

**RE-ESTABLISHING TRIABILITY BY MEANS OF PSYCHOTROPIC  
MEDICATION: AN ANALYSIS**

“If a man in his sound memory commits a capital offence and before arraignment for it, he becomes mad, he ought not to be arraigned; because he is not able to plead to it with that advice and caution that he ought”: Blackstone, 1984.

## 1 Introduction

Competency to stand trial is a concept of jurisprudence, which provides for the postponement of criminal proceedings for those accused persons who are considered to be unable to take part in their defence as a result of a particular mental illness or mental defect (Du Toit *et al Commentary on the Criminal Procedure Act* (2007) 13-1; Kriegler and Kruger *Hiemstra – Suid-Afrikaanse strafproses* (2008) 13-1; Burchell and Hunt *South African criminal law and procedure – General principles of criminal law* (1997) 163; Menzies, Webster and Jackson “Legal and medical issues in forensic psychiatric assessments” 1981 *Queens LJ* 7; Snyman “The declaration of a person as a State President’s patient” 1988 *Acta Juridica* 128; Oosthuizen and Verschoor “Faktore wat ’n invloed op die verhoorbaarheid van ’n beskuldigde kan hê” 1991 *TRW* 138; Oosthuizen and Verschoor “Herstel van verhoorbaarheid deur psigotropiese middels” 1990 *TRW* 74; Schiffer *Mental disorder and the criminal trial process* (1978) 51; Snyman *Criminal law* (2008) 178; Kaliski *Psycholegal assessment in South Africa* (2006) 98; Burchell and Milton *Principles of criminal law* (2006) 372; Strauss *Doctor, patient and the law* (1991) 124; Slovenko “The developing law on competency to stand trial” 1977 *J of Psychiatry and Law* 165; Webster, Menzies and Jackson *Clinical assessment before trial* (1982) 108).

Competency to stand trial is generally a very common field where psychiatric assessment by forensic mental health experts is requested by the courts (Menzies, Webster and Jackson 1981 *Queens LJ* 7).

It is a basic tenet of our law of criminal procedure that an accused person must be triable (Snyman 1988 *Acta Juridica* 128). The latter principle is closely related to another fundamental principle of our criminal procedure which entails that the trial of an accused person must take place in the presence of the accused (see s 158 of the Criminal Procedure Act 51 of 1977 (“the Act”). See also Calitz, Verschoor and Van Rensburg “Die ontwikkeling en problematiek van die verhoorbaarheidsbegrip” 1992 *TRW* 29; Slovenko “The developing law on competency to stand trial” 1977 *J of Psychiatry and Law* 165). An accused’s presence during the trial thus comprises of a physical as well as a psychic or psychological element which provides that the accused must have the required mental capacity to understand and follow his or her trial.

It is therefore a basic necessity that an accused should be mentally capable of participating during his or her trial and thus within the true spirit of our adversarial system, as the adversaries of the prosecutor (Snyman 1988 *Acta Juridica* 130). Triability should accordingly provide for the following:

- (a) The ability of the accused to comprehend the nature and consequences of the proceedings.

- (b) The ability of the accused to communicate with his or her legal counsel in a meaningful manner.
- (c) The ability of the accused to testify coherently and also to assess all the evidence which has already been presented at the trial (Du Toit *et al* 13-3; Melton *et al Psychological evaluations for the courts* (2008) 127; see also generally ss 77–79 of the Act; *Engels v Hoffman* 1992 2 SA 650 (C); *S v Malcolm* 1999 1 SACR 49 (SE) where the accused had been found incapable of understanding the proceedings in order to sustain a proper defence. The accused then appealed against such order, and applied for bail pending the outcome of the appeal. During the bail application, the magistrate refused to allow the accused to testify in support of her application for bail based on the finding that he had already rendered a finding that she was incapable of understanding the proceedings in order to make a proper defence. The accused then appealed against the magistrate's finding. On appeal it was held by De Bruyn AJ that it was grossly irregular to preclude the appellant from testifying in support of her bail application and on appeal her application for bail was granted. See also *S v Thurston* 1968 3 SA 284 (A); *S v Taylor* 1991 2 SACR 69 (C)).

