

COMPARING BEHAVIOURAL AND LEGAL PERSPECTIVES: AN EMPIRICAL-LEGAL ANALYSIS OF CASES OF ADDICTION, ACCOUNTABILITY AND PRIOR FAULT

Michiel van der Wolf and Anna Elisabeth Goldberg

A recent landmark case of the Dutch Supreme Court sparked interest – and some controversy – among legal and behavioural scholars in the Netherlands (Thijs H.: Supreme Court of the Netherlands, 2023). In this particular case, three reports by two experts each, discussed the defendant’s mental state to determine whether he should be held accountable for the offence he committed: three murders of seemingly random passersby, arguably committed while experiencing a psychotic episode. Due to H.’s mental disorder, two reports advised the court to consider the defendant non-accountable, and the third expert report refrained from providing a definitive recommendation. However, both the Court of First Instance and the Court of Appeal did not follow the majority expert opinion and considered H. to be diminished accountable instead of non-accountable.¹

When the case of H. reached the Supreme Court, it established two important notions in the context of the defence of mental incapacity, in addition to upholding the lower court’s judgment. First, it determined that establishing the presence of a mental disorder is the judges’ task: a mental disorder in the context of the non-accountability defence ought to be interpreted as a legal concept. Second, the assessment criteria for non-accountability ought to be based on the defendant’s inability to *understand* that his acts were unlawful or on his *inability to act* in accordance with his understanding of this unlawfulness (Supreme Court of the Netherlands, 2023), i.e. a cognitive and a volitional requirement. Although

1. The defence of mental incapacity ex. Art. 39 Dutch Criminal Code, i.e. the Dutch insanity defence equivalence, can be translated as ‘an inability for attribution’ (*ontoerekeningsvatbaarheid*). For the sake of readability, we use the translated terms non-accountability and diminished accountability throughout this chapter.

previous scholarly discussions had drawn up an assessment framework containing both cognitive and volitional aspects (e.g. Bijlsma, 2016), the Thijs H. case is the first instance whereby the Supreme Court confirmed these criteria.

Especially the fact that a mental disorder is established by the court, which may disregard the experts' opinions therein, caused debate among behavioural experts. Experts question their role in the criminal process and feel 'tricked' by the legal practitioners (Haan, 2023), who are now strengthened by this Supreme Court decision to determine and formulate their reasons for non-accountability themselves. In underlining the tension that may arise by the normative nature of such psycholegal assessments, an interesting comparison can be drawn with cases of prior fault. If a defendant culpably contributes to the development of a mental disorder, for instance through the voluntary use of substances, the defendant cannot rely on a defence of mental incapacity (Bijlsma, 2011). This prior fault doctrine essentially prevents exculpation, by arguing that it is the defendant's 'own fault' that they ended up in this situation and thus ought to be held responsible. Prior fault cases present an interesting intersection between behavioural insights (e.g. was the substance use voluntary, and did it cause a mental disorder?) and normative conclusions (e.g. can this prior fault behaviour result in anterior culpability, and thus accountability?) Yet for prior fault cases, it is uncontroversial that the judges decide on the consequences of such mental states, without a clear-cut role of a behavioural expert. In fact, the behavioural experts' disciplinary guidelines explicitly advise them to refrain from drawing conclusions regarding prior fault (NVVP, 2024). As a seemingly clear normative issue, prior fault is not considered to fall within the realm of behavioural expertise. However, the question of non-accountability seems equally normative – especially after the Supreme Court confirmed that establishing a mental disorder is at the judges' discretion. Thus, cases of prior fault present an interesting case study to evaluate the recent developments to the concept of non-accountability and disciplinary tensions therein.

Following the Thijs H. case, we explore disciplinary divisions and the integration of the empirical, behavioural features of a defendant's mental impairment(s) and the consequent normative, legal conclusions that ought to be drawn, using prior fault cases as an example. This leads us to two main aims of this research. First of all, we raise the question of how well the disciplines stay in their lanes in such cases of mental disorders and substance use and how (if at all) these two disciplines may be integrated. Second, we analyse the established decision-making in such prior fault cases in light of the new criteria for non-accountability, based on the Supreme Court ruling. With a confirmed volitional prong in the non-accountability defence, it is especially interesting to analyse how prior fault is assessed in cases of addiction and intoxication. After all, an underlying addiction

is a relevant circumstance explaining a lack of control towards self-intoxication. Moreover, it is also considered a mental disorder in the behavioural sense but not so much in the legal sense (Van der Wolf & Bijlsma, 2022), potentially resulting in legal conflicts. Thus, the overarching research question of this chapter is: How can an assessment of the differences between behavioural and legal perspectives on prior fault help us understand the recently affirmed normative standard of the non-accountability defence, and vice versa, how does this new non-accountability standard relate to the current prior fault assessment framework?²

To address this question, our research looks at substance use and addiction cases, whereby behavioural expert witnesses advise the court on accountability and prior fault to examine differences in perceptions and perspectives of both parties. Although we delve into the peculiarities and the overarching legal context of prior fault rules in more detail later, as a result of the Thijs H. case, our empirical-legal research design aims to examine differences between empirical insights and legal decisions in the context of prior fault. Based on the discrepancies that our research uncovered, we argue that such empirical research is a useful tool to challenge assumptions underlying the prior fault doctrine and to nuance the application of prior fault rules. As such, our research contributes to a ‘jurisprudence of consequences’, by using empirical data regarding a large body of criminal cases to develop appropriate assessment frameworks for complex cases of substance use and prior fault (Miller, 1965).

