SENTENCING OFFENDERS: THE ROLE OF IMPAIRED MENTAL FUNCTIONING AND THE RELEVANCE OF ADDICTIONS

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Introduction

There is strong evidence that the incidence of mental disorder in those sentenced for criminal offences is quite high.[1] Estimates of offenders with mental disorders range from one third to one half. The presence of mental disorder or abnormality at the time of the commission of the offence often raises difficult questions, and may make the conflicts within the sentencing exercise, more acute. An issue that regularly arises is whether the offender's moral culpability should be regarded as reduced. Mental disorder or abnormality at the time of sentencing raises other issues; commonly whether the offender is an appropriate medium for making an example to others, and how the community is best protected. Historically, the courts often encountered difficulties in receiving definitive expert diagnoses. Psychiatric illness was regarded as separate from inherent or acquired intellectual deficit, although the essential approach was the same.

The decision of the Victorian Court of Appeal in *R v Verdins, Buckley and Vo* [2007] VSCA 102, 16 VR 269 (*Verdins*) has been described as providing "both a synthesis of the evolving law in Australia on the relevance to sentencing of impaired mental functioning and a restatement of important issues of principle [constituting] Australia's most sophisticated and subtle analysis of the relationship between impaired mental functioning and sentencing".[2] *Verdins* has been adopted in this State.[3] More recently, in *Director of Public Prosecutions (Vic) v O'Neill* [2015] VSCA 325, 47 VR 395 (*O'Neill*), the decision in *Verdins* was confirmed and explained, and the Tasmanian Court of Criminal Appeal has referred to *O'Neill* with approval.[4] The decision in *Verdins* has also been held apply to disciplinary proceedings.[5]

This paper sets out the major aspects of *Verdins*, along with the restatement in *O'Neill* of the applicable principles. It discusses the scope of the operation of those principles, and the

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1 See for instance the commentary in Bagaric & Edney, *Sentencing in Australia*, 4th ed, at 350 [500.12300] fn 145.

2 I Freckleton, *Sentencing Offenders with Impaired Mental Functioning*: *R v Verdins, Buckley and Vo* (2007) 14 PPL 359.

3 For example, *Startup v Tasmania* [2010] TASCCA 5; *Groenwege v Tasmania* [2013] TASCCA 7; *Director of Public Prosecutions (Acting) v CBF* [2016] TASCCA 1.

4 *DPP (Acting) v CBF* (fn 3) at [1], [38]-[39].

5 *Quinn v Law Institute of Victoria Ltd* [2007] VSCA 127; *Legal Practitioners Board of Tasmania v Hall* [2015] TASSC 63.

nature of relevant mental impairment, with particular reference to substance abuse and gambling addictions.

The decision in *Verdins*

There are perhaps three essential aspects of *Verdins*. The first is that it clarified the position in relation to what kind of mental condition may be relevant to sentencing. Earlier, in *R v Tsiaras*,[6] the Victorian Court of Appeal had identified five ways in which serious psychiatric illness not amounting to insanity was relevant to sentencing. The decision in *Verdins* made it clear that the considerations identified in *Tsiaras* were not, and were not intended to be, applicable only to cases of "serious psychiatric illness". In *Verdins*, the court said that any mental disorder or abnormality or impairment of mental function may be relevant, and that a sentencing court should not have to concern itself with how a particular condition was to be classified.[7]

The second aspect is that the court dismissed the notion that a person suffering from psychiatric illness, whether or not the illness played a part in the offending, was not an appropriate vehicle for general deterrence, thus excluding general deterrence altogether as a consideration. The correct approach was said to be that general deterrence was not eliminated but still operated, sensibly moderated. The extent of moderation depends on the nature and severity of the symptoms and its effect upon mental capacity.[8]

The next aspect of *Verdins* is that the court identified at least six ways in which impaired mental functioning may be relevant to sentencing. Before setting out the list, the court addressed two particular issues. The first of these was the circumstances in which impaired mental functioning at the time of offending may reduce the offender's moral culpability. In par [26], in a list said not to be exhaustive, the court stated[9] that such impaired mental functioning may reduce moral culpability if it had the effect of:

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

The court acknowledged that it is the nature of the sentencing discretion that views will differ as to how, and to what extent, impaired mental functioning may reduce blameworthiness, but said the effect on the assessment will vary with the nature and severity of the condition, and the nature and seriousness of the offence.

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6 [1996] 1 VR 398.
7 *Verdins* at 271 [5], [8].
8 *Verdins* at 273 [15]-[16]
9 *Verdins* at 275 [26].

Further, the court considered the issue of the impact of prison on a mentally ill offender, and confirmed the proposition that psychiatric illness may mean that a given sentence would weigh more heavily on the prisoner than it would on a person in normal health, and also noted that imprisonment could cause an existing mental condition to deteriorate.

As to the relevance of impaired mental functioning to sentencing, by way of a "reformulation" of the principles the court said:[10]

> 32 Impaired mental functioning, whether temporary or permanent ('the condition'), is relevant to sentencing in at least the following six ways:
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> 1 The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
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> 2 The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
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> 3 Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
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> 4 Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
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> 5 The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
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> 6 Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment. [Footnotes omitted.]

This list of ways is sometimes called (rather misleadingly) the '*Verdins* principles'. The term 'limbs' is sometimes used interchangeably. Given the scope of the discussion in *Verdins*, 'limbs' is probably the better term. In *O'Neill*, the court considered it "desirable to summarise the scope and limitation of [the *Verdins*] principles "as consistently understood and stated by"[11] the Victorian Court of Appeal. The court in *O'Neill* made eight points, as follows:

- The principles are enlivened only where the offender suffers from an impairment of mental functioning, and they have always been confined to cases in which the offender suffered an impairment of his or her mental functioning;[12]
- For the first, second third and fourth principles set out in par [32] of *Verdins* to have application to the sentencing task, there must a connection between the impairment to mental functioning and moral culpability, or the need for general and specific deterrence. If the mental impairment existed at the time of the offending, it must have some 'realistic

[10] *Verdins* at 276 [32].
[11] *O'Neill* at 413 [70].
[12] *O'Neill* at 413 [71].

connection' with the offending; or have 'caused or contributed' to the offending; or be 'causally linked' to the offending.[13] The presence of the disorder could bear upon the assessment of the individual's motivation and level of culpability, prospects of rehabilitation, the need for specific deterrence and the appropriateness of giving full effect to the principle of general deterrence.[14]

- To show the necessary connection to the offending, and so to enliven limbs 1 to 4 of *Verdins*, an offender must establish that the mental impairment affected the ability to appreciate the wrongfulness of the conduct, or obscured the intent to commit the offence, or impaired the ability to make calm and rational choices, or to think clearly at the time of the offence.[15]
- The fifth and sixth limbs of *Verdins* may operate where the existing impairment will make prison more onerous, or where prison may exacerbate the mental condition, if the expert evidence establishes the significance of the impairment to the imposition of a prison sentence.[16]
- Cogent evidence, normally in the form of an expert opinion, is necessary to establish the existence of the mental impairment, either at the time of the offence, or at sentence, or both, and the nature, extent and the effect of the mental impairment experienced by the offender at the relevant time.[17]
- The assessment made by the sentencing judge must be undertaken with rigour.[18]
- An existing mental impairment at the time of sentence may require appropriate moderation of general deterrence, if it is determined that by virtue of the impairment the offender is not an appropriate vehicle for general deterrence. That will depend upon the nature and severity of the symptoms and their effect on the mental capacity of the offender.[19]
- A moderation of general deterrence will not ordinarily be required where the condition arises after the offence as a reaction to the discovery of the offender's crime or the prospect of a lengthy term of imprisonment.[20]

The notion of impaired mental functioning

In *Verdins*, before setting out the circumstances in which impaired mental functioning at the time of offending may reduce moral culpability[21], the court addressed the characterisation of relevant mental disorder:[22]

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[13] *O'Neill* at 414 [74], citing *Charles v the Queen* (2011) 34 VR 41 at 70 [12], per Robson AJA, with whom Redlich and Harper JJA agreed.
[14] *O'Neill* at 414 [74], quoting from *Director of Public Prosecutions v Weidlich* [2008] VSCA 203 at [17].
[15] *O'Neill* at 415 [75].
[16] *O'Neill* at 415 [76].
[17] *O'Neill* at 415 [77].
[18] *O'Neill* at 415 [78]. See also *Binse v The Queen* [2016] VSCA 145 at [70]; "There must be an elementary basis, a rigorous examination and an informed assessment …"
[19] *O'Neill* at 416 [82].
[20] *O'Neill* at 417 [83].
[21] Par [26], set out above at page 2.
[22] *Verdins* at 271-272.

