Advances in psychiatric treatment (2010), vol. 16, 193–198 doi: 10.1192/apt.bp.109.006742

Diminished responsibility and alcohol

ARTICLE

Nuwan Galappathie & Krishma Jethwa

SUMMARY

In England and Wales diminished responsibility is a partial defence to the charge of murder. If successfully argued by the defence, it reduces the charge from murder to manslaughter and thus avoids the mandatory life sentence. Alcohol has been reported to be a feature in up to 80% of all homicides but for many years the judiciary have set an almost unattainable threshold for the disease of alcoholism to amount to a finding of diminished responsibility, in accordance with other aspects of criminal law. Reform of the law on murder is likely to take many years but it is timely to recap the current law on diminished responsibility and review advances in case law in England and Wales on alcohol.

DECLARATION OF INTEREST

None.

Some may find it surprising to hear that the crime of murder is defined within England and Wales by virtue of common law, being first entered into domestic law by Sir Edward Coke (1628). Murder is defined as the unlawful killing (not by self-defence or legal justification) of a human being, with intent to kill or cause grievous bodily harm (Richardson 2008). *Rance v. Mid-Downs Health Authority* [1991] confirmed that the victim must be a living being, born alive and breathing through their own lungs. An indictment for murder can be made on a British subject in England and Wales, even when the offence is committed outside the geographical jurisdiction of these countries and regardless of the victim's nationality.

The Homicide Act 1957 introduced three statutory defences to the charge of murder that have come to be known as the 'special or partial defences': diminished responsibility (Box 1), provocation and acting in pursuance of a suicide pact. If argued successfully they reduce the charge from murder to voluntary manslaughter. They were originally introduced to avoid the death penalty, whereas today the significance of a partial defence to murder is that it avoids the mandatory life sentence, which must be given to those convicted of murder. This effectively unbinds the judge's hands and permits the full range of sentencing options.

Alcohol is reported to be a feature in more than 80% of homicides (Mitchell 1997). Within the pages of this journal, Haque & Cumming (2003) have provided a broad review of intoxication and legal defences, including a brief account of diminished responsibility. Their article outlines the stringent approach the judiciary has previously taken in dealing with homicides committed while the accused is under the influence of alcohol. Simply being intoxicated with alcohol at the time of the killing has as yet not permitted a partial defence to murder. However, perhaps reflecting increasing awareness of the clinical disorders associated with regular alcohol use, the past few years have seen a number of appellant cases that have significantly changed the *a priori* legal standing on alcohol and diminished responsibility. This article therefore reviews the legal framework for diminished responsibility and provides an update on recent changes in case law.

Diminished responsibility

We will first consider the defence of diminished responsibility, with particular reference to case-law interpretation of its definition and legal procedure.

Abnormality of mind

The term 'abnormality of mind' is a legal construct rather than a psychiatric term. Its definition was established in *R v. Byrne* [1960], where the Appeal Court gave its meaning as: 'a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal'.

BOX 1 Diminished responsibility

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 for his acts and omissions in doing or being a party to the killing.

(Homicide Act 1957, section 2(1))

Nuwan Galappathie is a consultant forensic psychiatrist at St Andrew's Healthcare, Birmingham, and Visiting Research Fellow at the Institute of Psychiatry, London, UK. St Andrew's Healthcare is a not-for-profit charity, and its newly opened Birmingham facility is a 128-bed secure psychiatric hospital providing conditions of medium, enhanced low and low security as well as pre-discharge and specialist autism-spectrum disorder services. **Krishma Jethwa** is a consultant psychiatrist with Coventry and Warwickshire Partnership NHS Trust, UK. Her research interests include mental health law, community treatment orders, crisis resolution and home-based treatment.
Correspondence Dr Nuwan Galappathie, Consultant Forensic Psychiatrist, St Andrew's Healthcare, Dogpool Lane, Stirchley, Birmingham B30 2XH, UK. Email: ngalappathie@standrew.co.uk

The determination of the presence of an abnormality of mind at the time of a killing is a matter for the jury. Medical evidence is of importance, although the jury are entitled to consider further evidence, including acts, statements and the demeanour of the accused. The jury can, if they decide, reject the medical evidence. In *Byrne* the Appeal Court also provided judgment on the meaning of 'mental responsibility', which it said:

> points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts.