2 LEGAL AND ANALYTICAL FRAMEWORK

In Dutch criminal law, the concept of prior fault is known as ‘*culpa in causa*’, which is used interchangeably in this chapter. *Culpa in causa* can be defined as the exclusion of an *a priori* applicable justification or excuse, normally leading to non-responsibility, because the defendant himself culpably contributed to the creation of these circumstances (Goldberg, 2022). Simply put, if you have had a share in creating, for example, a self-defence situation (such as provoking your assailant) or the presence of a mental disorder (such as inducing a psychosis through culpable substance use), you can no longer successfully invoke the relevant ground for negation of criminal liability (Goldberg et al., 2021). The Dutch excuse of mental incapacity in which prior fault can play a role is

2. Based on the same data that was used for this chapter, the authors have published a different article (see Goldberg et al., 2024) whereby the perspective was more general and less based on the questions raised by the Thijs H. case. This data was collected by students enrolled in the elective Seminar Behavioural Expertise in Criminal Cases (2023/24), which is part of the ambition of the Groningen Centre for Empirical Legal Research to provide law students with empirical research skills, and set up by the authors in association with the Netherlands Institute of Forensic Psychiatry and Psychology (NIFP), who provided the possibility to access the complete files of all forensic behavioural assessments in criminal cases in the Netherlands.

called '*ontoerekeningsvatbaarheid*', referred to here as 'non-accountability' (see also footnote 1).

The criteria for non-accountability are threefold: the presence of a mental disorder (i.e. a disorder requirement), which consequently must have influenced the offending behaviour (i.e. a causality requirement), ultimately leading to the normative decision that no responsibility should be attributed to the defendant (i.e. the accountability requirement). This last requirement contains, as mentioned, a cognitive and a volitional prong (Nauta et al., 2024). Courts often rely on behavioural experts to assess the disorder and causality requirements, who advise on accountability (full, diminished, or none) and treatment. Although this advice is not legally binding, courts follow the expert's advice in the majority of cases (Goldberg et al., 2024). In the Netherlands, accountability is graded rather than dichotomous as in Anglo-American jurisdictions (Van der Wolf & Van Marle, 2018), rendering diminished accountability a common recommendation. Moreover, in this third criterion anterior culpability may play a role: if the defendant had prior fault, for instance due to substance use, it may negate non-accountability.

Despite the important role of experts in cases of mental impairments, instances of substance use and intoxication have a somewhat unique position, as experts are instructed not to discuss prior fault due to the normative nature of prior fault. Specifically, Supreme Court jurisprudence established two factors in assessing prior fault, one of them being voluntariness and awareness of substance ingestion and the other foreseeability of consequences. Voluntariness is generally assumed, unless evidence suggests otherwise, such as being forced to use a drug or unknowingly consuming a spiked drink. Therefore, foreseeability was originally the key criterion. In the 1981 *Culpa-in-causa* case, a defendant stabbed his grandmother while in a cocaine-induced psychosis (Supreme Court of the Netherlands, 1981). Although the psychosis caused severe mental impairments, the Court of Appeal held him accountable as they were self-induced. The Court used a threefold argumentation to prove prior fault. They argued that the defendant was familiar with the effects of cocaine and had experienced hallucinations before; that it is a fact of common knowledge that illegal substances could affect moral reasoning; and that the defendant had previously experienced violent fantasies of bank robberies and firearms. Thus, the defendant:

...must be deemed to have had such an insight into the dangers of cocaine and its effect on his mental faculties that it must be judged that the pathological disturbance of his mental faculties – occurring at the time of the commission of the proven offence – should be blamed on the defendant, so that the acts committed in that state must be attributed to the defendant. (Court of Appeal Amsterdam, 1980)

The Supreme Court upheld the judgment. Due to the defendant's previous hallucinations and violent fantasies, and the prohibited nature of cocaine, which clearly identifies its use as risky and harmful, the harmful consequences of cocaine use could have been foreseen. In a subsequent landmark case, however, exactly these two issues (prior experiences and drug type) were different. As a result, the assessment framework that followed from this second landmark case assumed a form different from the one just discussed.

In this so-called *Cannabis-psychosis* case (Supreme Court of the Netherlands, 2008), the defendant experienced acute cannabis-induced psychosis. Judges maintained that psychosis was not a commonly known or frequently seen consequence of cannabis use. Also, unlike the defendant in the *Culpa-in-causa* judgment, the defendant had no previous negative experiences with cannabis. Nevertheless, the defendant knew that the use of cannabis had an effect on one's general mental state and, therefore, could have known that this drug could affect functioning in such a way that risky behaviour could arise from it (Court of Appeal's-Hertogenbosch, 2006). The Supreme Court upheld this judgement: the fact that the occurrence of a psychotic state is not a generally known or frequently occurring consequence of cannabis use does not affect prior fault arguments. Hence, the Supreme Court in this case interpreted the foreseeability requirement in a much broader and objective sense than it had previously done. After all, the defendant does not have to foresee any concrete negative consequences, for example due to earlier similar experiences. It is sufficient to assume that one could have known that the substance influences the general psychological state, even in cases such as cannabis, which is legally tolerated in the Netherlands, or at least not unequivocally prohibited. As a result, the *Cannabis-psychosis* case seems to set a much lower requirement for the attribution of prior fault: voluntary consumption seems sufficient, as there is no further need for concrete foreseeability of risky behaviour. As a result, substance use thus seems to be seen as a form of abstract endangerment that is sufficiently culpable to constitute prior fault (Goldberg, 2022, 2024).

We can understand that all voluntary substance use is, in principle, a form of prior fault, in order to avoid under-criminalisation by providing a reason (and precedent) to find responsibility for (potentially unwanted, but harmful) consequences of voluntary substance use. Moreover, considering all voluntary substance use to be sufficient for prior fault is also an easily applicable criterion and thus efficient for the judiciary. Yet reality is more complex: after all, there are a wide variety of reasons and causes for substance use, which may be overlooked when focusing solely on voluntary intoxication as a requirement. For instance, there seems to be an intuitive difference between the defendant who uses recreationally, the defendant who uses due to a very severe addiction, and the defendant who uses substances to self-medicate an underlying disorder. An

abstract foreseeability requirement, as was formulated in the *Cannabis-psychosis* case, would be satisfied in all these circumstances, although one may feel that the level of (anterior) culpability differs (Goldberg, 2024). Consequently, further examination of the time of the substance use is necessary to understand whether this prior behaviour is truly culpable.

