The Future of Mental Health, Disability and Criminal Law

Essays in Honour of Emeritus Professor Bernadette McSherry

Edited by
Kay Wilson, Yvette Maker, Piers Gooding and Jamie Walvisch

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9 Whydunnit?

Causal Explanations in Sentencing Offenders With Mental Health Problems

Jamie Walvisch, Andrew Carroll, Tim Marsh and Jaydip Sarkar

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Introduction

Throughout her distinguished career, Bernadette McSherry has sought to ensure justice for individuals with mental health problems in both civil and criminal contexts. To achieve this goal, she has aimed to 'integrate the expertise of international and Australian mental health experts from a range of disciplines' to develop model frameworks that are supported by evidence and comply with international human rights (McSherry 2008: 2). In doing so, she has clarified many of the underlying legal principles in the area and has provided guidance on the appropriate roles of the various participants. It is in this spirit that this chapter is written. It draws on the expertise of a legal academic, a barrister and two forensic psychiatrists to address two key issues that arise when a person with mental health problems is convicted of a criminal offence: how should legal practitioners, mental health experts and judges understand the relationship, if any, between their mental health problems and their offending conduct? And what impact should that relationship have on the sentence imposed?

Before beginning our analysis of this complex issue, we think it is important to make clear that most individuals with mental health problems, including those with severe mental disorders, do not commit crimes. This was emphasised in the Final Report of the Royal Commission into Victoria's Mental Health System (2021), to which Bernadette McSherry served as a commissioner, which stated that:

> The existing body of research on mental illness and offending can be summarised in this way: 'most people with mental illnesses are not violent, most violent offenders are not mentally ill, and the strongest risk factors for violence (e.g. past violence) are shared by those with and without mental illnesses'.
>
> (Volume 3, 354, citing Skeem, Peterson and Silver 2011: 113)

The relationship between mental health problems and crime is highly complex (McSherry 2020: 573). It has been suggested that whether or not an

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individual's mental health problems create an additional risk of offending behaviour

> depends upon the type of diagnosis, the nature and severity of the symptoms present, whether the person is receiving treatment and care, if there is a past history of violence by the individual, the co-occurrence of antisocial personality disorder and substance misuse and the social, economic and cultural context in which an individual lives.
>
> (Thornicroft 2006: 139)

Although most people with mental health problems never engage in criminal offending, many convicted offenders have experienced mental health problems at some point during their lives (see e.g. Fazel and Seewald 2012). In common law countries such as Australia, England and Wales, the presence of mental health problems at the time of the offence or sentencing currently plays a key role in determining what penalty to impose on convicted offenders.[1] This makes it essential to ensure that the part (if any) that is played by mental health problems in an individual's offending behaviour is properly understood by all participants in the criminal justice system and is addressed in a principled manner. Not only will this help ensure the just outcomes that are central to McSherry's work, but it will also help to achieve the rehabilitative aims of the sentencing process, by providing judges with information that can assist them to properly tailor a sentence to the needs of the offender and the community. It is for this reason that we have written this chapter.

It is important to note that our focus is on the sentencing process. We are looking at individuals who have been convicted of one or more offences and who are going to have a penalty imposed upon them. This differs from two other matters which often arise when an individual with mental health problems comes into contact with the criminal justice system: whether they should be held responsible for their criminal conduct at all, which relates to the availability of the 'insanity' defence or its jurisdictional equivalent;[2] and whether they are fit to stand trial, which focuses on their capacity to understand and participate in the trial proceedings.[3] We note that Professor McSherry has addressed both of these related matters in her writings (see e.g. Carroll et al. 2008; Hopper and McSherry 2001; Gooding et al. 2017).

There are five parts to this chapter. Part One examines the ways in which Australian, English and Welsh sentencing courts currently assess the relationship between mental health problems and offending conduct, focussing in particular on the determination of the offender's culpability. While the connection between the offender's mental health and the offence they committed may also be important to other aspects of the sentencing determination – such as the judge's assessment of the offender's rehabilitative prospects, the appropriateness of imposing a deterrent sentence or the need to protect the community from the offender (see e.g. Walvisch 2018a) – it is in the culpability context that this connection assumes a central role.

Part Two considers the 'psycho-legal challenge' that arises whenever the courts place reliance on evidence from mental health experts in the sentencing context: the task of bridging the two worlds of 'sentencing law' and 'mental health science'. It addresses two aspects of the challenge that are especially relevant to criminal sentencing: the role played by moral evaluative considerations in determining the causal relationship between mental health problems and offending behaviour; and the relevance of 'indirect' causal factors.

Part Three focuses on the type of explanation that should be given to help courts determine whether an offender's mental health problems and offending behaviour are related, and if so how they are related. It suggests that experts should give 'possibility explanations' rather than 'necessity explanations' (Walker 1980) and explores the consequences of this suggestion for the form, content and limits of the evidence that is given. Part Four outlines a framework that experts can use to describe the strength of the causal relationship. Part Five concludes the chapter by considering the roles that legal practitioners and the courts should play in assessing the causal issue.

Part One: Current Approaches to Assessing the Causal Relationship

Various mechanisms have been put in place to try to limit the number of individuals with mental health problems who are tried and convicted in the ordinary way (Walvisch 2018b: 160). For example, where it appears that an individual with a mental health problem has committed a crime, the police may issue a caution rather than charge them. In some cases, they may qualify for a diversion programme (see e.g. Richardson and McSherry 2010). If they are charged, the individual may be found unfit to stand trial or not guilty on the basis of the 'insanity' defence. These measures are, however, only of limited effect: most individuals with mental health problems stand trial in the ordinary way and may be convicted or plead guilty. Where this occurs, the sentencing judge needs to determine how (if at all) the offender's mental health problems should affect the sentencing determination.

