The Civil Liability for Damages of the Criminally Insane

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Abstract: As a rule, mentally ill patients are held to be responsible for their acts just like everyone else. Notwithstanding, the law in Israel contains special rules which distinguish individuals with mental illness from other people. The instructions laid out in article 34h of the Israeli Penal Law empower the court to release a defendant from criminal responsibility. To do this the following criteria must be met: (a) the defendant was mentally ill, (b) he/she was in a psychotic state at the time he/she performed the felony, (c) his/her mental illness deprived him/her of his/her abilities in at least one of the two following areas: 1] he/she could not understand what he/she was doing, or the forbidden nature of the act; 2] he/she was incapable of preventing him/herself from carrying it out. In the case presented, a mentally ill individual was charged with the murder of his child and with an attempt to murder another child. The court ruled him to be legally insane and therefore non-punishable. He was later sued by the other child's parents for damages on the grounds of the assault tort. The issue in question was how does the fact that the defendant was ruled legally insane while committing the wrongdoing affect the legal ruling of the defendant's liability especially regarding the tort of assault? The Magistrate's Court ruled that the Israeli Tort Law did not determine exemption from responsibility for the mentally ill. Liability for damages will be imposed upon an individual whenever the prerequisites to define a tort are met, even if the mental requisite is an outcome of one's mentally ill state. The District Court determined that an individual who intended to inflict harm is guilty of assault, even though the intent was an outcome of his mental state. Lack of volition due to one's inability to refrain from action does not constitute a defense for assault. In this case liability for damages was imposed on the defendant. The Court related to the issue of justice according to which an innocent person's damages should not remain uncompensated, and the assailant was required to pay damages to the victim.

Introduction

Criminal responsibility of the mentally ill patient is a subject on which much has been written (1). As a rule, mentally ill patients are responsible for their acts just like everyone else. Notwithstanding this, the law in Israel contains special rules which distinguish them from other people. The instructions laid out in article 34h of the penal law empowers the court to release the accused of criminal responsibility for his act and to deem him non-punishable (insane) (2). To do this, the following criteria must be met: (a) the accused was mentally ill, (b) he was in a psychotic state at the time he performed the felony, (c) his mental illness deprived him of his abilities in at least one of the two following areas: 1] on the intellectual-cognitive level, he could not understand what he was doing, or the forbidden nature of the act; 2] on the level of volition, he was incapable of preventing himself from carrying it out.

When the court finds the defendant still mentally ill at the time of the trial, it will decide — in accordance with article 15b of the Law for the Mentally Ill (3) — whether to rule that the patient be admitted to a psychiatric hospital or receive compulsory out-patient treatment.

The question dealt with in the case discussed below is as follows: Is it possible to claim civil damages from a mentally ill patient who committed a tort, when it has been established that he could not be held criminally responsible for the same acts for reasons of insanity as defined in the penal law?

The process of civil law is not identical to that of criminal law and the civil liability someone who is
mentally ill may carry is not necessarily identical to his criminal responsibility. This issue had not been awarded comprehensive scrutiny by Israeli courts until they were called to deal with the following case. In this presentation the focus will be on areas and concepts relevant to the practicing psychiatrist and not on the many legal aspects which were analyzed in depth by the judges who gave a ruling on the case.

**Case Description**

A few years ago, A. was in a park with his spouse and their 9-month-old baby daughter. At the same time, nearby, an 8-year-old boy was playing. A. called out to this boy and told him to say hello to his baby daughter. Ten minutes later he called out to him again, took a knife out of his pocket and seriously injured him. Following this he stabbed his daughter to death. The boy’s life was saved thanks to prompt medical attention at a hospital.

A. was charged in a criminal court with the murder of the baby and the attempted murder of the boy. The court ruled (4) that, in accordance with the psychiatric evaluation, he was mentally ill, and at the time of the crime he acted under the influence of his impaired mental processes and was therefore non-punishable. A. killed his daughter following his delusional beliefs that were associated with paranoid schizophrenia, from which he suffered. Since it was ruled that he was still mentally ill at the time of the trial, he was sent to involuntary hospitalization in a psychiatric hospital.

The parents of the injured child, acting on his behalf, appealed to the Magistrate's Court demanding compensation for the damages caused to their child during this incident (5). The charge on which he was being tried was assault.