Based on the challenges identified in this section, two issues are key in our subsequent empirical study. The first is whether the lawyers and behavioural experts stay in their (disciplinary) lanes. We use two levels of analyses here, by identifying, on a more superficial and quantitative level, whether *behavioural* experts refrain from using *legal* terminology in their conclusions. Then, more in-depth and qualitative analyses cover whether behavioural experts adhere to empirical reasoning. Because we qualify the development in the Supreme Court jurisprudence as a move from empirical, concrete foreseeability, towards more normative, abstract general foreseeability, it is interesting to see if experts still use arguments related to concrete individual foreseeability. The second issue considers the assessment framework of non-accountability. Since we believe that prior fault should be assessed using criteria equivalent to non-accountability or diminished accountability (the equivalence thesis: see Goldberg et al., 2021), and since cognition and volition are now key features of the accountability assessment, we analyse whether prior fault reasoning also addresses these two capacities. In other words, we investigate if there is overlap between the assessment criteria of accountability and prior fault.

3 DATA AND METHODOLOGY

3.1 Case File Analysis

We employed a case file analysis of behavioural expert witness reports, which were carefully selected and pseudonymised by the Netherlands Institute of Forensic Psychiatry and Psychology (NIFP), leading to a sample of 217 files in which a substance use disorder had been diagnosed.³ About a third of the reports came from the Pieter Baan Centre⁴ (hereafter referred to as PBC, $N = 65$, 30%), and the remaining cases ($N = 152$, 70%) were outpatient multidisciplinary assessments by a psychologist and a psychiatrist (hereafter referred to as ‘duo reports’). To

3. The selection process included all ($N = 943$) multidisciplinary outpatient and clinical PBC reports from 2021, from which all addiction-related cases were extracted. PBC reports were coded first, followed by as many outpatient reports as possible to match PBC numbers. Due to time constraints at the NIFP, the final number of files analysed was determined by available research time rather than file availability.

4. This is the NIFP’s observation clinic, allowing the defendant to be examined but also observed in order to aid the expert witness report. PBC placement is requested particularly in cases where defendants may be uncooperative.

increase the internal validity of the case file research, a codebook was drawn up with variables concerning the nature of substance use, addiction and other psychiatric disorders, as well as advice on attribution and possible intervention frameworks.

3.2 *Structured Case Law Analysis*

The relevant judgments were collected via Rechtspraak.nl, the open-source database of verdicts in the Netherlands, by search string containing the terms prior fault, addiction and behavioural expert witness reports, and setting a time frame covering the period January 2013 up to October 2023,⁵ resulting in 1,049 cases. Similarly to the case file analysis, a codebook was used containing 13 variables, including information on the offence, potential disorders, the type of substance addiction, and the judge's arguments regarding accountability and prior fault. Of the total number of verdicts, after coding, 740 cases were found to involve an addicted defendant as well as contain an expert witness report. This sample included mainly first-instance cases ($N = 644$, 87%) and some Court of Appeal cases ($N = 96$, 13%).

Importantly, the behavioural reports in the verdicts are not necessarily the same reports as those examined in the case file analysis, although they may overlap. Due to the anonymised nature of both the verdicts and the behavioural reports, it is not possible to compare them directly. The study was approved by the Ethical Review Committee of the Faculty of Law of the University of Groningen under *inter alia* the condition that the files were pseudonymised by the NIFP and studied at its offices in Utrecht. Encrypted file numbers were used in the database, and the analyses were conducted on an aggregate level, meaning no conclusions may be drawn about individual cases or verdicts.

4 RESULTS OF THE CASE FILE RESEARCH

4.1 *Quantitative Findings Regarding Addiction and Substance Use Information*

The sample contained only cases with complex psychopathology, meaning that their symptoms can be classified under several different psychiatric labels; a phenomenon referred to as comorbidity in medical terminology. All individuals involved had a diagnosed substance use disorder (possibly in remission), as this was the selection criterion, but the 141 defendants (on whom 217 reports were written) in the sample regularly had a mental disorder in addition to a

5. This time frame was set for two reasons: first, recent case law is most relevant as the subject of addiction and substance use changes within society, and, second, this keeps the number of judgments manageable.

substance use disorder ($N = 136$, 96.5%). Given the prevalence of comorbidity of mental health problems among defendants (Bloem et al., 2021), it is not entirely unexpected that almost half of the defendants from this sample suffered from a comorbid psychotic disorder (such as schizophrenia) and about 40% with a personality disorder. Moreover, a vast majority of individuals were considered to be (or have been) addicted to multiple types of substances ($N = 78$, 55.3%). The type of substance varied, but the sample contained (among others) a cannabis use disorder for 104 individuals and an alcohol disorder for 66 individuals: 73.8% and 46.8% of the sample, respectively. Aside from the presence of substance use disorders, about half of the defendants were intoxicated during the offence. Poly drug use was also frequent at the time of the offence: in 17.7% ($N = 25$) of the sample, the defendant was under the influence of two or more substances.

The impact of coexisting substance use and comorbid disorders on expert opinions about accountability can be inferred from how often it is mentioned in reports. There are 129 experts who do not mention the substance use disorder in the accountability advice (59.4%) and 88 experts who do (40.6%). With regard to discussing intoxication at the time of the offence, we found that 54.5% of experts ($N = 118$) mention substance use, compared to 95 experts (43.8%) who do not.