> [5] The sentencing considerations identified in R v Tsiaras are not — and were not intended to be — applicable only to cases of 'serious psychiatric illness'. One or more of those considerations may be applicable in any case where the offender is shown to have been suffering at the time of the offence (and/or to be suffering at the time of sentencing) from a mental disorder or abnormality or an impairment of mental function, whether or not the condition in question would properly be described as a (serious) mental illness.
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> …
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> [7] Clearly, the phrase 'mental disorder or abnormality' is apt to cover a wide variety of conditions. …
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> [8] The sentencing court should not have to concern itself with how a particular condition is to be classified. Difficulties of definition and classification in this field are notorious. There may be differences of expert opinion and diagnosis in relation to the offender. It may be that no specific condition can be identified. What matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time.
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> …
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> [13] Where a diagnostic label is applied to an offender, as usually occurs in reports from psychiatrists and psychologists, this should be treated as the beginning, not the end, of the inquiry. As we have sought to emphasise, the sentencing court needs to direct its attention to how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances — that is, at the time of the offending or in the lead-up to it — or is likely to affect him/her in the future.

Plainly enough, *Verdins* establishes that there is no need for an offender to suffer from a specifically diagnosed or identified disorder or illness, or for the condition to be of a particular level of seriousness, for it to have relevance. There is no doubt that the court intended the notion of impaired mental functioning to be a broad one. The approach has been described as involving a "liberalisation of mental health terminology [that] has produced one of the more progressive advances in forensic mental health sentencing in the modern era".[23] A critical issue is what the evidence establishes concerning the nature and extent and effect of the mental impairment; "What matters in any given case is not the label to be applied to the mental condition but whether and to what extent the condition will be shown to have affected the offender's mental capacity at the time of the offence or at the time of sentence".[24]

The adoption of the concept of impairment of mental functioning means that the *Verdins* principles extend to such conditions as intellectual disability[25] and acquired brain injury.[26] However, the question arises as to how to define a relevant mental impairment, and as to what, if any, limitations exist. Excluding consideration of substance abuse and addictions for the moment, the essential question must be whether the offender has established an impairment of mental functioning. It does not, or at least ought not, matter what the underlying cause is; the focus is on whether mental functioning has been, or is, impaired, and the nature of the impairment.

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[23] D G Gee & J R P Ogloff, *Sentencing Offenders with Impaired Mental Functioning: R v Verdins at the Clinical Coalface* (2014) 21 PPL 45 at 49.

[24] *R v Howell* [2007] VSCA 119, 16 VR 349 at [14].

[25] *R v MacIntosh* [2008] VSCA 242, *Streets v Tasmania* [2016] TASCCA 13.

[26] *R v Curtain* [2007] VSC 307.

It is possible to identify conditions which, after *Verdins*, have been found to give rise to relevant mental impairment.[27] These include schizophrenia, bipolar disorder, depression and post-traumatic stress disorder. It is also possible to identify conditions which have been found not to give rise to relevant mental impairment,[28] but while such analyses may be of some use, they are not entirely helpful in retaining focus on the true situation. *Verdins* makes it clear that it is the symptomology of the condition which is important. As Freckleton observes, the approach in *Verdins* represents a broad view of the relevance of psychiatric symptomology to the sentencing process.[29]

As previously shown, while the court in *O'Neill* stressed the need for proof of impairment of mental capacity, the judgment contains references that may be taken as suggesting the description or general nature of the condition, as distinct from its effect, has at least some role to play. In *O'Neill*, the offender was said to be suffering from a dependent personality disorder with prominent features of narcissistic personality disorder as identified in *DSM-V*.[30] The court acknowledged that while the court in *Verdins* did not regard the particular diagnostic label as determinative, the principles expressed were confined to cases in which the offender suffered an impairment of mental functioning; they "did not apply to personality disorders such as those from which the respondent suffered."[31] However, this statement should not be viewed in isolation, but put in context. The court said that the personality disorder suffered by Mr O'Neill did not fulfil the *Verdins* "threshold criteria".[32]

The meaning of this phrase was not discussed, but the court went on to explain that the evidence before the sentencing judge did not include any evidence that the offender suffered from an impairment of mental functioning, and that the offender had failed to establish on the balance of probabilities that he suffered from such an impairment. The court said:

> [The psychologist] did not opine that the respondent was unable to appreciate the wrongfulness of his conduct or exercise appropriate judgment or to make a rational choice, or, alternatively, how the respondent's personality disorder might have obscured his intention to commit the offence …

This is obviously a reference to the non-exhaustive list of effects of an impairment of mental function which made reduce culpability, as referred to in *Verdins* at [26]. The significance of the list set out in [26] of *Verdins* is the subject of later discussion in this paper. The present point is that in *O'Neill*, it was not so much that the law as set out in *Verdins* did not apply to

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[27] See the discussion by J Walvisch in *Sentencing Offenders with Impaired Mental Functioning: Developing Australia's "Most Sophisticated and Subtle Analysis"* (2010) 17 PPL 187 at 188.

[28] Ibid. Walvisch cites *Director of Public Prosecutions (Vic) v RLP* [2008] VSC 381 in which the offender was diagnosed as having a conversion disorder, a diagnosable disorder under the *DSM-V*. He was not psychotic and of normal intelligence. His mental and emotional states were said not to be such as to attract the *Verdins* principles.

[29] Freckleton (fn 2) at 362-363.

[30] Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

[31] *O'Neill* at 413 [71], 418 [85].

[32] *O'Neill* at 418 [85].

personality disorders, it was that in the particular case it had not been established that it, or any other mental condition, had given rise to an impairment of mental functioning.[33]

Relevant impaired mental functioning

The expression "impaired mental functioning" has not been defined or further explained. What is 'mental' functioning may have to be the subject expert evidence; "the nature and degree of impaired mental functioning, which might be relevant, may well be different, depending upon the particular aspect of the sentencing process that is under consideration".[34] The court in *O'Neill* also observed that a mechanistic approach that involves the proposition that because an offender is said to suffer from impaired mental functioning, the offender attracts the *Verdins* principles, "is overly simplistic and erroneous [and that] careful consideration needs to be given to whether the evidence establishes that mental capacity has been impaired and which of the circumstances set out in *Verdins* are engaged."[35] On that last point, it is inappropriate as being "wholly outside their expertise" for experts to comment on whether one or other the *Verdins* limbs is applicable.[36]

Of course, the reference to "circumstances" is a reference to the matters set out in the limbs of par [32]. As to this, it should be borne in mind that, as will be later addressed in greater detail, that list is not exhaustive. There are plainly other ways in which impaired mental functioning may be relevant to sentencing. This raises some aspects of the *O'Neill* restatement. In the author's view, there are uncertainties if not, (with respect) inaccuracies, in the second and third points made by the court. It will be recalled that, in summary, those points are:

- For the first, second, third and fourth limbs to have application, there must be a connection between the impairment and moral culpability, or the need for general and specific deterrence; if mental impairment exists at the time of the offending it must have some causative connection to the offending.
- To show the necessary connection to the offending, and so enliven limbs 1 to 4, an offender must establish that the mental impairment affected the ability to appreciate the wrongfulness of the conduct, or obscured the intent to commit the offence, or impaired the ability to make calm and rational choices, or to think clearly at the time of the offence.