The Australian Approach

Across Australia, this matter is largely governed by the '*Verdins* principles' (see Walvisch, Carroll and Marsh 2021). These principles, which were enunciated by the Victorian Court of Appeal in the landmark case of *R v Verdins* (2007) (*Verdins*), hold that mental health problems can be relevant to sentencing in at least six ways. They can:

- reduce the offender's moral culpability, thereby affecting the punishment that is just in the circumstances and the importance of denunciation as a sentencing consideration;
- influence the kind of sentence that should be imposed, or the conditions under which it should be served;

- moderate or eliminate the need for general deterrence as a sentencing consideration;
- moderate or eliminate the need for specific deterrence as a sentencing consideration;
- make a sentence weigh more heavily on the offender than on a person in normal health, thereby affecting the determination of a proportionate sentence; or
- create a serious risk of imprisonment having a significant adverse effect on the offender's mental health, suggesting the need to reduce the sanction.

The principles apply to any proceeding in which 'the offender is shown to have been suffering at the time of the offence (and/or to be suffering at the time of sentencing) from a mental disorder or abnormality or an impairment of mental function' (*Verdins*: 271). There is no need for an offender to have a diagnosable mental disorder, or for that condition to be of a particular level of gravity, for the principles to apply (although in practice a diagnosable disorder is almost invariably required). What matters is 'what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time' (*Verdins*: 271). In particular, sentencing courts need to consider 'how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances – that is, at the time of the offending or in the lead-up to it – or is likely to affect him/her in the future' (*Verdins*: 272).

In the years since the *Verdins* decision was handed down, these principles have been accepted in all Australian jurisdictions, as well as in New Zealand (Walvisch and Carroll 2017). They have been cited in over 1,000 cases, most of which have focussed on *Verdins* Principle 1: the reduction of the offender's moral culpability. The Court in *Verdins* (275) offered further guidance on this principle, stating that an offender's moral culpability may be reduced if, at the time of the offence, their mental condition had any of the following effects:

(a) impairing the offender's ability to exercise appropriate judgment;
(b) impairing the offender's ability to make calm and rational choices or to think clearly;
(c) making the offender disinhibited;
(d) impairing the offender's ability to appreciate the wrongfulness of the conduct;
(e) obscuring the intent to commit the offence;
(f) contributing (causally) to the commission of the offence.

This list essentially describes ways in which the courts' general assumption that 'a person who commits a criminal offence is a rational agent who calculates the benefits and costs of criminal behaviour and then makes a considered choice to commit a criminal offence' (Edney 2006: 253) can be challenged by the effects

of a mental health problem. While the list was stated to be non-exhaustive, these '*Verdins* effects' have been the focus of almost all subsequent cases that have addressed *Verdins* Principle 1 (Walvisch 2010: 191).

In the current context, point (f) is of particular significance, as it focuses on the *causal link* between the offender's impairment and the commission of the offence. In explicating this point, courts have held that an offender's moral culpability will only be reduced if 'the disorder was operative at the time of the offence and . . . it contributed to, in some way is connected to or explains the offending' (*Arthars v R* (2013): 614).

For the *Verdins* principles to apply, there needs to be specific expert evidence about the nature, extent and effects of the offender's mental health problems (*O'Connor v R* [2014]: para 65). However, such evidence must be thoroughly scrutinised by the judge, having regard to matters such as the witness's expertise and the information upon which it was based (*Ross v R* [2015]). It is for the judge to determine whether to accept the evidence and how to use it.

The English Approach

A similar approach has been taken to sentencing offenders with mental health problems in England and Wales. In October 2020, the Sentencing Council for England and Wales' (Sentencing Council) guideline on *Sentencing Offenders with Mental Disorders, Developmental Disorders, or Neurological Impairments* came into effect (the 'sentencing guideline').[4] This guideline states that '[c]ulpability may be reduced if an offender was at the time of the offence suffering from an impairment or disorder (or combination of impairments or disorders) such as those listed in Annex A' (Sentencing Council for England and Wales 2020: para 9). Annex A lists various mental disorders, neurological impairments and developmental disorders, such as schizophrenia, bipolar disorder, intellectual disability, autism spectrum disorder, substance use disorder, personality disorders and the dementias.

The sentencing guideline states that '[c]ulpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour' (Sentencing Council for England and Wales 2020: para 11). It goes on to list a number of questions that courts may find to be a 'useful starting point' in assessing an offender's culpability, such as whether the offender's impairment or disorder impaired their ability to exercise appropriate judgment, make rational choices, or understand the nature and consequences of their actions; or whether it caused them to behave in a disinhibited way (Sentencing Council for England and Wales 2020: para 15).

The guideline makes it clear that the decision about culpability is for the sentencer to make, after careful analysis of all of the circumstances of the case and all relevant materials (Sentencing Council for England and Wales 2020: paras 12–13). While expert evidence on the issue may be very valuable, and

must be considered, 'it is the duty of the sentencer to make their own decision, and the court is not bound to follow expert opinion if there are compelling reasons to set it aside' (Sentencing Council for England and Wales 2020: para 14).

Similarities and Differences Between the Australian and English Approaches

The similarities between the Australian and English approaches are readily apparent. In both jurisdictions there is:

- an acknowledgment of the possibility that an offender's mental health problems may reduce their culpability for the offence;
- a requirement that there be a relationship between the offender's mental health problems and their offending behaviour;
- an illustration of the various ways in which this relationship may be manifest, such as through the impact of the offender's mental health problems on their cognitive or volitional capacities; and
- a division of labour between the role of the expert witness and the sentencer, with the final determination falling within the sentencer's purview.

There is, however, one key difference between the jurisdictions. Although the English guideline acknowledges that it is for the sentencer to determine whether the offender's mental health problems reduced their culpability, English courts allow mental health experts to directly opine on this issue (Hallett 2020). By contrast, Australian courts have repeatedly emphasised that mental health experts should not comment on moral culpability, as it is a legal issue and thus outside their area of expertise (see e.g. *Wright v R* [2015]). In Victoria, this has been reinforced in the Supreme Court Practice Note on *Sentencing Hearings: Expert Reports on Mental Functioning of Offenders*, which explicitly states that it is beyond an expert witness's scope to comment on this matter (Supreme Court of Victoria 2017: section 7.3). In our view, this division of responsibility makes sense: culpability is a value-laden construct, influenced by a range of factors that go well beyond clinical expertise (Walvisch and Carroll 2022: 130).