Regarding the final accountability advice, most experts argue that the defendant should be held diminished accountable (see Table 1). While about one in five defendants is considered non-accountable, the defendant is considered fully accountable by very few experts. A close scrutiny of those full accountability cases clearly shows that these are predominantly cases containing only addiction as a diagnosis (i.e. no other comorbid disorders). Other cases, in which (some degree of) diminished accountability or non-accountability is advised, almost always concern defendants with an additional disorder, which the expert also explicitly addresses.

It is also interesting that there are 24 cases in which the experts do report on substance use at the time of the offence but still advise non-accountability. In the majority of these cases, prior fault is not discussed. In five reports, the expert does actively refute a prior fault argument, for example on the basis of a lack of foreseeability of the (often psychotic) consequences of substance use. It is worth noting that there is a non-significant difference in the frequency of the non-accountability advice in duo reports versus the PBC reports: in 25.7 to 15.4% of cases.⁶

6. χ^2 (2, $N = 214$) = 2.587, $p = 0.274$. For the chi-square test, the accountability opinion was converted into a three-point scale instead of the original five-point scale, with the few observations for the categories of strongly and slightly diminished accountability added to the category diminished accountability.

Table 1 **Accountability Advice by the Experts in the Case File Research, Differentiated between PBC Reports and Duo Reports**

	PBC		Dual Reports		Total	
	N	%	N	%	N	%
Accountability advice						
Non-accountable	10	15.4	39	25.7	49	22.6
Strongly diminished accountable ^a	2	3.1	5	3.3	7	3.2
Diminished accountable	43	66.2	95	62.5	138	63.6
Slightly diminished accountable	2	3.1	1	0.7	3	1.4
Fully accountable	6	9.2	11	7.2	17	7.8
No advice	2	3.1	1	0.7	3	1.4
<i>Total</i>	<i>65</i>	<i>100</i>	<i>152</i>	<i>100</i>	<i>217</i>	<i>100</i>

a For more information on these intermediate possibilities of strongly- and slightly diminished accountability, and why they are rarely mentioned, see Mebius and colleagues (2023).

4.2 *Qualitative Findings Regarding Addiction and Substance Use in Accountability and Prior Fault*

When it comes to ‘staying in one’s lane’, the reports have been screened for using normative arguments when discussing prior fault. In none of the reports was the exact term *culpa in causa* used. Nor did experts use more objective, general terms to underpin the individual’s knowledge of the possible dangerous effects of certain substances; even when the words ‘should have known’ or ‘ought to have known’ were used, this generally referred to knowledge based on individual experience with regard to frequent use (i.e. a subjective and empirical perspective).

Yet experts do discuss, using empirical and behavioural arguments, and thereby not exceeding their area of expertise, whether the defendant had a degree of prior fault in creating or exacerbating the circumstances. Such arguments are usually addressed in the defendant’s favour: for example, experts discuss reasons why the defendant cannot be held responsible for consuming substances. For example, in a case where the defendant was charged with multiple offences, a psychiatrist states that

it is relevant that people with psychoses are often inclined to use drugs to unwind. The defendant himself also stated that he used cannabis and cocaine because of his psychotic symptoms. For this reason, the defendant cannot be held (entirely) responsible for his decision to use drugs.⁷

7. Case 201-psa: a psychiatrist reporting on a 36-year-old defendant.

Thus, the temporal sequence in which the various disorders and symptoms manifest themselves and their interaction may be important for (the advice regarding) responsibility: although drug use may trigger or exacerbate psychosis, (pre-)psychotic symptoms may also have triggered self-medication (see also Goldberg, 2022).

Not only are other mental disorders discussed as a reason for substance use, but underlying addictions are also repeatedly cited as a reason not to hold the defendant (fully) accountable for using substances. For instance:

Based on his [addiction] disorder, the defendant has had difficulty resisting his cannabis cravings, despite fully being aware – due to his experience with the substance – that it has a negative effect on his capacity to think clearly. Inherent to the nature of a substance use disorder, he therefore cannot be held entirely responsible for blowing....⁸

Similar reasoning is evidenced in the following example, whereby the psychologist indicates that the defendant could have known that he might react ‘atypically’ to substance use. However, the defendant is

unable to resist his need for the effects of substance use (distraction, attenuation, stimulus seeking) due to his personality disorder – especially the impulsivity, limited tolerance towards frustrations and a tendency for immediate need satisfaction in his drug use – and his predisposition towards addiction.⁹

In the foregoing examples the experts mention the specific knowledge, and thus concrete foreseeability that the defendant had, but also address the substance use disorder as a (possible) reason why the defendant cannot be held fully accountable for substance use. An opposing argument, however, was found by a psychiatrist, reporting on a violent crime, who stated that “the absence of a personality disorder means that the defendant can in principle be held responsible for developing a cocaine and alcohol use disorder.”¹⁰ The psychiatrist continued the report by also addressing the defendant’s responsibility for the ensuing intoxications and further impulsive acts.

Because the last example involves an expert witness report on a serious violent crime, one may wonder to what extent the severity of the offence may (consciously or unconsciously) have played a role in determining the degree of accountability. The results do suggest this to be the case, by looking at the opinions on accountability compared between all cases of at least one (attempted) homicide

8. Case 116-psy: a psychologist reporting on a 21-year-old defendant.

9. Case 55-psy: a psychologist reporting on a 41-year-old defendant.

10. Case 15-psa: a psychiatrist reporting on a 38-year-old defendant.

versus all other, non-homicidal offences (see Table 2). Among defendants charged with homicide (among others), almost 18% of the experts recommended full accountability, compared to only 2.8% of other offences. This is a significant difference.¹¹ However, this finding can also be explained from its correlation with the presence of a personality disorder that explains both addiction and violence.¹²

Table 2 Accountability Advice by the Experts in the Case File Research, Differentiated between (Attempted) Homicides and All Other Offences

