

**TAKING JUSTICE TO REHAB: HOW CAN CRIMINAL  
RESPONSIBILITY ACCOMMODATE SCIENTIFIC  
UNDERSTANDING OF ADDICTION?**

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Aan my familie, vir hulle onvoorwaardelike liefde en onvoorsteuning.

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*“The criminal justice system, like any system designed by human beings, clearly has its flaws.”*

- Ben Whishaw

*“To change criminal justice policy in any meaningful way means to propose changing a very long-standing system. It’s not realistic to think you can do it overnight.”*

- Kamala Harris

*“The degree of civilisation in a society can be judged by entering its prisons.”*

- Fyodor Dostoyevsky

## ***I Introduction***

The law's conception of criminal responsibility assumes an offender's control over their behaviour and a general degree of rationality. If an offender is responsible or at fault for their offending, they are then deserving of punishment.<sup>1</sup> However, neuroscience is developing in a way that sheds new light on our understanding of people's responsibility for their behaviour. This raises important questions as to how we attribute criminal responsibility in light of these scientific developments.

Addiction can be understood as a question of degree regarding its effect on people to act given their circumstances. Typically, addicts are rational and understand that their offending is wrong, but they lack the agency or control over their actions to respond to that evaluation.<sup>2</sup> Despite this, the law continues to hold addicts criminally responsible for their offending without considering the effect addiction has on their offending in any meaningful way before the post-plea stage.

This dissertation contributes to the body of scholarship on the relationship between the criminal law and neuroscience of addiction in New Zealand. The link between drugs and crime is a defining feature of drug policy issues.<sup>3</sup> I work within a retributive understanding of the criminal law to assess what a deserved and proportionate assessment of the criminal wrongdoing of addicts looks like. The law assumes offenders act with free will to justify holding them legally responsible for their offending and deserving of blame but science can show that this is compromised in circumstances of addiction. The law is thus out of step with what the neuroscience of addiction tells us about an addict's control and responsibility.

This is a law dissertation that draws on scientific research, and I have chosen to utilise the disease model of addiction which is widely accepted. I will explore how the criminal law currently treats (some) crimes committed by (some) addicts in (certain) circumstances to

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<sup>1</sup> Nicola Lacey *State Punishment: Political principles and Community Values* (Routledge, New York 1988) at 26.

<sup>2</sup> Stephen J. Morse "Addiction, Genetics and Criminal Responsibility" (2006) 69 *Law & Contemp. Probs.* 165 at 175.

<sup>3</sup> Toby Seddon "Drugs, Crime and Social Exclusion" (2006) 46(4) *Br J Criminal* 680 at 681.

demonstrate how the effects that addiction has on liability are only acknowledged in extreme cases, leaving the majority of addicts who offend to be dealt with under the mainstream criminal justice system.

This dissertation explores whether the law can and should recognise various degrees of responsibility in the context of addicts who offend and whether we need to recalibrate our understanding of criminal responsibility and defences in light of scientific and societal developments. Neuroscience and the criminal law think about responsibility very differently, and this dissertation explores whether the two can be reconciled.

Chapter two sets out a characterisation of addiction according to the disease model of addiction. This model can be applied to any offender whose addiction manifests as a coercive compulsion which rewires the brain to impair agency and control.

Chapter three gives an overview of the principles of criminal responsibility in New Zealand and assesses the current debate on the relationship between the criminal law and the neuroscience of addiction. This chapter also explores some of the hurdles to reform, namely, the pervasiveness of the choice model in public perception of addiction and overcoming the tensions between the law and science.

Chapter four analyses the current legislative framework and common law approach to addicts who offend, and explains how the disease model of addiction challenges how the law currently views the criminal responsibility of addicts. The law as it stands already acknowledges the effects addiction can have on an offender's liability, but this approach is hesitant and inadequate, and can be described as 'nibbling on the extremities'. The status quo does not reflect the clinical realities of addiction nor acknowledge circumstances where an addict's offending does not reflect their level of responsibility for that offending.

Finally, chapter five makes the case for four tentative ways forward. I explore the legal, moral and practical implications of introducing a new addiction-related harm offence, introducing a defence of addiction, introducing addiction as a factor to be considered when assessing an offender's liability, or maintaining the status quo.

This dissertation concludes in favour of reform. The criminal law must better account for the effects that addiction can have on an offender's ability to form mens rea or to exercise agency and self-control. I add to the current literature on criminal responsibility and addiction by framing the debate within a New Zealand criminal law context and advancing tentative options for reform.



## ***II Characterising Addiction***

### *A Introduction*

Characterising what addiction is, and how it manifests itself, is necessary to examine how the law should respond to addiction. Defining addiction is a difficult task as the experts disagree significantly about the nature and effects of addiction. This is made more complicated by the fact that addiction is characterised as being on a continuum from mild to severe.<sup>4</sup> Despite these difficulties, there is clear need for an account of addiction below the threshold in the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 (“SACAT”), to apply to circumstances where addicts have some level of capacity, albeit diminished. This is not a dissertation on how the competing models of addiction compare and I will not pretend to be an expert in this area. My summaries are not an exhaustive catalogue of addiction knowledge and research, however, the model of addiction I have chosen to follow is based on the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-5”) and is widely accepted.<sup>5</sup>

Normative thinking about addiction has traditionally been divided between the disease model and the moral or choice model.<sup>6</sup> The disease model has medical and psychiatric origins and understands addiction as a disease characterised by compulsive and relapsing drug use over which the addict has little or no control.<sup>7</sup> Proponents of the disease model appeal to evidence showing that regular consumption of drugs causes changes in the brain structures involved with decision-making and motivation of behaviour.<sup>8</sup> The moral model, on the other hand, sees

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<sup>4</sup> American Psychiatric Association *The Diagnostic and Statistical Manual of Mental Disorders* (“DSM-5”) (5th ed, American Psychiatric Publishing, Arlington, VA, 2013) at 484.

<sup>5</sup> Compare David Nutt, Leslie A. King and William Saulsbury and Colin Blakemore “Development of a rational scale to assess the harm of drugs of potential misuse” (2007) 369 *The Lancet* 1047; World Health Organisation *International Statistical Classification of Diseases and Related Health Problems* (2010).

<sup>6</sup> Edmund Henden, Hans Olav Melberg and Ole Jorgen Røgeberg “Addiction: Choice or compulsion?” (2013) 4(77) *Frontiers in Psychiatry* 48 at 49.

<sup>7</sup> At 51.

<sup>8</sup> See generally the disease model as discussed in Morse, above n 2, and Meredith Cusick “Mens Rea and Methamphetamine: High Time for a Modern Doctrine Acknowledging the Neuroscience of Addiction” (2017) 85 *Fordham Law Review* 2417.

addiction as a choice characterised by voluntary and rational behaviour under the control of the addict.<sup>9</sup>

I understand addiction to be fundamentally about compulsive behaviour as established by the disease model. This view is based on an overview of the body of knowledge on addiction, with a particular focus on literature that has informed current legislation. In summary, this compulsion is coercive: an intense and insistent level of desire only temporarily satisfied by use. Addiction is effectively an erosion of the normal ‘free will’ or agency that people have in decision making due to the effect of repeated drug use on the front cortical structures of the brain.<sup>10</sup> As addiction progresses, so does a lack of capacity and agency. The user eventually reaches a stage where the degree of compulsivity and lack of control experienced means that the person’s behaviour can be predicted in favour of drug taking. Although drug use may start voluntarily, addicts lose control of their drug use and therefore not using voluntarily.<sup>11</sup> Addiction overrides the brain’s ability to alter course when anticipated negative consequences are realised, rewiring the ‘reward system’.<sup>12</sup>

This chapter attempts to advance a general characterisation of addiction. It first explores the current legislative definitions of addiction to show the need for a clear definition of addiction below the SACAT. It then unpacks the characterisation of addiction within the DSM-5 to build a base upon which the criminal law could understand addiction and its effects.

## *B Legislative Definitions of Addiction*

Addiction is only defined in three pieces of legislation: the SACAT, the Misuse of Drugs Act 1975 and the Evidence Act 2006. The SACAT focuses on ‘severe substance addiction’ whereas the Misuse of Drugs Act and the Evidence Act set a comparatively lower threshold for ‘addiction’ or ‘dependence’, and so apply to addicts with some level of capacity. The SACAT is

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<sup>9</sup> Henden, Melberg and Røgeberg at 52.

<sup>10</sup> Sedden, above n 3, at 681. See also Rita Z. Goldstein and Nora D. Volkow “Drug Addiction and Its Underlying Neurological Basis: Neuroimaging Evidence for the Involvement of the Frontal Cortex” (2002) 159(10) Am J Psychiatry 1642 for discussion on an integrated model of drug addiction to encompass intoxication, bingeing, withdrawal, and craving. This foreshadowed the 11 criteria in the DSM-5.

<sup>11</sup> Morse, above n 2, at 1017.

<sup>12</sup> American Psychiatric Association at 481. See also Goldstein and Volkow more generally.

the only piece of legislation with the purpose of managing people with addiction issues.<sup>13</sup> It replaced the Alcoholism and Drug Addiction Act 1966 (“ADAA”), which provided for the care and treatment of alcoholics and drug addicts.<sup>14</sup>

The Misuse of Drugs Act focuses on classification, supply and prescription of drugs. It does not define ‘addiction’ per se, choosing instead to use the language of ‘dependence’.<sup>15</sup> ‘Dependence’ is defined as “being in a state of periodic or chronic intoxication, produced by the repeated ... use of a controlled drug ... and involving a compulsive desire to continue ... using the drug.”<sup>16</sup> The Evidence Act similarly defines ‘drug dependency’ as “the state of periodic or chronic intoxication produced by the repeated consumption, smoking, or other use of a controlled drug ... detrimental to the user, and involving a compulsive desire to continue consuming, smoking, or otherwise using the drug or a tendency to increase the dose of the drug.”<sup>17</sup> The use of the terms ‘dependence’ and ‘compulsion’ in both the Misuse of Drugs Act and the Evidence Act is a promising starting point to build a legislative definition and understanding of addiction that is flexible to different intensities and levels of control.

The SACAT, however, only deals with extreme cases of addiction and compromised capacity. ‘Severe substance addiction’ is defined in s 8(1) as “a condition that manifests itself in the compulsive use of a substance ... of such severity that it poses a serious danger to the health or safety of that person and seriously diminishes that person’s ability to care for themselves.”<sup>18</sup> The ADAA defined ‘drug addict’ in similarly strict terms: “any person whose addiction to intoxicating, stimulating, narcotic, or sedative drugs is causing or is likely to cause serious injury to his health or is a source of harm, suffering, or serious annoyance to others or renders him incapable of properly managing himself or his affairs.”<sup>19</sup> The SACAT also goes into detail in setting out criteria or factors present in severe substance addiction.<sup>20</sup> A similar legislative

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<sup>13</sup> Andrew Green and John Young *Laws of New Zealand Liquor Law: Alcohol Addiction* (online ed) at 297-298.

<sup>14</sup> Substance Addiction (Compulsory Assessment and Treatment) Act 2017 (“SACAT”), s 122(1).

<sup>15</sup> Misuse of Drugs Act 1975, s 2.

<sup>16</sup> Section 2.

<sup>17</sup> Evidence Act 2006, s 59(6).

<sup>18</sup> SACAT, s 8(1).

<sup>19</sup> Alcoholism and Drug Addiction Act 1966 (“ADAA”), s 3.

<sup>20</sup> SACAT, s 8. I expand on these criteria further in chapter *IV*. Note that these criteria were first introduced by the SACAT and were not present in the earlier scheme.

approach could be taken to define addiction below this high threshold. This would provide courts with guidance and certainty when identifying varying levels in the severity of addiction of offenders.

