. If one is indoctrinated, one's desires and values may be perverted or corrupted. How would we know whether the agent – despite having erroneous reasons – is reason-sensitive? By the usual enquiry: would the agent, in appropriately enabling circumstances, correct his/her error?

Consider an example of a person who sits idly and watches a child drown, claiming to have been under the mistaken belief that the child was just playing. If the person, for instance cared enough, s/he would pay closer attention and may notice that the child is clearly not playing.[688]

To test whether the person watching is reason-sensitive and responsible we must consider again, a hypothetical variation in the circumstances. We must enquire whether the person would not choose and do the right thing, in appropriately enabling circumstances in which every reasonable person would choose and do the right thing. We have to imagine circumstances in which any reasonable person would recognise that the child was drowning, and save the child. We may imagine that the child is closely related to the person in question – perhaps a daughter who is just learning to swim.[689] Presumably this would hypothetically impose a further variation, down the line, to the effect that the person, if reasonable and reason-sensitive, would care to pay careful attention. If we asked this question of the person and note that the error would (hypothetically) persist, we can conclude that s/he either did care enough and paid proper attention or their **reasons** were 'stuck'. On either account, they cannot be blamed. However, if the error would (hypothetically) disappear, we can conclude that the failure to save the child was not due to the error, but to the fact that the person did not care enough to pay proper attention. S/he is reason-sensitive and therefore **responsible**.[690]

To be more abstract, in order to excuse it must be the case that the person would not choose and do the right thing, in appropriately enabling circumstances in which every reasonable person would choose and do the right thing. This reveals that the person is not reason-sensitive and tracking properly.

[688] Leon (Leon 'Responsible Believers' (2002) 85 The Monist) argues that one may be responsible for one's errant beliefs, for instance, if one did not behave in an epistemologically responsible manner. This is detected by whether the errant belief would have persisted even *if* the person had chosen otherwise – chosen to be more careful to ascertain the truth (what Leon terms, being more epistemologically responsible).
[689] Tadros 'The Characters of Excuse' (2001) 21 Oxford Journal of Legal Studies 514-5.
[690] This accused may nevertheless raise a defence of mistake of fact to exclude fault.

Applied to our example, we would want to know whether, ordinarily, under reasonable circumstances (such that *every* reasonable person would save the child) the person would save the child. If s/he would not, we have identified that s/he falls beyond the scope of what can be judged on the standard of reasonableness.[691]

8.6.2.3 Bad Luck and Abusive Environments

One final point must be observed regarding the role of bad luck. Concern may be expressed that mere reason-sensitivity may not adequately distinguish between those who deserve punishment and those who do not. This is because of the role that luck may play in the nature of the environments that any person is subjected to. It is possible that a person who is reason-sensitive may fortuitously have been exposed to a good and nurturing environment. This person may be led – because s/he is reason-sensitive in a good and nurturing environment - away from crime. Alternatively, a reason-sensitive person may fortuitously have been exposed to an adverse, perhaps abusive environment. This person (let us call him Jojo[692]), may be led – because he is reason-sensitive in an adverse abusive environment - toward criminal activity. Both are reason-sensitive, and yet we may be concerned that Jojo should not be punished for being sensitive to his environment.

Wolf's view is that Jojo – and supposedly anyone like him, who has suffered an adverse experience, is not responsible.[693] Yet this is surely not necessarily so, and I submit, Wolf's intuitions have, at times, apparently misled her.[694] Wolf has apparently confused understanding

[691] On whether ultimate blame is appropriate – even though the agent is responsible – not only must the agent be reasonable, but so too must the actual circumstances be reasonable – see on page 201.

[692] Following Wolf (Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002)). Wolf's example may easily be extended to anyone who has suffered an adverse experience, including a deprived or abusive childhood.

[693] Ibid 153, 5 & 6.

[694] Wolf's error appears to lie in the extent to which she adopts an unconditional interpretation of the requirement that one must be able to do otherwise, from which she derives the doubt as to the responsibility of JoJo and all who may have suffered deprived childhoods (Leon 'Responsible Believers' (2002) 85 The Monist 427). Wolf states: 'In light of

with excusing conduct; the bad with the 'mad'. This confusion is the basis for the public contempt of the 'abuse' excuse which may be conceived as an 'attempt to eschew the entirety of criminal responsibility onto society'.[695] Nevertheless, the problem must then be confronted. I expect that this is the very crux of this thesis: one distinguishes the mad from the bad, in accordance with what

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JoJo's heritage and upbringing - both of which he was powerless to control - it is dubious at best that he should be regarded as responsible for what he does. For it is unclear whether anyone with a childhood such as his could have developed into anything but the twisted and perverse sort of person that he has become.' (Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002) 153.)

Despite her emphasis that sanity depends upon abilities and not the exercise of such abilities, and the recognition given that the problem of the 'notion of "ability" being notoriously problematic' (ibid 161) – only one explanation demonstrates a conditional interpretation of capacity: '…though in one sense we are no more in control of our deepest selves than JoJo and others, it does not follow in our case, as it does in theirs, that we would be the way we are, even *if* it is a bad or wrong way to be.' (ibid 157; emphasis added).

Instead, unconditional interpretations of the requirement that a person must be able to do otherwise appear throughout:

> … [T]he condition of freedom requires that the agent in this case could have done otherwise in just the situation in which he was actually placed.' (Wolf 'Asymmetrical Freedom' (1980) 77 Journal of Philosophy 159; ibid 159);
>
> … this new proposal explains why we give less than full responsibility to persons who, though acting badly, act in ways that are strongly encouraged by their societies - the slave-owners of the 1850s, the German Nazis of the 1930s, and many male chauvinists of our fathers' generation, for example. These are people, we imagine, who falsely believe that the ways they are acting are morally acceptable, and so, we may assume, their behavior is expressive of or at least in accordance with these agents' deep selves. But their false beliefs in the moral permissibility of their actions and the false values from which these beliefs derived may have been *inevitable* given the social circumstances in which they developed. If we think that the *agents could not help but be mistaken about their values*, we do not blame them for the actions which those values inspired. [footnote omitted]
>
> It would unduly distort ordinary linguistic practice to call the slave-owner, the Nazi, or the male chauvinist even partially or locally insane. Nonetheless the reason for withholding blame from them is at bottom the same as the reason for withholding it from JoJo. Like JoJo, they are, at the deepest level, *unable to cognitively and normatively recognize and appreciate the world for what it is*. In our sense of the term, their deepest selves are not fully sane.
>
> The Sane Deep Self View thus offers an account of why victims of deprived childhood as well as victims of misguided societies may not be responsible for their actions without implying that we are not responsible for ours. The actions of these others are *governed by mistaken conceptions of value that the agents in question cannot help but have*. Since, as far as we know, our values are not, like theirs, unavoidably mistaken, the fact that these others are not responsible for their actions need not force us to conclude that we are not responsible for ours. (Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002) 156 emphasis added.

[695] Judd F. Sneirson 'Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate' (1995) 143 U.Pa.L.Rev 2288n182. Morris argues: 'Why not permit the defence of dwelling in a Negro ghetto? Such a defence would not be morally indefensible. Adverse social and subcultural background is statistically more criminogenic than is psychosis. . . You argue that insanity destroys, undermines, diminishes man's capacity to reject what is wrong and to adhere to what is right. So does the ghetto - more so.' (N Morris 'The Dangerous Criminal' (1968) 41 Southern California Law Review 520).

See also Morris on the defence of 'social adversity' (N Morris *Madness and the Criminal Law* (1982)) and Honoré *Responsibility and Fault* (1999) 141.

has been argued above, by considering whether the agent remains reason-sensitive as may be revealed by a consideration of the agent's conditional capacity to do otherwise.

There will be two types of Jojo: let us call them JojoX and JojoY – both are initially exposed to an adverse, abusive environment and both develop, as a function of being reason-sensitive, wrong reason sets. However, JojoX is no longer able, even if hypothetically placed in ideal circumstances, to revise his mental set. He is stuck and thus not **responsible** - because he is no longer reason-sensitive. JojoY on the other hand formulated a reason set that was wrong but he remains reason-sensitive such that, if hypothetically placed in ideal adequate circumstances, he could and would correct this reason set. Thus adequate circumstances would produce in JojoY a corrected reason set and he may thus be judged on that basis. JojoY, can choose and do the right thing if the circumstances are adequate. Thus JojoY is **responsible**, but JojoX is not.[696]

8.7 Locus of Control

These two components, voluntariness and circumsense, are clearly distinguishable by virtue of the difference in the locus of appropriate control. For voluntariness, the appropriate control lies within the person. His/her **reasons** must determine and control his/her choices which must determine and control his/her conduct. The control exerted by one's **reasons** must be actual – and not merely potential. This means that conduct is voluntary when a person can be said to have acted *because* of his/her **reasons**. His/her **reasons** actually dictated his/her choice and conduct.

[696] I am indebted to Mark Leon (Personal Communication, 2008) for this insight. Again, whether JojoY is ultimately to blame requires not only that he was responsible, but also that he was in circumstances in which we can expect him to have acted reasonably – see on page 201. A JojoY who is a responsible agent may be exposed to unreasonable circumstances – circumstances in which reasonable conduct cannot be expected of any reasonable person. In that case, though JojoY is responsible, he is not ultimately to blame for his conduct. This is operationalised under the heading 9.2 Fault on page 209ff.

For circumsense however, the locus of control lies outside the person. The person is acted upon by the world, that is his/her various (internal and external)[697] environments. As illustrated in 'Figure 5',[698] circumsense is the condition of *being* in the right *relationship* with those environments (the world). The required state of being is one of reason-sensitivity. As mentioned, for instance, one's beliefs must be sensitive to and follow/track the truth and the evidence; one's desires must be sensitive to one's needs and best interests and one's values must be sensitive to what is right and good.[699]

To be clear, there are two concerns here: the mental state of the person *and* the actual circumstances to which s/he is *currently* exposed. That is, the circumstances in which the offence took place. In the test of circumsense and voluntariness we are concerned with agent responsibility. We need to know, firstly, if the various (internal and external) environments to which the accused has been exposed in the past has produced *in the person* a reason set which, under adequate (reasonable) circumstances, would produce the right choice and conduct by the person. Here the *focus is on the mental state of the person*.

Secondly, we wish to know if the actual circumstances were adequate. The *focus here shifts to the current circumstances* to detect whether they were not an impediment to the production, via the person's reason system, of the right choice and conduct. Strictly speaking, this concern – with current circumstances – falls beyond considerations of whether the individual is a **responsible** person. This may be recognised as the concern with 'moral responsibility' – introduced above.[700] It falls beyond concerns with the **responsible** *mind*.[701] However, to omit this would propose an

[697] See notes 674 and 675.
[698] On page 195.
[699] One should be careful to note however that 'circumsense' is far-reaching and cannot be restricted 'mental' impediments alone. If the person's circumsenseis impaired s/he cannot be acting for his/her own reasons. That is, if his/her reasons have arisen in the wrong sort of way, they are not the agent's own reasons. Responsibility is excluded because the entire required stream of reason is not functioning properly.
[700] Under the heading 1.2 Responsibility on page 17.
[701] As will be discussed under the implications chapter 9 Implications and Recommendations on page 207ff, the actual current circumstances in which the conduct took place, seem the appropriate concern of the enquiry into fault (discussed on page 209ff).

incomplete picture of what **responsibility** (ultimately) requires. Without this, it would not be possible to propose an integration of this theory into practice and to take account of the person's circumstances.

Thus we wish to know if the person is reasonable *and* found him/herself in circumstances in which a reasonable person would chose and do the right thing. We can expect of reasonable people in reasonable circumstances to do so and we may punish them when they do not.

8.8 Conclusion

Thus, the model proposed here is that we are **responsible** when we are reason-sensitive and functioning properly. We are **responsible** when we do what we want, and are able to want what we ought, according to the appropriate standard,[702] to want. To summarise the required conditions, a **responsible** person is one who is reason-sensitive, this is a person who is functioning and tracking properly,[703] in that:

1. The person is acting voluntarily: his/her conduct is subject to his/her will, such that his/her conduct follows from his/her choice, which follows, in turn, from his/her will/reasons;
2. The person is sane: his/her **reasons** follow from and track whatever they ought to in the world.[704] Put plainly, s/he is a reasonable person.

[702] As dictated by the context.
[703] As determined by tests of hypothetical variation.
[704] This second condition is required since, even if the conduct were voluntary (under condition 1), the person may harbor a distorted and perverted will: false beliefs, and distorted and perverted desires and beliefs. To this we must add the condition of circumsense– that the will is 'plugged' into the world in the right way and that this interaction has produced the 'right' sort of will.

If all of the above pertain, and yet the person has failed to choose and to do the right thing, the person may be blamed for his/her conduct because his/her errant conduct reflects something in or about him/her.

8.9 Glossary

(in alphabetical order)

- ***Agent***: person whose **responsibility** for conduct is in question.
- ***Chance***: describes a state in which a lack of information and knowledge (an **epistemological** impediment) makes predicting the future state of something, impossible. For instance, the throw of a dice is subject to **chance**, because it is **determined** by various parameters, including the force and direction exerted upon the dice, and the surface upon which it is thrown. It is not an indeterminate event because if all parameters were known, the throw of a dice could be perfectly predicted. The concept of **chance** is often confused with **indeterminacy**, it will be reserved for its proper meaning, as described here.
- ***Compatibilism***: the doctrine that **psychological determinism** and **responsibility** are compatible; that is, even if **determinism** operates in and upon human minds, human beings are nevertheless **responsible** for their conduct. This may be understood as '**soft-determinism'**.
- *Conditional interpretation* – see under Principle of Alternative Possibilities.
- ***Conditional interpretation:*** relating to the requirement that an **agent** must be able to do otherwise, an **agent** must be able to do otherwise if, for instance, s/he wanted to. That is, an **agent** must be able to do otherwise on some hypothetical variation of his/her actual **reasons** or the circumstances in which the **agent** finds him/herself.
- ***Determinism operates in the right sort of way*** to make us **responsible** when it operates to make us reason-sensitive, when we are appropriately responsive to the world in which we live.
- ***Determinism operates in the wrong sort of way*** when we cannot respond appropriately to our world, when we are 'stuck'. Someone who is suffering an epileptic seizure, is a

kleptomaniac, or who is suffering paranoid psychotic delusions that a fire-breathing-dragon is chasing them, represents **determinism** operating in the wrong sort of way.

- ***Determinism***: the doctrine that what happens in the future depends upon the present; given the present, there can be only one possible future.
- ***Doppelgänger*:** a person's hypothetical molecule for molecule identical clone.
- ***Epistemological*:** relating to knowledge.
- ***Fatalism***: the doctrine that, irrespective of the present, there is only one possible future.
- ***Fault***: the technical legal term from criminal law referring to the wrongful state of mind of the accused (intention) or failure to observe a reasonable standard of conduct (negligence).
- ***Freedom***: In line with a common conception – freedom describes a state of **indeterminism**, in contrast to a **determined** state. On this understanding one may be free as opposed to being **determined**. However, freedom has another, more restricted meaning. One may also be free as opposed to being 'stuck'. On this understanding, one is free where one is functioning properly. This more restricted meaning of freedom is the sense in which it is used here.
- ***Hard-Determinism***: the **incompatibilist** doctrine that **psychological determinism** operates in and upon human beings so that human beings are not **responsible** for their conduct.
- ***Incompatibilism***: the doctrine that **psychological determinism** and **responsibility** are incompatible; that is, if **determinism** operates in and upon human minds, human beings cannot be **responsible** for their conduct. **Hard-determinism** and **libertarianism** are opposing views within this school of thought.
- ***Indeterminism***: the doctrine that what happens in the future is independent of the present; irrespective of the present, there are endless possible futures. In its true sense, it refers to randomness, arbitrariness or capriciousness – the absence of cause or reason for an event or state of being.

- ***Libertarianism***: the **incompatibilist** doctrine that human beings are **responsible** for their conduct and that therefore **psychological determinism** does not operate in and upon human beings.
- ***Ontological*:** relating to the way the world is.
- ***Principle of Alternative Possibilities***: The name under which the requirement that a person must be able to do otherwise is discussed in the philosophical literature.
- ***Psychological determinism***: **determinism** as it operates upon the mental life of human beings. That is, **determinism** operating upon the beliefs, desires and values of a person, upon their choices and ultimately their conduct.
- ***Reasons***: the composite of mental phenomena that inform a person's choice, including their beliefs, desires, and values.
- ***Responsibility***: the credit or blameworthiness of a person. That is, whether it makes sense to praise or blame a person for their conduct. Irrespective of their conduct or actual state of mind, responsibility concerns whether the conduct or state of mind of the accused, may be attributed to the accused. It is used here - unless the contrary appears from the context - to refer to the necessary conditions for blameworthiness (known as agent responsibility), in contrast to the concept of 'moral responsibility' which concerns whether the agent may be ultimately to blame given the actual circumstances of his/her conduct.
- ***Soft-Determinism***: the **compatibilist** doctrine that human beings are not **responsible** for their conduct even if **psychological determinism** operates in and upon human beings.
- ***Unconditional interpretation*** – see under Principle of Alternative Possibilities.
- ***Unconditional interpretation:*** relating to the requirement that an **agent** must be able to do otherwise, an **agent** must be able to do anything, irrespective of the **agent**'s **reasons**, and irrespective of the circumstances in which the **agent** finds him/herself.

