

# CHALLENGES TO "A MOST DANGEROUS DOCTRINE" OR A "FANTASTIC THEORY" OF VOLITIONAL INSANITY

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*In theory, an insanity defence can take two forms: the cognitive form (C-insanity) and the volitional form (V-insanity). The defence of C-insanity recognises that a disordered state of mind can make the ability to understand the nature of an action impossible. On the other hand, V-insanity is recognised in some common law jurisdictions, such as all jurisdictions in Australia except for Victoria and New South Wales, and is a full defence. It recognises that a disordered state of mind can make the exercise of self-control impossible. However, that disordered state of mind does not necessarily affect the understanding of the nature of the act impossible.*

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## **I INTRODUCTION**

For reasons explored in this article, V-insanity has not been accepted as a defence in New Zealand. Rather, New Zealand law adopts only C-insanity. This article develops an argument in favour of the introduction of V-insanity as a defence. Initially, we argue that the rejection of V-insanity as a defence is morally unacceptable. In addition, we show that, based on the basic construction of criminal responsibility, adopting V-insanity is fair.

Furthermore, we argue against two important reasons that have been offered for the rejection of V-insanity. In particular, we examine whether there is an inconsistency between the law's acceptance of C-insanity, and its rejection of V-insanity. In order to do this, we examine, firstly, the principles that underpin the insanity defence in its cognitive form, with a view to determining whether these are equally applicable to a volitional form. The second part of our enquiry will focus on practical considerations. To this end, we briefly review the state of science which supports the

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two limbs of the insanity defence. We consider whether the sort of evidence currently used to inform decisions about C-insanity is more established or reliable than the sort of evidence that would be needed to inform decisions as to V-insanity.

Finally, we argue that there is a conspicuous inconsistency in New Zealand law's acceptance of C-insanity and rejection of V-insanity, an inconsistency that should be addressed by accepting the latter form of insanity.

## **II THE STATUS OF V-INSANITY IN SOME COMMON LAW JURISDICTIONS**

V-insanity, as a form of the insanity defence, looks something like the following. A defendant (D) commits a criminal act. He or she is aware of the nature and quality of his or her act. He or she is also aware that it is widely perceived as morally wrong. Rather, D claims that at the time of the offence, he or she could not control his or her behaviour (that is, he or she was acting under irresistible impulse). D was subject to a compulsion or a loss of self-control, such that he or she should not be held responsible for his or her actions.<sup>1</sup> The response of some Common Law jurisdictions to the hypothetical case of D will be considered below.

The M'Naghten rules, which are the basis for the insanity defence in the Common Law system, do not recognise V-insanity as a defence. In 1843, the House of Lords, which provided the response to an appeal for clarification of the law and general enlightenment on legal insanity, held that an actor is insane and therefore not responsible if it is:<sup>2</sup>

... 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.

The M'Naghten rules are, therefore, applicable to C-insanity, but there is nothing in the rules that applies to D affected by irresistible impulse.<sup>3</sup>

The response to the claim of irresistible impulse varies among Common Law jurisdictions. Some jurisdictions took the M'Naghten rules as the starting point for their insanity defence, but expanded it to include V-insanity. Others have retained the original M'Naghten formula. One example of the former type of jurisdiction is South Australia, where, under the Criminal Law

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1 In legal literature, V-insanity has been called, variously, "volitional insanity test", "volitional insanity standards" or "uncontrollable impulse". See for example OCM Davis "The Macnaughton Rules" (1940) 4 JCL 75 at 91.

2 *R v M'Naghten* (1843) 10 Cl & F 200 at 210, 2 ER 718 (HL) at 722 per Tindal CJ.

3 *Halsbury's Laws of England* (5th ed, 2016) vol 25 Criminal Law at [33].

Consolidation Act 1935, V-insanity is accepted as a form of insanity. If proven, it means D is not responsible for his or her actions. This is set out in s 269C(c):<sup>4</sup>

A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment—

- (a) does not know the nature and quality of the conduct; or
- (b) does not know that the conduct is wrong; or
- (c) is unable to control the conduct.

The C-insanity test is set out in s 269C(a)–(b) and V-insanity is expressed in s 269C(c). South Australia is not the only Australian jurisdiction to have adopted V-insanity.<sup>5</sup> Further, a number of other overseas jurisdictions have followed the same approach.<sup>6</sup>

In contrast to South Australia, New Zealand law, which continues to adhere to the M'Naghten rules, only recognises C-insanity as a defence. V-insanity has not been recognised, which means that a person who cannot control his or her actions, while knowing the nature of those actions, has no access to an insanity defence. If D cannot establish any other statutory or common law defences, such as compulsion or duress of circumstances, the person will be held responsible even though he or she did not have control over his or her actions. Section 23(2) of the Crimes Act 1961 (CA 1961) states:<sup>7</sup>

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4 Criminal Law Consolidation Act 1935 (SA).

5 Apart from Victoria and New South Wales, all other Australian jurisdictions adopted V-insanity. Namely, Criminal Code (ACT), s 28(1)(c); Criminal Code (QLD), s 27(1); Criminal Code (NT), s 43C(1)(C); Criminal Code Act (WA), s 27(1); Criminal Code Act (TAS), s 16(1)(b); Criminal Law Consolidation Act (SA), s 269C(c). See also, Commonwealth Criminal Code Act (Cth), s 7.3(1)(C) adopted V-insanity. The New South Wales Law Commission recommended the inclusion of a V-insanity in that state's defence to be consistent with other Australian jurisdictions: see New South Wales Law Reform Commission *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* (NSWLRC R 138, 2013) at 69. On the other hand, in Victoria, there was no support for the introduction of V-insanity: see Victorian Law Reform Commission *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Report* (VLRC, 2014) at 118.

6 In the United States, the United States Model Penal Code adopted V-insanity: see Model Penal Code, s 4.01. As of 2014, 17 states have adopted V-insanity separate from C-insanity: see Paul H Robinson "The Effect of Mental Illness Under US Criminal Law" (2014) 65 NILQ 229 at 233. Similarly in Ireland: see *Attorney-General v Boylan* [1937] IR 449 (CA); *Doyle v Wicklow County Council* [1974] IR 55 (SC) at 71; and Criminal Law (Insanity) Act 2006, s 5(1). In South Africa: see *R v Hay* (1899) 16 SC 290; and *S v Kevin* 1978 (2) SA 731 (W). South Africa has not enacted statutory provisions for insanity: see Criminal Procedure Act (Act No 51 of 1977), s 78(1). Some civil law jurisdictions have also adopted V-insanity. For example in Germany via the Statutory Criminal Law of Germany 44, Comment (1946), pt I, s 51; and in France the French Penal Code of 1810, art 64.

7 Crimes Act 1961, s 23(2).

(2) No person shall be convicted of an offence by reason of an act done or omitted by him or her when labouring under natural imbecility or disease of the mind to such an extent as to render him or her incapable—

- (a) of understanding the nature and quality of the act or omission; or
- (b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

Attempts have, however, been made to introduce V-insanity into New Zealand. The first attempt was in *R v Deighton*, in 1900.<sup>8</sup> The Court cited s 23 of the Criminal Code Act 1893, which is largely the same as s 23 of the CA 1961, and rejected the claim of irresistible impulse. Ever since *Deighton*, New Zealand courts have repeatedly rejected the claim of V-insanity,<sup>9</sup> even if it is caused by a disease of the mind (DofM).<sup>10</sup> As the authors of one leading criminal law textbook state:<sup>11</sup>

... the only circumstances in which an irresistible impulse may assist a defendant in New Zealand is where there is evidence that an irresistible impulse is a symptom of a mental disease sufficient to exclude knowledge of the physical or moral quality of the act, amounting to legal insanity.

The defence of irresistible impulse has not been accepted in English law either. England, like New Zealand, adheres strictly to the M'Naghten rules.<sup>12</sup> The force of resistance to such a defence is reflected in the labels that have been given to it. It has been called "a most dangerous doctrine",<sup>13</sup> and a "fantastic theory". In *R v Kopsch*, Lord Chief Justice Hewart stated:<sup>14</sup>

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8 *R v Deighton* [1900] 18 NZLR 891 (SC).

9 *R v Burr* [1969] NZLR 736 (CA); *R v McAllister* (1984) 1 CRNZ 248 (CA); *Bannin v Police* [1991] 2 NZLR 237 (HC); and *Ericsson v Police* (1993) 10 CRNZ 110 (HC).

10 Andrew Simester and Warren J Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, Wellington, 2012) at 355.

11 At 356 (citations omitted).

12 In English law, for the first time, Stephen J left the matter of irresistible impulse to the jury in *R v Davis* [1881] 14 Cox CC 563. This instance was continued in *R v Fryer* [1915] 24 Cox CC 405. The Court of Criminal Appeal reasserted the authority of the Rules in *R v True* [1922] 16 Cr App Rep 164 (Crim App). After *True*, a Committee under the chairmanship of Lord Justice Atkin was appointed to evaluate any changes in the existing law of insanity. The Committee provided some suggestions, inter alia, it should be recognised as irresponsibility when D acted under an impulse which the person is, by mental disease, in substance deprived of any power to resist. The Committee's recommendation of V-insanity was referred to twelve High Court Judges. Ten of the twelve Judges were against the recommendation: see M Harding-Barlow "The Need for a New Conception of Insanity in its Relation to Crime" (1949) 66 SALJ 389 at 396–397.

13 Wightman J in *Reg v Burton* stated: "The medical man called for the defence defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind, under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This would appear to be a most

It is the fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be merely subversive. It is not yet part of the criminal law, and it is to be hoped that the time is far distant when it will be made so. The jury may well have thought that the defence of insanity in this case, as in so many cases, was the merest nonsense.

Following this case, English courts have steadily refused to adopt irresistible impulse as part of the insanity defence.<sup>15</sup>

Before discussing the reasons why V-insanity should be adopted in New Zealand law, we now turn to the issue of how such a defence could apply in New Zealand and try to distinguish between V-insanity and involuntariness. The latter is recognised by the law, but it is not the same as an irresistible impulse, despite the two sometimes being confused.

### ***A Distinguishing V-Insanity from True Involuntariness***

Generally, there are two stages in New Zealand law to which a claim like V-insanity might be addressed. The first stage is known as "establishing a crime" and the second stage is called "denying criminal responsibility". In the following sections, we will describe the relevance of V-insanity to these two stages.

#### ***1 The first stage: voluntariness in establishing a crime***

To establish a crime, there must be an actus reus, mens rea and a prohibited act.<sup>16</sup> To illustrate, take the following example. E injures F. The conduct element or actus reus is the injuring action.

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dangerous doctrine, and fatal to the interests of society and security of life." *R v Burton* (1863) 3 F & F 772 at 780, 176 ER 354 (Assizes) at 357.

14 *R v Kopsch* (1925) 19 Cr App Rep 50 (Crim App) at 51–52.

15 See *Sodeman v R* [1936] 2 All ER 1138 (PC); *Attorney-General for the State of South Australia v Brown* [1960] 2 WLR 588 (PC); *R v Barton* (1848) 3 Cox CC 275; *R v Holt* (1920) 15 Cr App R 10 (Crim App); *R v Quarmby* (1921) 15 Cr App Rep 163 (Crim App); *R v Kopsch*, above n 14; and *R v Flavell* (1926) 19 Cr App Rep 141 (Crim App). Compare *R v Hay* (1911) 22 Cox CC 268; and *R v Fryer* [1915] 24 Cox CC 405.

16 Actus reus comprises action or omission (it is also known as conduct). The exhibition of the conduct is the necessary element. However, the actus reus for every crime is distinctive. In some circumstances, actus reus comprises conduct and its attendant circumstances or results. Or it may include set of circumstances or "state of affairs": see Simester and Brookbanks, above n 10, at 42–87.