Part Two: The 'Psycho-Legal Challenge' in Assessing the Causal Relationship

There is a 'psycho-legal challenge' whenever the courts place reliance on evidence from mental health experts (generally forensic psychiatrists or psychologists) in the sentencing context: the task of bridging the two worlds of 'sentencing law' and 'mental health science', with their quite distinct aims, histories and epistemological frameworks.[5] Communication across the gap that separates those worlds is often suboptimal – beset by misunderstandings and

consternation on both sides. In this section we briefly consider two aspects of this challenge that are especially relevant to criminal sentencing: the role played by moral evaluative considerations in determining the causal relationship between mental health problems and offending behaviour; and the relevance of 'indirect' causal factors.

The Role of Moral Evaluative Considerations

One of the court's key foci when sentencing offenders with mental health problems is their *moral culpability*. It is important to distinguish this from their *legal responsibility*. Unlike individuals who are found not guilty by reason of 'insanity', individuals who face the sentencing process have been held legally responsible for their behaviour.[6] They have been found guilty and are to be punished for their crime in some way. However, due to their mental health problems, they may not be considered as blameworthy for their behaviour as they would have been had their mental functioning not been impaired. Consequently, the court may not consider it appropriate to punish them as harshly as other offenders.

The Victorian Court of Appeal explained the concept of moral culpability, and its relationship with mental health conditions, in *DPP v Weidlich* [2008] (para 15):

> Generally, the measure of culpability of an offender under the criminal law rests upon the extent to which the individual can be seen to be personally responsible for both the prohibited acts and their consequences. Little thought is required to appreciate that the greater the level of insight and understanding possessed by him or her concerning the act and its potential harm, the higher becomes the level of culpability for then deliberately engaging in the conduct involved. The Court in . . . Verdins recognised that sometimes as a consequence of the contribution made to the commission of an offence by a mental disorder from which a perpetrator was suffering at the time, it would be unjust to attribute to the offender a full measure of personal responsibility.

It can be seen from this passage that for an offender's culpability to be reduced, there needs to be *some kind of connection* between their mental health problem(s) and their offending behaviour. Without such a connection they will be equally as blameworthy as other offenders, despite the existence of any mental disorder. This does not, however, mean the same sanction should be imposed on them: as noted earlier, there are various other ways in which an offender's mental health problems may properly affect the sentencing determination. For example, an offender's sanction may be reduced if, due to their mental health problems, they would experience imprisonment as disproportionately burdensome, even if there is no relationship between their mental health problems and their offending behaviour.

Although not made clear by the courts, their determination that an offender's mental health condition was (or was not) a relevant 'cause' of their offending behaviour seems to be based on moral evaluative considerations. This can be clearly seen in a case such as *Paparone v R* [2000], in which the offender pleaded guilty to possessing and manufacturing amphetamines. He had been diagnosed with attention deficit disorder, and as outlined in the appellate judgment, his counsel argued that 'the attention deficit disorder had resulted in the [offender] taking drugs on a self-help basis for the purpose of alleviating the symptoms of his disorder and that this had resulted in the circumstances leading to the offences' (para 10). This argument was rejected by the original sentencing judge, who held that 'the disorder had no necessary connection with the manufacture or possession of illicit drugs' (para 10). The majority of the Western Australian Court of Appeal agreed, holding (para 54, italics added):

> There was no causal link *of the required kind* between the applicant's attention deficit disorder and his offending behaviour. He did not commence to manufacture, consume and sell amphetamines because he suffered from the disorder, but by reason of his deliberate choice, initially taken to obtain relief from the symptoms of the disorder. There was never any suggestion that the disorder precluded him from seeking treatment and the prescription of appropriate medication.

In reaching this conclusion, the court has rejected a purely fact-based (or 'but for') approach to causation. It has not accepted that the offender's mental disorder caused the offending behaviour because the offence would not have happened in its absence (as *but for* the attention deficit disorder he would not have needed the drugs for self-help purposes, and so would not have manufactured or possessed them). Instead, the court has *evaluated* the various factors that contributed to his behaviour, and has decided that it was his choice to take illicit drugs, rather than to seek treatment, which was the most significant factor. It has consequently labelled this decision the 'cause' of his actions. The phrase 'of the required kind' is a tacit acknowledgment of the evaluative nature of the decision-making.

A similar approach can be seen in *Carroll v R* [2011], in which the Victorian Court of Appeal stated (para 20, italics added):

> Where reliance is placed on proposition 1 [of *Verdins*], concerning moral culpability, the question for the Court is whether the evidence establishes – on the balance of probabilities – that the impairment of mental functioning did contribute to the offending *in such a way as to render the offender less blameworthy* for the offending than he/she would otherwise have been. Very often, this question is approached as one of causation. Did the evidence establish a causal connection between the impairment of mental functioning and the offending for which sentence is to be imposed?

The moral evaluative nature of legal determinations regarding causation has been commented on by Jane Stapleton, who observes that we use the term causation when addressing 'transitions' that have occurred in the world. She notes that while such transitions may have been the result of a myriad of factors, the courts must decide 'which of the factors that, it is agreed, brought about the transition seem important in the context of a legal dispute about responsibility' (Stapleton 2002: 18). Furthermore, '[w]here, as in law, the purpose at hand is the moral or policy evaluation of human conduct, this . . . inquiry can never be reduced to a question of fact. Indeed, it is only reached after the facts have been agreed or decided' (Stapleton 2002: 18).

Once the evaluative nature of causal determinations is accepted, it becomes clear that the conventional legal 'but for' test of causation will not be sufficient to fully meet the needs of the court when assessing the connection between mental health problems and offending behaviour. The issue the court is seeking to address is whether the offender *should* be considered less blameworthy for their behaviour because of their mental health problems – a moral evaluative question, the answer to which may be heavily influenced by broader public policy concerns. This requires consideration of various other factors such as the cause of the condition, the nature and strength of its impact on the offender's cognitive and volitional capacities, the offender's insight into their condition, and the opportunities the offender had to address the condition prior to offending (including the social and economic circumstances that shaped those opportunities) (Walvisch 2023).

This has consequences for the role that expert mental health evidence should play in a sentencing hearing. In our view, matters of moral evaluation sit outside a mental health expert's field of expertise and hence should not be directly opined on (contrary to the approach that is currently taken in England and Wales). Expert mental health evidence on this issue should be limited to clarifying the ways in which an offender's moral reasoning and self-control may have been affected by impaired mental functioning, such as by way of the '*Verdins* effects'. It is for the judge to determine whether, in light of that evidence, the connection was of the right kind to reduce the offender's blameworthiness.