Part IV: Criminal Responsibility – the law as it ought to be

9 Implications and Recommendations

9.1 Introduction

Our current law relating to responsibility appears to be riddled with ambiguity, vagueness and incoherence. Clarkson notes: 'Incoherent law opens the door for unequal treatment'.[705] No one can know who qualifies for any defence of non-responsibility. Any decision based on our current law must be arbitrary and lead to unequal treatment. Also, the law relating to what qualifies as a mental illness/defect is not only vague and incoherent, but it appears to be ultimately concerned with improper considerations of the *future* dangerousness of an offender whereas the criminal law can only concern itself with whether to punish an offender for *past* misdeeds.[706] It is clear that our law requires thorough revision.

One might think that a shift in deep theoretical premises will have such dramatic implications for the ultimate requirements of criminal liability that a drastic departure from the current structure and requirements for liability is required. This would allow for a fresh start, unencumbered by the rules that have grown out of the current doctrine and the peculiar meanings that some terms have acquired.

But it is not necessary to go as far as claiming that our law has got it entirely wrong. I am prepared to say only that our law sometimes gets it wrong, and certainly could benefit from some of the

[705] Clarkson *Understanding Criminal Law* (2005) 109.
[706] As indicated above (see note 573), responsibility as the basis for blame, is retrospective. This fits with the criminal law's requirement that it can only punish past misconduct and not mere thoughts or dispositions (Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 73; Snyman *Criminal Law* 5th ed (2008) 53).

perspectives submitted in the above chapters. But we must be careful not to lose balance. The solutions that I will ultimately propose will be more modest than, at times, I originally thought necessary. In most instances, the problem is not that there is no definition of the concepts relevant to responsibility; rather it is that there are too many. This thesis will seek to identify the various different possible conceptions and indicate which should be preferred based upon the most defensible theoretical basis.

Responsibility – in the sense of blameworthiness – is clearly in question when considering culpability. Thus the implications for both capacity and fault must be addressed. However, there is a degree to which concerns with responsibility spill over into concerns with conduct. This is because responsibility cannot be isolated from conduct – the relevant question is always whether the accused is responsible for his/her conduct. An accused can only be responsible for his/her conduct if his/her conduct was voluntary. Voluntariness forms an essential part of the model of responsibility proposed. Therefore I will consider the implications of the model of responsibility proposed for voluntariness, capacity, and fault and will suggest how these requirements may be integrated.

As a starting point we must recall that our law cannot expect more of us than to act as reasonable people.[707] From this starting point, it seems appropriate to begin to consider the requirements of criminal liability in what would conventionally appear in the reverse order – with considerations of fault first, followed by capacity, and ultimately voluntariness. As may be noted, this order of discussion also facilitates the integration of the various components of liability since problems concerning fault have implications for capacity, which in turn have implications for voluntariness.

[707] See above under the heading 1.3.2.2 Fault on page 24ff, particularly on page 30ff.

9.2 Fault

It may be recalled that all crimes - with the exception of strict liability offences - require some form of fault.[708] Fault may take the form of either intention or negligence. On the current law, negligence is present where the accused deviated from the standard of conduct of the reasonable person.[709] The standard of the reasonable person is an objective one, albeit, somewhat subjectivised.[710] The extent to which the standard is objective has attracted a great deal of criticism. The criticism has been directed at those instances where the accused is different to the 'reasonable person' and cannot observe the standard.[711]

Two strategies for addressing this problem have been offered. Either the standard must be subjectivised to fit the individual accused, or the solution lies in the current test for capacity. Neither of these seems to completely solve the problem.

However much we may wish to subjectivise the standard, we must maintain a degree of objectivity. Even Whiting's argument for a subjective standard of the reasonable person retains a degree of objectivity – 'the good citizen'.[712] We must maintain an objective standard in order to set a standard to which we must all aspire and against which we may all be judged. This cannot be compromised. Yet, it is unfair to judge a person by this objective standard if s/he cannot observe the standard.

[708] See above under the heading 1.3.2.2 Fault on page 24ff.
[709] *Kruger v Coetzee* 1966 (2) SA 428 (A); *R v Mbombela* 1933 AD 269; *S v Ngubane* 1985 (3) SA 677 (A).
[710] *S v Ngubane* 1985 (3) SA 677 (A).
[711] See Louw 'S v Ngema 1992 (2) SACR 651 (D) The Reasonable man and the tikoloshe' (1993) 6; *R v Mbombela* 1933 AD 269; *S v Melk (NCO)* 1988 (4) SA 561 (A); Whiting 'Negligence, Fault and Criminal Liability' (1991) 108 SALJ.
[712] Whiting 'Negligence, Fault and Criminal Liability' (1991) 108 SALJ 449. At the level of attempting to solve the problem by subjectivising the accused, one may note the difficulties encountered in US and English law in requiring that the accused who lost self-control nevertheless acted as a reasonable person. That is, the accused must establish that not only did s/he lose self-control, but that the reasonable person also would have. See above under the heading 7.2.3 Objective element: the Reasonable Person on page 139ff.

The solution does seem to lie in the domain of capacity – *could* the accused conduct him/herself as the reasonable person? As Hart recognises,[713] '[I]n a civilised system only those who *could have* kept the law should be punished.'[714]

But as I have argued, the current test of capacity is premised on an indeterministic model of responsibility and is framed in unconditional language.[715] The test of capacity itself requires revision. However, since the model of responsibility proposed turns ultimately on the standard of the reasonable person, the revision to the test of capacity can be made to accommodate the problems inherent in the test of the reasonable person under negligence. This proposed revision will be discussed below under 'Capacity'.[716]

The other form of fault recognised in our law is intention. It is present where – on our current law[717] - the accused persists with some conduct while foreseeing the (real) possibility that his/her conduct is prohibited. As discussed above,[718] it appears necessary to supplement this with an enquiry into unreasonableness. That is, there ought to be no finding of fault, even if there was intention (as it is currently understood), unless the accused also acted unreasonably.[719]

Thus, for any finding of fault (negligence or intention), it must be the case that the accused acted unreasonably – in a manner that the reasonable person would not. However, if an accused did not act as the reasonable person, s/he can only be blamed for this if s/he *could* have acted reasonably – in the sense described under capacity.[720] Thus, for any finding of fault, it must be the case that the

[713] Cited above at footnote 70.
[714] Original emphasis; Hart *Punishment and Responsibility* (1968) 189.
[715] See under the heading 3.2 Capacity – to do otherwise on page 48ff, particularly on page 49ff.
[716] On page 211ff.
[717] See under the heading 1.3.2.2 Fault on page 24ff.
[718] See discussion on page 29ff.
[719] See para 1 of the Suggested Statutory Provisions on page 275ff.
[720] This would introduce an internal limiting factor on offences for which – controversially – no fault is required (strict liability offences). Liability, in the absence of actual fault, could only be incurred where the accused was at least capable of fault.

accused did not act reasonably, but could have.[721] If the accused *did not* act reasonably but *could not* have, s/he is not responsible.

As indicated above, a suggestion for Statutory reform is included in an appendix[722] which will give effect to this proposal regarding fault.

9.3 Capacity

We may note that the requirement that an accused must be suffering with a mental illness or defect in order to qualify for an insanity defence is most unclear. Analysis[723] reveals that it is an (almost) meaningless obstacle placed in the way of a plea of insanity. It serves only to give covert expression to some myths, false intuitions, and is also largely redundant. The only discernible meaning it carries reveals a covert concern with the *future* dangerousness of an accused – which is not a proper concern of the criminal justice system.[724]

On the model of responsibility proposed (of reason-sensitivity) two alternatives appear. The first would be to give meaning to the requirement of mental illness/defect by identifying it as where an accused's mental faculties were not functioning properly. But the other alternative is better. It draws our focus to the ultimate question of responsibility – *whether* the accused was reason-sensitive and functioning properly, rather than *why*. The reason *why* the accused may not be functioning properly is only of interest in determining whether the accused was functioning properly. This is, in many instances, what courts are doing in any event – in focusing on the

[721] This concept is not entirely unknown to our courts. Rumpff CJ in *S v Van As* 1976 (2) SA 921 (A) 927 & 8 formulated the test of negligence to include the question of whether the accused could act as the reasonable person. However, Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) 687 has cautioned that this should not be taken to indicate a swing towards a subjective standard of negligence.
See also the case of *Weber v Santam Versekeringsmaatskappy BPK* 1983 (1) SA 381 (A) in which the negligence of a child was judged by reference to the child's capacity for negligence – judged subjectively.
[722] 15 Appendix E: Recommendation for Law Reform on page 275ff.
[723] Above, 6 Pathological Non-Responsibility on page 101ff.
[724] See note 573.

functional impediment in issue. Another advantage is served by dropping the requirement of any particular cause for the functional impediment. We avoid the problem of needing to define and distinguish the qualifying mental condition and the inevitable conflict that labels cause. As discussed above,[725] the problem that labels create is not only that there will inevitably be disagreement regarding the relevant qualifying criteria, particularly since the question straddles the fields of law and the social sciences. Labels also create the problem of the risk of 'reification'.[726] That is, that the label may be mistaken to mean something more than the basis upon which it was assigned. It may easily be mistaken to mean for instance that the accused is 'pathological' or even that the accused is dangerous, when this is not necessarily so.

Currently an accused who relies on the defence of incapacity bears a special burden of proof if s/he alleges that the cause of the incapacity was a 'mental illness or defect'.[727] The same is not however required of an accused who raises a defence of incapacity but does not assert that it was caused by a mental illness or defect. There are, of course, obvious issue of discrimination here,[728] but we may expect that this 'reverse burden' placed on an accused will be struck down as unconstitutional – in violation of the presumption of innocence.[729] Our Constitutional Court has declared that any variation in the burden which permits for the conviction of an accused person despite the existence of a reasonable doubt of his/her guilt, is a violation of the presumption of innocence.[730] There appears no basis upon which this violation may be justified in this context – of a claim to non-

[725] Under the heading 6.5.3.2 Diagnostic and Statistical Manual of Mental Disorders on page 113ff.
[726] Discussed above, in the context of the DSM, on page 115.
[727] This follows from the provisions of s 78 of the Criminal Procedure Act 51 of 1977:

> (1A) Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.
> (1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

[728] Apparently contrary to the right to equality (s 9 of the Constitution of the Republic of South Africa 108 of 1996).
[729] s 35 (3)(h) of the ibid.
[730] *S v Coetzee* 1997 (3) SA 527 (CC). Arguments that such a violation may be justified seem to rely on the risks associated with false claims and the difficulties of proof that a prosecution may encounter in having to prove that an accused possessed capacity (Card *Card, Cross and Jones Criminal Law* 19th ed (2010) 654-5 see *R v Chaulk* (1991) 1 CRR 1 (SCC) in which the Canadian Supreme Court considered the reverse burden a justified limitation on the presumption of innocence). Both arguments seem to be little more than an appeal to make the work of a prosecution easier – and for reasonable doubts that would otherwise exist, to be ignored.

responsibility. Dropping the distinction between claims to non-responsibility based on a 'pathological' condition, as opposed to a non-pathological condition, would also remove this constitutionally dubious 'reverse burden' from our law.

A further benefit of avoiding the use of the label of mental illness/defect is that our law would be released to take a more principled approach. Any relevant dysfunction qualifies no matter the cause. To the detractors, who may be concerned that an accused may avoid liability even though he/she are responsible for his/her state of dysfunction, the answer is that if doing so is a crime, then he/she should be charged with that crime. That is, if it is a crime to be responsible for one's state of non-responsibility, then the accused must be tried for that crime. The principles of antecedent liability are already in place to impose liability on an offender who is responsible in rendering themselves non-responsible.[731]

Currently capacity requires that the accused:

1. be able to appreciate the wrongfulness of his/her conduct; and
2. be able to act in accordance with that appreciation.

One may be reminded that this is based on an indeterministic model of responsibility which requires, for responsibility, that an accused is capable in the actual circumstances of his/her conduct of random, arbitrary, and capricious conduct. It requires the question of capacity to be asked unconditionally: could the accused, in the very circumstances and with the same reasons and choices, have chosen and done otherwise? That is, we must ask whether, even though the accused

[731] See *R v Schoonwinkel* 1953 (3) SA 136 (C); *S v van Rensburg* 1987 (3) SA 35 (T). In *R v Victor* 1943 TPD 77 the accused was convicted of negligent driving for driving his vehicle while he at least should have expected to suffer an epileptic seizure (Visser & Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 52).
Antecedent liability operates on the basis that even if the person was involuntary at a particular time, s/he may yet have held the required fault for the crime in question at a time antecedent to the onset of the state of involuntariness. Thus, as a function of the contemporaneity principle (that wrongful conduct and wrongful mental state must coincide), liability may be imposed for conduct at an earlier point in time.

did not appreciate the wrongfulness of his/her conduct,[732] s/he was able to appreciate the wrongfulness of his/her conduct in his/her precise circumstances and with the very reasons s/he had. Off course, this is only possible if indeterminism pertains – and then if it did, this ability would be for random, arbitrary or capricious choices and conduct. This cannot be correct. The current test of capacity, properly applied, can only identify as responsible conduct that which should be recognised as clearly not responsible. And so too with the second leg of capacity – it permits an unconditional enquiry and can only detect as responsible conduct that which should not be recognised as responsible conduct – random, arbitrary and capricious conduct. Thus the current test of capacity requires some revision.

On the model of responsibility proposed (of reason-sensitivity), determinism operating in the right sort of way is required for responsibility. At its most abstract, the model requires, at this point, that the agent's reasons (beliefs, desires and values) are controlled by the world in the right sort of way. That is, that his/her beliefs must follow the truth and the evidence, his/her desires must follow what s/he needs or what is in his/her best interests, and s/he must value what is right and good. As discussed, the concepts of truth, needs and interests, and right and good are value laden. It would appear that some objective basis for these concepts must be provided. It may be objected that this would introduce an objective consideration into responsibility which is,[733] or ought to be, exclusively subjective. That it introduces an objective feature cannot be denied, but I submit that this revision is necessary. Responsibility is a normative concept which must ultimately be judged by reference to some objective normative standard.[734]

[732] For if the accused *did* appreciate the wrongfulness of his/her conduct, the *capacity* to do so would not be in issue. See discussion under the heading 3.2.1 Fact and Capacity on page 48ff.
[733] See under the heading 7.4 Eadie – The End of Non-pathological Incapacity? on page 144ff.
[734] Burchell observes: 'Surely any determination of whether a person could exercise 'judgement' must involve some assessment of a standard or norm, against which to evaluate whether the person's capacity to form this ideal judgement was impaired and whether he or she could, in the circumstances, have exercised this capacity? A court cannot determine whether a person's capacity to exercise such judgement has been impaired solely according to that individual's own faculties for judgement, otherwise capacity would never be found to exist, as each accused (or defendant) would be entitled to argue that any temporary lapse in his or her capacity to form judgement would be an excuse.' (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 441) See also his discussion regarding the

In law, we are required to do no more than to observe the standard of the reasonable person.[735] But to judge a person by this standard makes no sense unless that person is capable of the beliefs, desires and values of this reasonable person. But how can we know if any person is capable of this? **We can know that an agent is capable of this if s/he *would* adopt these beliefs, desires and values in circumstances in which a reasonable person would.**

To adapt this as much as possible to the current law, we must first note that we are concerned with an accused who did not - in fact - appreciate the wrongfulness of his/her conduct.[736] If s/he did, this question would be redundant. It is only when an accused did not appreciate the wrongfulness of his/her conduct that his/her capacity is placed in issue – his/her responsibility for not appreciating the wrongfulness. **To answer this we must ask: *would* the accused appreciate the wrongfulness of his/her conduct in circumstances in which a reasonable person would.**

standard for test of capacity for appreciation of wrongfulness (ibid 379ff citing *R v Codère* (1916) 12 Cr App Rep 21 27)) and in respect of the import of *S v Eadie* 2002 (1) SACR 663 (SCA) (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 440ff).
Morse appreciates that responsibility is contingent upon some normative notion. (Morse 'New Neuroscience, Old Problems' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Garland (2004) 165).
Denno also suggests that the test of control should be appropriately qualified by a normative approach (Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review 359).
Tadros proposes a normative basis for distinguishing blame based ultimately upon the principle that requires that the agent must be able to do otherwise. He argues that blame is appropriate only where an accused has manifested a vice such as cruelty or wickedness which reveals that s/he is 'insufficiently motivated to act or not to act by the interests of others' (Tadros 'The Characters of Excuse' (2001) 21 Oxford Journal of Legal Studies 516). He contrasts these with vices such as cowardice, clumsiness and obliviousness, which he argues 'show nothing about of the extent to which one is motivated by the interests of others' (ibid 516). One may note that the excuse exists – according to Tadros, in the case of cowardice, *because* the agent could not do otherwise (ibid 498 & 516). People who are cowardly, presumably cannot conform. However, this analysis and explanation is not extended to those who have more reprehensible vices. Regrettably, there appears no basis upon which to distinguish incapacity based on the vices that Tadros distinguishes. What if the vice revealed – however reprehensible – is one which the accused could not but manifest. That is, what if the accused could not do otherwise than be cruel and evil? Ultimately Tadros has no answer. I submit that the model of reason-sensitivity proposed above (in 8 Philosophy of Mind: Responsibility on page 158ff) does answer this question, particularly under the heading 8.6.2.3 Bad Luck on page 198ff.

[735] See on page 29ff.

[736] As discussed above in footnote 732 and under the heading 3.2.1 Fact and Capacity on page 48ff.

Should we wish to retain the second part of the test for capacity,[737] we must ask whether the accused *would* conduct him/herself in accordance with an appreciation of wrongfulness in circumstances in which a reasonable person would.

