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The impairment factors in the new diminished responsibility plea

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****Crim. L.R. 462** Although much has been written about the level of impairment required in diminished responsibility as a result of the Supreme Court's decision in [Golds](#) , there has been little discussion of the three "impairment factors" contained in the reformed [s.2 of the Homicide Act 1957](#) . This paper will discuss and evaluate how the appellate courts and psychiatric experts have addressed these factors.*

The diminished responsibility plea has undergone reform and contains significant changes from how it was originally drafted. The original provision contained in [s.2 of the 1957 Homicide Act](#) reads:

"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."

This was replaced by [s.52 of the Coroners and Justice act 2009](#) which provides:

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 **Crim. L.R. 463*
- (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."

This has led the appellate courts to remark on how the new plea is more structured and more open to medical scrutiny in the form of expert psychiatric input. In particular, the Supreme Court endorsed this in [Golds](#) when in the course of his judgment (in which the other members of the court concurred) Lord Hughes stated:

"... medical evidence (nearly always forensic psychiatric evidence) has always been a practical necessity where the issue is diminished responsibility. If anything, the 2009 changes to the law have emphasised this necessity by tying the partial defence more clearly to a recognised medical condition, although in practice this was always required." ¹

One of the major changes made in the reformed [s.2](#) relates to what may conveniently be referred to as the "impairment factors" contained in the new provision. While in a plea of diminished responsibility both the old and the new pleas refer to the same the level of impairment which needs to be proved by D, namely that he or she must have been "substantially impaired", the nature of the impairment in the sense of what form(s) it must take has altered. In this paper, while a brief remark will be made about the level of impairment, the bulk of the discussion will focus on the new "impairment factors" by discussing how the appellate courts and psychiatric experts have addressed these factors. In relation to the latter, I will draw on the data contained in the empirical research study of the new plea conducted by myself and Barry Mitchell which was earlier published in the Review. ²

The level of impairment

Much has already been written about the decision of the Supreme Court in [Golds](#) most of it of a critical nature. ³ On the face of it what the decision has done is to raise the level of impairment required for it to be "substantial" beyond the "more than merely trivial" to one which has more substance in the sense of being **Crim. L.R. 464* "weighty", "important" or "significant" or whatever other relevant epithet is thought to be acceptable. In our empirical study of the new plea we found that the majority (72.7%) of the psychiatric reports to which we had access were of the view that D's level of impairment had reached the level of being "substantial", a slightly higher percentage than I found in my empirical study of the old plea for the Law Commission, namely 69.7%. ⁴ The concern has been expressed that the judgment in [Golds](#) "may have a negative impact upon this figure" of 72.7% and so reduce the availability of the plea. ⁵ While this does seem possible, especially as psychiatrists have been instructed in [Golds](#) to ensure that should they offer an opinion on the matter they "will be understood to be using the word" ⁶ in the second sense referred to above, such a view may have been tempered by the Court of Appeal's decision in [Squelch](#). During the

trial, which took place before the Supreme Court's decision in *Golds*, there the disagreement amongst the three psychiatrists was whether D's impairment had been "substantial". In directing the jury, the judge said:

"'Substantially' is an ordinary English word on which you will reach a conclusion in this case, based upon your own experience of ordinary life. It means less than total and more than trivial. Where you, the jury, draw the line is a matter for your collective judgment." ⁷

This direction to the jury clearly applies the meaning of the word substantially as had originally been thought to have been the result of the Court of Appeal's decision in *Lloyd*. ⁸ In response to this Davis LJ remarked:

"As it seems to us, that concise direction amply complies with what Lord Hughes had indicated in giving the judgment in the case of *Golds* in the Supreme Court. Moreover, it commendably does so (and, again as encouraged by Lord Hughes), without undue elaboration. Further, the judge having given that instruction she then went on to stress to the jury that the experts had differed between themselves on this issue and that it was a matter for the jury to decide." ⁹