Prohibited act is the most important characteristic of a crime is the recognition by the law as a crime. In other words, the law, in a particular jurisdiction, should recognise the crime, its elements and its punishment prior to the action. No one should be convicted of a crime unless it is recognised in law as a crime. The principle of this came from the Latin rule *nullum crimen sine lege*: no crime without law: see Simester and Brookbanks, above n 10, at 25. In New Zealand the Crimes Act 1961, s 9, codifies the above requirement.

Broadly speaking, mens rea is the deliberate intention to commit a crime. For example in order to convict a person for a crime of murder, it has to be proved that D committed the conduct and it was recognised by the

The mental elements or mens rea are that E must have acted intentionally, or possibly recklessly, while at least understanding that F is a human. The result element (this is a part of the actus reus) is that F is really injured.<sup>17</sup> Finally, the prohibited act element means that E's actions must constitute a crime under New Zealand law (in this case the CA 1961). If the prosecution is able to establish all these factors beyond a reasonable doubt (or occasionally, on the balance of probabilities), criminal liability will be established. The defence counsel might try to create reasonable doubt about one or more of the above elements. For instance, they might try to prove that E injured F by accident instead of intentionally. It might also be claimed that E had no voluntariness at the time of the crime. However, the above-mentioned elements have been proved, then criminal lawyers can, in the language of Simester and Brookbanks, speak in terms of a "prima facie offence".<sup>18</sup>

Proving that D acted voluntarily is also an essential element of proving a crime. The centrality of voluntariness to criminal responsibility in New Zealand is regarded as a matter of fundamental legal principle.<sup>19</sup> As a general principle of wide application, the current New Zealand law requires that D can be guilty of a crime only where there has been voluntary conduct (an act or omission) in circumstances where he or she could reasonably exercise choice.<sup>20</sup> An act is voluntary where there is a conscious and free exercise of will.<sup>21</sup> An omission will be culpable where there is an opportunity for the accused to behave differently.<sup>22</sup> In *Kilbride v Lake*, Woodhouse J summed it up as follows:<sup>23</sup>

... a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. If this condition is absent, any act or omission must be involuntary ....

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law prior to the action as a crime and D intentionally committed a crime: see Simester and Brookbanks, above n 10, at 91–93.

17 New Zealand legal system considers all of the above-mentioned elements to provide sufficient basis for establishing a crime: see Simester and Brookbanks, above n 10, at 58.

18 At 20.

19 At 85–88.

20 *Kilbride v Lake* [1962] NZLR 590 (SC). Only in the offences of absolute liability may D be criminally liable without a voluntary act or culpable omission. See for example *Police v Taylor* [1965] NZLR 87 (SC); *Helleman v Collector of Customs* [1966] NZLR 705 (SC); and *Department v Skeggs Foods International Ltd* [1974] 2 NZLR 648 (SC). Offences of absolute liability are as far as the criminal law will go in imposing liability without any fault. See *Marine Department v Skeggs Foods International Ltd* [1974] 2 NZLR 648 (SC).

21 *Kilbride v Lake*, above n 20, at 593.

22 At 593.

23 At 593.

As mentioned before, and as a matter of principle, providing the proof of a physical element (the actus reus) is essential for all criminal conduct.<sup>24</sup> Woodhouse J made it clear that voluntariness is the "spark" without which the actus reus cannot be produced at all.<sup>25</sup> Conduct is not voluntary unless the accused "consciously chose" to perform the act.<sup>26</sup> It should, however, be mentioned that there is some controversy over whether voluntariness is a part of the mens rea or actus reus. For example, the authors of *Adams on Criminal Law* take the approach that voluntariness is part of the mens rea.<sup>27</sup> It is not essential to our present purpose to determine whether voluntariness is an essential element of actus reus or mens rea.<sup>28</sup> The point is that voluntariness is a legal requirement, without which a prima facie offence cannot be established.

The role of voluntariness in New Zealand criminal law was recently discussed by the Court of Appeal in *M v R*.<sup>29</sup> M was convicted of assault for slapping his daughter on the face. M was found guilty and subsequently sentenced to community work and supervision. M appealed his conviction on the basis that the trial judge had misdirected the jury as to the role of voluntariness and instinctive actions. M's defence had been stated in these terms:<sup>30</sup>

He did not plan to apply force, he didn't plan to raise his hand in the manner that he did and that is the issue. He didn't form an intention. There is this discussion going on and he instinctively, or involuntarily as he put it, and you've just heard his words himself from the witness box so I won't repeat those to you but remember what he said when he described it. He describes an involuntary action. He didn't realise, he didn't plan to do it before, he didn't realise it had happened. That is not intentional. If he'd gone on and repeatedly hit his daughter numerous times that would be intentional. This is an unintentional action. He hasn't stood there and formed an intention and then struck her. He hasn't done it.

The Court of Appeal defined voluntariness in this way:<sup>31</sup>

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24 Simester and Brookbanks, above n 10, at 70–85.

25 *Kilbride v Lake*, above n 20, at 593. *Kilbride v Lake* has been criticised by some authors, for example, M Budd and A Lynch "Voluntariness, Causation and Strict Liability" (1978) 74 Crim L R 74 at 74. The case provides an excellent description of voluntariness as an element of actus reus.

26 *R v Williamson [No 2]* (1996) 67 SASR 428, 92 A Crim R 24 (SC) at 28–31.

27 Francis Boyd Adams *Criminal Law and Practice in New Zealand* (Sweet & Maxwell, Wellington, 1971) at 352.

28 Though, for further discussion, see John Fisher "Voluntariness - the Missing Link" (1988) 6 Auckland U L Rev 1 at 5–9.

29 *M v R* [2013] NZCA 134.

30 At [7].

31 At [24] (citations omitted).

A person cannot complete the *actus reus* of an offence, that is be responsible for the relevant conduct, unless their act is voluntary. Voluntary is not here synonymous with intention or state of mind, and does not indicate that the act was planned or desired. Rather it means that the act was a product of the person's reason.

Therefore, the Court regarded voluntariness as relating to the *actus reus* of an offence. An act which is truly involuntary is not within the accused's control at all, and even the *actus reus* will not be attributed to him or her.<sup>32</sup>

M's defence, though, had conflated the idea of involuntariness with that of instinct. In considering M's claim that "he instinctively or involuntarily" slapped his daughter,<sup>33</sup> the Court distinguished an instinctive act from an involuntary one. An instinctive act is one which "involves neither a loss of physical control, nor impaired consciousness, as do involuntary acts".<sup>34</sup> While an instinctive act may or may not be intentional, it will not – on the Court's approach – be involuntary. Then, instinctiveness relates to the *mens rea* of a crime, not to the *actus reus*. The Court defined voluntariness as a situation where "the act was a product of the person's reason".<sup>35</sup>

Now return to the claim of V-insanity. D knew what he or she was doing but was unable to control his or her actions. The question is, is a person with irresistible impulse acting involuntarily in the sense that the Court of Appeal used the term? Probably not. Because the bar for involuntariness as a negation of *actus reus* is set very high – too high for claims of V-insanity – this article is not considering the claim of V-insanity with regard to the step of 'establishing a crime'.

Moreover, the Court in *M v R* was concerned with total involuntariness in the sense of automatism and some of its examples like muscle spasm. Lord Denning in *Bratty v A-G for Northern Ireland* defined an involuntary act as:<sup>36</sup>

an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking.

*M v R*, and the examples given by Lord Denning, concern true involuntariness or total involuntariness, which is different from V-insanity. In other words, given *M v R* and the courts' general view as to what constitutes voluntariness, V-insanity is not going to be viable as a defence to the first part of establishing a crime. It might be viable as a defence, however, to the denying

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32 At [24].

33 At [7].

34 At [25] (citations omitted).

35 At [24].

36 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386 (HL) at 409.

criminal responsibility stage. This stage is explained below together with an assessment of the relevance of V-insanity to that stage.

## 2 *The second stage: denying criminal responsibility by reason of V-insanity*

Even though all the elements of an offence are established beyond a reasonable doubt, D can still avoid liability by claiming an exculpatory defence, which has to amount either to a justification or to an excuse.<sup>37</sup> Self-defence and prevention of crime are some examples of justification in New Zealand. Excusing factors include insanity, compulsion and duress of circumstances, where harm can be defensible on a more restricted basis (criminal lawyers would call this phase 'denying criminal responsibility').<sup>38</sup>

The sorts of defendants that we discuss in this article will not have experienced muscle spasms, or sleepwalking. Their actions may be said to have been voluntary in the sense meant by the Court of Appeal in *M v R*.<sup>39</sup> As such, they will be deemed to have carried out the actus reus of offences. The relevant question, therefore, is whether they will be deemed to be responsible for that action.

If the defence of V-insanity is raised, D is claiming that he or she knew what he or she was doing, but because of a DofM he or she was not able to control his or her actions. In terms of existing legal defences, the closest fit to such a claim is the defence of insanity. However, as mentioned before, the problem for D is that the current form of insanity in New Zealand law is cognitive in nature, with no provision made for volitional impairment. As D knew what he or she was doing, he or she will not be able to make use of this defence.

### **III REASONS FOR THE INCLUSION OF V-INSANITY AS A DEFENCE**

In this section we argue that the rejection of V-insanity as a defence is morally unacceptable. We then attempt to show that, based on the basic construction of criminal responsibility, adopting V-insanity is fair.

#### **A *Is it Morally Sound to Convict those whose Control Ability was Incapacitated?***

Simester and Brookbanks summarise New Zealand law's approach in this way:<sup>40</sup>

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37 Simester and Brookbanks, above n 10, at 11. Justificatory defences in effect are defences which allege that, even though D's conduct was harmful, his or her conduct was nevertheless appropriate in some circumstances. In contrast, excusatory defences are defences that are concerned with absence of fault or culpability of D: at 11–12.

38 At 11–12.

39 *M v R*, above n 29, at [24].

40 Simester and Brookbanks, above n 10, at 355–356 (citations omitted).

... irresistible impulse is not a defence even if caused by disease of the mind. ... the only circumstances in which an irresistible impulse may assist a defendant in New Zealand is where there is evidence that an irresistible impulse is a symptom of a mental disease sufficient to exclude knowledge of the physical or moral quality of the act, amounting to legal insanity.

Is this morally justifiable?

In answering this question, it is essential to understand the notion of moral responsibility. Francis Raab notes two requirements for determining whether D is morally responsible for what he or she did: (1) could he or she have helped doing the act? and (2) was his or her act intentional?<sup>41</sup> Inherent in Raab's requirements is the idea that whether D could control his or her conduct is independent from the question of knowledge. Both, however, are essential for the fair attribution of responsibility. For Raab:<sup>42</sup>

... it would be morally offensive to punish those who could not help doing what they did even though they knew what they were doing and knew it was legally and morally wrong.

Based on Raab's views, the current New Zealand test of insanity is morally defective because it treats as fully responsible those who do not have capacity for control. This is a moral fault. In *The Morality of Law*, Fuller describes eight faults that make a system of legal rules miscarry. The fault that is relevant here is "rules that require conduct beyond the powers of the affected party".<sup>43</sup>

As Raab notes, one of the fundamental elements of a suitable test of legal responsibility is that it must be in accordance with the concepts of moral responsibility.<sup>44</sup> If a person is not morally responsible, he/she cannot be held legally responsible. A person who has no control over his/her actions is not morally responsible for them and it is therefore wrong to hold him/her legally responsible. As Vaughan CJ in 1677 stated, "a law which a man cannot obey, nor act according to it, is void, and no law: and it is impossible to obey contradictions, or act according to them".<sup>45</sup>

We are not claiming that New Zealand's entire legal system is morally wrong because it excludes V-insanity. However, New Zealand law needs to be changed. As Fuller argues:<sup>46</sup>

A total failure in any one of these eight directions [one direction was mentioned above] does not simply result in a bad system of law; it results in something that is not properly called a legal system at all ... .