*C The American Psychiatric Association's DSM-5*

There have been attempts to align legislation with a modern understanding of addiction. Most notably, the eligibility criteria set out in s 8 of the SACAT is based on the approach to addictive disorders set out in the DSM-5.<sup>21</sup> By doing so New Zealand law is moving towards understanding addicts as people who have an intense focus on using particular substance(s) to the point that their dependency manifests as internal coercion or compulsion. It also demonstrates a move by Parliament towards making legislative definitions of addiction compatible with, and reflective of, modern scientific understanding.<sup>22</sup>

The DSM-5 categorises addiction as a 'substance-use disorder'.<sup>23</sup> This definition combines the categories of substance abuse and dependence into a single disorder, measured on a continuum from mild to severe.<sup>24</sup> Substance-use disorders have cognitive, behavioural and psychological symptoms indicating that the individual continues taking the substance despite significant substance-related problems. This is due to an underlying change in brain circuits that persist beyond detoxification: the disease model.<sup>25</sup> Substance-use disorders can be distinguished from 'substance-induced disorders', such as intoxication or withdrawal, because of the longer-lasting effects. While substance-induced disorders are often a feature of addiction, the DSM-5 distinguishes these from the psychological and behavioural effects of substance-use disorders, setting a foundation for the law to make a similar differentiation.

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<sup>21</sup> Ministry of Health *Guideline on Assessing Capacity to Make Decisions about Treatment for Severe Substance Addiction* (2017) at 6.

<sup>22</sup> Compare the definition of 'severe substance addiction' in s 8 of the SACAT, with the more limited definition of 'drug addict' in s 3 of the ADAA as "any person whose addiction to intoxicating, stimulating, narcotic, or sedative drugs is causing or is likely to cause serious injury to his health or is a source of harm, suffering, or serious annoyance to others or renders him incapable of properly managing himself or his affairs." While this is similar to s 8(1) of the SACAT, it lacks the criteria described in s 8(2) of the SACAT that are based off the DSM-5.

<sup>23</sup> American Psychiatric Association at 481.

<sup>24</sup> At 484.

<sup>25</sup> At 483.

People with a substance-use disorder have distorted thinking, behaviour and bodily functions, as found by brain imaging studies showing permanent changes in the areas of the brain that relate to judgement, decision-making, learning, memory and behaviour control.<sup>26</sup> People may be aware of the problem, but are unable to control their addiction or stop using despite the adverse effects.<sup>27</sup> Diminished control over use, as well as changes to behaviour and bodily functions, are significant differences between intoxication and addiction.<sup>28</sup>

The DSM-5 provides 11 detailed criteria for specific substance-use disorders.<sup>29</sup> The severity of the substance-use disorder is based on the number of criteria endorsed: 2-3 criteria indicate a mild disorder; 4-5 indicate a moderate disorder, and; 6 or more indicate a severe disorder. There are clear parallels between the 11 criteria set out in the DSM-5 and the eligibility criteria of the SACAT, with the definition of ‘serious substance addiction’ applying to addicts who meet most of the criteria listed in the DSM-5, resulting in a high and restrictive threshold.<sup>30</sup>

#### *D Comments*

Addiction can, therefore, be understood as an internal coercion that compels users to continue to feed the addiction. Addictive substance use causes an addict’s decision-making processes to be re-wired in favour of substance use despite the negative effects, and can be described as involuntary use. This occurs both when the addict is sober and intoxicated, thus having direct implications on an addict’s ability to respond to moral evaluations regarding their criminal offending.

The disease model of addiction shows that an addict experiences diminished control over both their drug use and their general decision-making. These effects are acknowledged in the SACAT, but its scope is limited to very severe cases of impaired capacity. Chapter three explores how the effects of addiction can lead us to the conclusion that it is problematic to hold

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<sup>26</sup> Goldstein and Volkow, above n 10, at 1643.

<sup>27</sup> American Psychiatric Association at 483.

<sup>28</sup> Chapter *IV* explores the current law on intoxication and explain why this is inadequate in the context of addiction.

<sup>29</sup> American Psychiatric Association at 483-484.

<sup>30</sup> Refer to appendix one for a detailed comparison of the criteria in the DSM-5 and s 8 of the SACAT.

addicts criminally responsible for their offending, as the cognitive and behavioural deficits which result from addictive drug use suggest that addiction affects mens rea.

### ***III What Does It Mean To Be ‘Criminally Responsible’?***

This chapter gives an overview of criminal responsibility within a retributive model of the law, focusing in particular on the principles of voluntariness and fair labelling. It also reviews the debate on the relationship between criminal responsibility and addiction to illustrate the gap in the literature that this dissertation fills. The notion of responsibility in the criminal law is a moral and social construct and does not take into account clinical or scientific understanding of capacity. This chapter explains how the neuroscience discussed in chapter two poses a challenge to the status quo, whereby addicts are held liable for their offending based on traditional understanding of what it means to be criminally responsible.

#### ***A Unpacking Criminal Responsibility***

Retributivist theory holds that people who offend are criminally responsible and deserving of punishment.<sup>31</sup> Individual autonomy is a fundamental concept in the justification of criminal law: everyone is treated as responsible for their behaviour.<sup>32</sup> The conditions for criminal liability are behavioural: in order to be convicted of an offence, the law holds that offenders must have done the criminal conduct (*actus reus*) and were acting with a requisite level of intent (*mens rea*).<sup>33</sup> Liability thus requires both a cognitive and a volitional element, and an offender is held responsible by the criminal law for their offending, and deserving of punishment, when these elements of the offence are met.<sup>34</sup> Responsibility in the criminal law relates to the particular functions of the criminal law under a retributive framework.<sup>35</sup>

Once an offender is found to have committed the elements of an offence, attention turns to whether a valid defence is available to absolve them of guilt. Defences can be a denial of

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<sup>31</sup> Lacey, above n 1, at 25; Jean Hampton “Correcting Harms Versus Righting Wrongs: The Goal of Retribution” (1992) 39 UCLA L. Rev. 1659 at 1664.

<sup>32</sup> Andrew Ashworth and Jeremy Horder Principles of Criminal Law (7th ed, Oxford University Press, Oxford, 2013) at 23.

<sup>33</sup> Ashworth and Horder at 6-7.

<sup>34</sup> Lacey at 63.

<sup>35</sup> At 5. See Hampton for a more detailed discussion on justifications as to which kinds of wrongdoing warrant punishment within a retributivist framework.

either the actus reus or mens rea of the offence, or seek to justify or excuse the commission of the offence.<sup>36</sup> Whereas justifications challenge whether the offence is wrongful, excuses acknowledge that the act was wrongful but challenge the attribution of responsibility to the offender based on their circumstances and why they committed the offence.<sup>37</sup> Defences ensure balance in the law: an offence and its corresponding punishment should reflect the offender's levels of responsibility and blameworthiness.<sup>38</sup> "Criminal liability is the strongest formal censure that society can inflict."<sup>39</sup> If an offender is to incur punishment for their offending, it is important that they are 'truly' responsible for it.<sup>40</sup>

As society develops, so do defences in the legal system through acknowledging circumstances where offending does not reflect the offender's level of responsibility. Examples of this include common law defences of duress and intoxication, as well as statutory defences such as compulsion,<sup>41</sup> self-defence,<sup>42</sup> and insanity.<sup>43</sup> Defences relate to different components of criminal responsibility. For example, insanity is concerned with capacity to make decisions for oneself whereas intoxication relates to the ability to form mens rea.<sup>44</sup>

This dissertation assesses whether the science of addiction challenges an addict's responsibility for their offending. Addiction can affect one's ability to form the requisite intent: addicts endure impaired capacity due to the psychological effects of addiction which last beyond the state of intoxication.<sup>45</sup> They also experience diminished agency through impaired control and choice over their actions, which is relevant to both the actus reus and mens rea, as well as voluntariness of the offending.<sup>46</sup>

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<sup>36</sup> A. P. Simester and Warren J. Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, Wellington, 2012) at 1.4.1.

<sup>37</sup> George P. Fletcher *Rethinking Criminal Law* (Little, Brown & Company, Toronto, 1978) 799; R. A. Duff *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Wiley-Blackwell, New Jersey, 1990) at 100.

<sup>38</sup> Simester and Brookbanks at 1.3.2.

<sup>39</sup> Ashworth and Horder at 1.

<sup>40</sup> Lacey at 63; Simester and Brookbanks at 3.4.

<sup>41</sup> Crimes Act 1961, s 24.

<sup>42</sup> Section 48.

<sup>43</sup> Section 23.

<sup>44</sup> See Ashworth and Horder at 139 and 202.

<sup>45</sup> See chapter II.

<sup>46</sup> Duff at 102. The issue of voluntariness is discussed further at chapter III.A.1.



This dissertation also explores whether the science of addiction could be reflected in legal defences. Addiction manifests as an internal coercion or compulsion which propels the addict to use and compromises their agency. It can be distinguished from intoxication or insanity as addicts are aware that they are doing something wrong, but are unable to stop themselves.<sup>47</sup> Additionally, people who are intoxicated or insane cannot form the mens rea in the first place, whereas addicts experience reduced ability to form mens rea. Parallels may be drawn with provocation, however, addicts experience lasting diminished self-control rather than a temporary loss of total self-control.

The concept of culpability is also important when assessing an offender's liability. Culpability is a measure of one's moral responsibility for an act or omission; it affects what offence someone is liable for and the reasons why someone might be held liable.<sup>48</sup> For example, the harm associated with stabbing someone means that stabbing someone has a higher level of culpability than hitting someone. Similarly, killing someone with intent to do so is considered to be worse than accidentally doing so.<sup>49</sup> Culpability is thus a moral assessment and relates to both the actus reus and mens rea elements of an offence, as well as to any available defences.<sup>50</sup> The law recognises circumstances of diminished culpability, for example, in circumstances of duress where the mens rea and actus reus elements of liability are satisfied but the law acknowledges that the defendant had a reason for doing the act and so excuses their conduct.<sup>51</sup>

This dissertation indirectly comments on an addict's culpability for their offending through examining the various components of criminal liability. However, my scope is whether scientific understanding of addiction could function to either negate the mens rea of addicts who offend or form the grounds for a defence. Although moral responsibility is relevant, it sits on the periphery of this dissertation.

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<sup>47</sup> Morse, above n 2, at 1012.

<sup>48</sup> A. P. Simester and A. T. H. Smith "Introduction: Criminalisation and the Role of Theory" in Simester and Smith (eds) *Harm and Culpability* (Clarendon Press, Oxford, 1996) 1 at 6.

<sup>49</sup> At 4.

<sup>50</sup> At 13.

<sup>51</sup> Ashworth and Horder at 130.

I now examine two key principles of criminal liability to demonstrate how traditional understanding of responsibility in the criminal law is challenged by modern scientific understanding: voluntariness and fair labelling.

### *1 Voluntariness*

The criminal law holds that distribution of punishment should be reserved for offenders who voluntarily break the law.<sup>52</sup> The principle of voluntariness is an integral part of criminal responsibility; if people are not responsible for their conduct due to involuntarily being in a state in which they cannot choose their actions, they should not be held liable.<sup>53</sup> Voluntariness is thus intertwined with the rationale of excuses whereby the law acknowledges circumstances where individual autonomy or choice is compromised.<sup>54</sup>

In the context of addiction, the first issue regarding voluntariness arises when we consider how addiction manifests itself. The disease model understands addiction as an internal coercion that changes the brain's wiring causing compromised decision-making processes.<sup>55</sup> If science can show addiction to be a coercive compulsion over which the addict has compromised control, which in turn impairs their decision-making and ability to exercise choice, then the assumption that addicts who offend are acting wholly voluntarily is challenged.<sup>56</sup> However, it is the addiction's compromising of control, as opposed to a total lack of control, that is tricky for the law.

A second issue arises when the doctrine of antecedent or prior fault is considered, as it may link an addict's voluntariness of offending to the voluntariness of their addiction. If a defendant's fault at an earlier stage led to the absence of fault at the time the offending took place, the law holds that they are still liable.<sup>57</sup> The doctrine of prior fault can help to reconcile the contemporaneity problem between the mens rea and actus reus in circumstances where they do

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<sup>52</sup> Fletcher, above n 37, at 804.

<sup>53</sup> Duff, above n 37, at 108.

<sup>54</sup> Fletcher at 805.

<sup>55</sup> See chapter II.

<sup>56</sup> Seddon, above n 3, at 691.

<sup>57</sup> Ashworth and Horder at 80.

not occur at the same time.<sup>58</sup> If you voluntarily or negligently put yourself in a situation where you cannot act voluntarily, your criminal acts can still be attributable to you.<sup>59</sup> I now unpack this doctrine in the context of intoxication and duress, then examine whether the same reasoning holds in the context of addiction.