At its most abstract – and possibly as the test ought to stand - **the test of capacity should ask whether the accused would choose to do what is right in circumstances in which a reasonable person would do so.** This question replicates, but appropriately states, both of the questions proposed above for capacity. This formulation also carries the benefit that it permits for a natural integration of capacity with fault. Under capacity, we ask whether the accused *could* act as the reasonable person; under fault, we ask whether s/he *did* act as the reasonable person.

9.4 Voluntariness

The concept of voluntariness is elusive, and there does not appear to be any sustainable basis to distinguish – in criminal law - between the capacity for self-control and voluntariness.

Based on the model of responsibility proposed – of reason-sensitivity - conduct is voluntary where the agent acts for his/her own reasons. The agent's conduct must follow from his/her choice, which in turn, must follow from his/her reasons (beliefs/desires/values). For instance, an agent who has chosen to stand and walk, and yet falls down, is involuntary. There appears no basis upon which one may discern two distinct volitional components. That is, there appears no theoretical basis for a requirement of voluntariness (under the *actus reus*) and one of capacity for self-control (under *mens rea*). There remains the question though of how this may be reconciled with the requirement of the capacity for self-control – the second leg of capacity.

[737] Since it may be argued that this merely replicates the enquiry into voluntariness – discussed below under the heading 9.4 Voluntariness on page 216ff.

It seems that under the current structure of criminal law in which criminal liability is divided (artificially it may be argued)[738] into an objective physical act (*actus reus*) and the requisite concurrent mental state (*mens rea*), some duplication or overlap is inevitable. It is inevitable because the *actus reus* cannot completely be stripped of mental considerations, nor can the mental state required be stripped of objective physical considerations. Voluntariness straddles both categories because it raises issues of objective physical phenomena related to mental phenomena. While the reasoning of Navsa in *Eadie* may be criticised on many points, his conclusion appears correct. The same appears true of his attempt at distinguishing voluntariness and capacity for self-control. He acknowledges that they were essentially identical, but refused to drop one. For this he has been severely criticised.[739] However, on closer analysis, it appears that he is correct. These two requirements are identical; but neither can be dropped.

Under the model of responsibility proposed, and in line with the philosophy of action, a component portion of the model may be identified as concerned with voluntariness as it concerns whether conduct was done because of the agent's reasons. Within this component, both mental and objective physical phenomena are in issue. However, in truth it is the *relationship* between them that is in issue.[740] Once this is recognised, it must also be recognised that voluntariness cannot be isolated under the *actus reus*. Furthermore, as noted above,[741] the question of responsibility, under capacity, inevitably involves questions of whether the accused could, in appropriate circumstances, choose and *do* what is right. This capacity cannot be confined to *the mens rea*. There is and must be, so long as the current structure of criminal liability remains in place, an overlap.

[738] Navsa JA in *S v Eadie* 2002 (1) SACR 663 (SCA) para 58.
[739] See above under the heading 7.4 Eadie – The End of Non-pathological Incapacity? on page 144ff.
[740] As Austin noted, voluntary conduct is conduct which follows (invariably and immediately) a particular mental condition, of wishes and desires (J Austin *Lectures on Jurisprudence* 5th ed (1885) 411-4). Hart recognises that voluntariness concerns the appropriate 'link' or 'connexion' (*sic*) between the body and mind. (Hart *Punishment and Responsibility* (1968) 92, 7, 9, 107)
[741] 8.6.2 Circumsense on page 191ff.

The overlap exists insofar as questions of responsibility are wider or more far-reaching[742] than questions of voluntariness, but certainly include several of the same concerns: whether conduct followed from the accused's choice, which followed from his/her reasons. An impediment at any point here would mean – speaking theoretically - that the agent is not responsible because his/her conduct was involuntary. Applied to the formal structures of our law, it would mean that the accused lacked both capacity (for self-control) and voluntariness. However, this duplication is a function of the current structure of criminal liability.

One may be tempted to think that questions of circumsensitivity can be restricted to capacity under the notion that a person may act voluntarily (for his/her reasons) even though his/her reasons have arisen in the wrong sort of way. But if the person's 'circumsensitivity' is impaired s/he cannot be acting for his/her own reasons. That is, if his/her reasons have arisen in the wrong sort of way, they are not the agent's own reasons. If circumsensitivity is impaired, responsibility is excluded because the entire required stream of reason is not functioning properly. Therefore, one may possess 'circumsensitivity' and be involuntary, but not lack circumsensitivity and yet be voluntary. In any event, whether it is voluntariness or circumsensitivity and voluntariness that a person lacks, that person is not responsible.

9.5 Procedure

This thesis did not concern itself with the procedure to be adopted for an enquiry into the responsibility of any person. It focused instead on the substantive provisions of our law relating to incapacity generally, and as stipulated in s 78 of the Criminal Procedure Act.[743] The procedure for an enquiry into responsibility, at least for any accused who alleges incapacity due to mental illness or defect, is set out in s 79 of the Criminal Law Amendment Act.[744] The adequacy of the

[742] They extend to whether the accused is in touch with reality; that is, whether his/her reasons arise in the right sort of way, from the evidence, from his/her needs and interests, and from what is good and right.
[743] Criminal Procedure Act 51 of 1977; attached as 'Appendix C' (on page 268ff) for ease of reference.
[744] Attached as 'Appendix C' (on page 268ff) for ease of reference.

provisions of s79 have not been considered and the integration of the proposals made here should not be taken as an endorsement of the provisions of s 79, nor of the provisions of s 78 relating or referring to s 79. Nevertheless, it is apparent from the provisions of s 79 that some degree of preference is given to the opinions of psychiatrists as opposed to clinical psychologists.[745] If the proposals for dropping the requirement of a 'mental illness or defect' are adopted, it is not clear whether this preference is appropriate, and it may require some further research.[746]

[745] See s 79 (1) Criminal Procedure Act 51 of 1977:

Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on—

(*a*) where the accused is charged with an offence other than one referred to in paragraph (*b*), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court; or

(*b*) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs—

(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions;

(iii) by a psychiatrist appointed for the accused by the court; and

(iv) by a clinical psychologist where the court so directs.

[746] I am not, by raising this question, implying that this preference is inappropriate – only that it may require further thought which falls beyond the scope of this project.

9.6 Practical Application

9.6.1 From Theory to Practice

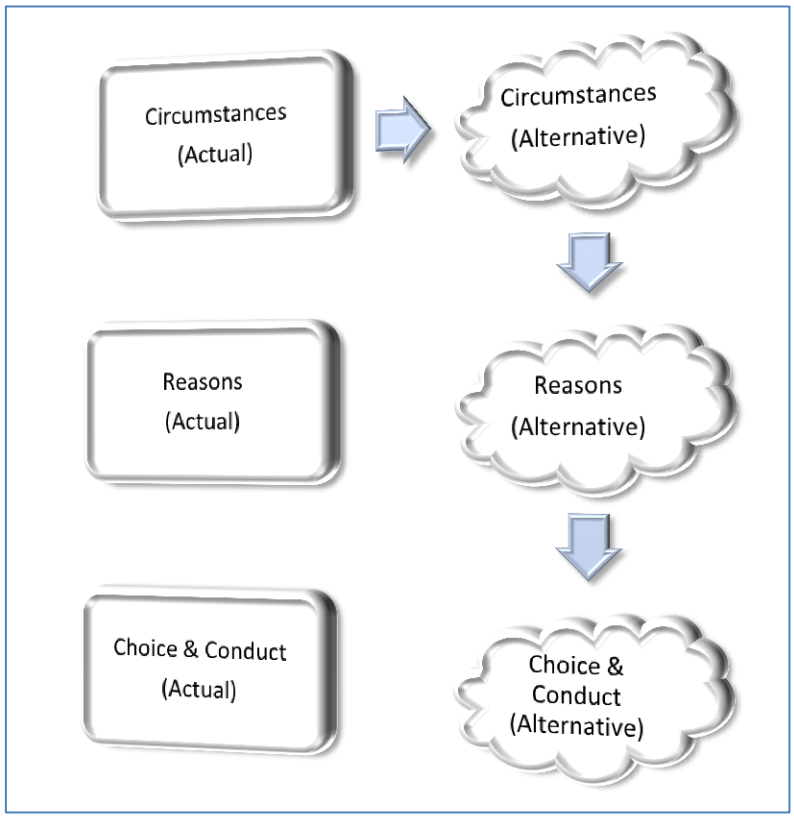


Figure 6: Hypothetical Variation of the Stream of Reason

As discussed above,[747] reason-sensitivity – that the accused is functioning properly - can be established by hypothetical variation. A person is responsible when his/her 'stream of reason'[748] is functioning properly: when his/her conduct follows his/her choice, which follows from his/her reasons (beliefs/desires/values) which have arisen out of the world in the appropriate way. For convenience, for our purposes, we may refer to choice and conduct as lower order components,[749] reasons as (relatively) higher order components, and external[750] circumstances as the highest order component of the 'stream of reason'. Since lower order components follow higher order components, lower order components must follow a variation in any higher order component. Thus, we know that an accused is reason-sensitive if a variation in a higher order component would *cause* a variation in a lower order

[747] 8.6 Reason-Sensitivity: Exerting and being controlled on page 188ff.
[748] I use this term to refer to all components and the relevant processes necessary for responsible conduct: that conduct follows choice, which follows from the agent's reasons (beliefs/desires/values) which have arisen out of the world in the appropriate way.
[749] With conduct (relatively) lower than choice on this ranking.
[750] Located outside of the agent/accused, in the world.

component. For instance, if the circumstances were different, the agent's reasons, and, in turn, his/her choice, must follow and be different, and so on. Therefore we may ask – to establish reason-sensitivity and responsibility: *if* the agent had chosen otherwise, would s/he have done otherwise? Ultimately we want to know if the accused would choose and do the right thing in external circumstances in which a reasonable person would. I will employ the concept of '*appropriate circumstances*'[751] to refer to circumstances in which a reasonable person would choose and do the right thing.

As indicated above,[752] we test whether an accused's will is functioning properly by testing its 'throughput' – what it would produce given the 'right' input. This enquiry treats the will as a 'black box'. We may add to this that we may test whether an accused's entire stream of reason is functioning properly by testing his/her 'throughput' and treating him/her as a 'black box'. We enquire whether the right (in our case, reasonable) input into the 'black box' will produce the right (reasonable) output. Thus we enquire whether the accused would have chosen and done what is reasonable if s/he were in external circumstances in which a reasonable person would choose and do what is reasonable.

In practice, this may be achieved by the hypothetical variation of introducing (hypothetically) a police officer into the accused's circumstances – a cop at the elbow.[753] See 'Figure 6: Hypothetical Variation of the Stream of Reason'. This varies the highest component of a person's stream of

[751] Discussed below at some length under the heading 9.6.2 'Appropriate Circumstances on page 223ff.
[752] Under the heading 8.6.2 Circumsense on page 191ff.
[753] See *S v Kensley* 1995 (1) SA 646 (A) 659. The test has fallen into some disrepute in the US for being absolutist (R. G. Meyer & S. E. Deitsch *The Clinician's Handbook: Integrated Diagnostics, Assessment, and Intervention in Adult and Adolescent Psychopathology.* 4 ed (1996) 439; Wrightsman, Nietzel & Fortune *Psychology and the Legal System* 3 ed (1994) 367) . For instance, Weihofen remarks: 'Most exhibitionists, for example, have enough control not to yield to their impulse in the presence of a policeman' (H. Weihofen *Mental Disorder as a Criminal Offense* (1954) 84). However, he regards it as sufficient for a conative impediment that '[n]evertheless, these individuals are the victims of urges so strong that most persons could not resist them under most circumstances.' (ibid 84). It does not make the test absolutist simply because on may contemplate circumstances (short of a cop-at-the-elbow) in which the agent would fail to resist. This test does not require that the agent would resist in *every* possible circumstance – that would be absolutist. It only requires that the agent would restrain him/herself if a police officer were present – representing the prohibition and risk, for failure to restrain oneself, of interference with some valued interest, such as liberty or life. On the model adopted we would not require that the accused would restrain him/herself in every possible circumstance, only in those circumstances in which reasonable people would.

reasoning – that component from which reasons must arise. If the person is reason-sensitive, it will produce a variation in the person's reasons; followed by the person's choice and conduct. Reznek notes that if we want to know if someone cannot truly resist the desire for another slice of cake, we need to consider whether s/he would eat it if s/he believed that it contained arsenic. If s/he would persist, we can conclude that s/he truly could not resist.[754]

The significance of introducing a police officer is that it is a variation that one may expect will remind a reasonable person of the prohibited nature of their prospective conduct and the desire not to suffer an infringement of some deeply valued interest, such as liberty, body integrity, or life. It operates on the basis that if an accused does not stop in the face of a variation in the circumstances which would produce in a reasonable people[755] a good reason[756] to refrain, it is safe to conclude that s/he cannot resist.[757]

As indicated above, a suggestion for statutory reform is included in an appendix[758] which will give effect to the proposed model of responsibility.

[754] Reznek *Evil or Ill: Justifying the Insanity Defence* (1997) 83. Tadros appears to offer a form of hypothetical variation that may offer some generalised form: 'Suppose that in performing the action in question, a side effect would be that something that the defendant least wanted would come about, that she wanted as little as we want people intentionally to break the criminal law. If the defendant would still have done the action in question we can say that she did not have the capacity to do otherwise. If she would have refrained from performing the action then she did have the capacity.' (Tadros 'The Characters of Excuse' (2001) 21 Oxford Journal of Legal Studies 514)

[755] Let me declare that I am presuming that all reasonable people do not want to suffer an infringement of interests such as liberty, bodily integrity, and life. This assertion is subject to the discussion below regarding 9.6.6.4 'Unreasonable Circumstances' on page 247ff.

[756] 'Law gives people good reason to behave one way or another by making the consequences of noncompliance clear or through people's understanding of the reasons that support a particular rule' (Morse 'New Neuroscience, Old Problems' In *Neuroscience and the Law: Brain, Mind, and the Scales of Justice* edited by Garland (2004) 159). See also Morse 'Reasons, Results, and Criminal Responsibility' (2004) ILL L Rev, in particular at 364.

[757] It may be recalled that resistibility was the most frequently, and uncontradicted, criterion offered by experts for detecting a conative impediment.

[758] See Appendix E: Recommendation for Law Reform on page 275ff. Paizes suggests an alternative formulation to the statutory proposal regarding the determination of capacity for reasonableness, set out in Appendix E: Recommendation for Law Reform as Responsibility: Option B on page 277 (Andrew Paizes Personal Communication 25 March 2011).

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9.6.2 'Appropriate Circumstances'

Some caution must be exercised in conceiving of the appropriate circumstances in which to hypothetically place the accused. What is fundamental is the degree to which one must (hypothetically) vary the circumstances in order to test for reason-sensitivity.

The variation must test the agent's sensitivity to the circumstances. Given that the legal standard of a reasonable person has been adopted as the standard against which to test for reason-sensitivity, the variation must - and this is fundamental - operate on the reasonableness of the agent. This makes the type or extent of variation quite specific. The appropriate circumstances cannot be the actual circumstances of the offence, overwhelming, insignificant, or irrelevant. In addition, we must note that since the test turns on the reasonableness of the accused, which is established by what a reasonable person would do, we will be forced to imagine the reasonable person in circumstances that may seem, at first, somewhat inappropriate. Each of these considerations is addressed below, in turn.

9.6.2.1 Actual versus Hypothetical

We must bear in mind that at the stage of enquiring into responsibility and whether the accused could act reasonably, we will already have established that, in the *actual* circumstances, the accused did not act as the reasonable person would. Therefore, in an enquiry into responsibility, we cannot rely on these circumstances to judge whether there would be a divergence in conduct between the reasonable person and accused. This is because an enquiry into reason-sensitivity demands a hypothetical variation in the accused's 'reason stream'.[759] Ultimately, in order to know that the entire 'reason stream' is functioning properly, and for practical convenience, we need to know whether the accused would respond appropriately if his/her circumstances were *different*. Thus, the test of responsibility requires that we consider how the accused would have conducted him/herself, in circumstances *other than the actual circumstances.* In a test for responsibility, if the circumstances in which the accused and reasonable person are envisaged are not varied from the

[759] See under the heading 9.6.1 From Theory to Practice on page 220ff.

actual circumstances, every accused would appear not responsible. This is because we have already established (under the enquiry for unreasonableness) a deviation between the reasonable person and the accused. This enquiry established that the accused did act unreasonably; it does not establish that the accused could act reasonably. To establish that, we must hypothetically vary the actual circumstances in order to know if the accused is capable of responding as a reasonable person. Thus the test for responsibility is whether the accused would respond as a reasonable person would, in all *other* appropriate circumstances.[760]

9.6.2.2 Reasonable Person: Not Every Person

The circumstances that must be envisaged cannot be overwhelming. They must be those in which we would see a response from the reasonable person, *because* s/he is reasonable. If the circumstances would elicit this response from everyone, irrespective of whether s/he is reasonable, this tells us nothing. For instance, it is of no assistance to contemplate whether the reasonable person and accused would both refrain from committing a theft or assault if they were both chained up. The circumstances must illicit what a reasonable person would do, *because* s/he is reasonable. If the circumstances would produce a concordance of conduct and compliance irrespective of whether the person is reasonable, they do not test the 'reasonableness' of the person in question.[761]

So, if the reasonable person and accused would both do the same under some hypothetical variation of the actual circumstances, this would ordinarily indicate that the accused is responsible. However, if both the reasonable person and accused would do so, in circumstances in which every person would, irrespective of whether s/he is reasonable, the responsibility of the accused must remain in question.

[760] Effect is given to this by the variation to the accused's actual circumstances by the hypothetical introduction of the feature/factor (contemplated in clause 3.a) that would cause the reasonable person to refrain (3.c) from committing the prohibited conduct, that the reasonable person would otherwise commit (3.b).
[761] Effect is given to this in clause 4.b of the Suggested Statutory Provision on page 277.

