The new diminished responsibility plea in operation: some initial findings

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R. v Dowds (Stephen Andrew) [2012] EWCA Crim 281; [2012] 1 W.L.R. 2576; [2012] 2 WLUK 629 (CA (Crim Div))
R. v Brown (Robert) [2011] EWCA Crim 2796; [2012] 2 Cr. App. R. (S.) 27; [2011] 12 WLUK 6 (CA (Crim Div))
R. v Golds (Mark Richard) [2014] EWCA Crim 748; [2015] 1 W.L.R. 1030; [2014] 5 WLUK 90 (CA (Crim Div))
R. v Brennan (Michael James) [2014] EWCA Crim 2387; [2015] 1 W.L.R. 2060; [2014] 11 WLUK 653 (CA (Crim Div))

Legislation cited
Homicide Act 1957 (c.11) s.2(1)

***Crim. L.R. 18** **Introduction**

The diminished responsibility plea which reduces murder to manslaughter has been the subject of major reform. The essentials of the old plea were contained in the original Homicide Act 1957 s.2(1) , which provided:

"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) which is unchanged makes it clear that, as with insanity, the burden of proving this defence on a balance of probabilities rests upon the accused [1] and if the plea is successful, subs. (3) ensures a conviction for manslaughter, thus enabling the judge to exercise discretion as to sentence.

The wording of the original s.2(1) had been the subject of much criticism as was clearly outlined in the *Law Commission's Consultation Paper on Partial Defences to Murder* [2] and again in connection with its wider project on murder and manslaughter. In the former the Commission described past reform proposals which did not seem to represent any radical departure from the original plea. More importantly, the Commission, drawing on the results of the empirical research it had commissioned, concluded: ***Crim. L.R. 19**

"Our view is that for the time being, and pending any full consideration of murder, s.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." [3]

Despite this clear conclusion that no reform was required the Commission, under the heading "A signpost for the future", stated:

"That said, we should not be shy about putting forward our thinking as to how a partial defence of diminished responsibility might be framed, were it to continue to be a defence under a reformed law of murder. We put forward our tentative suggestion as a 'stalking horse' against which the wisdom of having any such defence may be judged." [4]

The Commission continued its consideration of diminished responsibility as part of its work on murder with the result that its "tentative suggestion", after further consultation, was reformulated. [5] This proposal was then considered and consulted on by the Ministry of Justice (MOJ). Having done so the MOJ concluded that it was an appropriate vehicle for reform, with the result that, after Parliamentary scrutiny, a new diminished responsibility plea, modelled on the Law Commission's proposal, was enacted in the Coroners and Justice Act 2009 s.52 which came into force on 4 October 2010 and provides:

> 52 **"Persons suffering from diminished responsibility (England and Wales)**
>
> (1) In s.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; ***Crim. L.R. 20***
>
> (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." [6]

Both the MOJ and Government spokespersons repeatedly stated that all the reformulation of s.2 does is to update and modernise the wording of the section. Thus, in the Circular dealing with the new plea issued by the Criminal Policy Unit of the MOJ it is stated that "It replaces the existing definition of the partial defence with a new, more modern one". [7] A similar view was expressed by Maria Eagle MP the then Parliamentary under Secretary of State saying "it is really just a clarification of the way in which that defence works". [8] In essence, therefore, the "official" view has been that the old s.2 was in need of clarification and modernisation. Clarification as the original plea did not explain what was involved in the substantial impairment of the defendant's mental responsibility; modernisation because the defence was not drafted with the needs and practices of medical experts in mind, so was out of step with current psychiatric thinking.

Recent Court of Appeal decisions on diminished responsibility

Since the relevant provisions in the Coroners and Justice Act 2009 came into effect the Court of Appeal has had the following opportunities to consider certain aspects of the new law.

In *Dowds* [9] the appeal concerned the relationship between the phrase "recognised medical condition" in the new law and acute intoxication. More precisely, the question was whether "voluntary and temporary intoxication may now give rise to diminished responsibility", because "acute intoxication is a "recognised medical condition" within section 2(1)(a) …". [10] On behalf of

the court, Hughes LJ explained that the new law in the 2009 Act should be read subject to the well-established common law principle that a defendant cannot rely on voluntary intoxication other than in cases, such as murder, where the prosecution must prove "specific intent". There had been no indication of any dissatisfaction with that principle and there was nothing to suggest that Parliament had intended to alter it when the 2009 Act was passed. [11] Thus, where (as in this case) the intoxication is voluntary, it cannot per se raise the issue of diminished responsibility.

An equally significant issue considered by the Court of Appeal is the meaning of "substantial impairment". In the first case on this, *Brown* , [12] the court was asked to consider whether the words in s.52(1)(b) "substantially impaired D's ability to ***Crim. L.R. 21*** do one or more of the things mentioned in sub-section (1A)" were different from the original wording in s.2(1) "substantially impaired his mental responsibility for his acts …". Delivering the leading judgment, the Lord Chief Justice opined:

"We do not think that it does. When Parliament enacted the 2009 Act it was perfectly well aware of the way in which the court had interpreted the phrase "substantial impairment" for very many years, (see *R -v- Ramchurn (2010) 2 Cr App R 3* ." [13]

The jury had been directed that "substantially impaired" meant they had to decide whether the defendant's impairment was more than minimal. Thus, the trial judge had been correct to conclude that the accused's responsibility could be diminished even though it remained considerable in degree. In each case, having considered the evidence regarding the defendant's conduct and his mental condition, the judge may find that he nonetheless still "retained real culpability" for his actions. This, in turn, is something that the judge can then reflect in the sentence.

