The Defence of Diminished Responsibility

Notes for a Talk by Edward Fitzgerald QC

9 February 2012

Introduction

1.1. I want to deal with four topics.

1.2. Firstly, the place of diminished responsibility as a defence in the pantheon of defences and the justification of its continuing retention (part 2).

1.3. Secondly, the constituents of the defence as it now stands in light of the changes effected by s.52 of the Coroners and Justice Act 2009 (part 3).

1.4. Thirdly, brief comments on the relationship to provoked (part 4).

1.5. Fourthly, the vexed question of raising diminished responsibility for the first time on appeal, particularly where a defendant has run an inconsistent defence at trial (part 5).

1.6. Finally, the question of sentence where a plea of diminished responsibility succeeds (part 6).

2. The Place of the Diminished Responsibility plea in Criminal Law

2.1. Diminished responsibility was introduced in England and throughout the Commonwealth because of the limitations of the insanity defence and the need to recognise that less extreme forms of mental malfunctioning could nonetheless reduce responsibility so as to make it unjust to sentence the person to death. The cases of Derek Bentley (an epileptic with limited intellectual functioning) and Ruth Ellis (a troubled and much provoked woman who shot her
lover) focused on the need for a broader defence than that of insanity.

The Insanity Defence

2.2. Insanity is only established where it is proved that the defendant “was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong”. Developed in the M’Naghten case, the insanity defence is still confined by 19th century notions of psychiatry and law. It is not sufficient that the defendant knows that what he was doing is against the law, but thinks that God or some higher power has ordered him to do it - which is the common condition of many paranoid schizophrenics. Knowledge that what is done is against the law is sufficient to defeat the defence. The insanity defence also fails to cater for the many cases where some form of mental illness or handicap makes it more difficult or even impossible for the defendant to control himself, though he knows full well what he is doing.

2.3. In many jurisdictions, there is still only an insanity defence. The problems of relying on an insanity defence alone were shown in the case of St Lucian Capital Killers case, where two mentally disordered Rastafarians killed a priest and a nun, and then attacked the congregation in the cathedral in St Lucia, and then set the church on fire. They did this to carry out what they saw as their religious duty to destroy Babylon, and were undoubtedly suffering from mental disorder. They could not satisfy the conventional insanity defence because they certainly knew
that what they were doing were against the law, and knew the nature and quality of their acts in the literal sense. But in that case, the Privy Council found that the St Lucian criminal code contained an additional subsection which introduced a wider defence somewhat akin to diminished responsibility, where the underlying mental disorder rendered the defendant someone not deserving a punishment.

**Diminished Responsibility**

2.4. The plea of diminished responsibility was originally introduced to provide for a wider excuse and protection from the death penalty even where the mental disorder was not such as to satisfy the high test of insanity. It only applies to murder cases and is limited to providing a partial excuse, rather than a total defence. The old law under s.2 of the Homicide Act 1957 provided for conviction of manslaughter only where at the relevant time, the offender was suffering from “such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent cause or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing”. The workings of the old law are described in more detail in the Appendix.

**Justification for the Defence**

2.5. The defence of diminished responsibility has been criticised as a compromise which has no place in jurisdictions where the death penalty has been abolished. But:-
2.5.1. It remains an important defence where the penalty for murder is mandatory, even where the death penalty has been abolished.

2.5.2. It serves to limit the judge’s sentencing discretion by constraining the judge to respect a jury verdict that there is an element of reduced responsibility and sentence accordingly – this remains the case notwithstanding the removal of the question of “mental responsibility” from the wording of the defence.

2.5.3. It accords with sociological and psychiatric evidence that many of those who carry out unlawful killings are suffering from some form of mental disorder or handicap at the time, and that this affects their overall ability to think clearly, reason clearly, make sensible judgments, and above all, to control their emotions and their actions. So the legal excuse is justified by scientific understanding of the workings of the human mind.

2.5.4. Although it is particularly controversial in cases where personality disorders or psychopathy is relied on, the defence still makes some moral sense in those cases. Most of those suffering from personality disorder or psychopathy do so because of inherent predispositions and / or childhood experiences which were beyond their control. To hold them fully responsible for their actions in those circumstances is not just.