The Relevance of 'Indirect' Causal Factors

When providing an explanation of offending behaviour, mental health experts ideally employ the clinical skill of 'formulation': an attempt at explaining that behaviour, to the degree possible, on the basis of evidence-based bio-psychosocial variables (including mental disorder) in the context of the individual's whole life. Such formulations may take various forms (Weerasekera 1993), but generally involve:

- exposition of symptoms of mental disorder and how they have varied over time;

- description of interactions – often involving bidirectional and synergistic causal relationships – between
  - the effects of 'comorbid' mental disorders diagnosed in the same person (for example, interactions between a mood disorder, substance use disorder and personality disorder); and
  - situational factors (such as interpersonal stress and environmental context) and the effects of mental disorders; and
- description of the effects of enduring psychopathology (such as personality disorder or neurocognitive disorder) that act as predisposing/vulnerability factors for certain adverse outcomes, including offending behaviour.

Inevitably, a significant degree of hypothesising and reasoned speculation is involved in this task, given the inherent limits on what we can ever know about past events (Sadler 2002).

The ways in which the interaction between enduring 'background' personality-based variables and temporary situational factors can influence the court's determination of moral culpability is well illustrated in the following passage, in which the judge is passing sentence on a young woman who killed a previously unknown man, Mr Rathod:

> It is abundantly clear from all of the evidence that you have a profound personality disorder and impaired mental functioning particularly when you are in an aroused state. . . .
>
> The prosecution submitted that whilst *Verdins* principles can apply in an appropriate case, there is no realistic connection or causal link in your case. I disagree with the proposition that there is no realistic connection or causal link.
>
> I am satisfied that the disorder and its profound psychological deficits were active at the time of the offending and significantly impaired your mental functioning. . . .
>
> In your case, once you had reached an acute level of anger and were in an aroused state, your emotional dysregulation made it extremely difficult for you to control the impulse to act out that anger so that while you were aware that strangling Mr Rathod was wrong and you knew what you were doing and could in fact organise the steps that led to the actions which caused Mr Rathod's death, I am satisfied that your cognitive state (that is your capacity to think clearly and logically about your actions) was likely to have been severely impaired, particularly at the time of the doing of the act. Furthermore, your reduced capacity to experience and express empathy meant that you were not sufficiently responsive to Mr Rathod's distress to stop.
>
> In all the circumstances, your moral culpability for the offending is significantly reduced by reason of your severe personality disorder, which relevantly impaired your mental functioning at the time. As a result your sentence must be significantly moderated.
>
> (*R v Dolheguy* [2020]: paras 54–59)

As noted earlier, expert formulations should not seek to usurp the court's role in determining whether the causal connection was of a kind that is appropriate to reduce the offender's culpability. Nonetheless, expert opinions should be of practical utility to the courts – an aim that is facilitated by clarity about what factors the court may consider to be relevant.

It has been made clear that the impairment does not need to have been the *sole* cause of the offence. Instead, it must be shown that there was a 'realistic' (*R v Vuadreu* [2009]: para 37) or 'sufficient' (Sentencing Council for England and Wales 2020: para 11) connection between the impairment and the offending, or that the impairment 'contributed to' (*DPP v Patterson* [2009] VSCA 222) the offending in some way. Unfortunately, the law has not always provided consistent or clear guidance about the requisite nature and extent of this connection.

Some cases have suggested that moral culpability will not be reduced where the impairment only formed the 'background' to the commission of the offence (see e.g. *Bowen v R* [2011]), or where its contribution was 'indirect' (see e.g. *R v Surtees* [2022]): that *direct* causation of offending is required. For example, where an offender with a mental disorder was under the influence of drugs at the time of the offence, defence counsel may argue that their mental disorder predisposed them to use drugs, the effects of which in turn resulted in offending behaviour. Courts have consistently refused to mitigate on this basis, due to the 'indirect' contribution made by the mental disorder (see e.g. *Johnston v R* [2013]).

The argument that indirect causes do not count for mitigation seeks to distinguish between:

- direct causation: manifestations of mental disorder → offending behaviour; and
- indirect causation: manifestations of mental disorder → consequences (in terms of behavioural choices, such as ingestion of illicit drugs or in terms of other enduring vulnerabilities) → offending behaviour.

It is not clear, however, why the indirect nature of the contribution should preclude mitigation. The fact that the cause of an offender's conduct was indirect does not mean that it lacked significance. It will often be the case that an offender's mental disorder will greatly increase their vulnerability to choose to engage in offending behaviour, playing a crucial, but indirect, causative role in the offence. Examples of such indirect relationships would include:

- Post Traumatic Stress Disorder (PTSD) → Hypervigilance to threat → increased vulnerability to serious reactive violence if threatened;
- Major Depression → Reduced impulse control and fragile self-esteem → increased vulnerability to angry aggression if humiliated;
- Intellectual Disability → Reduced capacity for consequential thinking → increased vulnerability to reckless substance use → increased vulnerability to offending due to intoxication.

In the context of systems science, when analysing adverse outcomes such as aviation accidents, best practice is to take into account enduring background factors ('latent conditions') that confer vulnerability to future adverse outcomes when the system is under stress (Reason 2000). If we analogise this approach to the current context, offending behaviour can be considered to be an adverse outcome arising in a complex 'system' represented by an offender with an enduring mental disorder attempting to function in society. Their disorder can be seen as a 'latent condition' that renders the person vulnerable to the adverse outcome of offending. It makes sense to take such a disorder into account when analysing the offending behaviour, even if its impact is indirect: an explanatory framework that simply ignores the role of such factors because of their indirect nature is diminished.

Whilst there may be valid *policy* grounds for deciding, for example, that moral culpability is not reduced where the offender's mental disorder predisposed them to use drugs, this is a policy decision about the usage of illicit drugs rather than about the significance of the mental disorder to, or its direct relationship with, the offending behaviour. To limit mitigation *a priori* to those cases where there are no intervening mediating variables between symptoms of the disorder and the offending also seems to be contrary to the spirit of *Verdins*, a decision that nowhere sought to set such a limitation.