It is difficult, however, to accept Davis LJ's view that this direction to the jury complies with Lord Hughes' judgment in *Golds* for could the jury not simply decide that "any" impairment of D's beyond the "trivial" would be sufficient for it to be adjudged by them to be "substantial". However, if this is indeed a dilution of the strict approach in *Golds* then it will be welcomed by many, although it may leave psychiatrists in an uncertain position when they come to consider the meaning of the word "substantially" especially as Lord Hughes in *Golds* was clear that

"it is not enough that the impairment be merely more than trivial; it must be such as is judged by the jury to be substantial. For the same reason, if an expert witness, or indeed counsel, should introduce into the case the expression **Crim. L.R.* 465 'more than merely trivial', the same clear statement should be made to assist the jury." ¹⁰

Best then for psychiatrists to avoid the use of the word "merely" when giving an opinion that the impairment although "trivial" was sufficient in his or her clinical judgment to reach the threshold of "substantial".

The impairment factors

In the original diminished responsibility plea, there was a single impairment requirement, namely that of "mental responsibility" which Lord Hughes described in *Golds* as "a global one, partly a matter of capacity and partly a matter of moral culpability...".

¹¹ Although the concept of "mental responsibility" was much criticised for its lack of precision, empirical research into the original plea which I conducted for the Law Commission indicated that expert report writers were frequently willing to "give a clear view on this matter" ¹² and instead it was the bracketed aetiological causes in s.2(1) which were more problematic. ¹³ By way of comparison, the new s.2(1) requires that there be an impairment of one or more of three particular abilities. They are the ability:

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

In this connection, it is clear that "The new wording gives significantly more scope to the importance of expert psychiatric evidence" and that this is particularly so in relation to the three specified abilities. ¹⁴ In our "initial findings" article ¹⁵ on the operation of the new plea, we reported that experts referred most frequently to the ability to form a rational judgment, followed closely by the ability to exercise self-control and that ability to understand the nature of D's conduct was least commonly cited. Further, report-writers would often refer to a combination of the three abilities, the most common of which were the ability to form a rational judgement and to exercise self-self-control, followed by a combination of all three abilities. There were no cases in which the ability to understand one's conduct was mentioned by itself. ¹⁶ With this in mind what follows is a more detailed assessment of the data to which we had access in an attempt to discover more about how experts are dealing with the three impairment factors. In doing so each factor will be discussed separately even though, as already mentioned, they are frequently used in some form of combination. **Crim. L.R.* 466

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

In its discussion of this specified ability, the Law Commission confirmed that the wording replaced its original formula of "understanding events" in order to "ensure that the accused's lack of understanding of, say, global political events, is not relevant to his plea".¹⁷ With this in mind the revised wording now represents the first specified ability and in our empirical study, we found that of the 110 psychiatric reports to which we had access less than half (n=46) referred to this ability, a mere 28 of which were positive. This may be because the level of impairment perceived to be required to satisfy substantial impairment of this ability is higher than for the other two abilities. In this connection, it may be relevant that in the eleven cases where report writers also referred to the defence of insanity those cases which favoured the plea (n=7) were ones where the recognised medical condition was one of schizophrenia or psychosis and were ones where this particular ability was said to be satisfied. In short, this seems to confirm that the ability to understand the nature of D's conduct is much like the "nature and quality" limb of the *M'Naghten* Rules¹⁸ and that it is not easily satisfied. The fact that in our empirical study there was not a single case where this ability was used on its own to favour diminished responsibility seems to add additional support to this conclusion.