But whereas in *Brown* Lord Judge CJ thought that "substantial impairment" bears the same meaning in the amended version of the law as in the original, a more controversial view was expressed by the Court of Appeal in *Golds* . [14] There Elias LJ held that if the jury asked for help in understanding the meaning of "substantial" in this context they should be directed along the lines indicated in *Simcox* . [15] In that case the judge said they should ask themselves:

"Do we think, looking at it broadly as common-sense people, there was a substantial impairment of his mental responsibility in what he did? If the answer is 'no', there may be some impairment, but we do not think it was substantial, we do not think it was something that really made any difference, although it may have made it harder to control himself, to refrain from crime, then you would find him guilty …"

Prior to the decision in *Golds* the orthodox view was that the impairment need not be total but it must be more than minimal or trivial, as stated by the Court of Appeal in *Lloyd* . [16] Moreover, the court had specifically accepted in *Ramchurn* that there was no inconsistency between *Simcox* and *Lloyd* . [17] But in *Golds* Elias LJ took a different view. [18] He explained his approach thus:

"At the heart of this submission is the contention that the word 'substantial' is capable of having two different meanings. One possible meaning is that the abnormality of mental functioning substantially impairs if it does so to more than a trivial or minimal extent: it then has substance and the impairment is substantial. A second meaning is that the abnormality of mental functioning only substantially impairs where, whilst not wholly impairing the defendant's ability to do the things specified in section 2(1A) , it significantly or appreciably impairs that ability, beyond something that is merely more than ***Crim. L.R. 22*** trivial or minimal. For example, if a salary is described as substantial, that would not convey the meaning that it is something a little more than minimal; on the contrary, it suggests that it is significantly more than that." [19]

Elias LJ considered that *Simcox* adopted the second meaning [20] and since that was his preferred interpretation it seems that, assuming the decision is confirmed, the bar has effectively been raised. It will no longer be sufficient for the defence to persuade the court that the impairment was more than trivial or minimal; rather it must be greater still, though it need not be total. One likely consequence of this could be that the number of successful diminished responsibility pleas will fall.

At the time of writing, a further appeal has been made to the Supreme Court whose decision is currently awaited.

Finally, in *Brennan* [21] the court had to consider the implications of the presence of uncontradicted psychiatric evidence for the role of the jury. In that case a consultant psychiatrist opined that the defendant suffered from a schizotypal disorder and emotionally unstable personality disorder which would have substantially impaired his ability to form a rational judgment and to exercise self-control at the relevant time. There was no expert evidence from the Crown and the consultant psychiatrist's

evidence was not challenged. No application was made that the issue of murder should be withdrawn from the jury, and the trial judge directed the jury that they need not accept the psychiatrist's conclusions in their entirety and that they "might place greater weight on [the defendant's] ability to conduct his life in many regards coherently and normally". Allowing the appeal against conviction for murder, the Court of Appeal ruled that the judge should have withdrawn the charge of murder from the jury.

Two potentially conflicting principles were raised here: (1) that criminal cases are decided by juries, not experts; and (2) that juries must base their verdicts on the evidence before them. The re-wording of the law means that psychiatric and medical experts can and should be expected to play a very significant role and are arguably best qualified to reach a decision on what might be called the "ultimate issue"—whether the defendant's ability, etc. was substantially impaired and thus whether the plea should succeed. The court made it clear that where there is uncontradicted expert evidence and there is no other evidence to cast doubt on that expert evidence then the jury should not be able to depart from it. Moreover, even where there is other evidence the jury may still be unable to depart from the expert evidence if that other evidence is "too tenuous or, taken at its highest, insufficient (set in the light of the uncontradicted expert evidence) to permit a rational rejection of the defence of diminished responsibility". [22] In the course of his judgment Davis LJ also made the following remark about the nature of the new plea stating

"overall the provisions of s.2 as amended are altogether significantly more structured than the former provisions, in particular by reference to 'substantial impairment of mental responsibility' as contained in the original version of ***Crim. L.R. 23** s.2 of the 1957 Act . As we see it, most, if not all, of the aspects of the new provisions relate entirely to psychiatric matters". [23]

While there is nothing in what the Court of Appeal has said in these recent decisions that clearly signals any major changes brought about by the Coroners and Justice Act 2009 , [24] it should also be pointed out that our empirical research of the new plea was unable to take account of how both *Golds* and *Brennan* may affect the future of the new diminished responsibility plea and in particular what impact they may have on how psychiatrists evaluate these "new provisions".

The CPS Research Study [25]

In the remainder of this article we discuss an empirical study of 90 cases involving the new diminished responsibility plea in an attempt to ascertain how the new plea is operating as well as to try to discover whether the "official" view of the new plea referred to above is correct or whether the reformulated s.2 goes further and is more far reaching in scope. In doing so we will also draw on the empirical study of the old plea conducted for the Law Commission [26] while attempting to compare the two data sets. In doing so it must be pointed out that the Law Commission study was of a larger data set of 157 cases and that any comparisons made need to be viewed with that in mind.