Hence, rather than focussing on whether the causal connection was direct or indirect, it would be preferable for sentencing judges to focus on whether the connection was *sufficient* to reduce the offender's moral culpability. As noted earlier, that is a moral evaluative question, appropriately influenced by social policy concerns. It not only requires a nuanced consideration of the relationship between the mental health condition and the offending behaviour, but also a consideration of the various factors mentioned in the previous section, such as the aetiology of the condition and the nature and strength of its impact on the offender's cognitive and volitional capacities. In the next section we consider the type of causal explanation that should be given to help the judge make this determination.

Part Three: Using 'Possibility Explanations' to Explain the Causal Relationship

Nigel Walker's (1980) distinction between 'necessity explanations' and 'possibility explanations' provides a useful starting point for addressing the way in which mental health experts should explain the causal relationship (if any) between mental health problems and offending behaviour. 'Necessity explanations' answer the question 'why is or was that *necessarily* so?' and apply when a particular set of circumstances *necessarily* leads to certain consequences. Such explanations are the foundation of the physical sciences: an example from the realm of chemistry is elemental sodium being added to water, which *necessarily* results in an exothermic reaction releasing heat and light.

Such causal pathways have several characteristics:

- they are readily replicated: one can be confident that a repetition of the addition of sodium to water will *necessarily* have the same outcome;
- the causal explanation can be given in terms of a clear, well-established mechanism (in this case, electron exchange with consequent energy release);
- there is a direct relationship between the antecedent variables and the consequential outcome that can be summarised in equation form ($2Na + 2H_20 \rightarrow 2NaOH + H_2$); and
- the causal explanation is 'values free' – unaffected by potential cultural biases and other peculiarities of perspective of the person doing the explaining, and existing outside of any moral framework. For example, it would be absurd to blame the chemical ingredients of a bomb for the deaths inflicted by a terrorist.

By contrast, 'possibility explanations' answer the question 'how was that *possible*?' Such explanations are appropriate where the variables involved, and the interrelationships between them, are not replicable and are so complex that a simple, linear, equation-like assertion, directly linking antecedent conditions to consequent effects, will not be satisfactory. In such circumstances it is not possible to assert that a certain outcome was *inevitable*: the most that can be achieved is an account which adequately explains how that result *could* have occurred.

Walker (1980) notes that the complexity of human behaviour – including criminal behaviour – makes 'necessity explanations' for human conduct (including offending) impossible. Thus, the challenge of explaining, and hence linking potential causal variables to offending behaviour is akin to the challenge faced by a historian in explaining the outbreak of a war, not the challenge faced by a chemist in explaining an explosive reaction. All that can be realistically provided by a forensic mental health expert is a possibility explanation that explains how the relevant mental health problems could have contributed to the offending behaviour in the circumstances. This has implications for the form, content and limits of mental health evidence, as outlined in the following sections.

Form

Possibility explanations need to be presented in narrative form (Walker 1980). Unlike chemical reactions, the variables involved and the complex interrelationships between those variables are such that linear, equation-like assertions are not feasible.

In the sentencing context, this means that mental health experts should endeavour to construct a narrative account of the relationship between mental health problems and offending (if present) which is clinically convincing, best

fits the known facts and is held together by a clear logical thread: the path of reasoning. Ideally, the result will be a persuasive formulation built with empathy and clinical logic; consistent with the agreed factual foundation, but a *story*, rather than the ultimate complete version of 'the true cause' of the offence. Such stories can help to meet the psycho-legal challenge by focussing on factors such as the likely aetiology of any condition, any opportunities the offender may have had to address the condition prior to offending and the offender's insight into their condition, alongside evidence concerning the nature and strength of the impairment. The task is akin to creating a movie – developing a longitudinal, multi-perspectival account based on the collateral materials available to the forensic expert and the offender's lived experiences – rather than merely providing a snapshot of the cross-sectional variables at play at the time of the offence itself.

It is rare for such accounts to be simple. Unlike the necessity explanations underpinning chemical processes, possibility explanations of criminal offending generally involve multiple elements interacting in complex ways. Consequently, courts should be suspicious of one-dimensional explanations proffered by counsel which seek to oversimplify the story.

Content

While providing a possibility explanation necessarily involves an element of speculation, this does not give licence to the expert to be vague or unconstrained in their opinion. Notwithstanding the fact that forensic experts are dealing with states of affairs that are not replicable and are delivering opinions that are narrative rather than equation-like in form, the task must nonetheless be undertaken with scientific rigour. The story that is told about the *individual* offender must be built upon a solid foundation of empirical knowledge, based on evidence derived from group-based data. The way in which the expert's evidence draws out the causal relationship between the offender's mental health problems and their offending behaviour must be consistent with the evidence base – the underlying 'framework evidence' (Faigman, Monahan and Slobogin 2014) – regarding the relevant variables. For example, evidence regarding the relationship between delusions of infidelity and serious violence (Mullen 1995) may support an account in which morbid jealousy plays an important causal role in the commission of a specific violent offence.

Limits

Unlike necessity explanations, possibility explanations are not susceptible to scientific falsifiability; the relevant concatenation of circumstances can never be repeated. Consequently, a persuasive possibility explanation concerning mental health problems and offending behaviour will clarify the limits about what can and cannot be meaningfully asserted.

Persuasiveness will hinge on consistency with what is known, both about the accepted facts of the case itself and about the relevant underlying framework evidence. In some cases, this constraint may set limits on the extent to which any given offence can be satisfactorily explained to the courts at all. A logical pathway of reasoning is key, and specious claims of certainty are unlikely to help meet the psycho-legal challenge. It is preferable to acknowledge the broad confidence limits inherent in possibility explanations.

One key limitation arises from the fact that possibility explanations, unlike necessity explanations, are not underpinned by well-established mechanistic processes. We know next to nothing about the psychophysiological processes spanning and bridging the gap between, for example, a disrespectful insult and the decision to throw a punch towards a victim. The best that can be generally hoped for is a resort to common sense 'folk' psychological processes, bolstered by relevant framework evidence. These limits are intrinsic to the nature of the causal explanation itself and not indicative of inadequate expert skills.