The lack of any guidance as to the meaning of the expression "nature of D's conduct" is criticised by Rudi Fortson who considers that its interpretation "may prove to be a judicial nightmare".¹⁹ Because Lord Parker's additional words in *Byrne*, namely "whether an act is right or wrong" have been omitted from this ability the question arises as to whether D's substantial impairment of this ability would encompass his lack of understanding about the wrongfulness of his conduct. As Davis LJ has made clear in *Conroy* although the ability to form a rational judgment in ability (b) is not confined to an appraisal of "whether an act is right or wrong", nevertheless "in a usual case that will be one element – and potentially an important element – on which a jury's appraisal may be directed as part of the overall circumstances".²⁰ If that is true for ability (b) then there is no reason to suppose that the same is not the case for ability (a), in which case a possible way forward might be to interpret this ability as encompassing (substantial) "unawareness of what D was doing including the legal and moral wrongfulness of his actions". This would give experts a degree of flexibility when dealing with this ability which would be wider than both limbs of the *M'Naghten* Rules.²¹ As such it would include cases where D killed V in a state of altered or impaired consciousness which would not qualify for an automatism defence²² and cases where the killing was prompted by a recognised medical condition which resulted in D believing his fatal act to be morally right. **Crim. L.R.* 467

(b) To form a rational judgment

In relation to this ability, the Commission again replaced its original wording which was "judge whether his actions were right or wrong".²³ It did so at the request of the Royal College of Psychiatrists who considered that "'form a rational judgment' was apt to cover cases the original phrase was not".²⁴ Other than that there was no further discussion about why this phrase was chosen or how it might be interpreted other than the giving of three illustrations by the Commission in its Report on Murder, Manslaughter and Infanticide.²⁵ Clearly, as drafted this ability focuses on the "formation" of rational judgment rather than on the actual judgment itself. In addition, it is "judgment" rather than "decision" which is the crucial element in this ability. Although, as noted below, there is a great deal of literature and research on the complex nature of the judgment and decision-making processes it seems clear in the light of the remark made by Davis LJ in *Conroy*, about not permitting argument in this connection to become "over-refined",²⁶ that any attempt to introduce discussion of this nature into the legal analysis will be treated in a similar manner by the courts. Nevertheless, it does seem important to ask why this wording was chosen. In that connection, the influence is clear as the chosen words are identical to those used by Lord Parker CJ in *Byrne* but with the omission of the phrase that immediately followed, namely "as to whether an act is right or wrong."²⁷ This led Davis LJ to remark in *Conroy* that although the new plea "is so worded as to an extent to reflect some of the general observations of Lord Parker CJ...It should nevertheless be emphasised that the decision, in that case, was by reference to the previous provisions of s.2 of the 1957 Act and the current version of the section certainly has distinct differences".²⁸ These differences relate to the "psychiatric tenor of the whole section" thus permitting "an expert psychiatrist, if he so wishes, to express an opinion not only on all the elements of the section but also on the ultimate issue".²⁹ With this in mind, it is important to assess how experts are using this ability in their reports.

In our empirical study we found that the ability to form a rational judgment was the most frequently cited ability—86 (78.2%) reports of which 74 were positive. It seems clear, therefore, that this ability is of importance to psychiatrists when considering how D's abnormality of mental functioning impacts on his or her behaviour. It was difficult, however, to see any pattern in the psychiatric reports in the way in which this ability was said to be satisfied which is perhaps unsurprising in view of the varied

nature of the cases which gave rise to a diminished responsibility plea together with the fact that in essence whether this ability is or is not satisfied in the context of expert opinion is a matter of clinical judgment. How this judgment is made will vary according to the way in which each expert approaches this task. However, an examination of the relevant reports may help to give some limited information about this process. First, although it is perhaps unsurprising to find that the majority of positive reports were based on a **Crim. L.R. 468* diagnosis of schizophrenia (n=35) or psychosis (n=13) it is interesting to note that although there were eleven such reports based on personality disorder and ten based on depression, eight of these personality disorder reports and nine of these depression reports resulted in murder convictions which accounted for 17 out of total of 19 positive reports in respect of this ability resulting in murder convictions.³⁰ This means that in those reports where ability (b) was said to be satisfied, those cases where the diminished responsibility plea failed were predominantly ones of personality disorder or depression leading to disagreement amongst the experts as to whether the s.2 requirements were satisfied.