An example of the doctrine of prior fault in practice is the current approach to offending when intoxicated. Intoxication is relevant to the fact of intent and must be taken into consideration by the jury, but is never a defence in itself.<sup>60</sup> Intoxication struggles with two conflicting principles: if someone voluntarily gets drunk and then commits a crime, their prior fault in getting drunk removes their ability to claim that they are not responsible for their drunken acts. However, it is unjust to hold that an intoxicated offender is responsible for all crimes they may commit as a result of taking on the risks associated with substance use.<sup>61</sup> Intoxication law thus attempts to bring a user's liability in line with their culpability in deciding to use alcohol or other drugs through the doctrine of prior fault, and holds voluntary drug use to be acceptance of the risk of criminal conduct when intoxicated.<sup>62</sup>

A second example is duress. *Kingston v R* concerned the conviction of a getaway driver for an aggravated robbery.<sup>63</sup> He claimed he did not know what the principal offenders were going to do and was forced to remain once he found out.<sup>64</sup> The Court of Appeal held that, if an offender voluntarily enters into a relationship where they are then subject to coercion, and that the possibility of the compulsion was reasonably anticipated, the defence of compulsion under s 24 of the Crimes Act is unavailable.<sup>65</sup> The appellant may have been a reluctant participant but he voluntarily associated with and assisted the principal offenders.<sup>66</sup> The same reasoning may be

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<sup>58</sup> Ashworth and Horder at 159.

<sup>59</sup> Jeremy Finn and Simon France Adams on Criminal Law (2018 Student Edition, Thomas Reuters, Wellington, 2017) at CA24.01.

<sup>60</sup> *R v Kamipeli* [1975] 2 NZLR 610.

<sup>61</sup> Fletcher at 847.

<sup>62</sup> I will unpack the relationship between intoxication law and addiction in chapter *IV.C*.

<sup>63</sup> *Kingston v R* [2010] NZCA 460.

<sup>64</sup> At [14].

<sup>65</sup> At [22].

<sup>66</sup> At [24].

applied to addiction; by voluntarily deciding to start using and to continue to use a drug, addicts are shouldering the risk of becoming addicted.

Should this principle hold in the context of addicts who offend? How might an addict's liability regarding their offending be reconciled with both their 'culpability' in deciding to use a substance, and their diminished control over their addiction? When the development of addiction, and the effects addiction has on an addict, are examined, complexities that challenge the logic chain of the doctrine of prior fault emerge. Almost always, individuals become addicted through voluntary substance use. At some point, this substance use develops into an addiction, yet users are often unaware of this development. Addiction can thus be differentiated from the ratio of *Kingston*, where the appellant theoretically had access to the knowledge of the consequences of being involved with organised crime: it is impossible for addicts to know when they are becoming addicted.<sup>67</sup> The disease model shows that, once an addiction develops, an addict's drug use is involuntary as they experience compromised control and agency.<sup>68</sup>

Thus, the science of addiction poses a challenges to the traditional understanding of voluntariness in criminal responsibility. If the law believes that addicts are criminally responsible for their offending because their condition is the consequence of their earlier conduct, the status quo ignores the clinical realities of addiction and the fact that the state of addiction is not a necessary, certain or cognitively identifiable consequence of substance use. Addicts do not know when they become addicted, as such, addiction can be differentiated from examples of the doctrine of prior fault. Furthermore, the contemporaneity conflict between mens rea and actus reus in circumstances of addiction is more severe than for intoxication due to the length of time it takes for an addiction to develop. It is inappropriate and unjust to link the mens rea of an addict's initial drug use, or their recklessness in taking the risk that they may become addicted, to the mens rea components of offending while addicted.<sup>69</sup>

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<sup>67</sup> Morse, above n 2, at 206.

<sup>68</sup> Emily Grant "While You Were Sleeping or Addicted: A Suggested Expansion of the Automatism Doctrine to Include an Addiction Defense" (2000) U. Ill. L. Rev. 997 at 1017.

<sup>69</sup> Cusick, above n 8, at 2440.

## 2 *Fair labelling*

A second key principle of criminal responsibility is fair labelling. Fair labelling ensures the law respects and signals distinctions between different types of offences and degrees of wrongdoing.<sup>70</sup> Different offences encoded in the Crimes Act criminalise actions which have differing levels of social significance, wrongdoing and harm.<sup>71</sup> Fair labelling ensures that the law is clear about what kind of criminal each offender is and what their conviction is for. However, this does not occur in the context of addicts who offend. Holding addicts fully liable for their offending ignores the clinical realities of addiction and thus does not comply with the principle of fair labelling.

Offences are divided and labelled to represent fairly the nature and degree of the law-breaking.<sup>72</sup> Criminal liability is the strongest formal condemnation that a society can inflict and punishment often deprives offenders of liberties.<sup>73</sup> Proportionality is thus essential to the law regarding both the severity of the punishment offenders receive, and what is communicated to the public about the meaning of that punishment, the wrongfulness of the conduct and the offender's blameworthiness.<sup>74</sup> If the law labelled everyone as 'criminals', very different types of wrongdoing would be equated. "If an offender is convicted of murder, they should be a murderer and not a parking offender."<sup>75</sup> Where society regards two types of conduct as different, the law should reflect that difference.<sup>76</sup>

Although New Zealand does not have a tiered criminal code, an example of fair labelling in action is the role that guideline judgments play in setting out bands of offending for sentencing. Bands of offending help sentencing judges take a uniform approach given the degrees of severity of the offending within a single offence.<sup>77</sup> For example, the Court of Appeal in *R v Fatu* set out guidelines for offending involving manufacturing of methamphetamine: band

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<sup>70</sup> Ashworth and Horder at 77.

<sup>71</sup> Simester and Brookbanks, above n 36, at 2.1.4.

<sup>72</sup> Ashworth and Horder at 77.

<sup>73</sup> Fletcher at 412.

<sup>74</sup> Ashworth and Horder at 77.

<sup>75</sup> Simester and Brookbanks at 2.1.4

<sup>76</sup> Ashworth and Horder at 77.

<sup>77</sup> See *R v AM* [2010] NZCA 114; *R v Fatu* [2006] 2 NZLR 72 (CA).

two covered manufacturing of up to 250 grams, which warranted a starting point of 4-11 years' imprisonment, compared to the more serious offence of manufacturing large commercial quantities of 250-500 grams, which warranted a starting point of 10-15 years' imprisonment.<sup>78</sup> The Court recognised that the sentence must reflect the quantity of the drug involved as well as the offender's role.<sup>79</sup> Therefore, guideline judgements ensure that different levels of harm and culpability for the same criminal offence can be recognised through the imposed sentence.

A comparison can be made with the abolition of the provocation defence for homicide, which means there is no formal mechanism through which to distinguish a murder committed under extreme emotional stress from one committed with premeditation.<sup>80</sup> The provocation defence was a defence of diminished responsibility which allowed juries to recognise a defendant's lack of self-control by reducing a charge of murder to a charge of manslaughter.<sup>81</sup> It is an example of the legislature recognising that capacity for rationality is a continuum and a serious issue for some offenders. However, provocation was held to not adequately reflect the labelling of the offence as manslaughter because the killing was still intentional.<sup>82</sup> Addiction can be differentiated from this rationale as addiction can diminish or negate mens rea requirements.<sup>83</sup> That aside, the abolition of the defence of provocation means that differences in culpability are not taken into account until sentencing which is problematic for both fair labelling and fairness.<sup>84</sup> This is the reality also for addicts who offend.

As I explain further in chapter four, addiction is currently not taken into account in the assessment of an offender's liability aside from in very extreme cases. Although some courts consider addiction to be a mitigating factor in sentencing, there is no guideline judgment or consistent rule as to how this should be done.<sup>85</sup> The clinical reality of addiction and the

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<sup>78</sup> *R v Fatu* at [43].

<sup>79</sup> At [43].

<sup>80</sup> *Simester and Brookbanks* at 2.1.4.

<sup>81</sup> Law Commission "The Partial Defence of Provocation" [2007] NZLJ 378 at 378; Brenda Midson "Degrees of Blameworthiness in Culpable Homicide" [2015] NZLJ 230 at 232.

<sup>82</sup> Law Commission at 379. See also the Supreme Court's recognition of this conceptual constraint in *R v Rajamani* [2008] 1 NZLR 723 at [13] per Tipping J.

<sup>83</sup> *Cusick* at 2437.

<sup>84</sup> *Midson* at 232.

<sup>85</sup> See chapter *IV.B*.

diminished responsibility of addicts, though sometimes recognised by sentencing judges, is not acknowledged by the law and thus the current legal framework (or lack of) does not comply with the principle of fair labelling.

*B The Debate So Far*

The relationship between criminal responsibility and scientific understanding of addiction has been explored overseas. However, nothing has been written in New Zealand. This dissertation helps to fill this gap by exploring whether existing jurisprudence could or should be relevant to how the law in New Zealand treats addiction.

I explore a few of the leading ideas that have been advanced in the international sphere. I discuss first an article by Stephen J. Morse, Professor of Law and Psychology at University of Pennsylvania School of Medicine, a key academic on issues of individual responsibility and agency.<sup>86</sup> Morse sets the scene by examining the phenomenology of addiction and what the moral and legal implications would be of holding, or not holding, addicts responsible for their criminal behaviour.

I build on this by comparing the work of Sonja Brown<sup>87</sup> with that of Meredith Cusick.<sup>88</sup> Both authors validate the disease model of addiction and the value of neuroscience in explaining behaviours of addiction. However, they differ on their proposed solution to the disconnect between the neuroscience and how the law currently treats addiction. Brown argues for the status quo, concluding the best approach is to treat addiction as an explanatory mitigating factor in sentencing.<sup>89</sup> Cusick, on the other hand, proposes the adoption of an addiction doctrine to acknowledge the effect drug addiction has on mens rea.<sup>90</sup> I assess these different approaches to set a foundation to explore the relationship between criminal responsibility and addiction in a New Zealand context.

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<sup>86</sup> Morse, above n 2. Note that Morse is writing in an American context.

<sup>87</sup> Sonja Brown “Application of Addiction Neuroscience to Moral and Legal Responsibility: Explanations not Exculpations” (2008) 32(4) Crim LJ 239. Note that Brown is writing in an Australian context.

<sup>88</sup> Cusick, above n 8. Note that Cusick is writing in an American context.

<sup>89</sup> Brown at 248.

<sup>90</sup> Cusick at 2417.

Morse's work on individual responsibility and autonomy in the context of addiction has made important contributions to the literature on whether the law should accommodate addiction and, if so, how.<sup>91</sup> In 'Addiction, Genetics, and Criminal Responsibility', Morse seeks to understand the moral and legal responsibility of people for becoming addicted and for criminal conduct associated with their addictions.<sup>92</sup> Morse assumes that addicts are not responsible for becoming addicted in order to discuss whether addicts should be excused as addiction compromises their rational faculties.<sup>93</sup>

Morse begins by setting out the phenomenology of addiction and how it manifests in addicts. Morse uses terminology such as "craving" and "compulsion" to explain how addiction manifests as an "overwhelming or overpowering desire".<sup>94</sup> This shows how behavioural signs of addictions are virtually all reward-sensitive and manifest as structural changes in the parts of the brain associated with decision making.<sup>95</sup> Morse's characterisation is in line with the disease model of addiction and he concludes that addicts are the "victims of pathological mechanisms" and deserve help and sympathy.<sup>96</sup>

Morse then explores the model of criminal responsibility in a retributive framework, stating that, to be deserving of punishment for a crime, the offender must be at fault and responsible for that crime.<sup>97</sup> New Zealand's criminal law takes the same approach and Morse asserts that the retributive framework of criminal responsibility is consistent with the principle of individual autonomy.

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<sup>91</sup> For further publications by Morse on this field, see Stephen J. Morse "Addiction, Choice and Criminal Law" [2017] Faculty Scholarship at Penn Law. 1608., Stephen J. Morse "Good Enough Reason: Addiction, Agency and Criminal Responsibility" (2013) 56 *Inquiry* 490, and Stephen J. Morse "Hooked on Hyde: Addiction and Responsibility" (2009) 19 *L & Phil* 3.

<sup>92</sup> Morse at 165-166.

<sup>93</sup> At 167-168.

<sup>94</sup> At 168.

<sup>95</sup> At 168. Compare the characterisation of addiction in chapter *II*.

<sup>96</sup> At 169-170.

<sup>97</sup> At 172.