**The Legal Debate**

The Magistrate's Court (Beit Mishpat HaShalom) found for the plaintiff and ruled that the defendant pay compensation for the damages he caused.

The court pointed out that the law of torts did not allow any exemptions from responsibility for the mentally ill (in contrast to the instructions for exemption both from criminal responsibility and damage liability for minors under the age of 12).

The Magistrate's Court delineated three main approaches to the issue of the responsibility of the mentally ill in torts currently in use in English law, as laid out by Professor Englard (6):

**The First Approach** — a person is responsible for making restitution even when he did not understand the nature of his act at the time, due to mental illness, since it is the principle of restitution and not the principle of guilt which forms the basis for deciding on the responsibility for making restitution. This approach has the injured party as its focus. The significance of this approach is that the placing of responsibility is unequivocal and therefore compensation must be paid even by those with a mental disorder. Every person who causes damage should bear the responsibility for the results of the damage he caused, no matter what special personal circumstances existed at the time.

**The Second Approach** — exemption of the defendant from criminal responsibility automatically carries with it exemption from restitution for injury. In accordance with this approach there should be a uniform examination of the defendant for both the criminal and the civil proceedings, i.e., the McNaughton tests will also establish the civil responsibility. The significance of this approach is that whoever meets the McNaughton criteria and is found to be exempt from criminal proceedings will also be exempt from compensation claims.

**The Third Approach** — This is the middle road approach, and the one advocated by Professor Englard. In accordance with this approach the mentally ill person should be required to pay compensation like any other culprit, in cases where he is found to have the basis of the tort he has committed even if the basis is derived from mental illness or a mental defectiveness from which he was suffering at the time of the injury. Therefore, if the patient was not able to be aware that his actions were wrong, it suffices that his actions were intentional from his point of view in order for him to be deemed responsible for the damage caused by his actions. The concept of intention should be interpreted in its simple form: did the person causing the injury want to act in the way that he acted? The question of what motivated him to do this — his character, illness or external forces — does not belong to the area of the concept of volition.
Nonetheless, a person should not be held responsible for involuntary acts. It is possible to exempt a wrongdoer from responsibility when and only when he was without volition at the time when he carried out the offence. Consequently, focus should be placed on examining the existence of volition in the wrongdoer.

The Magistrate’s Court adopted the approach of Prof. England and ruled that “the mental basis required in order to define an injury by assault is the intention to induce bodily contact against the will of the attacked person.” The interpretation adopted by the court is that “intent,” in the legal context, means that a man expects a known result of his action and desires this result to occur. The Magistrate’s Court added that there could be instances where the assaulter could be absolved from responsibility even though on the mental level he understood the nature of his actions and their significance, and even intended their outcome, but acted without volition. An example of this is the situation in which a mentally ill patient performs a premeditated act, even one well thought out in advance, but while he is under the control of delusions to such an extent that he is incapable of resisting them. In the absence of volition there can be no “intent,” and also no blame, and, in Professor England’s opinion, even no injurious “act.” The absence of volition means negation of the possibility of choosing between alternative behaviors, for instance between behaviors which cause injury and behavior which avoids such injury. The Magistrate’s Court’s ruling differentiates between “sane automatism” whose source is in an external factor, or an organic illness, such as an epileptic fit (7) and “insane automatism” whose source is mental illness. The accepted description of this phenomenon of an act whose basis of volition has been revoked is “an irresistible impulse.” According to the Magistrate’s Court, only a person who acted as an automaton (be he sane or insane) will be exempted from liability. Release from criminal responsibility due to a mental disability which does not qualify as automatism does not necessarily release the perpetrator from being liable for compensating the injured party.

Basing its finding on the fact that the criminal proceedings did not establish that at the time of the assault the assailant was without volition, the Magistrate’s Court ruled that A. was liable for compensation for the damages he inflicted.

This decision to impose on him payment of compensation was appealed by A. in the District Court. The District Court rejected the appeal in a majority decision. The Court adopted an approach which was arrived at for different reasons than the previous ruling. The District Court pointed out the distinction that exists between the area of criminal law and that of civil law. Among the other distinctions it pointed out the difference in the sides that are party to the dispute, and in the distinction between the weight of evidence that is required in a criminal case (beyond any reasonable doubt), and that required in a civil suit (the balance of probabilities). In addition, the Court pointed out the difference between the purposes of the criminal law and those of the civil law.