Essentially, an accused person is unfit to stand trial if he or she is incapable of:

- (a) understanding the proceedings in court during his or her trial, and
- (b) conducting a proper defence (Du Toit *et al* 13–3; Melton *et al* 127; Kruger *Mental health law in South Africa* (1980) 64; *S v Gouws* 2004 2 SACR 512 (W)).

The factors which can influence triability can very well range from psychological factors such as mental retardation, organic mental illnesses, mental illnesses induced by the use of psychoactive medication, delusional disorders, psychotic disorders, affective disorders and anxiety disorders; to physical disorders such as hypoglycaemia, epilepsy, stress and amnesia (Oosthuizen and Verschoor 1991 *TRW* 143–149). Competency to stand trial and the psychiatric enquiry into fitness to stand trial are dealt with and regulated in terms of section 77 in conjunction with section 79 of the Act. A question which frequently arises is whether and to what extent a mentally ill or mentally defective person's triability can be re-established by means of psychotropic medication. A related question is whether accused persons, despite refusing to use psychotropic medication, may be forced to use such medication in order to render them triable.

In this contribution the author addresses the phenomenon of re-establishing triability by means of psychotropic medication as well as the contentious issue of forcibly medicating an incompetent accused person in order to render him or her triable.

## 2 Drug-induced competency

Due to the fact that the majority of accused persons found incompetent are suffering from psychosis, the most common method of re-establishing triability is by means of the administration of psychotropic medication (Melton *et al* 131; See also Davis "Antipsychotic drugs" in Kaplan and Sadock *Modern synopsis of comprehensive textbook of psychiatry* (1985) 1483).

According to Oosthuizen and Verschoor 1990 *TRW* 76, psychotropic medication can be defined as substances which influence the psychiatric functioning, behaviour and experience of a person. Psychotropic medication can re-establish

an accused's competency to stand trial (*idem* 74). The criticisms levelled against the use of psychotropic medication are the following (*ibid*; see also Bennett "A guided tour through selected ABA standards relating to incompetency to stand trial" 1985 *George Washington LR* 375):

- (a) It could be argued that the medication could possibly affect the mind of the accused in such a manner that he or she will be unable to respond properly to the events at the trial;
- (b) The medication could also portray an inaccurate picture of the accused.

Psychotropic medication by means of which triability can be re-established can be divided into the following categories:

(a) *Anti-psychotic medication*

Anti-psychotic medication is frequently used in the treatment of schizophrenia. This medication assists in re-establishing the cognitive functioning of a person with a resultant decrease in psychotic thoughts, suspicion and agitation. There is furthermore a reduction in hallucinations, paranoia and hostility. This form of medication is accordingly very important in the re-establishment of triability of the schizophrenic. According to Oosthuizen and Verschoor 1990 *TRW* 78 the accused should only appear before a court after a few weeks of use of this medication due to the sedative effect that this medication could have on an accused.

(b) *Anti-depressive medication*

Anti-depressants have the effect that persons suffering from major depression can be treated within the community rather than in a hospital (*ibid*). Accused persons found to be unfit to stand trial, can regain triability by means of the use of anti-depressants (see also Bennett 1985 *George Washington LR* 375).

(c) *Anti-manic substances*

Mania can be described as a mood disorder which could result in non-triability. General characteristics of this disorder include elation, hyperactivity, hypersensitivity and talkativeness. The most popular substance used to control mania is Lythium. According to Oosthuizen and Verschoor 1990 *TRW* 78 accused persons who use Lythium will be competent to stand trial.

(d) *Anxiety medication*

Medication for the control of anxiety is generally known as tranquilisers. The most important substance used is Valium. Anxiety neurosis is caused by insecurity characterised by a feeling of tension, irritability and insomnia. By means of medication an accused's triability can be improved if the accused suffers from anxiety neurosis (*idem*; see also Hollister *Psychotropic drugs and court competence* (1972) 17–21).

