

Threshold Competency from a Medico-Legal Perspective

KURT ZAMMIT

This article by **Kurt Zammit** was previously submitted as part of CVL1024 and is being published with the author's permission. The contribution analyses the legal aspects behind the mens rea and actus reus. It highlights the complexities that low mental capacity and mental illness and cognitive decline pose in order to answer the legal question whether there is the intellectual and/or volitional capacity regarding the mens rea.

TAGS: Criminal Law, Medical Law, Criminal Responsibility, Mental Capacity

Kurt Zammit is a fourth year Bachelor of Laws (Honours) student. He had contributed in the Junior Chamber of Advocates policy paper regarding IVF in his Second year of studies and was part of the publications sub-committee of GhSL in his third year.

1. Introduction

The maxim *actus non facit reum nisi mens sit rea* stipulates that nobody can be found criminally liable unless he has the required criminal intent accompanying the offence committed.¹ However, certain conditions might render the said person *dolo incapax*. How does one define the fine line between *dolo capax* and *dolo incapax*? Where is the threshold competence to be established for insane persons, persons with intellectual disabilities and persons with dementia?

2. Mc Naughton's Rules and the Irresistible Impulse Test

The criminal defence of insanity as it is known today developed with the case of *Daniel McNaughton* in 1843 with the McNaughton rules.² The first rule stipulates that each person is to be presumed sane and to possess a sufficient degree of reason, unless the contrary is proven. The second rule states that if a person, who at the time that he commits the act, is suffering from a disease of the mind, which renders him incapable of comprehending the nature of the act or can comprehend the nature of such act but cannot distinguish between moral right and wrong, they may be excused on grounds of insanity. The third rule stipulates that the right and wrong test is not in the general abstract sense but with respect to the particular offence committed. The fourth rule stipulates that where a criminal act is committed by a man under an insane delusion with regards to the surrounding facts, and such facts hide from him the true nature of the act, he will be liable to the same degree as if the acts were as he imagined them to be.

However, although relevant, the McNaughton rules do not take into account the complexities of mental illnesses as defined by modern psychiatry. First of all, it assumes that all mental illnesses are a result of a lack of cognitive capacity. Although this can be true, one can have a mental illness which leaves his mental capacity intact enough so as to comprehend the nature and morality of his act and subsequently is not found legally insane by the McNaughton rules. However, the same mental illness can impair his volitional capacity and subsequently he cannot have the free will to choose right from wrong, even though he can fully comprehend it.³

¹Anthony Hooper and David Ormerod, *Blackstone's Criminal Practice 2013* (Oxford University Press 2012).

²All Answers Ltd, 'R v McNaughten - M'Naghten' (Lawteacher.net, May 2022)

<<https://www.lawteacher.net/cases/r-v-m-naghten.php?vref=1>> accessed 15 May 2022.

³J. Pullicino, 'Insanity as a defence in Criminal law' (1974) 9 (1) *The St. Luke's Hospital Gazette* 47; Zaluski Wojciech, *The Insanity Defence A Philosophical Analysis*. (Edward Elgar Publishing Limited, 2021) 70, 71.

It is for these reasons that the Irresistible Impulse Test was developed. It says that the right and wrong test as established by the M'Naughton rules is not the sole test in determining criminal responsibility. Unless contrary to law, judges are bound to recognise the existence of mental illnesses that leave mental capacity intact so as to be legally competent, but control their conduct in such a manner that one cannot freely choose right from wrong. The defence of insanity is established if it is shown that because of such mental disease, the accused had lost his volitional capacity with respect to the particular act committed. In this case, the courts presume volitional capacity until the contrary is proven.⁴

3. Disease of the Mind

Blackstone defines a disease of the mind as a disease or condition which causes an impairment of the faculties of reason, memory and understanding.⁵ Thus, the concept of legal insanity differs from the medical one since it depends upon the consequences that it produces. Someone suffering from arteriosclerosis cannot be said to be suffering from a mental illness and thus is not insane from a medical perspective. However, such a condition can cause an impairment of the faculties of reason, memory and understanding, thus, it can be seen as a disease of the mind from a legal perspective as defined by Blackstone and one can theoretically plead insanity if they commit an act under such circumstances, even though the condition is not located inside the mind. The notion of disease of the mind as defined by Blackstone, and used in the M'Naughton rules, splits intellect from feelings and willpower. However, within the fields of psychiatry and psychology, it is a well-known fact that the mind works as one whole system and not as separate functions such as intellect, feelings and willpower. These components are in a constant interaction with each other and our behaviour is the result of this constant interaction.⁶

4. Partial Insanity and Diminished Responsibility

Within the field of psychiatry, it is common knowledge that insanity is not binary but exists on a spectrum. Some people are not insane enough so as to be exempt from criminal responsibility and subsequently be kept in a psychiatric hospital, however, they nonetheless do not have the same level of sanity as ordinary people do.⁷ This is referred to as partial insanity.⁸ Subsequently, although these people may still be able to form the required mens rea and consequently be found criminally liable, they may not have the

⁴ Matthew Lippman. *Contemporary Criminal Law: Concepts, Cases, and Controversies* (2021) 279, 280.

