

For educational use only

The Coroners and Justice Act 2009 - partial defences to murder (2) The new diminished responsibility plea

R.D. Mackay

Table of Contents

Introduction

The Role of the Law Commission

The New Plea

Crim. L.R. 296 The three specified things

Provides an explanation for D's acts and omissions in doing or being a party to the killing

Concluding remarks

Journal Article

Criminal Law Review

Crim. L.R. 2010, 4, 290-302

Subject

Criminal law

Other related subjects

Mental health

Keywords

Diminished responsibility; Mental impairment; Murder

Legislation cited

Coroners and Justice Act 2009 s.52

***Crim. L.R. 290** Introduction

Diminished responsibility was introduced in the Homicide Act 1957 as a method of reducing murder to manslaughter in the case of some mentally abnormal killers. In doing so the Government chose not follow the recommendation of the Royal Commission on Capital Punishment for extending the insanity defence ¹ but instead enacted s.2 of the 1957 Act which provided in subs.(1):

"Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility in doing or being a party to the killing."

Section 2(2) makes it clear that the burden of proving this defence on a balance of probabilities rests upon the accused.² If the plea is successful, subs.3 ensures a conviction for manslaughter thus giving the judge sentencing discretion and avoiding a murder conviction with its mandatory penalty.

The Role of the Law Commission

Despite its consistent use and application for over half a century, the plea--and in particular the wording of subs.1--has been the subject of regular criticism.³ This in turn led to a number of reform proposals that have culminated in the enactment of s.52 of the Coroners and Justice Act 2009, which creates an entirely new diminished responsibility plea which is the subject matter of this article. This new plea differs radically from past reform proposals which--apart from the Law Commission's recent recommendations--sought merely to simplify and improve the drafting of s.2 of the 1957 Act rather than to recommend any fundamental change. For example, in its work on a Criminal Code Bill, the Law Commission--building on the ***Crim. L.R. 291** work of the Criminal Law Revision Committee⁴ --preferred a formulation which required that the accused was suffering from, "such such mental abnormality as is a substantial enough reason to reduce the offence to manslaughter".⁵ More recently, the Law Commission again gave full consideration to the question of reforming diminished responsibility, first in relation to partial defences to murder, and finally in connection with its work on murder.⁶ In the former, the Commission--drawing on the results of the empirical research it had commissioned--concluded:

"Our view is that for the time being, and pending any full consideration of murder, section 2 should remain unreformed. There appears to be no great dissatisfaction with the operation of the defence and this is consistent with our consideration of the results of Professor Mackay's investigation of the defence in practice."⁷

Despite this clear view that no change to s.2 of the 1957 Act was required, the Commission nevertheless put forward a "tentative suggestion"⁸ as to how a new diminished responsibility defence might be formulated. This gathered momentum during the Commission's work on murder with the result that the "tentative suggestion", after further consultation, was reformulated into the following recommended definition,

"(a) a person who would otherwise be guilty of first degree murder is guilty of second degree murder if, at the time he or she played his or her part in the killing, his or her capacity to:

(i) understand the nature of his or her conduct; or

(ii) form a rational judgement; or

(iii) control him or herself,

<DPAC3>was substantially impaired by an abnormality of mental functioning arising from a recognised medical condition, developmental immaturity in a defendant under the age of eighteen, or a combination of both; and</DPAC3>

(b) the abnormality, the developmental immaturity, or the combination of both provides an explanation for the defendant's conduct in carrying out or taking part in the killing".⁹

This proposal was then considered by the Ministry of Justice (MOJ). The MOJ concluded that it was an appropriate vehicle for reform, with the result that, after Parliamentary scrutiny, we now have a new diminished responsibility plea modelled on the

Law Commission's proposal, subject to the exclusion of "developmental immaturity". What follows is a critical analysis of this new provision. Before doing so, however, the issue of "developmental immaturity" will be briefly considered.