Triability can accordingly be re-established through the use of psychotropic medication. Pivotal to the administration of such medication is the role of the mental health professional who will most probably be the psychiatrist who will have to monitor the use of this medication as well as the side effects of it on the accused (For a discussion of the various side effects anti-psychotic medication can potentially have on an accused see Oosthuizen and Verschoor 1990 *TRW* 79–81; *Dusky v United States* 362 US 402 1960; Tomashefsky "Antipsychotic drugs and fitness to stand trial: the right of the unfit accused to refuse treatment" 1985 *Univ Chicago LR* 773; Melton *et al* 131 139–141).

Oosthuizen and Verschoor 1990 *TRW* 81 caution that courts should be aware of the side effects of these medications on the accused as some of these medications could influence an accused's emotions and functioning in court. Due consideration should accordingly be afforded to the fact that inappropriate medication may diminish an accused's ability to partake in the trial proceedings (Melton *et al* 131).

Oosthuizen and Verschoor 1990 *TRW* 82 also acknowledge the crucial role of expert evidence by stating:

“n Bevel wat die verpligte behandeling om verhoorbaarheid te bewerkstellig impliseer, behoort ook nie ligtelik gemaak te word in gevalle waar die newe-effekte grotesk en onomkeerbaar dreig te wees nie. Die aanhoor van deskundige getuies oor die aard van enige newe-effekte op die beskuldigde moet as voorvereiste beskou word.”

Melton *et al* 131 also note that even though psychotropic medication do have side effects, they often enable an individual to attain at least the minimum threshold of understanding required in terms of the standard for competency to stand trial (see also Oosthuizen and Verschoor 1990 *TRW* 78–79). Reid “The insanity defense: Bad or mad or both” 2000 *J of Psychiatric Practice* 171 notes that often defence attorneys have the idea that if an accused with severe mental illness is allowed to remain psychotic, he or she will stand a better chance of convincing the court that he or she suffers from a mental illness and accordingly his or her true condition at the time of the offence. The problems associated with the latter approach are the following:

- (a) Avoiding treatment would deprive the accused of his or her right to be competent during trial which will inevitably result in such individuals never being tried and instead they will be detained indefinitely in a mental institution (Melton *et al* 131).
- (b) Many accused persons with psychotic illnesses have symptoms that fluctuate from week to week, day to day or even hour to hour. Some develop psychosis only after the specific incident by for example becoming depressed about what they have done. Other accused persons improve after a crime. Accordingly any psychosis that results from withholding anti-psychotic medication will almost never be exactly the same as that allegedly present when the crime was committed.
- (c) There is a substantial ethical issue associated with a mental health expert being a party to stopping clinically needed care.

### **3 Incompetent accused's right to refuse medication – the issues at stake**

Accused persons may often, for various reasons, elect to remain incompetent or even refuse treatment in the hope of avoiding trial (*idem* 139). From a tactical point of view, an accused may choose to refuse being medicated as a result of the potentially adverse effect that a calmer, more composed demeanour of a medicated or treated accused may have on the potential success of an insanity defence (*idem* 140). On the other hand, it remains an undeniable fact that in certain instances accused persons suffering from a mental illness or mental defect, may as a result of such condition, not be in a position to make an informed decision as to whether or not to receive treatment to render him or her triable.

A question which inevitably arises, is to what extent an accused person would be entitled to refuse the administration of psychotropic medication in order to

render him or her triable and to what extent such medication or treatment can be imposed on an involuntary basis, regardless of such accused's refusal. Currently, within the South African context, no set criteria or guidelines exist in respect of determining when forcibly medicating an incompetent accused person would be justified.

From a constitutional perspective, it remains an inescapable reality that the imposition of psychotropic medication upon an incompetent accused refusing such treatment, impacts severely upon various constitutional rights including his or her right to human dignity, freedom and security of the person and the right to a fair trial (see ss 10, 12 and 35 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996 ("the Constitution")).