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41 Francis V Raab "Moralist Looks at the Durham and M'Naghten Rules" (1961) 46 Minn L Rev 327 at 329.

42 At 335.

43 Lon L Fuller *The Morality of Law* (Yale University Press, New Haven, 1969) at 39.

44 Raab, above n 41, at 328–331.

45 *Thomas v Sorrell* (1673) Vaugh 330 at 337, 124 ER 1098 (KB) at 1102.

46 Fuller, above n 43, at 39.

## ***B Exempting Volitionally Impaired Individuals is Equitable***

In this section, we will seek to find whether the inclusion of V-insanity as a defence is consistent with the idea of fairness. In doing so, we will review those moral reasons (justifications and perhaps obligations) for punishment that are most influential in criminal law theory. This will lead to a discussion of responsibility. The approach we will adopt here will be based on the dominant theory in the criminal law: the "capacity theory". Finally, we will argue that the capacity in question is the capacity for both rationality and control. Therefore, those people who cannot control their behaviour cannot be treated as responsible.

The typical statement of the foundation of criminal responsibility is discussed by a legal theorist, Hart, as follows:<sup>47</sup>

What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity, etc, the moral protest is that it is morally wrong to punish because "he could not have helped it" or "he could not have done otherwise" or "he had no real choice".

After reviewing the foundation of criminal responsibility, we now consider theories of responsibility. Three main competing theories of responsibility – choice, capacity and character theories – were nicely captured by Tadros as follows:<sup>48</sup>

For choice theorists, an agent cannot be criminally responsible for his action unless he had choices. For the capacity theorist, he cannot be criminally responsible unless he had some kind of capacity in relation to his action. For the character theorist, he cannot be criminally responsible unless his action was properly related to his character.

According to legal scholars, the capacity theory (Hart's statement that a person cannot be criminally answerable because he or she could not have done otherwise) is the popular approach in criminal responsibility.<sup>49</sup> Hence, this article follows the approach of most academics in adopting the

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47 HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, New York, 1968) at 152.

48 Victor Tadros *Criminal Responsibility* (Oxford University Press, Oxford, 2005) at 45.

49 William Wilson "Impaired Voluntariness: The Variable Standards" (2003) 6 *Buff Crim L Rev* 1011; Stephen J Morse "Immaturity and Irresponsibility" (1997) 88 *J Crim L & Criminology* 15; and Peter Ramsay "The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State" (2006) 69 *MLR* 29. Some scholars argued against the capacity theory as the sole theory of criminal responsibility: see for example Tadros, above n 48, at 9; Nicola Lacey "Character, Capacity, Outcome: towards a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law" in M Dubber and Farmer L (eds) *Modern Histories of Crime and Punishment* (Stanford University Press, Stanford, 2007) 14;

capacity theory as the dominant theory. Other theories which seek to base criminal responsibility on an individual's character or on a person's choice will not be reviewed here. The difference between the choice and the capacity theory is that if a person does not have the capacity to choose otherwise, then he or she does not have a choice to choose otherwise. Supposedly, the opposite is not true.<sup>50</sup>

According to the capacity theory, to be criminally answerable an individual must have had "the capacity to do otherwise".<sup>51</sup> Hart explains this justification for punishment: "[f]airness require[s] that a man should not be punished ... unless he had the capacity and a fair opportunity to avoid doing the thing for which he is punished".<sup>52</sup> Brudner teases out of Hart's explanation an element of consciousness. By that, he means that Hart observed that humans have some awareness of themselves as beings that can reflect and act to be a moral agent: "a capacity to have done otherwise in this sense belongs to any human being that is aware of itself as an 'I' or subject".<sup>53</sup> This is the primary basis for treating a person as a responsible agent.<sup>54</sup>

The capacity approach is based on three fundamental capacities: understanding, reasoning and control over one's actions. Hart explained the elements of the capacity theory in this way:<sup>55</sup>

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Nicola Lacey *State Punishment: Political Principles and Community Values* (Routledge, London, 1988); and John Gardner "The Gist of Excuses" (1998) 1 *Buff Crim L Rev* 575.

50 Some differences and similarities between character and choice theory were mentioned by Claire Finkelstein "Excuses and Dispositions in Criminal Law" (2002) 6 *Buff Crim L Rev* 317.

51 It needs to be stressed that defining capacity as "the capacity to do otherwise" in the context of responsibility is different from the deterministic point of view. The deterministic perspective defines that the action is deterministically caused by a chain of events if the actor cannot do otherwise than he or she did. Defining the capacity to do otherwise in the context of this article is addressing voluntariness. For instance, for a person who could not understand the nature of his/her action at the time of the crime, it is impossible to do otherwise than he or she did (that is, to understand).

52 Hart, above n 47, at 190–191.

53 Alan Brudner *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford University Press, Oxford, 2009) at 72.

54 Horder determined that if an agent has the capacity to control his or her behaviour then it is fair to treat him or her as an individual with moral capacity and hold him or her responsible: Jeremy Horder "Pleading Involuntary Lack of Capacity" (1993) 52 *CLJ* 298 at 311. The capacity theory is consistent with what has been widely recognised as a subjectivist approach to liability and the capacity theory is also consistent with the principle of individual autonomy. The drawback of the capacity theory is the lack of scientific support to make a confident assessment of a person's capacity to exercise self-control: see Barry Mitchell "The Minimum Culpability for Criminal Homicide" (2001) 9 *Eur J Crime Cr L Cr J* 193 at 195–196. For a recent account of the capacity theory see Jeremy Horder *Excusing Crime* (Oxford University Press, Oxford, 2004) at 243–252.

55 Hart, above n 47, at 227. For explanation of elements of the capacity theory see Nicola Lacey "Psychologising Jekyll, Demonising Hyde: the Strange Case of Criminal Responsibility" (2010) 4 *CLPH* 109 at 117.

The capacities in question are those of understanding, reasoning, and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made.

The capacity theory sees an individual as a responsible agent who is capable of exercising control, and choosing whether to comply with the law.

Based on these grounds, as a matter of theory, if a person does not have any capacity for rationality or capacity to control, the law cannot treat him or her as criminally answerable. Currently, however, New Zealand law considers as fully responsible agents those people who do not have capacity for control, provided that they know what they were doing. Our argument is that it is immoral and unjust to punish those people. The main reason for such an argument is that it is unfair for those who cannot control their behaviour, owing to a DoFM, to be at risk of the same consequence (criminal sanction) as individuals without that condition (especially those who acted intentionally and purposefully). As Lord Chief Justice Bingham stated, "it would be offensive to visit the full rigour of the law on those who are not mentally responsible".<sup>56</sup>

To substantiate our argument, it is worth reviewing Hart's approach, which is shared by several scholars as the dominant theory justifying the inclusion of V-insanity.<sup>57</sup> Hart suggested:<sup>58</sup>

If we imprison a man who has broken the law in order to deter him and by his example others, we are using him for the benefit of society .... [T]his is a step which requires to be justified by (*inter alia*) the demonstration that the person so treated could have helped doing what he did.

Finally, punishing individuals driven by irresistible impulse is immoral.<sup>59</sup> As Ferguson notes:<sup>60</sup>

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56 *R v Antoine* [1999] 3 WLR 1204 (CA) at 1208. See also the statement of Henchy J: "... it is open to the jury to say, as say they must, on the evidence, that this man understood the nature and quality of his act, and understood its wrongfulness, morally and legally, but that nevertheless he was debarred from refraining from assaulting his wife fatally because of a defect of reason, his mental illness, it seems to me that it would be unjust, in the circumstances of this case, not to allow the jury to consider the case on those grounds": *The People (Attorney-General) v Hayes* Central Criminal Court, 20 November 1967 at 71.

57 See Husak who argues: "persons are responsible and deserve punishment only for those states of affairs over which they exercise control": Douglas Husak "Does Criminal Liability Require an Act?" in Antony Duff (ed) *Philosophy and the Criminal Law: Principle and Critique* (Cambridge University Press, Cambridge, 1998) 18 at 75. See also Goldstein who argues that the accused must be blameworthy and blameworthiness must arise from meaningful choice: Abraham S Goldstein *The Insanity Defence* (Yale University Press, New Haven, 1967) at 20.

58 Hart, above n 47, at 207.

59 For the same level of argument see the suggestion of the New South Wales Law Reform Commission which recommended the inclusion of V-insanity on the basis of providing the exculpation for those defendants who could not genuinely control their actions because of cognitive impairments: New South Wales Law Reform Commission, above n 5, at 69.

If it is true that our law in general – and criminal law in particular – is based on a conception of human beings as rational and autonomous individuals, then both conditions – reason and will – are relevant to attributing criminal responsibility to an individual. It is the ability to reason (right from wrong) *and* the ability to choose (to do right or wrong) which provides the moral justification for imposing criminal responsibility and punishment. If there is no ability to reason, or no ability to choose, then responsibility for one's conduct is impossible to establish and punishment for that conduct would be immoral. It is for this reason that the insanity test must include, at least on philosophic grounds, some consideration of both cognitive and volitional impairment.

In the following sections, we will describe and analyse two reasons for the rejection of V-insanity in New Zealand law.<sup>61</sup> We will analyse and argue against one main important reason in detail. In doing so, we will attempt to show that inconsistency exists as between the law's acceptance of C-insanity and its rejection of V-insanity.

#### ***IV EVALUATING THE ARGUMENT AGAINST THE INCLUSION OF V-INSANITY***

##### ***A The Objection: The Defence of V-Insanity is Redundant***

One argument against creating the defence of V-insanity is put forward by Bronitt and McSherry. They argue that the mind cannot be divided into separate compartments: volition and cognition.<sup>62</sup> Bronitt and McSherry subscribe to a view that explores the *interaction* between feelings and thought processes rather than dividing them into two unrelated compartments.<sup>63</sup> Based on their view, there can be no serious impairment of one mental function without some type of impairment to the others. Accordingly, it is impossible to suggest that mental difficulties in volition can occur without any effect on the cognitive part of the mind.<sup>64</sup>

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60 G Ferguson "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 QLJ 135 at 140–141 (emphasis in original).

61 For a review of other reasons for the elimination of V-insanity see Simon Bronitt and Bernadette McSherry *Principles of Criminal Law* (3rd ed, Thomson Reuters, Rozelle (NSW), 2010) at 249–253; and Warren J Brookbanks "Insanity in the Criminal Law: Reform in Australia and New Zealand" (2003) *Jur Rev* 81 at 94.

62 Bronitt and McSherry, above n 61, at 25.

63 At 250. For a similar argument see for example Jerome Hall "Psychiatry and Criminal Responsibility" (1956) 65 *Yale LJ* 761 at 775; Frederick Wilmer Sims "The 'Brain Storm,' or the 'Irresistible Impulse' Test, as Affecting Criminal Responsibility, and as a Substitute for the 'Unwritten Law' Defense" (1907) 13 *Va L Reg* 93 at 104; Charles L Cetti "M'Naghten Rule v Irresistible Impulse Test" (1962) 14 *Mercer L Rev* 418 at 420; Jerome Hall and K Menninger "Psychiatry and the Law' – a Dual Review" (1952) 38 *Iowa L Rev* 687 at 693–694; John Barker Waite "Irresistible Impulse and Criminal Liability" (1925) 23 *Mich L Rev* 443 at 457; Jerome Hall "Mental Disease and Criminal Responsibility" (1945) 45(5) *Colum L Rev* 677 at 708; and Santoni De Sio Filippo "Irresistible Desires as an Excuse" (2011) 22 *KLJ* 289 at 293.

64 Bronitt and McSherry, above n 61, at 250.

Subscribing to the above-noted viewpoint, which is supported by modern psychological research,<sup>65</sup> Bronitt and McSherry argue that tests for V-insanity incorrectly:<sup>66</sup>

... assume that a person can know what he or she is doing is wrong, yet be unable to control his or her actions. In reality, such tests assume that cognition remains completely unaffected, and this contradicts not only the holistic standpoint of modern psychology but also the view that the ability to reason plays an essential part in controlling conduct.