Finally, two further points can be made about this particular ability. The first concerns the fact that although the ability in question is clearly described as one of "form a rational judgment" it seems that no distinction is being made between "judgment" and "decision" even though they are not the same.³¹ For example, in *Conroy* the trial judge told the jury to "apply the English language definition of the expression, namely 'a considered decision based on reason,'" ³² to which no complaint was made in the court of appeal. However, surely the draftsman would have expressly used the word "decision" if that had been regarded as the correct term to describe this impairment. Instead, it now seems as if the two words are being used interchangeably. However, even from a common-sense perspective, there is a clear difference between the two terms which might be summarised as follows. Judgment is the process of weighing up of options before making a decision as to which alternatives to choose and "forming a judgment" relates to the thought processes involved in the making of that judgment. If that is regarded as correct then should "form a rational judgment" not simply relate to the question of whether those thought processes were based on reason and logic, despite leading to an illegal outcome? That being so it is becoming clear that when considering this ability, a jury may have to consider the "defendant's thinking processes" and not restrict their deliberations to "the actual outcome".³³ Indeed, in confirming that "The wording is altogether more open-ended" Davis LJ emphasised that in terms of legal directions "the focus should be on the actual provisions of the section without undue elaboration".³⁴ That the whole of the defendant's thought processes should be considered when the jury comes to consider this ability seems also to be confirmed in *Blackman* where the court martial appeal court gives full consideration to a whole range of emotional factors which impacted on the defendant's final decision to kill the victim.³⁵ In conclusion, there is no suggestion that this particular ability is being "construed narrowly"³⁶ as currently seems to be the case in ability (a) referred to above, in which case as indicated above a way **Crim. L.R. 469* forward might be to interpret this ability as requiring an assessment of whether and how far "all D's thought processes leading up to and including the killing were based on reason and logic". This would again enable experts to adopt a wide approach when assessing the judgments made by D before and during the behaviour which led to the fatal act.

(c) To exercise self-control

Once again it seems likely that the draftsman was influenced by Lord Parker CJ's remarks in *Bryne* where he referred to the defendant's "ability to exercise will-power to control his physical acts".³⁷ It has been suggested that "This might be construed very much more widely and render the defence available in a broader range of circumstances than under (a) or (b)".³⁸ In that connection, it needs to be borne in mind that in our empirical study it was ability (b) which was most frequently used in experts' reports closely followed by the ability to exercise self-control which was cited in 77 reports (70%), 64 of which were positive. It is clear then that while this ability is of importance to psychiatrists our study may tentatively suggest that it is not as important as ability (b). Further, it must be remembered that although 32 of these reports combined abilities (b) and (c) and 24 reports combined all three abilities in only six reports was the ability to exercise self-control used on its own compared to 16 which used ability (b) on its own.³⁹ In looking at these reports it was again difficult to find any pattern as to how this ability was said to be satisfied. However, an examination of the data may again help to give some limited information about this process. First, although as with ability (b) it is again perhaps unsurprising to find that the majority of positive reports were based on a diagnosis of schizophrenia (n=26) or psychosis (n=10) it is once more interesting to note that although there were ten such reports based on personality disorder and nine based on depression, five of these personality disorder reports and four of these depression reports resulted in murder convictions which accounted for nine out of total of 19 positive reports in respect of these "recognised medical conditions" which resulted in a murder conviction.⁴⁰ This means that in those reports where ability (c) was said to be satisfied, those cases where the diminished responsibility plea failed were more likely again to be ones of personality disorder or depression leading to disagreement amongst the experts as to whether the s.2 requirements were satisfied. One might tentatively conclude, therefore, that in relation to both abilities (b) and (c) a diagnosis of personality disorder or depression

often leads to a contested trial which in turn fails to persuade the jury on the issue of diminished responsibility with a murder conviction being returned.