If taken as face value, these statements involve a significant restriction on the operation of the principles. It is submitted that the statements are too broad. It is true that at least in the case of a mental condition said to exist at the time of the offending and to engage the first limb, there must be some causal connection between the impairment and the offending. However, limbs 3 and 4 of *Verdins* do not necessarily depend on impaired mental functioning

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[33] It is beyond the author's expertise as to say whether or not there are types of disorders or conditions that are uncontroversially viewed by experts as not being capable of giving rise to impaired mental functioning in any real sense.

[34] *O'Neill* at 412 [67].

[35] *O'Neill* at 412 [68].

[36] *Wright v The Queen* [2015] VSCA 333 per Maxwell P, Redlich & Osborn JJA at [24].

at the time of offending. It might usually be the case that the need to moderate general deterrence flows from reduction in moral culpability, but that is not always the case. It was made clear in *Tsiaras*, and confirmed in *Verdins*, that moderation of a factor of general deterrence may be appropriate whether or not mental impairment existed at the time of offending.[37] The same is true in relation to specific deterrence.

The third *O'Neill* restatement point presents a number of difficulties. That point follows on, in a sense, from the second restatement point, and accordingly it suffers the same type of difficulty. Consideration of whether the factors of general and specific deterrence may be moderated or eliminated might usually arise where it is established that mental impairment has affected the offender's abilities in the ways referred to in the point. But such moderation or elimination is not always dependent on that type of mental impairment existing at the time of the offence.

The next difficulty arises because of the reference in the third *O'Neill* restatement point to the types of impairment set out in par [26] of *Verdins*. Of course, that paragraph contains a list of the ways in which impaired mental functioning *may reduce moral culpability*. The list was expressly said not to be exhaustive, but a list of the various ways in which impaired mental function had been held, correctly in the court's view, to be capable of reducing moral culpability. Bagaric & Edney say the classifications and categories are "notable for their vagueness and absence of distinctiveness", and describe the list as "no more than a smorgasbord of seemingly random examples of when courts are inclined to permit mental disorder [to] mitigate penalty".[38]

The structure of the list in par [26] of *Verdins* warrants attention. That is because point (f) identifies the effect of contributing (causally) to the commission of the offence, but is expressed to be an alternative to the first five ways in which impaired mental functioning may reduce moral culpability. Point (f) is of a different nature than the others. As Bagaric & Edney point out, if the ways identified in points (a) to (e) are present, then presumably (f) is always satisfied.[39] An argument that Walvisch advances is that the inclusion of way (f) in the list might suggest that an offender's culpability may be reduced because of the ways identified in (a) to (e), even without any causal connection.[40] On the other hand, the court in *Krijestorac v Western Australia*[41], considered that pars (a) to (e) were all examples of the way in which a mental disability may contribute causally to the commission of an offence.[42]

The difficulty that arises is whether the reformulation of the principles in *O'Neill* means that for any impaired mental functioning to be relevant, there must be some form of causal nexus between that impairment and the offending. It seems to now be beyond argument that an offender's moral culpability will not be regarded as reduced unless there is some

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37 *Verdins* at 272-274 [14]-[22].
38 Bagaric & Edney (fn 1) at 362 [500.12900].
39 Ibid.
40 Walvisch (fn 27) at 191.
41 [2010] WASCA 35 per Wheeler JA (Owen and Newnes JJA agreeing) at [19].
42 See also *Tran v The Queen* [2012] VSCA 110 at [17]-[20], *O'Donohue v The Queen* [2013] VSCA 175.

causal connection between mental impairment and the offending.[43] But it cannot be correct to assert that the *Verdins* principles have no application at all in respect of a mental condition postulated to have existed at the time of the offending, unless there is some causal connection between the impairment and the offending. It cannot be the case that the list of the effects of impaired mental functioning that may reduce moral culpability, is a gateway to the general relevance to sentencing. There may well be a case in which the offender suffers an impairment at the time of the offending, but which is not causally connected to the offending, and which may still have relevance to the third and fourth limbs of par [32] of *Verdins*.

Comments

What is clear is that it is the consequences of the mental disorder or abnormality with which the sentencing process is concerned. The particular consequence is impaired mental functioning. That impairment must be relevant to at least one of the *Verdins* limbs, but may be relevant to another factor in the sentencing discretion. As to wider relevance, there is nothing to suggest that the emphasis in *Verdins* on impairment rather than classification of disorders or abnormalities, is not to be universally applied, and to say that it is restricted to the *Verdins* limbs. The proposition that for mental impairment to have any relevance at all to the sentencing process, it must have some causative connection to the offending itself is too broad. This follows directly from the terms of par [32] of *Verdins*. In practical terms, in the majority of cases, a court will be concerned with the possible reduction of moral culpability and the moderation of general deterrence because of a causatively operative impairment at the time of the offending. Focus must be clearly maintained on the nature and effects of the impairment and in such a case, on the causative link to the offending. The existence of the impairment and its relevance must be established by the offender on the balance of probabilities on the evidence. The impairment must in some way have actually caused or contributed to the offending. An impairment that simply predisposes a person to flawed decisions in not sufficient.[44] Expert evidence is no doubt crucial but the facts of the offending may of themselves be quite significant. In this State, *McCulloch v Tasmania*[45] and *DPP (Acting) v CBF*[46] are examples. Lastly, it should go without saying, but it has been stated, that it should not be assumed that because mental illness is directly relevant to sentence, a reduced sentence will be the outcome. It is but one factor to be balanced with others. It may have force one way in relation to one factor, with force in the other direction concerning another.[47]

Impairment due to substance abuse or gambling addiction

As noted, after *Verdins*, the focus is now on the nature, extent and effect of a mental impairment experienced by an offender, rather than on the identification of the condition

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[43] See for example *R v Bunning* [2007] VSCA 205; *R v Norris* [2007] VSCA 23; *Bowen v The Queen* [2011] VSCA 67 at [32].

[44] *Pantazis v The Queen* [2012] VSCA 160 at [195].

[45] [2010] TASCCA 21.

[46] *CBF* (fn 3).

[47] *GOK v The Queen* [2010] WASCA 185 at [58] citing Gleeson CJ in *Engert* (1995) 84 A Crim R 67 at 68.

(or conditions) responsible for the impairment. A diagnostic label is the beginning on the inquiry, not the end. In strict terms, that approach should mean that limb 1 of *Verdins* is engaged (and possibly limb 2 as a consequence) where:

- An offender has an addiction that of itself should be equated with impaired mental function, or
- There is a specific impairment caused by episodic or entrenched substance abuse.

However, as will be seen, that is not generally the case; in fact, it is rarely the case. Before going further, it is necessary to note that in many cases, offenders present with a mixed profile of mental disorder or abnormality, and substance abuse or addictions. Unfortunately, substance abuse is not uncommon among those with mental disorders. Particularly where moral culpability is concerned, the courts are often concerned with fine questions of causation. The question may be whether there is any causal connection between either an underlying condition and substance abuse, even taken together. The question may be whether the 'real connection' is between the impairment caused by an underlying disorder and the offending, or between impairment or aberrant behaviour caused by substance abuse, and the offending. There are many examples of this debate to be found in published decisions. *R v Clark*[48] is an example of where the addicted offender's drug intake was causally linked to the offending, but the addiction stemmed from a bi-polar disorder. The irrational behaviour was "in part" a consequence of the disorder, and that tended to lessen moral culpability.[49]

Substance abuse

By way of a preface, it is worth noting the observation of Bagaric & Edney that there are no clear principles regarding the impact of substance abuse on sentencing, with the area being marked by a high degree of uncertainty in terms of the theoretical principles and even more so in the application of those principles. "There are authorities which support every possible outcome regarding the impact that substance abuse should have to sentencing …"[50]

As to mental impairment, it is noted that *DSM-V* identifies a Substance Use Disorder. It is described as a cluster of cognitive, behavioural and physiological symptoms. An important characteristic is underlying change in brain circuits that may persist after detoxification, particularly in individuals with a severe disorder. Severe cases are marked by craving, tolerance and withdrawal. Substance Abuse Disorder is put under the heading of Substance-Related and Addictive Disorders, but in the diagnostic criteria *DSM-V* does not use the term 'addiction'.