The legal theory developed by the Chief Judge of the Appeals Court, His Honor Judge Amit, differs from that of the Magistrate’s Court. He does not accept the middle road approach adopted by the Magistrate’s Court. In the view of this theory, an insane person who commits an assault will be held liable to pay compensation even when at the time of the assault — due to his illness — he was undergoing a psychotic episode which deprived him of his volition. An assailant will not be exempt from liability because he did not act out of his free will, but from an internal impulse (intent) caused by his illness. The basic concept of intent should be interpreted simply: did the assailant intend to achieve the outcome? The Court went further to the point of presuming the assailant to be held liable under the law so that even if the subjective will for the desired outcome could not be proven, the perpetrator should be held to have desired it. It was sufficient that the assailant expected that his actions would bring him into bodily contact with the other person. There was no necessity for there to have been a motive for the injury. The element of intent will be met, even if the assailant was suffering from “automatism which precludes volition” due to his mental impairment.

The single exception to the obligation of the assailant to pay compensation which Judge Amit suggested was to alter the distinction between “sane automatism” and “insane automatism” to the distinction between “automatism which precludes control”
which has an organic origin (e.g., head concussion, hypoglycemia, epilepsy) and “automatism which precludes volition” which has its origin in mental illness. In accordance with this approach only “automatism which precludes control” (8) due to the intervention of an external force, or of an organic-physical disability may be used as a possible defense by the assailant in civil cases. The absence of volition, due to inability to restrain himself from performing the act due to mental illness, does not constitute a defense for criminal assault.

The District Court’s approach seems to have been inspired by the writings of the Supreme Court Presiding Judge, His Honor Judge A. Barak, who wrote that the essence of tort law is remedial; when the two sides of a dispute are innocent of moral blame, the rights of the victim should take precedence (9).

Discussion

The criminal process differs from the civil one and there is no automatic carryover from the one to the other. The law of torts has different aims than those of the penal law. One of these aims and one of paramount importance is restitution for the victim.

The law of torts does not have an explicit position about the civil responsibility related to torts committed by a legally insane person. It could be inferred from this silence on the part of the lawmakers that they intended not to differentiate them from the rest of the offenders. Another possibility is that a lacuna occurred in the law of torts, and that the Court is expected to fill this void by its interpretation of the Law of Torts.

Mental illness can abolish the element of volition, where the accused acts under an irresistible impulse. In this case, the District Court ruled that, where there was assault, civil liability for restitution did exist even when there was absence of volition.

The Court emphasized that worthy legal policy requires that even when both sides are free of guilt, the assailant cannot be exempt from responsibility for his acts, leaving the victim “orphaned,” unless it has been proved that the assailant acted as an automaton.

The conclusion that may be reached from the above is that in order for a mentally ill person to be held accountable to make compensation for a tort of assault that he had committed, he needs to be in possession also of the special mental element of “intent.” In the event that it is established that this element was present in the accused, he cannot take recourse in the defense that the “intent” arose from his mental illness. At the same time, if it becomes evident that he was lacking in volition, he may be exempted from bearing responsibility for his damaging behavior. Thus, when the Court is faced — when making a civil ruling against an assailant who is mentally impaired — with a decision made previously in criminal proceedings, according to which he is not responsible due to insanity, it needs to ask according to which alternative this decision was arrived at. A mentally ill person who caused bodily harm will not be exempted from responsibility solely on the grounds that his mental illness revoked his cognitive abilities. If it adopts the ruling of the Magistrate’s Court, the Court may find that an offender who is mentally ill is exempted from responsibility for making restitution only if there was meaningful damage to his ability of volition as a result of his mental illness, to the extent that at the time he carried out the damaging act he was not able to prevent himself from doing it — insane automatism. If, on the other hand, it follows the opinion expressed by the District Court, it may grant exemption only when the offender acted while under sane automatism.