Disease causation

Within the Homicide Act 1957 there is a need to specify the cause of the abnormality of mind. In *Byrne* it was concluded that this is a matter to be determined on expert evidence. This is clearly a disingenuous requirement because most clinical disorders are complexly multifactorial in aetiology and probably at least partly cryptogenic in origin.

Raising the defence of diminished responsibility

In *R v. Campbell* [1987] the Appeal Court confirmed that raising the defence of diminished responsibility is a matter solely for the defence. Even if the trial judge suspects diminished responsibility he or she should do no more than point it out to the defence counsel in the absence of the jury. This is because of the tactical nature of entering a plea. Pleading diminished responsibility implies an admission of guilt. This is fundamentally inconsistent with a plea of provocation, which effectively denies responsibility (owing to being provoked). Furthermore, if convicted of murder, the offender (unless there is fresh evidence that was unavailable at the time of trial) is not likely to be able to advance an alternative defence on appeal (two bites at the cherry are generally not permitted).

Burden of proof

The Homicide Act 1957 sets the burden of proof firmly on the accused. Several cases have attempted to challenge this standing, arguing that it is incompatible with the European Convention notion of innocent until proven guilty. Case law has continued to remain subservient to this statutory requirement because diminished responsibility is viewed as an 'optional' defence to the charge of murder.

Standard of proof

In determining the presence of an abnormality of mind, *Byrne* established that the jury must satisfy themselves that an abnormality of mind was present, based on the balance of probabilities. This is the so-called 'civil standard'. Arguably, this seems to be an unusually low threshold because determining this issue could amount to the accused avoiding the mandatory life sentence.

Acceptance of plea

In *R v. Vinagre* [1979] the Court of Appeal ruled that the Crown is permitted to accept a plea of manslaughter on the grounds of diminished responsibility. Previously, in *R v. Matheson* [1958], it was decided that all cases of diminished responsibility needed to be decided by the jury. This had led to the hearing in open court of several tragic and uncontested cases involving individuals who had killed a loved one during a period of mental imbalance.

Substantial impairment

The judiciary and medical profession have widely regarded the 'ultimate issue' as being whether an abnormality of mind led to 'substantial impairment of mental responsibility', this being the crucial factor in deciding whether the accused fulfils the requirements of diminished responsibility. It is simply not enough to establish that an abnormality of mind was present; it must also have in part caused the killing. Judicial guidance was first given on this issue in *Byrne*, where it was said, 'This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant'. In *R v. Lloyd* [1967] it was said that the actual meaning must be decided by the jury. The guidance given was that impairment of mental responsibility was more than trivial but not total. This was more helpfully stated in *Lloyd* as that which ordinary people are prepared to say is 'substantial'.

Psychiatrists' comments on 'substantial impairment' have always engendered a torrent of controversy. Some experts have attempted to circumnavigate this moral dilemma by stating their opinion on what they believe a jury would conclude on this matter. The difficulty is that any comment on substantial impairment will inevitably incorporate the psychiatrist's own personal judgement of justice, blameworthiness and social desirability. Surely, they are then no longer providing expert psychiatric opinion, but only the opinion of a 'layperson'.

Voluntary intoxication and diminished responsibility

Following the introduction of the Homicide Act 1957, the courts quickly decided that voluntary consumption of alcohol did not amount

Advances in psychiatric treatment (2010), vol. 16, 193–198 doi: 10.1192/apt.bp.109.006742

to an abnormality of mind, as shown in *R v. Fenton* [1975]. This is consistent with other aspects of judicial practice in dealing with criminal activity perpetrated by self-intoxicated individuals.

Alcohol, drugs and inherent causes

In *R v. Gittens* [1984] the Court of Appeal gave its verdict on directions given to the jury regarding consideration of the effects of alcohol and drugs on diminished responsibility. The appellant, prior to the index offence, had experienced depression and alcohol problems. On the day of the offence he had consumed alcohol and then killed his wife with a hammer. He then raped and killed his stepdaughter (thinking her to be his wife). Conflicting psychiatric evidence was heard from a number of psychiatrists regarding diminished responsibility. At trial the judge directed the jury that, when considering the effects of alcohol and drugs on one hand and inherent causes (such as depression) on the other, they must decide which factor was the substantial cause of the conduct. Then, only if the inherent causes were the major factor would diminished responsibility be established.