A similar, though opposite issue arises if the accused appears to have acted reasonably – that is, has done what the reasonable person would have done – though in circumstances in which every person would have done so, irrespective of whether s/he is reasonable or not. In the context of the actual circumstances, the effect is that the accused will enjoy the defence of a lack of fault,[762] but may also lack voluntariness. For instance, as discussed below,[763] an accused who is subjected to overwhelming physical force, will be identified as having acted reasonably, but s/he will also lack voluntariness and responsibility.[764]

9.6.2.3 Causation and Overdeterminism

On the other end of the spectrum, the variation in the circumstances cannot be so minor as to be insignificant. The variation must produce a response in the reasonable person. The variation must not be 'underwhelming' so that no effect on the reasonable person can be expected.

In addition to being less than overwhelming, but not insignificant, the variation must not be irrelevant. As discussed,[765] the variation in the external circumstances (representing the world outside of the accused) must produce the variation in the entire reason stream and therefore it must be causal.

If it must be causal, we must be clear that the expected response is due to the contemplated variation in the circumstances – as a necessary cause. But there is complexity here. If the expected conduct would occur in response to one or another cause, or both causes together, the cause of the conduct is difficult to identify when both causes are present. This situation, where two such causes are present (which would each produce the equivalent effect alone) is known as overdeterminism. Conduct which would be produced by the particular features of a set of circumstances alone, or by some other consideration (such as perhaps the inherently good nature of an agent) alone, but which occurs when both causes are present is 'overdetermined'. In the absence of either cause, but also

[762] As discussed under the heading 9.2 Fault on page 209ff.
[763] See under the heading 9.6.5.1 Superior overwhelming human and natural force on page 239ff.
[764] This is provided for in para 2.a of the Suggested Statutory Reform on page 276.
[765] Under the heading 9.6.1 From Theory to Practice on page 220ff, in particular note 750 and the text thereto.

where both are present, the same consequence or conduct would occur. In such scenarios, when both (possible) causes are present, what is causing the conduct is difficult to identify.

For instance, imagine a scenario in which a person is charged with the theft of a luxury item from a shop. If his/her responsibility was called into question, we may be satisfied that that the person is reason-sensitive and responsible if a cop-at-the-elbow would have caused the person to refrain. This would be correct, but only if certain other conditions are satisfied. The work that the cop-at-the-elbow test is doing is that we presume that a reasonable person would refrain from stealing in the presence of a cop. However, it is entirely possible, indeed probable, that a reasonable person would not steal in the absence of a cop-at-the-elbow. Thus we are faced with a problem of overdeterminism. The problem arises that, since the reasonable person may be conceived as being inherently good natured and honest, s/he would only in extreme circumstances, commit a prohibited act.[766] Left alone, the reasonable person would virtually never steal. For instance, one may imagine a reasonable person alone in a friend's home and conclude that despite any opportunity to steal some luxury item of significant value, s/he is exceedingly unlikely to do so. However, if one imagines the accused from our example above (who is charged with stealing the luxury item from a store), alone in a friend's home and ask whether s/he would steal in these circumstances, there may well be some doubt in his/her favour – that s/he may well steal. After all, one may think, s/he has just done a similar deed for which s/he now stands trial. Despite concluding on the test of the cop-at-the-elbow that the accused is responsible, one may consider this new hypothetical (of being alone in a friend's house) to present reason to doubt the accused's responsibility. However, there is a level of complexity here that requires that we proceed with caution.

We must recall that the variation in the external circumstances, such as the introduction of a cop-at-the-elbow, is supposed to be the *causal* feature/factor that produces the variation in conduct. It must also operate at the highest possible level in the reason stream.[767] It must be a variation in the world or the external circumstances of the accused. Even before we can engage in a comparison of

[766] Discussed under the heading 9.6.2.4 *Reasonable person in the 'wrong' circumstances* on page 229ff.
[767] See under the heading 9.6.1 From Theory to Practice on page 220ff.

what the accused would do, we must identify the *causal* factor or feature in a set of circumstances – as it relates to the conduct of a reasonable person. That is, we must identify a feature that is a necessary condition for the conduct required of the reasonable person (of refraining from the commission of the prohibited conduct). As a necessary condition, it must be the case that in the presence of the feature, the required conduct (of refraining) occurs, but not in its absence. It must be the variation (such as the hypothetical cop-at-the-elbow) that produces the required response in the reasonable person.[768] Anything short of what is necessary for the required effect on the reasonable person cannot serve our purposes.

Thus one must be certain that it is only by virtue of the introduction of, for instance, the cop-at-the-elbow that the reasonable person would refrain. The effect, in practice, is that the reasonable person who one must consider, is one who is necessarily about to commit the offence - for some reason.[769] We must conceptualise circumstances in which the reasonable person would commit the prohibited conduct in question. This is the first step required for determining the responsibility of an accused person.[770] The second step requires the identification of some external feature (perhaps the cop-at-the-elbow) which, if introduced into these circumstances (in which the reasonable person would commit the prohibited conduct) would cause him/her to refrain.[771] We are then required to consider whether this causal feature would produce the appropriate response in the accused.[772]

How would this focus on a causal factor/feature work if applied to the problem of the accused who appears to be reason-sensitive on an application of the cop-at-the-elbow test, yet s/he would

[768] The need to first identify a causal factor or feature informs the structure of the suggested statutory provision (see 15.4 Determining the Capacity for Reasonableness on page 276ff) which identifies the required causal feature by the contrast between 3.b and 3.c.
[769] This requires that one must imagine a reasonable person who has reasons, whatever they may be, to commit the offence in question, and who would commit the offence in the absence of a causal feature in some set of circumstances. Fundamentally though, the reasonable person, as the benchmark of responsibility is, necessarily, reason and circumstance sensitive. The reasonable person cannot be properly conceived as in any way independent of his/her circumstances or reasons. If the reasonable person were in any way independent or insulated from his/her reasons s/he would cease to be a responsible person.
[770] Reflected in para 3.b on page 276.
[771] Reflected in para 3.c on page 276.
[772] Reflected in para 3.a on page 276.

apparently steal from a friend if left alone in that friend's home? The answer is that it does not work – because if it is only by the introduction into a scenario of a cop-at-the-elbow that would cause the reasonable person to refrain, it is only that hypothetical variation that we can employ to test for responsibility. It is entirely inappropriate to ask what the accused would do, alone in his friend's house.

This narrows the hypothetical circumstances that are likely to serve our purposes. The circumstances must be those which would cause a reasonable person who would otherwise commit prohibited conduct, to refrain from committing the conduct. On reflection, this is probably why the cop-at-the-elbow test is so intuitively appealing. It almost invariably produces a circumstance in which, no matter how desperate a reasonable person may be, so that s/he is about to commit the prohibited conduct, s/he would refrain from the committing prohibited conduct in the presence of a cop-at-the-elbow.

The cop-at-the-elbow test therefore will almost invariably[773] provide a suitable hypothetical circumstance to test for an accused's responsibility. It hypothetically presents the accused with circumstances which would *cause* the reasonable person to refrain. As such, it is a sound basis on which to judge whether the accused could refrain from committing some prohibited conduct and thereby, to judge an accused person's responsibility.

Understood in this way, the problem of overdeterminism that arises ordinarily by virtue of the inherent good nature of the reasonable person becomes part of the solution. It is precisely because the reasonable person has an inherently good nature that the ambit of the circumstances in which s/he would commit prohibited conduct is so limited, as are the factors that would cause him/her to refrain from committing the prohibited conduct.

[773] See the discussion under the headings 9.6.2.5 Reasonable Conduct and Punishment on page 233ff and 9.6.6 Difficult Cases on page 244ff.

9.6.2.4 Reasonable person in the 'wrong' circumstances

It may be objected that the test for responsibility requires the inconceivable: that the reasonable person could ever commit a prohibited act, or be about to do so. Yet, on reflection, it may observed that the enquiry is not even unfamiliar let alone inconceivable. The logic of this brief discussion will be that, firstly we can conceive of the reasonable person committing an offence, and that we can therefore conceive of him/her being about to commit that offence – in circumstances in which we must imagine the accused. Also that we are, in fact, familiar with conceiving of the reasonable person in peculiar circumstances about to commit an offence - as we do in any determination of the reasonableness of the conduct of an accused. Finally, I will observe that we are required, in order to establish the responsibility of the accused, to conceive of the reasonable person in circumstances in which s/he would commit the prohibited conduct in question, and some variation in the circumstances, on the basis of which, the reasonable person would refrain from committing the prohibited conduct.

To begin, we must recall that while the reasonable person always does what is reasonable, s/he does not always do what is right. Paizes notes: '…even a reasonable man may engage in unlawful conduct…'.[774] As discussed above,[775] we may conceive of circumstances in which even a reasonable person would, for instance, intentionally and unlawfully kill another.

Furthermore if we can conceive of the reasonable person in particular circumstances in which s/he would actually commit the offence, we must, necessarily, be able to conceive of circumstances in which, before the reasonable person would commit the offence, s/he would have been about to commit the offence.

To respond that this may be true of other circumstances – in some alternative hypothetical other circumstances - but that is meaningless for the actual circumstances, is at odds with an essential theoretical point: that it is only by considering what the response of an agent would be in various

[774] Paizes 'Unreasonable Conduct and Fault in the Criminal Law' (1996) 113 SALJ 259.
[775] See note 57.

hypothetical circumstances that responsibility is revealed.[776] One must consider the response of the accused to hypothetical circumstances, other than the actual circumstance, in order to judge if s/he is responsible or not.

Also, it is a familiar hypothetical exercise to place the reasonable person in the circumstances of the accused about to do what the accused did. When one looks closely at what must be considered in order to determine whether an accused acted unreasonably, we place our reasonable person in the circumstances of the accused as the accused was about to do what s/he did. We must locate the reasonable person in the circumstances of the accused: heating (stolen) gold amalgam on a stove,[777] throwing a dangerous weapon at another,[778] striking someone,[779] and possibly in a shop, about to steal.[780] The alternative would be versarian.[781]

What is more, we must, in a test for reasonableness, imagine the reasonable person, not only in the circumstances of the accused, but about to do what the accused did. This is because a test for unreasonableness would not make any sense otherwise. Consider the test of negligence[782] which asks whether the reasonable person would foresee that 'his[/her] conduct'[783] posed the risk of the prohibited consequence occurring. What would the reasonable person be doing, in the circumstances, on the basis of which s/he must foresee? One may argue that the reasonable person could be 'in the circumstances of the accused' by being present and merely observing, perhaps as a

[776] Discussed, theoretically, under the heading 8.4.1.2 Hypothetical Other Worlds!? on page 185ff; and under the heading 9.6.1 From Theory to Practice on page 220ff for its practical implications.
[777] *S v Van der Mescht* 1962 (1) 521 (A).
[778] *S v Bernardus* 1965 (3) 287 (A).
[779] *S v Van As* 1976 (2) SA 921 (A).
[780] Paizes contemplates circumstances in which an accused who cannot afford to buy coal takes some from his neighbour who has a large supply to avoid the hardship of a cold and possibly sleepless night. We must enquire whether a reasonable person would also do so by locating the reasonable person is such circumstances (Paizes 'Unreasonable Conduct and Fault in the Criminal Law' (1996) 113 SALJ 250). Thus we are required to contemplate the reasonable person in the circumstances of the accused, about to do what the accused did.
[781] *Versari in re illicit*, known as the versari doctrine, permits liability to be imposed on an accused for any unlawful consequence of any unlawful conduct. More particularly, it permits for liability for a crime which requires some form of fault, even in the absence of the required fault, by virtue of one's liability in respect of some other crime. It was rejected from our law in the early 1960s (*S v Bernardus* 1965 (3) 287 (A); *S v Van der Mescht* 1962 (1) 521 (A)).
[782] Discussed on page 25ff.
[783] *Kruger v Coetzee* 1966 (2) SA 428 (A) 430.

bystander. However, this is not true to the formulation in *Kruger v Coetzee*.[784] But more importantly, it cannot tell us what the accused ought to have foreseen. A passive observer cannot possibly share the same perspective as the accused from which to judge what ought to have been foreseen.

That the hypothetical enquiry into negligence does require that one consider not only what the reasonable person, in the circumstances of the accused, would have foreseen, but also while doing what the accused was doing, is also implicit in the second 'conduct' requirement of the test of negligence.[785] The 'conduct' component requires that one considers what the reasonable person, in the circumstances of the accused, with the requisite foresight, would do. We must ask what steps the reasonable person would take to avert the prohibited consequence. But this question makes no sense unless the reasonable person is doing what the accused is doing. If the reasonable person is not understood to be doing what the accused is doing, but is merely a passive observer, presumably, s/he would do nothing, but continue to observe.

Visser and Maré remind us: 'Negligence is established by comparing the conduct of the accused to the hypothetical conduct of the reasonable [person] in the particular situation'[786] and '[t]he question is how the reasonable [person] would have behaved in the actual circumstances in which the accused found himself[/herself].'[787] We must know what the reasonable person would have done, in the circumstances. We cannot answer this question if the reasonable person is constructed as a passive observer. We must consider what the reasonable person, in the circumstances of the accused and about to do what the accused did, would have foreseen and, in response to this foresight, what steps the reasonable person would then have taken.

It may be argued (again) that this is irrelevant because we are now concerned with the responsibility of the accused. The argument would be that, at this stage, it will have been

[784] Ibid. See note 783. In *Kruger v Coetzee* the question was whether the reasonable person would foresee the risk of harm arising from his/her conduct.
[785] See discussion 1.3.2.2 Fault on page 24ff.
[786] Visser & Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 543.
[787] Ibid 545. See also Snyman *Criminal Law* 5th ed (2008) 215.

established that the accused did not do what the reasonable person would do, and that therefore that enquiry, and any conception one may have had of the reasonable person in the circumstances of the accused, is no longer relevant. But this argument does not show that one cannot conceive of the reasonable person in the circumstances of the accused, about to do what the accused did. That the relevance of this may have past for the purposes of establishing the unreasonableness of the conduct of the accused, does not mean that its serves no function under the present concern – with responsibility. The answer is that it remains an essential consideration and it is helpful that, at some prior point, we will already have conceived of a component of what we must ultimately consider.

In addition, in order to judge the responsibility of the accused, we must conceive of the reasonable person in circumstances in which s/he would commit the offence, and circumstances in which s/he is about to commit the offence. This is demanded by the theoretical imperative that responsibility is only revealed by a causal feature in a circumstance.[788]

It is only once the reasonable person who is about to commit the offence is conceived, that one may consider the accused's responsibility. The accused's responsibility is only revealed by a consideration of whether that causal factor or feature identified, would have the required effect on the accused.

We must observe that one cannot test for responsibility (by the standard of reasonableness) without conceiving of a reasonable person who, in some circumstances (perhaps desperate circumstances), would commit the prohibited conduct in question. This is the case even though one has moved passed enquiring whether the conduct was reasonable and concluded that the conduct was, in fact, unreasonable - that is, conduct which the reasonable person would not, in the actual (presumably, not desperate) circumstances, commit. One *must*, in order to answer the second question relating to whether reasonable conduct can be expected of the accused person, imagine circumstances in which a reasonable person would commit the prohibited conduct, and then identify what features

[788] Discussed under the heading 9.6.2.3 Causation and Overdeterminism on page 225ff.

may be introduced into those circumstances which would cause the reasonable person to refrain from committing the prohibited conduct.

Fundamentally however, one must, in any enquiry into responsibility, conceive of a reasonable person who, given certain circumstances, would commit the prohibited conduct, but for other circumstances in which s/he would not. Therefore, there should be no objection to imagining a reasonable person about to commit the prohibited conduct – doing so is, in fact, required.

9.6.2.5 Reasonable Conduct and Punishment

There is an interesting technicality[789] regarding the usefulness of the what I will refer to as the *ordinary* cop-at-the-elbow test in light of the proposal that conduct which is reasonable should be exempt from criminal liability.

The technicality is that if conduct which is reasonable is not subject to criminal liability, it cannot attract any punishment. If we presume[790] that the reasonable person knows the law, the ordinary cop-at-the-elbow test loses some of its force. A reasonable person who, for instance, is stealing to feed his/her starving children, may well do so in the presence of a police officer, knowing that his/her conduct is not punishable under law. Thus the proposal that all reasonable conduct be exempt from criminal liability seems to undermine the function of the cop-at-the-elbow test.

However, while this proposal may cause the cop-at-the-elbow test to lose some of its force, the test is not entirely undermined, and moreover, if one draws from the theoretical foundation for the cop-at-the-elbow test, the test can easily be varied to serve its purpose.

Starting with the theoretical foundation, the point of introducing any hypothetical variation into an agent's circumstances is to vary the highest component of his/her reason stream.[791] The function of the cop-at-the-elbow test is to introduce a variation which would – ordinarily – remind an agent of

[789] Spotted by Andrew Paizes at his most insightful. I am deeply grateful for this insight which inspired in me, at first, utter terror that my entire thesis was fatally flawed. Having been alerted to this issue, I am able to address it.
[790] It is not clear that a reasonable person will necessarily know the law, except the law relating to his/her sphere of activity (as indicated in *S v De Blom* 1977 (3) SA 513 (A).
[791] Discussed under the heading 9.6.1 From Theory to Practice on page 220ff.

the prohibited nature of his/her prospective conduct, that s/he may be arrested and subjected to detention for a period of time, and that ultimately, s/he may be convicted and punished for his/her conduct.