In terms of drug and alcohol induced offending, the clear general rule, of course, is that intoxication is not capable of having a mitigatory effect by reducing moral culpability. Very

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[48] [2009] QCA 361.

[49] See also for instance, *R v Howell* (fn 24), *R v Richardson* [2007] VSC 221, *R v Aggelidis* [2008] VSC 445, *R v Yarwood* [2011] QCA 367.

[50] Bagaric & Edney, (fn 1) at 368 [500.14600].

often it will provide an explanation for the offender's behaviour.[51] An exception to the rule is where an offender was not aware that intoxication could lead to disinhibition to the extent of criminal conduct, and that the state has caused the offender to act out of character.[52] The onus of proof is on the offender to prove these matters. In the sentencing process, intoxication may be relevant beyond an explanation and relate to such things as whether the offence was planned or impulsive. It will often be relevant to specific deterrence and rehabilitation.

The position in relation to drug or alcohol addictions is not dissimilar. Addiction is not of itself a factor that calls for a lesser sentence than would otherwise be appropriate. Generally speaking, addiction and any consequent impairment of judgment will not have any significant mitigatory effect on sentencing considerations such as, seriousness of the offence, denunciation and general deterrence.[53] However, addiction will not always be relevant in the same way; there may be circumstances in which an offender's drug addiction will have a particular bearing upon moral culpability, and it will usually be of relevance to the question of rehabilitation.[54] Much will depend on the nature of the offending and whether there is a link to the addiction.

R v Henry[55] is a leading authority. The view of the majority was that drug addiction of itself did not usually operate as a mitigating factor, except it may be taken into account by way of mitigation where the original addiction was not a willed act but was attributable to some event for which the offender was not primarily responsible. Spigelman CJ said there were a number of aspects of the relationship between drug addiction and crime which indicated that moral choices were made.

- The original decision to experiment with drugs was usually a completely free choice.

- The evidence did not show that the choice was between a negative feeling and the need for money to allay it; it showed that the choice may often be for the positive feeling said to be associated with drug euphoria, and the desire to bring about the state of wellbeing in an addictive state was a moral choice.

- Not all persons who suffered from addiction behaved in a criminal way, and those who did so made a choice.

- Individuals emerged from addiction, although with difficulty and help; the decision to persist with an addiction rather than to seek assistance, was a choice. [56]

Wood CJ at CL said that he was not persuaded of the appropriateness of the suggested analogy between drug addiction and mental abnormality in respect of which the element of

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[51] In this State, there are instances of intoxication being treated as both an explanation and a factor in mitigation; see for instance *Gray v Strickland* 44/1978, *Good v Wood* B30/1990.
[52] *DPP (Vic) v Arvanitidis* [2008] VSCA 189, 202 A Crim R 300 at [29].
[53] *R v Koumis* [2008] VSCA 84, 18 VR 434 at [53].
[54] Ibid at [54].
[55] (1999) 46 NSWLR 346; Spigelman CJ, Wood CJ at CL, Newman and Hulme JJ agreeing.
[56] *Henry* (fn 55) at [196]-[200].

general deterrence is often given less weight. His Honour concluded that addiction might be relevant as a subjective circumstance, it it's origin or extent suggested that it was not a matter of personal choice, but attributable to some other event for which the offender was not primarily responsible. Examples given included addiction to prescription medication following injury, addiction at a very young age, or where the person was not in a position to exercise appropriate judgment. [57]

Henry represents the predominant and prevailing view in Australian jurisdictions.[58] In this State, in *Director of Public Prosecutions (Acting) v Poole*[59] the Court of Criminal Appeal summarised the situation in relation to substance abuse and addiction in this way:

> [32] … There is a distinction between the two situations, [a longstanding drug addiction being the root cause of offending, and where an offender was suffering from intoxication at the time of offending] although both provide explanations. Intoxication, whether by alcohol or drugs, may explain an offence but ordinarily will not mitigate penalty, except perhaps where there is an underlying addiction not involving free choice. As to addictions, the fundamental premise seems to be that self-induced addiction at an age of rational choice establishes moral culpability for the predictable consequences of that choice: *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at 385 [197]–[202], per Wood CJ at CL at 397 [267]; *Douglas v The Queen* (1995) 56 FCR 465 at 470; *Hinchliffe v The Queen* [2001] WASCA 15 at [24].
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> [33] However, there is judicial recognition that by virtue of seriously adverse personal circumstances, particularly in formative years, some people are more susceptible or vulnerable to drug use and addiction than others. It is sufficiently established that drug addiction and its consequences are factors to be taken into account, although the effect and weight will vary considerably across individual cases, depending on, among other things, the seriousness of the offence. Rehabilitation is a consideration which needs to be put into the balancing exercise where appropriate, but the nature of the offending and the need for public protection may leave little room for leniency.

A passage from the judgment of Buchanan JA in *R v McKee*[60] is then set out as an instance of that judicial recognition.

> The extent to which a decision to experiment with drugs is freely made, in my view, bears upon the moral culpability of the offender who commits a crime as a consequence of addiction to drugs. Age is relevant to the question, … I would add that in the case of adults, despair and low self-regard may also play a significant part in the decision to use drugs and that condition may be the result of social or economic disadvantage, poor education or emotional or physical abuse. An addiction to heroin may also bear upon the question of rehabilitation, where the prospects of success will often depend upon the likelihood of the addiction being successfully treated. In my view, a sentencing judge may have regard to the circumstances which led to an addiction that caused the commission of the offence and to whether the addiction has continued or is being treated in deciding upon a sentence appropriately tailored to the personal circumstances of the offender.

The possible mitigatory effect of drug addiction as such rests on the notion that the acquisition of the addiction might have some reasonable explanation in the offender's past. For instance, drug and alcohol addiction is not uncommon among victims of physical and

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[57] *Henry* (fn 55) at [252], [272].
[58] See *R v Proom* [2003] SASC 88, 85 SASR 120 per Doyle CJ at [45].
[59] [2015] TASCCA 10 per Porter J, Blow CJ and Wood J agreeing.
[60] (2003) 138 A Crim R 88 at 92-93 [13].

emotional abuse. The point is the extent to which the person exercised a free choice in starting on the pathway to substance abuse and addiction.[61] More broadly, in *R v Hammond*, a case of armed robbery to fund an addiction,[62] the court said:

> The true relevance of drug addiction as a factor contributing to the commission of crime and its effect in the sentencing process has never been adequately explained.
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> Addiction is a factor that may help an offender to the extent of showing that his or her descent into the crime in question was a *secondary* consequence of desperation produced by a human weakness rather than a primary choice. It may be inferred in many cases … that the offender would almost certainly never have become a thief but for loss of control of an ordered life through drug addiction.
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> The proposition that the results of drug addiction are self-inflicted is half true and therefore dangerous. The offender must of course be held responsible for his or her own actions. The drug addiction is not an excuse; but it is a factor that may tell the court that the real weakness of character is that of a drug addict rather than that of a robber.
>
> The fact that drug addiction has led to criminal activity can properly lead to a wider understanding of the offender's character and motivation for the crime. Depending on the circumstances of the particular case this may sometimes show the offender to be less deserving of condemnation than the primary facts, without more, might suggest.[63]

In *Henry*, Spigelman CJ pointed out that later in the judgment the court in *Hammond* did not include addiction in a list of mitigating factors, and said the decision affirmed that drug addiction was not a mitigating factor of itself; to the extent it suggested otherwise, it should be regarded as anomolous.[64] The decisions after *Verdins* do not show any real inclination to change the *Henry* orthodoxy, and to equate alcohol and drug addictions with mental abnormality such that they would, of themselves, give rise to impaired mental functioning, as that term was used in *Verdins*.