2.6 The Tactics of the Defence

The decision to run a defence of diminished responsibility often excludes or damages other defences, such as accident, self defence, or provocation. Indeed, the decision to opt for an insanity or diminished responsibility defence tends
to require an emphasis on the irrational, irresponsible and uncontrolled history of the defendant.

Tactical Considerations

2.7 This can be illustrated by cases like Darville in the Bahamas where it was necessary to adduce evidence on appeal of all the defendant’s other unproven crimes of murder in order to emphasise that the one of which he was convicted was likely to have been committed under the influence of mental disorder. But this is not always so. For example, in cases where a reactive depression is relied on, the position is different.

Acceptance of Responsibility

2.8 Another problem which is of acute importance in death penalty cases is that the prosecution and the Court usually require the defendant to make a full admission of deliberate killing before they accept evidence of diminished responsibility. It is particularly difficult to run a defence of “he didn’t do it, but if he did, he did it under conditions of diminished responsibility” (the Winston Solomon Dilemma) or “this was an accident but if it wasn’t, I should be excused as suffering from diminished responsibility” (the Sarah Thornton Dilemma).

An Elective Defence

2.9 The Defence is described as an elective defence. The general view is that neither the prosecution nor the judge can raise it unless the defendant puts it forward as a defence, however mad he appears to be. In Erskine [2010] 1 WLR 183, the Court of Appeal raised the question of whether
diminished responsibility could be raised by the judge of his own volition where there was obviously something wrong with the defendant. But the general view of all counsel which the Court appear to accept was that this was not possible or desirable. Again, it is not anticipated that this approach will change under the new law.

3. The Constituents of the defence under the New Law

3.1. The new law, as introduced by s.52 of the Coroners and Justice Act 2009 (set out in full at Appendix 1), substantially alters a number of the key elements of the defence:

3.1.1 “abnormality of mind” has been replaced with “abnormality of mental functioning”;

3.1.2 the abnormality must now arise from a “recognised medical condition” as opposed to “a condition of arrested or retarded development of mind or inherent cause or induced by disease or injury”; 

3.1.3 the somewhat flexible jury question as to whether the abnormality “substantially impaired [the defendant’s] mental responsibility for his acts or omissions in doing or being party to the killing” has been replaced with the more tightly defined requirements that the mental abnormality “substantially impaired [the Defendant’s] ability...
(a) to understand the nature of [his] conduct;
(b) to form a rational judgment; [or]
(c) to exercise self-control”

PLUS:

3.1.4 the new defence introduces an express requirement for a causal link between the abnormality and D’s
acts and omissions in doing or being a party to the killing [see, s.2(1)(c) and 2(1B) HA 1957 (as amended)].

3.2. Each of these changes is considered below.

**Abnormality of mind v abnormality of mental functioning arising from a recognised medical condition**

3.3. As Professor Eastman points out in his paper, “abnormality of mental functioning” introduces a dynamic notion in place of the status of suffering from an abnormality of mind. In the debates on the Coroners and Justice Bill as it passed through the House of Lords, this shift was endorsed by Baroness Murphy (former professor of psychiatry of old age at Guy’s Hospital) because it, together with the new requirement that the abnormality must arise from a recognised medical condition:

“... 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 Organisations ICD-10 criteria, or those specified by the American Psychiatric Association’s Diagnostic and Statistical Manual... 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.”

3.4 This was certainly the cited aim of the proposed amendment as it was first advanced in the Law Commission’s report Murder, Manslaughter and Infanticide (HMSO, 2004), Law Com. No.290. The report explains that the change was

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1Hansard HL Vol.712, col.177 (June 30, 2009)
recommended by the Royal College of Psychiatry, not to introduce medical expert evidence that had not previously been required, but:

“[to] encourage reference within expert evidence to diagnosis in terms of one or two of the accepted internationally classificatory systems of mental conditions (WHO ICD10 and AMA DSM) without explicitly writing those systems into the legislation...Such an approach would also avoid individual doctors offering idiosyncratic ‘diagnoses’ as the basis for a plea of diminished responsibility. Overall the effect would be to encourage better standards of expert evidence and improved understanding between the courts and experts.”