This leads to their other argument, namely, that instances of incapacity to control conduct amount to or involve C-insanity.<sup>67</sup> Accordingly, creating a separate provision of V-insanity is redundant,<sup>68</sup> because the accused still has the ability to run C-insanity.<sup>69</sup> The result of Bronitt and McSherry's claim is that the failure to provide V-insanity will not necessarily deny D's right to a defence; D will still be able to raise a defence of C-insanity.

### ***B The Argument Against the Redundancy in Accepting V-insanity***

Two parts of Bronitt and McSherry's argument need to be divided and analysed separately. First, adopting their view would mean that creating a volitional form of insanity would be wrong. Secondly, following the previous argument, since all forms of V-insanity can fall within the category of C-insanity, creating the defence of V-insanity is superfluous.

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65 In this regard, Bronitt and McSherry cited several sources: James Patrick Chaplin *Dictionary of Psychology* (2nd ed, Laurel, New York, 1985) at 174; and EE Smith and others *Atkinson & Hilgard's Introduction to Psychology* (14th ed, Wadsworth/Thomson Learning, Belmont (CA), 2003) at 390.

66 Bronitt and McSherry, above n 61, at 250. The above-mentioned objection was echoed by Brookbanks: Simester and Brookbanks, above n 10, at 94; and American Psychiatric Association "American Psychiatric Association Statement on the Insanity Defense" (1983) 140 *Am J Psychiatry* 681 at 685 cited by RD Mackay "McNaghten Rules OK? The Need for Revision of the Automatism and Insanity Defenses in English Criminal Law" (1987) 5 *Dick J Int'l L* 167. See also Morse, above n 49; and Stephen J Morse "Culpability and Control" (1994) 142 *U Pa L Rev* 1587 at 1659: "Virtually all cases of so-called irresistible impulse will prove on close analysis to be instances of irrationality, especially if the law continues to require that an abnormality is required." Morse suggested that an individual should be excused on the ground of his or her irrationality. He believes that where an individual is acting irresistibly the excuse should be grounded on his or her irrationality rather than V-insanity. The reason is that the person whose desires are in conflict is not irrational.

67 Bronitt and McSherry, above n 61, at 250.

68 See also Schopp who argues that adopting V-insanity is unnecessary: Robert F Schopp *Automatism, Insanity, and the Psychology of Criminal Responsibility: A Philosophical Inquiry* (Cambridge University Press, New York, 1991) at 201–303.

69 Stephen J Morse "Diminished Capacity" in Stephen Shute, John Gardner and Jeremy Horder (eds) *Action and Value in Criminal Law* (Clarendon Press, Oxford, 1993) 239 at 265. See also Schopp, above n 68, at 201–303 who argues that adopting the volitional limb is unnecessary.

The main reason to reject the Bronitt and McSherry's view is that there is no concrete reason to suggest that it is completely correct. Further, there is no reason to believe that the only variety of mental difficulties which an accused may have are those where an accused's involuntary conduct is associated with a lack of knowledge.<sup>70</sup> In addition, as Mackay argues, no empirical evidence is tendered to support Bronitt and McSherry's contention.<sup>71</sup> In contrast, there is a significant body of psychological literature which argues against their viewpoint and rejects the interaction between cognition and emotion. That literature supports that there is a separation between cognition and emotion.<sup>72</sup> Empirical research suggests that some types of impulse control disorders *only* result in loss of volitional control, while cognitive knowledge and appreciation of wrongfulness or criminality are preserved. Specifically, empirical research focuses on various impulse-control disorders which are currently recognised in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), under the category of "disruptive, impulse-control and conduct disorder".<sup>73</sup> This research cites some disorders like compulsive sexual behaviour,<sup>74</sup> pathological gambling,<sup>75</sup>

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70 For similar type of argument see Steven Yannoulidis *Mental State Defences in Criminal Law* (Ashgate Publishing, Farnham (England), 2012) at 130. He analyses one type of scientific evidence, pyromania to show that involuntary conduct may be considered as happening independently of the lack of knowledge as to the nature or wrongness of the conduct: at 141–164.

71 Mackay, above n 66, at 116.

72 For example Carole Wade and Carol Tavis *Psychology* (4th ed, Harper Collins, New York, 1996) at 55; Alan J Fridlund, Daniel Reisberg and Henry Gleitman *Psychology* (6th ed, WW Norton and Company, New York, 2004) at 97; Peter Gray *Psychology* (2nd ed, Worth Publishers, New York, 1994) at 124; Margaret W Matlin *Psychology* (2nd ed, Oxford University Press, New York, 1995) at 26; and Smith and others, above n 65, at 380.

73 American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: DSM-V* (5th ed, Washington, 2013) at 466–469.

74 Katherine L Derbyshire and Jon E Grant "Compulsive sexual behavior: A review of the literature" (2015) 4 *J Behav Addict* 37 at 37–39.

75 Sean Cowlishaw and others "Pathological and problem gambling in substance use treatment: a systematic review and meta-analysis" (2014) 46 *J Subst Abuse Treat* 98 at 100–104.

trichotillomania,<sup>76</sup> intermittent explosive disorder,<sup>77</sup> pyromania<sup>78</sup> and compulsive buying.<sup>79</sup> Further, the relevant research concludes that:<sup>80</sup>

... a high proportion of offenders who are unanimously classified by a psychiatric team as acquittable under [V-insanity] would not be if the volitional prong were removed and capacity to appreciate became the exclusive test for responsibility.

Indeed, the research indicates that "the primary logical division between the volitional and cognitive standards appears to be powerful".<sup>81</sup>

To substantiate our argument against the holistic model, we consider two significant studies. One study examined 164 insanity evaluations (conducted by four forensic psychiatrists in one of the United States jurisdictions which had both C-insanity and V-insanity tests).<sup>82</sup>

The accused who met the C-insanity test	70 per cent
The accused who met both V-insanity and C-insanity tests	98 per cent
The accused who only met the V-insanity test	24 per cent

**Table 4.1. A summary of the research by Wettstein and his colleagues**

Another, more recent, study had a larger sample. The research team looked at 5175 insanity evaluations conducted over a ten-year period in one of the United States jurisdictions which had both cognitive and control tests in its insanity defence.<sup>83</sup>

The accused who met both C-insanity and V-insanity tests	57 per cent
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76 Martin E Franklin, Kathryn Zagrabbe and Kristin L Benavides "Trichotillomania and its treatment: a review and recommendations" (2011) 11 Expert Rev Neurother 1165 at 1165–1168.

77 Orla O'Donnell, Allan House and Mitch Waterman "The co-occurrence of aggression and self-harm: Systematic literature review" (2015) 175 J Affect Disord 325 at 325–326.

78 Bernardo Dell'Osso and others "Epidemiologic and clinical updates on impulse control disorders: a critical review" (2006) 256 Eur Arch Psychiatry Clin Neurosci 464 at 464.

79 Elias Aboujaoude "Compulsive buying disorder: a review and update" (2014) 20 Curr Pharm Des 4021 at 4021–4022.

80 Alexander D Brooks "The Merits of Abolishing the Insanity Defense" (1985) 477 Annals Am Acad Pol & Soc Sci.125 at 134.

81 Robert M Wettstein, Edward P Mulvey and Richard Rogers "A Prospective Comparison of Four Insanity Defense Standards" (1991) 148 Am J Psychiatry 21 at 26.

82 At 24–25.

83 Janet I Warren and others "Opinion Formation in Evaluating Sanity at the Time of the Offense: An Examination of 5175 Pre-Trial Evaluations" (2004) 22 Behav Sci Law 171 at 182.

The accused who only met the V-insanity test	9 per cent
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**Table 4.2. A summary of the research by Warren and her colleagues**

The above studies suggest that there is a group of criminal accused who can avail themselves of an insanity defence only if the V-insanity test is recognised. Although this number is lower than other groups, it undoubtedly exists. Bronitt and McSherry's first objection – that the defence is redundant – can be refuted.

The response to Bronitt and McSherry's second objection – creating V-insanity is superfluous – is threefold. First, undoubtedly the existence of serious mental conditions in some cases precludes a person from knowing the nature, wrongness and quality of his/her conduct while also being unable to exercise control in relation to the conduct. But, while some mental difficulties manifest a lack of cognitive capacity, it is not true in all situations. Research indicates that in some cases the criminal accused were only volitionally impaired. As Ashworth notes, only "some forms of mental disorder impair practical reasoning and the power of control over actions".<sup>84</sup>

This research aside, the second response to Bronitt and McSherry is that as a matter of theory, it is possible that some individuals may suffer from a mental disorder characterised by involuntary conduct without any cognitive difficulties. Thirdly, as a matter of principle, no harm is involved in creating a new form of defence for some individuals driven by irresistible impulse. At the moment, there is no verifiable evidence to suggest that V-insanity is a form of C-insanity. Or, currently, there is no categorisation within the psychiatric profession to indicate that V-insanity is a form of C-insanity. Even if such evidence or categorisation could be provided in the future, at the moment no harm is involved in creating a defence of V-insanity.

In the following section, we will analyse another objection against creating a new limb to the insanity defence.

### ***C The Objection: An Irresistible Impulse or an Impulse Unresisted?***

Stephen Morse explained this objection in this way:<sup>85</sup>

... we cannot distinguish between irresistible impulses and those impulses simply not resisted. No established metric exists to determine the magnitude of impulses, desires, or feelings.

84 Andrew Ashworth *Principles of Criminal Law* (6th ed, Oxford University Press, Oxford, 2009) at 145. Similarly it has been offered that some accused who are unable to control their actions as a result of a DoFM are able to appreciate their actions: see Victorian Law Reform Commission *Defences to Homicide, Final Report* (VLC FR94, The Melbourne University Law Review Association, 2004) at [5.27]. See also *R v Radford* (1985) 42 SASR 266 (SC) at 275 per King CJ.

85 Morse, above n 66, at 1657.

To put the above explanation in a simple example, assume that A, for some reason, could not control his or her impulse. In contrast, B could actually control his or her impulse, albeit perhaps with some difficulty, but on a particular occasion chose to give in to it. In the view of some legal scholars, drawing a distinction between A's impulse and that of B is impossible. A's impulse was irresistible and B's was resistible, but unresisted. But an observer has no way of knowing that this was the case. An accused may claim that he or she was acting due to an irresistible impulse and therefore should not be held responsible. But how could a court be sure that this was truly the case? For the purposes of this article, drawing a distinction between A's and B's impulses is referred to as the "line-drawing problem".

Morse's view about this difficulty echoes the conclusion reached by scholars such as Harding-Barlow,<sup>86</sup> McAuley,<sup>87</sup> Goldstein,<sup>88</sup> Mackay,<sup>89</sup> Ormerod,<sup>90</sup> Slobogin,<sup>91</sup> and Wootton.<sup>92</sup>

### ***D The Argument Against the Objection***

One response to the difficulty of the line-drawing problem is this: as a matter of principle, the difficulty should not preclude the availability of V-insanity to those who are deserving of the defence. Setting aside that response, however, it is necessary to consider the debate in detail.

### ***E Distinction between Irresistible and Unresisted Impulse: What Type of Evidence?***

This difficulty – or impossibility, even – of the line-drawing problem explains at least some of the reluctance of New Zealand courts and legislators to accept V-insanity as a valid defence.

Such a distinction requires an actual finding as to the accused's mental states. In other words, the only way to satisfy the opponents' demand (distinguishing between A and B, and establishing a claim of irresistible impulse for A) is by conducting empirical research, which shows the actual workings of the accused's mind at the time of the crime. We emphasise the demand of the opponents of V-insanity because it is not necessarily the demand of the law. Only by conducting empirical

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86 Harding-Barlow, above n 12, at 393.