At the outset it is worth briefly noting the official statistics on the successful use of diminished responsibility as a partial defence. In this connection it is interesting that the number of successful pleas has fallen. For example, the most recent statistics reveal that from April 2013 to March 2014 the total number of successful pleas was 27 and for the previous two years 32 and 31 respectively. [27] However, it has to be pointed out that the fall in numbers is not linked in some way to the new plea but is rather part of an ongoing trend. Thus in 2002/2003 the number was 17 [28] which can be contrasted with 1997 where the total was 40 and 1992 where the total was 78. [29] In short there has been a consistent reduction in the number of successful diminished responsibility pleas in recent years. [30]

Through the good offices of the Crown Prosecution Service (CPS) we were given permission, through its computerised Case Management System (CMS), to access the available documentation relating to the cases in which diminished responsibility pleas were raised under the new s.2 . Although this approach had the ***Crim. L.R. 24** advantage of convenience and ease of access it also brought with it disadvantages in that in some cases the data were sometimes incomplete. In particular, in a number of cases there were no psychiatric reports to be found on CMS or at least none to which we could gain access. In other cases, we had access to some reports but not all of them. Although the results of our study of the operation of the new plea have to be read in the light of this limitation we nevertheless were able to collect data on 90 cases where diminished responsibility had played a role in the trial proceedings.

Results of the CPS Study

What follows is an analysis of these cases together with some attempt to make a comparison with the results of the Law Commission study of the old plea. In this way we hope to be able to evaluate the new s.2 so as to ascertain whether the changes it has implemented are just ones of clarification and modernisation or are more than this.

Participants and the relationships between them

The characteristics of the defendants and victims in the CPS study were broadly similar to those in the Law Commission research; there were no obvious contrasts between the two samples. The majority (almost 85%, n=83) of defendants in the CPS study were male.[31] The mean age of defendants was 32 years, the youngest being 14 and the oldest was 88.[32] Roughly 61% were white and born in the UK.[33] Just over two-fifths of defendants had previous convictions, and nearly a third had been convicted for offences of violence.[34] Almost two out of three defendants had had previous contact with psychiatric services.

The victims consisted of almost equal numbers of women (48) as men (50)[35]; the mean age of victims was 39.2 years, with the youngest being just 12 weeks and the oldest 86 years.[36] The vast majority of victims were known to the accused (89.8%, n=88). The largest group was parent/step-parent (16.3%, n=16), compared to the Law Commission study in which the biggest group was spouses (25.5%, n=40).

As in the Law Commission study the great majority of female victims (44 of the 48—91.6%)[37] were killed by a male defendant. The eight female defendants in the CPS study, between them killed eight victims, four males and four females.[38] Female victims were more likely than their male counterparts to be killed by a present or former partner/lover—41.7%, compared to 20.0%. (The respective figures in the Law Commission study were 64.2% compared to 19.7%). Ten of the 48 female victims in the CPS study, but only three of the 50 males, were killed by their spouse or ex-spouse. Conversely, a larger proportion of male victims than ***Crim. L.R. 25*** females were killed by a friend or acquaintance—36.0%, compared to 10.4%. (The contrast in the Law Commission study was greater—57.1% compared to 6.9 %.)

It would be unwise to draw any firm conclusions about the statistics relating to the gender of defendants because the CPS study contained so few females. Nevertheless, in all the cases where the participants were strangers to one another, the defendants were male.

Offence characteristics

The statistics relating to the venues of the offences in the CPS study were almost identical to those in the Law Commission study. The largest group (40.0%) occurred in the matrimonial/partners'/family home, and a further 25.6% in the victim's home. Just less than one fifth of the homicides were committed in the street.

Figures for the *apparent circumstances* in which the killings took place are set out in Table 1.

Table 1: Apparent Circumstances in the Law Commission and CPS Studies

Apparent Circumstances	**Law Commission Study**		**CPS Study**	
	No.	**%**	**No.**	**%**
Rage/quarrel/fight with known person	27	17.2	26	28.9
Rage/quarrel/fight with unknown person	46	29.3	3	3.3
Jealousy	8	5.1	1	1.1
Faction fighting	0	0	1	1.1
Mercy killing	4	2.5	2	2.2
Motiveless — suspect mentally disturbed	66	42.1	50	55.6

Drink/drug related	0	0	1	1.1
Other	6	3.8	1	1.1
Not known	0	0	2	2.2
In furtherance of theft or gain	0	0	3	3.3
Totals	157	100.0	90	100.0

Two principal points of comparison can be made between the earlier Law Commission study and our more recent CPS study. First, there is a smaller proportion of offences resulting from rage or quarrel or fight in our CPS study (32.2% compared to 46.5%)—and a significant drop in those involving a person not previously known to the accused (3.3% compared to 29.3%). Secondly, in both studies the largest single group of cases was those where the killing appeared motiveless and committed by a suspect who was mentally disturbed. Note, of course, that this does not imply that defendants in some of the other cases were not mentally disturbed when they committed the fatal assault. In addition, in view of the very nature of a diminished responsibility plea the numbers of cases categorised as "suspect mentally disturbed" is perhaps lower than might have been expected. ***Crim. L.R. 26***

Table 2 shows a considerable degree of consistency in the *method* of killing between the two studies with the use of a "sharp instrument" predominating.