⁵ Anthony Hooper and David Ormerod, *Blackstone's Criminal Practice 2013* (Oxford University Press 2012) 4,5.

⁶ J. Pullicino (n 3) 47; Zaluski Wojciech (n 3) 70, 71.

⁷ J. Pullicino (n 3) 48, 49;

Deepti M. Lobo and Mark Agius, 'The Mental Illness Spectrum' (2012) 24 *Psychiatria Danubina*, 2012 159.

⁸ Prof. A.J. Mamo Revamped by Christopher Aquilina, *Mamo Notes* (GhSL 2020) 130;

Rebecca Camilleri, 'Redefining Insanity bringing the Insanity Plea into the 21st Century' (LLD thesis, University of Malta 2017) 48.

same ability that more mentally sound people do. Thus, they should be held criminally liable, but not to the same extent that more mentally sound people do. This is known as the doctrine of diminished responsibility.⁹

5. Regina v. Byrne

The case of *R v. Byrne* decided in 1960 dealt with the issue of volitional capacity as part of an abnormal state of mind and the doctrine of diminished responsibility.¹⁰ The defendant had strangled and mutilated a young woman and was subsequently charged with the crime of wilful homicide. The defence pleaded for diminished responsibility since there was enough medical evidence to prove that the accused suffered from irresistible gross and sadistic sexual violence and had been a sexual psychopath since he was a young boy. The judge dismissed such defence and found him guilty. The appeal however ruled that the first judge was mistaken since to successfully plead diminished responsibility under the Homicide Act 1957, one had to suffer from an abnormality of the mind which substantially impairs the mental capacity and volitional capacity.¹¹ However, the judge in the first trial excluded the inability to control urges from the definition of abnormality of the mind. Lord Parker CJ explained the meaning of abnormality of the mind as:

*wide enough to cover the mind's activities all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment.*¹²

6. Intellectual Disability and Criminal Liability

Another issue with regards to threshold competency, is that of mental capacity and criminal liability. People's mental capacity exists on a spectrum, ranging from people with intellectual disabilities to people who are geniuses. However, the issue that arises is that of how one does define the threshold competency with regards to mental capacity and criminal liability and cut the fine line between competent and incompetent. Currently, some jurisdictions rely primarily upon IQ testing, with a score below seventy signifying intellectual disability. However, medically, a person with an IQ of sixty-nine is not very different from a person with an IQ of seventy-one. However, in some jurisdictions, the former is exempt from criminal responsibility while the latter is not.¹³ In addition to IQ testing, current

⁹ J. Pullicino (n 3) 49, 50;

Mark Tebbit, *Philosophy of Law, An Introduction* (3rd edition, Routledge 2017) 240, 241.

¹⁰ 'Regina v Byrne: CCA 1960'(swarb.co.uk, 10 October 2021) < <https://swarb.co.uk/regina-v-byrne-cca-1960>> accessed 15 May 2022.

¹¹ Homicide Act 1957, s 2 (1).

¹² Mark Tebbit (n 9) 241; Regina v Byrne (n 10)

¹³ James W. Ellis, 'Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins' (2015) 23 William and

medical experts suggest further evidence of difficulties in adaptive functioning. Adaptive functioning means that a person can function productively and independently in society and in everyday life such as the ability to go to work, pay the bills, successfully travel to different places independently and other basic everyday life functions.¹⁴

7. Hall v. Florida

A landmark US case, *Hall v. Florida*, decided on the 27th of May 2014, tackled the issue of whether Florida's statute dealing with the threshold competency regarding intellectual disabilities was unconstitutional.¹⁵

In 2002, a case named *Atkins v. Virginia*, ruled that the death penalty to people with intellectual disabilities violated the eighth amendment since it was cruel and unusual.¹⁶ Part of the rationale behind this decision was that a growing number of US states were prohibiting such executions. Thus, this was a reflection that society was deeming and accepting the scientific fact that people with intellectual disabilities are less criminally liable than the average person.¹⁷ Also, in the *Atkins v. Virginia* case, the court reasoned that it was not convinced that the death penalty served its purpose in serving as a deterrent to intellectually disabled people in restraining them from committing offences since such people experience difficulties with higher executive functioning such as abstract thinking and comprehending cause and effect realities, thus making them unable to form the required mens rea since they cannot foresee the consequences of their actions in a particular situation.¹⁸

In the *Hall v. Florida* case, the Supreme Court tackled the issue whether Florida's statute was violating the eighth amendment in deciding that any IQ score above seventy did not signify intellectual disability and thus, anyone scoring above seventy was eligible to receive the death penalty. In *Atkins v. Virginia*, the Supreme Court had given states discretion about how to decide whether one is intellectually disabled or not. The Court ruled that US states could not make an IQ threshold above seventy (thus taking away some of the discretion that it had given them in *Atkins v. Virginia*) but did not make a ruling about whether states could set a competency threshold at an IQ of seventy-five or above.

