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Foreseeability and Prior Fault: Examining the Assessment Framework for Intoxication, Blame and Criminal Responsibility¹

Abstract: Prior fault in cases of intoxication prevents any mental impairments stemming from the intoxication from having exculpatory or mitigatory effects. This article critically examines the pitfalls of using ‘foreseeability’ as a main requirement to establish prior fault in such cases in the Netherlands, with brief comparative references to Polish law. The appropriateness of foreseeability as a criterion strongly depends on the approach taken. When foreseeability is interpreted in an abstract manner, the ability to adequately differentiate between situations of prior fault is greatly reduced. Specifically for intoxication combined with addiction or other mental disorders, this approach to foreseeability may cause over-criminalization. The article provides suggestions for a more appropriate assessment framework, which could include a more concrete foreseeability requirement and a volitional criterion.

Keywords: addiction, foreseeability, intoxication, non-accountability, non-responsibility, prior fault

Introduction

Recently, the Court of Amsterdam was confronted with a particularly complex and compelling case of manslaughter (Court of Amsterdam, 2023), not only due to the extremely violent nature of the offence – the victim was found with over 60 stab

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wounds – but also due to the court’s task to adequately understand and incorporate the defendant’s mental capacities in the assessment of responsibility. Based on the report by three behavioural expert witnesses, the defendant was considered to suffer from an alcohol, cocaine and GHB use disorder, in addition to a personality disorder. Moreover, the experts considered it likely that the defendant was psychotic during the time of the offence, which was potentially caused or otherwise exacerbated by their substance use. Commonly, the severity of the impairments caused by an acute psychosis could be a reason to consider the defendant not responsible. Yet based on the interplay of disorders and the use of substances, the judges considered the defendant to be ‘diminished accountable’ instead of ‘non-accountable’, thereby following the experts’ advice (Court of Amsterdam, 2023).²

The reason why the presence of the psychosis could not unequivocally lead to non-responsibility, in this specific case but also in comparable conditions, relates to the role of prior fault. One may consider the defendant to have some ‘anterior culpability’, for instance, because of their continuation of hazardous substance use or failure to engage in appropriate health care programmes.³ As such, the defendant’s previous (culpable) behaviour may be incorporated into the overall responsibility assessment. Many jurisdictions employ prior fault rules to prevent reckless and/or culpable behaviour from becoming an excusatory condition (Goldberg et al., 2021). Such rules essentially mean that one may lack the required *mens rea* at the time of the offence (which we can call T2): perhaps one’s mental capacities are impaired to such a degree that an excuse applies or the required intent cannot be formed. Yet suppose the missing mental elements at T2 were brought about culpably, through blameworthy behaviour at some point in time prior to the offence (referred to as T1). In that case, we may use the behaviour at T1 to replace the missing elements at T2. Thus, despite the defendant being *a priori* not responsible for the offence, culpable prior behaviour may trigger prior fault rules to prevent exculpation (Child, 2016).⁴

Prior fault rules are most commonly discussed in the context of intoxication. In such cases, the prior fault mechanism prevents intoxication-induced exculpatory conditions, such as substance-induced psychoses, which may have robbed the

2 These concepts are explained and discussed further in section 1. In general, the terms ‘non-responsibility’ or ‘diminished responsibility’ are used to refer to the more universal concepts of defences and mitigations based on mental impairments. When discussing the Dutch jurisdiction directly or citing from Dutch case law, the terms ‘non-accountability’ and ‘diminished accountability’ are used, as these are the more appropriate translations of the relevant Dutch laws.

3 Anterior culpability is a term commonly used to describe a sense of fault or blameworthiness prior to the offence at hand.

4 Note that in civil law jurisdictions, prior fault rules are conceptualized as preventing exculpation by ‘blocking’ the applicability of a defence. In common law systems, however, prior fault rules may also be used to construct an offence, for instance by using prior behaviour to construct intent, thereby fulfilling the substantive requirements of the offence definition. For a discussion on the difference between blocking defences and constructing offences, see Child (2016) or Goldberg et al. (2021).

defendant of their ability to understand the nature of their actions or conform their behaviour according to the law (Van Netburg, 1994). A common argument to prove prior fault is that of foreseeability (Bijlsma, 2011), i.e. whether the defendant could have foreseen the negative effects or risks that their behaviour brought about. If these were indeed foreseeable, then the defendant can be blamed for failing to prevent these outcomes and thus can be considered responsible for the consequences. In cases such as the one highlighted earlier, one can argue that the defendant knew that his substance use could have resulted in harmful behaviour or unexpected consequences. After all, through his substance use disorder, the defendant was an expert in the effects of these substances and could thus have foreseen that they may have negative or unexpected (side) effects. Even if the defendant did not actively consider such consequences, he could and should have inferred this from the fact that GHB and cocaine are illicit substances. By prohibiting their use, distribution and sale, the law signals the dangerousness of such drugs, and thus users can be expected to foresee negative consequences. As a result, the defendant – in our case or in general – may be held responsible if they consume them nonetheless.