[Report para. 5.114]

3.5 First, it should be noted that whilst Baroness Murphy’s comments and the Law Commission’s recommendations contemplate psychiatric medical conditions, the new defence encompasses any recognised medical condition – thus physical and psychological conditions are included\(^2\).

3.6 Further, as the Law Commission acknowledged in advancing the proposed amendments, the old law was not devoid of any requirement for expert support for the presence of “mental abnormality”. In Byrne\(^3\), Lord Parker CJ observed that “The aetiology of the abnormality of mind (namely whether it arose from a condition of arrested or retarded development of mind [etc.] does... seem to be a matter to be determined on expert evidence...” [p.403].

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\(^2\)This is recognised in the MoJ Consultation Paper on the reforms: Murder, manslaughter and infanticide: proposals for reform of the law (HMSO, 2008) CP19/08, para. 49.

\(^3\) [1960] 2 QB 396
3.7 However, the express statutory restriction of the scope of what constitutes a qualifying “abnormality” to one arising from a “recognised medical condition” does represent a retreat from the “merciful” roots of the defence. In practice, the old law afforded some flexibility for a broader approach to qualifying “abnormality” than is available under the new law. The new law, for example, is unlikely to afford a defence of diminished responsibility to a “mercy killer” on the basis of “mental anguish”.

3.8 It is also significant that the old law provided for abnormality arising from “arrested or retarded development of mind”. The Law Commission had in fact recommended a requirement that the qualifying “abnormality of mental functioning” should arise from “a recognised medical condition, developmental immaturity in a defendant under the age of eighteen, or a combination of both”\(^4\). However, this was not taken forward by the Government, on the basis that “normal immaturity” on the part of the child should not qualify for a defence of diminished responsibility in any event, but that cases of “abnormal immaturity”, whether in the case of a child or an adult, would fall within “recognised medical condition”\(^5\).

\(\text{Substantial impairment of mental responsibility} \equiv \text{substantial impairment of the ability to understand the nature of one's conduct; form a rational judgment; or to exercise self-control}\)

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\(^4\) Murder, Manslaughter and Infanticide, 2006, Law Comm. No.304, para.5.112.

3.9 Under the old law, it was for the jury to determine whether the defendant’s mental abnormality substantially impaired his mental responsibility. In *Byrne*, Lord Parker CJ observed that “abnormality of mind” “...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 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.” [p.403]

3.10 The new law takes Lord Parker’s exposition of “the mind’s activities in all its aspects” and turns the elements highlighted into statutory criteria. Thus the new law expressly requires that the defendant’s abnormality of mental functioning must have substantially impaired his ability:

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

3.11 In practice, it is the third of these criteria that is likely to remain the most significant and widely utilised.

The test of substantial impairment

3.12 In each of the three cases, the impairment has to be “substantial”. But “substantial” means no more than “more than trivial, less than total” (*R v Lloyd* (1967) 1 QB 715. This test has been reaffirmed as applicable under new law in the case of *R v Brown* [2011] EWCA Crim 2796. So, for example, proof that the medical condition made it
significantly more difficult for the defendant to control himself than for a normal person to control themselves, and that this arose as a result of a medical condition, and was part of the explanation for the killing, would be enough.

Impaired ability to understand nature of conduct

3.13 The first criterion in s.2(1A)(a) may seem to provide for a somewhat extreme position and suggests a degree of overlap with a plea of insanity. But since we are only talking about an impairment of ability to understand, it may cover cases where abnormally low intelligence or mental disorder reduces defendant’s understanding of the nature of their conduct, even if the defendant still understands broadly the nature of what they are doing.

Impaired ability to form a rational judgment

3.14 It is often said that depression and schizophrenia impair the ability to form rational judgments. Likewise, mental handicap can have the same effect. The person is less able to think clearly and reason things out. Such a state of mind will be covered by the defence under s. 2 (1A) (b). But obviously it is a matter of degree.