It must be noted that the test does not operate on the basis of the desire (choice and conduct) to avoid punishment alone. The test also represents the threat of arrest and detention, irrespective of whether, after a fair trial, any conviction and punishment is possible. We must recall that all that is required is that the cop-at-the-elbow must produce in the reasonable person a good reason to refrain from committing the unlawful conduct.[792] The ordinary cop-at-the-elbow test may still produce this effect in that the threat of arrest and detention for some period of time may well give the reasonable person a good reason to refrain from committing the unlawful conduct.

If this is not enough, given the gravity of the circumstances which cause the reasonable person to be about to commit unlawful conduct, we may imagine a cop-at-the-elbow who is threatening to shoot the reasonable person if s/he commits the unlawful conduct. If this seems unrealistic, imagine then that the cop-at-the-elbow is 'trigger-happy'[793] or that the cop-at-the-elbow threatening to shoot is merely a proxy for the owner of the property in question.

The point is that even the ordinary cop-at-the-elbow test may well produce the required effect on the reasonable person; but if not, the hypothetical may be enhanced as necessary such that the variation, whatever it is, will indeed produce the required effect. Thus, all references to the cop-at-the-elbow, or the arrival of a police officer on the scene, may be read to include whatever threat is necessary to provide the reasonable person with a good and effective reason to refrain from committing the unlawful conduct.

[792] Discussed on page 221ff.

[793] There is nothing intrinsic in the test of the cop-at-the-elbow that requires that the 'cop' be reasonable or that s/he operates with restraint. Again, all that is required is that whatever feature is introduced into the circumstances, would cause the reasonable person to refrain from committing the prohibited conduct.

9.6.3 Expert evidence

The results of the empirical research emphatically reflect the confusion in our law. Not only do the experts contradict each other, but they often contradict themselves. It is arguable therefore that they bring little value to enquiries into criminal responsibility. But this would be unfair. They are confused, but so is our law. Indeed our law is the ultimate source of confusion on questions of responsibility. It does seem fair however to wonder how experts allowed themselves to become engaged in this state of confusion and did not point out that the questions being asked of them made little or no sense. It seems that if they expected the law simply to make sense, they gave it too much credit.

Follow up discussions were engaged in with several of the original interviewees. As indicated above,[794] of the original thirteen experts, eight were available for a follow-up interview and were re-interviewed.

Regarding whether they continued to practise forensic psychology or psychiatry, half[795] indicated that they continue to practise in the field of forensic psychiatry or psychology. W8 indicated that, though he had last testified on matter of criminal responsibility in about 2005, he was returning to the field.

W1, W10 and W12 no longer practise forensic criminal psychiatry or psychology. Of vital importance, however, is that W10 indicated that the reason she no longer practises in the field is that she felt it almost impossible to understand what was being asked of her. This is in line with the comments of other witnesses (W8 and W1). All of these experts expressed the view that the proposals contained here would clarify matters to the point where they felt they would know what is being asked of them, and would feel comfortable engaging in the enquiry proposed. W12 made

[794] Under the heading 2.3 Sample on page 42ff.
[795] W5, W7, W9, and W11.

the point that while he did not think the proposals would simplify matters, they would bring much needed clarity.

They were asked whether, in their understanding of the legal questions they are required to answer, there had been any substantive changes since the original interviews. As indicated, W1, W10 and W12 no longer practise forensic criminal psychiatry or psychology and could not comment about whether the law had changed. W5, W7, W8, W9 and W11 said that in their view, the law had not changed in any substantial respect, despite the decision in *Eadie*.[796] W9 indicated however though that in his view the courts are stricter in recognising an incapacity defence.

Furthermore, their opinions were sought on whether the proposals made here would assist them in performing a forensic evaluation and ultimately in testifying. To this end, they were asked how they enquire into whether a particular accused suffered, at the relevant time, with a specified functional impairment. They were asked whether their approach was to collect information, directly or indirectly (through reports from others), regarding how the person responds to particular questions, stimuli or circumstances generally. Furthermore, they were asked whether this information is used to compare how the person in question responds relative to a recognised standard of proper functioning.

All witnesses re-interviewed[797] agreed that information was required about the person to permit a comparison of the mental functioning of that person relative to a recognised standard of proper functioning. W1, W8 and W12 cautioned however that this can be done only where the standard of proper functioning is recognised or set. All witnesses indicated though that they would be content if a court or the law indicated what this standard should be.[798]

[796] See the discussion on *Eadie* (under the heading 7.4 Eadie – The End of Non-pathological Incapacity? on page 144ff).
[797] W1, W5, W7, W8, W9, W10, W11 and W12.
[798] W7 suggested that this could form part of training given to social scientists who wish to practise in a forensic setting.

All witnesses indicated that it is a familiar exercise to engage in a clinical comparison of the functioning of a person, based upon the information they may gather about that person, relative to a recognised standard of functioning. They indicated they would feel comfortable engaging in this exercise in a forensic setting, where the law indicates the standard of proper functioning as that of a reasonable person.

This is fundamental, since it indicates that the proposal, according to which the expert will be asked to compare how a reasonable (functioning) person would respond to a particular stimulus or circumstance[799] with how the particular accused would respond, is a familiar line of enquiry for social scientists. It is an enquiry which they consider themselves able and comfortable to engage in.

Finally, they were asked if it would assist them and whether they would prefer not having to answer questions relating to whether the accused suffered with a legally recognised 'mental illness or defect'. To this question they all responded that this would be a welcome development. W8 said he thought that this requirement has always been a problem obscuring the true question.

W5, W9 and W11, all psychiatrists, did point out that they would need to diagnose some condition upon which to base a forensic opinion, but were content that this was a consideration which they would be free to take account of or not. However, they welcomed the proposal that this 'diagnosis' should not be required in law and should not be restricted by any legal definition.[800]

A most encouraging implication of the model proposed is that it permits lawyers and judges to speak the same language as social scientists: psychologists, psychiatrists and social workers. Lawyers and judges will no longer operate on a mythical indeterministic assumption of free-will, but will operate, with social scientists, within the same deterministic framework. They will operate

[799] The introduction of a cop-at-the-elbow, for instance.
[800] This does not detract from the proposals made here in which, as mentioned, a mental health practitioner may take account of whether or not an accused person suffered with a mental disorder or not.

upon the same facts and evidence and on the undisputed premise that the past and present, and what one is made of, what one does, feels, values, and what one thinks, all matters. It radically alters the current adversarial relationship between lawyers and social scientists. On the current libertarian model of responsibility, people are responsible only if their conduct is undetermined. However, social scientists can only testify about the determinants of conduct. The result is that social scientists are received in the forensic setting, with scepticism, on the basis that, on the current model, any explanation of conduct excuses it. On the model proposed, people may nevertheless be responsible if their conduct was determined. Indeed, as indicated, determinism, operating in the right sort of way, is required. Lawyers will need to know from social scientists, not whether the accused's conduct was determined, but how it as determined. The proposed model permits a cooperative and collaborative venture in which the framework of determinism is shared, and the manner in which it operates determines responsibility.

Furthermore, on the model proposed experts will no longer be required to make normative judgments. The court will determine and stipulate the applicable standard arising out of the circumstances in which a reasonable person would choose and do what is right. Experts will be required only to answer the empirical question of whether the accused could live up to the required normative standard. This will release experts from being called upon to answer normative questions regarding criminal responsibility.

9.6.4 Disposition

In the context of the current ‘insanity’ defence, it is not clear what is meant by ‘mental illness or defence’. Further, it is not clear why there should be different dispositions of an accused found not guilty by reason of insanity as opposed to a person acquitted under a successful claim to incapacity for some non-pathological condition. Analysis of the insanity defence and the purpose of the diagnosis of ‘mental illness or defect’ reveals a concern with the future dangerousness of the accused. However, there is no reason why this concern should not be triggered in respect of all persons acquitted under a defence of incapacity. Also, our civil law of commitment is already

focused on any person who poses a danger to themselves or others.[801] This concern may therefore adequately be addressed within the context of the civil law and perhaps more appropriately so. If a person is found to be not responsible, it seems that the *criminal* law's jurisdiction over that person falls away and only the civil law may be invoked against this person. It seems appropriate that an inquiry under the Mental Health Care Act[802] is triggered – perhaps automatically - where a person receives an acquittal due to non-responsibility.

9.6.5 Examples

9.6.5.1 Superior overwhelming human and natural force

Consider the following example: X, who is physically stronger than Y, grasps Y by Y's hand and, overpowering Y, forces Y to strike Z. The movement of Y is involuntary because Y's conduct does not follow from the choice of Y, or from Y's reasons. We may know this by asking whether the movement would vary in line with a variation in Y's choices or reasons. Would Y *not* have struck Z if Y had chosen or wanted *not* to? No, Y would still have struck Z. Y's choices and reasons are irrelevant. Thus Y's conduct is involuntary. If the force was of natural origin such as wind, the result is the same. A person who has been picked up by a hurricane and is thrown by the wind through another person's window, cannot alter his/her conduct in line with his/her choices and reasons.[803] Would the hypothetical introduction of a cop-at-the-elbow have had any effect in either case? No, neither are responsible.

[801] Mental Health Care Act 17 of 2002; Relevant provisions are attached as 'Appendix D' (on page 273ff) for ease of reference. Vorster observes correctly that dangerousness should include a consideration of the risk posed to the property of others, not only to the person of others (Vorster Personal Communication 13 June 2011). The Mental Health Care Act only provides for in (s 9(1)(c)) relating to immediate admission. However, this section only authorises committal for a maximum of 24 hours (s 9(2)(b)). The provisions of s 32 and 33, regarding involuntary committal, do not take account of the risk posed to the property of others. The provisions permit commitment when the person concerned poses a risk to their own financial interests, but in an apparent omission, this is not extended to the financial interests of others.

[802] Relevant provisions are attached as 'Appendix D' (on page 273ff) for ease of reference.

[803] Notice that this is contrary to those definitions of conative functioning that require that the *will* must be controlled – that the person is voluntary if s/he can want not to fly through the air (see on page 76ff). What the agent wants is clearly irrelevant and it is not enough for voluntariness that the agent can or does control his/her will.

One should note however, that this instance of involuntariness will invariably be identified also as an instance of reasonable conduct. This is because the circumstances are such that every person, irrespective of whether s/he is reasonable, would do what the accused did – including, off course, the reasonable person. Under the structure and order of the enquiry proposed, in which it is first enquired whether the conduct was reasonable, and only if not, is responsibility enquired into, these instances (of overwhelming force) will be identified as reasonable conduct.[804] This is a function of not only the particular structure and order of the enquiry proposed, but at the deeper theoretical level, of the standard adopted for what constitutes proper functioning for establishing responsibility.

The problem for an agent overwhelmed by superior physical force is that, while his/her reasons may be arising in the right sort of way, that is, s/he may be circumsensitive, s/he is unable to exercise his or her reasons and choices. We can detect this, in practice, by presenting the agent with some variation in the circumstances, which would cause the responsible agent (the reasonable person) to vary his/her reasons and, in turn, to vary his/her conduct appropriately. On a practical level, one may be tempted to simply imagine away the implicated source of the impediment: the overwhelming physical force. However, on a theoretical level, the focus must be to induce a change of reasons. Hypothetically eliminating the implicated source of the impediment will not, in itself, induce a vary the agent's reasons. This would simply free the agent to give effect to his/her reasons – whatever they may be. The more appropriate variation would be to hypothetically vary the circumstances of the agent/accused, given the implicated source of the impediment. This is again the work that the cop-at-the-elbow would do in this scenario. We need not imagine away the impediment – indeed we should not. We need merely ask whether the accused who claims to have been overwhelmed by superior physical force, would refrain if a police officer arrived on the scene, [805] given the continued operation of the force implicated.

[804] This is provided for in para 2.a of the Suggested Statutory Reform on page 276.
[805] Subject to the discussion under the heading 9.6.2.5 Reasonable Conduct and Punishment on page 233ff.

9.6.5.2 Epilepsy, Kleptomania and Drug addiction

Similarly for instances of epilepsy, kleptomania, and drug addiction: a person suffering an epileptic seizure cannot alter his/her conduct in line with his/her choices and reasons. A kleptomaniac may steal irrespective of his/her reasons and choices, in which case he/she will not be responsible.[806] In such a case, he/she may want not to steal, or choose not to steal, but will be unable to give expression to that desire or choice.[807] Similarly for the drug addict: if , irrespective of what s/he wants or chooses to do, the addiction will prevail and cause the addict to take the drug. The addict's conduct in taking the drug is involuntary. Again, if the hypothetical cop-at-the-elbow would have had no effect on the conduct in question, then neither the person with epilepsy, kleptomania, nor the drug addict are responsible.

9.6.5.3 Schizophrenia/Psychosis

Psychosis is, by definition, a break between the mind of the accused and his/her circumstances.[808] A person who is delusional or hallucinating is not sensitive to his/her circumstances. If an appropriate hypothetical variation of the circumstances will not produce in the psychotic person the right choice and conduct, she is not responsible. Typically, persons suffering with psychosis act independently of their circumstances. Take the person who is deluded into believing that the Prime Minister is persecuting him and that s/he must kill the Prime Minister to save him/herself.[809] There are no appropriate circumstances into which this agent may hypothetically be placed that will produce the right choice and conduct – not to kill the Prime Minister. One cannot effectively present evidence to him to the effect that – presumably – the Prime Minister is not persecuting him. Nor could we know with any certainty that the presence of a cop-at-the-elbow would be

[806] The label 'kleptomaniac' is used here as it is commonly understood, to signify someone who will steal irrespective of his/her reasons and choices.
[807] Nielsen 'Reason and Practice' In *Free Will* edited by Kane (1971/2002) 44.
[808] Barlow & Durand *Abnormal Psychology: An Integrated Approach* 5 ed ed (2009) 469ff; Comer *Abnormal Psychology* 7th ed (2010) 453. Psychosis is, however, not the only possible condition that will have this effect. Severe mental retardation or brain damage for instance, may also have this effect.
[809] Kring, Johnson, Davison & Neale *Abnormal Psychology* 11th ed (2010) 222. As in the case of Daniel M'Naghten (discussed above under the heading 4.3 M'Naghten Rules on page 54ff).

perceived properly or at all. As such this individual does not have a will that makes him/her responsible for his/her conduct.

9.6.5.4 Depression

A person suffering with severe depression may equally be non-responsive to his/her circumstances. While depression may be accompanied by psychosis and be dealt with on that basis (above),[810] the form I wish to address here is in the absence of psychosis. Consider a mother who is so depressed that she no longer cares if she lives or dies. Indeed, she would prefer to die. Her state of mental despair extends to her children, who she thinks would be better off dead than having to live in this cruel world. Of course this may border on a delusion and be treated as such. But presume only that she is so immobilised by her debilitating depression that she no longer cares to feed her new born child and the child dies.[811] Is she responsible? Not if there were no appropriate circumstances into which she may have been hypothetically placed to produce the right choice and conduct. She may of course be subjected to counseling and a regimen of anti-depressants – but this is contrary to the appropriate enquiry. We are concerned with her *current* mental state and reason system, and in particular, whether she is reason responsive. If there are no appropriate circumstances (including a cop-at-the-elbow) to which she may be exposed that would cause her to start caring and be motivated enough to feed her child, she is not responsible.

9.6.5.5 Psychopath/Antisocial Personality Disorder

The psychopath is someone who persistently violates the rights of others.[812] There is apparently nothing wrong with their knowledge and understanding of the laws and rules that govern society. However, they appear emotionally blunted and are notoriously ego-centric.[813] They do not seem capable of any emotional appreciation; nor do they seem capable of empathy for others around

[810] 9.6.5.3 Schizophrenia/Psychosis on page 241.
[811] This is an omission but the mother would be under a legal duty to act by virtue of her protective relationship with the child (*S v A* 1993 (1) SACR 600 (A); *S v B* 1994 (2) SACR 237 (E)).
[812] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000); Comer *Abnormal Psychology* 7th ed (2010) 518.
[813] Comer *Abnormal Psychology* 7th ed (2010) 520.

them.[814] Psychopaths will, of course, display different degrees of this and it is perhaps most helpful to consider whether the most extreme form of emotional blunting and ego-centricity may render one reason insensitive. Depending on the psychopath, there may well be many appropriate circumstances into which s/he may (hypothetically) be placed, in which s/he would choose and do what is right. In any circumstances in which a psychopath's interests are patently[815] threatened, such as by a cop-at-the-elbow, one may expect that s/he will do what is right in order to guard his/her interests.