Although foreseeability seems at first sight a sensible criterion for prior fault, it has serious shortcomings. In this paper, I focus on the assessment framework for prior fault, and foreseeability in particular, and argue that more refined criteria must be used to ensure fairness and equality. A brief illustration based on our example case introduces this argument, before I explore it further in the next sections. In the example, it is indeed clear that a general sense of foreseeability could easily be satisfied, both through the defendant's prior experiences with the drugs and due to the illegal nature of the substances. However, whether such an abstract interpretation of foreseeability ought to be sufficient is a matter for debate. One can argue that at least some concrete consequences or risks of harm must be foreseen for prior fault to apply; otherwise, there seems to be no connection between the drug consumption – which is, arguably, always dangerous to some extent – and the offence at hand. Moreover, the question arises whether foreseeability alone is sufficient for blame. In our case example, we can read that the defendant has an addiction to the use of these substances. Based on foreseeability only, there is no reason to account for his volitional impairments, for instance through cravings for the substances, even though these impairments may have been crucial in his becoming intoxicated. These arguments are, amongst others, explored in further detail later in this paper.

It is important to examine the prior fault assessment framework critically. Often, an intoxication is straightforwardly voluntary and blameworthy, and establishing responsibility for the consequences is thus generally not controversial. Yet as the example case demonstrates, reality can be more complex: disorders may interact, and severe substance use disorders may (at least intuitively) reduce the perception that the defendant should have acted differently. The need for appropriate criteria mostly arises once cases become more complex. The defendant

who has a few drinks too many at the pub, then decides to drive home and later causes an accident, arguably clearly consumed the drink voluntarily and was (or could have been) easily aware of the negative consequences. As a result, it was in his power to do otherwise. Yet one can understand an intuitive difference between a recreational user and a long-term, hardened user who is compelled to use through their cravings. In the latter case, one may wonder whether their prior behaviour is really culpable (enough) to satisfy prior fault. Based on an abstract foreseeability requirement only, even the most severe long-term addicted user will be at (prior) fault: they know from their experience what the effects of intoxication are or can be. Thus no distinction seems to be made between these two intuitively different situations if the assessment framework is not explicated or expanded.

I address these issues through an analysis of Dutch law, but relate these findings incidentally to the Polish doctrine of prior fault. The purpose of this comparison is twofold. First, I aim to relate my arguments to the wide Polish audience that this journal draws. Although the analysis is rooted in Dutch (case) law, the challenges and potential pitfalls outlined may be universal to any jurisdiction relying on foreseeability as a criterion for prior fault, such as Poland. Second, there is a fundamental difference between the Dutch and Polish prior fault rules – their codified versus non-codified nature – that makes it worthwhile to draw comparisons.

While spending time at the University of Białystok on a research visit, I learned that the Polish Criminal Code (*Kodeks karny*, PCC) includes a prior fault concept in its non-responsibility defence. After the requirements of the non-responsibility defence (section 1) and the diminished responsibility mitigation (section 2) are outlined in Article 31 PCC, the subsequent Article 31 section 3 reads: ‘The provisions of § 1 and 2 shall not be applied when the perpetrator has brought himself to a state of insobriety or intoxication, causing the exclusion or reduction of accountability which he has or could have foreseen.’⁵ This is interesting, as such a provision does not exist in the Netherlands, Germany or England and Wales, just to name a few (Goldberg et al., 2021); in these countries, the concept of prior fault is known and applied but is not codified or otherwise formalized. One immediate benefit that springs to mind when reading the Polish prior fault provision is the increased clarity of a potential assessment framework for prior fault. Based on the provision itself, it seems that prior fault is applicable if the consequence of substance use ‘was or could have been foreseen.’ This already sets a clear criterion for prior fault, i.e. foreseeability, which may consequently be further developed in case law. Without such a provision, the Netherlands (and possibly other countries) experience inconsistent prior fault reasonings, which may affect legal certainty and equality (Goldberg et al., in press). Importantly, although a clear provision such as the

5 Przepisów § 1 i 2 nie stosuje się, gdy sprawca wprowadził się w stan nietrzeźwości lub odurzenia powodujący wyłączenie lub ograniczenie poczytalności, które przewidywał albo mógł przewidzieć (translation from Faulkner (2012)).

Polish Article 31(3) may have benefits by providing a clearer framework for assessment, it does not remedy the shortcomings of foreseeability as a requirement.

As prior fault may stand in the way of a successful non-responsibility defence or a diminished responsibility mitigation, a lot is at stake. In the example case, the defendant did not straightforwardly consume substances causing impairment in his capacities. Not only was there an underlying substance use disorder, which may help understand the defendant's urges to use, but he was also psychotic during the time of the offence (Court of Amsterdam, 2023). It is difficult to disentangle whether he experienced (pre-)psychotic episodes already or whether the psychosis was fully caused by the substance use. One of the behavioural experts who provided a forensic expert opinion on the case explained this further during one of the court hearings:

[T]here is normally no question of diminished accountability in the case of substance use. In the defendant's situation, however, the substance use disorder is so serious that one cannot consider the consumption of substances to be free. Furthermore, the suspect's intellectual abilities were under pressure due to cognitive damage caused by substance use and the psychotic symptoms. (Court of Amsterdam, 2023)