Another limitation of possibility explanations arises from their subjective and plural nature. Just as different historians have emphasised diverse variables as being central to the genesis of World War One (Stone 2009), different mental health experts may legitimately emphasise diverse factors as being causally relevant to a particular offence. This similarity between the work of mental health experts and historians was commented on by John Z Sadler (2002: 55), who noted how mental health experts seeking to explain a past event by drawing upon a range of evidentiary materials 'must *select* and *order* the priority, importance or salience of such materials, a core task of history-writing, lawyering or doctoring that is inherently subjective'. Sadler (2002: 55) asserts that this process of selection and prioritisation is not 'arbitrary or whimsical', and it is not the case that 'just *any* conclusions about cases can be drawn'; nonetheless, 'more than one set of potential conclusions may exist within the discipline's set of methodological constraints'. In light of this, mental health experts should acknowledge (at least to themselves) that their opinions, however honest and evidence-based, will be influenced by their own personal, subjective values.

Part Four: Describing the Strength of the 'Causal Relationship'

While it is not the role of a mental health expert to determine whether the relationship between mental health problems and offending behaviour is sufficient to warrant mitigation, experts should provide a clear and cogent opinion regarding the strength and nature (if any) of the causal connection. In practice, given that we are dealing with states of affairs that are not replicable, providing such an opinion requires the forensic expert to engage in a mental exercise that involves a degree of hypothesising and speculation; this includes conducting a counterfactual 're-run' of the events and conditions antecedent to the offending *in the absence* of the mental disorder of concern. To the extent

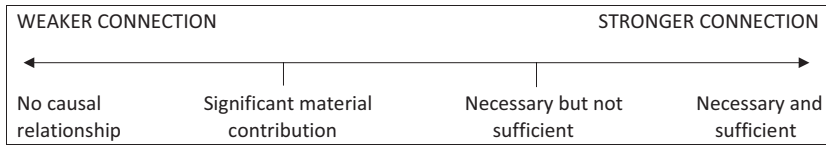

Figure 9.1 Spectrum of causal relationships

that the offending remains explicable in the absence of that mental disorder, the causal connection between the disorder and the offending can be considered to be correspondingly weaker.

Although there is often a complex interplay between multiple mental disorders diagnosed within the same offender, in practice courts sometimes require an expert to opine on the strength of *each* disorder's relationship to the offending behaviour. This is particularly likely to be the case where one of the disorders is a substance use disorder, due to the different policy considerations raised by such disorders (see earlier). This mental exercise may therefore need to be carried out more than once.

The strength of the causal relationship exists on a continuous spectrum, from no causal relationship to a necessary and sufficient relationship (see Figure 9.1). However, there is practical utility in delineating four distinct degrees of 'strength of causal relationship': no causal relationship; significant material contribution; necessary but not sufficient; necessary and sufficient. Descriptions of these categories are presented next. It is important to note, however, that while such categories may help mental health practitioners to explain the connection between an offender's mental health problems and their offending behaviour, they should *not* be taken as directly mapping onto any particular *legal* outcomes (such as justifying a particular degree of mitigation): that is a judicial determination that will depend on the sentencing judge's interpretation of the specific details of the case.

No Causal Relationship

At one end of the spectrum, there will be cases where an expert concludes that there is no causal relationship between the alleged mental disorder and the offending behaviour. This may be because, in their view:

- the offender did not have a mental disorder at the time of the offence; or
- the offending still would have occurred even in the absence of mental disorder; or
- the offending and the mental disorder simply co-occurred due to a common third factor, such as voluntary drug use; or
- there is no plausible mechanism to link the disorder with the offending.

The case of *R v Hayes* [2010] provides a useful illustration. The offender in that case had been diagnosed with borderline personality disorder, which a

mental health expert considered was likely to make her 'reckless and dangerously impulsive' and to act 'without thinking first about the consequences'; she was also diagnosed with an adjustment disorder. However, the offending in question – a series of systematic fraud offences – was not impulsive in nature and clearly required premeditation and planning. Consequently, there was not found to be any causal connection between her disorders and the offending.

Significant Material Contribution

Moving along the spectrum, there will be cases in which an expert does not find an adequate basis to confidently assert that the mental disorder was a *necessary* part of the causal matrix that explains the offending behaviour, but concludes that the disorder made a significant material contribution to that behaviour. The concept of 'material contribution' has long been accepted as grounds for a causal relationship in the realm of civil tort law: see e.g. *Bonnington Castings v Wardlaw* [1956]. In these cases, the offending *may* still have occurred even in the absence of the mental disorder; however, the disorder made a significant contribution that made the offending more likely.

Many cases that come before the courts fall within this category. This includes cases in which mental disorder is a background, 'indirect' vulnerability factor, rather than a source of symptoms that 'directly' drove the offending behaviour. The case of *DPP v Missen* [2019] provides an illustration. In that case, the offence – the murder of a father by his adult son – occurred in the context of complex household dynamics, described by the judge as 'like a tinderbox' (para 12). Although the offence was not directly driven by any identifiable psychiatric symptom, it was found that the offender's propensity for serious violence had been influenced by a range of background mental health conditions (major depressive disorder, methamphetamine use disorder and post-traumatic stress disorder) acting in a mutually synergistic fashion and 'contributing to the episode of rage that erupted' at the time of the killing (para 60).

Necessary but Not Sufficient

Moving further along the spectrum, there will be cases in which a mental health expert concludes that the offending would not have occurred in the absence of the mental disorder, but that other causal factors were also involved. In such cases, the mental disorder can be considered to be a necessary, but not sufficient, causal factor.

The case of *DPP v Brown* [2020], in which the offender engaged in repeated acts of arson, provides an illustration. While it was accepted that the offender's severe personality disorder was a necessary element in explaining her repeated fire-setting, her instrumental goal of wanting to live in a custodial environment was also considered to be an essential part of the causal explanation for the offending.

Necessary and Sufficient

There will be some cases in which an expert concludes that the offending would not have occurred in the absence of the mental disorder, and that no other factors of more than negligible causal significance were present. In many, but not all, such cases, a defence of 'insanity' or its equivalent may be viable. Where the defence is not available, or where an individual chooses not to avail themselves of the defence,[7] their disorder will need to be taken into account in sentencing.