Mary Bill of Rights Journal 384-388

¹⁴ *ibid* 388-389.

¹⁵ American Psychological Association, 'Atkins vs Virginia' (*APA*)
<<https://www.apa.org/about/offices/ogc/amicus/atkinsl>> accessed 15 May 2022;

James W. Ellis (n 13) 383,384.

¹⁶ American Psychological Association (n 15);

James W. Ellis (n 13) 383,384.

¹⁷ American Psychological Association (n 15);

James W. Ellis (n 13) 383-389.

¹⁸ American Psychological Association (n 15);

James W. Ellis (n 13) 383,384.

Part of the rationale was that according to the American Psychological Association, there was unanimous professional consensus that the diagnosis of intellectual disability required comprehensive assessment and clinical judgment and not just pure reliance upon IQ testing. Comprehensive assessment requires analysis of both intellectual and adaptive functioning. Also, IQ test scores are prone to a standard error of measurement and thus one cannot rely solely upon them to diagnose intellectual disability. Thus, for a fair and accurate diagnosis of intellectual disability, one has to take IQ test scores and then interpret them within the context of adaptive functioning and other clinical measurements of mental capacity so as to accurately diagnose such disability.¹⁹

8. Dementia and Criminal Liability

People suffering from dementia may also experience difficulties in adaptive functioning. People suffering from dementia are at an increased risk of violating social and moral norms which often carry legal sanctions. Thus, this makes them a vulnerable population that requires protection in the same way that people suffering from psychiatric illness and intellectual disabilities do since these people are less blameworthy than other cognitively healthy people.²⁰ People with dementia may experience difficulty comprehending the nature of their actions, their consequences and may struggle to comprehend logical cause effect relations. Patients of frontotemporal dementia have difficulties in controlling impulse behaviour.²¹

These factors make people suffering from dementia incapable of reaching the threshold competency required for criminal liability. However, since dementia often remains undiagnosed in individuals, one may commit an offence and afterwards, be diagnosed with dementia. The defence would have difficulties in proving that the offence was caused by the disease of the mind (dementia) since he was not diagnosed when he committed the act.²²

Dementia is often the final stage of a spectrum of cognitive impairment. A person experiencing mild symptoms of dementia may still meet the threshold competency required for criminal responsibility.²³ Thus, a pertaining question is at which stage of dementia one ceases to be criminally liable since most criminal codes, including the Maltese one, do not allow for the doctrine of diminished responsibility. Also, because of the progressive and irreversible nature of dementia, placing convicted people with dementia

¹⁹ American Psychological Association (n 15); James W. Ellis (n 13) 383-389.

²⁰ Jalayne J. Arias and Lauren S. Flicker, 'A Matter of Intent: A Social Obligation to Improve Criminal Procedures for Individuals with Dementia' (2020) 48 (2) J Law Med Ethics 319.

²¹ *ibid* 321

²² *ibid* 322, 323.

²³ *ibid* 323.

in prison would defeat the purpose of reforming the individual since such people cannot be reformed.²⁴

9. HKSAR v. Chow Lee-hung

In the case of *HKSAR v. Chow Lee-hung*, the defendant, an eighty-seven year old man, was facing criminal charges of manslaughter and of wounding two fellow bedridden residents in an elderly home.²⁵ The Honourable Mr. Justice Zervos was given psychiatric reports about the mental condition of the defendant. They diagnosed the defendant to be suffering from dementia at an advanced stage and with psychotic features. Due to the progressive and irreversible nature of dementia, his condition was expected to deteriorate and thus, more specialised medical care was required. The court concluded that the defendant had been suffering from a disability of the mind at the time that he committed the acts with which he was charged, and thus was admitted to a mental hospital for both his protection and for the protection of society as a whole. Thus, dementia may exempt a person from criminal responsibility because it is a disease of the mind that impairs reason, memory and understanding.²⁶

10. Conclusion

Since the purpose of law is the attainment of justice, having clear and effective regulations regarding threshold competency and criminal liability is crucial. With the science of psychiatry and psychology become ever more sophisticated, such as in the case of mental health, mental capacity and neurological diseases, it is up to the legislators and legal professionals to make the best use of such knowledge and make laws which are just and reflect contemporary social realities.

²⁴ Colleen M. Berryessa, 'Behavioural and neural impairments of frontotemporal dementia: Potential implications for criminal responsibility and sentencing' (2016) 46 (1-6) *Int J Law Psychiatry* 3,4,5

²⁵ Vlex, 'Hksar v Chow Lee Hung' <<https://vlex.hk/vid/hksar-v-chow-lee-862518781>> accessed 15 May 2022

²⁶ *ibid.*



OLJ

GHSI ONLINE LAW JOURNAL