3.15 In respect of s.2(1A)(b), the position of a “mercy killer” is again instructive. In considering possible examples where there might have been substantial impairment of the ability to form a rational judgment, the Law Commission in its report Murder, Manslaughter and Infanticide gave the following example: “a depressed man who has been caring for many years for a terminally ill spouse, kills her, at her request. He says that
he had found it progressively more difficult to stop her repeated requests dominating his thoughts to the exclusion of all else, so that 'I felt I would never think straight again until I had given her what she wanted.'” [Report para. 5.121]

**Impaired ability to exercise self-control**

3.16 Generally speaking this should be the easiest thing to prove. Conditions such as depression and schizophrenia tend to affect the whole person including their emotional control. People with personality disorders frequently suffer from impulsivity and lesser powers of self control. Mental handicap in the form of low intelligence also tends to affect impulse control. So the fact that such recognised medical conditions are present and are likely to have reduced powers of self control will often be sufficient to establish the defence. The exceptions obviously will be where it is obvious from the actual facts of the case that the impairment of powers of self control provide no explanation for the actual commission of the offence. For example where it is an obviously calculated and rationally motivated killing for greed or other acquisitive purposes, it is obviously less likely that a depressive condition provides an explanation for the offence, even if there is a depressive condition and it would generally affect powers of self control and rational judgment.

**Causation**

3.17 Finally, there is the requirement that the abnormality of mental functioning provides an explanation for these “acts and omissions” in the sense that it “causes, or is a significant contributory factor in causing, D to carry out that conduct.” This means that there must be some
demonstrated causal influence of the mental disorder and the impaired mental functioning on the commission of the offence.

3.18 There is some debate as to the extent to which the old law required a causal link between the defendant’s abnormality of mind and his acts or omissions in doing or being party to the killing. However, such a requirement is made express in the new law: s.2(1)(c) requires that the abnormality of mental functioning must “provide[] an explanation for D’s acts and omissions in doing or being a party to the killing”. And s.2(1B) prescribes that “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 the conduct.

3.19 It is debatable to what extent the question of causation or “significant contribution” is one for the jury to determine in accordance with their common sense and life experience, or whether it becomes largely the province of expert evidence. Under the old law it was always a matter for the jury to determine whether the mental abnormality did in fact substantially diminish responsibility. It is likely that psychiatrists and judges will take the view that the extent to which the abnormality of mental functioning provides an explanation, will be left to the jury.

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6 See Murder, Manslaughter and Infanticide, 2006, Law Com No.304, 5.122-5.123
4 Diminished Responsibility and Provocation

4.1 As set out above, diminished responsibility presupposes an abnormality of mental functioning and an impairment of the ability to exercise normal powers of judgment and self-control. By contrast, provocation is determined by reference to whether a person of the defendant’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or in a similar way to the defendant. As with diminished responsibility, provocation is a partial defence only - it reduces a defendant’s liability for an unlawful killing from murder to manslaughter.

4.2 The provocation defence, as it previously stood, became controversial in the battered wife cases. In many of these, the requirement of sudden and temporary loss of self-control was hard to establish because the female defendant acted with some degree of planning and premeditation after a prolonged exposure to abuse. Strictly speaking, this was not covered by provocation, but could be covered by diminished responsibility once the “battered wife syndrome” and associated disorders were recognized as abnormalities of mind capable of grounding a diminished responsibility defence.

Special characteristics

4.3 There was a brief period when the Courts in England held that the reasonable man test had to be modified to take account of the “special characteristics” of the offender, including any greater susceptibility to lose their self-control as a result of some underlying mental disorder.
This was ended by the decision of the Privy Council in Holley [2005] 2 AC 580 which followed the earlier Privy Council decision from Hong Kong Luc Thiet Thuan v R [1997] AC 131.