Morse then poses whether, once addicted, addicts should be responsible for use and further drug-related activity.<sup>98</sup> He argues that, by experimenting with drugs, addicts knowingly take on the risk that they will become “irrational”.<sup>99</sup> Morse also states almost all addicts have lucid and rational intervals between use during which they could seek help.<sup>100</sup> These rational intervals are the reason why Morse argues that addicts should be held responsible for their offending, despite the consequences of prolonged substance use being both physically and psychologically debilitating.<sup>101</sup> I disagree with Morse’s justification here and contend that addictive substance use has long-lasting effects on an addict’s decision-making facilities that persist after detoxification.<sup>102</sup> This means that, even when an addict is sober, their decision-making abilities and control over substance use are still impaired.

Morse thus contends that addiction should not be an ‘excuse’, choosing instead to advance a few ways through which the law can produce more proportionate blame and punishment for offending by addicts.<sup>103</sup> First, he examines introducing a defence of partial or diminished responsibility; secondly, forced treatment of addicts; and thirdly, a sensible drug use criminalisation policy. Morse concludes that all three of these ways forward are viable options for responding more fairly to the claims of diminished responsibility of addicts, while still holding addicts responsible for their offending.<sup>104</sup>

Morse’s work is a solid foundation upon which an examination of criminal responsibility and the disease model of addiction can be considered in a New Zealand context. New Zealand similarly takes a retributive approach to the criminal law, and the notion of criminal responsibility is entrenched in principles of individual autonomy and blameworthiness. Like Morse, our understanding of addiction within the law is similarly based on the disease model of addiction as outlined by the DSM-5.<sup>105</sup>

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<sup>98</sup> At 178-179.

<sup>99</sup> At 193.

<sup>100</sup> At 195.

<sup>101</sup> At 194.

<sup>102</sup> American Psychiatric Association, above n 4, at 484.

<sup>103</sup> Morse at 196.

<sup>104</sup> At 205.

<sup>105</sup> See chapter II.

Morse's solutions, however, are thought-provoking for this dissertation. His discussion on forced treatment has direct crossovers with New Zealand's treatment of addicts under the SACAT. Additionally, a defence of diminished responsibility has important implications as to how the criminal law in New Zealand could respond more generally to circumstances of limited rationality and control. The potential for this solution is explored in chapter five. Lastly, Morse's discussion on sensible criminalisation policies on drug crime seems common sense, however, this is beyond the scope of this dissertation.

## 2 *Brown*

Brown examines what the relationship between neuroscience and legal responsibility should look like in practice in the context of addiction.<sup>106</sup> Brown ultimately concludes that neuroscience is "too powerful" in encouraging the disease model of addiction.<sup>107</sup> "Although science can describe the biological changes associated with addiction, it cannot dictate how the law ought to respond."<sup>108</sup> Brown, therefore, holds that the role of neuroscience of addiction in the law should continue to be explanatory of the potential presence of a mitigating factor, rather than exculpatory.

Brown begins by briefly outlining the current literature on the relationship between the neuroscience of addiction and criminal responsibility, frequently citing Morse.<sup>109</sup> Brown then gives an overview of the neuroscience of addiction, accepting that addiction is "compulsive seeking and using of drugs."<sup>110</sup> Imaging studies of the brain give crucial evidence as to how addictive substance use changes the decision-making process in favour of further use.<sup>111</sup> Brown's conclusion on the neuroscience is that the addict is "presented with a difficult choice, not that the addict has no choice, in deciding whether to seek and use drugs."<sup>112</sup> It is on this distinction that Brown builds her argument as to how the criminal law should accommodate addiction.

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<sup>106</sup> Brown, above n 87, at 239.

<sup>107</sup> At 239.

<sup>108</sup> At 240.

<sup>109</sup> At 239.

<sup>110</sup> At 240.

<sup>111</sup> At 241.

<sup>112</sup> At 241.

Brown goes on to examine how the Australian criminal law approaches issues of addiction.<sup>113</sup> The Australian approach is equally as conservative as the approach in New Zealand, with addiction not being considered to be either an excusing condition or a mitigating factor when assessing liability.<sup>114</sup> Brown limits her scope to “instrumental crime”, that is, crimes committed by an addict to obtain funds to purchase drugs.<sup>115</sup> This is to focus on the direct interaction between the science of addiction and the illegality of the behaviours of addiction. This dissertation, comparatively, takes a broader scope to encompass any offence committed by an addict, the justification being that addiction manifests in compromised decision-making and agency beyond feeding the addiction.<sup>116</sup>

Brown then examines how scientific development can change societal attitudes and views regarding the responsibility of addicts.<sup>117</sup> She recognises that science can show that the basis of addiction is “complex and real, and not simply a moral failing” and acknowledges that this is of social value.<sup>118</sup> The risk for Brown is that “hard” science can cause the public to “incorporate an inaccurate understanding of neuroscience into the conception of responsibility”.<sup>119</sup> This concern is valid. Criteria for responsibility within the criminal law are moral and legal concepts reflective of societal standards. The tension occurs when addicts are held responsible for their offending despite the criteria for criminal responsibility arguably not being met given the disease model of addiction, and Brown argues that the criminal law should not be changed due to an over-simplified understanding of the neuroscience.<sup>120</sup>

To supplement her advocacy of the status quo, whereby the science of addiction serves as an explanation for an addict’s offending, Brown analyses the consequences of alternative approaches, namely, introducing a partial defence or considering addiction as a mitigating factor when assessing an offender’s liability.<sup>121</sup> Brown argues that the difficulty with a partial defence

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<sup>113</sup> At 241.

<sup>114</sup> At 242. See chapter *IV* for discussion on how addiction is currently approached by the law in New Zealand.

<sup>115</sup> At 242.

<sup>116</sup> See chapter *II*.

<sup>117</sup> Brown at 243.

<sup>118</sup> At 240.

<sup>119</sup> At 244.

<sup>120</sup> At 244.

<sup>121</sup> At 244-247.

of addiction, as proposed by Morse, is that an addict always has some level of control or opportunity during non-compulsive states to take action.<sup>122</sup> Capacity for rationality is a spectrum and assessing responsibility is the role of the sentencing judge.<sup>123</sup>

Brown's thesis sits on the more conservative side on the debate on the relationship between neuroscience and the criminal law. A fundamental flaw in Brown's argument is that she fails to discuss circumstances where the law already recognises scenarios of diminished control, such as the Australian defence of provocation. Brown cannot explain how addiction is, or why it should be, a condition that can be distinguished from already-recognised circumstances of diminished responsibility.

Furthermore, Brown does not entertain what legal responsibility could look like if it did reflect the reality of science, as her analysis stops with her assertion that legal responsibility is a moral, not a scientific, construct. The thread linking Brown's thesis together is that the public does not want addiction to be treated either as a partial defence or a mitigating factor, even where it has logical appeal.<sup>124</sup> This dissertation argues against this rationale and in favour of a legal approach that adequately acknowledges an addict's level of responsibility for their offending.<sup>125</sup>

### 3 *Cusick*

On the other end of the spectrum to Brown, Cusick argues for the adoption of an addiction doctrine to bring the law up to speed with the neuroscience of addiction.<sup>126</sup> Her work is motivated primarily by the finding that addiction is fundamentally different to intoxication, though the law treats them the same.<sup>127</sup> This status quo also exists in New Zealand.<sup>128</sup> Focusing on the effects of methamphetamine, Cusick provides an overview of intoxication law and the

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<sup>122</sup> At 245.

<sup>123</sup> At 246.

<sup>124</sup> At 245.

<sup>125</sup> See chapter *V*.

<sup>126</sup> Cusick, above n 8, at 2417.

<sup>127</sup> At 2420.

<sup>128</sup> See chapter *IV*.

science of addiction to show the difficulty in applying intoxication law to addiction, laying a foundation upon which she builds a new doctrine of addiction.<sup>129</sup>

Cusick begins by examining the notion of criminal responsibility in the American criminal law.<sup>130</sup> Her work similarly takes place within a retributive framework. She then sets out the American approach to drug-related offending.<sup>131</sup> What is relevant to this dissertation is a similar common law approach to voluntary intoxication.<sup>132</sup> Cusick then outlines the phenomenology of addictive use of methamphetamine and the effects it has on the brain, utilising the disease model of addiction to show the effects use has on the neural structures and deficits in associated cognitions and behaviour.<sup>133</sup>

With this groundwork laid, Cusick unpacks the mens rea issues with addicts who offend.<sup>134</sup> First, she explores whether methamphetamine addiction should be considered ‘voluntary’ as intoxication is considered to be, concluding that neither the initiation nor maintenance of addiction is voluntary.<sup>135</sup> Additionally, the deterrence justification for holding individuals liable for offending following voluntary intoxication does not apply to addiction.<sup>136</sup> Cusick then examines whether addiction effects mens rea, questioning Morse’s conclusion that addicts do not lack mens rea for their substance-related activity.<sup>137</sup> Cusick finds that, in the case of methamphetamine addiction, mens rea is affected because the drug use results in organic brain damage that can influence an individual’s ability to form requisite mens rea.<sup>138</sup>

Cusick recommends the introduction of a doctrine of addiction in order to adopt scientific findings on the impact of addiction on cognition, behaviour and mens rea.<sup>139</sup> It is important that this doctrine is separate to the doctrine of intoxication: whereas intoxication in a voluntary and

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<sup>129</sup> Cusick at 2420.

<sup>130</sup> At 2420.

<sup>131</sup> At 2422-2426.

<sup>132</sup> At 2423. See also earlier discussion at chapter *III.A.I.*

<sup>133</sup> At 2426-2434.

<sup>134</sup> At 2434-2441.

<sup>135</sup> At 2437.

<sup>136</sup> At 2436.

<sup>137</sup> At 2437.

<sup>138</sup> At 2438.

<sup>139</sup> At 2444.

transient condition, addiction endures and does so destructively.<sup>140</sup> A doctrine of addiction would function much like the doctrine of the alcoholic automaton does currently; it would require the jury to weigh up the evidence regarding the defendant's addiction and its effect on their mental state.<sup>141</sup> Cusick believes that it is essential for the law to acknowledge the effects that addiction has on mens rea; modern science should not "be ignored for the sake of simplicity".<sup>142</sup>

Cusick's work calls for the criminal law to update how it takes addiction into account. She states that a doctrine of addiction does not mean that the addicts would not be held responsible for their offending; it just means that addiction should be considered in assessing liability.<sup>143</sup> This dissertation similarly argues for this reform. Where Cusick falls short, however, is how this would look in practice. If addicts who offend are found not guilty by reason of addiction, is the appropriate response acquittal, like the current approach to alcoholic automatons, or compulsory treatment, as with insanity? The issue here is precisely what Cusick herself identified: addiction is lasting and addicts who offend are prone to re-offending due to the nature of their psychiatric condition.

#### 4 *A brief note on applying this debate to New Zealand*

What Morse, Brown and Cusick all have in common is that their work on addiction sits within a larger discussion as to what the relationship between the law and science should be. This dissertation does not purport to answer this question in full. Instead, it looks at it in one context and introduces the debate on the relationship between criminal responsibility and the neuroscience of addiction to New Zealand. Many of the retributive principles of criminal responsibility in the American and Australian contexts also hold in New Zealand, and chapter four will explore how these principles manifest in the current legal approach to addicts who offend.

Morse, Brown and Cusick will be relevant again in chapter five when I examine whether the law in New Zealand can and should recognise various degrees of responsibility in the context

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<sup>140</sup> At 2441.

<sup>141</sup> At 2446.

<sup>142</sup> At 2447.

<sup>143</sup> At 2447.

of addicts who offend and whether the criminal law needs to recalibrate its understanding of criminal responsibility and defences in light of scientific and societal developments.

### *C Hurdles to Reform*

I now address four critical hurdles to any reform of the law's current treatment of addicts who offend. First, I look at the prevalence of the choice theory of addiction in the public sphere and how this manifests itself in policy-making. Secondly, I explore the debate on the relationship between law and neuroscience: should the law on addiction be medicalised and, if so, to what extent? Thirdly, I examine the fact that different drugs have different effects on users and, more generally, academic disagreement on characterising addiction. Lastly, I assess the task of converting a clinical question of degree into a binary legal test. These issues are explored in depth to analyse whether, and to what extent, they stand in the way of change, or particular types of change, to the criminal law's approach to addicts who offend.