Table 2: Method of Killing in the Law Commission and CPS Studies

Method	**Law Commission Study**		**CPS Study**	
	No.	**%**	**No.**	**%**
Sharp instrument	96	61.1	62	63.3
Blunt instrument	21	13.4	14	14.3
Kicking or hitting	12	7.6	2	2.0
Strangulation	11	7.0	8	8.2
Poisoning	1	0.6	0	0
Shooting	3	1.9	2	2.0
Suffocation	3	1.9	5	5.1
Burning	3	1.9	2	2.0
Other [39]	7	4.5	3	3.1
Totals	157	100.0	98	100.0

Aspects of the trial

The CMS database could not shed light on all of the intricacies of the trial process in each case but the following data were extracted and may help to explain a number of different aspects of what took place. First, the frequency with which jury trials took place is shown in Table 3.

Table 3: Jury Trial in the Law Commission and CPS Studies

Jury Trial	**Law Commission Study**	**CPS Study**

	No.	%	No.	%
Yes	36	22.9	39	43.3
No	121	77.1	51	56.7
Totals	157	100.0	90	100.0

Clearly, the more recent CPS study found a higher proportion of cases being dealt with as jury trials (43.3%) than occurred in the Law Commission research (22.9%) which indicates that more cases are being contested under the new law. Although care should be taken before drawing any firm conclusions from the data the figures do seem to suggest that fewer diminished responsibility pleas are now being accepted under the new s.2 .

The Law Commission study found that in a slightly higher proportion of female (than male) defendants there was no jury trial (86.2%, compared to 75.0%), but ***Crim. L.R. 27*** in our CPS study there was hardly any difference between defendants (56.6% for males, and 57.1% for females). [40]

Verdicts

Details of the verdicts in the two studies are shown in Table 4 below.

Clearly, there was a higher proportion of murder verdicts in the CPS study than in the earlier Law Commission research—34.4% compared to 14.0%. All but one of the 31 murder verdicts involved male defendants. The proportion of diminished responsibility manslaughter verdicts fell from 80.3% to 65.6%.

We were also able to collect data on the relationship between jury trial and verdicts, and a comparison of the Law Commission and our CPS studies is set out in Table 4.

Table 4: Verdict by Jury Trial in the Law Commission and CPS Studies

	Law Commission Study						Our CPS Study					
	Jury Trial		No Jury Trial		Totals		Jury Trial		No Jury Trial		Totals	
Verdict	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Murder	22	61.1	0	0.0	22	14.0	31	79.5	0	0.0	31	34.4
Manslaughter [41]	6	16.7	3	2.5	9	5.7	0	0.0	0	0.0	0	0.0
DR Manslaughter	8	22.2	118	97.5	126	80.3	8	20.5	51	100.0	59	65.6
Totals	36	100.0	121	100.0	157	100.0	39	100.0	51	100.0	90	100.0

It is notable that 31 of the 39 (79.5%) contested cases in the CPS study—compared to only 61.1% in the Law Commission study—resulted in murder convictions, all of which were unsuccessful diminished responsibility pleas. Where there was a jury trial the proportion of cases in which the defendant avoided a murder conviction decreased from 38.9 % in the Law Commission study (i.e. eight diminished verdicts plus six unspecified manslaughters), to 20.5% in the CPS study.

The sentence

Figures relating to the sentences imposed in the Law Commission and CPS studies are shown in Table 5 below.

The numbers in many cases are small and so care is needed when interpreting the statistics, but some cautious observations may be made. For example, although slightly fewer of the diminished manslaughter verdicts in the CPS study resulted in the imposition of a restriction or hospital order (49.2% compared to 54.0%), five (5.6%) Hybrid Orders were given in the CPS study which means the figures are almost identical. Clearly, a larger proportion of cases in the CPS study resulted in a discretionary

life sentence. None of the defendants in the CPS study were subjected to a probation or supervision order, whereas of the 17 cases in the Law *Crim. L.R. 28* Commission study where such an order was imposed, 11 involved female defendants.

The relationship between the verdicts and the sentences in the two studies is also shown in Table 5 below.

Table 5: Verdicts and Sentences in the Law Commission and CPS Studies

	Law Commission Study Verdict			CPS Study Verdict	
Sentence	**Murder**	**Manslr**	**DR Manslr**	**Murder**	**DR Manslr**
Mandatory Life	22	0	0	31	0
Discretionary Life	0	2	10	0	12
Over 10 years' impt	0	0	0	0	2
7 to 10 years' impt	0	4	8	0	3
5 to 7 years' impt	0	0	10	0	0
3 to 5 years' impt	0	2	7	0	4
1 to 3 years' impt	0	0	5	0	1
Under 1 year's imp	0	0	0	0	1
Community Sentence	0	1	16	0	0
Fully Susp'd Sentce	0	0	2	0	1
Hospital Order with Restrictions	0	0	62	0	27
Hospital Order	0	0	6	0	2
Hybrid Order	0	0	0	0	5
IPP	0	0	0	0	1
Totals	22	9	126	31	59

In many respects the relationship between verdicts and sentences bears a close resemblance in the two studies. For example, the proportions of diminished manslaughters that resulted in restriction orders were similar—45.8% in the CPS study and 49.2% in the Law Commission study—and 40.7% of the CPS cases resulted in traditional punishments compared to 46.0% in the Law Commission study.