4.4 The effect of Holley has now been put on a statutory footing in sections 54-56 of the Coroners and Justice Act 2009, which abolish the common law defence of provocation and establish a new statutory defence of “loss of control”. The detail of these changes is for another talk, but in headline, the provisions enact the following changes:–

4.4.1 The loss of self-control no longer has to be sudden and temporary.

4.4.2 It has been settled beyond doubt that no reliance can be placed on special characteristics which involve a greater propensity to lose self-control, so that Holley has now been given statutory underpinning.

4.4.3 No reliance can be placed on a confession of infidelity unless it is integral to the facts of the case as a whole – see Clinton [2012] EWCA Crim 2

4.4.4 The kind of words and deeds that can be treated as triggering events for the purposes of a provocation defence have to be very serious and are restrictively defined. So it is no longer possible to rely on some mere offensive remark or the crying of a baby as in earlier cases.

5 Appeals based on New Evidence of Diminished Responsibility

5.1 Very often evidence of mental disorder that could support a defence of diminished responsibility or insanity does not emerge until late in the day – after the trial and
even, in some cases, after the first appeal. This can be
the result of a number of possible factors:

5.1.1 Firstly, many defendants do not appreciate or volunteer
the fact of their mental history – which is not always
apparent – and simply run a Not Guilty plea, and deny
involvement in the crime altogether. In some cases this
is because they suffer from a mental disorder one of the
feature of which is total lack of insight into their own
condition.

5.1.2 Secondly, even where mental disorder is identified before
trial, the defendant may insist on running a simple Not
Guilty defence, and not wish to advance any evidence of
his mental disorder at the trial stage.

Test for Admission of New Evidence

5.2 The admission of fresh evidence in the Court of Appeal is
governed by Section 23 Criminal Appeal Act 1968 (as
amended by the Criminal Appeal Act 1995).

Section 23

"(1) For the purposes of this Part of this Act the Court of
Appeal may, if they think it necessary or expedient in the
interests of justice–

(a) order the production of any document, exhibit or
other thing connected with the proceedings, the
production of which appears to them necessary for the
determination of the case;

(b) order any witness who would have been a compellable
witness in the proceedings from which the appeal lies to
attend for examination and be examined before the court,
whether or not he was called in those proceedings; and

(c) receive any evidence which was not adduced in the
proceedings from which the appeal lies.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to--

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

5.3 The overriding test applied by the Court is whether the admission of the proposed evidence is, in the Court’s view, “necessary or expedient in the interests of justice.” This confers a wide, unfettered, discretionary power.

5.4 In Benedetto and Labrador [2003] 1 WLR 1545 PC the Judicial Committee of the Privy Council stated that, whilst all available defence should be run at the trial, “...the discretionary...power to receive fresh evidence represents a potentially very significant safeguard against the possibility of injustice. The court’s discretionary power is one to be exercised if, after investigation of all the circumstances, the court thinks it is necessary or expedient in the interest of justice to do so....”

The Requirement of a reasonable explanation for not advancing defence at trial
5.5 But, it remains the case that the appellate courts will tend to expect a reasonable explanation for the failure to adduce evidence of diminished responsibility at the original trial. Unlike in civil proceedings the explanation for failing to adduce the evidence at trial is not determinative as seen from the analysis above. The ultimate test is whether the new evidence casts doubt on the safety of the conviction. In T (MC) Moses LJ stated that:

"...The test whether an explanation is reasonable is not always easy to apply. The reasonableness of the explanation probably depends upon a quite separate question of the court's view of the cogency and impact of the fresh evidence. Courts will be driven by a desire to act in the interests of justice and will not therefore exclude evidence which may have an important impact on the safety of the verdict merely because that evidence might have been obtained earlier. But nevertheless, caution is needed lest the appeal amounts to no more than an attempt to have a second go."

5.6 The kind of explanations that have been regularly accepted in the field of diminished responsibility for the failure to adduce evidence of diminished responsibility at trial are:

(i) The fact that the person was mentally disordered at the time the original decision was taken not to advance diminished responsibility (R v Erskine (2009) 2 CAR 29 and R v Gilfillan).