#### *1 Prevalence of the choice theory of addiction in the public sphere*

A key hurdle to any reform on how the law accommodates addiction will be the public perception of addicts. The moral or choice theory of addiction is prevalent in the public sphere.<sup>144</sup> People therefore see addicts as responsible for their predicament: they begin using, and continue to use, voluntarily. The choice model blurs the distinction between voluntariness of addiction and voluntariness of offending, by holding addictive behaviour to be “volitionally influenced” by incentives.<sup>145</sup> People see addicts who offend first and foremost as criminals: bad people with moral failings who can “manipulate” evidence if the law takes a “softer” approach.<sup>146</sup> This manifests in ‘tough on crime’ policies targeted at drug offending.<sup>147</sup> This is a systemic issue; any change in the law that acknowledges the vulnerability of any group of offenders will always face public backlash.

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<sup>144</sup> Henden, Melberg and Røgeberg, above n 6, at 50.

<sup>145</sup> At 50.

<sup>146</sup> Brown, above n 87, at 243.

<sup>147</sup> Redonna K. Chandler, Bennett W. Fletcher and Nora D. Volkow “Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety” (2009) 301(2) JAMA 183 at 183.

Public education on the nature and effect of addiction may provide a remedy. If the public is not educated as to the clinical realities of addiction, they will not respond well to legal reform on addiction. However, information as to the scientific and medical realities of addiction, as well as a defined legal test for addiction, and treatment to help target the root of an addict's offending, can help to change these misconceptions. Acknowledging human frailty and circumstances where offenders cannot be blamed for their offending is an integral part of the law. Defences highlight this.<sup>148</sup> The law should not allow a misinformed public construction of addiction to stand in the way of implementing smart and fair legislation. Addiction is a health problem, not a criminal problem, and neuroscience can help the public to see this.

Brown raises the argument that the neuroscience of addiction may be too “persuasive” in explaining addiction.<sup>149</sup> She cites studies whereby mock jurors were shown brain scans and neuroscience information. In these cases, the return of a ‘not guilty by reason of insanity’ verdict was more likely than cases where mock jurors were only given psychological evidence.<sup>150</sup> For Brown, the issue is that often the meaning and reliability of scientific studies is simplified or made to seem “real” or “objective”, leading to an inaccurate understanding of neuroscience and criminal responsibility.<sup>151</sup> These are valid concerns and may lead to further discussion on use of expert evidence or the introduction of ‘diagnostic trials’ rather than jury trials.<sup>152</sup> However, this is beyond the scope of this dissertation as my task is whether there is a need for a change in the criminal law’s approach to addicts who offend. I argue that there is a middle ground between Brown’s two extremes, whereby the law better acknowledges the clinical reality of addiction while still grounding the concept of criminal responsibility in a legal and moral framework.

## 2 *The relationship between law and neuroscience in the context of addiction*

If the notion of responsibility in the criminal law is grounded in moral and social standards, can scientific development in neuroscience present valid challenges? This debate is part of a broader discussion about the relationship between law and science, and whether the law

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<sup>148</sup> See chapter III.A.

<sup>149</sup> Brown at 243.

<sup>150</sup> At 243.

<sup>151</sup> At 243-244.

<sup>152</sup> See Cusick, above n 8, at 2441-2443.



should be medicalised. This problem does not have a clear answer and I do not purport to solve this issue. What this dissertation will do is examine whether neuroscience can play a greater role within the criminal law in the context of addiction.

Brown and Cusick present competing views as to what the relationship between the criminal law and science should be. Although Brown contends that the notion of criminal responsibility is a moral and legal construct, not scientific, Cusick argues that it is time for the law to acknowledge scientific developments that concern the diminished capacity of offenders. Can the criminal law take scientific insights seriously while maintaining legal understanding of responsibility?

A middle ground may be found in Green and Cohen's aptly titled 'For the Law, Neuroscience Changes Nothing and Everything'.<sup>153</sup> 'Everything' refers to the idea that new neuroscience on people's capacity for moral and legal responsibility threatens the notion of free will.<sup>154</sup> This will have important ramifications for the law as the retributivist tradition ultimately depends on the notion of free will which when undermined by science, causes a rejection of retributivism.<sup>155</sup> However, neuroscience also changes 'nothing' because the law makes no assumptions that are challenged by neuroscience.<sup>156</sup> "Every action is caused by brain events, and describing those events and affirming their causal efficacy is of no legal interest in and of itself."<sup>157</sup> The law assumes people have a general capacity for rational behaviour and, as such, questions about responsibility come back to an offenders ability to be rational.<sup>158</sup> Green and Cohen contend that this explains the law's acknowledgement of conditions that limit an offender's capacity.<sup>159</sup> The role of neuroscience is, therefore, to help explain rationality, but will not be exculpatory. This is also Brown's conclusion.<sup>160</sup>

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<sup>153</sup> Joshua Green and Jonathan Cohen "For the Law, Neuroscience Changes Nothing and Everything" (2004) 359(1451) *Law and the Brain* 1775.

<sup>154</sup> At 1776.

<sup>155</sup> At 1776.

<sup>156</sup> At 1778.

<sup>157</sup> At 1778.

<sup>158</sup> At 1778. See also chapter *II*.

<sup>159</sup> At 1778.

<sup>160</sup> Brown at 248.

This dissertation argues that science can inform the law to a greater extent than it currently does. Responsibility in the criminal law should continue to be grounded in legal and moral understanding. However, in the context of addiction, neuroscience can help to engage a better understanding of the nature and effect of addiction, particularly, how addiction motivates offending and reduces agency. Moral and legal judgements are already informed by theory, and enhanced scientific understanding of addiction can lead to positive reform in the law's current approach to accommodating addicts who offend.

### 3 *Differences in the nature and effect of addiction*

As discussed in chapter two, experts disagree significantly as to the nature and effect of addiction. This is complicated by the range of effects that different types of drugs can have on users. A report from the Ministry of Health splits drugs into four groups based on their effects: amphetamine-type stimulants, cannabinoids, hallucinogenic and psychedelic drugs, and opioid and sedative drugs.<sup>161</sup> The effects of addictive use of the drug methamphetamine, such as permanent brain damage<sup>162</sup> or psychosis,<sup>163</sup> are very different to those of opioids or cannabinoids, which are generally considered to be less harmful.<sup>164</sup>

This presents a difficult policy decision. Is it possible to create a generalised or blanket policy response regarding addicts who offend, despite the type of drug used? Should policy target specific effects or more harmful drugs, or particular circumstances of offending? These questions are beyond the scope of this dissertation. Instead, this dissertation rests on a generalisation that holds across all types and severities of addictions: addicts may have a capacity issue whereby their addiction affects their agency and their ability to act on evaluation of the moral wrongdoing of their offending. This has direct implications for an addict's liability and culpability. This dissertation explores how the status quo fails to take this into account and offers tentative solutions as to how the criminal law can better accommodate addiction.

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<sup>161</sup> McFadden Consultancy New Zealand Drug Harm Index 2016 (Ministry of Health, Research Report, 2016).

<sup>162</sup> Cusick, above 8, at 2430.

<sup>163</sup> Alice Lindsay Irving "Methamphetamine, Psychosis and the Insanity Defence" (LLB (Hons) Dissertation, University of Otago, 2009) at 4.

<sup>164</sup> Nutt *et al.*, above n 5, at 1047.

#### 4 *The binary nature of legal test*

A final challenge here is how a clinical question of degree of addiction, can be turned into a binary legal test. This issue pertains to the practicality of legal reform in the context of addicts who offend. Addiction is a continuum, not a dichotomy.<sup>165</sup> Conversely, legal tests on liability and defences are binary - they either apply or they do not. How can the criminal law introduce a legal test for addiction that demarcates between an addict whose capacity is compromised to the point where their agency is affected, and one who sits below this threshold?

The law already has a binary legal test for addiction to acknowledge addicts' diminished capacity, as demonstrated by the SACAT. However, there is little room in the law to take into account degrees of control. The high threshold of the legal test in the SACAT is an example of this. This is indicative of underlying assumptions about responsibility in the criminal law: people are rational actors capable of knowing the difference, and making a choice, between right and wrong.<sup>166</sup> The science of addiction shows us that this assumption does not hold in the context of addicts who offend. The question for my dissertation is whether it is possible to introduce a binary legal test for addiction at a level below the SACAT. Continuation of the law's current reliance on the criteria in the DSM-5 could lead to the introduction of bands of addiction that pertain to differing levels of capacity based on how many criteria are present.<sup>167</sup> The test for addiction could, therefore, remain a legal one, with neuroscience and expert evidence informing the court as to the nature and extent of an offender's addiction.

#### *D Comments*

The current conception of criminal responsibility assumes offenders have both the cognitive and volitional elements required to be liable for an offence. However, this assumption is at odds with the science of addiction. If the law continues to ignore the clinical realities of addiction, the status quo will remain at conflict with the principles of fair labelling: a principle of criminal law that the offence the person is convicted of should reflect their blameworthiness.

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<sup>165</sup> Brown, above n 87, at 239.

<sup>166</sup> Midson, above n 81, at 234.

<sup>167</sup> See chapter II and appendix one.

Furthermore, it means that the effect addiction has on the offender's ability to form mens rea is not taken into account. To link the mens rea or recklessness of an addict's substance use before the state of addiction developed, to offending once addicted means that liability is imposed without an addict's mental state being considered.

The criminal law and science conceptualise responsibility very differently. This dissertation does not set out to solve this problem but argues that the law can take science into account in the context of addiction better than it currently does. Resistance to any reform in the law that acknowledges an offender's vulnerability is expected. Concerns about how any proposed reform will work in practice are valid and need to be addressed.

Morse, Brown and Cusick represent three very different approaches to the literature on criminal responsibility and addiction. Morse justifies his conclusion that addicts can be held responsible for their offending by explaining that addicts experience periods of sobriety. He also acknowledges, however, the long-term effects that addiction has on an addict's decision-making facilities and argues in favour of the introduction of a partial defence. Brown represents a more conservative voice, yet fails to distinguish addiction from other circumstances in the law where the diminished control of an offender is recognised. Cusick's argument is the most promising. However, her scope is limited to methamphetamine addiction, as it is one of the most harmful drugs. I extend her conclusions to addiction to other drugs.

This dissertation adds to the literature on criminal responsibility and addiction by advancing an analysis of the current legal approach, to addicts who offend, when assessing liability in New Zealand. I also examine how the law can be more reflective of science in the context of addiction and look at the feasibility of various paths forward. Chapter four explores the current statutory and case law framework to highlight the disconnect between the science of addiction and criminal responsibility, and the resulting gap in the law. This sets a foundation for my tentative recommendations for reform in chapter five.

#### ***IV How Does the Law Currently Approach the Issue of Criminal Responsibility for Alleged Offending By People With Addictions?***

This chapter explores the current statutory and case law framework to highlight this disconnect and the resulting gap in the law. It demonstrates that the criminal law does not account for compromised free will or control, which means that it is out of step with the clinical reality of addiction below the high threshold of the SACAT. Courts are acknowledging that addiction plays a role in offending but this factor is taken into account only at sentencing and not when assessing liability.<sup>168</sup> The law generally takes a simplistic and conservative approach to addiction and does not think enough about its relationship with criminal responsibility, given the scientific understanding of addiction. As discussed in chapter two, New Zealand does not have a legislative framework that provides a detailed definition of addiction. Courts currently deal with addiction through fitness to stand trial when it is extremely severe, or at the post-plea stage, either as mitigation in sentencing or through the Alcohol and Other Drug Courts.

##### ***A Legislation***

The conservative approach of the law is most clearly exemplified by the focus of the SACAT on ‘serious substance addictions’, as discussed in chapter two. There is thus a gap in law for addicts who offend and do not meet the threshold in the SACAT due to having some level of capacity, despite this capacity being compromised to a degree whereby it may be unfair to impose criminal liability on them as if their offending was not the result of an addiction. The SACAT enables those with ‘serious substance addictions’ to receive compulsory treatment if their capacity to make decisions about treatment for their addiction has been ‘severely impaired’.<sup>169</sup> A person’s capacity is ‘severely impaired’ if that person is unable to understand information relevant to decisions about their treatment, retain that information, use or weigh the information as part of the decision-making process, or communicate the decisions.<sup>170</sup>

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<sup>168</sup> *R v Guthrie* [2008] NZCA 439; *He v R* [2017] NZCA 77; *Beckman v NZ Police* [2018] NZHC 324.