The Appeal Court realised that if a situation occurred when both inherent causes on one hand and alcohol and drugs on the other separately reached the threshold needed to substantially impair responsibility, then the trial judge's direction might cause the effects of the inherent causes to be ignored if this was not the main factor compared with alcohol or drugs. The Appeal Court therefore judged that:

> the jury were to be directed to disregard what in their view was the effect of the alcohol or drugs on the defendant, for abnormality of mind so induced was not in general due to inherent causes and was, therefore, not within [the section]; that the jury were then to consider whether the combined effect of the other matters which did fall within [the section] amounted to such abnormality of mind as substantially impaired his mental responsibility.

Accordingly, the murder convictions were overturned and substituted with convictions of manslaughter by reason of diminished responsibility. Although this direction accords with statute, it perhaps does not take proper consideration of the fact that it will be difficult to accurately separate the differing effects of alcohol, drugs and inherent causes.

Alcohol dependence syndrome: R v. Tandy [1989]

Until very recently one of the most influential judgments on the issue of alcohol has been *R v. Tandy* [1989]. The appellant Linda Tandy experienced chronic alcohol misuse. She normally consumed vermouth but on the day of the offence she drank nine-tenths of a bottle of vodka, which has a higher alcohol content than vermouth. She lived with her second husband with the two children from her first marriage. Evidence presented at trial suggested she had a good relationship with her 11-year-old daughter. However, on the day of the killing her daughter returned home late and asked her mother if she could go and live with her grandmother, saying that she had been sexually interfered with but would not name the person responsible. While intoxicated, Ms Tandy strangled her daughter with a scarf and later claimed amnesia for the offence. Her blood-alcohol level taken shortly after the offence was 240 mg of alcohol per 100 ml of blood – three times the UK drink–drive limit. At trial, the judge directed the jury that for her to have an abnormality of mind arising as a result of the disease of alcoholism she must have 'no immediate control' over her drinking. If the taking of the first drink of the day was not involuntary, then the whole of the drinking that day was not involuntary. Tandy was accordingly convicted of murder.

Tandy appealed to the Appeal Court, which considered the breadth of meaning given to an abnormality of mind in *Byrne*. However, the Court appeared to judge quite harshly on those with alcohol dependence, seeming to favour the moral model of alcoholism. This suggests that those experiencing alcohol misuse are capable of choice and choose their condition and associated consequences. Indeed, the medically innocuous factors of her choosing to drink vodka instead of vermouth and not finishing the bottle were considered by the Appeal Court to indicate her ability to exercise control over her drinking. The Court did concede that alcoholism as a disease could give rise to diminished responsibility in certain circumstances. Their influential judgment is summarised in Box 2.

BOX 2 Judgment given in *R v. Tandy* [1989]

1 For diminished responsibility to be established:
   - an abnormality of mind must be present at the time of the killing
   - which was induced by the disease of alcoholism and
   - which substantially impaired mental responsibility for the killing.
2 For alcohol dependence syndrome to amount to an abnormality of mind:
   - it must at the material time have reached the level at which the brain has been injured by the repeated insult from intoxicants so that there was gross impairment of judgement and emotional responses; and
   - in cases where brain damage has not been reached: drinking must have been 'involuntary', which is described as occurring when an individual is no longer able to resist the impulse to drink.
3 If the first drink of the day was not involuntary then the rest of the drinking that day was not involuntary.

Problems with *Tandy*

With regard to diminished responsibility, the judgment in *Tandy* placed an insurmountable obstacle before those dependent on alcohol but with no brain damage. The dichotomy of viewing control over drinking as present or absent is myopic. Even individuals with severe forms of the disorder clearly make choices such as: choice of beverage, where to obtain alcohol, when to start drinking, when to stop, whether to eat, dress, wash or attend to other essential daily activities. The Court appears to have focused on the loss of control aspect of alcohol dependence while disregarding the other behavioural, psychological and physiological aspects of the disorder.