Psychiatric reports

Unfortunately, in 26 of the 90 cases in the CPS study there were no psychiatric reports that were accessible through the CMS and in other cases it was only possible to access some of the reports even though it was clear that others had been prepared and appeared to have been referred to at trial.

The numbers of psychiatric reports accessed in each case are shown in Table 6 below.

In the CPS study there was a total of 110 accessible reports and 366 in the earlier Law Commission study. *Crim. L.R. 29*

Reports in the CPS study were requested in almost equal numbers by the defence and prosecution (54 and 52 respectively), whereas in the Law Commission research the prosecution requested 129 and the defence slightly more (160).

Table 6: Psychiatric Reports in the Law Commission and CPS Studies

Number of Reports	Law Commission Study		CPS Study	
	No.	%	No.	%
1	18	11.5	26	28.9
2	65	41.4	31	34.4
3	47	29.9	6	6.7
4	13	8.3	1	1.1
5	5	3.2	0	0
0	9	5.7	26	28.9
Totals	157	100.0	90	100.0

Primary diagnosis [42]

Details of the primary diagnoses are shown in Table 7. In both the Law Commission and CPS studies the four most frequent diagnoses were the same—schizophrenia, depression, personality disorder, and psychosis—though there was a slight variation within that group.

Table 7: Primary Diagnosis in the Law Commission and CPS Studies

Primary Diagnosis	Law Commission Study		CPS Study	
	No.	%	No.	%
Schizophrenia	37	23.6	34	37.8
Depression	45	28.7	13	14.4
Personality Disorder	20	12.7	15	16.7
Psychosis	20	12.7	15	16.7
Mental Impairment	4	2.5	2	2.2
Addiction	7	4.5	2	2.2
Adjustment Disorder	3	1.9	3	3.3
Other	15	9.6	3	3.3
No Mental Disorder	3 [43]	1.9	0	0
Unclear	3	1.9	1	1.1
PTSD	0	0	2	2.2
Totals	157	100.0	90	100.0 ***Crim. L.R. 30***

Key: A = Schizophrenia; B = Depression; C = Personality Disorder; D = Psychosis; E = Mental Impairment; F = Addiction; G = Adjustment Disorder; H = Other; I = No Mental Impairment; J = Unclear; K = PTSD.

Table 8: Relationship between Primary Diagnosis and Sentence in the Law Commission and CPS Studies

Sentence	Law Commission Study											CPS Study										
	A	B	C	D	E	F	G	H	I	J	Totals	A	B	C	D	E	F	G	H	J	K	Totals
Mandatory Life	0	6	5	1	0	1	2	4	3	0	22	4	5	11	5	1	1	1	2	1	0	31
Discretionary Life	1	0	8	1	0	2	0	0	0	0	12	3	1	3	3	1	0	0	0	0	1	12
Over 10 yrs' imp.	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	2
7 – 10 yrs' imp.	0	3	1	1	1	1	0	4	0	1	12	0	2	1	0	0	0	0	0	0	0	3
5 – 7 yrs' imp.	0	4	1	1	0	1	0	3	0	0	10	0	0	0	0	0	0	0	0	0	0	0
3 – 5 yrs' imp.	0	5	1	2	0	0	1	0	0	0	9	0	2	0	0	0	0	1	0	0	1	4
1 – 3 yrs' imp.	0	4	1	0	0	0	0	0	0	0	5	0	1	0	0	0	0	0	0	0	0	1
Under 1 yr's imp.	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1
Probn./Supervn.	0	11	1	0	1	2	0	2	0	0	17	0	0	0	0	0	0	0	0	0	0	0
Fully Suspended Sent.	0	2	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	1	0	0	1
Restriction Order	33	8	2	14	1	0	0	2	0	2	62	24	0	0	3	0	0	0	0	0	0	27
Hospital Order	3	2	0	0	1	0	0	0	0	0	6	0	1	0	1	0	0	0	0	0	0	2
Hybrid Order	0	0	0	0	0	0	0	0	0	0	0	2	0	0	3	0	0	0	0	0	0	5
IPP	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	1
Totals	37	45	20	20	4	7	3	15	3	3	157	34	13	15	15	2	2	3	3	1	2	90 *Crim. L.R. 31

In the CPS study schizophrenia was the most common primary diagnosis, followed by equal numbers of personality disorder and psychosis, and then depression. The Law Commission study produced slightly different results in this respect, with depression being the most frequent diagnosis, followed by schizophrenia and then equal numbers of personality disorder and psychosis.

Table 9: Relationship between Primary Diagnosis and Jury Trial in the Law Commission and CPS Studies

Primary Diagnosis	Law Commission Study			CPS Study		
	Jury Trial	No Jury Trial	Totals	Jury Trial	No Jury Trial	Totals
Schizophrenia	1	36	37	7	27	34
Depression	8	37	45	5	8	13
Personality Disorder	8	12	20	12	3	15
Psychosis	2	18	20	6	9	15
Mental Impairment	1	3	4	2	0	2
Addiction	3	4	7	1	1	2
Adjustment Disorder	2	1	3	2	1	3
Other	7	8	15	2	1	3
No Mental Impairment	3	0	3	0	0	0
Unclear	1	2	3	1	0	1
PTSD	0	0	0	1	1	2
Totals	36	121	157	39	51	90

A statistical analysis of the relationship between the primary diagnosis and the sentence imposed by the courts in the two studies is set out above in Table 8. Under the old and the new law restriction orders were most commonly made where the defendant

was suffering from schizophrenia; this is especially so in the CPS study. Not surprisingly perhaps, the other group of cases most likely to result in this outcome was those diagnosed with some form of psychosis. Generally, in the earlier Law Commission study the primary diagnoses seemed to be associated with a range of sentences. But it is worth noting that 11 of the 17 defendants who were given a probation or supervisions order were diagnosed as suffering from depression. No defendants received such a sentence in the CPS study. Of the 13 cases in the CPS study where depression was the "recognised medical condition" all but one resulted in a sentence of imprisonment, six of which were life sentences (five mandatory and one discretionary). Only one case resulted in a hospital order. In contrast, defendants in the Law Commission study who suffered from depression received a range of sentences.