	(attempted) Homicide		Other Offences		Total	
Accountability advice	N	%	N	%	N	%
Non-accountable	16	21.9	33	22.9	49	22.6
Strongly diminished accountable	1	1.4	6	4.2	7	3.2
Diminished accountable	43	58.9	95	66	138	63.6
Slightly diminished accountable	0	0	3	2.1	3	1.4
Fully accountable	13	17.8	4	2.8	17	7.8
No advice	0	0	3	2.1	3	1.4
<i>Total</i>	<i>73</i>	<i>100</i>	<i>144</i>	<i>100</i>	<i>217</i>	<i>100</i>

Interestingly, substance use does not always negate a non-accountability advice. A psychiatrist explains: “In the days before the offence, the defendant’s delusions were increased due to heavy cannabis use and sleep deprivation, on top of the existing severe psychotic condition.”¹³ In this case, therefore, there seem to be pre-existing psychotic symptoms, which become aggravated by substance use. The same applies to an opinion of the PBC, which refers to cannabis and truffle consumption as reasons for the deterioration of the defendant’s psychosis. This fact “could not, in my opinion, have been foreseen by the defendant”, states the expert.¹⁴ Addiction can also exacerbate underlying psychotic vulnerabilities. In a PBC report, the experts also recommended non-accountability, explaining that

11. The chi-square test suggests a significant difference between the distribution of accountability opinions among defendants suspected of (among others) (attempted) homicide versus other defendants ($\chi^2 (2, N = 214) = 14.882, p < 0.001$). Also for this chi-square test, the original five-point scale was converted into a three-point scale.
12. Possibly, such a personality disorder is a *confounder*, i.e. a factor that is related to the violent offence and also to the accountability opinion, and can thus explain the relationship between the two factors. Indeed, when tested, having a personality disorder significantly affects the accountability advice. In this sample, defendants with (among other things) a personality disorder are considered completely insanity-prone in only 4.9% of cases ($N = 4$), compared to 33.8% of defendants without a personality disorder ($N = 45$): $\chi^2 (2, N = 214) = 28.123, p < 0.001$.
13. Case 47-psa: a psychiatrist reporting on a 22-year-old defendant.
14. Case 777: a PBC report on a 28-year-old defendant.

the severe impairment in cannabis use puts further pressure on the defendant's sense of reality, but also reduces his ability to regulate emotions and aggression and his ability to control himself.¹⁵

These examples, as well as all data, together suggest that psychotic symptoms are the core of non-accountability. Even if there is concurrent substance use, whether or not stemming from an underlying addiction, which has exacerbated the psychotic tendencies, it does not negate the fact that the defendant had already been experiencing distortions in perceptions. Hence, these are not clear-cut cases (such as described for the standard case law in paragraph 2) of psychosis induced solely by substance use.

In short, behavioural experts seem to use two types of arguments to motivate a lack of prior fault. The first is a lack of insight ('unable to foresee'): a cognitive argument. More common, however, is the use of a volitional argument, in which underlying addictions and other disorders are used as evidence on which to argue that the defendant had limited behavioural alternatives ('unable to limit himself').

5 RESULTS OF THE STRUCTURED CASE LAW ANALYSIS

5.1 *Quantitative Analysis on the Accountability Judgment and Deviations from Expert Witness Advice*

Like the expert report sample, the case law analysis contained predominantly complex cases with (relatively) serious charges and/or charges for multiple offences.¹⁶ While addiction was a selection criterion, most cases involved a comorbid mental disorder: only 7.7% (57 judgments) featured substance use disorder alone. Intoxication at the time of the offence was also common, occurring in 71.2% ($N = 529$) of cases. Nevertheless, only a few judges (12% of case, $N = 89$) use the term 'prior fault' or 'culpa in causa'.

The case law analysis shows that about 10% of defendants, i.e. 71 cases, are considered non-accountable in this sample (see Table 3), despite the presence of an underlying addiction. A more detailed analysis of these cases reveals some interesting findings. In one case, the judge deliberately deviates from the advice of both experts, both of whom considered the defendant accountable through an explicit prior fault reasoning. The judge, however, disagrees and deviates, but, unfortunately, does not elaborate on the reasons why (Court of First

15. Case 816: a PBC-report on a 29-year-old defendant.

16. Evidently, the influence of sampling is very strong here. By selecting for the presence of behavioural reports, lighter offences are automatically excluded, with the consequences for the external validity of this study.

Instance Amsterdam, 2019). In some cases, psychosis was caused by not taking anti-psychotic medication (correctly), either with or without concurring substance use. In one of these cases, the judge emphasised “that the defendant’s medication non-adherence is clearly related to his underlying mental health problems” and is therefore not relevant for prior fault (Court of First Instance Noord-Holland, 2011). One particular judge was also inclined to consider the substance use as a method of (inadequate) coping, and therefore symptomatic of the underlying problem. However, in the majority of the 71 cases where a non-accountability verdict is reached, the judge does not address any form of *culpa in causa* at all, rendering it unclear what the role of addiction and possible substance use is in these judgments.

Table 3 Accountability Judgments in the Case Law Analysis Sample

Accountability decision	N	%
Non-accountable	71	9.6
Strongly diminished accountable	25	3.4
Diminished accountable	531	71.8
Slightly diminished accountable	26	3.5
Fully accountable	45	6.1
No advice	42	5.6
<i>Total</i>	740	100

In only a small percentage of cases (see Table 4) does the court deviate from the expert(s)’ opinion. It is striking that in this small subgroup of cases ($N = 42$) in which the court deviates, prior fault seems to be disproportionately featured: in about a third of this group ($N = 15$, 35.7%), the judge mentions prior fault. In the full sample, prior fault was ‘only’ discussed in 12% of cases. Furthermore, it stands out that when this small subgroup of cases – whereby the judge deviates from the experts – is compared with the full dataset, the type of offence committed appears to be the more serious. In the small subgroup, about 25% of the offences (among others) are homicides, and another 21.4% are attempted homicides ($N = 11$ and $N = 9$, respectively). In the full dataset, the number of homicides is 12.6% ($N = 97$), and the number of attempted homicides is 135 (18.2%). Thus, possible reasons for deviating from the advice might be the severity of the offence, in addition to the degree of prior fault.