<sup>169</sup> SACAT, above at n 14, s 3.

<sup>170</sup> Section 9.

Although the SACAT is a shift towards the inclusion of modern neuroscience on addiction within legislation, its provisions are very detailed and set a high threshold for eligibility.<sup>171</sup> This narrowness is understandable given that compulsory treatment involves coercive powers, which has serious rights implications, and so these situations are considered with great care. However, if an offender met the threshold under the SACAT, it is unlikely that they would be tried for their offence and would instead be dealt with under the Criminal Procedure (Mentally Impaired Persons) Act 2003.<sup>172</sup> There is therefore, a clear gap for addicts who do not meet the high threshold under the SACAT, and who are thus fit to stand trial, but whose capacity is compromised due to their addiction.

### *B Case Law*

In New Zealand case law, addiction cannot be examined aside from in the sentencing process, where it can be regarded as a mitigating factor depending on the offender's circumstances.<sup>173</sup> Courts cannot create new common law defences, justifications or excuses to offences.<sup>174</sup> However, they are explicitly acknowledging the role that addiction plays in drug offending.<sup>175</sup> This has resulted in an informal matrix of rules through which an offender's addiction can be taken into account in the sentencing process.

Courts have acknowledged that addiction can be an underlying factor in drug-related offending, though this is subordinate to the statutory purpose of deterrence.<sup>176</sup> Addiction has not been defined in case law and is typically established through expert testimony to be accepted or rejected by the court.<sup>177</sup> Addiction can explain an offender's motivation for offending, for

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<sup>171</sup> Pita Roycroft "A critical analysis of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017" (2017) 9 NZFLJ 15.

<sup>172</sup> Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 7-14.

<sup>173</sup> Sentencing Act 2002, s 8(a), (h)-(i).

<sup>174</sup> Crimes Act, s 20.

<sup>175</sup> *He v R* [2017] NZCA 77. See also *R v Guthrie* [2008] NZCA 439 at [11]-[13] where the Court of Appeal considered the appellant's addiction to methamphetamine and the resulting psychological issues as seriously impacting her decision-making process.

<sup>176</sup> *Jarden v R* [2008] NZSC 69 at [12]. See also [14] where the Supreme Court held that the personal circumstances of an offender, such as drug addiction, may be relevant if they contribute to the offending or on purely compassionate grounds.

<sup>177</sup> See *Walker v R* [2016] NZHC 2647 where Williams J afforded a discount for a drug counsellor's observation that Walker's individual management of his drug taking habit had improved.

example, that the criminal activity was a secondary consequence of addiction, due to impaired judgement, rather than primary choice. Offending in these circumstances would then point to rehabilitation, rather than punishment, as the most appropriate sentence, particularly if the offender can show genuine attempts to and desire to recover from addiction.<sup>178</sup>

However, little regard is given to personal circumstances such as addiction where the offence is serious, such as drug dealing operations or supplying a Class A drug.<sup>179</sup> Determining the seriousness of drug-related offending generally follows the bands set out in the aforementioned guideline judgment of *R v Fatu*.<sup>180</sup> *R v Fatu* involved the manufacturing and supply of methamphetamine.<sup>181</sup> The Court of Appeal proposed sentencing bands dependent on the quantity and purity of the drugs involved, as well as the offender's role.<sup>182</sup> The relevant band of offending affects whether the court will take the offender's addiction into account as a mitigating factor.<sup>183</sup> Serious cases are distinguished as the offending goes beyond "fuelling the addiction."<sup>184</sup>

There may be a few reasons why courts do not consider addiction to be a mitigating factor in the sentencing of serious crimes. First, there may be a threshold line where an offender's behaviour becomes too sophisticated for addiction or is motivated by more than addiction.<sup>185</sup> Deterrence then becomes the prime objective when sentencing, as opposed to rehabilitation. Secondly, there may be some crimes deemed so serious and harmful by society that excuses do not hold. This speaks to public protection and denunciation of conduct, rather than the offender's responsibility for their offending.<sup>186</sup> A comparison can be made with the

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<sup>178</sup> See *Beckman v NZ Police*, above at 168, where the Court gave a discount in the sentencing due to the offender's addiction issues as well as two months of sobriety showing behavioural changes.

<sup>179</sup> *Martel v R* [2018] NZCA 305; *R v M* [2017] NZCA 483; *Chen v R* [2009] NZCA 445, [2010] 2 NZLR 158.

<sup>180</sup> *R v Fatu*, above n 77.

<sup>181</sup> At [1].

<sup>182</sup> At [30]. See chapter III.A.2.

<sup>183</sup> At [43]. See *Martel v R*, *He v R*, and *R v Ingram* [2018] NZCA 252, where the appellants' offending generally fell within band four and no discount was given for remorse or addiction.

<sup>184</sup> *Martel v R* at [30].

<sup>185</sup> At [30]; *He v R* at [19]. See also *R v Hoddinott* (1992) 9 CRNZ 262 (CA) where the offences of importing and possessing Class A drugs amounted to more than purely addiction-motivated offending as financial gain played an important part.

<sup>186</sup> See *He v R* at [19].

inability for the common law defence of duress to apply in the context of homicide.<sup>187</sup> However, the key point here is that even in cases where courts deem the offending too serious to warrant the consideration of addiction as a mitigating factor in sentencing, courts are still stating the role that addiction plays in the offending: that it affects culpability.<sup>188</sup>

In cases where offenders have a history of offending to secure the means to sustain their addiction, structured and supervised programmes, such as those offered by rehabilitation facilities or the Alcohol and Other Drug Courts in Auckland and Waitakere, are considered as a final alternative to prison.<sup>189</sup> These programmes involve active supervision of treatment by either medical professionals or a judge.<sup>190</sup> The appropriateness of this approach is tested on a case-by-case basis, where the offender shows a genuine desire to reform.<sup>191</sup> Although I agree that addicts should receive treatment, rather than imprisonment, for their offending, the scope of this dissertation is whether addiction should be considered when assessing liability before the post-plea stage.

### *C Relationship Between Addiction and Intoxication Law*

This section examines the crossovers between intoxication and addiction to demonstrate that these are distinct conditions and so cannot be painted with the same legal brush. Intoxication is a temporary and transient substance-induced disorder, and a common feature of addiction, which is a substance-use disorder.<sup>192</sup> Intoxication is managed by the law in two ways, depending on the level of intoxication. First, that where the offender is so intoxicated that they act as an ‘alcoholic automaton’ and are unable to form the requisite mens rea.<sup>193</sup> This law also accommodates addiction where an addict’s circumstances meet the legal threshold of an

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<sup>187</sup>P. R. Glazebrook “Structuring the Criminal Code: Functional Approaches to Complicity, Incomplete Offences and General Defence” in Simester and Smith (eds) *Harm and Culpability* (Clarendon Press, Oxford, 1996) 195 at 208. See also *R v Lowe* [1987] AC 417 (HL) at 432 which reaffirmed that necessity is not legal justification of homicide as the criminal law needs to protect the “innocent victim”, as set out by Lord Coleridge in *R v Dudley and Stephens* (1884) 14 QBD 273 at 286.

<sup>188</sup> *Martel v R*, above n 179, at [29].

<sup>189</sup> Litmus Final Process Evaluation for the Alcohol and Other Drug Treatment Court (Ministry of Justice, 2016) at 3.

<sup>190</sup> Law Commission “Controlling and Regulating Drugs” [2011] NZLJ 153 at 154.

<sup>191</sup> Litmus at 18-19.

<sup>192</sup> American Psychiatric Association, above n 4, at 483.

<sup>193</sup> Finn and France, above n 59, at CA23.43.



automaton. Secondly, intoxication can be a factor relevant to the jury when establishing whether there is sufficient evidence of the requisite mens rea.<sup>194</sup> Interestingly, and perhaps arbitrarily, addiction is not.

Intoxication is a common law defence that continues to apply in New Zealand under s 20(1) of the Crimes Act.<sup>195</sup> Intoxication is not an excuse for the commission of a crime, but may limit or negate the fact of intent. The leading case here is *R v Kamipeli* which ruled that intoxication is never in itself a defence.<sup>196</sup> When drunk, Kamipeli kicked another person to death. The trial judge directed the jury that, to acquit, they would have to find that Kamipeli was so drunk he was acting as an automaton. However, the Court of Appeal held that the correct approach is that the Crown must prove intent for the relevant offence beyond reasonable doubt. Intoxication is, therefore, a part of the totality of evidence which may raise reasonable doubt as to intent, and a matter for the jury to take into consideration.<sup>197</sup> This approach was upheld in *R v Tihi*.<sup>198</sup>

Intoxication is thus relevant to the jury establishing whether there is sufficient evidence of the requisite mens rea. This requires a detailed direction explaining how intoxication may have affected the requisite mental elements.<sup>199</sup> This is the same whether the offender was affected by alcohol, other drugs, or by both.<sup>200</sup> No distinction has been drawn between the relevance of intoxication to offences which require “basic intent”, where recklessness is sufficient, to those which require “specific intent”.<sup>201</sup> Consumption of alcohol and other drugs

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<sup>194</sup> *R v Storer* CA 368/05, 2 May 2006, where omission to direct the jury on evidence of consumption of alcohol or drugs as to relevant intent resulted in a successful appeal.

<sup>195</sup> Finn and France at CA23.54.

<sup>196</sup> *R v Kamipeli*, above n 60.

<sup>197</sup> Finn and France at CA23.50.

<sup>198</sup> *R v Tihi* [1990] 1 NZLR 540 (CA).

<sup>199</sup> Finn and France at CA23.55.

<sup>200</sup> *R v Lipman* [1970] 1 QB 152, [1969] 3 All ER 410 (CA); *Director of Public Prosecutions v Majewski* [1977] AC 443, [1976] 2 All ER 142 (HL); *Viro v R* [1978] HCA 9; (1978) 141 CLR 88; compare *R v Hardie* [1985] 1 WLR 64, [1984] 3 All ER 848 (CA).

<sup>201</sup> J. M. E. Garrow and Gary L. Turkington *Garrow and Turkington's Criminal Law in New Zealand* (LexisNexis, Wellington, 2018) at CRI20.9.

can, therefore, contribute to a finding of absence of intent, taken into account by the jury alongside other factors.<sup>202</sup>

Severe intoxication may result in automatism, where the offender is acting without conscious volition.<sup>203</sup> However, these cases are “extremely rare” and expert evidence is likely to be needed.<sup>204</sup> Alcoholic automatism has so far only been considered in circumstances where intoxication is so severe that it reduces murder to manslaughter, as there is no requirement for intent. It has been left open as to whether alcoholic automatism could ever result in an acquittal for murder.<sup>205</sup>

Due to the nature of addiction, the current law on intoxication would likely catch some addicts in circumstances either where their intoxication, alongside other factors, is found to negate intent, or where their intoxication is so severe that automatism applies. However, this leaves a gap in the law for addicts who offend when they are sober, or when they are intoxicated but below the high threshold of alcoholic automatism. It also means that it is the state of intoxication, not the addiction, that is being taken into consideration when assessing an offender’s criminal responsibility. Addiction must be treated differently from intoxication because it is inherently different. Addicts endure neuro-adaptation to the substances, cravings, and their ability to control or make rational decisions about their drug use has been compromised.<sup>206</sup> Addiction is a long-lasting and severe disorder whereas intoxication is temporary.<sup>207</sup>

#### *D Relationship Between Addiction and Insanity*

The defence of insanity under s 23 of the Crimes Act is concerned with the individual’s mental capacity for crime. Insanity is a legal, rather than a medical category, and a high threshold of lack of rationality must be met for the defence to succeed.<sup>208</sup> This means that the

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<sup>202</sup> *R v Kamipeli* at 616.

<sup>203</sup> *R v Cottle* [1958] NZLR 999 (CA) at 1007, 1021 as per Gresson P.

<sup>204</sup> See Canadian cases of *R v Daviault* [1994] 3 SCR 63; *R v Daley* 2007 SCC 53.

<sup>205</sup> Garrow and Turkington at CRI20.12.

<sup>206</sup> American Psychiatric Association, above n 4, at 483.

<sup>207</sup> At 483 and 485.