Alcohol in combination with other causes

In *R v. Dietschmann* [2001] an attempt was made to place a high threshold requirement for alcohol and diminished responsibility. The appellant had a relationship with his aunt and when she died he experienced a depressed grief reaction and possible alcohol dependency. After drinking with friends he believed one of them had damaged a watch his aunt had given him. He killed his victim by kicking and punching. The Appeal Court initially judged that for diminished responsibility to be established the defence must prove on the balance of probabilities that if he had not taken alcohol the killing would still have occurred and he would still have met the requirements for diminished responsibility. This was clearly in conflict with the *Gittens* judgment.

BOX 3 Judgment given in *R v. Wood* [2008]

1 The need to decide whether brain damage has occurred or not is no longer appropriate.

2 Where brain damage has occurred the jury may be more likely to conclude that the defendant has an abnormality of mind induced by disease or illness.

3 An abnormality of mind is present if the syndrome [alcohol dependence] is of such an extent and nature that it constitutes an abnormality of mind.

4 In determining substantial impairment the jury must:
- consider exclusively the effect of alcohol consumed by the defendant as a direct result of his illness or disease
- ignore the effect of any alcohol consumed voluntarily.

5 In determining the possible impact and significance of an abnormality of mind constituted by alcohol dependence, the jury must consider:
- whether the craving for alcohol was irresistible or not
- whether consumption of alcohol in the period leading up to the killing was voluntary (and if so, to what extent) or was not voluntary
- ultimately, whether the defendant's mental responsibility for their actions when killing the deceased was substantially impaired as a result of the alcohol consumed under the baneful influence of the syndrome.

6 The need for every drink of alcohol to be entirely involuntary for a successful finding of diminished responsibility is not required.

Dietschmann therefore petitioned for leave to appeal at the House of Lords. In *R v. Dietschmann* [2003] the House of Lords overturned the verdict of the Appeal Court. Lord Hutton confirmed that in cases where the jury believed that, if the defendant had not taken alcohol he might not have killed, the defence of diminished responsibility may still be available if the jury are satisfied that, despite the alcohol being voluntarily taken, his mental abnormality substantially impaired his mental responsibility for his fatal acts (in essence returning to the previous mechanism applied in *Gittens*). Legal commentators have widely held the view that this judgment confirms that a component of voluntary drinking still permits the defence of diminished responsibility. Significantly, in *Dietschmann* the defendant also had a comorbid inherent cause, namely depression.

Alcohol dependence syndrome: R v. Wood [2008]

The judgments given in *Gittens* and *Tandy* regarding diminished responsibility and alcohol have been further clarified in the light of *Dietschmann* by the decisive verdict given in *R v. Wood* [2008]. This case, like *Tandy*, involves a sole diagnosis of alcohol dependence syndrome. Mr Wood appealed against his conviction for murder. He had chronic alcoholism and after drinking at a flat with associates, woke to find another man trying to perform oral sex on him. He killed the victim by striking him 37 times with a meat cleaver. At his trial he was examined by four psychiatrists, who were unanimous in their opinion that he had alcohol dependence syndrome. They disagreed regarding whether an abnormality of mind was present as per *Tandy* and whether brain damage had occurred. At trial the judge directed that diminished responsibility would apply if the defendant's consumption of alcohol was truly involuntary:

> A man's act is involuntary if, and only if, he could not have acted otherwise. Giving in to a craving is not an involuntary act. An alcoholic not suffering from severe withdrawal symptoms, who tops up his overnight level or who later chooses to accept a drink after he's reached his normal quota, is not drinking involuntarily.

On appeal Mr Wood's solicitors argued that this direction was incorrect because succumbing to a craving would depend on the strength of the craving and the defendant's capacity to address and overcome it. It was contended that this was supported by the House of Lords judgment in *Dietschmann*. The Court of Appeal concluded that *Dietschmann* did alter the way in which *Tandy* should be applied, in that it permits some dilution of the rigid principles laid down in *Tandy*; the judgment given is summarised in Box 3.