Table 4 Degree in Which Courts Follow the Advice of the Expert Concerning Accountability in the Case Law Analysis

	Psychiatrist		Psychologist	
Following expert's opinion	N	%	N	%
No	27	3.6	33	4.5
Yes	425	57.4	561	75.8
Not applicable ^a	242	32.7	94	12.7
Unknown	46	6.2	51	6.8
<i>Total</i>	<i>740</i>	<i>100</i>	<i>740</i>	<i>100</i>

a These cases involved inconclusive expert advice, often due to the defendant's refusal to cooperate. The numerous 'non-applicable' cases for psychiatrists are explained by many reports being authored solely by psychologists.

5.2 *Addiction and Substance Use in the Motivation of the Accountability and Prior Fault Verdict*

The qualitative analysis of the courts' motivations reveals two interesting trends regarding the influence of substance use or addiction on accountability verdicts. First, in the vast majority of cases, judges discuss the defendant's behaviour – and impairments therein – from a predominantly cognitive perspective, mainly leaving a volitional perspective aside. Second, judges tend to underpin foreseeability with arguments regarding the individual's concrete knowledge, even though the standard jurisprudence allows them to motivate foreseeability in more general, normative terms. By using empirical arguments to motivate concrete foreseeability, we notice inconsistencies in the judges' arguments. These two trends are discussed and explained in more detail in what follows.

5.2.1 *A Predominantly Cognitive Focus*

Judges often refer to the defendant's concrete knowledge about the (negative) effects of substance use as an argument for prior fault.

The defendant stated that he knew from the previous use of alcoholic beverages and drugs that the combination of these substances would have a negative effect on his behaviour. Nevertheless, after drinking heavily and using drugs, he went out onto the streets despite the fateful consequences. (Court of First Instance Oost-Brabant, 2016)

However, even if the substance use has a different effect than it did in previous instances, the current assessment framework has a simple solution. Courts can always rely on the argument that it is common knowledge that the effects of substance use may vary individually or differ depending on the specific

circumstances. Even in cases where the defendant himself has no experience with the drug and thus does lack concrete prior knowledge of such effects, he can be blamed for not knowing about such effects even though he could have known:

The defendant had never used speed before and therefore did not know what effect speed would have on him and for how long. He stated that at the time of consumption, he did not know that using speed could lead to psychosis. However, he could easily have known this, by (for example) looking on the internet. (Court of Appeal Arnhem-Leeuwarden, 2017)

A final variation of the cognitive criterion stands out, thereby complementing the trinity: the defendant knew; or he could have known; and otherwise he *should* have known; that substance use can have negative consequences. The judge regularly refers to it being a ‘fact of common knowledge’ that the effects of substance use can vary from person to person and vary according to the situational circumstances, ensuring that any defendant could effectively always have known about possible negative effects of substance use.

Individuals with severe substance use disorders typically retain cognitive capacities but struggle with volitional control. They are aware of substance effects through experience, yet their main challenges are cravings to use and difficulty quitting. Despite the frequent acknowledgment of these impairments by experts, as mentioned in Section 4, judges rarely address these volitional features. Occasionally, cravings and impairment of choice or will are mentioned by the courts:

The excessive substance use leading up to the offence should be placed in the context of the defendant’s disorders. Based on these disorders, or at least the structural addiction and possible other underlying problems, the defendant has reduced control over his substance use and must be assumed to have reduced freedom of choice in this context. (Court of First Instance Amsterdam, 2022).

Yet in this case, too, the court’s final conclusion still emphasised the defendant’s cognitive ability, which remained unimpaired. As such, although volitional impairments are mentioned, they do not seem to be a decisive feature.

5.2.2 *Constructing Prior Fault: The Role of Treatment History*

Courts seem to rely on arguments related to an individual’s concrete foreseeability, i.e. specifying why the defendant specifically could have foreseen negative consequences. However, in proving concrete foreseeability, inconsistent reasoning was found regarding the role of the defendant’s treatment history. On the one hand, the defendant may be blamed for failing to seek help for his substance use problems, thereby ‘taking the risk’ of causing harm to others (e.g. Court of

First Instance Rotterdam, 2021). If this train of thought is followed consistently, however, we would expect that if the defendant did undergo treatment, it would weigh in his favour. Yet this is not necessarily the case:

The defendant can be blamed to some extent for failing to seek help for his cannabis and alcohol dependency after aborting previous outpatient treatment, which he underwent for a short period of time; even though, apparently, he did not consider the possibility that his substance use could lead to a psychosis, which is a risk that was generally known to him. (Court of First Instance Amsterdam, 2022)

Here, enrolling in treatment once is not sufficient: after aborting treatment, the defendant should have continued to seek help. In another case, the defendant had completed a treatment programme but can be blamed for “seeking help for addiction only once” (Court of First Instance Rotterdam, 2017).

