



# PSYCHOSIS IN CRIMINAL LAW

## CAN PSYCHOSIS MAKE YOU NOT CRIMINALLY RESPONSIBLE?

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### Critical appraisal

On May 5th 2019, a body was found. Two days later, two more bodies were found [1]. All victims were killed by stabbing while walking their dogs [1]. Thijs H. was swiftly arrested as the suspect of the three murders [1]. The prosecution requested to examine Thijs H.'s criminal responsibility for these crimes in the Pieter Baan Centre (PBC) [1]. The PBC advised the judge to not charge Thijs H. as criminally responsible for his actions and consequently give him 'terbeschikkingstelling' (TBS) with compulsory mental treatment [1]. However, contrary to this advice, the court considered him diminished criminally responsible [2]. This contradiction is remarkable, since the PBC exists to advise the court on the interpretation of a mental disorder and what it entails in relation to the offence. The court does not possess expertise in this field. In any case, the judgment is important because the court did not follow the advice of the PBC to declare Thijs H. not guilty by reason of insanity and has provided direction for the concrete interpretation of the spectrum of criminal responsibility. In which way is criminal responsibility assessed, given that the criteria are not defined in concrete terms? Is the current interpretation of criminal responsibility favourable for the suspect without losing sight of protecting society?

**KEYWORDS:** Psychosis, criminal law, criminal responsibility, diminished criminal responsibility, insanity

Thijs H. was arrested on May 8, 2019 as a suspect of three murders. Subsequently, the criminal responsibility of Thijs H. was investigated due to a possible psychotic condition. For this, it is crucial to know whether the mental disorder already existed at the time the crime was committed and if the disorder could have influenced the suspect's behaviour. Then, taking into account the presence of the disorder and the causal relation of the disorder with the crime, in combination with all the circumstances of the case, an assessment is made of what judgment should be pronounced regarding criminal responsibility. If the behaviour stems from a mental disorder, someone cannot be held fully criminally responsible for their behaviour [3]. The behaviour therefore remains unacceptable, but instead of a penalty a measure called *terbeschikkingstelling* (TBS) is imposed. On account of the case of Thijs H., the criminal significance of a psychosis and criminal responsibility of a suspect has come up for discussion. In this article, we aim to explain the legal and psychiatric factors of the case against Thijs H. Consecutively, we explain shortly when TBS is imposed, what criminal responsibility means, what psychosis is, what the case against Thijs H. was, and conclude with a contemplative conclusion.

### TBS and when it is imposed

TBS is a security measure applied by the court in the Netherlands when a criminal offence is committed that warrants more than four years of imprisonment, the general safety of the public is compromised, and when the suspect was diminished criminally responsible or not guilty by reason of insanity during the commitment of the crime [4]. Insanity defence is described as follows: "Not punishable is he who commits a crime that because of his poor development or morbid mental disorder cannot be imputed" [3]. In other words: when the behaviour arises from a mental disorder, the suspect cannot be penalised for his behaviour. This defence is in accordance with the

principle of 'no punishment without guilt'. This principle does not mean that there was not any intent; someone in a psychosis can completely act knowingly. The behaviour remains criminal, but a so-called measure will be applied instead of a penalty.

Exactly how insanity should be formulated is left open under Dutch law. So, the court retains discretion [5]. As a judge does not have the expertise to determine whether somebody has a mental disorder, advice from behavioural experts is usually needed before the court comes to a judgement. Usually, the judge follows the advice of the experts. The behavioural experts can use international criteria, such as judgement of the unlawfulness of behaviour of a suspect and the ability to direct that behaviour to assess criminal responsibility of a suspect, although in essence, the concept of criminal responsibility remains an open concept (Table 1)[4].

Table 1: An overview of the international criteria to determine accountability as used by behavioural experts at the Pieter Baan Centre.

1. Judgement	a. the lack of awareness of the unlawfulness of their behaviour by the suspect; b. and/or the lack of awareness of what they are doing;
2. Ability to direct behaviour	c. and/or the inability to be consistent with that realisation (a/b) to determine their behaviour.

The behavioural experts investigate whether the mental disorder was already present at the time of the criminal offence [4]. This is also called the simultaneity context [4]. Secondly, there will be an investigation on whether the present mental disorder has caused the criminal behaviour, or if there exists a meaningful connection between the disorder and the criminal behaviour, and what these connections imply for the subject's criminal responsibility [4].