87 Finbarr McAuley *Insanity, Psychiatry and Criminal Responsibility* (Round Hall Press, Dublin, 1993) at 61.

88 Goldstein, above n 57, at 67–68.

89 Mackay, above n 66, at 190–191.

90 David Ormerod *Smith and Hogan's Criminal Law* (12th ed, Oxford University Press, Oxford, 2008) at 287–288.

91 Christopher Slobogin *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty* (Harvard University Press, Cambridge (Mass), 2006) at 131–132.

92 Barbara Wootton *Crime and Criminal Law: Reflections of a Magistrate and Social Scientist* (Stevens & Sons, London, 1963) at 74.

research can the demand be met. For the purposes of the current article, we refer to an empirical investigation as a "scientific inquiry", in contrast to a "common sense inquiry".

As a result, only by conducting a scientific inquiry will the opponents' demand be satisfied. There is some debate in scientific literature as to whether science is presently able to solve the line-drawing problem in V-insanity.<sup>93</sup> It is not the purpose of this article to investigate the current state of science in that respect. As noted above, though, critics of V-insanity have not only disputed that solving the line-drawing problem is presently impossible; for some of them, like Barbara Wootton, the objection is that it is impossible "not merely in the present, but indeed in any, state of medical knowledge".<sup>94</sup>

Certainly, the difficulty of the line-drawing problem is a challenge for V-insanity. But is it a challenge so different from other parts of the law? In order to answer the question, in the following sections, we will examine some other legal issues that involve internal mental states. How does the law respond to matters such as C-insanity and intention? Does it require scientific certainty? Or is it more common to rely upon common sense inquiries? If the latter, then lawyers may reasonably wonder whether a higher standard of proof and certainty is being demanded of V-insanity than of other legal inquiries.

In the next section, the criteria for establishing non-responsibility (C-insanity) and responsibility (the legal requirement of intent), and the practical way to establish C-insanity will be shown.

## ***F Dissecting the Criteria for Establishing Non-responsibility (C-insanity) and Intent***

### ***1 The line-drawing problem and C-insanity***

The difficulty of the line-drawing problem, then, may not be unique to questions of volition. In the context of C-insanity, an analogous challenge arises when courts are tasked with determining whether D, at the time of the offence, was unable to understand what he/she was doing (or the morality of his/her action). The question is whether the law relies on any direct scientific means to solve this problem. If not, how does the law in practice determine whether the accused was unable to understand what he/she was doing in the context of C-insanity? The short answer is by conducting a common sense inquiry; the law does not rely on any direct scientific means of ascertaining the accused's state of mind. Two reasons will be provided to substantiate this answer. We will elaborate on these two reasons below while we will be trying to show the way of

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93 Mark R Dixon and Taylor E Johnson "Impulse Control Disorders" in Peter Sturmey (ed) *Functional Analysis in Clinical Treatment* (Academic Press, Amsterdam, 2007) 429 at 429.

94 Wootton, above n 92, at 74.

establishing C-insanity. Finally, we will analyse the case of *R v Dixon*<sup>95</sup> to show that the law rejected the scientific inquiry in the assessment of C-insanity.

As mentioned above, s 23(1) and (2) of the CA 1961 provides the defence of C-insanity:<sup>96</sup>

- (1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.
- (2) No person shall be convicted of an offence by reason of an act done or omitted by him or her when labouring under natural imbecility or disease of the mind to such an extent as to render him or her incapable—
  - (a) of understanding the nature and quality of the act or omission; or
  - (b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

Section 23 initiates with a presumption that every person is sane at the time of doing or omitting any act "until the contrary is proved".<sup>97</sup> That presumption has the effect of casting on D the onus of proving the defence of insanity.<sup>98</sup> D must show (has the burden of proving) that he or she was insane when he or she committed the relevant act (the first criterion).<sup>99</sup> A mere assertion that D was insane will not be sufficient to discharge the burden of proving insanity. Rather, D must prove this on the balance of probabilities, which is to say, he or she must convince the jury (or, as the case might be, the judge) that it is more likely than not that he or she was insane at the time of the alleged offence.<sup>100</sup>

D must prove that he or she was affected by either a DofM or natural imbecility.<sup>101</sup> Whether a particular condition constitutes a DofM is a question of law, to be determined by the judge. It is open to the court to recognise any physiological factor that has an effect on D's mind. Also, D needs to prove that the DofM had the effect of preventing him or her from "understanding the nature and quality of the act or omission; or ... of knowing that the act or omission was morally wrong, having

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95 *R v Dixon* [2007] NZCA 398, [2008] 2 NZLR 617.

96 Crimes Act 1961, s 23(1)–(2).

97 Crimes Act 1961, s 23(1).

98 Simester and Brookbanks, above n 10, at 298.

99 At 298.

100 *R v Cottle* [1958] NZLR 999 (CA) at 1014 per Gresson P.

101 The latter concept, which has been acknowledged by the New Zealand Law Commission to be archaic, will form no further part of the discussion here: see Law Commission *Mental Impairment Decision-Making and the Insanity Defence* (NZLC PP55, 2010) at 3–6.

regard to the commonly accepted standards of right and wrong".<sup>102</sup> This is a question of fact and in jury trials is therefore left to the jury to decide.

As noted above, DofM is a legal rather than a medical term. While scientific assessors are allowed to give their opinions as to whether a disorder may be treated as a DofM, and may testify as to the symptoms and causes of the condition, their assessment is not the ultimate determinant of whether D will be found insane. Scientific testimony is informative only. In *R v Cottle*, the Court of Appeal made this plain: "Surely [what constitutes a DofM] cannot be left to a medical witness to apply his own definition?"<sup>103</sup>

Therefore, the question of whether D laboured under a DofM is for the trier of fact (the jury or in non-jury trials, the judge). How do they reach that conclusion? The trier of fact has to decide whether, for the purposes of s 23, a DofM has rendered D incapable of knowing what he or she was doing, or that the act or omission was morally wrong (the second criterion). The judge or jury, then, is required to determine the matter of insanity not just on the basis of the medical evidence, but on the basis of all evidence, including medical evidence, circumstantial evidence and evidence of D's behaviour. It is not a scientific inquiry. The following case illustrates this and shows that assessing a claim of C-insanity requires a common sense inquiry.

In 2003, Antonie Dixon embarked on a reign of terror ending in the death of one person and severe injuries and trauma to a number of others. Dixon was charged with numerous offences, including murder, attempted murder and wounding with intent to cause grievous bodily harm. He pleaded not guilty by reason of insanity under s 23 of the CA 1961. Dixon argued that at the time of the crime he was affected by a DofM – specifically, severe personality disorder – that prevented him from knowing his actions were morally wrong – that is, a defence of C-insanity.

Dixon presented psychiatric evidence which indicated that he had some mental difficulties – the Court of Appeal later referred to "what everyone agreed was a disordered mind (though not necessarily an insane one)".<sup>104</sup> The question for the jury was "whether the defence had established, on the balance of probabilities, that Mr Dixon, because of his [DofM], did not know that what he was doing was morally wrong".<sup>105</sup>

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<sup>102</sup> Crimes Act 1961, s 23(2).

<sup>103</sup> *R v Cottle*, above n 100, at 1028 per North J.

<sup>104</sup> *R v Dixon*, above n 95, at [10].

<sup>105</sup> At [32].

In directing the jury, the trial judge said they were to make an assessment of Dixon's capacity to rationalise what was morally wrong and right.<sup>106</sup> The trial judge put the emphasis on Dixon's capacity in this way:<sup>107</sup>

... the defence could be established only if the jury were satisfied that the state of Mr Dixon's brain was such that he was totally incapable of understanding what was right and what was wrong.

The jury found Dixon guilty of several charges, including murder and wounding with intent, though not of the charges of attempted murder.<sup>108</sup>

Dixon appealed and argued that the trial judge's direction was incorrect on the question of insanity. The majority of the Court of Appeal agreed:<sup>109</sup>

What is to be avoided is any suggestion that, under this limb of the insanity defence, the jurors' task is to perform a neurological or psychiatric assessment of the accused's brain or its workings, with a view to establishing its *capacity*.

Rather, it provided a guideline for assessing the accused's state of mind:<sup>110</sup>

The jury should have been simply asked whether the defence had established, on the balance of probabilities, that Mr Dixon, because of his disease of the mind, did not know that what he was doing was morally wrong. This is a comparatively simple inquiry, but simplicity in this area is highly desirable.

To take some lessons from the *Dixon* case, the trial judge directed the jury that they should investigate the accused's state of mind to find (in a scientific way) whether he was totally incapable. The Court of Appeal held that this direction was erroneous. Further, the Court of Appeal held that the jury should have been particularly warned away from neurological or psychiatric assessments in an attempt to find actual incapacity. Scientific assessment is not the sort of evidence a jury should be looking for, and the absence of such evidence does not seem to be the sort of thing that would invalidate an insanity defence. The Court of Appeal emphatically rejected the scientific inquiry approach. Yet, deprived of this definitive evidence, the jury had nonetheless to draw a conclusion as to insanity. The majority of the Court of Appeal considered that this must be done in a simple way.

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106 At [31].

107 At [31].

108 Interestingly, the existence of "reckless murder" in New Zealand law allowed the jury to reach what may, at first glance, look like a perverse decision: that Antonie Dixon was capable of forming the necessary state of mind for murder, but not for attempted murder.

109 *R v Dixon*, above n 95, at [32] (emphasis in original).

110 At [32].

For the purposes of the present discussion, we call a simple investigation as to D's capacity the common sense inquiry, which contrasts sharply with the scientific inquiry.

In discussing *Dixon*, we analysed what the fact-finders should not do while examining D's mental state and his/her incapability to form the required cognitive state. In the following case analysis, we will show how fact-finders should determine D's mental state, for the purposes of determining insanity.

Maxwell Tobin was charged with importing heroin into New Zealand, and with possessing cocaine with intent to supply. His insanity defence was based on his belief that he was:<sup>111</sup>

... God, the Messiah, some divine or important personage, each one having a message of dramatic import to carry which was noted on examination either for its triviality or for its potential for destructiveness.

He believed that he had a mission to save the world and this could be done by showing young people how to use drugs. On these grounds, Tobin claimed insanity, arguing that at the time of the crime he was suffering from schizophrenia to a degree that he was incapable of knowing that what he had done was morally wrong having regard to the commonly accepted standards of right and wrong.<sup>112</sup>

Tobin's insanity defence was buttressed by defence medical experts who interviewed him in prison and testified to the existence of the Messianic belief, concluding that he was suffering from schizophrenia. Although this evidence was not challenged, the trial judge directed the jury that they were not obliged to accept the defence.<sup>113</sup> The question, the judge explained, was not whether Tobin "was suffering from a disease of the mind",<sup>114</sup> but rather, "whether he was suffering from that disease to such an extent that he was incapable of knowing that the importation of heroin and possession of cocaine was morally wrong".<sup>115</sup>

The defence medical experts formed the view that Tobin's offence was caused by his schizophrenic delusions, but the judge identified some doubts about this. For instance, at an earlier stage, Tobin had accepted that taking drugs was an evil thing, a view that may be thought difficult to reconcile with a Messianic belief. Further, the doctors who had interviewed Tobin "did not seem to

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111 *R v Tobin* [1978] 1 NZLR 423 (CA) at 427.