An important aspect which should be borne in mind, is the distinction between violent and non-violent offences. Within the context of violent crimes, accused persons are often dangerous criminals whom, if left to their own devices, pose a danger not only to themselves but also to others if left untreated. Treatment as such becomes crucial not only with the implicit aim of restoring competency, but also to treat dangerousness (Melton *et al* 140).

#### 4 Reflections from abroad

Within the context of the legal principles on this issue prevailing in the United States of America, the law on this has evolved to an extent that it could serve as a yardstick for the future when a court has to determine whether to forcibly medicate an incompetent accused. In *Washington v Harper* 494 US 210 (1990) a convicted prison inmate claimed that the State of Washington had disregarded his due process rights by enforcing the use of antipsychotic drugs against his will. The court acknowledged that Harper had a liberty interest in refusing unwanted medication but nevertheless held that the

"Due Process Clause permits the state to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if (the inmate) is dangerous to himself or others and the treatment is in [the inmate's] medical interest" (211).

(See also Klepner "*Sell v United States*: Is the Supreme Court giving a dose of bad medicine?: The constitutionality of the right to forcibly medicate mentally ill defendants for purposes of trial competence" 2005 *Pepperdine LR* 727–764.) In *Harper*, the court accordingly weighed the inmate's right to liberty against the State's interests to assess whether Harper's constitutional rights were infringed (221–222; Klepner 737). The court held that the State's interest could outweigh individual autonomy in choosing to refuse antipsychotic medication (225–226; see also *Youngberg v Romeo* 457 US 307 (1982); *United States v Charters* 829 F 2d 479 498 (4th Cir 1987)). The court in *Harper* accordingly held that where an inmate's mental illness is the cause of the threat that he or she poses to the other inmates, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with the necessary and required medication for his or her illness (225–226).

In *Riggins v Nevada* 504 US 127 (1992), a pre-trial detainee was forcibly medicated with the antipsychotic drug Mellaril. After being convicted of murder and being sentenced to death, after unsuccessfully invoking the insanity defence, Riggins appealed his death sentence on the basis that the forced drugging had violated his due process rights by manipulating his demeanour during his trial and interfering with his ability to communicate properly with his legal representative (131; see also Melton *et al* 140; Klepner 738). In addition, it was

argued on behalf of Riggins that the prejudice was not justified as the State had not proved a need to administer the drug, nor did it explore alternative less intrusive treatments. The Supreme Court held that Riggins' Fourteenth Amendment rights had been infringed as the Nevada court failed to acknowledge the detainee's right to liberty in freedom from unwanted medication and it had also failed to provide a ruling in respect of reasonable alternatives to antipsychotic medication (136–137). The Supreme Court stated that Nevada would have satisfied due process if the prosecution had indicated, and the district court had found, that treatment by means of antipsychotic medication was medically appropriate and, having regard to less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others; or that an adjudication of Riggins' guilt or innocence could not have been attained by using less intrusive treatments (135; Klepner 739). Accordingly, the *Harper* and *Riggins* decisions indicate the court's approval to the principle that, subject to certain conditions, due process permits a state to administer antipsychotic drugs to a mentally ill accused facing criminal charges to render such accused triable without his or her consent (Klepner 740).

In *Sell v United States* 539 US 166 (2003), the United States Supreme Court was confronted with assessing the constitutional validity of an order granted by a lower court which provided for the forcible administration of antipsychotic medication to an accused person who had been found incompetent to stand trial with the sole aim of rendering the accused competent to stand trial. The facts of the *Sell* decision were as follows. In 1997, Sell and his wife were charged with fifty-six counts of mail fraud, six counts of medical aid fraud and one count of money laundering. Sell was released on bond, but the government filed a bond revocation petition on the grounds that Sell had violated the conditions of release. During his revocation hearing, Sell was completely out of control (*Sell* 170). The court hearing the revocation arguments, received evidence that Sell's mental state was deteriorating. A psychiatrist reported that Sell would in all probability pose a danger to himself and others. In 1999, Sell's counsel requested a hearing to determine Sell's competency. Both Sell's psychologist as well as the state psychologist diagnosed Sell with delusional disorder and more specifically, the persecutory type (see American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (1994) 296).