This citation highlights that normally, diminished accountability would not be an option when there is a case of substance use, because prior fault would prevent such a mitigatory effect. Yet due to the complex interplay of factors, the experts believed this situation to be an exception.⁶ Interestingly, however, they do not seem to mention foreseeability as a criterion in their reasoning. Instead, they mention that the voluntariness of the consumption was impacted. Had they looked at the circumstances by only addressing foreseeability, they may have reached a different conclusion: after all, it seems that the lack of voluntary or free acts is the main impairment for the defendant, not his ability to foresee the negative consequences of substance use. As mentioned before, as an addicted individual, he is likely very much aware of such consequences through his years of experience, and this could have been used to his disadvantage. This example illustrates how using different criteria for prior fault may have far-reaching consequences. The defendant in the example case was considered diminished accountable, commonly associated with a mitigated sentence (Claessen & De Vocht, 2012), whereas through a sole foreseeability argument, he could have been considered fully accountable and received a full, unmitigated sentence. Moreover, without prior fault rules at all, his psychosis may have been sufficient to satisfy the non-accountability excuse and he could be considered not responsible for the offence. Non-accountability in the Netherlands, as well as the non-responsibility

6 Although a (behavioural) expert may provide advice to the judge regarding the defendant's capacities and accountability, the decision is ultimately up to the judge.

equivalent in Poland, means that the defendant is excused and cannot be sentenced, although both systems have structures in place that allow for (potentially indefinite) mandatory psychiatric hospitalization (Heitzman & Markiewicz, 2012; Lindenberg & Wolswijk, 2021).⁷ Therefore, the difference between full accountability/responsibility, diminished accountability/responsibility, and non-accountability/non-responsibility in both systems is significant. This highlights the need for clear and consistent assessment criteria for prior fault.

In this paper, I further discuss prior fault in the context of intoxication and addiction, specifically focusing on the role of foreseeability as a criterion. Although foreseeability is commonly addressed in Dutch jurisprudence and literature as a requirement, I argue that it is not consistently invoked as a criterion, and if it is, different interpretations thereof are applied. These pitfalls of foreseeability as a (sole) requirement for prior fault are, by extension, also relevant to the Polish interpretation of the doctrine, as they also rely on foreseeability as a criterion. Then, I further address the need for a volitional prong in the prior fault rules to remedy the purely cognitive approach of foreseeability. The final section of this article addresses how an unclear prior fault assessment framework paves the way for more implicit prior fault arguments towards addiction, which could have its roots in stigma. First, however, I briefly outline some basic legal frameworks of Dutch criminal law, so that the subsequent discussion on the problems of prior fault can be fully understood.

1. Non-accountability and diminished accountability in the Netherlands

Although prior fault may affect a range of defences (such as self-defence or duress; see Jansen, 2020), in this particular discussion I focus on the effects of intoxication and addiction. As such, this contribution focuses on the non-accountability excuse and the non-codified but generally accepted diminished accountability construct. Very similarly to Article 31 in the PCC, the Dutch Criminal Code (*Wetboek van Strafrecht*, DCC) recognizes a mental incapacity defence in Article 39. This provision explains that an offender is not liable if ‘due to a mental disorder, psychogeriatric condition or intellectual disability, the offence cannot be accounted to him.’⁸ The Polish equivalent reads: ‘Whoever, at the time of the commission of a prohibited act, was incapable of recognizing its significance or controlling his conduct because of a mental disease, mental deficiency or other mental disturbance, shall not commit

7 Importantly, both Poland and the Netherlands have a civil law tradition. The structure of non-responsibility as an excuse must be considered against that background.

8 Niet strafbaar is hij die een feit begaat, dat hem wegens de psychische stoornis, psychogeriatrische aandoening of verstandelijke handicap niet kan worden toegerekend (personal translation).

an offence.⁹ Note that the Dutch non-responsibility excuse outlined in Article 39 (*'ontoerekeningsvatbaarheid'*) directly translates to 'the inability to attribute accountability', and is therefore commonly translated as 'non-accountability'. For this reason, I consistently refer to non-accountability and diminished accountability when discussing the Dutch context directly, and I refer to the more generalized terms of non-responsibility and diminished responsibility in universal settings.

One difference between the Dutch and Polish articles immediately becomes apparent. The Dutch provision seems to employ an 'open norm', i.e. it specifies that non-accountability is possible and that it must be related to mental impairment, but it does not further specify criteria under which conditions this applies (Meynen, 2022). This is different in the Polish equivalent, where the types of impairments are specified. The Poles seem to base non-responsibility on either a lack of understanding towards the offence (a cognitive requirement) or an impairment in behavioural control (a volitional requirement). The Polish approach is the more common one: England and Wales (the M'Naghten rules), Germany (*Schuldunfähigkeit*, Article 20 of the German Criminal Code (*Strafgesetzbuch*)) and some jurisdictions in the United States (the Model Penal Code), just to mention a few, similarly specify the types of impairment that could lead to (their equivalents to) non-responsibility, although what kind of impairments are relevant may differ (Meynen, 2016).¹⁰

Even though the DCC does not specify criteria, case law has developed over the years through which an assessment framework has been laid out (Bijlsma, 2016). The Supreme Court only recently addressed this framework for the first time in the case of *Thijs H* (Supreme Court of the Netherlands, 2023). Essentially, this judgment acknowledged three main criteria for the acceptance of the non-accountability excuse, thereby affirming previous lower court rulings and scholarly discussions (Bijlsma et al., 2022).