A further notable feature of Table 8 is that 11 of the 15 cases in the CPS study in which the "recognised mental condition" was a personality disorder were ***Crim. L.R. 32*** convicted of murder: a further three resulted in a discretionary life sentence, and the other one resulted in a prison sentence of between seven and 10 years. In the Law Commission study five of the personality disorder cases resulted in mandatory life sentences and an additional eight in discretionary life sentences. Fixed term custodial sentences were imposed in a further four cases.

It is interesting to note the relationship between primary diagnosis and jury trial, as shown in Table 9 above. Although more than half (56.7%) the cases in the CPS study were dealt with by way of guilty plea, there was a trial in most of the personality disorder cases (12 of the 15). (In the earlier Law Commission study there was no trial in two-thirds of the personality disorder cases.) In addition, whilst as noted earlier in this article the proportion of trials was greater in the CPS study than under the old law, those cases where the "recognised medical condition" was schizophrenia—and, to a slightly lesser extent, psychosis—remained very likely to be dealt with by way of guilty plea.

Report opinions on diminished responsibility

Clearly, expert opinions are likely to have a significant influence on the outcome of cases, and a statistical analysis of the views expressed in the Law Commission and CPS studies is set out in Table 10.

In the CPS study, 86 of the 110 report-writers whose reports were on file (78.2%) supported a diminished responsibility plea, a strikingly similar proportion to that in the Law Commission research. Only 17 experts (15.3%) felt that the defendant's circumstances did not fall within the ambit of s.2(1) of the Homicide Act 1957 . Overall, the figures for the two studies are very comparable.

Table 10: Reports on Opinions on DR in the Law Commission and CPS Studies

Report Opinion	**Law Commission Study**		**CPS Study**	
	No.	**%**	**No.**	**%**
No report on file			65	37.1
No mention of DR	19	5.2	4	2.3
Favours DR	286	78.1	78	44.6
Favours DR but for jury to decide			8	4.6
Says not DR	41	11.2	17	9.7
No Clear View as to DR -For jury to decide	20	5.5	3	1.7
Totals	366	100.0	175	100.0

Expert references to the wording of s.2(1)

The Law Commission research indicated that report-writers often did not appear to have considered the aetiological causes of the defendant's abnormality of mind—the original wording being "whether arising from a condition of arrested or retarded

development of mind or any inherent causes or induced by disease or injury"—and it was tentatively suggested that this may have reflected the fact that ***Crim. L.R. 33*** the causes mentioned in the original s.2(1) of the Homicide Act were not psychiatrically recognised concepts. [44]

Under the new/current law the defence must satisfy the court on a balance of probabilities that:

(i) D was suffering from an abnormality of mental functioning

(ii) Which arose from a recognised medical condition

(iii) Which substantially impaired D's ability to: (a) understand the nature of his conduct; (b) form a rational judgment; or (c) exercise self-control

(iv) Which provides an explanation for his acts or omissions in the killing—and the abnormality of mental functioning provides an explanation if it causes, or is a significant contributory factor in causing, D to carry out his conduct.

In 25 of the 110 (22.7%) reports in the CPS study it was unclear whether the writer thought the defendant was suffering from an "abnormality of mental functioning", and in 28 cases (25.5%) it was unclear whether the writer thought the abnormality arose from a recognised medical condition.

Writers of nine reports (8.2%) did not express a view about whether the defendant's ability to do one of the three specified things was "substantially impaired". [45] In 80 reports (72.7%) a positive view was expressed, though in 10 instances the writer added that the issue was ultimately for the jury to determine. A negative view was expressed in 20 reports (18.2%) and in one of these the writer again said that the issue was for the jury. Interestingly, the Law Commission research found that under the old law a positive view was expressed in 69.7%, and a negative view in 8.5%, of reports in which the diminished plea was considered. [46] When looking at these statistics it is important to note that these reports were written before the decision of the Court of Appeal in *Golds* [47] on the meaning of the word "substantial", when the prevailing authority was *Lloyd* . [48] (It is the authors' view that the Court of Appeal in *Golds* seemed to require a higher degree of impairment, but the decision of the Supreme Court in this case is keenly awaited.)

With regard to the three specified abilities one or more of which must be impaired, the least commonly cited in reports was the ability to understand the nature of his conduct; just 46 reports (41.8%) referred to it, 28 of which were positive. The ability to form a rational judgment was the most frequently cited ability—86 reports (78.2%), of which 74 were positive. Not far behind was the ability to exercise self-control, which was cited in 77 reports (70%), 64 of which were positive.