Later during 1999, the district court conducted a hearing to assess Sell's competency. Upon an analysis of the evidence, Sell was found incompetent to stand trial and to assist properly with his defence and it was ordered that Sell be institutionalised at Springfield. At Springfield, Sell was under the care of two mental health professionals, Dr De Mier, a clinical psychiatrist, and Dr Wolfson, a consulting psychiatrist. Both mental health professionals were of the opinion that Sell was in need of antipsychotic medication. An administrative hearing was accordingly conducted where Dr De Mier and Dr Wolfson testified in favour of treating Sell with antipsychotic medication and asserted that it was the only way in which Sell's competency could be restored (*Sell* 171). Sell relied on the affidavit deposed by his psychiatrist, Dr Cloninger, who argued that Sell would not respond well to antipsychotic medication. The medical hearing officer concluded that antipsychotic medication should be administered as no other alternative was available to treat Sell's delusional symptoms.

In August 2000, an order was granted that Sell posed a danger to himself and others (173). It was accordingly ordered that Sell be forcibly medicated with

antipsychotic medicine. In April 2001, the order that Sell posed a danger to himself and others was reversed by the district court due to insufficient evidence but affirmed the order that *Sell* be forcibly medicated in order to stand trial. *Sell* then lodged an appeal to the Supreme Court in order to determine whether the district court erred in finding that he could be forcibly medicated with antipsychotic drugs for the sole purpose of restoring his competency to stand trial (see also Klepner 742).

It is important to note that although the decisions in *Harper* and *Riggins* dealt with the issue of medicating accused persons with antipsychotic drugs without their consent, the issue of the constitutionality of forcibly medication solely for trial purposes was never addressed (Klepner 746). In addition, *Riggins* failed to provide a benchmark in respect of a standard that a state would have to meet in order to justify the overriding of an accused's constitutional right to refuse medical intervention. Klepner notes that *Riggins* merely provided general conditions without providing exact standards that should be employed when assessing decisions to forcibly medicate (*ibid*; see also Elm and Passon "Forced medication after *US v Sell*: Fighting your client's war on drugs" <http://www.fal.org/pdf-lib/sell.pdf> (accessed on 2012-04-02)). In an attempt to provide clarity on the issue, Breyer J used *Harper* and *Riggins* as the foundational framework for his decision in *Sell* (*Sell supra* 177–178; Klepner 747). Breyer J held that it will be permissible to administer antipsychotic drugs to a mentally ill accused facing serious criminal charges in order to render such accused competent to stand trial only if the State can prove that:

- (a) the medication is medically appropriate;
- (b) it is substantially unlikely to have any side effects which will affect the accused negatively in assisting his or her legal representative in properly conducting a defence;
- (c) the forced medication is the least intrusive option available to further the state's interests; and that
- (d) treatment is essential to further the state's interest in a fair trial (*Sell* 179; Klepner 747; Melton *et al* 131; Etheridge and Chamberlain "Application of *Sell v United States*" 2006 *J of the American Academy of Psychiatry and Law* 248–250).

The court, in addition, held that in such instance a court must find that "*important governmental interests are at stake*" (*Sell* 180–182; Klepner 747). Serious crimes such as crimes against the person or property will be deemed an important government interest (*Sell ibid*). It should also be established that "involuntary medication will significantly further those concomitant state interests" (181; Klepner 748). It should thus be found that the use of antipsychotic drugs will in all probability restore the accused's competence to stand trial. In addition, it should also be established that the side effects of the antipsychotic medication will not hinder the accused's ability to participate in the preparation of his defence thereby inadvertently affecting his or her right to a fair trial (*Sell* 181). A court should also assess whether any less intrusive treatments are available and it should be found that any less intrusive treatments are unlikely to achieve the same results (*ibid* 181; Klepner 749). Finally it must be concluded that the administration of such antipsychotic medication is "medically appropriate" and as such in the patient's best medical interest with due regard to his or her medical status (*Sell* 181).