The first requirement, naturally, concerns the presence of a mental disorder. The Supreme Court specified that this ought to be a disorder 'in a legal sense', meaning judges do not have to specify the behavioural qualification of the disorder (such as through a diagnostic set of criteria, as in the DSM-5) and the judges can determine the existence of the disorder themselves (Nauta et al., 2024). Generally, however, judges will strongly rely on the advice from a behavioural expert witness, such as a psychiatrist or psychologist, and their diagnoses (Goldberg et al., in press). The second requirement considers a causal connection between the disorder and the

9 Nie popełnia przestępstwa, kto, z powodu choroby psychicznej, upośledzenia umysłowego lub innego zakłócenia czynności psychicznych, nie mógł w czasie czynu rozpoznać jego znaczenia lub pokierować swoim postępowaniem (translation from Faulkner (2012)).

10 Whether a volitional prong (i.e. impairments in control) is included in the requirements may be different, for instance. The M'Naghten rules do not include this, whereas the German and Polish systems do. See Meynen (2016).

offence at hand (Supreme Court of the Netherlands, 2023). This outlines that the mere presence of a disorder is insufficient; a post-traumatic stress disorder, for instance, would likely be unrelated to tax fraud, whereas a psychotic disorder with persecutory hallucinations could very well describe a violent outburst.

As a third criterion, the disorder must mean that the offence cannot be accounted to the offender. This criterion in itself has two sub-requirements which specify under what conditions such non-accountability may take place. Non-accountability is accepted either in a situation in which the defendant ‘could not understand the content, the legal and moral impermissibility of his actions’, i.e. a cognitive requirement, or ‘was unable to form his will to conform to this understanding’, i.e. a volitional requirement (Supreme Court of the Netherlands, 2023).¹¹ Hence, through the jurisprudence of the Supreme Court, the Dutch non-accountability excuse contains almost identical requirements to Article 31(1) PCC.

Aside from the non-accountability excuse, the Netherlands also accepts a diminished accountability plea (Lindenberg & Wolswijk, 2021). In Polish law, this is codified under Article 31(2) PCC and reads: ‘If at the time of the commission of an offence the ability to recognise the significance of the act or to control one’s conduct was diminished to a significant extent, the court may apply an extraordinary mitigation of the penalty.’¹² The requirements seem very similar to the full excuse under Article 31(1) PCC, addressing both volitional and cognitive impairments. Rather than the offender being ‘incapable’ of having these capacities, the diminished responsibility provision merely requires a significant limitation. In the Netherlands, a similar construct can be found, although it has never been codified. As such, it is not a formal mitigatory condition, although in practice, diminished accountability often results in a more lenient sentence (Claessen & De Vocht, 2012).

Currently, the Netherlands allows for three degrees within the accountability scale: accountable, diminished accountable and non-accountable (Mebius et al., 2023). Previously, a five-point scale was employed, resulting in two extra options, namely somewhat diminished accountable and severely diminished accountable (Meynen, 2016). This scale was abolished as a general practice in 2012 (although it is still sometimes used), as it was criticized for, amongst other things, creating a false sense of mental capacities being quantifiable and able to be empirically assessed. After all, such seemingly clear-cut boundaries between the points on the scale are not supported by evidence from behavioural sciences that such categories are even possible to

11 Of de verdachte door een psychische stoornis of gebrekkige ontwikkeling de strekking, de wettelijke en morele ongeoorloofdheid en/of context van zijn gedrag(en) niet heeft (kunnen) begrijpen, dan wel niet in staat was om overeenkomstig dat begrip zijn wil te vormen (personal translation).

12 Jeżeli w czasie popełnienia przestępstwa zdolność rozpoznania znaczenia czynu lub kierowania postępowaniem była w znacznym stopniu ograniczona, sąd może zastosować nadzwyczajne złagodzenie kary (translation from Faulkner (2012)).

consistently demarcate. Hence in the guidelines for forensic psychiatric assessment that followed, the three-point scale was suggested (Meynen, 2016). Importantly, the concept is available as general mitigation to the offence, meaning it applies to all crimes. This is similar to the Polish Article 31(2) but is different from common law systems such as England and Wales, where a diminished responsibility argument can only apply to reduce a murder charge to manslaughter (Allen & Edwards, 2019).

To conclude, prior fault can prevent the non-accountability excuse from being accepted or may negate the mitigating effects of diminished accountability. With these basics of the Dutch framework in mind, let us turn to the application of the foreseeability requirement of prior fault and the pitfalls thereof.

2. Foreseeability as a requirement for prior fault

Although no formal requirements exist, Dutch law and literature have emphasized the role of foreseeability (Bijlsma, 2011), similar to the prior fault provision in the PCC. A main line of jurisprudence has been developed through two landmark cases: the *culpa in causa* case, and the cannabis psychosis case (Supreme Court of the Netherlands, 1981; 2008a). Both instances concerned a defendant who became psychotic after the use of substances and committed the offence while in their psychotic episode. In both cases, the Supreme Court ruled that the defendants had prior fault in causing their psychoses, and thus the non-accountability defence ought not to apply. Yet the reasoning that made up these prior fault arguments differed between the two cases.