The legal community does not find a contradiction when the accused is not found guilty of a specific crime but is obligated to pay damages for the same deed, because two separate systems, the criminal and the civil, are involved. The lay person and the physician may, however, sense a contradiction. The emphasis is placed on the plaintiff and his/her right to compensation for damages even when the offender is a mentally ill individual. The ruling does not deal with other types of situations in which a mentally ill person caused damage to another. Discussion regarding a person unfit to stand trial and who should compensate the victim for damages caused by “sane automatism” is beyond the scope of this paper.

Consequently, what, in our opinion as therapists of the mentally ill, should be the right approach in this issue? On the one hand, the prevailing approach at present is to restore civil rights to the mentally ill (10), and these rights carry with them responsibili-
ties. On the other hand, it is difficult to understand intuitively how it is possible to rule that a patient is not criminally responsible for an act that he committed yet is obliged to compensate for damages he causes by this act.

The accepted approach in current forensic psychiatry is the narrow interpretation, which exempts the patient from responsibility for his acts only if these can be directly linked to his mental illness. Furthermore, as things stand today, there is no patient who is devoid of all rights and responsibilities. Even the incapacitated mentally ill patient, who is hospitalized chronically, is expected to behave in the ward in accordance with certain norms of behavior, and even patients who are deemed unfit to stand trial are not stripped of all their rights, e.g., the right to vote in elections (11).

The ruling of the District Court is still not the final stage of this case, since an appeal has been lodged in the Supreme Court (12).

**Practical Suggestion for Clinical Psychiatrists**

This case has brought a new challenge to the field of forensic psychiatry in Israel: the evaluation of intent (in cases of civil liability) which is a different medico-legal construct from that of understanding or that of volition. “Intent” is a juridical term and determining intent is solely at the discretion of the court. The evaluation of intent would have as its aim determination of the absence or presence of the idea to carry out the offence in the psychiatric offender. When asked by the court this clinical investigation would look for elements such as:

- verbal and/or written statements prior to the wrongdoing;
- (including information from sources other than the suspect himself — heteroanamnesis) especially those describing detailed plans of action and/or elaborated justifications, albeit irrational, for the execution of the offence;
- behaviors, that preceded the offence, which by implication may be deemed to have expressed a clear intention to hurt, e.g., buying a knife or a gun or repeated threats or stalking of the victim in a frightening manner;
- conduct during the offence (in the case dealt with here, the intention to hurt the victim was expressed by the following sequence of events: A. called the child to approach him, and then the offender pulled out a knife and repeatedly stabbed the victim);
- verbal and/or written statements gathered during the psychiatric examination;
- the presence of external or organic factors which could suit the medico-legal concept of “sane automatism” like head concussion, insulin-induced hypoglycemia, involuntary intoxication and sleep-walking.

We emphasize that it is difficult to see how these situations could lead to crime.

Evaluation of intention has an implicit added value for the practicing psychiatrist, i.e., it may help to prevent crimes. Daniel McNaughton’s intentions, including the purchase of two guns, seemed to have been known to a number of persons, including police officers, for a long period of time, but nothing was effectively done to prevent him from committing the crime which brought him his unsolicited fame (14).

**Final Ruling**

On December 2, 2007, the Supreme Court rejected the appeal of A. and upheld the ruling of the District Court. The Supreme Court ruled that when an unequivocal statutory order is lacking, the responsibility for damages of the mentally ill is to be decided according to the considerations of judicial policy. The suitable judicial policy on the topic of discussion is that it is appropriate and fair to adopt the premise that the aim of the Law of Torts is to provide a remedy to the injured party for the damage suffered and the aim of the Law of Damages is revocation of the outcome of the harmful act. Thus between two sides who are free of guilt, the concerns of the offended will be preferred. Mental illness per se does not provide an all encompassing exemption from responsibility for damages.

Concerning the question of the exception that may provide defense for the perpetrator, opinions are divided: according to the opinion of the majority, only lack of control over bodily movement, the
source be what it may, will provide defense in damages. According to the opinion of the minority, there may be situations involving a mentally ill perpetrator who is exempt from paying damages, taking into account various just considerations.

Reference: Supreme Court, G.C vs D.S., Appeal 1272.05

References
2. Penal code 1977, section 34h.
5. Haifa Magistrate’s Court 12851/00A, D.S vs. G.C.
7. Haifa District Court, 2174/04, G.C. vs. S.D.
8. Penal code 1977, section 34g.
12. Supreme Court 1272/05, G.C. vs. D.S.