The case of *DPP v UA* [2018] provides an illustration. In that case the offender experienced a schizophrenic illness characterised by emotionally laden delusions regarding family members. In the midst of an acute relapse, she stabbed and killed her young daughter. While she could have raised the defence of mental impairment (Victoria's version of the 'insanity' defence), she chose to plead guilty to infanticide. In sentencing her for this offence, it was accepted that the offending would not have occurred in the absence of her mental disorder, and that there were no other significant factors underlying her conduct.

Part Five: The Role of Legal Practitioners and the Court in Addressing Causation

Assessing the causal relationship between an offender's mental health problems and offending behaviour is not an easy task. In most cases, the causal matrix will be complex. A mental disorder experienced by an offender is likely to:

- have a multiplicity of effects on their state of mind and behavioural propensities; and
- impact upon, and be impacted by:
    - situational factors (such as interpersonal relational dynamics or availability of psychiatric treatment);
    - behavioural choices (such as substance use or decisions to seek psychiatric treatment); and
    - comorbid disorders, impairments and disabilities – whether physical or psychological (and including enduring disorders that act as vulnerability factors).

The relationships between mental disorders and the preceding factors may involve complex bidirectional processes. Given this complexity, it is almost always possible to argue, where a diagnosis has been made, that there is at least *some* causal connection (in the broad sense) between an offender's mental health problems and the offending behaviour. Conversely, it is also generally possible to argue that it was 'really' something *other* than the mental disorder that *caused* the offending behaviour.

In an adversarial system, such as exists in countries like Australia, England and Wales, the participants' role in the system will influence the way in which they deal with this complexity. It is the sentencing judge's role to determine the strength of the connection. In doing so, they may find the spectrum presented in Part Four to be a useful tool. As noted earlier, however, the strength of the causal relationship is not determinative of the issue: sentencing judges must also make a moral evaluation of whether that relationship was of the appropriate kind to mitigate the offender's culpability. This may involve consideration of various factors such as the offender's conduct prior to the offence (for example, the use of illicit drugs) and the opportunities the offender had to address their mental health condition (Walvisch 2023).

The role of prosecuting and defence counsel is to assist the judge to make these assessments. They should do this by presenting expert evidence that addresses the relevant issues and by constructing a narrative that suits their forensic goals. Defence counsel's role is to present the strongest mitigating arguments on their client's behalf. Where the offender has mental health problems, the greatest mitigating force will be offered by demonstrating that the offender's circumstances fall within one or more of the established categories of mitigation (such as those set out in *Verdins* or the sentencing guideline). Consequently, the primary task of defence counsel should be to relate the available expert evidence to those categories.

As noted in Part One, there are various bases on which a sanction may be reduced due to the presence of mental health problems. For example, a judge may decide that there is less need for a deterrent sentence, or that a lesser sentence should be imposed due to the likelihood that imprisonment will be more burdensome simply because of the presence of a mental disorder. The case law in this area indicates, however, that the biggest sentencing reduction tends to flow from establishing that there was a strong causal relationship between the offender's mental health problems and their offending behaviour, and consequently that their moral culpability was substantially reduced. Defence counsel should therefore seek to locate the causal relationship as far to the right of the spectrum described in Part Four as is supported by the evidence.

Where the proximate cause of the offending seems to have been a factor unrelated to the offender's mental health problems, defence counsel may seek to develop a narrative that explains how the offender's mental health problems contributed in a contextual fashion to the offender being in a situation that was productive of the offending (thereby demonstrating that they made a significant material contribution to the offending behaviour). For example, it may be argued that a diagnosis of a mental disorder in early adulthood led to the offender's estrangement from their family, an unstable housing situation and a drug addiction, which in turn led to the offending behaviour.

The narrative should be constructed in a way that appeals to both the mental health-specific sentencing principles and a more generalised assessment of the offender's moral blameworthiness. This is because even if a case does not

fall within the scope of the *Verdins* principles or the sentencing guideline, the presence of mental health problems may nonetheless be relevant to a sentencing judge's global assessment of the offender's culpability. It may help to explain who the individual is as an offender, and how they have come to be in their current situation (see e.g. *DPP v O'Neill* (2015)). Presenting this evidence to the court can help to ensure that the offender is sentenced in a manner that gives full weight to who they are as an individual.

A useful illustration of this is provided by *Alexopolous v R* [2022] before the Victorian Court of Appeal. In that case the offender had been diagnosed with attention deficit hyperactivity disorder early in his life. While he had initially received psychiatric support, this was removed and he declined 'into a cycle of drug abuse, offending and court appearances' (para 42). Although the sentencing judge did not mitigate the offender's sentence on *Verdins* grounds, his psychiatric history was nonetheless considered mitigating because it helped explain his use of drugs and offending behaviour. On appeal, it was held that:

> Acceptance of this explanation was logically capable of permitting the judge to reason that [his] offending on this occasion was less the manifestation of wilful disobedience of the law than it was the product of drug addiction that had its genesis in a particular troubled background and psychological profile.
>
> (para 43)

Defence counsel should also seek to address the moral evaluative issue. Where it is arguable on the evidence, they may present a narrative which asserts that it was the offender's mental health problems, rather than any other relevant factors, which largely or even wholly explain the offending behaviour. In this regard, the decision of an offender to disengage from treatment or engage in drug use will often be highlighted by prosecuting counsel as examples of how it was the offender's poor decision-making, rather than the presence of the underlying condition, that led to the offending. In such cases, the ability of the defence advocate to anchor the decision to spurn pharmacotherapy or take recreational drugs within the ambit of the offender's underlying condition will be critical to the causal relationship being given full weight by the court.

Although the role of prosecuting counsel is sometimes presented as being the opposite of defence counsel, this is not the case. Their role is not to seek the heaviest sentence possible, but rather to make submissions addressing their views on the seriousness of the offence and the offender's circumstances. In doing so, they will often place an emphasis on different aspects of the causal matrix than defence counsel. For example, they may seek to make much of the fact that the offender's mental disorder did not necessitate the offending behaviour, since most people with that disorder do not offend. They may also present a narrative that emphasises the role of morally culpable choices made

by the offender or may seek to amplify the significance of other factors such as voluntary drug use.