112 At 424–428.

113 At 430.

114 At 430.

115 At 430.

really pin him down in their interviews and say, 'Why did you do it? What exactly did you do?' And if necessary, question him as to what they claim they believe to be his beliefs."<sup>116</sup>

Even if it were accepted that Maxwell Tobin was affected by a DofM, and even if that DofM caused the Messianic delusions by which he claimed to be affected, the jury still had to decide whether those delusions caused the offence in question. How did those beliefs lead Tobin to commit drug offences? How did his pattern of offending fit with what he claimed to believe of his divine mission? Denied direct access to the inner workings of Tobin's mind, the jury could only base their answers to these questions on inferences drawn from other factors. They had to consider what Tobin said and did, and the testimony of the doctors who interviewed him – though they need not be persuaded by that testimony.<sup>117</sup>

The South Australian case of *R v Adam*<sup>118</sup> provides another example of the way in which C-insanity defences are approached. The accused, Charlie Adam, was bushwalking and had lit a fire. He was charged with causing a bushfire, in contravention of South Australian criminal law. As a defence, he claimed that he became lost while hiking and lit a signal fire to summon assistance. He was equipped with water, a map, a mobile phone and a whistle. Adam pleaded not guilty not because of the reasonableness or necessity of his action, but rather on the ground of mental incompetence.<sup>119</sup> The defence of mental incompetence in South Australia functions in a very similar way to C-insanity in New Zealand.<sup>120</sup>

In particular, Adam claimed that he was suffering from bipolar affective disorder and on the day of the alleged crime he was affected by stress which was exacerbated by heat, fatigue and panic arising out of the situation. He claimed that as a result of those factors, his insight and judgement were limited to the extent that he was unable to reason about the wrongfulness of his conduct. Adam

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116 At 430–431.

117 The Court of Appeal dismissed the appeal, and convicted Tobin of importing heroin into New Zealand, and also of possessing cocaine with intent to supply.

118 *R v Adam* [2012] SADC 119. The *Adam* case is not applicable in New Zealand law. We review the case here only to show the principles for assessing the insanity defence.

119 At 119.

120 Criminal Law Consolidation Act 1935, s 269 C:

A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment –

- (a) does not know the nature and quality of the conduct; or
- (b) does not know that the conduct is wrong; or
- (c) is unable to control the conduct.

relied upon the testimony of two psychiatrists. The evidence of one is worth quoting, as it shows the sorts of limitations to which such assessments are subject:<sup>121</sup>

My opinion is based on my history compared with my knowledge and experience of other people suffering from similar disorders namely a baseline of an illness potentially causing psychosis ... I have no objective evidence that Mr Adam became psychotic at the time except his subjective history which is internally consistent and shows a complete lack of logic.

Even though the psychiatrist had no objective evidence of Adam's state of mind on the occasion of setting the bushfire, the psychiatrist concluded that Adam "was not aware of the wrongfulness of his conduct".<sup>122</sup>

As it turned out, the judge rejected the defence of mental incompetence.<sup>123</sup> Brebner J referred to the fact that Adam took specific (although ultimately ineffective) precautions before lighting the bushfire and held:<sup>124</sup>

... the accused had retained the capacity to reason ... and to recognise the risk that the bush might be set alight if he lit a signal fire and also to identify and implement the steps that were available to him to obviate or minimise that risk. His ability to recognise the very risk which made lighting a signal fire wrong according to the standards of ordinary people and to recognise that it was a risk he should attempt to obviate demonstrates that it was self-evident to him that lighting a signal fire in such a way that it created a risk that the surrounding scrub might be set alight was something that he should not do.

Two important points about the use of mental incompetency and its analogous defence of insanity are understandable in *Adam*. First, the case illustrates that even expert witnesses may have to rely on common sense evidence, from which to draw certain inferences as to an accused's state of mind at the time of the crime. The psychiatrist acknowledged that he had no way of finding, scientifically and objectively, that Adam's bipolar affective disorder affected his reasoning and judgement such that he did not appreciate the wrongness of lighting the fire.

Secondly, the judge's rejection of this defence is a further explanation of what we discussed above, in *Tobin*. In cases where insanity is pleaded as a defence, the fact-finder must determine whether the DofM really rendered D unable to appreciate the nature of the act. Having no access to D's state of mind on the relevant occasion, the fact-finder will search for the most plausible account of D's conduct. This does not mean that the defence case is uncritically accepted. Rather, the trier of fact would search and question as to how the DofM was related to the behaviour. Two different

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<sup>121</sup> *R v Adam*, above n 118, at [53].

<sup>122</sup> At [74].

<sup>123</sup> The case was heard by a judge alone, that is, with no jury.

<sup>124</sup> *R v Adam*, above n 118, at [105].

situations are imaginable. On the one hand, if D's conduct is not consistent with the typical symptoms of that DofM, then it is likely that it will not be attributable to that DofM. On the other hand, if the conduct is very irrational, and no other more compelling explanation for it is advanced, then the fact-finder may accept that the most likely explanation is that D's conduct was caused by the DofM.

So far, we have provided cases in which the accused has introduced the defence of C-insanity, but in none of those cases was the defence successful. In the next section, we review one case in which C-insanity was successful. This success was not the result of a scientific inquiry.

Paul Warren, the accused, was driving at a speed in excess of 100 kilometres an hour on a highway in New Zealand which resulted in the deaths of two victims and serious injury to another. He was charged with manslaughter and causing serious injury. An insanity defence was raised on the basis he believed "he was in a time machine and was invisible when he exceeded 100 kilometres an hour and could pass through walls and matter".<sup>125</sup> The accused's perception was such that he did not understand he was driving a vehicle dangerously; hence he did not understand the nature of his act.

Two psychiatrists examined him after the crimes. They reviewed his mental health records, which posited a history of mental disorders including depression and bipolar disorder. There was also evidence of erratic behaviour before the offence. One of the psychiatrists concluded that "it [is] likely the accused was not aware of the nature and quality of his actions at the material time".<sup>126</sup> The other concluded that, "because of his psychotic condition, [the accused] would not have recognised that he was driving a car dangerously".<sup>127</sup>

The medical evidence was unchallenged. The trial judge – in a judge-alone trial – accepted the experts' evidence and concluded that Warren was suffering from a DofM at the time of the crime, namely, a bipolar mood disorder. The judge accepted that Warren was not aware of his actions and was therefore insane. The judge accepted the defence of C-insanity because of the medical evidence and the criterion for establishing the insanity defence. That criterion, as mentioned above, is on the balance of probabilities, that is, Warren was more likely than not insane at the time of the crimes.<sup>128</sup>

In *Warren*, neither the psychiatric experts nor the Court carried out a scientific inquiry to access the inner workings of the accused's mind at the time of the crime. It is impossible to determine his

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125 *R v Warren* HC Auckland CRI-2008-092-007733, 29 April 2009 at [11].

126 At [35].

127 At [36].

128 As mentioned before, courts are not obliged to accept the medical evidence. However, if they find the medical evidence substantially based, they can accept that as the basis of the insanity defence. See *Simester and Brookbanks*, above n 10, at 301–306.

state of mind precisely as it was when he thought he was in a time capsule, driving at high speed and with the doors locked. What was looked at instead was the surrounding evidence – his erratic behaviour prior to the crimes and his history of mental disorders. On the basis of the evidence, and given the relevant standard of proof, the Court accepted the defence, even though a causal link between the DofM and crimes could not be proved to a scientific level.

As can be seen from *Dixon, Tobin, Adam* and *Warren*, the law does not require a scientific inquiry in the case of C-insanity. Insanity defences are not, of course, the only context in which criminal juries are asked to make decisions about an accused's state of mind. The question of an accused's intention is another important question for criminal juries.

## 2 *Establishing intent – a common sense inquiry*

For a number of crimes, the prosecution must prove D's intention as the fault element of the crime. Courts are concerned with how intention is proved: what counts as conclusive or sufficient evidence that an accused intended a specific consequence? In order to find the answer to the question, consider another example.

G had a fight with H and promised that the next day he would definitely kill H with a gun at 2 pm in T Street. After this conversation, G bought a firearm and bullets and was waiting for H at 2 pm in T Street. On seeing H, G fired the gun and killed H and then mutilated H's body. In order to establish G's mental state – typically, that he intended to kill H – the court will not be able to rely on direct evidence of what was going on in G's head. Instead, it will draw inferences from surrounding circumstances and from G's behaviour. The implicit reasoning will go something like this: how could G have behaved like this if he had not intended to kill H? If the courts cannot think of another plausible explanation, they will often assume that G intended to kill H. The law accepts the evidence as long as it is beyond reasonable doubt in most situations. Hence, at the moment, the law does not concern itself with the scientific inquiry into what was happening in G's internal mental states, states to which – at least until now – courts have been denied direct access.<sup>129</sup> Instead, the law draws inferences as to D's state of mind from the circumstantial evidence, medical evidence and D's external behaviour. Drawing conclusions about what D intended, by drawing inferences from this sort of evidence, is the same as the common sense inquiry. A handful of cases can illustrate the process.<sup>130</sup>

In *R v Hancock*,<sup>131</sup> two striking miners killed a taxi driver by dropping pieces of concrete onto his car from an overbridge. The accused claimed that their intent was only to intimidate the driver,

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129 R A Duff *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* (Basil Blackwell, Oxford, 1990) at 20–31.

130 None of the cases that will be reviewed in this section are applicable in New Zealand law. We will mention the cases here merely to describe the standards for assessing an accused's intention.

131 *R v Hancock and Shankland* [1986] 1 AC 455 (HL).

and thereby to prevent him carrying strike breaking miners to work. The prosecution argued that their intent to kill could be inferred from their actions. As summarised by the trial judge:<sup>132</sup>

... the prosecution case could be compressed into one question and answer, the question being "what else could a person who pushed or threw such objects have intended but to cause really serious bodily harm to the occupants of the car?" The answer in the prosecution's submission was that a person acting in that way could in the circumstances have intended nothing less.

The defence case invited a very different interpretation of events, specifically that "the two men intended to block the road, to stop the miner going to work, but not to kill or to do serious bodily harm to anyone".<sup>133</sup> The jury, of course, had no means of scientifically or clinically ascertaining what was going through the minds of Reginald Hancock and Russell Shankland when they dropped the objects from the bridge. Instead, they were required to reach a decision as to the accused's mental state by drawing inferences from such factors as the likelihood of death or serious injury ensuing. If such an outcome was highly likely, the jury might reasonably infer that the accused foresaw and therefore intended the injury or death. As the prosecution rhetorically asked, what else could they have intended? In the absence of a plausible alternative narrative, such an inference may seem unavoidable.<sup>134</sup>

As observed by Smith, commenting on *Hancock*: "Of course a process of inference is always involved in determining whether a person had a particular state of mind because this can be proved only by circumstantial evidence."<sup>135</sup>

Another well-known example is provided by *R v Charlson*.<sup>136</sup> Stanley Charlson, the accused, lived in a house the back room windows of which overlooked a river two feet deep. He called his ten-year-old son into the back room telling him that there was a rat to be seen near the river. Once the boy came to the window, the accused picked up a wooden mallet and struck the boy twice on the head, breaking the skin and causing blood to flow. The boy tried to defend himself by wrapping his head in a towel. Then, the accused picked the boy up and threw him out the window. The accused was charged with several crimes including unlawfully and maliciously causing grievous bodily harm with intent to murder. No plea of insanity was raised. However, the prison doctor gave evidence to the effect that the accused's actions were consistent with his having a mental problem. This problem made him engage in impulsive violence, over which he had no control. The defence, therefore, argued he could have no intention.

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132 At 469.

133 At 469.

134 At 469.

135 JC Smith "Comment on Hancock and Shankland" (1986) Crim L R 181 at 183.

136 *R v Charlson* [1955] 1 WLR 317 (Assizes).

In his direction to the jury, Barry J mentioned the importance of circumstantial evidence and said:<sup>137</sup>

All these are matters which you have to consider in addition, of course, to the evidence of the prison doctor. You have to ask yourselves whether, having regard to those circumstances, you ought to infer that the accused did have a real intention of causing serious injury to his son.

The intention of the accused can, of course, only be inferred from all the circumstances which have been proved before you. Neither you nor I can ever look into the mind of an accused person and say with positive certainty what his intention was at any particular time. A jury is entitled to infer a man's intentions from his acts.

The Court made it clear that a scientific inquiry is impossible and there is no pretence at certainty as to what was actually going on in the accused's mind at the time of the crime.