As for the wording used to describe ability (c), it is important to try to ascertain how the phrase might be interpreted. First, although the phrase "self-control" is the same as that used in the "loss of control" plea contained in [ss.54 – 56 of the Coroners and Justice Act 2009](#), in the former there is no need for self-control to **Crim. L.R. 470* be lost, rather this ability focuses on a failure to "exercise" self-control. This, in turn, seems to require that D's facility to control himself is (substantially) reduced. The problem here is that "exercise" and "ability" seem to mean the same thing, or at the very least it seems difficult to find a separate meaning for each. What it may be asked does the term "exercise" add here? If D's "ability" to control himself is assessed as being "substantially impaired" then would that not be enough to bring him within the new plea without the need for any consideration of what it is to be able to "exercise" self-control?⁴¹ In short, although the word "exercise" does have the judicial approval of Lord Parker CJ in *Byrne* until the court of appeal decides that it has a distinct meaning and role to play within ability (c) it is perhaps best regarded as somewhat superfluous. Of course, this does not mean that it should be ignored. Rather how the experts' reports are constructed tend towards including the word "exercise" when a conclusion is made about this ability. The court martial appeal court has also approached ability (c) in this manner. So in *Blackman* Lord Thomas CJ in drawing a conclusion that the evidence, including that of three psychiatrists, entitled the court to find diminished responsibility states in relation to ability (c) "we have also considered whether he lost his self-control (within the context of diminished responsibility)".⁴² Pausing there, it is of note that there is no mention made here of "exercise" until later in the same paragraph when Lord Thomas finally states:

"The appellant's decision to kill was probably impulsive and the adjustment disorder had led to an abnormality of mental functioning that substantially impaired his ability to exercise self-control. In our judgement the adjustment disorder from which he was suffering at the time also impaired his ability to exercise self-control." ⁴³

In short, a finding of loss (or substantial loss) of self-control is often made first followed by a conclusion which is worded using the full phraseology in ability (c) but without any discussion or analysis as to the meaning of "exercise" which again leads to the conclusion that it has no distinctive role to play in the application of ability (c). If this is correct then it might be appropriate to interpret this ability as requiring "a substantial loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning".⁴⁴ This mirrors the approach taken in the loss of control plea and approved by the court of appeal⁴⁵ and there is no reason to believe that the phrase "loss of self-control" should be given a different meaning in diminished responsibility. In addition, this approach gives experts the opportunity to focus on the degree to which D's normal powers of reasoning were affected by his recognised medical condition which can, if necessary, be followed by citing the full phraseology contained in ability (c). **Crim. L.R. 471*

Concluding remarks

The new diminished responsibility plea was introduced for the twin purposes of clarification and modernisation.⁴⁶ However, while the latter may have been achieved it is open to doubt as to whether the new provision achieves the goal of "clarification" insofar as the impairment factors are concerned. In this connection, the official Circular from the Ministry of Justice dealing with the new plea states:

"In drafting the new partial defence, it was envisaged that when determining what constitutes a 'recognised medical condition', practitioners would have recourse to existing accepted classificatory lists." ⁴⁷

While this makes it clear that this matter is one of medical/psychiatric expertise, the same cannot be said of the three abilities in respect of which the Circular gives no explanation or further guidance. While the appellate courts have been at pains to confirm that the new plea "puts the emphasis very much on what are psychiatric issues relating to all aspects of the defence,"⁴⁸ one may legitimately ask whether the impairment factors in the new [s.2](#) are psychiatric in the manner which is clearly the case for "recognised medical condition". Certainly, "substantially" is not a medical or psychiatric concept and the same seems to be true for the three abilities described in subs. (1A). Take, for example, "loss of self-control" which appears in both the loss of control and diminished responsibility pleas. In respect of the former it is clear that this is not a medical/psychiatric matter so how, it may be asked, could the mere addition of the words "ability to exercise" in ability (c) transform it as such. Of course, psychiatrists are required to make clinical judgments in respect of these factors when making expert assessments for the