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7 See Arnold [1996] 31 BMLR 24; Sales; R v CCRC Ex p Pearson.
8 Arnold
9 [2008] EWCA Crim 3229. See para 20
(ii) Negligence of counsel or solicitors leading to failure to explore diminished responsibility or to explain the options to the defendant at trial (R v Ravalia Ref. 96/4959/X3 and many of the Privy Council cases such as R v Winston Solomon).

(iii) The fact that there have been new advances in psychiatric or medical science since the trial which have changed the assessment of the availability of a defence, (e.g. R v Kathleen Hobson (1998) 1 CAR 31 which resulted from the new understanding of the "battered wife" syndrome, and R v Colin Campbell (1997) 1 CAR where advances in medical science had further illuminated the influence of an underlying epileptic condition on behavior and impulse control).

Decision in Erskine
5.7 More recently, in Erskine,10 Lord Judge LCJ stressed the "one trial principle and the need for a good explanation for not advancing diminished at trial, though the court found that there was a good explanation in that case (the mental disorder of the defendant at trial which led him to fear execution if he admitted anything

"Virtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focusing on the interests of justice. The considerations listed in subs.(2)(a)-(d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However it is well understood that, save exceptionally, if the defendant is allowed to advance on

10 [2009] 2 CAR 29 at para 39
appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the “interests of justice” test will be satisfied.”

The Overall Discretion

5.8 In Erskine Lord Judge LCJ considered the authorities in this area and stated that:

“90. Subject to these broad considerations, where it is proposed to raise diminished responsibility for the first time on appeal, the court is examining the appellant's mental state at the time of the killing in accordance with s.2 of the Homicide Act 1957. It should normally be necessary to refer the court to no more than the terms of s.23 of the 1968 Act, and the approach suggested in R. v Criminal Cases Review Commission Ex p. Pearson [2000] 1 Cr. App. R. 141 at 164:

“Wisely and correctly, the courts have recognised that the statutory discretion conferred by section 23 cannot be constrained by inflexible, mechanistic rules. But the cases do identify certain features which are likely to weigh more or less heavily against the reception of fresh evidence: for example, a deliberate decision by a defendant whose decision-making faculties are unimpaired not to advance before the trial jury a defence known to be available; evidence of mental abnormality or substantial impairment given years after the offence and contradicted by evidence available at the time of the offence; expert evidence based on factual premises which are unsubstantiated, unreliable or false, or which is for any
other reason unpersuasive. But even features such as these need not be conclusive objections in every case. The overriding discretion conferred on the court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed and not for psychological failings to which they may be subject.”

92 The court will normally expect the parties to provide a detailed analysis of the facts to assist it in the application of the statutory test, including an analysis of the following:

- i) The psychiatric and/or psychological evidence or other information in relation to the appellant's mental state which was available at the time of trial.
- ii) The evidence which has become available since the trial, and an explanation why it was not available at trial.
- iii) The circumstances in which the appellant sought to raise on the appeal (a) the evidence available at the time of the trial and (b) evidence that has become available since the trial.
- iv) The reason why such evidence or information as was available at the time of the trial was not adduced or relied on at trial. This will ordinarily include details of the advice given, the reasons for the appellant's decision at trial and, subject to paragraph ..., any relevant evidence of the mental condition in the period leading up to and at the time of the trial and its impact on his decision making capacity.
- v) The impact of the fresh evidence on the issues argued at trial and whether and the extent to which it involves a re-arguing of issues considered at trial.
- vi) The extent to which the opinions of the experts are agreed and where they are not.
93 These heads of analysis will not all necessarily apply in every case; in some cases additional areas of analysis may be required. However, any such analysis should suffice to assist and inform the court in its task of applying the provisions of s.23 (1) of the 1968 Act.”