<sup>208</sup> Fletcher, above n 37, at 839; Ashworth and Horder, above n 32, at 143.

insanity defence cannot accommodate compromised rationality as a result of addiction. Section 23 of the Crimes Act declares that those labouring under a natural imbecility or disease of the mind (“DOTM”) cannot be convicted of an offence if their condition renders them incapable of understanding the nature and quality of their offending, or that their offending was morally wrong. A disease of the mind can generally be understood as an illness or disorder that impairs the human mind and its functioning.<sup>209</sup> Classification is a question of law for the judge, and as such, there is no precise definition for DOTM either at statute or in common law.<sup>210</sup>

The relationship between insanity and intoxication is complex and academic opinion is divided. An external factor, such as an intoxicant, may support an insanity defence if it causes a DOTM.<sup>211</sup> For example, a disease of the mind may occur where substance use aggravates a pre-existing mental illness.<sup>212</sup> Additionally, a drug such as methamphetamine can cause a syndrome similar to schizophrenia, accompanied by vivid hallucinations, delusions and thought disorders.<sup>213</sup> However, more than the temporary effects of substance use is generally required to be a disease of the mind.<sup>214</sup>

There has also been discussion as to whether alcoholism is a DOTM.<sup>215</sup> Although intoxication itself may not be classified as a DOTM, severe substance-use disorders produce an independent and recognised pathological condition, which may form the grounds for an insanity defence.<sup>216</sup> Following the disease model of addiction, addiction could well be a DOTM under s 23. There has not been any discussion on this at common law in New Zealand.

If addiction is a DOTM, and the other limbs of s 23 are satisfied, proof of such a disorder would mean that the appropriate verdict is insanity. However, this may not be appropriate. The other limbs of the defence state that the DOTM must have rendered the offender incapable of

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<sup>209</sup> Garrow and Turkington at CRI23.4.

<sup>210</sup> At CRI23.4.

<sup>211</sup> See Ashworth and Horder at 90-92 and 141 for further discussion on the internal vs external factor debate. See also Finn and France, above n 59, at CA23.13 and CA23.61.

<sup>212</sup> Finn and France at CA23.61. See also *Director of Public Prosecutions v Whelan* [2006] VSC 319, (2006) 177 A Crim R 449.

<sup>213</sup> Cusick, above n 8, at 2430. See generally Irving, above n 163.

<sup>214</sup> Garrow and Turkington at CRI 23.5; Ashworth and Horder at 91.

<sup>215</sup> Finn and France at CA23.13.

<sup>216</sup> See *R v Enright* [1961] VR 663 (SC).

understanding the nature and quality of the act or omission, or of knowing that the act or omission was morally wrong.<sup>217</sup> These presume irrationality and speak to a level of addiction and capacity similar to what is covered by the SACAT. The insanity defence thus cannot accommodate compromised rationality of addicts who offend. Including addiction as a DOTM under s 23 could result in an incoherent doctrine and confuse the criteria.

Additionally, s 23 is the product of the tension between individual autonomy and social protection, with an insanity verdict prioritising the latter over the former.<sup>218</sup> Although there may be considerations of social protection regarding an addict's propensity to re-offend, given the nature of addiction, this is a very different harm to that targeted by an insanity verdict. Insanity verdicts pertain to social protection through the compulsory treatment of offenders who suffer from a DOTM and are incapable of understanding their conduct was wrong. Addicts who offend, however, may have some level of capacity and may be aware that their conduct is wrong but lack the agency to respond to that evaluation. Furthermore, there are very real implications with declaring an offender to be legally insane, with a successful defence under s 23 calling for the detainment of an offender as a 'special patient'.<sup>219</sup> While treatment or rehabilitation may be appropriate for addicts, the consequences of an insanity verdict are similar to the compulsory treatment requirement in the SACAT.<sup>220</sup>

### *E Is the Current Approach to Addicts Who Offend Sufficient?*

The current approach to offending by addicts through legislation and case law only acknowledges extreme circumstances. The law is generally reluctant to take broad approaches to defences or mitigating circumstances. However, in the context of addiction, this reluctance occurs despite substantial evidence that addictive behaviour can be out of control and hence addicts are less than fully morally responsible. Addicts have a capacity issue, but the law as it stands does not recognise this aside from through the SACAT at a very severe level. I argue that this is problematic.

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<sup>217</sup> Crimes Act, s 23(2).

<sup>218</sup> Ashworth and Horder at 142.

<sup>219</sup> Criminal Procedure (Mentally Impaired Persons) Act, ss 21-24.

<sup>220</sup> SACAT, s 38.

Exploration of the high threshold in the SACAT, mitigating factors in sentencing, the law on intoxication and the law on insanity shows that there is a clear gap in the law regarding addicts who offend but have some level of capacity. The current approach leaves addicts with some level of capacity to the regular criminal justice system, which does not consider the effects addiction has on offending until the post-plea stage. Although the law on intoxication is adequate when dealing with cases of addicts whose level of intoxication amounts to automatism, addiction is not a factor to be taken into account by the jury when assessing the evidence as to whether the offender had the requisite mens rea, unlike intoxication below the automaton level. Cusick shows that this is problematic in the context of addiction because addiction can result in either a partial or full negating of mens rea.<sup>221</sup>

Addicts who offend may be able to appreciate the wrongdoing of their actions but, due to their addiction, do not have the agency to respond to that evaluation. This manifests itself in offending, and the law needs to be able to respond to this in a manner that acknowledges the existence and the cause of the addict's diminished responsibility. Chapter five will set out four tentative paths forward in order to do so.

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<sup>221</sup> Cusick, above n 8, at 2437.

## *V Should the Criminal Law Accommodate Addiction and, If So, How?*

This chapter explores whether the criminal law should accommodate circumstances where addicts offend but lack responsibility for their offending and, if so, how. This chapter sets out and assesses three paths for reform available to the criminal law to accommodate addiction when assessing liability, as well as anticipate arguments against these paths and for the status quo.

### *A Recommendations*

I have assessed the criminal law's current approach to addiction, which only acknowledges extreme circumstances where an offender's addiction affects their liability. Understanding of responsibility in the law is based on the assumption that people have some general level of capacity for rationality, agency and choice. This manifests itself in the law's reluctance to not hold offenders responsible for their actions. This dissertation highlights how neuroscience can show that this assumption does not hold in the context of addicts who offend. How do we 'fix' the disconnect between the neuroscience of addiction and the criminal law? How could the law better acknowledge or incorporate developments in neuroscience that inform understanding of the role addiction plays in offending?

I set out three potential ways that the criminal law can respond to addiction in offenders when assessing liability. First, I examine the feasibility of introducing a new offence of addiction-related harm to apply to addicts who offend. Secondly, I look at whether a partial defence for addiction could be introduced. Thirdly, I assess whether addiction could be included as part of the evidence taken into account by the jury when establishing whether an offender had the requisite mens rea. We are only just starting to think about the role addiction plays in offending, and these are tentative options. I also assess the advantages and disadvantages of maintaining the status quo.

The disease model of addiction shows us that addiction is also a health issue. Whatever the 'formal' response of the criminal law will be, the cause of an addict's offending - their addiction - must also be addressed. Addicts are overrepresented in crime statistics, and treatment,

rather than punitive responses, is the only meaningful way to help addicts to overcome their addiction and curb reoffending rates.<sup>222</sup> However, this is relevant to sentencing and beyond the scope of this dissertation. My focus here is how the criminal law can better accommodate the science of addiction when assessing an addict's liability for their offending.

### *1 Introducing a new offence of addiction-related harm*

One option for reform in the law would be to introduce a strict liability offence of addiction-related harm. This approach would acknowledge the disease model of addiction, which demonstrates how cognitive and behavioural changes resulting from addictive drug use can reduce or negate an addict's ability to either form intent or to exercise choice and agency.<sup>223</sup> The status quo currently convicts addicts of their offending without considering the effects that their addiction has on their offending. A strict liability offence would be a more honest reflection of the status quo and also better align with the principles of fair labelling.

The requirements for this offence would be two-fold. First, the offender would need to have an 'addiction', meeting either a clinical test or a legal test, or a mix of the two, to show that they are not fully responsible for their conduct. Secondly, the offender must have been charged with one of a list of specified offences. If these two requirements are satisfied, the addict can be charged with a strict liability offence of addiction-related harm instead. In line with the current approach to addiction in sentencing, this new offence may only be available for addicts charged with less serious crimes. It would only be necessary for the offender to have committed the actus reus of a specific offence, with no mens rea requirement. A strict liability offence would better account for the reality of addiction by acknowledging the effects it has on an addict's ability to form the requisite intent or exercise agency.

A new offence of addiction-related harm would reflect a lower level of responsibility and culpability for the same act and same level of harm. It could serve to reduce the sentence for that crime by a determined amount, ensuring that the consequences of conviction are proportionate to

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<sup>222</sup> Law Commission "Controlling and regulating drugs", above n 190, at 154.

<sup>223</sup> See Cusick, above n 8, at 2438 for further discussion on how cognitive and behavioural defects associated with addiction affect mens rea.

the offending. It is important that this is done here rather than through judicial discretion in sentencing mitigation. A new offence would recognise the diminished capacity of addicts who offend. Caution must be taken not to criminalise the state of addiction. It is not a crime to be intoxicated or addicted per se. However, people still need to be held accountable for their offending.

This option may still perpetuate the current non-compliance with the principles of fair labelling. If all addicts who offend, regardless of their crime, are charged and convicted of the same ‘addiction-related harm’ offence, then there is no way to differentiate between the seriousness of the crimes. A solution to this concern may be to tier the offences by the seriousness of the wrongdoing or harm, determined, for example, by the current legislative sentences for the mens rea versions of listed crimes. This would be akin to bands in sentencing or degrees of offending in jurisdictions that tier the seriousness of crimes.<sup>224</sup> Such a solution would adequately acknowledge degrees of responsibility and fault for offending, and may also help to still public backlash.

## 2 *Introducing a partial defence of addiction*

A partial defence of diminished responsibility may be appropriate for circumstances where addiction has affected an offender’s ability to refrain from wrongdoing after moral evaluations of their actions. I am not suggesting this function as a diminished responsibility defence that reduces murder to manslaughter. Rather, I propose it take the form of a new type of verdict and function as an excuse. Such a defence would acknowledge that, although the offender committed an offence, they should not be held fully criminally liable for doing so as their addiction impaired their agency and self-control. This is one of the responses advocated for by Morse.<sup>225</sup> However, in New Zealand, we currently have no defence of diminished responsibility.

A partial defence of addiction is a popular recommendation in the literature on practical responses to criminal offending of addicts.<sup>226</sup> It was first argued for by defendants in two

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<sup>224</sup> See Ashworth and Horder, above n 32, at 246-249 for discussion on the advantages of degrees of murder to recognise different types of mens rea.

<sup>225</sup> Morse, above n 2, at 196-199.

<sup>226</sup> See generally Morse and Grant, above n 68.



Supreme Court decisions in the United States, who contended that their addiction produced a lack of self-control and thus a lack of criminal responsibility.<sup>227</sup> Introducing a partial defence of addiction would recognise diminished responsibility for a range of addiction-related circumstances that do not reach the threshold in the SACAT or insanity. It would rely on expert evidence and would accommodate offenders who do not have the self-control or regulation to resist the impulses of their addiction.<sup>228</sup> The purpose of positive defences in the law is to recognise human frailty, and a partial defence for addiction would be no exception to this.<sup>229</sup> This option would allow for more flexibility, sensitivity and discretion within the law when determining the liability of addicts. It will also bring the law into line with the principles of fair labelling.

The key question is how this will work in practice. Jurisdictions with defences of partial responsibility typically move the offending to a lower tier.<sup>230</sup> Although the criminal law in New Zealand is not set up in this way, a partial defence could occur through the court's verdict. It could function either as 'not guilty by reason of addiction' or 'guilty but partially responsible due to addiction'. The first option would acknowledge that an addict is not culpable or liable for their offending due to their addiction, much as the current law on insanity does. The second option would hold the offender legally responsible but provide a formal mechanism through which to allow or require appropriate mitigation in sentencing. This provides sentencing judges with a framework through which to recognise the diminished responsibility of addicts who offend, rather than relying on the discretion of some judges. This is beneficial for both consistency in sentencing of addicts who offend, and accommodating for the effects that addiction has on offenders.