9.6.5.6 Sleepwalking

The problem of a person who is asleep or sleepwalking raises the issue of whether there is an appropriate relationship between the sleepwalker's reasons and his/her circumstances. If one hypothetically places the sleepwalker into appropriate circumstances – circumstances in which a reasonable person would choose and do the right thing – would the sleepwalker choose and do so? The answer is obviously not. S/he is not sensitive to her circumstances and is operating in an imaginary world. The sleepwalker would be oblivious to a cop-at-the-elbow. Thus the sleep walker is not responsible because s/he lacks circumsensitivity and is involuntary.[816]

9.6.5.7 Intoxication

It is conceivable that intoxication could interfere with both a person's voluntariness and his/her 'circumsensitivity': his/her connection to the world. Thus, a significantly intoxicated agent may act irrespective of the choices s/he has made; or his/her choices may arise independently of the reason set s/he has. For instance, s/he may choose to stand up, and yet fall down – in which case s/he is unable to execute his/her choice. In such cases, the accused's movements are involuntary. Alternatively, intoxication may impair a person's reason system to the point that s/he becomes

[814] Snyman *Criminal Law* 5th ed (2008) 177.
[815] I include this qualifier since people who suffer with antisocial personality disorder appear to take far greater risks than 'normal' people do and do not seem to learn from their mistakes (Kring, Johnson, Davison & Neale *Abnormal Psychology* 11th ed (2010) 370-1).
[816] Note, under the current law the sleepwalker is treated as an instance of involuntariness. This remains the position under the model of reason-sensitivity, but we would also recognise that the source of the involuntariness is the breakdown in the relationship between his/her will/reasons and circumstances (see on page 218).

detached from the world. S/he may well be unable to process information or temper and mediate his/her desires. S/he may for instance, become paranoid, mistakenly believing that s/he is under attack, whereas there is no basis for this. Where there are no hypothetical circumstances in which a reasonable person would choose and do what is right, in which the intoxicated accused would choose and do what is right, s/he is not responsible. It is possible that a cop-at-the-elbow would not produce the required effect on a sufficiently intoxicated person. Thus the intoxicated accused may be involuntary and therefore not responsible, or lacking circumsensitivity and involuntary and not responsible, depending on the effect of the intoxication.[817]

9.6.6 Difficult Cases

9.6.6.1 Hadfield

One may recall the case of Hadfield – discussed above.[818] The problem posed by the Hadfield case is that he tried to save the world by dying as a martyr. In his mind, suicide was forbidden as a sin, so he shot at King George III in the expectation that he would be executed. Clearly Hadfield knew that his conduct was illegal, but his purpose was to save the world, and thus his objective was ultimately, at least from his perspective, moral. Hadfield's case highlights the dilemma regarding whether the concept of knowledge/appreciation of wrongfulness should be given a legal or moral interpretation. Hadfield knew it was illegal; indeed it was because it was illegal that he did it. Yet our intuitions seem to indicate that it does not seem fair to punish Hadfield.

The model of responsibility proposed adopts the standard of the reasonable person to give meaning to the insight that we can demand of an accused. We must ask, would the accused appreciate the wrongfulness of his/her conduct in circumstances in which a reasonable person would.

[817] Following *S v Chretien* 1981 (1) SA 1097 (A). The objection that intoxication should not be permitted as the basis of a defence because it allows people to get drunk in order to commit crime is not well founded. Firstly it is – by definition - impossible to plan your conduct in a condition in which you have no control. Secondly, as indicated above (footnote 731), if the offensive conduct is the planning of an offense or starting to commit an offense to be committed or completed once one has drunk enough to lack responsibility, then that conduct should be targeted. The principles of antecedent liability are already in place to target such behaviour.

[818] See on page 53.

On the model of reason-sensitivity, we would ask whether Hadfield could act as a reasonable person. For instance, if we hypothetically introduce a police officer into Hadfield's circumstances at the time he committed his offence, would he have persisted? Apparently, he would have. He could not observe the standard of the reasonable person. In that sense he is 'stuck' and not reason-sensitive. Hadfield is not responsible.

9.6.6.2 The Abuse Excuse

On the model of reason-sensitivity, an adverse, even abusive childhood, may translate into an excuse for an accused. However, it will not necessarily excuse.

The problem of Jojo, described by Wolf[819] and discussed above,[820] illustrates this well. A person (such as Jojo) is only not responsible if his reason set is not only wrong, but is 'damaged' so that he truly is non-responsive to appropriate circumstances. As argued above,[821] whether an agent who has suffered abuse is responsible depends upon whether his/her experience of an abusive environment has made him/her reason insensitive.

Consider a twelve year old child who is torturing her three year old brother by burning him with a cigarette lighter. The younger brother is screaming and crying, but the twelve year old persists. Is this twelve year old child responsible? The question is whether she is reason-sensitive. We can only know this by considering whether her conduct would (hypothetically) alter if her circumstances were appropriately altered. Consider then what she would do if her mother (instead of a cop) arrived home and walked in. Presumably this would produce a variation in her choice,

[819] Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002)
[820] 8.6.2.3 Bad Luck and Abusive Environments on page 198ff.
[821] 8.6.2.3 Bad Luck and Abusive Environments on page 198ff. As indicated, there will be two types of Jojo: JojoX and JojoY – both are initially exposed to an adverse, abusive environment and both developed, as a function of being reason-sensitive, (wrong) reason sets. However, JojoX is no longer able, even in ideal circumstances, to revise his mental set. He is stuck and thus not responsible - because he is no longer reason-sensitive. JojoY on the other hand, formulated a reason set that was wrong but he remains reason-sensitive such that, in adequate circumstances, he could and would correct this reason set. Thus reasonable circumstances would produce in JojoY a corrected reason set and he may thus be judged on that basis. JojoY, can chose and do the right thing if the circumstances are reasonable. Thus JojoY is responsible, but JojoX is not.

and her conduct would vary appropriately – she would stop burning her brother. If so, she is reason-sensitive and responsible.

However, consider the situation where the child continues to burn her brother despite the arrival of her mother. This would signify that an appropriate variation of her circumstances would not produce the appropriate variation in her choice and conduct. As such the child is identified as non-reason responsive and therefore not responsible. This child is one whose mental state is 'stuck' perhaps by virtue of abuse, perhaps by exposure to violence and having come to think it is appropriate behavior. This child's mind is scarred and she is not responsible.

9.6.6.3 Severe Emotional Stress

The model of reason-sensitivity does not distinguish between sources of insensitivity to an individual's circumstances. There is also no veiled assumption[822] that one source or cause ('mental illness or defect') of non-responsibility poses future danger whereas others do not. If an emotional disturbance prevents an accused from tracking the truth or evidence in the world, his/her needs or best interests and what is right and good, they are not responsible. Thus, if a person's reason system is damaged, by whatever cause, to the point where exposure to circumstances in which a reasonable person would choose and do what is right, but the person would not, then she cannot be held responsible. As further indicated above,[823] there would appear nothing inappropriate in an automatic referral for a civil inquiry into such an acquitee's mental health and the actual – rather than assumed – danger that they may pose to themselves and others.[824]

If however, given appropriate circumstances, the accused would respond and act reasonably, we must still enquire into whether the actual circumstances were sufficiently reasonable to permit reasonable conduct. It may be that a person, functioning perfectly well, is exposed to circumstances in which a reasonable or ordinary person would do as they did.

[822] As for 'pathological' incapacity (see 6.7 Dangerousness on page 126ff).
[823] 9.6.4 Disposition on page 238ff.
[824] As is permitted under the Mental Health Care Act 17 of 2002.

9.6.6.4 'Unreasonable Circumstances'

It is entirely conceivable that, not due to any insensitivity in the reason system of a person, but due entirely to exposure to an extremely stressful circumstance, a person may do 'wrong' in circumstances in which a reasonable person would. For instance someone who discovers his/her spouse committing adultery, or a parent who finds a neighbour raping his/her child. These are circumstances in which it is conceivable that a reasonable person may attack and kill another person.[825] Also, following *Goliath*,[826] our courts have accepted that a reasonable person may kill in order to save his/her own life.[827] If one enquired into whether s/he is reason-sensitive by varying his/her circumstances – according to the test for reason-sensitivity - into circumstances in which a reasonable person would choose and do the right thing, it would be established that the agent is reason responsive and therefore responsible. However, if the actual circumstances are not reasonable - that is, circumstances in which all reasonable people would choose and do what is right – then the accused is responsible, but nevertheless not to blame.[828]

S/he is not to blame on the basis that his/her conduct is reasonable. As argued above,[829] it cannot be correct that any form of fault can be found unless the conduct in question was at least unreasonable. Thus even though the accused was responsible, effect may be given to this under the requirement of fault.[830] Thus, where conduct is reasonable, no fault should be attached – neither negligence nor intention.[831]

Therefore, even where an accused is reason responsive and therefore responsible, s/he may nevertheless escape liability on the basis that he/she lacked fault.

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[825] Discussed under the heading 1.3.2.2 Fault on page 24ff, particularly at on page 29ff.
[826] *S v Goliath* 1972 (3) SA 1 (A).
[827] Discussed above under 1.3.2.2 Fault on page 24ff.
[828] The distinction here is between agent responsibility (which I have discussed as responsibility) and what philosophers may call 'moral' responsibility – concerning the blameworthiness of an agent relative to his/her circumstances.
[829] Following Paizes (Paizes 'Unreasonable Conduct and Fault in the Criminal Law' (1996) 113 SALJ). See under the heading 1.3.2.2 Fault on page 24ff, particularly on page 29ff.
[830] Discussed under the headings 8.7 Locus of Control on page 200ff and 9.2 Fault on page 209ff.
[831] There is also the possibility that current circumstances have prevailed for some time and have impaired the functioning of the person's reason system. In this case the accused would lack responsibility, but would escape blame also on the basis that even if s/he were responsible, no fault could be attributed to him/her.

9.7 Conclusion

Thus we may bring the test of capacity into line with what appears to be a better view of what is required for responsibility. Furthermore, the proposed model of responsibility allows us to avoid the confusion over the label of mental illness by directing our attention to what it is that ought to concern us: any impediment to proper functioning – rather than the reason for the impediment. It proposes a basis upon which all acquittals based upon non-responsibility may be treated equally. In addition, since it is premised on whether reasonable conduct can be expected of an accused, it solves the problem of unfair objectivity under fault. Furthermore it clarifies the volitional component of responsibility and explains how and why it may co-exist under both the *actus rea* and *mens rea*. The proposal also provides a framework for proper communication between forensic experts and lawyers and judges.

10 Conclusion

The original purpose of this thesis was to attempt to clarify what our courts, and in particular the expert mental health practitioners who testify on matters of criminal responsibility, understand by the various concepts employed in our law concerning responsibility. However, it soon became clear that mental health practitioners hold vague and conflicting views on what indicated responsibility. This appeared to follow from the lack of clarity and even contradictions that exist in our law. This research turned to address this apparent problem in our law.

A review of the common law showed that many, if not all, of the concepts relevant to responsibility are ambiguous or at least unclear. Our law currently requires, for criminal liability, that an accused's conduct must be voluntary and accompanied by criminal capacity: the capacity to appreciate the wrongfulness of one's conduct and to act in accordance with that appreciation. Our law recognises several bases which may exclude capacity: youth, mental illness or defect, or any non-pathological condition, such as severe emotional stress. But we are not clear what we mean by almost every concept that we use to describe the conditions for responsibility.

10.1 Criminal Responsibility – the law as it is

The analysis in chapter 3 of the conceptual framework and philosophical model of responsibility currently relied upon shows that our law adopts an indeterministic model of responsibility. This indeterministic model requires that the accused could do otherwise unconditionally. The question, then, is whether s/he could do otherwise in his/her precise circumstances, given the very reasons s/he has and the choices s/he has made. This requires that we identify a responsible person as a person who acts irrespective of his/her choices, reasons and circumstances – a person who acts capriciously, randomly or arbitrarily.

As noted in chapter 4, our law has not yet decided what it means by the term 'appreciation of wrongfulness'. It is not clear whether it refers to a moral standard or to a legal standard. If it refers to a moral standard, then it is not clear to what or whose standard of morality it refers. If it is a legal standard, it is not clear whether it refers to the general prohibition of particular conduct (that it is criminal offence), or to unlawfulness, that the conduct is not justified in the specific circumstances. Yet, as discussed, none of these appears entirely suitable. It was suggested that the standard for responsibility should not turn on any of these possibilities, but rather on a standard that expresses what the law can legitimately expect of each of us.

As indicated in chapter 5, the problem with the requirement of the capacity to conduct oneself in accordance with an appreciation of wrongfulness is to know what it is and what it is not. In search for some meaning we have resorted to relying on a forbidden[832] meaning of capacity for self-control (as resistibility) and it is not clear what this means. Also, the concept of voluntariness remains elusive – at least four definitions may be discerned. Furthermore, there does not appear to be any sustainable basis to distinguish between the capacity for self-control and voluntariness. Only one conative function may be discerned. Finally it seems that several factors have been mistaken as indicating proper conative functioning. We often confuse the conative requirement with a cognitive requirement. We obfuscate matters by employing the term 'consciousness', and we mistake goal-directedness and the absence of a 'trigger' as indicating proper conative functioning.

The requirement of a 'mental illness/defect' is discussed in chapter 6. It is argued that this requirement is an (almost) meaningless obstacle placed in the way of a plea of insanity. It serves only to give covert expression to some myths, false intuitions, and is also – to a large extent – redundant. The only discernable meaning it carries reveals a covert concern with the *future* dangerousness of an accused instead of with his *past* conduct.

[832] See discussion on page 70ff.

Non-pathological incapacity is discussed in chapter 7. It notes that given the failure of our law to define the 'pathological' condition required for an insanity defence, it follows that the distinction between pathological and non-pathological non-responsibility is ill defined. The leading case on non-pathological non-responsibility, *Eadie*, has focused attention only on the problem of when we ought to recognise that any accused lacked responsibility.

10.2 The Philosophy of Responsibility

Chapter 8 discusses the philosophical problem of free-will and responsibility. We noted that even if indeterminism did operate in and upon us, this would not make us responsible. We are responsible instead, to the extent to which determinism operates in and upon us in a particular way. Determinism operates in the right sort of way to make us responsible when it operates to make us reason-sensitive, or even further, when we are appropriately responsive to the world in which we live. Determinism operates in the wrong sort of way when we cannot respond appropriately to our world, when we are 'stuck'. For instance, someone who is suffering an epileptic seizure, is a kleptomaniac, or who is suffering paranoid psychotic delusions that a fire-breathing-dragon is chasing them, represents determinism operating in the wrong sort of way.

Furthermore we noted that we cannot hold people responsible if their ability to do otherwise would be to do anything, irrespective of their reasons, choices, and irrespective of the circumstances in which they find themselves. This would demand the ability for acting randomly, arbitrarily or capriciously – which is not a sound foundation for responsibility. Instead we note that we hold people responsible for what they do of their own accord, or, when they do what they want, even if they could not do otherwise. Whether they could do otherwise only reveals what is essential to know: whether they did so of their own accord.

Furthermore, we noted that our current law is based on an indeterministic model of responsibility which requires, for responsibility, that an accused is capable, in the actual circumstances of their

conduct, of random, arbitrary, and capricious conduct. It requires the question of capacity to be asked unconditionally: could the accused, in the very circumstances and with the same reasons and choices, have chosen and done otherwise. Instead it is argued, we must impose a conditional interpretation. An agent must be able to do otherwise *if* for instance s/he wanted to. That is, an agent must be able to do otherwise on some hypothetical variation of his/her actual reasons or the circumstances in which the agent finds him/herself.

As indicated, the model of responsibility proposed (of reason-sensitivity), requires determinism operating in the right sort of way. For voluntariness, I propose that conduct must be controlled by the agent's will. This requires that the agent's conduct follows from and is controlled by his/her choices. His/her choices must follow from and be controlled by his/her reasons.

Beyond this – for what may be understood as 'circumsensitivity', I note that our reasons must arise in the right sort of way. At its most abstract, the model requires that the agent's reasons (beliefs, desires and values) are controlled by the world in the right sort of way. That is, that his/her beliefs must follow the truth and the evidence, his/her desires must follow what s/he needs or what is in his/her best interests, and s/he must value what is right and good. As discussed, the concepts of truth, needs and interests, and right and good are value laden. This leads to the recognition that responsibility is a normative concept which must ultimately be judged by reference to some objective normative standard.

I have argued that in law this normative standard is provided by the standard of the reasonable person. Thus we must be capable of the beliefs, desires and values of this reasonable person. The question of responsibility then becomes whether an accused would believe, desire, value, choose and do what the reasonable person would. In short we are concerned with whether the accused is a reasonable person.

10.3 Criminal Responsibility – the law as it ought to be

The implications of this theoretical approach are then discussed in chapter 9. Starting from the point that the law cannot expect more of us than to act as reasonable people, the requirements of criminal liability are discussed in the following order: fault, capacity, and ultimately voluntariness.

I argue that for any finding of fault, it must be the case that the accused did not act reasonably, but could have. If the accused *did not* act reasonably but *could not* have, s/he is not responsible. This model offers a basis for the integration of fault and capacity.

Whether an accused *could* act reasonably depends on whether he/she would choose and do what is right in circumstances in which a reasonable person would.[833] If we wish to retain the more specific questions relating to an appreciation of wrongfulness and capacity for self-control, we may ask:

1. *Would* the accused appreciate the wrongfulness of his/her conduct in circumstances in which a reasonable person would; and

2. *Would* the accused conduct him/herself in accordance with an appreciation of wrongfulness in circumstances in which a reasonable person would.

The model of reason-sensitivity provides no theoretical basis for distinguishing two conative requirements – in line with the failure of any attempt at distinguishing voluntariness from capacity for self-control in our law. Based on the model of responsibility proposed – of reason-sensitivity - conduct is voluntary where the agent acts for his/her own reasons. The agent's conduct must follow from his/her choice, which in turn, must follow from his/her reasons

[833] See the discussion under the heading 9.6 Practical Application on page 220ff; particularly under the heading 9.6.2 'Appropriate Circumstances' on page 223ff.

(beliefs/desires/values). However, though only one conative function – of voluntariness – may be accommodated within the model of responsibility proposed, the current structure of criminal liability requires that we recognise that this requirement exists under both the wrongful conduct (*actus reus*) and wrongful mental state (*mens rea*) requirements. This is because voluntariness concerns the *relationship* between objective physical movements and mental phenomena. Therefore voluntariness cannot be isolated under the *actus reus*. Furthermore, as noted above, the question of responsibility, under capacity, inevitably involves questions of whether the accused could, in appropriate circumstances, choose and *do* what is right. This capacity cannot be confined to the *mens rea*. There is and must be, so long as the current structure of criminal liability remains in place, an overlap. Furthermore, the one discernable conative requirement is required under both the *actus reus* and *mens rea*.