purposes of diminished responsibility. However, these judgments are essentially evaluative and built around other factors such as diagnosis and the results of interviewing the defendant. In short, these important abilities discussed above which are now central to any diminished responsibility plea are not purely medical or psychiatric matters but are rather medicolegal concepts which require careful analysis not only from a medical but also from a legal perspective so that both professions have a clear(er) view of what is required for each. In this paper some tentative suggestions have been made as to how the three abilities might be interpreted so as to give experts a wide degree of flexibility when forming a clinical judgment as to whether D's abilities in (a), (b) or (c) were substantially impaired.⁴⁹ To date there has been very little discussion or critique of the impairment factors in s.2 other than in respect of "substantially" so it is to be hoped that in due course this will be remedied as the appellate courts, lawyers and psychiatrists continue to grapple with a plea which is markedly different from the original. If this short paper can add to that debate, then its aim will have been achieved.

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Footnotes

- 1 [Golds \[2016\] UKSC 61; \[2016\] 1 W.L.R. 5231; \[2017\] 1 Cr. App. R. 18](#) (p.273) at [38].
- 2 See R. Mackay and B. Mitchell, "The New Diminished Responsibility Plea in Operation: Some Initial Findings" [2017] *Crim. L.R.* 18. With thanks to the Crown Prosecution Service for permitting access to a sample of new diminished responsibility cases.
- 3 See M. Gibson, "Diminished responsibility in Golds and beyond: insights and implications" [2017] *Crim. L.R.* 543 and case commentaries by K. Laird [2017] *Crim. L.R.* 316 and R. Mackay [2017] *Archbold Review Issue 1* p.4.
- 4 *Partial Defence to Murder* (2004), *Law Com. No. 290, Appendix B, para.32*.
- 5 K. Laird case comment on [Golds \[2017\] Crim. L.R. 316](#), 317.
- 6 [Golds \[2016\] UKSC 61; \[2016\] 1 W.L.R. 5231; \[2017\] 1 Cr. App. R. 18](#) (p.273) at [42].
- 7 [Squelch \[2017\] EWCA Crim 204](#) [37].
- 8 [Lloyd \[1967\] 1 Q.B. 175](#) at 178.
- 9 [Squelch \[2017\] EWCA Crim 204](#) at [38].
- 10 [Golds \[2016\] UKSC 61; \[2016\] 1 W.L.R. 5231; \[2017\] 1 Cr. App. R. 18](#) (p.273) at [41].
- 11 [Golds \[2016\] UKSC 61; \[2016\] 1 W.L.R. 5231; \[2017\] 1 Cr. App. R. 18](#) (p.273) at [7].
- 12 *Partial Defences to Murder* (2004), *Law Com. No.290, Appendix B, p.152*.
- 13 *Partial Defences to Murder* (2004), *Law Com. No.290, Appendix B, p.151*. See also R.D. Mackay, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] *Crim. L.R.* 117.
- 14 See [Brennan \[2014\] EWCA Crim 2387; \[2015\] 1 W.L.R. 2060; \[2015\] 1 Cr. App. R. 14](#) at [49] and [51], see also [Squelch \[2017\] EWCA Crim 204](#) at [53].
- 15 Mackay and Mitchell, "The New Diminished Responsibility Plea in Operation: Some Initial Findings" [2017] *Crim. L.R.* 18.
- 16 Mackay and Mitchell, "The New Diminished Responsibility Plea in Operation: Some Initial Findings" [2017] *Crim. L.R.* 18, 33–34.
- 17 *Law Commission, Murder, Manslaughter and Infanticide* (2006), *Law Com. No.304, para.5.112, fn.84*.
- 18 See R. Mackay, "The New Diminished Responsibility Plea" [2010] *Crim. L.R.* 296.
- 19 R. Fortson, "The Modern Partial Defence of Diminished Responsibility" in *Reed and Bohland (eds), Loss of Control and Diminished Responsibility* (Ashgate, 2011), p.32.
- 20 [Conroy \[2017\] EWCA Crim 81; \[2017\] 2 Cr. App. R. 26](#) (p.371) at [33].
- 21 Recently confirmed in [Loake v CPS \[2017\] EWHC 2855 \(Admin\); \[2018\] 1 Cr. App. R. 16](#) at [238].