***Crim. L.R. 292 Developmental immaturity**

The Law Commission was keen to include this limb within its new diminished responsibility plea on the basis that, as children mature at different rates, it would be prejudicial not to reflect this in a new plea.¹⁰ However, the MOJ was not persuaded as it considered that its inclusion was unnecessary and would open up the defence too widely. During Parliamentary debate the Government defended this approach on the basis that "normal immaturity" on the part of a child should not in any event qualify for a plea of diminished responsibility, but that cases of "abnormal immaturity" --whether in the case of a child or an adult-- would fall within "recognised medical condition".¹¹ While this may be a delicately balanced issue, would it not be preferable for the Law Commission and/or the MOJ urgently to conduct an in-depth review of the "age of criminal responsibility"¹² rather than include this untried and untested (age related) concept within the new diminished responsibility plea?¹³

The New Plea

Section 52 of the Coroners and Justice Act 2009¹⁴ provides as follows:

"52 Persons suffering from diminished responsibility (England and Wales)

(1) In section 2 of the Homicide Act 1957 (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute--

"(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an **abnormality of mental functioning** which--

- (a) arose from a recognised medical condition,
- (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
- (c) provides an explanation for D's acts and omissions in doing or /being a party to the killing.

(1A) Those things are--

- (a) to understand the nature of D's conduct;
- (b) to form a rational judgment;
- (c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct."

***Crim. L.R. 293** What is immediately apparent is that little of the original diminished responsibility plea in s.2(1) of the 1957 Act remains other than the words "abnormality", "substantially impaired" and "in doing or being a party to the killing" in subs.(1). All other elements of the old plea have been replaced with what the Law Commission and the MOJ considered was required to bring the law up to date by ensuring that the plea has a basis on both valid medical diagnoses and in specifying how a defendant's abilities are to be impaired in order for the defence to succeed. There is no denying, however, that the new plea in seeking to achieve clarity does so by introducing a number of difficult and challenging concepts, each of which deserves comment.

Abnormality of mental functioning

This phrase replaces "abnormality of mind". The latter had been long criticised on the basis that it was not a psychiatric term--but neither, it seems, is the former. Further, unlike the other novel concepts contained in s.52 of the Coroners and Justice Act

2009, "abnormality of mental functioning" received little scrutiny. In its Consultation Paper the MOJ did not discuss it while the Law Commission merely stated that, "mental functioning is a term preferred by psychiatrists to "mind".¹⁵ It is also of interest to note that the definition of diminished responsibility originally suggested by the Law Commission was developed from a definition proposed by the Law Reform Commission of New South Wales,¹⁶ and that although the latter was later implemented in the Crimes Amendment (Diminished Responsibility) Act 1997, the New South Wales legislature retained "abnormality of mind" in its new plea in preference to "abnormality of mental functioning". It did so on the basis that the term "has a restricted meaning in the context of this amendment".¹⁷ While that may be so, the term "abnormality of mental functioning" certainly seems wider but must be read in the context of the other requirements in s.52 of the 2009 Act. Support for it was given by Baroness Murphy¹⁸ during the debates on the Bill in the House of Lords when she remarked:

"Overall the concept of abnormal mental functioning is better than the current concept of abnormality of mind because it emphasises processes rather than a static idea. I strongly favour this adjustment because it offers a legislative route towards ensuring that conditions put forward in the defence come within accepted diagnostic criteria. I think we will move towards the World Health Organisation's ICD-10 criteria, or those specified by the American Psychiatric Association's *Diagnostic and Statistical Manual*-- we currently use number 4. That will avoid the idiosyncratic diagnoses that have been offered in the past by many experts.... We would like to see the definition narrowed, and I accept that the new definition will ensure consistency."¹⁹

However, it is not the notion of "abnormality of mental functioning" of itself which will achieve any such narrowing of the types of condition which may qualify for a *Crim. L.R. 294 diminished responsibility plea but rather its relationship to the other new concepts created by s.52 of the 2009 Act; namely "recognised medical condition", the three specified things in subs. (1A) and the causal provision in subs.(1B).

Recognised medical condition

The concept of a recognised medical condition is of itself nothing new. For example, it has been the subject of judicial comment within the context of disability litigation.²⁰ However, its introduction as a requirement for a diminished responsibility plea is novel--viewed as necessary by the MOJ,

"to accommodate future developments in diagnostic practice and encourage defences to be grounded in a valid medical diagnosis linked to the accepted classificatory systems which together encompass the recognised physical, psychiatric and psychological conditions".²¹