### Far-reaching consequences

The aim of TBS is to remove the danger that has led to the criminal offence and for a safe return of the suspect to society [4]. The measure can have far-reaching consequences, as infinite extension of TBS under conditional termination is possible. This extension is only possible in case of a criminal offence against the inviolability of the body [6]. Secondly, conditional TBS can be converted into TBS with compulsory treatment when the conditions (*e.g.* going to therapy) are not followed [6]. The judge must at all times verify whether imposing TBS is proportional; it must be the last possible measure to guarantee the safety of society. When (in case of diminished criminal responsibility) imprisonment as well as TBS is imposed; the imprisonment will be executed before TBS [4]. This can be counterproductive because the mental state of a person can deteriorate in prison [4]. However, TBS before imprisonment is also not ideal: prison may diminish the efficacy that TBS had on the criminals [4]. Additionally, TBS is mainly aimed at resocialisation, whereas imprisonment is not [4].

### From psychosis to PBC

Now that we have defined the law behind criminal responsibility, it is important to look at criminal responsibility during psychosis from a medical perspective. Psychosis is a condition of the mind in which someone does not sufficiently test their own observations and beliefs against reality [7]. Psychosis often presents with delusions, hallucinations, and/or disorganisation of behaviour or thoughts [4,7,8]. Delusions include certain ideas or beliefs that are inconsistent with generally accepted beliefs [4]. The person experiencing the delusion cannot change their mind when evidence is presented that proves their views are incorrect [4]. In addition, a person can hallucinate during a psychosis. Hallucinations are observations that are not caused by an external stimulus [4]. In case of Thijs H., he said he heard voices that gave him further orders to commit a murder. Disorganisation is the inability to bring order to thoughts, behaviour, or emotions [4]. As a result, someone can no longer perform actions that they previously were able to perform, like performing administrative tasks, or making statements that are difficult to follow [8]. However, being able to perform these actions does not indicate that someone cannot be psychotic.

A short-term psychotic disorder can last from one day to a month, with a full recovery of functioning [8]. A psychotic disorder increases the risk of aggression and violence [9]. This increased risk is mainly caused by concomitant use of alcohol and/or drugs [10]. Violent behaviour is more likely to occur in the presence of imperative hallucinations, which order the person that experiences the hallucinations to do something violent to another person [4]. When under the influence of alcohol or drugs, the hallucinated commands are more likely to be obeyed [4].

If the criminal responsibility of a defendant of a serious (violent) crime is questioned due to mental health, the defendant can be sent to the PBC. An example of a condition that can lead to questioning whether a criminal is responsible for the crime or not is a suspicion

for psychosis, such as in the case of Thijs H. The psychiatrists of the PBC work within a multidisciplinary research team consisting of a psychologist, social-environment researcher, jurist, and a social worker [11]. The PBC advises the judge to which extent the suspect can be held criminally responsible for the crime [11]. In addition, the PBC advises on treatment and the risk of recidivism [4,12]. However, it is up to the judge to decide whether there is reason to impose TBS [4].

A suspect may have an interest in a certain outcome of the investigation at the PBC, which means that suspects sometimes feign a mental disorder [11]. The investigation of the subject in the PBC lasts six weeks and may be extended [11]. The length of the observation significantly reduces the possibility of feigning a psychiatric disorder, as it is difficult to keep up an act under supervision for weeks [11]. In addition, a suspect is given a psychological assessment in which investigators test whether what a suspect says is consistent with the results of the test psychological assessment [11].

### Trial and judgement of the case Thijs H.

At the hearing, Thijs H. stated that he suffered from delusions and fears and used drugs [1]. Experts from the PBC concluded that Thijs H. had serious reality testing problems at the time the crimes were committed and that he was, therefore, unable to reflect properly [1]. Furthermore, they concluded that he was not properly helped by mental health care in the months prior to the disintegration [1]. As the focus of his treatment was on treating his other mental disorders (attention deficit hyperactivity disorder and an autism spectrum disorder), the psychotic disorder was overlooked. Besides, during the treatment of attention deficit hyperactivity disorder, the antipsychotic medication was stopped and other medication was started that could have caused or worsened his psychosis [1]. Due to these circumstances, the PBC advised the judge to not let Thijs H. be criminally responsible for his crimes and, consequently, give him TBS with compulsory treatment [1].