Conclusion on “Reasonable Explanation”

5.9 In the end, even where a defendant in full possession of their faculties takes a fully informed decision and deliberately does not adduce diminished responsibility at trial, they cannot be absolutely precluded from adducing it for the first time on appeal. And if the evidence is overwhelming or undisputed, then it is clearly right that the verdict of murder should be set aside. As Lord Bingham observed in Pearson, defendants should be punished for the crime they have committed, and not for their mental disorder. Equally, the punishment for an irresponsible decision not to put forward a diminished responsibility defence at trial should not be to serve an inappropriate sentence if the offender was in fact suffering from diminished responsibility all along. There are limits to the “one trial principle”.

6 The Question of Sentence

6.1 Once a verdict of diminished responsibility has been returned, the sentence for manslaughter is discretionary. But the courts have developed principles governing the imposition of sentence. In general, where the offender meets the requirements for a hospital order, the sentencing authorities indicate that this is the appropriate disposal rather than a sentence of
imprisonment – even where the defendant is extremely dangerous (see R v Mitchell (1997) 1 CAR (S) 90). But in the light of Erskine, it appears that sentences of imprisonment can still be imposed where an element of punishment is required or, exceptionally, where the Court can justifiably conclude that the public can only be properly protected by a sentence of life imprisonment. This is a highly controversial area. In principle, a person who suffers from mental disorder, suffered from mental disorder at the time of the offence, and is in need of medical treatment should be given a hospital order rather than a prison sentence. But the recent decision in Erskine tends to suggest that, in extreme cases, there are no absolute principles requiring hospitalization as opposed to a life sentence.

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Appendix 1
Sections 52, 54 and 55 of the Coroners and Justice Act 2009

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.”

(2) In section 6 of the Criminal Procedure (Insanity) Act 1964 (c. 84) (evidence by prosecution of insanity or diminished responsibility), in paragraph (b) for “mind” substitute “mental functioning”.

54 Partial defence to murder: loss of control E+W+N.I.
(1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—
(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
(b) the loss of self-control had a qualifying trigger, and
(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
(3) In subsection (1)(c) the reference to “the circumstances of D” is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.
(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.
(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

55 Meaning of “qualifying trigger”
(1) This section applies for the purposes of section 54.
(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—
(a) constituted circumstances of an extremely grave character, and
(b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger—
(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7) In this section references to “D” and “V” are to be construed in accordance with section 54.
1 The Ingredients of the Old Diminished Responsibility Defence

1.1 The key ingredients of the old defence were threefold:

1.1.1 Firstly the defence must establish the presence of abnormality of mind at the time of the killing. An abnormality of mind has been defined as “a state of mind so different from that of ordinary human beings that the reasonable man would find it abnormal” (R v Byrne (1960) 2 QB 396). The term is “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 whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that judgment” (R v Byrne).

1.1.2 Next, the abnormality must be shown to have been caused by one of the conditions that are referred to in the bracketed passage “whether arising from a condition of arrested or retarded development etc etc” – i.e. a “condition of arrested or retarded development of mind”, any “inherent cause”, “disease” or “injury”. In effect this list includes any abnormality that arises from mental handicap, or from recognised mental disorders such as psychosis and mood disorders (which are all “diseases”), or from “inherent causes” such as brain damage, epilepsy or other such inherent conditions. The underlying condition need not be permanent, provided it is causative of an abnormality of mind at the time of killing. And, in
fact, even episodic depressions, or temporary mood disorders, have been accepted by the Courts as “diseases” or “inherent causes”. So, too, have post-traumatic stress disorders and the “battered wife syndrome” (as in R v Thornton (1996) 1 WLR 158; R v Ahluwalia (1993) CrAppR 133; and State v Ramjattan PC (1999)). Most importantly personality disorders, or severe personality disorders, can qualify as causal conditions giving rise to an “abnormality of mind”. In broad terms, any mental disorder recognised as such by the International Classification of Diseases - ICD - should qualify to support a diminished responsibility plea.

1.1.3 Finally, there must be shown to be a “substantial” diminution of responsibility. But “substantial” means no more than “more than trivial, less than total” (R v Lloyd (1967) 1 QB 175). And proof that the underlying condition made it significantly more difficult for the defendant to control himself than for the normal person should satisfy the test that his responsibility was not “full”, and was therefore “more than trivially affected” or, in other words, “reduced”.