The relevant classificatory systems referred to by the MOJ are the two cited above by Baroness Murphy. However, while the phrase "recognised medical condition" will clearly encompass all relevant mental disorders which fall within ICD-10²² and DSM-IV²³, it is not restricted to these, and, as the MOJ concedes, must cover both "psychological" and "physical" conditions. Clearly, therefore, it is not limited to recognised mental disorders and must include conditions like epilepsy, sleep disorders and diabetes. In short, this is a concept which is capable of covering any and all medical conditions and as such is wider than the bracketed causes in s.2(1) of the 1957 Act which it replaces. These bracketed causes were open to criticism in that they were not psychiatrically recognised and their meaning had taxed the courts.²⁴ However, it was clear that to succeed in a plea under s.2(1) the abnormality of mind had to fall within one or more of these bracketed causes, thus restricting the plea's availability.²⁵ There is no such restriction relating to the scope of "recognised medical condition" in s.52 of the Coroners and Justice Act 2009, so it is to the new plea's other requirements which one must turn for this. Before doing so, however, three additional remarks may be made about "recognised medical condition".

First, although it has been suggested above that this concept is wider than its counterpart in the original s.2(1) of the 1957 Act, there is ironically a danger that--because it focuses exclusively on the need for a defined and demonstrable condition which is medically recognised--it may fail to include those "mercy killing" cases which currently qualify for a diminished responsibility plea. The reason for this is that because the wording of the current plea is so obscure, the court and the experts are sometimes able to enter into a benevolent conspiracy, *Crim. L.R. 295 thus permitting the psychiatric evidence to be stretched so as "to produce a greater range of exemption from liability for murder than its terms really justify".²⁶ In short, therefore--having regard to the difficulty which psychiatrists experienced in bringing such cases within "abnormality of mind" under the original s.2 of the 1957 Act--the concept of "recognised medical condition" may exacerbate this difficulty. Secondly, in his article on the new loss of control plea, Alan Norrie makes it clear that as this new plea is narrower than the provocation plea which it replaces,²⁷

cases such as *Humphreys*²⁸ (emotional immaturity) and *Acott*²⁹ (low intelligence) are unlikely to fall within its scope. And the same is likely to be true in relation to s.52 of the Coroners and Justice Act 2009, as its requirements--including the need for a "recognised medical condition"--lack the flexibility of the original s.2 of the 1957 Act, which it turn often permitted both pleas to be combined³⁰; a defence strategy which is now much less likely to succeed owing to the fact that both new pleas are drafted in a manner which militates against possible overlap. Finally, by whom does the condition need to be recognised? Most of us can "recognise" certain conditions of a medical nature. Presumably, however, what is meant here is that in order to fall within s.52 of the Coroners and Justice Act 2009, it must be a professionally accepted medical condition; although such recognition it seems will no longer be restricted to those with psychiatric expertise but will include, where relevant, all other branches of the medical profession and psychologists.

Substantially impaired D's ability to do one or more of the things mentioned in subsection (1A)

The abnormality of mental functioning upon which the new plea depends must not only arise from a recognised medical condition but also substantially impair D's ability to do one or more of three things specified in subs.(1A) of the 1957 Act as amended, which will be discussed below. Before doing so it is worth repeating that the phrase "substantially impaired" is lifted from s.2(1) of the 1957 Act, so it seems likely that the "less than total--more than trivial" interpretation given to the phase in *Lloyd*³¹ will endure. It also seems likely that experts will continue to give their opinions on this issue as they did under s.2 of the 1957 Act. It is also of interest to note that the draftsman has dropped the reference to "capacity" in the Law Commission's original draft and has chosen to replace it with "ability". No explanation is given for this change in terminology. However, as is mentioned below it seems likely to have been influenced by Lord Parker's dictum in *Byrne*.³² More importantly, should the crucial question not be whether D actually had a substantial impairment relating to one or more of the relevant things specified rather than whether he had the "ability" to do them?

****Crim. L.R. 296 The three specified things***

Subsection (1A) specifies the following things:

- (a) to understand the nature of D's conduct;
- (b) to form a rational judgment;
- (c) to exercise self-control.

Each deserves comment as D's ability to do one or more of these things must have been substantially impaired for the new plea to succeed.

(a) to understand the nature of D's conduct

This element is similar to the first limb of the *M'Naghten Rules*, which famously refers to "not to know the nature and quality of the act he was doing".³³ In essence, therefore, if this specified thing is satisfied it seems more like a partial insanity plea than one of diminished responsibility. Indeed, in the light of this particular similarity between the new diminished responsibility plea and the defence of insanity one might have expected some discussion of the relationship between the two pleas by the MOJ.