Advances in psychiatric treatment (2010), vol. 16, 193–198 doi: 10.1192/apt.bp.109.006742

Accordingly, Mr Wood's conviction for murder was quashed and a re-trial ordered.

Considering the effects of each drink

The momentum of the judgment within *Wood*, although significant, appeared flawed by a seemingly semantic failing. The requirement to consider exclusively the effect of alcohol consumed by the defendant as a direct result of his illness or disease and ignore the effect of any alcohol consumed voluntarily indicated a need to return to the previous outdated standard within *Tandy* of considering the effects of each drink – arguably an insurmountable task. This was swiftly remedied by the judgment in the case of *R v. Stewart* [2009]. The appeal concerned an individual convicted of murder who had alcohol dependence syndrome. The Court correctly identified that it would be an unrealistic task to try to separate what might appear to be 'voluntary' drinking from the defendant's underlying condition of dependence.

The judgment is summarised in Box 4. It contains guidance for trial judges working on cases involving the defence of diminished responsibility based on alcohol dependence syndrome. The judgment places significant weight on the severity of the defendant's dependence and thus rightly avails the defence to those with the most severe forms of this condition.

Reforms to the law on murder

The definition of diminished responsibility has been repeatedly criticised. Historically, the legal profession has regarded the Homicide Act 1957 as clumsy and shockingly elliptical (Lipkin 1990). Psychiatrists have also found the definition both antiquated and ethically challenging (Hamilton 1981). Following a lengthy consultation process, in November 2006 the Law Commission produced its proposals for fundamental reform of the law in the report *Murder, Manslaughter and Infanticide*. This included a proposed new definition of diminished responsibility (Law Commission 2006). As part of the reform process the government's first-step consultation *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* was published in July 2008 (Ministry of Justice 2008). The government proposed a new three-tier structure to the law on murder, namely: first degree murder, second degree murder and manslaughter.

In November 2009, the Coroners and Justice Act 2009 received Royal Assent. The Act contains the new definition for the partial defence of diminished responsibility (outlined in Box 5). A date of commencement for this statutory defence is yet to be determined. A successful argument for diminished responsibility would once again reduce the charge from murder to manslaughter.

The new definition appears more functional and is geared towards the question of capacity. It contains a requirement that a recognised medical disorder be present, but there is no longer a need to specify disease causation. The focus on capacity is likely to further engender issues related to control and choice when considering the legal implications of a diagnosis of alcohol dependence syndrome. In keeping with growing clinical and legal understanding of the complexity and breadth of impairment that this disorder encompasses, we hope that when the new definition of diminished responsibility comes into force it continues to enable the positive findings of recent judgments.

BOX 4 Judgement given in *R v. Stewart* [2009]

1 Establishing the presence of an abnormality of mind depends upon the nature and extent of the alcohol dependence syndrome and broadly whether consumption of alcohol before the killing was fairly to be regarded as the involuntary result of an irresistible craving or compulsion to drink.

2 When deciding upon substantial impairment the jury should consider:

- the extent and seriousness of the defendant's dependency, if any, on alcohol
- the extent to which his ability to control his drinking or to choose whether to drink or not was reduced
- whether he was capable of abstinence from alcohol and, if so, for how long and whether he was choosing for some particular reason to decide to get drunk or to drink even more than usual
- the defendant's pattern of drinking in the days leading to the day of the killing, and on the day of the killing itself
- notwithstanding his consumption of alcohol, his ability, if any, to make apparently sensible and rational decisions about ordinary day-to-day matters at the relevant time.

BOX 5 New definition of diminished responsibility

(a) A person who kills or is a party to the killing of another is not to be convicted of murder if they were suffering from an abnormality of mental functioning which:

- arose from a recognised medical condition
- substantially impaired their ability to do one or more of the following: understand the nature of their contact, form a rational judgement or exercise self control
- provides an explanation for [their] acts and omissions in doing or being a party to the killing.

(b) An abnormality of mental functioning provides an explanation for the conduct if it causes, or is a significant contributory factor in causing, the defendant to carry out that conduct.