Not infrequently, report-writers referred to the impairment of more than one of the three abilities, and the ways in which they did so in the CPS study is shown in Table 11. ***Crim. L.R. 34***

Table 11: Combination of the Three Abilities in the CPS Study

	Frequency	**%**
Form a rational judgment only	16	9.1
Exercise self-control only	6	3.4
Understand conduct & Form a rational judgment	2	1.2
Understand conduct & exercise self-control	2	1.2
Form a rational judgment & Exercise self-control	32	18.3
All 3 abilities	24	13.7
No report on file	65	37.1

Negative views/None mentioned	28	16.0
Total	175	100.0

Clearly, the most common combination of abilities to which report-writers referred was forming a rational judgement and exercising self-self-control, followed by a combination of all three. There were no cases in which the ability to understand one's conduct was mentioned by itself.

Writers of 61 reports (55.5%) referred to the requirement that the abnormality of mental functioning provided an explanation for the defendant's conduct in the killing, and of these 54 expressed a positive opinion. But it was interesting to find that 47 (42.7%) reports made no reference to the requirement. Indeed, an even greater number of reports—66—were silent on the question whether the abnormality caused or significantly contributed to causing the defendant's conduct. The 42 reports that referred to it did so in various ways—13 referred only to causing (and in one of these the writer added that the jury must ultimately decide); another 13 only referred to it being a significant contributory factor; and a further 11 referring to both (again in one of these the writer said the jury must decide). One writer did not express an opinion on the issue but simply said it was for the jury to determine. Five reports opined that neither "cause" nor "significantly contribute" was satisfied.

Since the numbers involved here are small caution should be taken when interpreting these statistics, but on the face of it the tentative conclusion is that report-writers are frequently not addressing the "explanation" requirement under the new law.

References to insanity

Given that whenever the plea of diminished responsibility is considered the question of the accused's mental capacity is automatically raised, a note was made of the frequency with which report-writers also referred to a plea of insanity. In the CPS study this occurred in 11 cases (14 in the Law Commission study). Obviously, this suggests that the insanity defence is considered in a relatively small proportion of cases.

Conclusions and implications

It is worth repeating that because some of the figures in the CPS study were small, the results and implications should be construed cautiously. Nevertheless, the ***Crim. L.R. 35*** following observations can be made. The "official" view has been that the old s.2 was in need of clarification and modernisation and that the reformulation contained in the revised section was designed to achieve that and nothing more. However, this study could be regarded as casting some doubt on this "official" view of the new s.2 , the operation of which may be giving rise to unintended consequences. [49] In particular, what is of note is that 43.3% of the CPS cases under the new plea were contested compared to 22.9% under the old plea. In addition, in 65.6% (n=59) the finding was one of diminished responsibility, of which 13.5% (n=8) were contested. In the Law Commission study in 80.3% of the cases (n=126) the finding was one of diminished responsibility, of which 6.3% (n=8) were contested. In short, the new plea seems to have resulted in more contested pleas with convictions for murder being returned in 34.4% of these cases compared to a murder conviction rate of 14% under the old plea. While an increase in the number of convictions for murder was one of the clear reasons for abolishing provocation and introducing a new "loss of control" plea [50] this was not true for diminished responsibility in that no such increase in murder convictions was ever suggested as a reason for reformulating s.2 . If this is indeed what is happening in the context of the new diminished responsibility plea, then it is important to discover the reasons for this. However, only further research into the operation of the new plea can hope to shed light on these matters.

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Footnotes

1 See *Foye [2013] EWCA Crim 475; (2013) 177 J.P. 449; [2013] Crim. L.R. 839* ; *Lambert [2002] Q.B. 1112; [2001] 1 Cr. App. R. 14*

2 *Partial Defences to Murder*, Law Commission Consultation Paper No.173 (2003).

3 *Partial Defences to Murder (2004), Law Com. No.290, para.5.86*. Professor Mackay's empirical study can be found at Appendix B of that Report.

4 *Partial Defences to Murder (2004), para.5.93*.

5 *Murder, Manslaughter and Infanticide (2006), Law Com. No.304, para.5.112*.

6 For comment see R.D. Mackay, "The New Diminished Responsibility Plea" [2010] Crim. L.R. 290.

7 Circular 2010/13, Partial defences to murder: loss of control and diminished responsibility; and infanticide: Implementation of Sections 52, and 54 to 57 of the Coroners and Justice Act 2009, MOJ, Issued 4 October 2010.

8 Coroners and Justice Bill, Public Bill Committee, 3 February 2009.

9 *Dowds [2012] EWCA Crim 281; [2012] 1 W.L.R. 2576; [2012] 1 Cr. App. R. 34* (p.455).

10 *Dowds [2012] EWCA Crim 281; [2012] 1 W.L.R. 2576; [2012] 1 Cr. App. R. 34* (p.455) at [1]. Acute intoxication is listed as a recognised medical condition in the accepted medical authorities.

11 *Dowds [2012] EWCA Crim 281; [2012] 1 W.L.R. 2576; [2012] 1 Cr. App. R. 34* (p.455) at [35].

12 *Brown [2011] EWCA Crim 2796; [2012] 2 Cr. App. R. (S.) 27* (p.156).

13 *Brown [2011] EWCA Crim 2796; [2012] 2 Cr. App. R. (S.) 27* (p.156) at [23].