While these different lines of reasoning seem consistent when addressing them separately, they are not convincing when combined. Not seeking any help, enrolling but then discontinuing treatment, and completing a course of treatment are all arguments that reflect negatively on the defendant. Similar trains of thought can be found outside our current sample, whereby an addicted defendant is sometimes considered to have heightened responsibility, because his addiction made him extra aware of the risks of substance use.¹⁷ Hence, following such an argument, it is not far-fetched to believe that an extensive treatment history may also be indicative of a very high level of understanding and knowledge about the potential negative consequences of use. Yet what it also seems indicative of, although not reflected by the courts’ judgments, is the defendant’s inability to stop using substances, reflecting a severe impairment of volitional capacities. Intuitively, the courts seem to be reasoning towards a particular goal, considering defendants responsible for the addictive behaviour. Whether this would be the case due to his lack of treatment needs (thereby ‘taking the risks’) or due to his having gone through a treatment programme (‘the risk was generally known to him’) seems to be largely irrelevant. However, many reasons could explain the lack of active help-seeking or treatment discontinuation. Seeking the behavioural expert’s advice by the court – considering the empirical nature of these claims – seems appropriate and represents a better alternative than automatically assuming that reasons for failed treatment would be the defendant’s disinterests or ‘acceptance of risks’.

17. As, for example, in the Tolbert case (Court of Appeal Arnhem-Leeuwarden, 2007): “Given his years of intensive amphetamine use, the defendant knew what the risks of his drug use could be.” Yet knowledge of substance use is not the problem in addiction: craving and relapse is. Hence, a volitional addiction would have been appropriate.

6 DISCUSSION

This study reveals that substance use, addiction and accountability cases are often more complex than the standard jurisprudence outlined in paragraph 2 suggests. Cases frequently involve addiction alongside other mental disorders during self-intoxication. Only a few of these complex cases result in prior fault reasoning, either in court or (more implicitly) among experts. Prior fault arguments typically apply only when severe mental issues, often of a psychotic nature, are self-induced and would otherwise justify non-accountability. In most cases, however, prior fault arguments are not necessary, as diminished accountability is already available as an outcome that can balance responsibility with the individual's limited insight or control at the time of self-intoxication.

When a pre-existing psychotic disorder influences self-intoxication (e.g., as self-medication), experts and courts often have no issue assuming non-accountability despite substance use or addiction. However, if judges do deviate from expert advice regarding non-accountability, this is often based on prior fault reasoning, particularly in serious offences. This suggests that prior fault reasoning helps maintain accountability in such cases and prioritise societal norm confirmation. The file study also indicates that experts may be equally influenced by offence severity when assessing responsibility. But similarly to the severe Thijs H. case, in prior fault cases, a more normative approach can be considered somewhat of a 'trick' for legal practitioners to come to harsher consequences than they would by taking a more behavioural, individual approach.¹⁸ As mentioned in the first paragraph, 'trick' is the word used to describe the experience of medical (or behavioural) experts of having their expert opinion, tailored to the individual, bypassed by legal practitioners on the basis of more general or procedural reasoning (compare Haan, 2023).

Key differences emerge in regard to how experts and courts justify their assessments. Behavioural experts focus on the individual's concrete foreseeability of substance use effects, relying on empirical evidence such as past experiences and personal capacities. As such, they stay in their disciplinary lane. Courts, supported by standard jurisprudence, extend this reasoning normatively to 'could (and therefore should) have known.' However, when concrete foreseeability can be substantiated, judges still emphasise it, even though the broad, abstract foreseeability criterion no longer requires this. However, when constructing prior fault, they sometimes seem to overstep their expertise into more empirical areas, such as treatment history. This can lead to contradictory arguments. In such cases,

18. Also, Goldberg's chapter in this volume (Chapter 12) shows how a legal perspective on addiction leads to harsher consequences for the individual than a behavioural (disease) perspective.

experts' advice should be sought, or these arguments should be avoided, as they are not necessary in the broad assessment framework. Such arguments suggest a purposeful reasoning towards prior fault; a whiff that the broad assessment framework gives to the issue of self-intoxication anyway. If the Thijs H. ruling encourages both experts and judges to focus on their respective areas of expertise in accountability cases, behavioural experts are likely to be better equipped to report on concrete foreseeability than their legal counterparts. However, beyond prior fault, we foresee a continued discussion on the disciplinary nature of non-accountability, and as long as the disciplinary boundaries of accountability remain unclear, concerns about sticking to one's own trade will persist.

In addition to cognitive arguments on knowledge and foreseeability, behavioural experts regularly present volitional arguments, while judges typically focus on cognitive issues. This puts individuals with addiction at a disadvantage, as their impairments are primarily volitional. The current framework for prior fault was developed before there was a clear framework for non-accountability. Following the Supreme Court's Thijs H. ruling, it is now clear that non-accountability involves both cognitive and volitional elements. Hence, based on the idea of anterior culpability, it seems reasonable to apply an equivalent assessment regarding preceding moments of self-intoxication. In other words, if a disorder causes such a loss of control that non-accountability may apply, it seems reasonable to extend that reasoning to moments earlier, such as during self-intoxication. The question of whether a person was capable of acting in accordance with his (concrete or abstract) understanding of the risks allows more room for assuming diminished or non-accountability in the (comorbidly) addicted defendant. Although it is not necessarily the case that addiction completely removes control (e.g. depending on the context of use), complex cases may demonstrate enough volitional impairments to meet the criteria for non-accountability. This approach would encourage a more meaningful dialogue between experts and judges, requiring judges to give more weight to the volitional arguments presented by experts.

This research also shows, however, that while behavioural experts, possibly influenced by their prevailing view of addiction as a mental disorder, see some room for excusability based on addiction, the law explicitly and diligently seeks to link addiction to accountability. Moreover, there is a long-standing view in the literature about extending anterior culpability to the moment the person first used drugs, known as *culpa in causa* squared (see Bijlsma, 2011; Verkes & Fechner, 2022). Hence, we do not expect changes in the assessment framework to drastically alter case outcomes but rather to encourage more consistent dialogue between experts and judges regarding addiction in these cases.

7

CONCLUSION

This research shows that the one-sided (merely cognitive) legal approach to prior fault does not match behavioural/empirical findings related to mental disorder and addiction, and in doing so also does not fully match the recent case law on non-accountability from the Thijs H. case. Similarly to this case, our empirical research shows that a more normative approach – in cases of prior fault, addiction and (diminished) accountability – allows for ‘tricks’ and harsher consequences for the individual when the severity of the offence seems to require these. Finally, it also highlights inconsistencies in reasoning outside one’s own (mainly behavioural instead of legal) field of expertise. Due to this addition to a ‘jurisprudence of consequences’ (Miller, 1965), legal development related to (prior fault, addiction and) accountability as well as the dialogue between behavioural and legal practitioners could profit.

REFERENCES

- Bijlsma, J. (2011). Drank, drugs en culpa. Zelfintoxicatie en culpa in causa: pleidooi voor een voorzienbaarheidseis, *Delikt & Delinkwent*, 44(6), 654-678.
- Bijlsma, J. (2016). *Stoornis en strafuitsluiting: Op zoek naar een toetsingskader voor ontoerekenbaarheid* (Dissertation, VU Amsterdam). Wolf Legal Publishers.
- Bloem, O., Verkes, R. J., & Bulten, E. (2021). Mentally disordered in prison? Prevalence, development of symptoms and recidivism. In P. H. van Kempen & M. Krabbe (Eds.), *Mental health and criminal justice: International and domestic perspectives on defendants and detainees with mental illness* (pp. 109-132). Eleven.
- Court of Appeal Amsterdam 29-12-1980, referred to in ECLI:NL:HR:1981:AC0902.
- Court of Appeal Arnhem-Leeuwarden 16-04-2007, ECLI:NL:GHLEE:2007:BA3007.
- Court of Appeal Arnhem-Leeuwarden 31-10-2017, ECLI:NL:GHARL:2017:9380.
- Court of Appeal 's-Hertogenbosch 30-06-2006, referred to in ECLI:NL:HR:2008:BC3797.
- Court of First Instance Amsterdam 23-07-2019, ECLI:NL:RBAMS:2019:5440.
- Court of First Instance Amsterdam 26-01-2022, ECLI:NL:RBAMS:2022:2610.
- Court of First Instance Noord-Holland 11-02-2011, ECLI:NL:RBNHO:2021:1303.
- Court of First Instance Oost-Brabant 09-02-2016, ECLI:NL:RBOBR:2016:483.
- Court of First Instance Rotterdam 03-10-2017, ECLI:NL:RBROT:2017:8265.
- Court of First Instance Rotterdam 03-03-2021, ECLI:NL:RBROT:2021:2003.
- Goldberg, A. (2024). Foreseeability and prior fault: Examining the assessment framework for intoxication, blame and criminal responsibility. *Białostockie Studia Prawnicze*, 29(4), 69-88.
- Goldberg, A. E. (2022). *Blaming the addicted brain: Building bridges between criminal law and neuroscientific perspectives on addiction* (Dissertation, Maastricht). Eleven.
- Goldberg, A. E., Altena, A., Beute, W., Buderman, C., Jongen, S., Oldenburger, A., Staring, M., Wierenga, E., & Van der Wolf, M. J. F. (2024). Verslaafd en verantwoordelijk? Complexe culpa in causa kwesties in rapportage pro Justitia en jurisprudentie. *Delikt & Delinkwent*, 10(58), 833-853.
- Goldberg, A. E., Child, J. J., Crombag, H., & Roef, D. (2021). Prior fault blame in England and Wales, Germany and the Netherlands. *Journal of International and Comparative Law*, 53-86.
- Haan, B. (2023). Kritiek op arrest Hoge Raad binnen psychiatrie en rechterlijke macht. NRC 20-10-2023.

- Mebius, L., Prinsen, M., Kempes, M., & Van der Wolf, M. J. F. (2023). Maar hoe verminderd toerekeningsvatbaar bent u dan precies? Een empirische en juridische studie van de mogelijkheid om de 'verminderde toerekeningsvatbaarheid' nader te preciseren. *Boom Strafbblad (Themanummer Strafrecht & empirie)*, 5, 216-225.
- Miller, A. S. (1965). On the need for impact analysis of Supreme Court decisions. *Georgetown Law Journal*, 53(2), 365-402.
- Nauta, E., Ligthart, S., & Meynen, G. (2024). Stoornis en ontoerekenbaarheid: Het arrest van de Hoge Raad in de zaak Thijs H. *Nederlands Juristenblad*, 1, 6-12.
- NVVP (2024). *Psychiatrisch onderzoek en rapportage in strafzaken*. Federatie Medisch Specialisten/NVVP.
- Supreme Court of the Netherlands 09-06-1981, ECLI:NL:HR:1981:AC0902.
- Supreme Court of the Netherlands 12-02-2008, ECLI:NL:HR:2008:BC3797.
- Supreme Court of the Netherlands 17-10-2023, ECLI:NL:HR:2023:1295.
- Van der Wolf, M. J. F., & Bijlsma, J. (2022). Het stoornisbegrip in het strafrecht en de pro Justitia rapportage. In H. J. C. Van Marle, P. A. M. Mevis, S. J. Roza, & M. J. F. Van der Wolf (Eds.), *Gedragskundige rapportage in het strafrecht. Derde herziene druk* (pp. 263-286). Kluwer.
- Van der Wolf, M. J. F., & Van Marle, H. J. C. (2018). Legal approaches to criminal responsibility of mentally disordered offenders in Europe. In K. Goethals (Ed.), *Forensic psychiatry and psychology in Europe. A cross-border study guide* (pp. 31-44). Springer International Publishing.
- Verkes, R. J., & Fechner, E. (2022). Middelengebruik, verslaving en culpa in caus. In H. J. C. Van Marle, P. A. M. Mevis, S. J. Roza, & M. J. F. Van der Wolf (Eds.), *Gedragskundige rapportage in het strafrecht. Derde herziene druk* (pp. 379-398). Kluwer.