In the first case, the defendant had used heroin and cocaine simultaneously, leading to a paranoid psychosis in which he caused his grandmother's death. The initial ruling, later upheld by the Court of Appeal, stated that he was responsible for the psychosis since he had voluntarily taken drugs, rendering him accountable for his mental state at the time of the manslaughter. Therefore the psychosis could not lead to a successful non-accountability defence. According to the Court of Appeal, accountability involves understanding and recognizing the full impact of one's actions, including an awareness of the potential dangers of drug use (Supreme Court of the Netherlands, 1981).¹³ In this case, the offender was deemed accountable for his psychotic state for four main reasons. First, cocaine and heroin are widely known to be dangerous and harmful, and second, using these substances can impair one's moral judgment. These two facts, the court argued, are expected to be known by anyone, particularly given the state's prohibition of these drugs. Third, the offender had previously experienced psychotic symptoms after cocaine use, such as hallucinations – although he was unaware that these events were not real – and had

13 The full verdict and transcripts of the Court of Appeal in this case are not available, but the arguments by the Court of Appeal are directly cited by the Supreme Court in their later conclusion.

reported violent fantasies that he only experienced while under the influence. Finally, despite already feeling agitated, the defendant chose to inject an even higher dose of the drugs. Given these factors, the court concluded that he was aware of the widely recognized risks associated with drug use as well as the specific effects thereof on his own mind, demonstrating an understanding and acceptance of the full extent of his actions (Supreme Court of the Netherlands, 1981).

This reasoning seems valid and, looking at it through the foreseeability lens, one can indeed say that the defendant was able to foresee the negative consequences. The specifics of the case, such as his prior experience with psychotic symptoms, suggest that the defendant had been aware of the potential risks and thus can be expected to have acted differently (Bijlsma, 2011; Goldberg, 2022). In light of this, the second landmark case seems to employ a slightly different – and less convincing – reasoning.

In the cannabis psychosis case, the defendant had used cannabis, resulting in acute psychosis, and committed an attempted theft, destruction of property and assault (Supreme Court of the Netherlands, 2008a). Here, the defence specifically focused on the concept of foreseeability in their arguments against prior fault and in favour of a non-accountability plea. As the defence argued, a psychosis stemming from cannabis is highly unlikely, and in this case, no similar symptoms had ever been experienced before by the defendant, unlike in the original *culpa in causa* decision. The court, however, did not concur. The judges emphasized that a defendant's specific awareness of the negative effects of drug use is not necessary; prior fault can also apply without such awareness. In this particular case, four arguments were provided to hold the defendant accountable: (1) the defendant was a frequent cannabis user; (2) he knew that cannabis affected his mental state; (3) he could have known that using cannabis was not completely safe; and (4) it is commonly known that the effects of cannabis may differ individually (Supreme Court of the Netherlands, 2008a).

These arguments clearly suggest a much broader interpretation of foreseeability than the original *culpa in causa* case (Bijlsma, 2011; Goldberg, 2022). In the original case, there was specific awareness of the negative consequences (due to the defendant's prior experiences). Conversely, in the latter case, the defendant had not experienced adverse effects from cannabis before. In the first case, the defendant had used multiple illegal drugs, as opposed to the second case, where the defendant had consumed cannabis, which is not unequivocally prohibited in the Netherlands (Grund & Breeksema, 2017). Thus the application of foreseeability seems to have moved from a rather concrete one (foreseeing relatively concrete negative consequences) to an abstract assessment (being able to foresee any negative consequence suffices).

The consequence of a more abstract foreseeability requirement is that it reduces the amount of control the defendant has to act otherwise (Bijlsma, 2011; Goldberg, 2022). In cases of concrete foreseeability, such as in the first case, we can expect the defendant to have acted differently based on his concrete knowledge of potential consequences. But if one is unaware of negative consequences, how can one prevent

them from happening? Without awareness of potential negative consequences, there is no control for the individual to decide and act differently. The only possibility would be to refrain from drug use altogether, to avoid potential adverse effects. Consequently, abstract foreseeability can seemingly be implied from any voluntary substance use, because all substance use may potentially have negative consequences (Goldberg et al., in press). Essentially, this means that a broad and abstract interpretation of the foreseeability requirement simply boils down to accepting *any* voluntary intoxication as a sufficient reason for prior fault. The second Supreme Court case clearly states that we can expect drugs to affect the mind, to differ per person and to never be entirely safe (Supreme Court of the Netherlands, 2008a). Consequently, it is always possible to find some form of abstract foreseeability in any kind of substance use. The use of substances could, therefore, be considered a type of abstract endangerment offence (Bijlsma, 2011; Goldberg, 2022).

3. Challenges of the foreseeability requirement for prior fault

Although this position – equating any voluntary substance use to a form of prior fault – may be the position the law wishes to take, it is important to recognize its flaws. First is that of fair labelling (Goldberg et al., 2021; Jansen, 2020). If the law refers to some form of foreseeability requirement, which is suggested through the two landmark Supreme Court cases, this requirement cannot be reduced to mere voluntariness: the label ‘foreseeability’ would not sufficiently cover the meaning of the concept.

The second is the mechanism which allows us to use T1 behaviour (i.e. the prior fault behaviour) to be relevant at the mental capacity assessment of T2 (i.e. the time of the offence). Normally, substantive liability operates in a narrowly defined temporal time frame in which there needs to be a correspondence between the objective and subjective elements of the offence definition. This means that the objective and subjective elements of the offence both need to be present at T2. If mental impairments at T2 result in non-responsibility for the defendant, and the law uses T1 behaviour instead to ‘replace’ what is lacking at T2, it would deviate from the general mechanisms of inculcation (Goldberg et al., 2021). Legal theorists have yet to find a satisfactory answer to justify the inclusion of T1 behaviour in the assessment of T2 responsibility. Especially when cases are more complex, such as including addiction, and the prior fault behaviour cannot be pinpointed to a specific moment in time but rather is a string of actions, it is unclear what the temporal scope may be.