Thirdly, consider the case of *Gollins v Gollins*.<sup>138</sup> After the parties married in 1956, the wife realised that the husband was enormously in debt, and therefore unable to finance the family. For several years, the wife suffered from an anxiety state, attributable to her financial and marital difficulties. In 1961, the wife obtained an order against the husband on the basis of his wilful neglect to support the family. Then, she was diagnosed as suffering from anxiety disorder, attributable to her marital and financial troubles. On that basis, she applied to justices for a variation of the original order to include a non-cohabitation clause, on the basis of the husband's persistent cruelty. The justices granted the application. The husband appealed to the House of Lords. Lord Reid's statement on the intention needed for the offence of matrimonial cruelty is important for the article. He stated that:<sup>139</sup>

Intention is a state of mind. You cannot see into other people's minds, but ordinary people have little difficulty in inferring intention from what a man does and says viewed in light of the circumstances. Juries deal daily with the burden of proof of intention, whether it has to be proved beyond reasonable doubt or on a balance of probability.

Similar to *Charlson*, it is clear that Lord Reid considered that for finding an intention the scientific inquiry should not be conducted. Instead, the accused's state of mind is inferred in an ordinary sense, either based on beyond reasonable doubt or on the balance of probabilities, depending on the question at issue.

As can be seen from the above discussion, there is an inconsistency in the law's approach. For establishing certain mental states that are key to criminal responsibility, such as intent and C-

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137 At 320.

138 *Gollins v Gollins* [1964] AC 644 (HL).

139 At 663 per Lord Reid.

insanity, the common sense inquiry is accepted. Finding the accused's mental state from their behaviour and circumstantial evidence is what Peter Cane refers to as "epistemological uncertainty" in the criminal law.<sup>140</sup> As he states "responsibility in law is not 'real' responsibility".<sup>141</sup> Although the approach to ascertaining state of mind is not absolutely accurate, it is an approach on which the law relies. Yet when the prospect is raised of introducing a defence based on V-insanity, the higher standard of a scientific inquiry is demanded.

Before elaborating on such an inconsistency, we need to ascertain whether scientific support for C-insanity outweighs scientific support for V-insanity. In order to do so, we will review another argument for the rejection of V-insanity. This argument claims that measuring C-insanity is possible, while it is not possible for V-insanity. We will then counter that argument in detail and discuss whether scientific evidence for C-insanity is stronger than V-insanity.

### ***F C-insanity can be Scientifically Proved but V-insanity Cannot***

One of the most influential arguments for rejecting V-insanity asserts that, while the assessment of cognitive abilities is within a professional's expertise, the assessment of volitional capacities is not. This argument is categorised under the line-drawing problem because it has the same alleged difficulty: the lack of scientific support for V-insanity.

The above argument was favoured by the American Psychiatric Association, which claimed that there was a lack of consensus among psychiatrists with respect to the role of volition in human behaviour. It warned against the application of V-insanity in legal proceedings:<sup>142</sup>

Many psychiatrists ... believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether the defendant was able to control his behavior. The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk. ... The concept of volition is the subject of some disagreement among psychiatrists. Many psychiatrists therefore believe that psychiatric testimony (particularly that of a conclusory nature) about volition is more likely to produce confusion for jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding.

This view echoes the perspectives of the American Medical Association, which went a step further and claimed that the medical profession cannot diagnose V-insanity.<sup>143</sup> Similarly, some

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140 Peter Cane *Responsibility in Law and Morality* (Hart Publishing, Oxford, 2002) at 44–49.

141 At 46.

142 American Psychiatric Association, above n 66, at 685.

143 Report of the Board of Trustees "Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony" (1984) 251 JAMA 2967 at 2978.

scholars, such as Bonnie<sup>144</sup>, Goldstein<sup>145</sup> and Williams,<sup>146</sup> as well as the American Bar Association,<sup>147</sup> shared the view of the American Psychiatric Association and the American Medical Association.

The crux of the legal and psychiatric professions' argument was that V-insanity is not able to be measured reliably and can create confusion for courts. C-insanity, in comparison, is clinically more accurate. As a result, those professional bodies believed that C-insanity should be maintained in the scope of the insanity defence, but V-insanity should be removed.

### ***G The Argument Against the Scientific Superiority of C-insanity***

The best way to respond to the previous argument is by asking this question: is there any evidence to support the conclusion that C-insanity has a stronger scientific basis than V-insanity? The view of psychologists and jurists can help us to find the response to this question.

First, the American Psychological Association objected to the rejection of V-insanity. It argued for an *empiricist* position that changes should be grounded in the scientific research. The American Psychological Association argued for a thorough review of the existing research literature and the conducting of:<sup>148</sup>

... empirical studies, if needed, to provide information about whether the behavioral sciences are able to render informed opinions about behavior control and whether such opinions assist the jury in making their scientific, moral and legal decisions regarding the defendant's responsibility for alleged criminal acts.

Secondly, Richard Rogers' work casts light on this. Rogers, a professor of psychology, carefully examined the issue. He reviewed the contemporary scientific literature and noted that there is no empirical research to back up the "assumption that the cognitive prong has a stronger scientific basis than the volitional prong and can be more reliably measured".<sup>149</sup> In addition, in the evaluation of the empirical research which existed, Rogers concluded not only that "this research flatly contradicts the American Psychiatric Association's unsupported assertions regarding the scientific superiority of the cognitive prong" but also that "psychiatrists were more confident of their decisions regarding the

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144 Richard Bonnie "The Moral Basis of the Insanity Defense" (1983) 69 ABAJ 194 at 196.

145 Goldstein, above n 57, at 1036.

146 Glanville Williams *Textbook of Criminal Law* (2nd ed, Stevens & Sons, London, 1983) at 659.

147 American Bar Association Standing Committee on Association Standards for Criminal Justice *Criminal Justice Mental Health Standards* (American Bar Association, Washington, 1983).

148 American Psychological Association *Text of position on the insanity defense* (APA Monitor, 1984) at 11.

149 Richard Rogers "APA's Position on the Insanity Defense: Empiricism versus Emotionalism" (1987) 42 Am Psychol 840 at 841.

volitional prong" and that there were "no significant differences between the cognitive and volitional prongs in the frequency of insanity recommendations".<sup>150</sup> Rogers then proposed several criteria to help psychiatrists assess V-insanity.<sup>151</sup> Reviewing those criteria is not the purpose of this article. We mentioned the issue only to show that, according to some academics, there are some criteria for diagnosing V-insanity, and no reason to support the suggestion that doing so is more difficult than in the case of C-insanity.

Thirdly, the views of the American Psychological Association and Rogers are shared by Ronnie Mackay, a criminal law scholar. Mackay reviewed some of the most relevant contemporary literature on the availability of scientific evidence for V-insanity. He found that there is no valid scientific evidence to suggest that V-insanity is operating in an unfavourable manner, and concluded that criticisms against V-insanity were not backed by the science:<sup>152</sup>

... there appear to be no empirical data to support the "assumption that the cognitive prong has a stronger scientific basis and more reliable measurement than the volitional prong and can be more reliably measured."

The arguments of the American Psychological Association, Rogers and Mackay have been buttressed by recent research. This research indicates that the evaluative tools used to assess impulse control are similar to those used to evaluate cognitive capacity,<sup>153</sup> and appear to be just as precise.<sup>154</sup> The evidence does not support the claim that volitional control claims are categorically harder to assess, either in the clinic or in court, than other types of mental difficulties.<sup>155</sup> More

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150 At 842–843. See also Wettstein, Mulvey and Rogers, above n 81, at 21–27.

151 R Rogers, W Seman and CR Clark "Assessment of Criminal Responsibility: Initial Validation of the R-CRAS (Rogers Criminal Responsibility Assessment Scales) with the M'Naghten and GBMI (Guilty-But-Mentally Ill) Standards" (1986) 9 Int'l J L & Psychiatry 67 at 70.

152 RD Mackay *Mental Condition Defences in the Criminal Law* (Clarendon Press, Oxford, 1995) at 116 (citations omitted). See also Rogers, above n 149, at 841.

153 Richard E Redding "The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century" (2006) 56 Am U L Rev 51 at 106; and Ariane Zermatten and others "Impulsivity and Decision Making" (2005) 193 J Nerv Ment Dis 647 at 647–650.

154 Michael Stoll "Miles to Go before we Sleep: Arizona's 'Guilty Except Insane' Approach to the Insanity Defense and its Unrealized Promise" (2009) 97 Geo LJ 1767 at 1797–1798; and Maxwell Bennett "Criminal Law as it Pertains to 'Mentally Incompetent Defendants': A McNaughton Rule in the Light of Cognitive Neuroscience" (2009) 43 Aust NZ J Psychiatry 289 at 289–299.

155 See generally Wayne LaFare *Criminal Law* (4th ed, Thomson/West, Illinois, 2003) at 342; and Michael Phelps "The Search for the Optimum Definition of Criminal Insanity – the American Experience" (1977) 37 CRNS 88 at 88.

importantly, in 2004, contemporary neuroscience demonstrated that volitional control can be impaired "just as unambiguously as any other aspect of brain function".<sup>156</sup>

To finalise, there was no empirical evidence to suggest that C-insanity has a stronger scientific basis than V-insanity or to indicate that the claim of V-insanity can mislead the court more than the claim of C-insanity. Moreover, some scholars cast doubt on the idea that C-insanity has stronger scientific basis than V-insanity. Therefore, the assumption used to reject V-insanity – V-insanity is not scientifically as strong as C-insanity – is questionable and appears to lack empirical support.

Thus far, we have shown that opponents of V-insanity are demanding the scientific inquiry as the main criterion for establishing V-insanity, an inquiry that is not recognised as the standard for establishing other mental states, such as C-insanity and intent. In addition, we have argued that it is questionable to assume that C-insanity has scientific superiority over V-insanity; in fact, there is no clear reason to suppose that science can offer any clearer insights into cognitive states than volitional ones. If we are right about this, then it is appropriate to discuss the obvious inconsistency in the law's rejection of V-insanity and acceptance of C-insanity. We will provide that argument after reviewing the New Zealand commentary on the issue of V-insanity.

## **V THE RECENT POSITION OF V-INSANITY IN NEW ZEALAND**

In 2010, the New Zealand Law Commission (NZLC) reviewed the defence of V-insanity and rejected its inclusion into New Zealand law. After reviewing the United States' experience,<sup>157</sup> the NZLC noted two opposing views on the matter. On the one hand, it noted that the rejection of the defence in the United States may have been principally a policy decision to narrow the scope of the insanity defence. Proponents of this view also argue that C-insanity does not have a scientifically superior basis to V-insanity and psychiatrists are no less confident making volitional assessments than they are cognitive ones.<sup>158</sup> The opposing view was that of the American Psychiatric

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<sup>156</sup> Robert M Sapolsky "The Frontal Cortex and the Criminal Justice System" (2004) 359 *Philos Trans R Soc Lond B Biol Sci* 1787 at 1794. See also, Filippo, above n 63, at 293; Michael Louis Corrado "The Case for a Purely Volitional Insanity Defense" (2009) 42(2) *Tex Tech L Rev* 481 at 501–502.

<sup>157</sup> In the United States, in 1962, the insanity test which was adopted by the recommendation of the American Law Institute (ALI) included both C-insanity and V-insanity: see American Law Institute *Model Penal Code and Commentaries* (American Law Institute, Philadelphia, 1962) § 4.01. The test was widely adopted and used in the federal jurisdictions and the majority of states. In 1982, the Hinckley trial raised some controversies over the insanity defence and the American Law Institute standard. John Hinckley attempted to assassinate President Ronald Reagan and was acquitted under the standard. It is unknown whether Hinckley's acquittal was based on the cognitive or the volitional components of the standard: Rogers, above n 149, at 840. Hinckley's acquittal was followed by strong public outcry, demands for reform and sharp criticisms of experts' roles in the trial. The American Law Institute standard was reviewed and the outcome was the Insanity Defense Reform Act 18 USC § 17. This Act limited the insanity defence in the federal jurisdictions to C-insanity and many states removed V-insanity from their statutes.