14 *Golds [2014] EWCA Crim 748; [2015] 1 W.L.R. 1030; [2014] 2 Cr. App. R. 17* (p.229), for comment See Mitchell and Mackay "The Golds Standard of Substantial Impairment" (2015) (4) Archbold Review 7.

15 *Simcox [1964] Crim. L.R. 402* .

16 *Lloyd [1967] 1 Q.B. 175 at 180; (1966) 50 Cr. App. R. 61* , per Edmund Davies J.

17 See *Ramchurn [2010] EWCA Crim 194; [2010] 2 Cr. App. R. 3 (18)* at [22] per Lord Judge CJ; and *Baker [2012] EWCA Crim 2843* (though the latter was decided on the basis of the original version of the law).

18 *Golds [2014] EWCA Crim 748; [2015] 1 W.L.R. 1030; [2014] 2 Cr. App. R. 17* (p.229) at [67].

19 *Golds [2014] EWCA Crim 748; [2015] 1 W.L.R. 1030; [2014] 2 Cr. App. R. 17* (p.229) at [55].

20 *Golds [2014] EWCA Crim 748; [2015] 1 W.L.R. 1030; [2014] 2 Cr. App. R. 17* (p.229) at [58].

21 *Brennan [2014] EWCA Crim 2387; [2015] 1 W.L.R. 2060; [2015] 1 Cr. App. R. 14* (p.161).

22 *Brennan [2014] EWCA Crim 2387; [2015] 1 W.L.R. 2060; [2015] 1 Cr. App. R. 14* (p.161) at [65].

23 *Brennan [2014] EWCA Crim 2387; [2015] 1 W.L.R. 2060; [2015] 1 Cr. App. R. 14* (p.161) at [51].

24 By that we consider that each of these decisions could have been arrived at using the original s.2 .

25 Acknowledgments: To the Crown Prosecution Service for permitting us access to a sample of new diminished responsibility cases and for the cooperation and support we received at CPS Headquarters and at the CPS Regional Offices in Leicester and Birmingham.

26 *R.D. Mackay, The Diminished Responsibility Plea in Operation" Appendix B of Partial Defences to Murder (August 2004), Law Com. No.290, Cm.6301*.

27 *Focus on: Violent Crime and Sexual Offences, year ending March 2015, Ch.2: Homicide - Appendix Table 2.02*, http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2015/chapter2homicide#main-points [Accessed 19 October 2016].

28 *Focus on: Violent Crime and Sexual Offences, year ending March 2012, Ch.2: Homicide - Appendix Table 2.02*.

29 See *Patsy Richards, Homicide Statistics, House of Commons Research Paper, 99/56, 27 May 1999, p.23, Table 6*.

30 *Richards, Homicide Statistics, House of Commons Research Paper, 99/56, 27 May 1999, p.22* the author remarks: "The proportion of homicide convictions that are for murder has been growing, at the expense of convictions for section 2 manslaughter. Today, almost half of homicide convictions are for murder and a tenth

for section 2 manslaughter. By comparison, in 1970 for instance, convictions for murder accounted for only a third of homicide convictions and s.2 manslaughter one fifth".

31 In the Law Commission study 81.5% were male.

32 Defendants in the Law Commission study aged from 12 to 83 years.

33 The corresponding Law Commission figure was 74.5%.

34 The respective statistics in the Law Commission study were 51.6% and 31.8%.

35 In the Law Commission study there were slightly more women (51.6%) than men.

36 In the Law Commission study the mean age was 40.5 years, and the range 1 month to 91 years.

37 The Law Commission proportion was 88.9%.

38 In the Law Commission study 69% of female defendants killed males.

39 In our CPS study these consisted of a case where the victim was pushed in front of an incoming tube train and two cases where the victims were fatally run over by motor vehicles.

40 These figures should be treated cautiously because the total number of female defendants in the CPS study was small.

41 In the cases in this row the basis of the manslaughter verdict was unclear.

42 The "Primary Diagnosis" was the one which an overall analysis of the DR reports in each case seemed to support the plea. Clearly, in some cases there was disagreement amongst the experts about the diagnosis. In short, the primary diagnosis is based on a cumulative view of the reports in each case.

43 In all three cases the reports stated there was no abnormality of mind and the defendants were convicted of murder.

44 *Mackay, The Diminished Responsibility Plea in Operation" Appendix B of Partial Defences to Murder (2004), para.30*.

45 This is a slightly smaller proportion than that found in the Law Commission study; see Mackay, para 32.

46 *Mackay, The Diminished Responsibility Plea in Operation" Appendix B of Partial Defences to Murder (2004), para.32*.

47 *Golds [2014] EWCA Crim 748; [2015] 1 W.L.R. 1030; [2014] 2 Cr. App. R. 17* (p.229).

48 *Lloyd [1967] 1 Q.B. 175; (1966) 50 Cr. App. R. 61* .

49 See *R. Mackay, "The New Diminished Responsibility Plea: More than Mere Modernisation?" in A. Reed and M. Bohlander, Loss of Control and Diminished Responsibility -Domestic Comparative and International Perspectives (Ashgate, 2011), Ch.1*.

50 See *Ministry of Justice, Impact Assessment - Coroners and Justice Bill: homicide clauses (14 January 2009), p.5* "As far as outcomes are concerned, the narrower partial defence [of loss of control] would lead to some defendants who are currently convicted of manslaughter being convicted of murder instead. We estimate that there might be additional 10 – 20 murder convictions a year".