For instance, consider an alcoholic who wakes up, still (somewhat) intoxicated, proceeds to drink further and commits an offence. Which action is the prior fault behaviour? Her most recent drink(s) were already consumed in an intoxicated (and thus impaired) state, so we may need to look at her drinking the day before, or even the days before those, potentially going back all the way to the moment she became addicted – if

such a moment is even clearly identifiable. In this example, we may intuitively feel that it is the broader range of reckless behaviour that we find culpable (Browning & Goldberg, 2024). Therefore applying prior fault in such a case may not be controversial in practice, as one may understand the law's need to avoid exculpation or mitigation due to the defendant's inability or unwillingness to remain sober. Theoretically, however, it is unclear what legal mechanism allows for the inclusion of a broad, unidentified and unrelated range of actions in the assessment of responsibility. Especially for complex cases, such a justification is necessary (Goldberg, 2022).

Third, and related to the previous argument, is the concern of equivalence (Child et al., 2020). If voluntary intoxication at T1 is sufficient to replace responsibility that is missing at T2 – although, as mentioned, this is yet to be convincingly justified – we would expect the behaviours to be of comparable culpability, or at least normatively related. Is being aware that one is using substances, and that substances have an effect on one's psyche (which is, more often than not, the reason to take drugs in the first place), the same as knowingly and willingly engaging in dangerous behaviour? In the severest of cases, is a homicide committed while in a cannabis-induced psychosis on a par with the voluntary decision to smoke a joint? This, in very crude terms, is what it ultimately boils down to, as non-accountability for the homicide would be rejected based on the consumption of drugs. Although nobody would deny that substance use is risky, it is questionable to what extent this behaviour is really so reckless as to justify the substitution of responsibility for manslaughter. In the Netherlands, around 5% of adults have used cannabis in the past month (Jellinek, n.d.). Moreover, although there is much evidence of a relationship between cannabis use and psychotic symptoms, this connection is not a causal one per se, and the exact risks of cannabis use remain unclear (Hall & Degenhardt, 2008). Moore and colleagues (2007) reported an odds ratio of 1.4 for a psychotic disorder if the individual had used cannabis before, i.e. cannabis users were more likely to experience a psychotic disorder than non-users.

This begs the question of what an acceptable empirical benchmark is for considering T1 behaviour risky enough to be considered culpable, and to replace responsibility at T2. If voluntary intoxication is sufficient for prior fault, then the intoxication itself ought to carry a degree of risk that is criminally relevant. If, hypothetically, using a substance were entirely free of risk, then pinpointing prior fault on its consumption would not be justified, as the behaviour cannot be considered culpable. Because all substance use, even of legal substances, carries at least some risk, the question is not whether the consumption is risky but how much risk is necessary to satisfy the requirements of anterior culpability and whether substance use meets this threshold.

Returning to Poland, depending on the exact application of the foreseeability requirement that is mentioned in Article 31(3) PCC, these critiques may also apply to the Polish prior fault doctrine. Unfortunately, not many Polish authors have discussed this topic in English, although one author states that the 'requirement of the foreseen [in Article 31(3) PCC] refers to the possibility of the offender to

foresee the results of the state of intoxication, not to the prediction of committing a crime' (Golonka, 2021, p. S154). As such, this would also suggest a rather abstract foreseeability requirement and could thus be subjected to the same criticism as in Dutch law. Further research on Polish case law, however, ought to clarify how freely or strictly this criterion is applied in practice. A more concrete prior fault criterion would be preferable, as this will satisfy a normative connection between the behaviour at T1 and the offence at T2 (Bijlsma, 2011).

Having discussed the pitfalls of abstract foreseeability, let me specifically focus on cases where the defendant suffers from volitional impairments and how these effects could be part of prior fault assessment.

4. Prior fault in cases of volitional impairment

Specifically for cases where there are volitional impairments, such as with addicted defendants, a problem arises regarding the volitional criteria of prior fault, or rather the lack of it.¹⁴ The emphasis on the rationality and knowledge of the defendant in prior fault cases is different from the requirements for non-accountability, which contains a cognitive and a volitional prong, as was explained earlier (Meynen, 2016). Thus theoretically, a disorder resulting in volitional incapacity can be the basis for allowing a non-accountability excuse, but this same incapacity can be disregarded when applying prior fault rules (Goldberg, 2022). It seems odd that a lack of volition can be the basis of the excuse but is not taken into account in some way in the evaluation of prior fault when this excuse is blocked. As mentioned already, what seems to be important here is that if prior fault rules aim to replace a lack of culpability at T2 with culpability at T1, these two types of culpability ought to correspond somehow (Goldberg et al., 2021). This argument can be extended by expecting the assessment requirements to correspond and assessing similar criteria for the prior fault behaviour as those that the excuse in question (here: non-accountability) requires.