The overlap exists insofar as questions of responsibility are wider or more far-reaching than questions of voluntariness, but certainly include several of the same concerns: whether conduct followed from the accused's choice, which followed from his/her reasons. However if an accused's reasons have arisen in the wrong sort of way, they are not the agent's own reasons. Thus if circumsensitivity is impaired, responsibility is excluded because the entire required stream of reason is not functioning properly. Therefore one may be sane and involuntary, but not lacking circumsensitivity and yet be voluntary. In any event, whether it is voluntariness or circumsensitivity and voluntariness that a person lacks, that person is not responsible.

In practice we want to know if the accused would choose and do what is right in circumstances in which a reasonable person would. We test whether an accused is reason-sensitive by testing his/her prospective 'throughput' – whether s/he would do what is right/reasonable given the right/reasonable 'input'. This enquiry treats the agent as a 'black box'. We enquire whether the right (in our case, reasonable) input into the 'black box' will produce the right (reasonable) output.

This may be achieved by the hypothetical variation of introducing a police officer into the accused's circumstances – a cop at the elbow. The significance of introducing a police officer is that it is a variation that one may expect will remind all reasonable people of the prohibited nature of their prospective conduct and the desire to avoid an interference with a valued interest, such as liberty, bodily integrity, or life. It operates on the basis that if an accused does not stop in the face of a variation in his/her circumstances which would produce in all reasonable people a good reason to refrain, it is safe to conclude that s/he cannot resist.

Regarding the condition of a 'mental illness/defect' required for an insanity defence, I have proposed two possible solutions. The first would be to give meaning to the requirement of mental illness/defect by identifying it as instances where an accused's mental faculties were not functioning. But the other alternative is better. It draws our focus upon the ultimate question of responsibility – *whether* the accused was reason-sensitive and functioning properly, rather than *why*. The reason *why* the accused may not be functioning properly is only of interest in determining *whether* the accused was functioning properly. The proposed model of responsibility allows us to avoid the confusion over the label of mental illness by directing our attention to what it is that ought to concern us: any impediment to proper functioning – rather than the reason for the impediment. It proposes a basis upon which all acquittals based upon non-responsibility may be treated equally. The disposition of a person acquitted for non-responsibility may naturally attract an enquiry into whether they are dangerous or not under the appropriate law – the civil law.

Ultimately this model proposes a basis upon which to distinguish the mad from the bad. It allows us to accommodate bad or wrong beliefs, desires and values and only to recognise an excuse when the accused is dysfunctional because of some adverse experience or impediment – where the accused is no longer reason-sensitive. Also, we are able to accommodate claims of adverse circumstances and to distinguish whether these should permit for an excuse (excluding fault) on the basis that the accused acted reasonably.

Finally, the adoption of this compatibilist model will facilitate communication between social science experts and judges and lawyers. Lawyers and judges will no longer operate upon an indeterministic assumption of free will, but will operate, with social scientists, within the same deterministic framework. They will all recognise that the past and present, and what one is comprised of, what one does, feels, values, and what one thinks, all matter.

11 Appendix A: Interview Vignettes and Question Schedule

11.1 Introduction and Welcome:

Welcome; thank-you for your time today. As you are probably aware, the views and opinions that you express here today will be treated as anonymous, and it is hoped that you will feel free to speak your mind, so long as it is remains the truth as you know it to be.

I also wish to express the hope that today will be in no way confrontational; but that we may be able rather to collaborate in order to try to solve some of the difficulties that reside within the field of criminal responsibility. Before we begin, may I ask:

1. What your academic qualifications are?
2. Your professional qualifications (that is your professional affiliations)?
3. Your current occupation?
4. For how many years have you practised as a psychiatrist/psychologist.
5. Approximately in how many cases have you testified concerning matters of criminal responsibility?

11.2 Vignette one: Mental illness/defect.

A client/patient came to you who you diagnosed as a paranoid schizophrenic. One month later she is arrested for a murder she is accused of committing at the time of your diagnosis. You are asked to comment on her responsibility in terms of an insanity plea: S 78 of the Criminal Procedure Act (51 of 1977).

Questions:

6. Are you familiar with the facts contained in vignette one headed: mental illness/defect?

7. Are you familiar with the provisions of s 78 of the Criminal Procedure Act (CPA), in terms of which an accused person may be given a special verdict of not guilty by reason of insanity? And that it is premised upon the presence, at the time of the offence, of a mental illness or defect?

8. Assuming the facts of vignette one, do you cite your earlier diagnosis of paranoid schizophrenia as a mental illness or defect as contemplated in s 78 of the CPA?

9. Would you cite the following as a mental illness/defect, as contemplated in s 78 of the CPA, if you had, upon your consultation at the time of the offence, diagnosed or noted:

    9.1. A personality disorder such as antisocial personality disorder;

    9.2. OCD or PTSD;

    9.3. Intermittent explosive disorder or kleptomania;

    9.4. A depression, particularly one which may be said to be “reactive”;

    9.5. Alcoholism or other substance dependence, particularly nicotine dependence;

    9.6. Severe alcohol abuse without any addiction;

    9.7. Premenstrual dysphoric disorder;

9.8. A belief in witchcraft?

10. How do distinguish between those that you cite or would cite as a mental illness/defect and those you don't or would not?

    Alternatively (if no distinction): How does one distinguish the presence of mental illness or defect from its absence?

11. Do the following factors influence your view:

    11.1. Is the effect on insight or self-control relevant? Why?

    11.2. The source of the condition in the sense of it being attributable to endogenous or exogenous causes? Why?

    11.3. Is a possible DSM IV/ICD10 diagnosis equivalent to a mental illness/defect? Why?

12. To which school or model of psychology/psychiatry do you primarily subscribe? What effect does your subscription (if any) have on your view of what constitutes a mental illness/defect?

11.3 Vignette two: Appreciation of wrongfulness.

The accused is a paranoid schizophrenic (as defined by the DSM-IV) who came to believe that President X of South Africa was an evil person who was covertly torturing and massacring the people of South Africa. No-one took his concerns seriously, so he decided that he would have to kill the President so as to save his people and his country. He knew that it was and is illegal to murder and he believed that if he was apprehended he would be punished for murder in terms of criminal law. However, he was convinced that he was morally obliged to save his people and his country and was prepared to sacrifice himself for this. He attended a political rally which the president attended and inflicted a fatal stab wound upon the president. He is now charged with murder. You are asked to give evidence concerning the accused's criminal responsibility.

Questions:

13. Are you familiar with the facts contained in vignette two headed "appreciation of wrongfulness"?

14. Assuming the facts contained in vignette two, particularly that the accused knew that his conduct was illegal, did the accused "appreciate the wrongfulness" of his conduct at the time thereof?

Alternatives: If I commit an offence with any of the following states of mind, consider please whether you would regard my state of mind as one which appreciates the wrongfulness of my conduct (and therefore possesses that capacity/ability), irrespective of whether my condition may be said to be pathological at the time:

15. What if, knowing it to be illegal, I believe that I must kill as many people of a particular racial group as possible in order to free my people from oppression or to guard their freedom?

    15.1. What if I believe that such a killing is mandated by my God?

16. What if, while knowing it to be illegal, I believe that I am morally entitled to steal:

    16.1. what I need to feed my family; or

    16.2. to balance the distribution of wealth; or

    16.3. because I want to be rich?

17. What if a child of eight years old knows he will be in trouble with the law if he steals sweets, but believes that sweets should be free for everyone, and so he steals some sweets?

    If time permits:

18. What if, while I know it to be illegal, I believe I am entitled to kill all who (I believe) to me to be immoral?

    18.1. What of killing because it makes me feel good?

19. How do you distinguish? Is the standard you use a legal or a moral one?

20. Is this not a legal/moral question rather than a psychiatric or psychological one?

    Psychological/psychiatric issue: upon which/what principles/theories or research within your discipline do you base your opinions?

11.4 Vignette three: Self-control and voluntariness.

Derrick is afflicted by pyromania in that he regularly sets fire to buildings and watches them burn in fascination. He experiences enormous tension prior to the setting of a fire and pleasure and relief thereafter which are his only motives. His behaviour cannot be better accounted for as Conduct Disorder, Antisocial Personality Disorder or a manic episode.

He recently approached a building with the intention of setting fire to it in line with his pyromania. However, just before he set it alight he noticed that the building was occupied by two people who were asleep inside. He realised that if he set fire to the building the people inside would die, but proceeded nevertheless in order to relieve the tension he was experiencing to set the fire.

The two occupants died and Derrick is now charged with arson and two counts of murder. You are asked to give evidence concerning the accused's criminal responsibility.

Questions:

21. [None – error in numbering on original question schedule]

22. Are you familiar with the facts contained in vignette three, headed: Self-control and voluntariness?

    Assuming the facts contained in vignette three:

23. Did Derrick act voluntarily?

24. Did he have the capacity for self-control; that is the ability to conduct himself in accordance with an appreciation of wrongfulness?

25. What do you understand by the concepts of "voluntariness" and "self-control". And is there any difference between these two concepts?

26. Is it possible to distinguish when a person cannot exercise self-control as opposed to a person who simply fails to control him/herself?

    If possible to distinguish: upon which/what principles/theories or research within your discipline do you base your opinions?

11.5 Vignette four: Non-pathological incapacity.

Godfree discovers that his daughter has been raped and she identifies the perpetrator as a neighbour named Shakes. Godfree is enraged and confronts Shakes who he believes is the perpetrator. He performs a citizen's arrest in which he takes hold of Shakes by the arm and begins to walk him to the police station. Whilst on route, a friend of Godfree's, Thabo, joins them and expresses the view that Godfree should kill his daughter's rapist. Godfree becomes convinced that he has a moral obligation to kill Shakes. He begins to assault Shakes ultimately crushing his head with a rock. Godfree is charged with murder. You are asked to give evidence concerning the accused's criminal responsibility.

Questions:

27. Are you familiar with the facts contained in vignette four headed: Non-pathological incapacity?

Assuming that Godfree suffered from no mental illness or defect:

28. Did Godfree have the capacity for an "appreciation of wrongfulness"?; and/or

29. Did he have the capacity to act in accordance with an appreciation of wrongfulness?

30. What if Godfree and Thabo took Shakes to Thabo's house where they detain him until Godfree can acquire a gun, some days latter, with which he shoots Shakes to death?

    Ask two previous questions again: Appr:
    SC:

31. If a distinction drawn: Why do you distinguish this scenario from the former?

32. Can rage, anger or stress deprive a person of insight (an appreciation of wrongfulness) or self-control? Why do you say so?

33. Is this rather not a moral question in which an expert would really be testifying about the reasonableness of the accused's behaviour in the circumstances?

34. If pro Non-pathological incapacity and/or not only a moral question upon which/what principles/theories or research within your discipline do you base such opinions?

12 Appendix B: Follow Up Interview Schedule:

12.1 Introduction

Thank-you for making time for me again and again thank-you for your participation in the original research. I am pleased to report that, though it has been a long and difficult road, that research did not come to nothing.

As promised I have through-out honoured my undertaking of treating the views expressed by all those who participated in the interviews with anonymity. Of course, whatever you say here will also remain anonymous.

1) However, for the purposes of **record** keeping only, may I record this interview?:

   Yes ___

   No ___

2) Please may I confirm your qualifications:
   Qualifications:_____

3) As a gesture of gratitude, in case you may be interested, I would like to send you a copy of the thesis once it is completed. May I have a postal **address** for this?

Address: _____

12.2 Practicing?

Before I describe the results of the original research in which you kindly participated, may I ask:

4) Do you **still testify** in matters of criminal incapacity, including cases of involuntariness or automatism?

   Yes ___

   No ___

5) Do you think that **the law, concerning incapacity and involuntariness** – that your opinions are directed at answering – has **changed** in any substantial way since the initial interview in 1999?

   Yes: ___

Eadie __

Other?_____

No: ___

You don't think that the **Eadie** case of 2002 (SCA) changed the law at all?

_____

12.3 Description of results

Analysis of the data collected from the original interviews revealed a great deal of disagreement; conclusion that I began to suspect that the questions experts were trying to answer were ambiguous and perhaps impossible to answer – concluded that the problem lies with the law, the specific questions, but ultimately with the foundational model of responsibility assumed by the law. Therefore I wish to make several proposals for reform, and would be grateful for your comments on some aspects of these.

12.4 Approach?

I would like to know what your **approach** is when determining whether any person you are considering/examining/observing suffers with any **particular functional impediment**.

6) Is your approach one in which you collect **information, directly or indirectly (through reports from others), regarding how the person responds** to particular questions, stimuli or circumstances generally …

   …. for the purpose of gathering this information to **compare** how the person responds relative to a recognised standard of proper functioning ?

Yes ___

No ___

_____

_____

7) Do you think you could perform this exercise if the question in all cases regarding responsibility was whether the accused, who did act unreasonably, **could act reasonably, that is, as a reasonable person**?

The specific question you may address yourself to then is whether the accused could choose and do what is right; or put in the negative, whether the accused could (know/recognise what is wrong) and avoid doing what is wrong.

That is, would you feel comfortable engaging in this comparative/clinical exercise – based upon the information you may gather about a person relative to the standard of conduct expected **from a reasonable person - representing proper functioning for legal purposes**?

This may require that a court describe how a reasonable person would respond in various scenarios. For instance, the court may need to indicate that, for its purposes for a particular case, a properly functioning (reasonable) person would, say:

- Desist from committing a theft or an assault if a police officer were to arrive on the scene.
- Alternatively, in a case of arson, it may indicate that the reasonable person does not burn down his/her own house.
- Alternatively, that a reasonable person would desist if some belief, which motivates the conduct in question, is shown to be false.

Would you be able, from the information you may have gathered, to indicate whether the particular accused person you have examined, would have also desisted?

Yes ___

No ___

_____

_____

_____

_____

12.5 Mental Illness/Defect

8) Is it necessary to determine, in order for you to formulate your forensic opinion concerning criminal responsibility, whether the accused suffered with a legally recognised '***mental illness or defect'***?

Yes

_____

_____

No

_____

_____

13 Appendix C: Excerpts from the Criminal Procedure Act

78 Mental illness or mental defect and criminal responsibility

(1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable-

(a) of appreciating the wrongfulness of his or her act or omission; or

(b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

[Sub-s. (1) substituted by s. 5 *(a)* of Act 68 of 1998.]

(1A) Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.

[Sub-s. (1A) inserted by s. 5 *(b)* of Act 68 of 1998.]

(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

[Sub-s. (1B) inserted by s. 5 *(b)* of Act 68 of 1998.]

(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

[Sub-s. (2) substituted by s. 5 *(c)* of Act 68 of 1998.]

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(4) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

(5) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 enquired into the mental condition of the accused.

(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act-

(a) the court shall find the accused not guilty; or

(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,

by reason of mental illness or intellectual disability, as the case may be, and direct-

(i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the

court considers it to be necessary in the public interest that the accused be-

(aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

(bb) admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental care health [sic] user contemplated in section 37 of the Mental Health Care Act, 2002;

(cc) .....

(dd) released subject to such conditions as the court considers appropriate; or

(ee) released unconditionally;

(ii) in any other case than a case contemplated in subparagraph (i), that the accused-

(aa) be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(bb) .....

(cc) be released subject to such conditions as the court considers appropriate; or

(dd) be released unconditionally.

[Sub-s. (6) substituted by s. 11 of Act 33 of 1986, amended by s. 9 of Act 51 of 1991 and by s. 43 of Act 129 of 1993 and substituted by s. 5 *(d)* of Act 68 of 1998, by s. 13 of Act 55 of 2002 and by s. 68 of Act 32 of 2007.]

(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.

(8) *(a)* An accused against whom a finding is made under subsection (6) may appeal against such finding if the finding is not made in consequence of an allegation by the accused under subsection (2).

(b) Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the finding and the direction under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary course.

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79 Panel for purposes of enquiry and report under sections 77 and 78

(1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on-

(a) where the accused is charged with an offence other than one referred to in paragraph *(b)*, by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court; or

(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs-

(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions;

(iii) by a psychiatrist appointed for the accused by the court; and

(iv) by a clinical psychologist where the court so directs.

[Sub-s. (1) amended by s. 44 of Act 129 of 1993 and by s. 28 of Act 105 of 1997 and substituted by s. 6 *(a)* of Act 68 of 1998, by s. 68 of Act 32 of 2007 and by s. 10 *(a)* of Act 66 of 2008.]

(1A) The prosecutor undertaking the prosecution of the accused or any other prosecutor attached to the same court shall provide the persons who, in terms of subsection (1), have to conduct the enquiry and report on the accused's mental capacity with a report in which the following are stated, namely-

(a) whether the referral is taking place in terms of section 77 or 78;

(b) at whose request or on whose initiative the referral is taking place;

(c) the nature of the charge against the accused;

(d) the stage of the proceedings at which the referral took place;

(e) the purport of any statement made by the accused before or during the court proceedings that is relevant with regard to his or her mental condition or mental capacity;

(f) the purport of evidence that has been given that is relevant to the accused's mental condition or mental capacity;

(g) in so far as it is within the knowledge of the prosecutor, the accused's social background and family composition and the names and addresses of his or her near relatives; and

(h) any other fact that may in the opinion of the prosecutor be relevant in the evaluation of the accused's mental condition or mental capacity.

[Sub-s. (1A) inserted by s. 6 *(b)* of Act 68 of 1998.]

(2) *(a)* The court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding thirty days at a time, as the court may from time to time determine, and where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.

(b) When the period of committal is for the first time extended under paragraph *(a)*, such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.