See *C* [2013] *EWCA Crim* 223; [2013] *M.H.L.R.* 171; [2013] *Crim. L.R.* 923 at [22] where Hughes LJ confirmed that automatism requires "complete destruction of voluntary control".

Law Commission, Murder, Manslaughter and Infanticide (2006), para.5.112, fn.85.

Law Commission, Murder, Manslaughter and Infanticide (2006), para.5.112, fn.85.

Law Commission, Murder, Manslaughter and Infanticide (2006), para.5.121.

Conroy [2017] *EWCA Crim* 81; [2017] 2 *Cr. App. R.* 26 (p.371) at [28].

Bryne [1960] 2 *Q.B.* 396 at 403.

Conroy [2017] *EWCA Crim* 81; [2017] 2 *Cr. App. R.* 26 (p.371) at [5].

Conroy [2017] *EWCA Crim* 81; [2017] 2 *Cr. App. R.* 26 (p.371) at [6].

It should be borne in mind that in the majority of cases to which we had access there were multiple reports leading to a total of 110 accessible psychiatric reports from 90 cases, see Table 6 at [2017] *Crim. L.R.* 29.

There is a burgeoning body of psychological research in this area, see, e.g. *D.J. Koehler and N. Harvey (eds), Blackwell Handbook of Judgment and Decision Making* (Blackwell Publishing, 2004) where the editors in their Preface remark at p.xv "judgment is defined as the set of evaluative and inferential processes that people have at their disposal and can draw on in the process of making decisions. Decision making is treated quite broadly, covering not only the traditional topics of riskless and risky choice, but also examining the rules of social, emotional and cultural influences".

Conroy [2017] *EWCA Crim* 81; [2017] 2 *Cr. App. R.* 26 (p.371) at [27].

Conroy [2017] *EWCA Crim* 81; [2017] 2 *Cr. App. R.* 26 (p.371) at [37]. See also [32] and *Squelch* [2017] *EWCA Crim* 204 at [44].

Conroy [2017] *EWCA Crim* 81; [2017] 2 *Cr. App. R.* 26 (p.371) at [38].

Blackman [2017] *EWCA Crim* 190 at [109] to [111].

D. Ormerod and K. Laird, Smith and Hogan Criminal Law, 14th edn (Oxford University Press, 2015), p.615.

Bryne [1960] 2 *Q.B.* 396 at 403.

Ormerod and Laird, Smith and Hogan Criminal Law (2015), p.615.

Mackay and Mitchell, "The New Diminished Responsibility Plea in Operation: Some Initial Findings" [2017] *Crim. L.R.* 18, 34 at Table 11.

See above, fn.30.

The Law Commission's original wording at para.5.112 of Law Com. No.304 is "control him or herself" without any reference to "exercise" which was added later. It is not clear how this came about as the MOJ states at para.50 of "Murder, manslaughter and infanticide: proposals for reform of the law", Consultation Paper CP19/08 Published on 28 July 2008, "The Law Commission recommendation clarifies that the following must be substantially impaired: the defendant's capacity (i) to understand the nature of his or her conduct, (ii) to form a rational judgment or (iii) to control him or herself. We agree that this is helpful and have incorporated this wording in our draft clause". But in the same Consultation Paper cl. (1A)(iii) of the draft bill at Appendix B inserts "exercise" without any explanation.

Blackman [2017] *EWCA Crim* 190 at [112].

Blackman [2017] *EWCA Crim* 190 at [112].

See *Ormerod and Laird, Smith and Hogan Criminal Law* (2015), p.583.

In *Jewell* [2014] *EWCA Crim* 414 at [24].

See Mackay and Mitchell, "The New Diminished Responsibility Plea in Operation: Some Initial Findings" [2017] *Crim. L.R.* 18, 20.

Circular 2010/13 at para.11.

Squelch [2017] *EWCA Crim* 204 at [6].

This is surely within the spirit of the new s.2 which was reformed with a view to giving psychiatrists more input by way of their expertise.