However, during the trial it becomes clear that Thijs H. has had paramount influence on the onset of his own psychiatric disorder by using both prescribed and non-prescribed medication and drugs [4]. In addition, Thijs H. regularly searched the internet for the signs of psychosis and how this can be induced by the (combined) use of certain drugs. This suggests that he knowingly caused his own psychosis and that he had the freedom of choice in doing so [1].

The court concludes that at the time of the offense there is a decompensated psychotic picture of the situation [1]. The causal relationship between the disorder and the offences is sufficiently plausible, leaning towards the insanity plea. The judge also ruled that Thijs H. had enough time to consider the murders and that, within the commands, he was given a choice of how these should be completed in terms of victim, place, and time [1]. The combination of these two considerations, led to the court's ruling to consider Thijs H., contrary to the advice of the PBC, diminished criminally responsible [2].

The judge's ruling of diminished criminal responsibility is based upon the impression that Thijs H. was still in control of his own behaviour to a certain extent. Firstly, the court questions whether the way Thijs H. presented himself is a call for help or an exaggerated way of obtaining a certain desired sentence [1]. This is based upon the finding that Thijs H. searched for information about psychosis and the effect of substance use on the development of psychoses and aggressive behaviour before the alleged crimes were committed.

Furthermore, a practitioner of the penitentiary institution of Vught described his story as little lived through, as if it were not his own story [2]. It is noted that Thijs H. takes the moment of the emergence of the delusions further and further back in time, and he can tell only few details about the content of the messages [2]. Secondly, the court reiterates the importance of freedom of choice in the execution of his assignment. The court also mentions that he made the conscious choice well before the offence to not share correct information about his psychological state [13]. As a result, his disruption could not be properly noticed [13]. The court also ruled that he made a conscious choice to take narcotics and (non-)prescription medication, despite advice not to do so [14].

In view of this choice, his searches on the internet, and his intellect, he could be expected not to use the narcotics and non-prescription drugs [2]. In addition, during the entire period of disruption, there were also times when Thijs H. did not use drugs, which makes substance dependence less plausible. By abusing drugs, Thijs H. contributed to the increase in the seriousness of his psychological state and chose the dangers himself [14].

Corresponding to their ruling that Thijs H. is deemed diminished criminally responsible, the court imposes an 18 year prison sentence on Thijs H. and, because of the safety of others and the high risk of recidivism, TBS with compulsory treatment [2]. The compulsory nursing is considered necessary because there is no confidence that Thijs H. will adhere to the treatment given his behaviour in previous treatments [2]. Thijs H. has appealed the decision [15].

### Contemplative conclusion

In conclusion, the court agreed with the psychotic disorder that was found in the PBC. In Thijs H.'s case it seems abundantly clear to us that he was suffering from a mental disorder at the time of the offence. We would, like the PBC, in first instance plead for complete insanity. After all, to what extent did he truly have freedom of choice? However, the court also has to look at other aspects such as substance use, his search queries, his intellect, and freedom of choice in his behaviour. Looking at these circumstances, it seems as if he has been able to oversee and foresee the situation of disruption. The court thus arrived at a judgment deviating from the advice of the PBC. We also think it is right for the court to declare him "only" diminished criminally responsible, so that in addition to treatment, retribution can also take place.

This case seems to clarify what psychosis means in criminal law. Being fully criminally responsible in a psychotic state is possible, but is not applicable when judgment and direction were lacking. However, two gradations are left on this spectrum in the Netherlands: diminished criminal responsibility and not guilty by reason of insanity. In this judgment, the court has made it clear that having freedom of choice in a psychotic state can mean that a suspect is not considered 'not guilty by reason of insanity', but diminished criminally responsible. The tipping point therefore lies on both the assessment and control capacity and the degree to which a person has had freedom of choice. This provides a broad spectrum of criminal responsibility and seems to us to be a "favourable" interpretation for both the suspect and society. On the one hand, a disorder that a suspect may have acknowledged and treated by means of the imposition of a measure. On the other hand, there is room for retribution by imposing a punishment. The judgment is in any case important, for the court has not followed the advice of the PBC and has given direction in the concrete interpretation of the spectrum of criminal responsibility. How this will pan out on appeal or perhaps even before the Supreme Court afterwards remains to be answered. Perhaps the assessment

of the concept of criminal responsibility will proceed differently after the appeal. To be continued...

### Affiliations

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