[Para. *(b)* added by s. 4 of Act 4 of 1992.]

(c) The court may make the following orders after the enquiry referred to in subsection (1) has been conducted-

(i) postpone the case for such periods referred to in paragraph *(a)*, as the court may from time to time determine;

(ii) refer the accused at the request of the prosecutor to the court referred to in section 77 (6) which has jurisdiction to try the case;

(iii) make any other order it deems fit regarding the custody of the accused; or

(iv) any other order.

[Para. *(c)* added by s. 6 *(c)* of Act 68 of 1998.]
[Sub-s. (2) amended by s. 44 of Act 129 of 1993.]

(3) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or, as the case may be, the clerk of the court in question, who shall make a copy thereof available to the prosecutor and the accused.

(4) The report shall-

(a) include a description of the nature of the enquiry; and

(b) include a diagnosis of the mental condition of the accused; and

(c) if the enquiry is under section 77 (1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or

(d) if the enquiry is in terms of section 78 (2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect or by any other cause.

[Para. *(d)* substituted by s. 6 *(d)* of Act 68 of 1998.]

(5) If the persons conducting the relevant enquiry are not unanimous in their finding under paragraph *(c)* or *(d)* of subsection (4), such fact shall be mentioned in the report and each of such persons shall give his finding on the matter in question.

(6) Subject to the provisions of subsection (7), the contents of the report shall be admissible in evidence at criminal proceedings.

(7) A statement made by an accused at the relevant enquiry shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the mental condition of the accused, in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible.

(8) A psychiatrist and a clinical psychologist appointed under subsection (1), other than a psychiatrist and a clinical psychologist appointed for the accused, shall, subject to the provisions of subsection (10), be appointed from the list of psychiatrists and clinical psychologists referred to in subsection (9) *(a)*.

[Sub-s. (8) substituted by s. 8 *(a)* of Act 42 of 2001.]

(9) The Director-General: Health shall compile and keep a list of-

(a) psychiatrists and clinical psychologists who are prepared to conduct any enquiry under this section; and

(b) psychiatrists who are prepared to conduct any enquiry under section 286A (3),

and shall provide the registrars of the High Courts and all clerks of magistrate's courts with a copy thereof.

[Sub-s. (9) substituted by s. 17 of Act 116 of 1993 and by s. 8 *(b)* of Act 42 of 2001.]

(10) Where the list compiled and kept under subsection (9) *(a)* does not include a sufficient number of psychiatrists and clinical psychologists who may conveniently be appointed for any enquiry under this section, a psychiatrist and clinical psychologist may be appointed for the purposes of such enquiry notwithstanding that his or her name does not appear on such list.

[Sub-s. (10) substituted by s. 8 *(c)* of Act 42 of 2001.]

(11)[11]*(a)* A psychiatrist or clinical psychologist designated or appointed under subsection (1) by or at the request of the court to enquire into the mental condition of an accused and who is not in the full-time service of the State, shall be compensated for his or her services in connection with the enquiry from public funds in accordance with a tariff[12] determined by the Minister in consultation with the Minister of Finance.

(b) A psychiatrist appointed under subsection (1) *(b)* (iii) for the accused to enquire into the mental condition of the accused and who is not in the full-time service of the State, shall be compensated for his or her services from public funds in the circumstances and in accordance with a tariff determined by the Minister in consultation with the Minister of Finance.

[Sub-s. (11) substituted by s. 8 *(d)* of Act 42 of 2001.]

(12) For the purposes of this section a psychiatrist or a clinical psychologist means a person registered as a psychiatrist or a clinical psychologist under the Health Professions Act, 1974 (Act 56 of 1974).

[Sub-s. (12) substituted by s. 8 *(e)* of Act 42 of 2001.]

(13) *(a)* The National Director of Public Prosecutions must, in consultation with the Minister, issue directives regarding the cases and circumstances in which a prosecutor must apply to the court for the appointment of a psychiatrist as provided for in subsection (1) *(b)* (ii) and any directive so issued must be observed in the application of this section.

(b) The directives referred to in paragraph *(a)* must ensure that adequate disciplinary steps will be taken against a prosecutor who fails to comply with any directive.

(c) The Minister must submit any directives issued under this subsection to Parliament before those directives take effect, and the first directives so issued, must be submitted to Parliament within four months of the commencement of this subsection.

(d) Any directive issued under this subsection may be amended or withdrawn in like manner.

[Sub-s. (13) added by s. 10 *(b)* of Act 66 of 2008.]

11 Tariff of compensation to psychiatrists or clinical psychologists to enquire into the mental condition of an accused determined - GN R393 in *GG* 30953 of 11 April 2008

12 Determination of tariff payable to psychiatrists or clinical psychologists for an enquiry into the mental condition of an accused has been published under GN R393 in *GG* 30953 of 11 April 2008 - see Regulations to the Act

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14 Appendix D: Excerpts from the Mental Health Care Act

9 Consent to care, treatment and rehabilitation services and admission to health establishments

(1) A health care provider or a health establishment may provide care, treatment and rehabilitation services to or admit a mental health care user only if-

(a) the user has consented to the care, treatment and rehabilitation services or to admission;

(b) authorised by a court order or a Review Board; or

(c) due to mental illness, any delay in providing care, treatment and rehabilitation services or admission may result in the-

(i) death or irreversible harm to the health of the user;

(ii) user inflicting serious harm to himself or herself or others; or

(iii) user causing serious damage to or loss of property belonging to him or her or others.

(2) Any person or health establishment that provides care, treatment and rehabilitation services to a mental health care user or admits the user in circumstances referred to in subsection (1) *(c)*-

(a) must report this fact in writing in the prescribed manner to the relevant Review Board; and

(b) may not continue to provide care, treatment and rehabilitation services to the user concerned for longer than 24-hours unless an application in terms of Chapter V is made within the 24-hour period.

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32 Care, treatment and rehabilitation of mental health care users without consent

A mental health care user must be provided with care, treatment and rehabilitation services without his or her consent at a health establishment on an outpatient or inpatient basis if-

(a) an application in writing is made to the head of the health establishment concerned to obtain the necessary care, treatment and rehabilitation services and the application is granted;

(b) at the time of making the application, there is reasonable belief that the mental health care user has a mental illness of such a nature that-

(i) the user is likely to inflict serious harm to himself or herself or others; or

(ii) care, treatment and rehabilitation of the user is necessary for the protection of the financial interests or reputation of the user; and

(c) at the time of the application the mental health care user is incapable of making an informed decision on the need for the care, treatment and rehabilitation services and is unwilling to receive the care, treatment and rehabilitation required.

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33 Application to obtain involuntary care, treatment and rehabilitation

(1) *(a)* An application for involuntary care, treatment and rehabilitation services may only be made by the spouse, next of kin, partner, associate, parent or guardian of a mental health care user, but where the-

(i) user is below the age of 18 years on the date of the application, the application must be made by the parent or guardian of the user; or

(ii) spouse, next of kin, partner, associate, parent or guardian of the user is unwilling, incapable or is not available to make such application, the application may be made by a health care provider.

(b) The applicants referred to in paragraph *(a)* must have seen the mental health care user within seven days before making the application.

(2) Such application must be made in the prescribed manner, and must-

(a) set out the relationship of the applicant to the mental health care user;

(b) if the applicant is a health care provider, state-

(i) the reasons why the application is made by him or her; and

(ii) what steps were taken to locate the relatives of the user to determine their capability or availability to make the application;

(c) set out grounds on which the applicant believes that care, treatment and rehabilitation are required; and

(d) state the date, time and place where the user was last seen by the applicant within seven days before making the application.

(3) An application referred to in subsection (1) may be withdrawn at any time.

(4) *(a)* On receipt of the application, the head of the health establishment concerned must cause the mental health care user to be examined by two mental health care practitioners.

(b) Such mental health care practitioners must not be the person making the application and at least one of them must be qualified to conduct physical examinations.

(5) On completion of the examination the mental health care practitioners must submit to the head of the health establishment their written findings on whether the-

(a) circumstances referred to in section 32 *(b)* and *(c)* are applicable; and

(b) mental health care user must receive involuntary care, treatment and rehabilitation services.

(6) *(a)* If the findings of the two mental health care practitioners differ, the head of the health establishment concerned must cause the mental health care user to be examined by another mental health care practitioner.

(b) That mental health care practitioner must, on completion of such examination submit a written report on the aspects referred to in subsection (5).

(7) The head of the health establishment may only approve the application if the findings of two of the mental health care practitioners referred to in subsection (4) or (6) concur that conditions for involuntary care, treatment and rehabilitation exist.

(8) The head of the health establishment must, in writing, inform the applicant and give reasons on whether to provide involuntary care, treatment and rehabilitation services.

(9) If the head of the health establishment approves involuntary care, treatment and rehabilitation services, he or she must-

(a) within 48 hours cause the mental health care user to be admitted to that health establishment; or

(b) with the concurrence of the head of any other health establishment with the appropriate facilities, refer the user to that health establishment.

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15 Appendix E: Recommendation for Law Reform

[The provisions are suggested to replace the current provisions of s 78 of the Criminal Procedure Act.[834]]

15.1 Definitions:

For the purposes of [these provisions]:

Circumstances refer to the world external to an accused or reasonable person[835] and includes both the immediate situation and background factors;

Conduct does not imply voluntariness and refers to mere movement or a failure to move.

15.2 Unreasonableness

1. Notwithstanding the provisions of any other law, an accused person shall not be criminally liable in respect of unlawful conduct if, in committing that conduct, the accused person acted reasonably, in that the conduct was what a reasonable person, in the accused's actual circumstances, might have committed. [836]

15.3 The Capacity for Reasonableness

2. Notwithstanding the provisions of any other law, where an accused person, in committing unlawful conduct (under 1 above), has acted:

[834] Attached as 'Appendix C' (on page 268ff) for ease of reference.
[835] Consistent with the limitations observed under the test for unreasonableness (see on page 27), but also, more fundamentally, in line with the theoretical imperative that the required variation must affect the highest level of the 'reason stream' – the world outside of the accused (see under the heading 9.6.1 From Theory to Practice on page 220ff). This requirement is discussed in the context of the 'Appropriate Circumstances' on page 226).
[836] Note that, following this provision, if the conduct was what a reasonable person, in the accused's actual circumstances, might have committed, the accused will be acquitted as having acted reasonably. However, if the actual circumstances were such that every person, whether reasonable or not would have committed the conduct, such as in the case of overwhelming physical force, the accused will also lack voluntariness (as discussed under the heading 9.6.5.1 Superior overwhelming human and natural force on page 239). This is provided for in para 2.a.

a. reasonably, but where the actual circumstances were such that every person would have done so, whether s/he was reasonable or not, that accused shall not be criminally liable on the additional ground that s/he acted involuntarily; or
b. unreasonably, the accused person shall not be criminally liable in respect of that conduct if that accused person was not capable of acting reasonably.

15.4 Determining the Capacity for Reasonableness

15.4.1 Responsibility: Option A[837]

3. In determining whether an accused is capable of acting reasonably, a court shall consider whether the accused would refrain from committing the unlawful conduct:
    a. if a new material feature (such as described in para 4) was introduced into his/her actual circumstances[838]
    b. which, if introduced into circumstances in which it would otherwise be reasonable to commit the unlawful conduct,
    c. would cause[839] a reasonable person to refrain from committing that conduct.
4. **The nature of the new feature -**
    a. The new (material) feature might include some event/feature which would cause the reasonable person to realise that:
        i. his/her persistence would endanger a deeply valued interest, person or object – such as a threat of harm or arrest and detention that a police officer may pose if s/he were to appear on the scene;[840]
        ii. the belief which inspired the conduct is unfounded or false - such as if evidence was presented showing that s/he is mistaken in believing that s/he is under attack; or

[837] Preferred Option. A comparison of this Option (A) with Option B appears in note 842.
[838] This requires that the circumstances are varied hypothetically – as required (9.6.2.1 Actual versus Hypothetical on page 223ff).
[839] Giving effect to the requirement that the circumstances must be causal, as discussed under the heading 9.6.2.3 Causation and Overdeterminism on page 225ff.
[840] Subject to the discussion under the heading 9.6.2.5 Reasonable Conduct and Punishment on page 233ff.

iii. the desire or need which motivated the conduct was satisfied or could readily be satisfied by other means – such as if food is made readily available to a starving person.

b. The new (causal) feature shall not include anything which would cause every person to refrain from committing the act, irrespective of whether s/he is reasonable or not, such as circumstances of physical restraint or interference.[841]

15.4.2 Responsibility: Option B[842]

3. A court shall, in determining whether an accused person who committed unlawful conduct, was capable of acting reasonably (under para 2 above), consider whether the accused person would have been deterred from committing that act, by circumstances that would have deterred a person who, but for his/her involvement,

[841] Giving effect to the concerns addressed under the heading 9.6.2.2 Reasonable Person: Not Every Person on page 224ff.

[842] Suggested by Andrew Paizes (Paizes Personal Communication 25 March 2011). It differs from my preferred formulation (Option A) particularly in respect of the standard ('benchmark person') proposed for establishing responsibility: '… the person who, but for his/her involvement, in being about to commit an identical unlawful act, shares the attributes of a reasonable person …'.

This formulation (Option B) does assist in conceptualising the required material feature in that it places the benchmark person 'about to commit the prohibited conduct' and requires that one identify some 'circumstance' that would deter this person. These benefits are emulated in option A.

In addition, the formulation (Option B) operates to avoid the problem of overdeterminism (discussed under the heading 9.6.2.3 Causation and Overdeterminism on page 225) by excluding the internal restraints that may ordinarily prevent a reasonable person from 'being about to commit an unlawful act' and requires then that the new material feature cannot operate on any internal restraint in the reasonable person. While this is attractive, it appears to come at a cost. I include here the main concerns I have with this formulation, which I believe do not apply to my preferred formulation (Option A). However, I must concede that my formulation (Option A) is complex and perhaps even relatively cumbersome – partly in order to emulate and partly in order to address the concerns that I raise here against Option B.

My primary concern with Option B is that the benchmark person may be an inappropriate benchmark for testing responsibility. We must recall that the theory of reason-sensitivity requires the benchmark person - to be responsible – must be reason-sensitive. For instance, the theory of reason-sensitivity requires that a responsible person would vary his/her conduct in response to something that revealed to him/her that his/her needs were satisfied or if his/her beliefs were shown to be false. The benchmark person employed in Option B, lacking the internal restraints of a reasonable person, is no longer reason-sensitive and responsible, and would presumably not respond to these revelations. It is also not clear that the cop-at-the-elbow has the desired effect on the benchmark person in the right sort of way. What we need, following from the theory, is a benchmark person who responds to the cop-at-the-elbow in the way and for the reasons that a reasonable person would. It may well be that the proper effect of the cop-at-the-elbow is to trigger the internal restraints of the benchmark person. This being so, if we carve out the internal restrains of the benchmark person, s/he becomes insensitive to factors that a responsible person is responsive to, and may respond to other factors in the wrong sort of way. Thus our benchmark does not respond appropriately and appears, to that extent, an inappropriate benchmark.

Nevertheless, the formulation (Option B) is concise and perhaps even elegant. It achieves or requires much in few words. However, this too has its disadvantages, which I have tried to avoid in Option A. The several mental steps that are required to test for responsibility are not as apparent as, in my view, they ought to be. I have preferred – in Option A – a formulation that sets out very deliberately the various mental steps required to the point that the formulation may even appear cumbersome. I have opted for this approach to alert one to the inescapable complexities of the test.

in being about to commit an identical unlawful act, shares the attributes of a reasonable person, from committing the act.

15.5 The Enquiry

1. [From s 78(2) - amended] If it is alleged at criminal proceedings that the accused is not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might not be so responsible, the court shall direct that the matter be enquired into and be reported on in accordance with the accordance with the provisions of section 79.
2. [From s 78 (3) – unamended] If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.
3. [From s 78 (4) – unamended] If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.
4. [From s 78 (5) – unamended] Where the said finding is disputed, the party disputing the finding may subpoena and cross- examine any person who under section 79 enquired into the mental condition of the accused.
5. [Replaces 78 (6)] If a person is charged with the commission of an offence and is found not responsible under the provisions of section [3 above] and the court is of the view that the person may nevertheless present a danger to himself or herself or to others, in person or property (as contemplated in the Mental Health Care Act),[843] the court shall order the head of a health establishment to:
    a. admit the person if the provisions of s 9 (1)(c) of the Mental Health Care Act are satisfied, subject to the provisions of s 9(2) of the Mental Health Care Act; and
    b. enquire into the suitability of involuntary care, treatment, and rehabilitation of the person, as contemplated in s 32 of the MHCA and according to the procedure set out in s 33 of the MHCA).

[843] Attached as ‘Appendix D’ (on page 273ff) for ease of reference.

6. [From s 78(7) - amended] If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to act reasonably was diminished, the court may take the fact of such diminished responsibility into account when sentencing the accused.

15.6 Appeal

7. [From s 78(8)(a) – amended] An accused against whom a finding is made under subsection (5) may appeal against such finding.
8. [From s 78(8)(b) – unamended] Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.
9. [From s 78(9) – unamended] Where an appeal against a finding under subsection (5) is allowed, the court of appeal shall set aside the finding and the direction under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary course.

15.7 Miscellaneous Amendments

In addition, it appears that the following amendments must be made:

1. Section 33 (1) of MHCA must be amended accordingly to include a referral by court as contemplated here (b above);
2. Section 79 (4) of CPA need not ‘include a diagnosis of the mental condition of the accused’;
3. Section 79 (4) of CPA must be amended to extract references to a mental illness or defect.

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