(Coroners and Justice Act 2009)

MCQ answers
1 d 2 c 3 c 4 b 5 c

Conclusions

The judgments in *R v. Wood* [2008] and *R v. Stewart* [2009] reflect greater recognition by the judiciary of alcohol dependence as a distinct clinical disorder, while still upholding the long-standing understanding that simple voluntary intoxication with alcohol does not afford a legal defence. These judgments are far less rigid than that in *R v. Tandy* [1989]. It is likely that they will lead to a significant increase in the contestability of cases involving alcohol dependence syndrome and diminished responsibility. Whether they lead to an increase in findings of diminished responsibility, particularly when the new definition of this statutory defence comes into effect, will be a matter for juries.

References

Coke E (1628) *The Institutes of the Laws of England*. Societie of Stationers.

Hamilton R (1981) Diminished responsibility. *British Journal of Psychiatry* **138**: 434–6.

Haque Q, Cumming I (2003) Intoxication and legal defences. *Advances in Psychiatric Treatment* **9**: 144–51.

Law Commission (2006) *Murder, Manslaughter and Infanticide. Project 6 of the Ninth Programme of Law Reform. Homicide, Law Commission No 304*. Law Commission.

Lipkin R (1990) Free will, responsibility and the promise of forensic psychiatry. *International Journal of Law and Psychiatry* **13**: 331.

Ministry of Justice (2008) *Murder, Manslaughter and Infanticide. Proposals for Reform of the Law, Consultation Paper CP 19/08*. Ministry of Justice.

Mitchell B (1997) Diminished responsibility manslaughter. *Journal of Forensic Psychiatry* **8**: 111–7.

Richardson J (ed) (2008) *Archbold 2008: Criminal Pleading, Evidence and Practice*. Sweet & Maxwell.

R v. Byrne [1960] 2 QB 396.

R v. Campbell [1987] 84 Cr App R 255.

R v. Dietschmann [2001] EWCA Crim 2052.

R v. Dietschmann [2003] UKHL 10.

R v. Fenton [1975] 61 Cr App R 261.

R v. Gittens [1984] QB 698.

R v. Lloyd [1967] 1 QB 175.

R v. Matheson [1958] 42 Cr App R 145.

R v. Stewart [2009] EWCA Crim 593.

R v. Tandy [1989] 1 WLR 350.

R v. Vinagre [1979] 69 Cr App R 104.

R v. Wood [2008] EWCA Crim 1305.

Rance v. Mid-Downs Health Authority [1991] 1 All ER 801.

MCQs

Select the single best option for each question stem

1 Diminished responsibility:
a is a complete defence to the charge of murder
b places the burden of proof on the prosecution
c requires proof beyond reasonable doubt
d can only be raised by the defence
e must always be determined by the jury.

2 The following is a feature in the Homicide Act 1957 definition of diminished responsibility:
a an abnormality of mind must be present at the time of the trial
b the abnormality of mind must be caused by mental illness
c the abnormality of mind must substantially impair mental responsibility for the killing
d the defendant did not know the nature or purpose of his act.
e the defendant did not know that what he was doing was wrong.

3 In relation to diminished responsibility, case law has established that:
a the term 'abnormality of mind' has a narrow definition
b the judge decides whether an abnormality of mind is present
c the jury decide whether substantial impairment of mental responsibility has occurred
d self-induced intoxication always results in a verdict of diminished responsibility
e substantial impairment is that which psychiatrists are prepared to say is substantial.

4 In *R v. Tandy* [1989], for alcohol dependence syndrome to be considered an abnormality of mind the defendant must:
a have liver damage caused by alcohol consumption
b have no immediate control over their drinking if brain damage has not occurred
c be intoxicated
d experience alcoholic blackouts
e be willing to stop drinking alcohol.

5 The judgment in *R v. Wood* [2008]:
a is more rigid than the judgment in *Tandy*
b still requires brain damage to have occurred for an abnormality of mind to be present
c recognises alcohol dependence syndrome as a disease that can give rise to an abnormality of mind
d was made by the High Court
e is based on the law of complicity.

Advances in psychiatric treatment (2010), vol. 16, 193–198 doi: 10.1192/apt.bp.109.006742