An issue may be whether the principle is consistently applied. But each case is very much dependent on its facts, and even within the stricter *Henry* view of things, there seems to be scope for latitude in resolving a question about free choice. An example is *El-Ahmed v The Queen*.[65] The offender, who faced drug trafficking charges, underwent a forced marriage at 13 to a relative, introduced to drugs at an early age, and was physically abused. Addiction was not treated as an excuse, but "that it had its origins in such circumstances" was of some significance. Lenience was specifically extended notwithstanding a refusal to co-operate with court ordered rehabilitation measures.[66]

At least in Victoria, and contrary to the position in New South Wales,[67] a particular instance of where drug addiction may amount to a significant mitigating factor is where an addict is

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[61] *Henry* (fn 55) per Simpson J (dissenting) at [336].
[62] [1997] 2 Qd R 195 at 199-200.
[63] Referred to in *R v Bailey* [2009] QCA 251, but where a violent assault was not seen as 'necessitated' by the offender's alcoholism. See also *R v Budd* [2012] QCA 120, *R v Proom* per Gray J at [77].
[64] Henry (fn 55) at [192]-[193].
[65] [2015] NSWCCA 65.
[66] Ibid at [77]. Compare for instance *Avdic v The Queen* [2012] VSCA 172.
[67] *Henry* (fn 55) per Spigelman CJ at [202], per Wood CJ at CL at [225] where his Honour notes that the situation may avoid a finding of aggravation such the commission of the crime out of greed; [273].

engaged in low level selling or dealing simply to provide the wherewithal to satisfy the need for the drug. One authority for this is *R v Lacey*.[68] As well as the passage from *Hammond*, the court set out the passage from the judgment of Buchanan JA in *R v McKee* repeated above. The Victorian approach seems to be the one taken in this State.[69]

The next step is to look at the principles that govern the relevance to sentencing of mental disorder or impairment *caused* by substance abuse. (*DSM-V* identifies a Substance Induced Disorder.) A drug induced psychosis is an obvious and unfortunately common example. It may be difficult in any given case to distinguish between what might me regarded as 'intoxication by drug or alcohol' and an impairment within the scope of the *Verdins* principles. Fortunately, the applicable principles do not differ, but again the nature, extent and effect of the condition will vary from case to case; each will depend on its own facts.

The issue of drug induced psychoses has not infrequently come before the courts. A succinct statement of principle, along with the facts to which it relates in the case, appears in *R v Sebalj*:[70]

> *It would be seldom that a self-induced psychosis would result in a significant lowering of the sentence to be imposed*. In this case, whilst the applicant acted deliberately, it is clear that he did so under the influence of paranoid delusions. Whether they were the manifestations of a transient psychosis brought on by his endeavours to withdraw from the use of drugs or indicative of the onset of the subsequently diagnosed illness of paranoid schizophrenia, his level of culpability must be regarded as low. [Emphasis added.]

A leading case is *R v Martin*.[71] At the time of the offending, the appellant was suffering an acute psychotic illness as a result of using illicit drugs, primarily cannabis and amphetamine. It was established that there was a direct causal connection between the psychosis and the offending. The sentencing judge had held that the psychosis was not a mitigating factor at all, saying that the principle that permits the mitigation of punishment because of serious psychiatric illness depends on that illness being beyond the control of the person being sentenced, whereas in the present case, the psychosis was induced by the offender's own illegal act; accordingly, the principle had no application. The appeal court said:[72]

> 19 We respectfully agree with his Honour's conclusion that, in the circumstances of this case, the applicant's moral culpability is not reduced by reason of his psychotic state. We would not, however, endorse the general proposition which underpins this conclusion – that psychosis (or other mental illness) which is drug induced can never be a mitigating factor because it is the result of the offender's own (illegal) act.
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> 20 Cases can be imagined where the offender's psychotic state is drug-induced but is nevertheless treated as lessening the offender's culpability. For example, the offender might have had no awareness – because of a lack of prior knowledge or experience – that the ingestion of a particular drug might trigger a psychotic reaction. In such a case, the resultant impairment of mental capacity might be regarded as involuntary, notwithstanding that the

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[68] [2007] VSCA 196. See also *Koumis*, (fn 53), *R v Nagy* [1992] 1 VR 637 at 640, *R v Bouchard* (1996) 84 A Crim R 499.

[69] See K Warner, *Sentencing in Tasmania*, 2nd ed at 375 [13.111].

[70] [2006] VSCA 106.

[71] [2007] VSCA 291, 20 VR 14.

[72] Maxwell P, Nettle and Redlich JJA, citing *Coleman* (1990) 47 A Crim R 306, *Redenbach* (1991) 52 A Crim R 95, *Wright* (1997) 93 A Crim R 48 and *R v Gagalowicz* [2005] NSWCCA 452.

> taking of the drug was a voluntary act. Again – as in the case of Sebalj – the psychosis might occur in the course of the offender's attempts to withdraw from the use of the drug which was, nevertheless, the cause of the psychosis. In Sebalj, the drug-induced psychosis was seen as substantially reducing the offender's level of culpability for what he did while under the influence of paranoid delusions.
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> 21 As these examples illustrate, the critical factor in determining the significance of drug-induced psychosis for sentencing purposes is the degree of foreknowledge on the part of the offender. There is an obvious parallel in this respect with sentencing for offences committed while under the influence of alcohol, where the concept of "reckless intoxication" has been developed.
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> …
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> 30 Voluntary ingestion of drugs should be approached no differently from intoxication, in our view. The critical question will be what the probable consequences of the ingestion of the particular drug by the particular offender were, and whether the offender foresaw those consequences.

The court went on to examine the appellant's history of drug taking and symptomology. Their Honours concluded that because he was well aware of the psychotic symptoms fluctuating as he dosed himself, he had many opportunities to stop, and had a high level of insight and intellectual function to be aware that what he was consuming had a high degree of likelihood of behavioural disturbance. As a result, the drug induced psychosis was in reality an *aggravating* factor.

The way in which the principle operates was explored in *Director of Public Prosecutions (Vic) v Arvanitidis*.[73] To lose the benefit of *Tsiaras* and *Verdins*, it was not necessary to have foreknowledge that the psychotic symptoms would cause an offender to behave in the precise manner in which he offended or make him generally dangerous or violent. If the offender was aware that by taking the drug, his judgment would be so affected that he would behave irrationally or that it would affect his ability to exercise control, his self-induced mental state would not constitute a mitigating circumstance. It was for the offender to establish on the balance of probabilities that he did not know that the drug would have such effects. The court described the *Sebalj* type of case as involving an involuntary resultant impairment of mental capacity from a voluntary act, but framed the question in terms of foresight of the probable consequence of the ingestion of the particular drug.[74]

In short, where an offender asserts a reduction in moral culpability through mental impairment, it must be established that the impairment was involuntary. *Wright v The Queen*[75] and *Director of Public Prosecutions (Cth) v Boyles (a pseudonym)*[76] both embrace this principle, and each provides an example of an offender who suffered significant mental impairment by ceasing to take medication that controlled underlying mental illness. In *Wright*, the offender not only stopped taking his proper medication but started using methamphetamine. *Wright* has an important aspect to it. The court discussed the relevance of drug addiction as a mitigating factor in sentence. Their Honours noted the comments of Buchanan JA in *R v McKee* to the effect that whether an addiction as a causal factor in the offending warranted a reduction in moral culpability depends upon the extent to which the