<sup>158</sup> Mackay, above n 66, at 114–117 cited by Law Commission, above n 101, at 50.

Association, which claimed that, since "The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk",<sup>159</sup> a distinction between irresistible impulse and impulse unresisted was impossible. Finally, the NZLC concluded:<sup>160</sup>

We encountered some mixed views as to whether a volitional test ought to be included in the New Zealand defence but, on balance, it was opposed. We do not consider the arguments for introducing it sufficiently strong to outweigh reservations about whether it can be robustly applied in practice. We do not recommend it.

Interestingly, no further reasons were given for this conclusion.

### ***A Rejecting V-insanity is a Policy Decision***

It seems that the main reason for the NZLC's rejection lies in the difficulty of the line-drawing problem. We have already considered this argument and suggested that it is not clear why the difficulty is seen as an insurmountable difficulty for V-insanity, when New Zealand law does not require such certainty for other sorts of defences like C-insanity, or other mental states like intention. The fact that it may not be possible to determine with great accuracy whether understanding was actually lost in a particular case does not preclude New Zealand law from accepting C-insanity as a defence. Instead, the law makes do with inferences drawn from non-direct sources of evidence. However, with regard to V-insanity, New Zealand law seems to regard the line-drawing problem as an insurmountable obstacle. This is an inconsistency in law which will be elaborated in the concluding part of the article. Specifically, as Mackay pointed out, scientifically speaking, the C-insanity test is not superior to the V-insanity test.<sup>161</sup>

If the lack of direct evidence does not constitute an insurmountable obstacle in principle, then a second question may be whether there exist obstacles in practice to the recognition of the defence. Perhaps, the reason for the rejection is not merely the difficulty of distinguishing between impulses which are irresistible and ones which are not resisted. Perhaps, as Mackay suggests, there is an underlying policy reason to reject it:<sup>162</sup>

It would be preferable, therefore, if more emphasis were laid on the fact that the rejection of the volitional test was essentially a policy decision based primarily on a perceived need to narrow the scope of the insanity defence rather than the result of alleged difficulties which the assessment of volitional impairment [V-insanity] presents to psychiatrists.

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159 American Psychological Association, above n 148, at 22 cited by Law Commission, above n 101.

160 Law Commission, above n 101, at 50.

161 Mackay, above n 66, at 116.

162 At 117.

Freedman and Ferguson also suggest the rejection of V-insanity is a policy decision.<sup>163</sup>

Our intuition is that perhaps the rejection of V-insanity in New Zealand is a policy decision, mainly because the argument for rejecting the defence is not sufficiently strong. The emphasis is, however, on *perhaps*, because we do not know what is actually happening in the mind of authors of the NZLC report and New Zealand legislators. This is a law article and it is not our primary object to elaborate or speculate on the motives that lie behind policy decisions. Instead, the goal of this article is to examine the legal problem and propose some suggestions for adopting a new defence.

## **VI CONCLUSION: THE INCONSISTENCY OF THE LAW'S APPROACH IN REJECTING V-INSANITY BUT ACCEPTING C-INSANITY**

This article noted that the line-drawing problem is a recurring difficulty in some areas of the criminal law, particularly for establishing mens rea states such as intent, and mental state defences such as both C-insanity and V-insanity. As Abraham Goldstein stated, "Whether the issue is 'control' or 'knowledge' or 'intent' or 'negligence', it will be impossible to draw absolute lines."<sup>164</sup>

We thoroughly explained how C-insanity is established in law. To summarise, s 23 of the CA 1961 has three requirements for the establishment of an insanity defence. Firstly, establishing C-insanity is on the balance of probabilities, with the onus on D. That standard is lower than beyond reasonable doubt, which is the standard for the prosecution to meet when proving a crime. Both these standards are lower than complete certainty, a standard not required in law. Secondly, the jury are entitled to draw inferences as to D's state of mind. Such inferences are drawn from various types of evidence, namely medical evidence, circumstantial evidence and evidence of D's behaviour. Ultimately, the decision on C-insanity is for the judge or the jury to make. Thirdly, as the *Dixon* case showed, there is no emphasis on the scientific inquiry for establishing C-insanity. In other

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<sup>163</sup> Freedman mentions: "There is an obvious difficulty with the provocation defence that has led to the present state of affairs. How may one deter a person from indulging his or her 'excitable nature', or diminished capacity for control, merely by obligating that person to conform to a standard of self-restraint denied them by nature? Ought such a person fall outside the normal threshold or be judged on a standard relative to his or her subjective capacity for control in the face of provocation? The traditional response to such arguments has been a policy decision not to allow 'irresistible impulses' to lower the standard of conduct necessary to justify or excuse behaviour." CD Freedman "Restoring Order to the Reasonable Person Test in the Defence of Provocation" (1999) 10 KLJ 26 at 32 (citations omitted). In the same vein, Ferguson mentions: "It is clear to me that an insanity defence must recognize, at least on philosophic grounds, some level of both cognitive and volitional impairment. However, the public expectation that citizens must in general take personal responsibility for their conduct is an important value which is essential to the continued preservation of peace and order in our society. This public expectation must not be destroyed by setting the minimum capacity for responsibility too low, thereby allowing a large number of persons to escape this general expectation." Ferguson, above n 60, at 141.

<sup>164</sup> Goldstein, above n 57, at 77–78. See also Bronitt and McSherry, above n 61, at 250; and Stanley Yeo "The Insanity Defence in the Criminal Laws of the Commonwealth of Nations" (2008) 1 Sing JLS 241 at 254.

words, the law does not rely on scientific means to determine D's state of mind at the time of a crime. Instead, the common sense inquiry is sufficient.

Nevertheless, when it comes to V-insanity, legal scholars and perhaps the courts seem to demand evidence of the actual state of the accused's mind and, furthermore, seem to be requiring scientific evidence of this, rather than a common sense determination. Some scholars argue that rejecting V-insanity because of the difficulty of the line-drawing problem amounts to mistrust of the jury:<sup>165</sup>

The criticism of the volitional element in mental state defences has focused on the supposed impossibility of the jury's task to distinguish between an impulse that could not be resisted and an impulse that was not resisted. Yet, this is precisely the task the jury is set whenever an issue of involuntarism is raised. The task is clearly not impossible. The criticism of the volitional aspect really amounts to mistrust of the jury.

We are not saying that rejecting V-insanity because of the line-drawing problem necessarily amounts to mistrust of the trier of fact. Rather, we are emphasising the conspicuous inconsistency in New Zealand law; the inconsistency in rejecting V-insanity and accepting C-insanity.

In this article, we established that it is doubtful whether C-insanity is scientifically superior to V-insanity. In light of this fact, it is inconsistent if the law only accepts C-insanity and rejects V-insanity. As a matter of principle, there is no reason to restrict the defence of insanity to C-insanity. Therefore, the law's approach is noticeably inconsistent.

The problem of ascertaining, to a scientific standard, whether D could not understand his/her action (or the morality of his/her action) undoubtedly exists in C-insanity cases. However, although it may often not be possible to resolve this to a scientific standard, New Zealand law nevertheless recognises a cognitively-based defence of insanity. In doing so, it deals with that uncertainty all the time, or trusts the trier of fact to do so. The common sense inquiry, which is sharply in contrast with the scientific inquiry, has been deemed adequate for C-insanity. However, for distinguishing between impulses which are really irresistible (A who could not control him/herself) and those which are merely unresisted (B who could control him/herself but would not do so) opponents of V-insanity set a much higher threshold: the scientific inquiry standard – a type of investigation which is enormously difficult.<sup>166</sup> This is clear – the requirement of a higher standard – from the objections raised by opponents of the V-insanity defence.

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165 Ian Graham Campbell *Mental Disorder and Criminal Law in Australia and New Zealand* (Butterworths, Wellington, 1988) at 124.

166 The New South Wales Law Reform Commission, who recommended the inclusion of V-insanity in the Victorian jurisdiction, suggested that the matter of the line-drawing problem in V-insanity is ultimately to be decided by the fact-finders: New South Wales Law Reform Commission, above n 5, at 67.

This was clearly expressed by Laura Reider, who said:<sup>167</sup>

... the practical difficulty of requiring the criminal justice system to distinguish between offenders who lack the capacity to control their actions and offenders who merely refrain from using their ability to control their actions is not insurmountable. Indeed, the legal system already imposes this line-drawing burden in innumerable other contexts.

Another inconsistency is found in the Public Safety (Public Protection Orders) Act 2014 (PSPPOA 2014).<sup>168</sup> Before turning to the detailed element of the inconsistency, we need to describe the PSPPOA 2014. It empowers the New Zealand High Courts to issue a public protection order that would allow for the detention of a person in a secure facility.<sup>169</sup> In order to identify the issue of dangerousness in an individual who might pose a threat to society, the PSPPOA 2014 provided some criteria which are articulated in s 13. The PSPPOA 2014 allows evidence as to the respondent's behaviour including:<sup>170</sup>

(a) an intense drive or urge to commit a particular form of offending: [and] (b) limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties ...

In its advice on the Bill, the Department of Corrections, who appears to be broadly in charge of the drafting of s 13(2), suggests that:<sup>171</sup>

A psychological assessment of the offenders would be necessary to determine whether the characteristics that identify them as being at a very high risk of imminent and serious sexual or violent re-offending are present. This would include the use of psychometric and actuarial risk assessment procedures.

It seems that the New Zealand Government is confident that the above-mentioned traits can be detected with sufficient accuracy to justify a public protection order. If this is so, then it is justifiable to argue that if those traits can be identified, the basic condition for V-insanity – total loss of self-control – can also be sufficiently identified, though the line-drawing problem in V-insanity would still exist. Accepting that some traits can be sufficiently identified to form a public protection order,

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167 Laura Reider "Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories" (1998) 46 UCLA L Rev 289 at 308–309 (citations omitted). See also Edwin R Keedy "Irresistible Impulse as a Defense in the Criminal Law" (1952) 100 U Pa L Rev 956 at 990.

168 Public Safety (Public Protection Orders) Act 2014.

169 Section 13.

170 Section 13(2)(a)–(b).

171 Jane von Dadelszen *Regulatory Impact Statement Management of High Risk Sexual and Violent Offenders at End of Sentence* (Department of Corrections, March 2012) at [26].

but rejecting V-insanity because of the line-drawing problem, is obviously an inconsistency in the law.

Someone might object to our argument and propose that, for identifying the issue of dangerousness, the New Zealand law works on a probabilistic level. In other words, the PSPPOA 2014 is not suggesting that an individual who exhibits a severe disturbance in behavioural functioning, established by any of four criteria which are articulated in s 13(2), will definitely commit an offence, or is compelled to offend. What can be understood from s 13(2) is that the probability of committing a crime in an individual has increased significantly when any of those four criteria is established. Our response to the above-mentioned objection is that if the New Zealand Government adopted the probabilistic standard for establishing that some traits can be sufficiently discerned to form the foundation for a public protection order, the same standard can be adopted for establishing V-insanity.

Another argument is that the PSPPOA 2014 does not just require a confident prediction of future offending, but a finding of "limited self-regulatory capacity". Of course that is not the same thing as saying that the person has no control, nor does it tell us whether he had control on a particular occasion. However, it does suggest that volitional capacity in general is amenable to measurement in a manner that the law will rely on for important purposes. Therefore, perhaps it is not so much an inconsistency as an indication that what we are proposing is not entirely alien to New Zealand law, albeit that we are asking New Zealand law makers to go just a bit further. The law already recognises a class of individuals who have limited self-regulatory capacity. Is it such a big ask for this to be reflected in decisions about culpability as well as decisions about future dangerousness?