An important question here will also be whether addiction calls for legal intervention. If addiction absolves offenders from theoretical criminal liability, the issue remains that their

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<sup>227</sup> *Robinson v California* (1962) 370 US 660; *Powell v Texas* (1968) 392 US 514.

<sup>228</sup> Compare *R v Gordon* (1993) 10 CRNZ 430 (CA) where the Court of Appeal accepted that expert evidence can be relied upon to show that consequences of an illness or disorder, that can affect judgement, may be such to weaken or negate the inference of intent.

<sup>229</sup> See chapter III.A.

<sup>230</sup> Fran Wright "Does New Zealand Need a Diminished Responsibility Defence?" (1998) 2 Yearbook of New Zealand Jurisprudence 109 at 211. See also Fletcher, above n 37, at 849.

offending did not result from an aberration and so the risk of repetition may be high.<sup>231</sup> Addiction is the root of an addict's offending, and treatment is the preferred consequence of a partial defence of addiction. Incarceration has benefits for public protection but serves limited rehabilitative purposes for addicts. However, New Zealand currently does not have the resources or facilities to deal with the addiction-related health issues of offenders.

### 3 *Considering addiction when assessing an offender's liability*

A third option could be to include evidence of addiction when assessing the liability of an offender. The neuroscience of addiction illustrates how addiction affects mens rea. Like the current approach to intoxication, evidence of addiction could be included in the inquiry as to whether the prosecution has established the mental element required for conviction. At sentencing, courts are already acknowledging the significant role that addiction can play in offending.<sup>232</sup> Allowing courts to consider this evidence when assessing liability is a logical step, particularly as it is already done for intoxication. Like intoxication, the judge should adequately direct the jury as to the effects that the offender's addiction could have on the requisite mens rea elements of the relevant offence(s). In severe cases where the offender could not form the requisite mens rea due to their addiction, the result would be an acquittal, akin to how the law currently treats alcoholic automatism.<sup>233</sup>

Brown, however, contends that an inquiry into the effect of addiction on an offender's capacity is more appropriately done at the sentencing stage. Although sentencing processes can take into account different degrees of moral blameworthiness, they have their limitations. Sentencing is about the extent to which offenders should be punished and presumes liability. Despite the science of addiction exhibiting the impact addiction has on an offender's ability to form mens rea or exercise agency, this is currently not taken into account. This means that the status quo excludes potentially negating evidence of mens rea when assessing liability, which is problematic. Additionally, allowing the jury to consider evidence of addiction when assessing liability will help to bring the law in line with the principle of fair labelling by ensuring that an

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<sup>231</sup> Lacey, above n 1, at 66.

<sup>232</sup> See chapter *IV.B*.

<sup>233</sup> Grant, above n 68, at 1018-1020.

addict's comprised culpability for their offending is considered when assessing liability. This should hold whether the offender is sober or intoxicated, so long as they have an underlying condition of addiction. This solution acknowledges the role that addiction has in reducing an offender's liability without making drastic changes to our criminal code.

#### 4 *Retaining the status quo*

There may also be good arguments for retaining the status quo. First, the law must draw a line when recognising an offender's deviation from the criminal law's assumptions of rationality. The law emphasises individual autonomy and responsibility for one's behaviour.<sup>234</sup> Any defence of impaired control needs demarcation to keep the defence within verifiable bounds.<sup>235</sup> Taking into account extreme cases of addiction is an appropriate task for the law but, for a generalised group of addicts who offend, there is a real need for social regulation and incentivising self-control.<sup>236</sup> Making allowances in the law for offenders with addiction levels below the threshold in the SACAT may function to exculpate or 'reward' addiction.

Secondly, legal responsibility is a moral and social norm to be kept separate from science and other causal variables. It may be most appropriate for these variables to be considered at the sentencing stage.<sup>237</sup> However, it can be argued that the status quo ultimately punishes people for a condition they are often powerless to change. Addiction is a status and not criminalised in and of itself. However, punishing an addict for their drug-related offending, or for offending resulting from their diminished capacity for rationality, is essentially convicting addiction under a different name.

Thirdly, there are practical reasons to want to hold addicts legally responsible for their conduct. We want to protect citizens against harm and criminal behaviour.<sup>238</sup> If addicts are prone to offending and to re-offending, due to the nature of their addiction, there are sound policy

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<sup>234</sup> See discussion on criminal responsibility in chapter *III.A*.

<sup>235</sup> Fletcher, above n 37, at 802.

<sup>236</sup> The Law Commission "Controlling and regulating drugs", above n 190, at 154.

<sup>237</sup> See generally Brown, above n 87.

<sup>238</sup> Fletcher at 414.

reasons to want to separate them from the public either through compulsory treatment programmes or imprisonment.

If addicts are genuine about their rehabilitation and desire to break the cycle of re-offending, the Alcohol and Other Drug Courts are an option available to them. However, the Alcohol and Other Drug Courts are only available for those in Auckland and Waitakere who have pled guilty to their offending.<sup>239</sup> This is problematic in two ways. First, it is only available to addicts who offend within the regions where the Alcohol and Other Drug Courts are set up, meaning that those beyond these areas do not have this alternative available to them. Secondly, having a guilty plea as a requisite criterion into admissibility into programme presumes liability for offending, which addiction compromises. Acknowledging that one's addiction is a problem and wanting to seek treatment is very different from acknowledging guilt for a criminal offence.

## *B Conclusion*

The paths for reform outlined above range in how radical they are compared to the status quo. My conclusion is that reform is necessary. The legal concept of criminal responsibility should take the science of addiction into account where it can be shown that an addict's offending does not reflect their level of responsibility. Science can help to inform legal concepts of responsibility, explain an addict's offending and motivate reforms such as the options outlined above.

Although these conclusions are tentative, I believe that introducing a new offence for addiction-related harm is the preferred path forward. This option best accommodates the neuroscience which demonstrates how addiction causes a diminishing or negating of mens rea. Strict liability offences criminalise specific behaviour that violates social norms, without needing to prove intent or mental culpability.<sup>240</sup> The test in the SACAT gives us a framework for a legal test for 'addiction', though it deals with capacity. A new strict liability offence can build off this framework to accommodate for addicts with some capacity. The list of offences, which the new offence can be substituted for, can be limited to only cover less harmful crimes, and the offence

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<sup>239</sup> Litmus, above n 189, at 8.

<sup>240</sup> Fletcher at 469.

can be structured so that the conviction can reflect both the gravity of the offending and the addict's diminished culpability. Although a partial defence serves to excuse the offender's conduct, it assumes that the actus reus and mens rea elements of the offence have been satisfied, which may not be the case in the context of addicts who offend. Introducing a new offence is the strongest way for the criminal law to better accommodate science and acknowledge the role addiction plays in reducing an offender's agency and responsibility: key principles of criminal liability.

However, this option will likely be the most difficult to implement in practice due to both public resistance and the legislative changes required. Resistance to any reform in the law that acknowledges an offender's vulnerability is expected. Concerns about how any proposed reform will work in practice are valid and need to be addressed. As such, I submit that a more realistic option would be to include addiction as part of the evidence to be considered when assessing liability. Ensuring that assessment of an offender's liability takes the nature and effect of addiction, in the circumstances of that particular addict's offending, into account, will help to bring legal responsibility closer to scientific responsibility. This would be the first step of a slow process of reform to the inadequate status quo.

## ***VI Conclusion***

The criminal law's current approach to criminal responsibility does not take into account the role addiction plays in offending, aside from in extreme circumstances or, occasionally, in sentencing. The disease model demonstrates how addiction has a real and direct impact on an offender's ability to form mens rea, to understand the moral wrongdoing of their offending and to respond to that evaluation. By not considering addiction when assessing liability, the status quo is disconnected from what neuroscience tells us about an addict's decision-making processes as well as their agency and culpability. This means that offending by addicts is criminalised without acknowledgement of the effects that addiction has on their ability to form mens rea or to exercise choice and control over their actions. I conclude that the current approach is problematic and unjust. The criminal law should not continue to ascribe legal responsibility to a group of people who empirically do not have it.

There are options available to reform how the law accommodates for addiction that is in line with both scientific understanding of addiction and the principles of fair labelling. Although introducing a strict liability offence for addiction-related harm is my preferred approach, as it acknowledges an addict's reduced culpability for their offending and is in line with fair labelling, simply taking addiction into account when assessing liability is a step towards ensuring the law acknowledges the nature and effect of addiction on offending.

Reform in this area of the criminal law will need to be supplemented with an increase in rehabilitation and treatment facilities for addicts, further inclusion of clinical evidence at trial and sensible drug criminalisation policies. Responsibility in the criminal law should continue to be grounded in legal and moral understanding, however, a 'tough on crime' approach does not work in the context of addiction, as addicts are not in control of their addiction nor using voluntarily. Addiction is a disease and the principles of deterrence do not hold.<sup>241</sup> New Zealand is poorly equipped to provide treatment to deal with the health concerns of addicts, and an increase in

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<sup>241</sup> Grant, above n 68, at 1021.

resources for treatment of addiction can help to curb the drug-crime cycle and reduce re-offending rates.<sup>242</sup>

This dissertation highlights the real need for the criminal law to better accommodate addiction. We cannot continue to ignore the diminished responsibility of addicts who offend nor bind the justice system to misinformed public perceptions of addiction. Neuroscience can help to engage a better understanding of the nature and effect of addiction, particularly, how addiction motivates offending and reduces agency and self-control. Judges currently do what they can within the more flexible framework of sentencing but need to be empowered to take addiction into account when assessing an addict's liability for their offending. Reform will help to make the law's approach to addiction in line with both the clinical realities of addiction and the principle of fair labelling.

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<sup>242</sup> Litmus, above n 189, at 3.

## *Appendix One*

A person is only likely to be assessed as having a ‘severe substance addiction’ under s 8 of the SACAT if they meet many, if not most, of the 11 DSM-5 criteria for substance-use disorder. A comparison of the criteria of the DSM-5 and that of SACAT are summarised in the table below:

<b>Criteria in DSM-5</b>			<b>Corresponding section(s) in the SACAT</b>	
Impaired control	1	Individual may take the substance in larger amounts or over a longer period than what was originally intended.	Section 8(1)(a)	A severe substance addiction is a continuous or an intermittent condition of a person that manifests itself in the compulsive use of a substance.
	2	Individual may express a persistent desire to cut down or regulate substance use and may report multiple unsuccessful efforts to decrease or discontinue use.	Section 8(2)(c)	Unsuccessful efforts to control use.
	3	Individual may spend a great deal of time obtaining or using the substance, or recovering from its effects.	Section 8(1)(a)	A severe substance addiction is a continuous or an



				intermittent condition of a person that manifests itself in the compulsive use of a substance.
	4	Craving (manifested by an intense desire or urge for the drug); involves classical conditioning; associated with activation of specific reward structures in the brain.	Section 8(2)(b)	Craving.
Social impairment	5	Failure to fulfill major role obligations at work, school or home.	Section 8(1)(b)	A severe substance addiction is a continuous or an intermittent condition of a person that...is of such severity that it poses a serious danger to the health or safety of the person and seriously diminishes the person's ability to care for himself or herself.
	6	Individual may continue substance use despite having	Section 8(2)(d)	Use despite harmful consequences.

		persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance.		
	7	Important social, occupational or recreational activities may be given up or reduced because of substance use.	Section 8(1)(a)	A severe substance addiction is a continuous or an intermittent condition of a person that manifests itself in the compulsive use of a substance.
Risky use	8	Substance use in situations in which it is physically hazardous.	N/A	
	9	Individual may continue to use despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance; key issue is individual's failure to abstain from the substance despite the difficulty it is causing.	Section 8(2)(d)	Use despite harmful consequences.

Pharmacological criteria	10	Tolerance signalled by requiring a markedly increased dose of the substance to achieve the desired effect or a markedly reduced effect when the usual dose is consumed; depends on the person and the substance; must be distinguished from individual variability in the initial sensitivity to the effects of particular substances.	Section 8(2)(a)	Neuro-adaptation.
	11	Withdrawal which occurs when blood or tissue concentrations of a substance decline in an individual who had maintained prolonged heavy use of the substance; substance use relieves symptoms; varies greatly across the classes of substances (e.g. withdrawal from alcohol, opioids or sedatives have easily measured physiological signs, whereas signs with stimulants, tobacco or cannabis are present but less apparent).	Section 8(2)(a)	Neuro-adaptation.

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