? uncertainty
But there is none.³⁴ Will this alignment of the two pleas mean that distinguishing between them will become more difficult? What is to happen in a case of insane automatism where the defendant when he killed the victim is adjudged not have been "unconscious" but "partially conscious"? Will such conditions now ground a successful diminished responsibility plea?

(c) to exercise self-control

Both of these "things" are modelled on the judgment in *Byrne*.³⁵ However, in this connection it is worth quoting what Lord Parker C.J. actually said in his famous judgment which helped to shape the development of diminished responsibility:

"'Abnormality of mind,' which has to be contrasted with the time-honoured expression in the *M'Naughten Rules* defect of reason, means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and

matters, and the ability to form a rational judgment *as to whether an act is right or wrong*, but also the ability to exercise will power to control physical acts *in accordance with that rational judgment.*"³⁶

Although the draftsman has clearly been influenced by this dictum--having also chosen to adopt the term "ability" in preference to "capacity"--the words in bold have been omitted. Is this because they are regarded as surplusage or that their inclusion might restrict the scope of the new plea unduly having regard to Lord Parker's earlier remark that "abnormality of mind" is "wide enough to cover the mind's activities in all its aspects"? One suspects that it is the latter. *Crim. L.R. 297 However, the new plea's approach of spelling out what abilities need to be impaired inevitably means that "abnormality of mental functioning" is now narrower than "abnormality of mind" in that the only activities of the mind which are included are the three specified things in subs.(1A) of the 1957 Act as amended. In addition, there is a legitimate concern that these three specified things will, taken together, prove to be more limited in scope than those which fell within the original plea. This was certainly the view of Baroness Murphy who, during debate on the Bill in the House of Lords, put forward an amendment to allow for,

"distortion of thinking or perception as a basis for a successful plea of diminished responsibility where the defendant was able to exercise self-control".³⁷

This would have more readily accommodated those whose mental disorder substantially impairs his or her perception of reality. It might also have included those with personality disorders, a condition which is now unlikely to fall within the new plea unless the defendant's ability to exercise self-control can be proved to have been substantially impaired. In any event, this amendment was roundly rejected by the Attorney General who said:

"In the unlikely event of cases arising where a defendant's perception of reality is substantially impaired but his ability to understand the nature of his conduct, form a rational judgment and exercise self-control are not, we do not consider that he should benefit from the partial defence as these issues go right to the heart of the case for reduced responsibility in homicide cases where there is an abnormality of mental function."³⁸

However, what this remark fails to acknowledge is that under the original s.2 of the 1957 Act there was nothing in principle to prevent a substantial impairment of perception of reality from falling within its scope owing to the flexibility/obscenity of the plea's drafting.

Provides an explanation for D's acts and omissions in doing or being a party to the killing

This provision follows the recommendation of the Law Commission. Initially the Commission recommended a stronger causal provision which was as follows,

"the abnormality was a significant cause of the defendant's conduct in carrying out or taking part in the killing".³⁹

However, after consultation the Commission decided that such a requirement might be problematical⁴⁰ and instead opted for the provision (which now appears in subs.(1)(c) of the 1957 Act as amended) stating,

"we have framed the issue in these terms: the abnormality of mind, or developmental immaturity, or both, must be shown to be "an explanation" for *Crim. L.R. 298 D's conduct. This ensures that there is an appropriate connection (that is, one that grounds a case for mitigation of the offence) between the abnormality of mental functioning or developmental immaturity and the killing. It leaves open the possibility, however, that other causes or explanations (like provocation) may be admitted to have been at work, without prejudicing the case for mitigation."⁴¹

Both the MOJ and government ministers have repeatedly opined that a stronger causal requirement is necessary. As a result subs.(1B) of the 1957 Act as amended provides:

"For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct."

The MOJ has been adamant that, "there must be some connection between the condition and the killing for the partial defence to be justified".⁴² In its response to its consultation exercise the MOJ further opined:

"With regard to the link between the impairment and the defendant's conduct, we have carefully thought through the various comments made but have concluded that it is right to maintain the position set out in the consultation paper. We are satisfied that it is right that, while it need not be the sole cause of the defendant's behaviour, it should be a significant contributory factor in causing the conduct--that is, more than a merely trivial factor. The partial defence should certainly not succeed where the jury believes that the impairment made no difference to the defendant's behaviour--he would have killed anyway."