It was emphasised by the court that the abovementioned criteria apply to cases involving forcible administration of drugs in order to render an accused fit to stand trial and accordingly if involuntary treatment is necessary for other purposes of the accused's own health, then the court will not have to render a finding whether forcible medication is necessary for competency purposes (182; see also Klepner 749–750). Breyer J also noted that courts should strive to assess whether forcible medication can be justified on alternative grounds before examining trial competency.

Breyer J assessed the standards employed during the medical hearing by the magistrate and reached the conclusion that during both occasions, Sell's alleged dangerousness towards society was used as motivation for approving forcible medication (*Sell* 183). It was further held that forcible medication had been imposed due to the fact that it was the only way to render Sell less dangerous and competent to stand trial and accordingly not for trial competence alone. Justice Breyer noted that the experts who participated in the hearing held before the magistrate also focused solely on the issue of Sell's dangerousness and neglected to ask questions pertaining to the issue of trial competence (185; Klepner 752). The experts, in addition, had failed to ask questions regarding the potential side effects that antipsychotic medications may have on an accused as such questions are pivotal to an assessment of triability due to the tendency of such side effects to undermine the fairness of the trial (*Sell* 185). Absence of such questions rendered it impossible to assess whether the antipsychotic drugs would have rendered Sell's trial unfair or not. Breyer J accordingly held that the order permitting forcible administration of antipsychotic medication was issued in error and the case was remanded to another date for trial (186).

It is submitted that the decision in *Sell* could serve as a yardstick for the future where courts are confronted with the onerous task of determining whether forcible administration of antipsychotic medication on an incompetent accused person refusing such treatment will be justified. Klepner opines that *Sell* has established four stringent conditions that the government or the State has to satisfy before an order for forcible medication to restore the accused's competency will be granted which will in all probability discourage governments from seeking orders for forcible medication (Klepner 761). As such *Sell* will have a profound impact on the position of the government who is the party seeking to involuntarily medicate as well as those seeking to avoid forcible medication (*idem* 761–762).

Melton *et al* 140 opine that the decision in *Sell* is salutary in the sense of focusing the attention of trial courts on the essential issue as to whether medication is pivotal either to restore competency or to treat dangerousness. In addition it also emphasises the principle that courts and clinicians should carefully monitor the effects or possible side effects of such medication on accused persons' demeanour and ability, to take part in criminal proceedings (*ibid*).

Melton *et al* submit that the court in *Sell* reiterated that medication may only be administered forcibly if it is the least offensive manner of re-establishing competency and does not infringe on an accused person's right to a fair trial (*ibid*). As such situations in which the State is authorized to enforce medication or treatment will be rare and only permissible if a compelling public or government interest is affected (*ibid*). In addition, *Sell* clearly establishes that forcible medication of an accused who is dangerous to him- or herself or others, will be permissible, if such treatment is essential to reduce such dangerousness (*ibid*). From a constitutional perspective, the decision in *Sell* seems sound in that it



provides a viable solution in terms of protecting the accused's constitutional rights, on the one hand, but also providing for exceptions in terms of which accused persons can be forcibly medicated when compelling circumstances exist in support of restoring the accused's competency to stand trial.

## 5 Conclusion

From the outset of this contribution it was indicated that the aim of this contribution was to shed light on the issue of re-establishing triability by means of psychotropic medication. The question was posed as to whether psychotropic medication can forcibly be administered on an accused person, despite such accused person refusing such treatment. It is clear that forcing medication on an accused, despite refusal thereto, can potentially seriously infringe upon the accused's constitutional rights. In addition, certain medications have the potential of causing serious adverse side effects which could impact negatively on an accused's cognitive functioning during trial. As such, the *Sell* decision paves the way for a solution to the problem of forcibly medicating an un-triable accused, rendering it permissible only in situations where public interest as well as the accused's medical condition necessitates such treatment, thus protecting the accused's constitutional rights as well as community and public interest, and ultimately serving justice.

GP STEVENS

*University of Pretoria*