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[73] [2008] VSCA 189 at [34].
[74] See also *R v Parker* [2009] VSCA 19 at [33], *McNamara v Western Australia* [2013] WASCA 63 at [98].
[75] (Fn 36).
[76] [2016] VSCA 267.

decision to experiment with drugs is freely made. The court observed that in the case before it there was no evidence to establish that the mental illness – even when controlled by medication – should be viewed as having robbed the offender of the ability to make a rational choice to give up the medication and start taking methamphetamine.[77]

In *R v Gibson*[78], *Martin* was applied but the case provides an illustration of the exceptional operation of the rule. The offender's psychotic state was precipitated by voluntary drug taking. The sentencing judge said that while the offender had a long history of drug taking, and while there was a correlation between his earlier drug use and some undefined psychotic symptoms, he was satisfied that the offender had never experienced a psychosis of the particular proportions, let alone a violent psychotic episode, induced by drug taking. His Honour was satisfied that any psychotic symptoms that were previously experienced were likely to have been the product of what was an undiagnosed schizophrenia:

> Even if I am wrong in that particular conclusion, I am satisfied that he had no reason to think the drug taking would induce a psychosis of the nature and severity he experienced at the time of his attack … Thus, also his psychosis was caused by voluntary drug taking, he could not have been aware that taking drugs on this occasion would cause him to behave as he did. Accordingly his psychosis reduced his moral culpability and degree of responsibility for the offence.[79]

An interesting case is *R v Bowley*, a decision of the Queensland Court of Appeal.[80] The offender was an addict of long standing. His offences of robbery involved seeking cash and drugs while badly drug affected. The sentencing judge had expert evidence that the offender had some early behavioural disorders. Drug use escalated and the offender gradually became psychotic and completely consumed by addiction. The psychosis was substance induced and attributed to "pathological changes in brain biochemistry". This distinguished the situation from simply one of "voluntary intoxication by drugs", a matter that was precluded from consideration by statute. Although there was no suggestion the addiction was connected to the early behavioural issues, the mental state at the time of offending was held to be relevant to his moral culpability "by reference to the matters raised in *Verdins*". There was no discussion of 'moral choices'. Where this fits within the *Henry/Martin* approach is not clear.

Gambling

Within the category of Substance-Related and Addictive Disorders, *DSM-V* identifies a Gambling Disorder. For its severe form, indicators would usually include a need to gamble increasing amounts, gambling when anxious or depressed, preoccupation with gambling, chasing losses, lying to conceal the extent of the activity, and jeopardising or losing employment or a significant relationship. Historically, it was only in an exceptional or most unusual case that a court would give any mitigatory weight to a gambling addiction that was

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77 *Wright* (fn 36) at [46]-[49].
78 [2016] VSC 634, Croucher J.
79 Ibid at [107].
80 [2016] QCA 254 per P Lyons J, Fraser and P McMurdo JJA agreeing.

causally linked to the offending.[81] This is so even where the condition can be described as 'pathological'.[82] The question of how a gambling addiction falls to be treated after *Verdins*, was answered in *R v Grossi*[83], a case applied by the Tasmanian Court of Criminal Appeal in *Johnstone v Tasmania*.[84] Bagaric & Edney observe that *Grossi* "represents a hardening of judicial attitude towards gamblers".[85]

In *Grossi*, Redlich JA (with whom Vincent and Neave JJA agreed on this issue), reviewed a number of authorities that supported the historical view. As to the operation of *Verdins*, his Honour said there was no tension between the principles explained in that case, and the authorities that had dealt with gambling addiction. He acknowledged that evidence might establish that an offender sufferered from an impulse control disorder in the form of pathological gambling, and said the relevance of that disorder is to be assessed in accordance with *Verdins*. His Honour concluded that the assessment generally led to the conclusion that a gambling addiction should not, of itself, result in any appreciable moderation of the sentence. The reasons were:[86]

- In most cases the nature and severity of the symptoms of the disorder, considered in conjunction with the type and circumstances of the offending, will not warrant a reduction in moral culpability or any moderation of any general deterrence.
- It will frequently be the case that crimes associated with gambling addiction will have been repeated and extended over a protracted period, and there is often much effort expended to recoup losses.
- In cases involving dishonesty, the crimes will commonly be sophisticated, devious, and the result of careful planning.
- The gravity of such offences, if there is a breach of trust or confidence, will commonly attract an increased penalty making such offences more appropriate vehicles for general deterrence.
- When offences of this nature are committed over extended periods, the prominent hypothesis will be that the offender has had a degree of choice which they have continued to exercise as to how they finance their addiction.
- Perhaps most importantly, the nexus of the addiction to the crime will often be unsubstantiated in that the disorder will not generally be directly connected to the commission of the crime but addiction will provide only a motive and explanation for its commission.

In *Johnstone*[87] Blow J (as he then was) summarised the principles that emerged from Redlich JA's analysis. One of the points of summary made by Blow J was that stealing because of a

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[81] See for instance *Director of Public Prosecutions (Vic) v Raddino* (2002) 128 A Crim R 437 at [26], *R v Molesworth* [1999] NSWCCA 43.
[82] *Assi v The Queen* [2006] NSWCCA 257 at [27].
[83] [2008] VSCA 51, 23 VR 500.
[84] [2011] TASSCA 9, 20 Tas R 227.
[85] Bagaric & Edney, (fn 1) at 383 [500.15900].
[86] *Grossi* (fn 83) at [56].
[87] *Johnstone* (fn 84) at 230 [13].

gambling addiction should be regarded as less morally culpable than stealing because of pure greed, or stealing in order to fund some other criminal activity.[88] This point should not be misunderstood. It is correct to say that offending because of a gambling addiction may be regarded as less morally culpable, but the situation described in the authorities is one in which there is an absence of an aggravating factor.

It remains the case that a gambling addiction *may* enliven the *Verdins* principles but it depends on the nature and severity of the symptoms.[89] Much depends on the evidence. As with substance abuse and addictions, a gambling addiction is not necessarily irrelevant to the sentencing process because it does not fall to be treated in under the *Verdins* principles. It is relevant to such things as motive and explanation, an explanation for persistence in offending and of questions of rehabilitation. *Johnstone* is of some further interest. Although the addiction itself was not mitigatory, because of the facts of the case it had a connection with mitigatory aspects. The addiction seemed to have become established not long before the offending commenced. A very considerable amount of money was obtained over 6 and a half weeks through computer fraud. The offender had no insight into his addiction until after his activities were stopped, and until then he had no idea of the total amount of the credit he had fraudulently obtained.

The *Verdins* limbs – relevance of impaired mental functioning to sentencing

This discussion is of the ways in which impaired mental functioning is relevant to sentencing, as identified in the list in par [32] of *Verdins*. By way of comment on that list, Bagaric & Edney say that, in reality, the passage identifies only five situations in which mental impairment impacts on sentencing.[90] Those five situations are:

- Mental disorder can lead to a softer penalty because of a diminished level of moral culpability which supposedly induces the role of denunciation; (*Verdins* limb 1).
- The lower level of moral culpability of some mentally impaired offenders reduces the harshness of the sanction that is necessary to impose a proportionate sentence; the reference to "punishment that is just" is a reference to the proportionality principle; (*Verdins* limb 1).
- The diminished level of moral culpability may reduce the relevance of general deterrence; (*Verdins* limb 3).
- The diminished level of moral culpability may reduce the relevance of general (sic specific) deterrence; (*Verdins* limb 4).
- The existence of a mental impairment may make the penalty more burdensome for an offender and hence can mitigate penalty – the additional burden can be as a result of the greater difficulty associated with dealing with a prison environment (or compliance with another penalty), or alternatively the sanction could make the condition worse.