The Attorney General explained this further during debate on the Bill in the House of Lords saying:

"The Government consider it is necessary to spell out what connection between the abnormality of mental functioning and the killing is required for the partial defence to succeed. Otherwise a random coincidence would suffice. It need not be the sole cause or even the most important factor in causing the behaviour but it must be more than merely a trivial factor. We believe this gets the balance about right."⁴³

The reference to "random coincidence" seems strange.⁴⁴ How--it may be asked--can this be possible if the defendant is able to prove that his abnormality of mental functioning gave rise to a substantial impairment of one or more of the *Crim. L.R. 299 abilities specified in subs.(1A) of the 1957 Act as amended?⁴⁵ Surely, if such is the case then the killing cannot have been a "random coincidence".⁴⁶ In any event, why, if the defendant proves that this is so, is this not enough? One possible line of argument is that subs.(1B) of the 1957 Act as amended is merely making express provision for what is already impliedly provided for in the original s.2(1). Two sources might be used to support this approach. The first is the following remark made by Lord Hutton in *Dietrichschmann*⁴⁷:

"I think that in referring to substantial impairment of mental responsibility the subsection does not require the abnormality of mind to be the *sole cause* of the defendant's acts in doing the killing. In my opinion, even if the defendant would not have killed if he had not taken drink, the *causative effect of the drink* does not necessarily prevent an abnormality of mind suffered by the defendant from substantially impairing his mental responsibility for his fatal acts."⁴⁸

The second is the Judicial Studies Board Specimen Direction on diminished responsibility which states:

"Substantially impaired means just that. You must conclude that his abnormality of mind was a *real cause* of the defendant's conduct. The defendant need not prove that his condition was the sole cause of it, but he must show that it was more than merely a trivial one [which did not make any real/appreciable difference to his ability to control himself]."⁴⁹

The following points can be made about these sources. First, Lord Hutton's reference to "sole cause" has to be read in the context of the facts of the case, namely the causative relationship between the effect of alcohol and abnormality of mind. There is no suggestion in *Dietrichschmann* that his Lordship was seeking to express an opinion on the need for some more general causal requirement in s.2(1) of the 1957 Act. Secondly, the reference in the Specimen Direction to "real cause" is nowhere to be found in Lord Hutton's judgment. Despite this the Specimen Direction was used by Maria Eagle MP, the Parliamentary Under-Secretary of State, to support her conclusion that:

"While there is no reference to causation in [the] statute, we believe that the existing requirement that the abnormality substantially impairs mental *Crim. L.R. 300 responsibility for the killing implies a causative connection and that in practice the law is applied in this way. We therefore do not consider that the approach we are taking here represents any real departure from current law and practice or indeed from the Law Commission proposal."⁵⁰

However, such a conclusion seems highly contentious for, as is mentioned above, there is no real support for such a strict causal requirement within the original s.2(1) of the 1957 Act. Not only that, no other diminished responsibility plea contains any such express requirement. In particular, none is to be found in the New South Wales revised plea upon which s.52 of the 2009 Act is modelled. Finally, it seems worth in this connection turning to the insanity defence. The *M'Naghten Rules* do not contain any such similar causal requirement. All the Rules require is "a defect of reason, from disease of the mind".⁵¹ What is necessary is that a "disease of the mind" cause "a defect of reason". There is no additional need to prove that the "disease of the mind" caused or was a significant contributory factor in causing, D to carry out his conduct. As a result one is compelled to ask whether it will not now be easier for a defendant whose mental state at the time of the offence satisfies all the elements of

both pleas (with the exception of this causal requirement) to prove insanity within the *M'Naghten Rules* rather than the new diminished responsibility plea.

Concluding remarks

We now have a diminished responsibility plea which no longer contains the word "responsibility". Rather, the new plea focuses on the abilities of the defendant which have to be impaired for the defence to succeed. But in so doing there is a danger that the scope of the new plea will be more limited than that of its predecessor. This in turn could be exacerbated by the causal requirement in subs.1(B) of the 1957 Act as amended which--as mentioned above--may well pose problems of proof for those who seek to use the new plea.⁵² In this connection it is worthy of note that the vast majority of diminished responsibility pleas were formerly settled without a jury trial, in the sense that the defendant's plea of guilty to manslaughter on that basis was accepted by the prosecution and the court.⁵³ In short, there were relatively few contested cases. But will this continue to be the case? Will the novelty and complexity of the new plea mean that contested cases **Crim. L.R. 301* will be more likely?⁵⁴ In its Impact Assessment on the homicide clauses of the Coroners and Justice Bill the MOJ said of the new diminished responsibility plea:

"Given the nature of the changes proposed, we do not expect any significant shifts in the numbers or types of cases which benefit from the partial defence of diminished responsibility, and our analysis of the 2005 cases supports this conclusion. We do not therefore think that there will be an impact on the courts or prison population as a result of the changes."⁵⁵

Two points can be made about this conclusion. First, on the issue of contested cases, no mention is made of this although it receives consideration within the context of the new "loss of control plea" where it is opined that as a result of the narrowing of this new partial defence "the CPS would accept fewer pleas to manslaughter, thus increasing the number of trials".⁵⁶ But, as argued above, is this not also more likely to happen as a result of the new diminished responsibility plea in that just like provocation where most trials went to a jury, the majority of such pleas will no longer be settled?

Secondly, it seems that we may not even reliably know the annual number of diminished responsibility pleas. The Impact Assessment states:

"Convictions for manslaughter on the grounds of diminished responsibility (section 2 manslaughter) are recorded separately from manslaughter in general. Home Office statistics show 19 convictions in 2005/06.⁵⁷ This may be an under-recording as our analysis of sentencing remarks for the calendar year 2005 included 39 cases (involving 39 defendants and 43 victims) where diminished responsibility appeared to be the basis of the manslaughter conviction."⁵⁸

These figures are worrying for if correct they mean that the true annual number of diminished pleas could be considerably more than contained in the Home Office statistics.⁵⁹ In any event, over time the number of diminished responsibility convictions has fallen from a maximum of 109 in 1979 to apparently 39 in 2005.⁶⁰ With this in mind there is a concern that the number of successful pleas could continue to fall, for if the new plea is narrower in scope than the original and more **Crim. L.R. 302* difficult to prove then it follows that more defendants will fail to qualify for the partial defence and will be convicted of murder. Not only that, research indicates when diminished responsibility pleas are contested juries are much more likely to reject them and again return a murder conviction.⁶¹

There seems little doubt that the driving force for reform within partial defences to murder was the dissatisfaction felt with provocation. Had it not been for this then one wonders if reform of diminished responsibility would have resulted? It was certainly not regarded as a priority for unlike provocation there were no pressing concerns about the operation of s.2 of the 1957 Act, which the Law Commission had concluded was working satisfactorily.⁶² In retrospect it might have been prudent to await the Law Commission's report on reforming the defence of insanity⁶³ before changing a plea which, as argued above,⁶⁴ to some extent now seems to have a closer relationship to the former. By way of contrast it is interesting to note that such an approach was taken by the Scottish Law Commission whose proposals on insanity and diminished responsibility⁶⁵ have been adopted by the Scottish Executive and are now contained in Pt 7 of the Criminal Justice and Licensing (Scotland) Bill. In that connection it is also worthy of note that the diminished responsibility plea contained in that Bill bears more resemblance to the original s.2 of the 1957 Act than to its replacement.⁶⁶ Nor, of course, does it contain any specific causal provision. As a result,

England and Scotland are soon likely to have new diminished responsibility pleas which are radically different and it will be fascinating to see how they both operate and develop over time.