This is particularly relevant for cases of (severely) addicted defendants. For users with a substance use disorder, the effects of a substance are well known due to their previous experiences. After all, using substances repeatedly is the essence of the condition (American Psychiatric Association, 2013). Moreover, the negative consequences of substance use are commonly known amongst addicted users, yet the main problem with dependency is the urge to continue anyway, as is also featured

14 Addiction is commonly associated with impairments in volitional capacities. Individuals with substance use disorders show impairments in their inhibition (the act of suppressing pre-motor responses) and heightened impulsivity (acting without thinking), both necessary to the capacity to exercise control. See Goldstein & Volkow (2011), Jentsch et al. (2014) and Smith et al. (2014).

in the diagnostic criteria.¹⁵ Hence addicted individuals generally consume the substance despite their specific awareness of harmful consequences, because of their difficulties in ceasing their drug use (Sjöberg & Olsson, 1981). Addiction can lead to strong urges as well as generally impaired impulse control, which can (depending on the individual case) negate this volitional aspect (Campbell, 2003). Thus the lack of a volitional prong in prior fault rules especially disadvantages this group. Based on their experience, they most likely satisfy a foreseeability requirement, yet they may have serious impairments that ought to be included in the assessment of responsibility. I argue that a volitional requirement ought to be included in the prior fault assessment framework in order to achieve more coherency. Such a criterion may take a similar shape to the volitional requirement in non-accountability (Goldberg, 2022).

Based on my limited knowledge of the Polish system, this problem also seems to arise in Poland. Article 31 PCC stipulates a volitional as well as cognitive prong for non-accountability: lack of capacity to ‘recognize the significance of an act’ as well as ‘controlling their actions’ are both mentioned in section (1) of the Article for non-responsibility. Conversely, section (3), the prior fault provision, only refers to the foreseeability of the negative consequences. As such, the Polish system may also suffer from a mismatch between the excuse requirements and the doctrine that prevents its application. Again, further clarification from Polish case law is needed to fully understand the practical application of both the non-responsibility defence and prior fault rules, an avenue not explored in the current paper.

Moving towards the final section of this article, I want to draw attention to the consequences of inappropriate or inconsistent assessment frameworks for cases of addiction and intoxication. Ambiguous assessment criteria result in more judicial freedom, which makes such cases vulnerable to the effects of bias or preconceived notions on the legal decision-making process. This is especially problematic for defendants with addictions, who suffer from a great deal of stigma, and may negatively affect their perceived prior fault and thus their responsibility assessment.

5. Addiction as a form of prior fault

Let us consider a hypothetical situation where severe addiction could result in a judgment of diminished accountability. If the defendant was not intoxicated at the time of the offence, how does prior fault apply, if at all? On what grounds would it be determined whether the basis for the mitigation – in this case, the addiction – was culpably self-caused? Arguably, foreseeability becomes an inadequate standard, for there is no clear T1 moment where one may identify the prior culpable behaviour

15 For instance, Diagnostic Criteria A9: ‘Substance use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance’ (American Psychiatric Association, 2013, p. 491).

and assess whether those acts had any foreseeable negative consequences. Perhaps the moment he took his first drink or drugs could be used, but one may contend that such a T1 moment is usually too far removed from the offence. Additionally, previous arguments concerning equivalence as discussed in Section 3 above also apply here. As such, it is unclear how the presence of addiction must be assessed in light of the current prior fault framework.¹⁶

Indeed, there is a fundamental concern when the assessment framework for prior fault, which is focused on a clear act or omission that can be assessed as potential prior fault behaviour, is used to address a broader behavioural notion such as addiction. If there is a lack of fit between the situation at hand and the assessment criteria to be employed, courts are left with a large degree of judicial freedom. Without clear requirements, there is a risk that addiction becomes a form of prior fault in itself, i.e. that the presence of an addiction becomes a blameworthy circumstance. This is indeed highlighted by several judgments. For instance, in the *Tolbert* case (Supreme Court of the Netherlands, 2008b), the defendant, a habitual amphetamine user, suffered an amphetamine-induced psychosis that led to the killing of his girlfriend's two children. The court emphasized that the defendant, as a regular user, was aware of the substance's dangerous effects and thus bore significant criminal responsibility. This perspective appears to not only hold addicted individuals accountable, but even *more* accountable than non-addicted individuals simply because of their continued (and disordered) use. While it may be understandable that allowing addiction to become a mitigating factor is somewhat controversial, applying stricter standards to addicts compared to non-addicts suggests a moral judgement of addiction itself.

A similar argument can be found in a different homicide case, where the court reasoned that 'in the end, the defendant is responsible himself for the origination and continuation of his addiction behaviour. Thus, he can be considered blameworthy, although the offence can be only partially accounted to him' (Court of Appeal 's-Hertogenbosch, 2016).¹⁷ This perspective highlights a broader concern: criminal liability should primarily address the offence and the conduct at issue, not general lifestyle blame, known in German as *Lebensführungsschuld*.¹⁸ Dutch legal theorists

16 Elsewhere I discuss in more detail whether it is appropriate to view addiction (i.e. without a subsequent intoxication) as a form of prior fault at all, and argue that only behaviour stemming from addiction must be considered, not the state of addiction itself (Goldberg, 2022).

17 Hij is in laatste instantie zelf verantwoordelijk voor het ontstaan en continueren van zijn verslavingsgedrag. Er kan hem dus een schuldverwijt worden gemaakt, ook al is het delict hem in verminderde mate toerekenbaar (personal translation).