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[88] Blow J referred to *Grossi* (fn 83) at [51], *Vu v The Queen* [2006] NSWCCA 188 at [74], *R v Henry* (fn 55) at [225].

[89] *Deakin v Tasmania* [[2016] TASCCA per Wood J at [39]-[40], Tennent and Pearce JJ agreeing.

[90] Bagaric & Edney, (fn 1) at 357-358 [500.12700].

Bagaric & Edney argue that limb 2 of the *Verdins* list is a conclusion that follows from the other limbs. However, both Gee & Ogloff, and Walvisch[91] seem to read the word 'kind' literally, and to treat point number 2 as having some independent operation. That is, impaired mental functioning can result in a different form of punishment or order. That seems to be the better view, but whatever the true situation, it has been, as Walvisch points out, the subject of very little discussion in the cases.

A simple observation needs to be made about the *Verdins* limbs. It is that they all concern mitigation of penalty, and even to that extent, the list of ways in which impaired mental functioning may be relevant to sentencing is not exhaustive. Obviously, the principles are not to be regarded as a code. Staying for the moment with factors that operate in favour of the offender, it may be that mental impairment may attenuate an aggravating factor. In *R v Swan*[92], the offender suffered from an intellectual disability, and assaulted a person whom he claimed had sexually abused him.

The nature of mental impairment as it relates to at least one factor mentioned in the limbs, may operate against the interests of the offender. That factor is specific deterrence. In *Director of Public Prosecutions (Cth) v De la Rosa*[93], McClellan CJ at CL as a member of the New South Wales Court of Criminal Appeal, referred to a number of cases, including *Verdins*, that dealt with the principles to be applied when sentencing an offender suffering from mental illness, intellectual handicap or other mental problems. In line with *Verdins*, his Honour noted the potential reduction of moral culpability and the reduced need for denunciation where the person's mental health contributed to the commission of the offence. He also noted that the state of mental health may have the consequence that an offender is an inappropriate vehicle for general deterrence, or may reduce or eliminate the significance of specific deterrence. Significantly, the Chief Judge went on to say:

> Conversely it may be that because of a person's mental illness, they present more of a danger to the community. In those circumstances, considerations of specific deterrence may result in an increased sentence … .

The NSW Court of Criminal Appeal in *Iskandar v The Queen*[94] approved the passage from which this is taken. It follows that impaired mental functioning is also relevant to sentencing as it affects the issue of community protection as a separate issue, and in the balancing exercise this may count for or against the offender. Much depends on the nature of the condition in terms of its actual or likely duration and whether in it is treatable. Ordinarily, it might be expected that in the case of a particularly grave crime, community protection will be given significant weight, even if the offender suffered from a serious impairment of mental function causally connected to the offending.[95] On the other hand, an impairment of mental functioning causally connected to the offending but not particularly substantial or weighty in degree, (and so reducing moral culpability to a limited extent only), may limit the weight to

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[91] Gee & Ogloff (fn 23) at 56; Walvisch (fn 27) at 192.
[92] [2006] NSWCCA 47.
[93] [2010] NSWCCA 194, 79 NSWLR 1 at [177] (Simpson JA, Barr AJ agreeing).
[94] [2013] NSWCCA 235.
[95] See for example *R v Cheney* [2009] VSC 154 at [51]-[57].

be given to community protection where the condition has been very effectively treated with medication at the time of sentencing.[96]

Further, as in fact recognised in *O'Neill*, rehabilitation is another objective of sentencing to which impaired mental functioning would be relevant. The presence of a disorder could bear upon the sentencing judge's assessment of the prospects for rehabilitation. Principal factors would be the treatability of a condition or any improvement in the condition or the offender's behaviour or attitude, since the time of the offending.[97]

It follows from this discussion that, as alluded to earlier, the mental disorder, abnormality or impairment may be such that the various mitigating and aggravating considerations neutralize each other, and becomes of no direct relevance in the sentencing process in that sense.[98]

The Verdins limbs

Moral culpability

The reduction in moral responsibility because of operative mental impairment rests on the notion that the greater the level of insight and understanding possessed by the offender about the act and its consequences, the higher the level of culpability for deliberately engaging in the conduct.[99] As earlier noted, the court in *Verdins* said that the assessment of culpability will vary with the nature and severity of the condition and with the nature and seriousness of the offence. As also noted, for an offender's moral culpability to be reduced, the mental capacity must have been affected in some relevant way. Examples of those ways were set out in *Verdins* at [26].

In relation to the 'nature' of the condition, Walvisch comments[100] that although it is not clear, it seems that there may be some mental disorders or abnormalities which, because of their nature, will never reduce an offender's culpability even if mental functioning was relevantly impaired. He provides the example of *Director of Public Prosecutions v EB*.[101] The court held that psychosexual disorders would not ordinarily be regarded as reducing a sexual offender's moral culpability. This category is different to the concept of voluntary impairment through substance abuse. The court in *EB* did not explain why such conditions giving rise to relevant mental impairment could not reduce moral culpability, and the decision might be seen as one involving a policy choice.

In relation to severity of impairment generally, the court has to make an assessment of the degree of severity. That might mean a finding that although there was some impairment it was immaterial, or alternatively that moral culpability was reduced but to a limited extent.

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[96] See for example *R v Oznek* [2007] VSC 192.

[97] *Director of Public Prosecutions v Weidlich* (fn 14) at [17]; *O'Neill* at 414 [74]. See generally the discussion by Walvisch (fn 27) at 196.

[98] *Western Australia v Khasay* [2014] WASCA 58 at [40].

[99] See for instance *DPP v Weidlich* (fn 14).

[100] Walvisch (fn 27) at 190.

[101] [2008] VSCA 127. *Verdins* was not referred to.

As to the nature and seriousness of the offence, it is easy to understand why that is an issue relevant to the determination of the appropriate sentence overall, but again to drawn on Walvisch,[102] the true issue is whether the offender's impaired mental functioning reduces the culpability that would ordinarily attach to a crime of that nature and seriousness. That is obviously an important point to bear in mind. Care should be taken to avoid confusion with a situation in which the nature and seriousness of the offence might suggest that any mental impairment lacked a sufficient connection with the offending, such as where the offending is over a long period of time. However, the balancing of a reduction of moral culpability against the gravity of the offence is entrenched in principle, and explained as follows in *Freeman v The Queen*:[103]

> 27 … It appears to us to represent an accurate summation of the weight of the psychiatric and psychological evidence which was before him and adequately to support the conclusion that the applicant's mental condition was relatively lacking in seriousness compared to the gravity of the offending. Contrary to submissions advanced on behalf of the applicant, in our view the assessment of moral culpability required the judge to have regard to both the extent of the applicant's mental dysfunction and the gravity of the crime in question and to consider each in light of each other.
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> 28 That is to say, if an offence is but venial, a lesser mental condition may go a significant way to reducing the offender's moral culpability. But if an offence is as serious as this was, a relatively insignificant mental condition is likely to weigh less in the scale of assessment of moral culpability. It requires a substantial degree of mental disability to result in a substantial reduction in moral culpability for this class of offending.[104]

Kind of sentence

This limb has been considered above. Although it is true to say that a completely different type of sentence could well be the end result of considerations under other limbs, the better view is that it does have an independent operation. The court in *Verdins* obviously had separate aspect in mind when formulating it. Plainly, the existence of a mental impairment may completely change a court's approach. An obvious example is the making of an order under s 75 of the *Sentencing Act 1997* (Tas). Treatment and supervision orders may be utilised instead of community-based rehabilitation orders; restriction orders instead of imprisonment.[105]

General deterrence

It is very often the case that impaired mental functioning having a causative link to the offending will also have an impact in relation to general deterrence. Notwithstanding what might be made of the second and third summary points in *O'Neill* (discussed above), the better view is that impaired mental functioning may be relevant to general deterrence without such a causative link. The disorder or abnormality might not have existed at the time of the offending, or it might have been present but had no operative role. If it did have an operative role, then the various suggested effects of impaired mental function as set out

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[102] Walvisch (fn 27) at 191.
[103] [2011] VSCA 349 at [27]-[28].
[104] See also *R v Dupuy* [2008] VSCA 63 at [34].
[105] *R v Imadonmwonyi* [2008] VSCA 135.

in par [26] of *Verdins*, may well lead to the moderation of general deterrence as a factor. It is not clear why this should be so simply because of the operative presence of the impairment. The more correct approach in principle is to examine the potential effect on those whom it is sought to deter, of a particular type of sentence on the particular offender. That approach might have two bases, or they may be part of the one concept. It may be that characteristics personal to an offender "make him an unpersuasive vehicle for the deterrence of others in the sight of those others."[106] The other basis, or alternatively a broader description of the same proposition, is whether the offender is an appropriate medium or vehicle for making an example of to others.[107]

If impaired mental functioning is to be put forward as the basis for moderation of general deterrence, the court needs to be informed about not only the nature, severity and relevance of the offender's condition, but about the extent to which the individual differs from the average offender, and thus the average offender's ability to draw inferences from the sentence imposed. This may require some consideration to be given to the "base line characteristic" of the population, or for some broad assessment of the capacity of the community to take heed.

Specific deterrence

Of course, specific deterrence means that aspect of the punishment designed for the purpose of deterring a person from re-offending. For impaired mental functioning to lead to a moderation or elimination of specific deterrence as a sentencing consideration, the impairment must operate in a relevant way. Primarily, this may be where the impairment reduces or negates the offender's capacity to learn from the pronouncement of the court. This may lead to a moderation, even where it cannot be said the offender is unlikely to offend again.[108] Specific deterrence might also be eliminated as a sentencing consideration where the offender has, because of the mental condition, no insight into the nature of the impairment.[109]

The aspects of general deterrence and specific deterrence are often treated as one notion of deterrence. The moderation or elimination of specific deterrence as a sentencing consideration is often linked to a reduction in moral culpability or a lessening of the weight of general deterrence as a factor without any clear delineation. Sometimes a refusal to moderate or eliminate specific deterrence is caught up with the outcome as to whether the *Verdins* principles apply, or the resolution of these other issues. It is the need for, and potential efficacy of, measures to deter the particular person that must be considered under this separate limb.[110] The nature and severity of the impairment might make specific deterrence a high priority, along with (as has been shown) community protection.

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[106] *Engert* (1995) 84 A Crim R 67 per Allen J at 72.
[107] *Hurd v The Queen* [1988] Tas R 126 at 129, *R v Anderson* [1991] VR 155 adopted in *Tsiaras* (fn 6).
[108] *R v Curtain* (fn 26) at [59].
[109] *R v Imadonmwonyi* (fn 105).
[110] See generally the discussion by Walvisch (fn 27) at 193-194.

When addressing specific deterrence, the inquiry must relate to the unique characteristics of the offender, and the impaired mental functioning that would limit the potential for further offending, or the ability or capacity to desist from engaging in repeated offending or reduce the capacity to learn from the court's attempts to persuade them from re-offending. As Gee and Ogloff observe, it might be straightforward to understand how an individual with an acquired brain injury would struggle to learn from the court's sentence, but the task becomes more difficult when considering the intrinsic uniqueness of symptom profiles underlying the case by case approach espoused by *Verdins*.[111]

The burden and effect of imprisonment

The burden of imprisonment on an offender and the effect of imprisonment are dealt with separately under the *Verdins* limbs. As to burden, for this to ameliorate sentence, the offender must establish that the mental disorder or abnormality, or impairment, means that the sentence would weigh more heavily on the offender than it would on a person in normal health. In this exercise, it is accepted that ordinary people in normal health suffer considerable stress when imprisoned.[112] Here again, it is the particular effect of the condition or impairment which has to be established, not the mere existence of a condition or impairment that takes the person out of the ordinary. There would need to be material relating to the symptoms and effects of the impairment at the time of sentence or likely to be endured during the period of the sentence, the history of the condition and its treatability. The factors that would also be taken into account are the conditions under which the offender is to be held. Such things as hospital settings as distinct from prison settings, and periods to be spent in isolation might be relevant. Proper management for the mental health issue is a relevant factor.[113]

In relation to effect, the *Verdins* limb speaks of "a serious risk of imprisonment having a significant adverse effect". That contemplates some impact and it is a matter of judgment for the court. At least some level of variation greater than might generally be experienced, needs to established.[114] Broadly, the same considerations in relation to the offender's mental condition or impairment that arise in respect of the *burden* of imprisonment, also apply to the issue of *effect*.

The role of the prosecution

In *O'Neill*, after speaking of the "rigorous evaluation of the evidence" that is required, the court said that in this connection, it should be emphasised that the Crown has an important role to play in identifying any inadequacy in the opinion of the expert or the circumstances in which it was formed.

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[111] Gee & Ogloff (fn 23) at 55.
[112] *R v Zander* [2009] VSCA 10 at [32].
[113] *R v Margach* [2008] VSC 255.
[114] See for instance *R v Benbrika* [2009] VSC 21, *R v Howell* (fn 24).

> The prosecutor should provide full assistance to the judge in the performance of his or her task. The expert evidence should be scrutinised with care, and where appropriate, challenge made to the adequacy of the material.[115]

In this respect, *O'Neill* does not break new ground. *O'Neill* reminds prosecuting authorities that there is an obligation not to allow an assertion of *Verdins* relevance to pass by unscrutinised, and to go unchallenged when it ought to have been. That is part of a broader obligation. At the same time, the court would expect, as is usually the case, a responsible approach to persuasive material. It might also be said that lawyers who act for offenders should exercise care before setting out on the *Verdins* pathway. If a mental disorder abnormality or impairment is to be relied on for more than relevant background material, but in relation to a specific relevant sentencing factor or issue, attention needs to be directed to obtaining the material required to persuade the court. That material will often be complemented by inferences that can be drawn from the uncontentious facts of the offending.

Conclusion

Verdins is noteworthy for its emphasis on impaired mental functioning as an effect of mental disorder or abnormality, rather than formal diagnoses and descriptors. Impaired mental functioning can be made directly relevant to various aspects of sentence. *Verdins* outlines particular ways in which it can be relevant. Those ways have the potential to moderate or eliminate a sentencing factor so as to reduce or alter in favour of the offender, an otherwise appropriate sentence. *Verdins* does not operate to exclude other ways in which impaired mental function can be made relevant to the sentencing process. In all cases, what is required is proof of the nature and effect of the impairment, and the way in which it is relevant to the particular consideration. Where a particular limb of *Verdins* is not engaged, or the impairment not made directly and specifically referable to any other consideration the disorder, abnormality or impairment may still be relevant and of some significance. For instance, in *O'Neill* the offender's "complex personality matrix was not ... irrelevant to the sentencing synthesis" and "[h]is condition bore, in a limited way, upon the seriousness with which his conduct should be viewed".[116] But of course, the existence of impaired mental function may operate adversely to the interests of the offender.

What needs to be generally, but steadfastly, borne in mind when considering these issues is that each case is heavily dependent on its own facts. Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases, and the application of those facts and circumstances to the principles laid down by statute or established by the common law.[117] In this context of the *Verdins* principles, Nettle JA in *R v Howell*[118] said:

> The point of *Verdins* is that each case depends upon its own facts and in particular the nature of the mental condition in question … In each case it will depend on the facts. The theory

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[115] *O'Neill* at 416 [81].
[116] *O'Neill* at [96], [100].
[117] *Engert* (fn 106) per Gleeson CJ at 58.
[118] (Fn 24) at [24], (Ashley and Redlich JJA agreeing).

> and reality upon which the intuitive …… approach to sentencing is built is that each case is unique …

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