Footnotes

- 1 Royal Commission on Capital Punishment (HMSO, 1953), Cmd. 8932, para.333. See also para. 413 where the Commission decided not to recommend the introduction of diminished responsibility.
- 2 *Dunbar* [1958] 1 Q.B. 1.
- 3 See, e.g. Edward Griew, "The Future of Diminished Responsibility" [1988] Crim. L.R. 75.
- 4 Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person* (HMSO, 1980), Cmnd.7844, para.93.
- 5 See cl.56(1) of the Draft Bill in Vol.1 of *A Criminal Code for England and Wales* (HMSO, 1989), Law Com. No.177.
- 6 Law Commission, *Murder, Manslaughter and Infanticide* (HMSO, 2006), Law Com. No.304, paras 5.83-5.142.
- 7 Law Commission, *Partial Defences to Murder* (HMSO, 2004), Law Com. No.290, para.5.86. My empirical study can be found at appendix B of that Report.
- 8 *Partial Defences to Murder*, 2004, Law Com. No.290, para.5.93.
- 9 *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.112.
- 10 *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, paras 5.125-5.137.
- 11 See the remarks of the Attorney General, *Hansard*, HL Vol.712, col.186 (June 30, 2009).
- 12 See cl.38 of the Criminal Justice and Licensing (Scotland) Bill which--if enacted--will raise the age in Scotland from 8 to 12 years.
- 13 For discussion of possible solutions see Andrew Ashworth "Child Defendants and the Doctrines of the Criminal Law" in J. Chalmers, L. Farmer and F. Leverick (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010), forthcoming.
- 14 This provision will come into force on such day as the Secretary of State may by order appoint, see s.182(5) of the Act.
- 15 *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.114.
- 16 *A New Homicide Act for England and Wales?* (HMSO, 2005), Law Com. Consultation Paper No.177, para.6.2 and discussed at paras 6.42-6.61.
- 17 See the remarks of the NSW Attorney General during the Second Reading of the Bill, *NSW Legislative Council Hansard*, p.11065 (June 25, 1997).
- 18 Until recently Professor of Psychiatry of Old Age at Guy's Hospital.
- 19 *Hansard*, HL Vol.712, col.177 (June 30, 2009).
- 20 Child Poverty Action Group, *Welfare Rights Bulletin 181* (London: CPAG, 2004) and Child Poverty Action Group, *Welfare Rights Bulletin 186* (London: CPAG, 2005).
- 21 *Murder, manslaughter and infanticide: proposals for reform of the law* (HMSO, 2008), MOJ Consultation Paper CP19/08, para.49.
- 22 World Health Organisation, *Statistical Classification of Diseases and Related Health Problems*, 10th Revision, (Geneva: WHO, 2007).
- 23 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th edn (DSM-IV-TR) (Philadelphia: APA, 2000).
- 24 See R.D. Mackay, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] Crim. L.R. 117.
- 25 See *Dix* (1982) 74 Cr. App. R. 306 at 311 CA (Crim Div).
- 26 Griew "The Future of Diminished Responsibility" [1988] Crim. L.R. 75, 84.
- 27 Alan Norrie "Loss of Control" [2010] Crim L.R. 275, 283.
- 28 *Humphreys* [1995] 4 All E.R. 1008; [1996] Crim. L.R. 431.
- 29 *Acott* [1997] 1 W.L.R. 306; [1997] 1 All E.R. 706.
- 30 See R.D. Mackay, *Mental Condition Defences in the Criminal Law* (Oxford University Press, 1995), pp.198-202.