In presenting their competing narratives, prosecuting and defence counsel will often seek to push a mental health expert in the direction of greater or lesser degrees of certainty, as suits their forensic goals. In doing so, they may diminish the complexity of the mental health expert's possibility explanation. It is critical that expert witnesses resist being browbeaten into accepting an overly simple explanation of the causal relationship and present a full and nuanced account of the complex causal matrix.

In reaching their final determination, sentencing judges must comply with an increasingly complex web of restrictions: sentencing statutes around the common law world now prescribe various offence categories, limitations on available sentences and frameworks for evaluating the weight to be given to certain factors (see e.g. *Sentencing Act 1991* (Vic)). These structures make it seem as if the sentencing process is a rational, almost algorithmic process. However, this chapter has shown that it continues to involve an instinctive, values-based assessment: the sentencing judge must make a moral evaluation of the extent to which the offender should be held to be individually responsible for their conduct. Different judges are likely to attach different levels of significance to certain behaviours, such as an offender's decision to cease taking anti-psychotic medication. One judge may see this decision as existing within the framework of the offender's disorder, secondary to the lack of 'insight' that is a very common core element of severe mental disorder; another may see it as a rational decision made in acceptance of the possible consequences. Judges may reach these conclusions despite the absence of evidence bearing directly on the issue. To ensure rigour in their assessment, judges should acknowledge, at least to themselves, that they are making a values-based decision, and consider the ways in which their own background and experience may be influencing their determination.

Conclusion

Bernadette McSherry's (2008: 2) goal of integrating the expertise of the various participants in the criminal justice system is an important one. All participants – lawyers, judges and mental health experts – have a key role to play, and if just outcomes are to be achieved it is essential that we understand how these roles fit together. In this chapter we have considered the roles that the various participants should play in the sentencing context, when addressing the connection between an offender's mental health problems and their offending behaviour.

We have argued that the current focus on the *directness* of the connection is misplaced, as the mere fact that the cause of an offender's conduct was indirect does not mean that it lacked significance. We have suggested that it would be preferable for sentencing judges to instead focus on whether the connection

was *sufficient* to reduce the offender's moral culpability. This is a moral evaluative question, appropriately influenced by social policy concerns. It requires judges to consider not only the relationship between the offender's mental health condition and their offending behaviour, but also factors such as the aetiology of the condition and the nature and strength of its impact on the offender.

To assist judges in making this determination, we have recommended that mental health experts use 'possibility explanations' to explain how the offender's mental health problems could have contributed to the offending behaviour in the circumstances. This has implications for the form, content and limits of the evidence that is given. One of the key issues that mental health experts will frequently need to address is the strength of the relationship between the offender's mental health problems and their offending behaviour. We have provided a framework for describing the strength of this relationship that they may find helpful in undertaking this task. We have also provided guidance for defence counsel, prosecuting counsel and sentencing judges who need to address the causal issue.

The psycho-legal challenges that are raised when assessing the connection between mental health problems and offending behaviour are complex. We are hopeful that the tools provided in this chapter can assist mental health experts, legal practitioners and sentencing judges to adopt a principled, rigorous and just approach to the task.

Notes

1 We note that views differ on whether an individual's mental health problems should be taken into account in assessing their responsibility or culpability for their criminal behaviour. For example, Minkowitz (2015) has argued that differentiating between individuals due to their mental health problems is discriminatory and that the criminal law should be reformed to remove such distinctions. We do not address this issue in this chapter. We proceed on the basis that mental health problems currently play a key role in sentencing determinations and are likely to continue to do so in the future. In light of this fact, our aim is to develop a principled approach to the way in which mental health problems are addressed by legal practitioners, expert witnesses and courts.

2 While the requirements for this defence vary, it will generally be established by proving that, at the time they committed the relevant act, the individual had a 'disease of the mind' that caused them either to not understand the nature and quality of their conduct, or to not know that their conduct was wrong: see e.g. *R v M'Naghten* (1843); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) section 20. In some jurisdictions it can also be established by proving that the individual could not control their behaviour: see e.g. *Criminal Code 1995* (Qld) section 52. While in England and Wales this defence is still referred to as the 'insanity' defence, it has been given different names in other jurisdictions. For example, in Victoria it is called the defence of 'mental impairment', while in New South Wales it is referred to as the 'mental disorder' defence. For the sake of simplicity, it will be referred to as the 'insanity' defence throughout this chapter. The word 'insanity' will be enclosed in inverted commas to make clear that this is technical legal terminology, rather than an endorsement of the term.

3 While the fitness to stand trial requirements vary from jurisdiction to jurisdiction, an individual will generally only be deemed unfit to stand trial where, at the time of the trial, they were unable to do one or more of the following: understand the charges; understand the potential consequences of the proceedings; understand the trial process; participate in the trial process; or communicate with counsel: see e.g. *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) section 6(1); *Criminal Procedure (Insanity) Act 1964* (UK) chapter 84, section 4; *R v Pritchard* (1836).
4 While this guideline applies to courts in both England and Wales, for simplicity this chapter refers to it as the English approach.
5 See Walvisch (2017) for a discussion of the different aims of law and mental health science, as well as a consideration of some of the limitations of the current psychiatric framework.
6 In passing we note that the 'insanity' defence does not raise the same concerns that we address in this chapter, as it does not hinge upon the strength of the causal relationship between an individual's mental disorder and their offending behaviour. It depends upon the impact of the individual's mental health problems on their ability to know the nature and quality or wrongfulness of their conduct, or (in some jurisdictions) on their ability to control their impulses. Attempts to tether the defence to causal relationships by way of a causal 'product rule' have historically proven to be problematic (see e.g. *United States of America v Archie W Brawner* (1972)).
7 An individual may choose not to raise the 'insanity' defence, even if it is available, due to the potential consequences. Depending on the jurisdiction, these may include being detained (possibly in prison) or subjected to supervision for a longer period than had they been found guilty of the offence, possibly in conditions worse than prison, or being subjected to compulsory treatment. In order to avoid these prospects, some individuals may prefer to instead plead guilty and seek more advantageous dispositions at the sentencing stage.

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