18 An important concept in German law, *Lebensführungsschuld* refers to the blameworthiness of a person's lifestyle as opposed to a specific act itself (*Tatschuld*). Many scholars strongly oppose such a general lifestyle culpability. In the Netherlands, this concept is less controversially discussed, although it is often mentioned that the Dutch system also focuses on an 'act-centred criminal law' (*daadstrafrecht*) rather than a general character or lifestyle culpability. The focus is consequently only on the specific range of human behaviour that is prohibited by the law. See Hörnle (1999).

have stated that the law must focus on the specific blame for a given act; a generalized form of culpability is ultimately irrelevant to criminal liability (De Hullu, 2018). What matters is the concrete culpability of behaviour at the time of the offence or, in assessing prior fault, the behaviour at a prior moment before the offence. Foreseeability as a requirement for prior fault, as mentioned, also seems to be suited specifically to one such moment, act or omission.

It also raises a cardinal question: Is a person truly responsible for becoming addicted? This question requires a broader look at the theoretical underpinnings of addiction. Perspectives on responsibility and addiction largely depend on one's view of addiction and the individual involved (Goldberg, 2020). This is not a straightforward discussion. Conceptualizations of addiction differ greatly: for example, the 'brain disease model' frames addiction as a chronic, relapsing disease, while the 'choice model' views it as the result of behavioural choices and preferences (see Leshner, 1997 and Heyman, 2009, respectively).¹⁹ The court's statement aligns more closely with the choice model. However, assuming that all addicts choose to become or remain addicted oversimplifies the issue. A subset of individuals with severe addictions, where the disorder often presents together with complex comorbidities, may not be able to recover from their addiction (Pickard, 2012). Consequently, the perspective of addiction being a condition that is culpably caused is not based on a (socio-)scientific consensus.

As this indicates, prior fault rules also convey a more implicit perception of addiction. This fits the broader framework of the stigmatization of addiction, which has been extensively researched and confirmed. For instance, Boekel et al. (2013) found that laypeople tend to impose restrictions on alcohol – and drug-dependent individuals, such as prohibiting them from raising children. They found that respondents had the expectation that addicted individuals would display more aggressive behaviour than others, and assumed that those with a substance use disorder are personally responsible for their addiction. Relatedly, Crisp et al. (2000) also observed that people perceive addicts as unpredictable. Moreover, individuals dependent on substances were viewed as a danger to their own lives and the lives of their children (Holma et al., 2011). Researchers also found that stigmatization is greater for drug addicts than for the homeless or people with mental disorders such as schizophrenia (Pescosolido et al., 1999; Room et al., 2001; Van Boekel et al., 2013). However, not all addicted individuals are stigmatized to the same degree; this appears to depend on various factors, such as age and the duration of the addiction (Sattler et al., 2017). There is no evidence that judges are not equally susceptible to preconceived notions about addiction, thereby letting stigma influence the way prior fault arguments are applied to cases of addiction.

19 Naturally, there are more perspectives on addiction, but these two are often highlighted as they reflect the (primarily Anglo-American) 'addiction debate'. For the use and relevance of these models and the debate, see Goldberg (2020).

As such, cases of addiction may be at a disadvantage in the application of prior fault rules, especially when a clear assessment framework is lacking or when such a framework is inadequate. Under those circumstances, bias and stigma may more easily find their way into judgments. Bringing the discussion back to the use of foreseeability as a requirement for prior fault, I argue that using the foreseeability requirement more consistently and applying a more concrete interpretation of it would help reduce the influence of stigma and bias towards addiction in a prior fault assessment. After all, with a clearer criterion to be applied to complex cases, a judge may be less susceptible to preconceived notions, as there is less judicial freedom in how to interpret prior fault rules.

Conclusion

Inspired by the specific prior fault provision under Article 31(3) PCC, this article has critically examined the pitfalls of the current assessment framework of prior fault in the Netherlands, which by extension is also relevant to Polish law or other jurisdictions employing a foreseeability requirement. A focus on foreseeability as a criterion for prior fault seems sensible at first, but its appropriateness is strongly dependent on the approach taken towards foreseeability. Once this is interpreted as an abstract requirement, meaning that the defendant did not foresee any concrete risks of harm but that general awareness of potential risky consequences suffices, this may lead to over-criminalization. Such an abstract requirement essentially diminishes the foreseeability requirement to the extent that it becomes irrelevant, as all forms of substance use can be argued to have some risk of harmful, unwanted consequences. Thus it seems that, when foreseeability is interpreted and applied abstractly, the voluntariness of the substance use is the main driver for prior fault. A solution to this problem of fair labelling would be to employ a more concrete foreseeability requirement, where there at least needs to be a normative connection between the prior fault behaviour and the offence behaviour.

Specifically for addiction, a sole foreseeability requirement creeps towards further over-criminalization, as addicted defendants are experts in the consequences of substance use and know from their experience what the potential harms could be. It would be appropriate, therefore, if prior fault assessment also included a volitional component, to account for those offenders who may have had knowledge and awareness but who were unable to control their impulses. By including such a requirement, the prior fault assessment also becomes more equivalent to the assessment of non-accountability and non-responsibility (Article 39 DCC and Article 31(1) PCC). As prior fault is the mechanism whereby this excuse can be denied, some equivalence between the two should be expected.

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