- 31 *Lloyd* [1967] 1 Q.B. 175; [1966] 1 Q.B. 175.
32 *Byrne* [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440.
33 *McNaughten* (1843) 8 E.R. 718; (1843) 10 Cl. & F. 200 at 210.
34 The Law Commission does touch upon this issue in *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, paras 5.138-5.143.
35 *Byrne* [1960] 2 Q.B. 396.
36 *Byrne* [1960] 2 Q.B. 396 at 403. Emphasis added.
37 See *Hansard*, HL Vol.712, col.180 (June 30, 2009). See also col.179 where it is opined that the criteria (a) (b) and (c) (the three specified things) will be problematical owing to their narrowness.
38 *Hansard*, HL Vol.712, col.189 (June 30, 2009).
39 *Partial Defences to Murder*, 2004, Law Com. No.290, para. 5.97.
40 *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para. 5.123.
41 *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.124.
42 *Murder, manslaughter and infanticide: proposals for reform of the law* (MOJ, 2008) CP19/08, para. 51.
43 *Hansard*, HL Vol.712, col.190 (June 30, 2009).
44 See also the similar remarks of Maria Eagle MP made during the House of Commons General Committee on the Coroners and Justice Bill, 11th sitting, col.414 (March 3, 2009): "The partial defence cannot succeed when the truth is that the recognised medical condition and impairment were randomly present by coincidence and made absolutely no difference to the behaviour that ensued" and at col.416: "We do not believe that the partial defence should succeed where random coincidence has brought together the activity of the person and the recognised medical condition."
45 In addition, if such is the case, how could the impairment have "made no difference to the defendant's behaviour"?
46 The three specified things must impliedly include the italicised words as follows: (a) to understand the nature of D's conduct *which forms D's acts and omissions in doing or being a party to the killing*; (b) to form a rational judgment *in relation to those acts and omissions*; (c) to exercise self-control *in relation to those acts and omissions*. There is, in short, already clear linkage between D's relevant substantial impairment and his homicidal conduct without the need for any specific causal requirement. In addition as is mentioned below, the original diminished responsibility plea did not contain any such causal requirement and the lack of it was not a matter of criticism. Further, so far as is known, killings brought about by "random coincidence" did not qualify as successful pleas under the old s.2 provision.
47 *Dietschmann* [2003] UKHL 10; [2003] 1 A.C. 1209.
48 *Dietschmann* [2003] UKHL 10 at [18], emphasis added.
49 Judicial Studies Board Specimen Direction, available at http://www.jsboard.co.uk/criminal_law/cbb/mf_06.htm [Accessed January 20, 2010]. Emphasis added. See *Ramchurn* [2010] All E.R. (D) 32, which makes it clear that the specimen directions merely provide guidance, not authority binding on the court.
50 Coroners and Justice Bill letter from Maria Eagle MP to Members of the Public Bill Committee, Coroners and Justice Bill, March 10, 2009, available at <http://www.justice.gov.uk/publications/docs/coroners-justice-letters-public-bill-comm.pdf> [Accessed January 20, 2010].
51 *McNaughten* (1843) 10 Cl. & F. 200 at 210.
52 See the following remark made by Frank Cook MP during the House of Commons General Committee on the Coroners and Justice Bill, 11th sitting, col.410 (March 3, 2009): "People who represent psychiatrists object to the extra specificity because they say that they cannot tell whether a particular condition caused a particular thing to happen, and they cannot give evidence in court to that effect. They can talk about people's mental processes, their attitudes and what was happening in general inside that person's head, but they cannot talk about it in the specific terms that seem to be required by [s.52]."
53 See R.D. Mackay, "The Diminished Responsibility Plea in Operation--An Empirical Study", in Appendix 2 of the Law Commission's Final Report, *Partial Defences to Murder*, 2004, para.20 which reveals that there was no jury trial in 77.1% of relevant cases.
54 In addition, will the new plea attract more appellate litigation?
55 Ministry of Justice, "Murder, manslaughter and infanticide: proposals for reform of the law, Impact Assessment" (Ministry of Justice, July 2008), <http://www.justice.gov.uk/publications/cp1908.htm> [Accessed January 20, 2010], p.6.
56 Ministry of Justice, "Murder, manslaughter and infanticide: proposals for reform of the law, Impact Assessment", <http://www.justice.gov.uk/publications/cp1908.htm> [Accessed January 20, 2010], p.2. Emphasis in original.

- 57 K. Coleman, "Homicide" in D. Povey (ed.), *Home Office Statistical Bulletin 03/08: Homicides, Firearm Offences and Intimate Violence 2006/07* (London: Home Office, 31 January 2008), Table 1.10.
- 58 K. Coleman, "Homicide" in *Home Office Statistical Bulletin 03/08*, January 31, 2008, p. 15.
- 59 The most recent Home Office statistics show that there were 24 such convictions in 2005/06, an increase of five. See K. Coleman and S. Osborne "Homicide" in K. Smith (ed.), *Homicides, Firearm Offences and Intimate Violence 2008-09* (London: Home Office Statistical Bulletin 01/10), Table 1.10. For 2006/07, the figure is 34 and for 2007/08 it is 27.
- 60 K. Coleman, "Homicide" in *Homicides, Firearm Offences and Intimate Violence 2008-09*, Table 1.08.
- 61 See R.D. Mackay, "The Diminished Responsibility Plea in Operation--An Empirical Study", in Appendix 2 of the Law Commission's Final Report, *Partial Defences to Murder*, 2004, para.21
- 62 *Partial Defences to Murder* (2004), Law Com. No.290, para.5.86. My empirical study can be found at appendix B of that Report.
- 63 The defence of insanity forms part of the Commission's 10th Programme of Law Reform: Law Commission, *Tenth Programme of Law Reform* (HMSO, 2008, HC Paper No.605), Law Com. No.311, para.1.20.
- 64 In addition, if such is the case, how could the impairment have "made no difference to the defendant's behaviour"? See above pp.298-299.
- 65 Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (The Stationery Office, 2004) Scots Law Com. No.195.
- 66 See s.51B(1) of the Criminal Justice and Licensing (Scotland) Bill which provides: "A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind."