Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 224–244
Article DOI: 10.53386/nilq.v72i2.873

What's happening with the reformed diminished responsibility plea?

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ABSTRACT

The reformed section 2 of the Homicide Act 1957 is markedly different from the original provision. Despite this, the 'official line' has been that the changes to the plea were merely ones of 'clarification' and 'modernisation'. This article analyses the requirements of the new section 2 in the context of the results of an empirical study into the operation of the new plea carried out by myself and Professor Barry Mitchell. In doing so, it attempts to evaluate the changes which have taken place through an analysis of a sample of 90 cases involving the new plea. The results of the study are discussed in order to assess the validity of the 'official line'. Is it correct, or have the new elements in section 2 resulted in unintended consequences?

Keywords: diminished responsibility; homicide; partial defences; reform; Law Commission; Ministry of Justice; modernisation; contested cases.

INTRODUCTION

It is now over 10 years since the diminished responsibility plea was reformed in the Coroners and Justice Act 2009 as a result of recommendations proposed by the Law Commission and taken forward by the Ministry of Justice (MOJ). As such, this article clearly sets out to re-evaluate the 'official line' which continues to persist, that the changes to the diminished responsibility plea were ones of 'clarification' and 'modernisation'. It does so by examining the plea's requirements in the context of an empirical study (the only one to date which exists). The data from the study, it is argued, supports the contention that the new section 2 has resulted in unintended consequences, including more contested pleas, and a corresponding increase in the number of murder convictions. These findings, supported by the study, give the article's empirical contribution to the literature.

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The diminished responsibility plea has undergone reform and contains significant changes from how it was originally drafted.[1] The original provision contained in section 2 of the 1957 Homicide Act reads:

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

This was replaced by section 52 of the Coroners and Justice Act 2009 which provides:

> 52 **Persons suffering from diminished responsibility (England and Wales)**
>
> (1) In section 2 of the Homicide Act 1957 (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute—
>
> "(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
>
> (a) arose from a recognised medical condition,
>
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
>
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are—
>
> (a) to understand the nature of D's conduct;
>
> (b) to form a rational judgment;
>
> (c) to exercise self-control.
>
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct."

This has led the appellate courts to remark on how the new plea is more structured and more open to medical scrutiny in the form of expert psychiatric input. In particular, the Supreme Court endorsed

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1 For discussion, see Rudi Fortson, 'The modern partial defence of diminished responsibility' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2019) ch 2: Louise Kennefick 'Introducing a new diminished responsibility defence for England and Wales' (2011) 74 Modern Law Review 750.

this in *Golds*[2] when, in the course of his judgment (in which the other members of the court concurred), Lord Hughes stated:

> .... medical evidence (nearly always forensic psychiatric evidence) has always been a practical necessity where the issue is diminished responsibility. If anything, the 2009 changes to the law have emphasised this necessity by tying the partial defence more clearly to a recognised medical condition, although in practice this was always required.[3]

The changes which have taken place were the result of the Law Commission's recommendations which were taken forward by the MOJ. 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.'[4] A similar view was expressed by Maria Eagle MP, the then Parliamentary Under-Secretary of State, saying, 'We do not believe that the changes we are proposing to diminished responsibility will change the numbers enormously; it is really just a clarification of the way in which that defence works.'[5] A month later the same minister summarised the changes as follows:

> Our change of wording for the partial defence is designed to make the law clearer, easier, more modern and better able to move into the future. The definition should be easily understood rather than left behind by medical developments, as the current one arguably has been.[6]

THE OPERATION OF THE NEW PLEA

At the outset it should be noted that, although the wording of the original section 2 had been the subject of much criticism, the Law Commission, drawing on my empirical research which it had commissioned, concluded:

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

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2 [2016] UKSC 61.

3 Ibid [38].

4 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, 4 October 2010) [5].

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

6 Ibid 3 March 2009 col 416.

7 Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) [5.86]. My empirical study can be found at appendix B of that Report.

That study presented data relating to 157 defendants where the diminished responsibility plea was clearly an issue of relevance within the trial process from which it appeared that the plea was operating in a broadly pragmatic but satisfactory manner. Certainly, there was no suggestion that the plea was being abused or that the defendants who were subject to such manslaughter convictions were somehow wrongly avoiding murder convictions. In short, while this was the nature of criticism aimed at the provocation plea, the same could not be said for diminished responsibility. Nevertheless, the Commission decided that it was appropriate after further consultation to recommend adoption of a reformulated definition of the plea 'developed from a definition adopted in the state of New South Wales in 1997'.[8] This, in turn, was taken forward by the MOJ and duly enacted in the 2009 Act.

The new plea is worded very differently from that of the original section 2 of the Homicide Act. In a paper discussing this, I pointed out that little remains of the old plea. Instead, most elements have been replaced in order to ensure that the plea 'has a basis on both valid medical diagnoses and in specifying how a defendant's abilities are to be impaired for the defence to succeed'.[9] In an attempt to gain some understanding of how the new plea is operating in practice, Professor Barry Mitchell and myself were able to examine 90 cases[10] involving the new plea (the CPS study) and compare them with the 157 cases dealt with under the old plea in my Law Commission study. We did this in the hope of assessing 'whether the "official" view of the new plea referred to above is correct or whether the reformulated section 2 goes further and is more far reaching in scope'.[11] The results of this study are informative for a number of reasons. First, in terms of demographics, there were no obvious contrasts between the two studies. In addition, there was considerable consistency in the method of killing with the use of a 'sharp instrument' predominating in both studies. Further, although the four most common primary diagnoses in both studies were schizophrenia, depression, personality disorder and psychosis (but with some slight variations), the relationship between those diagnoses and whether there was a jury trial or not gave rise to interesting results which were described as follows:

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8 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) [5.112].

9 Ronnie Mackay, 'The new diminished responsibility plea' [2010] Criminal Law Review 290, 293.

10 All 90 cases are from England and Wales. The study does not include any cases from Northern Ireland.

11 Ronnie Mackay and Barry Mitchell, 'The new diminished responsibility plea in operation: some initial findings' [2017] Criminal Law Review 18, 23.

> 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 ... 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.[12]

These findings need to be considered in the context of the study of the new law (the CPS study) which found a higher proportion of cases being dealt with as jury trials (43.3 per cent) than under the Law Commission study of the old law (22.9 per cent). This, in turn, resulted in a higher proportion of murder verdicts in the CPS study than in the Law Commission research – 34.4 per cent compared to 14 per cent. Although these results must be considered with caution, a possible conclusion is that there has been a shift in the number of contested cases under the new law resulting in an increase in murder convictions and that this, in turn, may partly be tied into the diagnosis used to support a diminished responsibility plea with personality disorder in particular now more likely to lead to contested trials. However, the other novel elements contained in the new section 2 are also likely to have a role to play in relation to the increase in jury trials, and, in that connection, this article will now consider each of these elements in turn.

THE NEW SECTION 2

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

1 D was suffering from an abnormality of mental functioning which:
2 arose from a recognised medical condition;
3 substantially impaired D's ability to do one or more of (a) understand the nature of his conduct; (b) form a rational judgment; or (c) exercise self-control;
4 provides an explanation for D's acts or omissions in the killing – and the 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 his conduct.

What is immediately apparent is that these requirements are all novel with the exception of the phrase 'substantially impaired' which itself has ironically undergone major reinterpretation as a result of the Supreme Court's decision in *Golds*,[13] examined below. However, before the issue of impairment is considered, I will first briefly discuss the first two

12 Ibid 32.
13 *Golds* (n 2 above).

novel factors. It is clear that the requirement 'an abnormality of mental functioning' was inserted into the new section 2 as it was preferred by psychiatrists as being one upon which they could express an expert opinion.[14] However, although it is a wide concept, it is also clear that it is inextricably tied to the need for a 'recognised medical condition' and that if the 'abnormality of mental functioning' suffered by D did not arise from such a condition then the plea will fail. If confirmation of this basic point is needed, it can be found in *R v Lindo*[15] where Hallet VP, in a case dealing with a drug-induced psychosis, dismissed D's appeal against his murder conviction, stating:

> ... we turn to the judge's directions on diminished responsibility. It is important to focus on the issues as presented to the jury. It was common ground that the appellant was in a prodromal or at risk state for paranoid schizophrenia, he was in a state of psychosis, and the state of psychosis was drug-induced. It was in dispute whether the abnormality of functioning arose from a recognised medical condition. The only candidate for a recognised medical condition left to the jury was drug-induced psychosis in the context of an underlying prodromal, state. In that context, in our view, the judge's directions taken as a whole left the issue of diminished responsibility to the jury in as fair and generous a way possible.[16]

Thus, although there was clear evidence of an 'abnormality of mental functioning', the court applied the decision in *R v Dowds*[17] to the effect that a recognised medical condition grounded in self-induced intoxication will not suffice as evidence of a 'recognised medical condition' for the purposes of section 2. Hughes LJ in *R v Dowds* put it this way:

> It is enough to say that it is quite clear that the re-formulation of the statutory conditions for diminished responsibility was not intended to reverse the well established rule that voluntary acute intoxication is not capable of being relied upon to found diminished responsibility. That remains the law. The presence of a 'recognised medical condition' is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility.[18]

Clearly, therefore, whether any medical condition is 'recognised' as falling within section 2 is a question of law rather than one of medicine. This is not to say that the legal position is uncomplicated as the role of voluntary intoxication within the new section 2 and its relationship to other mental health issues and psychiatric conditions from which

14 Law Commission (n 8 above) [5.114].
15 [2016] EWCA Crim 1940.
16 Ibid [61].
17 [2012] EWCA Crim 281.
18 Ibid [40].

D may have been suffering has given rise to considerable litigation.[19] For example, in *R v Foy*[20] the primary issue in relation to diminished responsibility concerned a dispute amongst the medical experts as to the roles which drugs and alcohol and a concurrent medical condition played in the homicide. In rejecting the proposed fresh medical evidence Davis LJ concluded that describing D's abnormality of mental functioning as being 'caused by the recognised medical condition of an acute psychotic episode' was 'tautologous'[21] and that, excluding the involvement of the voluntarily ingested alcohol and drugs, there was 'simply no solid basis for asserting an abnormality of mental functioning arising from a recognised medical condition which substantially impaired the appellant's ability in the relevant respects and which provided an explanation (in the sense of the statute) for his acts'.[22] Further, it is interesting to note that a medical condition described by the defence expert as an 'abnormal personality structure' was referred to by Davis LJ as not being a recognised medical condition. So it would now seem that as a matter of law this particular condition can be added to the list of conditions that do not qualify as 'recognised' within section 2. Before leaving the vexed question of voluntary intoxication, it is important to remember that following *Dietschmann*,[23] decided under the old law, a similar approach has been taken under the current legislation. Thus, in *Kay and Joyce*,[24] cited with approval in *Foy*,[25] Hallett VP made it clear that a person suffering from schizophrenia was not prevented from pleading diminished responsibility where voluntary intoxication had triggered the onset of a psychotic state. Her Ladyship opined:

> The recognised medical condition may be schizophrenia of such severity that, absent intoxication, it substantially impaired his responsibility (as in the case of *Jenkin*); the recognised medical condition may be schizophrenia coupled with drink/drugs dependency syndrome which together substantially impair responsibility. However, if an abnormality of mental functioning arose from voluntary intoxication and not from a recognised medical condition an accused cannot avail himself of the partial defence. This is for good reason. The law is clear and well established: as a general rule voluntary intoxication cannot relieve an

19 For a comparative critique, see Nicola Wake, 'Recognising acute intoxication as diminished responsibility? A comparative analysis' (2012) Journal of Criminal Law 76(1), 71–98.

20 [2020] EWCA Crim 270.

21 Ibid [87]. The crucial issue was 'to ascertain from what recognised medical condition that psychotic episode arose' [80].

22 Ibid [95].

23 [2003] UKHL 10.

24 [2017] EWCA Crim 647.

25 [2020] EWCA Crim 270 at [75]–[76].

> offender of responsibility for murder, save where it may bear on the question of intent.[26]

Turning now to the other requirements which D must prove to succeed under section 2, I will first consider the level of impairment needed, followed by the 'impairment factors' and finally the 'explanation' factor.

THE LEVEL OF IMPAIRMENT

In our empirical study, all 90 cases in our sample pre-date the Supreme Court's decision in *Golds*,[27] so the study's findings relating to the 'substantially impaired' requirement, namely that a positive view was expressed in 80 (72.7 per cent) of the reports[28] which addressed this issue, must be viewed in that light. There has been much academic commentary on *Golds* with consistent criticism that the decision gives rise to uncertainty.[29] The problem stems from the fact that, although Lord Hughes unsurprisingly confirmed that 'substantially' remains a jury question, he makes it clear that the proper approach to dealing with the word is as follows:

> It does not follow that it is either necessary or wise to attempt a re-definition of 'substantially' for the jury. First, in many cases the debate here addressed will simply not arise. There will be many cases where the suggested condition is such that, *if* the defendant was affected by it at the time, the impairment could only be substantial, and the issue is whether he was or was not so affected. Second, if the occasion for elucidation does arise, the judge's first task is to convey to the jury, by whatever form of words suits the case before it, that the statute uses an ordinary English word and that they must avoid substituting a different one for it. Third, however, various phrases have been used in the cases to convey the sense in which 'substantially' is understood in this context. The words used by the Court of Appeal in the second certified question in the present case ('significant and appreciable') are one way of putting it, providing that the word 'appreciable' is treated not as being synonymous with merely recognisable but rather with the connotation of being considerable. Other phrases used have been 'a serious degree of impairment' (*Seers*), 'not total impairment but substantial' (*Ramchurn*) or 'something far wrong' (*Galbraith*). These are acceptable ways of elucidating the sense of the statutory requirement but it is neither necessary nor appropriate for this court to mandate a particular form of words in substitution for the language used by Parliament. The jury must understand that 'substantially' involves a matter of degree, and that it is for it to use the

26 [2017] EWCA Crim 647 at [16].

27 *Golds* (n 2 above).

28 Mackay and Mitchell (n 11 above) 33.

29 M Gibson, 'Diminished responsibility in Golds and beyond: insights and implications' [2017] Criminal Law Review 543; Ronnie Mackay, 'R v Golds' [2017] Archbold Review 4.

> collective good sense of its members to say whether the condition in the case it is trying reaches that level or not.[30]

So, in most cases, a jury will be left to make this assessment without any guidance. But in cases where guidance is required, the jury will be directed to apply its collective good sense in its deliberations as to whether the degree of impairment reaches a level akin to 'significant and appreciable' or 'serious' impairment. As a result, it seems more than likely that different juries will apply different standards,[31] with the undirected jury being left to use any standard it sees fit as opposed to the directed jury having to apply the stricter standard. Not only that, it also seems possible that this level of confusion is already present in the appellate cases. Thus, in *Squelch*, the direction to the jury was as follows: '"Substantially" is an ordinary English word on which you will reach a conclusion in this case, based upon your own experience of ordinary life. It means less than total and more than trivial. Where you, the jury, draw the line is a matter for your collective judgment.'[32] This was approved by the Court of Appeal which stated:

> As it seems to us, that concise direction amply complies with what Lord Hughes had indicated in giving the judgment in the case of *Golds* in the Supreme Court. Moreover, it commendably does so (and, again as encouraged by Lord Hughes), without undue elaboration.[33]

By way of contrast more recently in *Foy*, the same Lord Justice of Appeal, Davis LJ remarked:

> The Supreme Court [in *Golds*] rejected the notion that any impairment beyond the trivial would suffice. Aside from that, it was to be left to the jury to decide whether in any given case the impairment was of sufficient substance or importance to meet the statutory test. Although this approach has been the subject of academic criticism to the effect that it leaves so important an issue as in effect undefined for the jury,

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30 *Golds* (n 2 above) [40].

31 Interestingly, this issue is raised by Lord Hughes in ibid [38] when in the context of the existence of two possible senses of the word 'substantially' he states that this would lead to 'a risk that different juries may apply different senses'. And yet this is exactly what the judgment has achieved.

32 [2017] EWCA Crim 204 [37].

33 One may legitimately ask: what is the difference between this 'concise direction' and the following direction given by Ashworth J in *Lloyd* [1967] 1 QB 175, para 5 at pages 178-179: 'I am not going to try to find a parallel for the word "substantial". You are the judge, but your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so, was it substantially impaired?'

> and with consequential room for the approach to be adopted to vary from case to case, it is to be presumed that such an approach is based on pragmatic considerations in the context of jury trials.[34]

Further, in *R v Brown*[35] the Court of Appeal stated '"substantially" is an ordinary English word which imports a question of degree and it is for the jury to decide whether it is satisfied. The impairment must be more than merely trivial and "significant and appreciable" may be another way of putting it see *Golds*.'[36] Thus, in that case, Lord Hughes warned that:

> ... it is not enough that the impairment be merely more than trivial; it must be such as is judged by the jury to be substantial. For the same reason, if an expert witness, or indeed counsel, should introduce into the case the expression 'more than merely trivial', the same clear statement should be made to assist the jury.[37]

So where does this leave us? In particular, how are psychiatrists to approach this issue which, although a matter of degree for the jury, is a matter of clinical judgment for the expert? One suspects that, in much the same way as many experts in making this clinical assessment under the old law did not expand on the meaning of the word 'substantially',[38] this approach will continue, as was the case in our empirical study of the new law prior to *Golds*.[39] For clinicians, this approach may be desirable as it avoids the expert having to give any detailed analysis of how the assessment that D's impairment was 'substantial' was reached. However, if there is disagreement on this issue amongst the experts then, of course, such detailed analysis may well be required and, in that connection, there is a real concern that *Golds* will result in more disputes of this type with the result, as has been remarked in a commentary on *Golds*, that the judgment 'may have a negative impact upon this figure'[40] of 72.7 per cent of reports[41] which in our empirical study were found to have reached the 'substantial' threshold and so, in turn, reduce the availability of the plea; an issue which may also be exacerbated by the new 'impairment factors' which will now be discussed.

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34 *Foy* [2020] EWCA Crim 270 [77].
35 [2019] EWCA Crim 2317.
36 Ibid [5].
37 *Golds* (n 2 above) [41].
38 Law Commission (n 7 above) appendix B, [32]–[33].
39 Mackay and Mitchell (n 11 above) 33.
40 Karl Laird 'Case comment' on *Golds* [2017] Criminal Law Review 316, 317.
41 Mackay and Mitchell (n 11 above) 33.

THE IMPAIRMENT FACTORS

The new section 2(1) requires that there be an impairment of one or more of three particular abilities. They are the ability:

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

In this connection, it is clear that '[t]he new wording gives significantly more scope to the importance of expert psychiatric evidence'[42] and that this is particularly so in relation to the three specified abilities.[43] However, the problem is: what do these impairment factors mean and how are they to be applied? Clearly, they are based upon the Law Commission's recommendations,[44] and although the Commission in its discussion of 'what impact on capacity the effects of an abnormality of mental functioning must have' gives some illustrative examples,[45] there is no discussion as to their meaning. Nor is there any such discussion in the official MOJ Circular which merely cites the three abilities without any further comment.[46] In his judgment in *Golds*[47] Lord Hughes states:

> ... the expression 'substantially impaired' has been carried forward from the old Act into its new form. But whereas previously it governed a single question of 'mental responsibility', now it governs the ability to do one or more of three specific things, to understand the nature of one's acts, to form a rational judgment and to exercise self-control. *Those abilities were frequently the focus of trials before the re-formulation of the law*. But previously, the question for the jury as to 'mental responsibility' was a global one, partly a matter of capacity and partly a matter of moral culpability, both including, additionally, consideration of the extent of any causal link between the condition and the killing. Now, although there is a single verdict, the process is more explicitly structured. The jury needs to address successive specific questions about (1) impairment of particular abilities and (2) cause of behaviour in killing. Both are of course relevant to moral culpability, but the jury is not left the same general 'mental responsibility' question that previously it was. The word used to describe the level of impairment is, however, the same.[48]

42 *Brennan* [2014] EWCA Crim 2387 [49].
43 Ibid [51]; *Squelch* (n 32 above) [53].
44 MOJ, Consultation *Paper, Murder, manslaughter and infanticide: proposals for reform of the law* (CP19/08, 28 July 2008) [50].
45 Law Commission (n 8 above) [5.121].
46 Circular 2010/13 (n 4 above) [6].
47 *Golds* (n 2 above).
48 Ibid [7], emphasis added.

Because of this statutory 'reformulation', I have argued elsewhere that:

> [As the three abilities] are now central to any diminished responsibility plea they are not purely medical or psychiatric matters but are rather medicolegal concepts which require careful analysis not only from a medical but also from a legal perspective so that both professions have a clear(er) view of what is required for each.[49]

In the course of that discussion, I made some attempt to do just that and what follows is a summary of my thoughts in this connection.

The first impairment factor in (a) is 'to understand the nature of D's conduct'. It has been remarked that this element seems similar to the 'nature and quality' limb of the M'Naghten Rules.[50] Our empirical study might be interpreted as lending some support for this view as in not a single case was this ability on its own used to support a diminished responsibility plea.[51] This, in turn, might indicate that, like the first limb of the M'Naghten Rules – the 'nature and quality' limb – this ability is also difficult to satisfy. However, the wording is different and an important question is whether ability (a) encompasses a lack of understanding about the wrongfulness of D's conduct. In *Conroy*,[52] Davis LJ made it clear in respect of the ability to form a rational judgment that 'whether an act is right or wrong … will be one element – and potentially an important element – on which a jury's appraisal may be directed as part of the overall circumstances'.[53] Accordingly, I have argued that if that is true for ability (b) then that should be the case for ability (a) as part of what Davis LJ referred to as the jury's assessment of 'all relevant circumstances preceding, and perhaps preceding over a very long period, the killing as well as any relevant circumstances following the killing'.[54] This, in turn, would allow experts a degree of flexibility when considering this ability and might increase its relevance as it would include those whose recognised medical condition resulted in a substantial lack of knowledge that the killing was not only legally but also morally wrong.[55] Accordingly, on this basis, ability (a) would encompass 'a substantial impairment of D's ability to understand the legal or moral wrongfulness of his actions'.

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49 Ronnie Mackay 'The impairment factors in the new diminished responsibility plea' [2018] Criminal Law Review 462, 471. See also Nicholas Hallett, 'Psychiatric evidence in diminished responsibility' (2018) 82(6) Journal of Criminal Law 442, 449–454. Here it is strongly argued that the 'impairment factors' are not solely psychiatric in nature but have moral dimension.

50 Mackay (n 9 above) 296.

51 Mackay and Mitchell (n 11 above) 34.

52 [2017] EWCA Crim 81.

53 Ibid [33].

54 Ibid [32].

55 There is no reason to suppose that an assessment of wrongfulness should be here restricted to legal wrongfulness as in the M'Naghten Rules.

The second ability (b) is 'to form a rational judgment'. This phrase is identical to that used by Lord Parker CJ in *Byrne*[56] and was favoured by the Royal College of Psychiatrists.[57] As such it is now enshrined in statutory form. However, its meaning is far from clear. First, the phrase is built on the 'formation' of a rational judgment rather than on the judgment itself and, second, it is a 'judgment' rather than a 'decision' which is the crucial element in this ability. With regard to the latter, a decision is reached after a judgment is made and, in respect of the former, the 'formation' of a judgment concerns the thought processes which are involved in the making of that judgment. What this means is that the 'forming' of a judgment takes place before the actual judgment is made. Further, there is surely a clear difference between the two terms 'judgment' and 'decision'. Take, for example, legal proceedings where the 'judgment' of the court precedes the actual 'decision'. Accordingly, I have argued that:

> even from a common-sense perspective, there is a clear difference between the two terms which might be summarised as follows. Judgment is the process of the weighing up of options before making a decision as to which alternatives to choose and 'forming a judgment' relates to the thought processes involved in the making of that judgment.[58]

However, it does seem that discussion of this type is likely to be regarded as being, as Davis LJ remarked in *Conroy*, 'over-refined'[59] and perhaps unhelpful. In this connection, it seems that when ability (b) is discussed sometimes no distinction is being made between the terms 'judgment' and 'decision'. Thus, in *Conroy*, the trial judge in dealing with ability (b) told the jury:

> What does 'rational judgement' mean, and how do you apply its meaning to the circumstances of this case? The expression 'rational judgement' has not been defined by the Act of Parliament that creates the defence of diminished responsibility, nor is it an expression used by psychiatrists. Accordingly you should apply the English language definition of the expression, namely 'a considered decision based on reason'.[60]

Interestingly, no complaint was made about this wording in the course of the appeal in *Conroy* even though, as mentioned, there is a clear distinction between the two words. Further, experts might be surprised to learn that the expression referred to in ability (b) is not one 'used by psychiatrists'. However, what is becoming clear is that, when considering this ability, a jury may have to consider the

56 [1960] 2 QB 396, 403.
57 Law Commission (n 8 above) fn 85 on page 102.
58 Mackay (n 59 above) 468.
59 *Conroy* (n 52 above) [37].
60 Ibid [27].

'defendant's thinking processes' and not restrict their deliberations to 'the actual outcome'.[61] Indeed, in confirming that 'The wording is altogether more open-ended', Davis LJ emphasised that legal directions should 'focus on the actual provisions of the section without undue elaboration'.[62] That the whole of the defendant's thought processes should be considered when the jury comes to consider this ability seems also to be confirmed in *Blackman* where the Court Martial Appeal Court gives full consideration to a whole range of emotional factors which impacted on the defendant's final decision to kill the victim.[63] In conclusion, our empirical study found that ability (b) was the most frequently used ability by experts with 86 (78.2 per cent) of reports referring to the ability to form a rational judgment of which 74 were positive. Accordingly, I have suggested that a way forward might be to interpret this ability as requiring an assessment of whether and how far 'all D's thought processes leading up to and including the killing were based on reason and logic'.[64] This would allow experts to adopt a wide approach when assessing the judgments (including their formation and rationality) made by D before and during the behaviour which led to the fatal act.

The third and final ability is (c) 'to exercise self-control'. In our empirical study, we found that 77 reports (70 per cent) cited this ability, 64 of which were positive which means that the ability to exercise self control was used a little less frequently than ability (b). In addition, although 32 of these reports combined abilities (b) and (c)[65] and 24 reports combined all three abilities, in only six reports was the ability to exercise self-control used on its own compared to 16 which used ability (b) on its own.[66] These figures might tentatively suggest that, although ability (c) is of importance to psychiatrists, it is not as important as ability (b).

Turning to the wording used to describe ability (c), an obvious point to note is that the phrase 'self-control' is identical to that used in the 'loss of control' plea contained in sections 54 to 56 of the Coroners and Justice Act 2009. However, rather than require 'self-control' to be lost, ability (b) focuses on a failure to 'exercise' self-control. The use of the word 'exercise' is troubling. The Law Commission's original wording

61 Ibid [37], [32]; *Squelch* (n 32 above) [44].

62 *Conroy* (n 52 above) [38].

63 *Blackman* [2017] EWCA Crim 190, [109]–[111].

64 Mackay (n 49 above) 469.

65 This could indicate that there is some degree of overlap between abilities (b) and (c) which in turn might result in juries blending the two in much the same way as may have occurred when both diminished responsibility and 'loss of control' are pleaded together, see below.

66 Mackay and Mitchell (n 11 above) 34, table 11.

was to 'control him or herself',[67] without any reference to 'exercise' which was added later. But it is not clear how this came about as the MOJ stated in its Consultation Paper, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*:

> The Law Commission recommendation clarifies that the following must be substantially impaired: the defendant's capacity (i) to understand the nature of his or her conduct, (ii) to form a rational judgment or (iii) to control him or herself. We agree that this is helpful and have incorporated this wording in our draft clause.[68]

But, in the same Consultation Paper, clause (1A)(iii) of the draft bill at Annex B inserts 'exercise' without any explanation.[69] So we are left to wonder about the role which the word 'exercise' is supposed to play in ability (c). If there is found to be a substantial impairment of D's 'ability' to control himself, then is that not enough to bring him within the new plea without any need to consider further the requirement of the ability to 'exercise' self-control. While it does seem likely that the draftsperson was influenced by Lord Parker LCJ's remark in *Byrne* referring to the defendant's 'ability to exercise will-power to control his physical acts',[70] until the Court of Appeal decides that the word 'exercise' has a distinct meaning and role to play within ability (c) it is perhaps best regarded as superfluous. As far as experts' reports are concerned, they tend to reach a conclusion by citing ability (c) and thus including the word 'exercise'. The same can be said for the Court Martial Appeal Court in *Blackman*, where Lord Thomas CJ when referring to ability (c) said: 'we have also considered whether he lost his self-control (within the context of diminished responsibility)'.[71] Pausing there, it is of note that there is no mention made here of 'exercise' until later in the same paragraph when Lord Thomas finally states:

> The appellant's decision to kill was probably impulsive and the adjustment disorder had led to an abnormality of mental functioning that substantially impaired his ability to exercise self-control. In our judgement the adjustment disorder from which he was suffering at the time also impaired his ability to exercise self-control.[72]

With this in mind, it seems likely, as mentioned above, that the inclusion of the word 'exercise' was as a result of the Law Commission's wording being altered so as to include reference to 'self-control' rather than 'control him or herself', but in doing so it means that 'ability' and

67 Law Commission (n 8 above) [5.112].
68 MOJ (n 44 above) [50].
69 Ibid page 35.
70 *Byrne* (n 56 above) 403.
71 *Blackman* (n 63 above) [112].
72 Ibid [112].

'exercise', as mentioned above, seem to play similar roles. If this is correct then it might be appropriate to interpret ability (c) as requiring 'a substantial loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning'.[73] This mirrors the approach taken in the loss of control plea and approved by the Court of Appeal,[74] and there is no reason to believe that the phrase 'loss of self-control' should be given a different meaning in diminished responsibility. Support for this view can be found in the fact that, as confirmed by the Court of Appeal in *R v Sargeant*:

> The two defences may be presented together as alternatives. The law does not therefore ignore a mental disorder that, through no fault of a defendant, renders him or her unable to exercise the degree of self-control of a 'normal person.[75]

Although the interrelationship between the loss of control and diminished responsibility pleas may now be different,[76] it remains common practice as part of a defence strategy to plead them together and, if this strategy is successful, the sentence must be based on both.[77] In short, although the impairment of 'self-control' may be qualitatively different as between the two pleas, the essential nature and definitional meaning of the term is surely the same. Further, adopting this approach would allow experts, in the context of section 2, to focus on the degree to which D's normal powers of reasoning were affected by his recognised medical condition[78] which would normally be placed in the context of the full phraseology contained in ability (c).

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73 David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* 14th edn (Oxford University Press 2015) 583.

74 *R v Jewell* [2014] EWCA Crim 414 [24].

75 *Sargeant* [2019] EWCA Crim 1088 [44].

76 For discussion of using both pleas under the old law, see R D Mackay, 'Pleading provocation and diminished responsibility together' [1988] Criminal Law Review 411.

77 For an example of this, see *R v Caddick* [2018] EWCA Crim 865 where it is stated at [11]: 'The court in sentencing, however, indicated that the appellant, through his counsel and his defence case statement, had put forward the other partial defence, namely that of loss of control. Having had regard to the opinions of the psychiatrists as to the impact on the appellant's loss of control of his mental state and abnormality of mental functioning at the time, the court accepted that the appellant should be sentenced on this basis also.'

78 See Hallett (n 49 above) 454, stating that the difference between the two pleas lies in 'what has caused the loss of self-control'.

THE 'EXPLANATION' FACTOR

Section 52(1)(c) adds the requirement that only if the abnormality of mental functioning 'provides an explanation for D's acts and omissions in doing or being a party to the killing' will D be entitled to avail himself of the new plea. Further, subsection (1B) adds '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.' In our empirical study, we found that report writers were frequently failing to address this requirement, and when they did so they were inconsistent in its application. This is not surprising in view of the fact that the relationship between these two provisions is unclear. This stems from the fact that the Law Commission, after consultation, decided against a strong causal provision in favour of an 'explanation' requirement which in its view ensured 'an appropriate connection between the abnormality of mental functioning … and the killing'.[79] However, both the MOJ and government ministers made it clear that a stronger causal requirement was needed.

This, in turn, resulted in what is now subsection (1B). While it seems clear that the 'explanation' requirement is mandatory it has been argued by Smith et al that this may not be the case in respect of subsection 1(B) as it does not include the word 'only' before 'if it causes'.[80] Although this is a view taken in the Crown Court Compendium,[81] it is notable that in the 'Directions' reliance is placed exclusively on the need for the additional requirements in (1B) to be satisfied, which in turn may stem from the fact that the MOJ was adamant that this was essential, a view also strongly supported by Simester and Sullivan.[82] Further, in *Gold*s, this was also the view of Lord Hughes when, in summarising the 'new statutory formulation', he referred to 'cause or significantly contribute to his killing the deceased' without any mention of the 'explanation' provision.[83] In addition, the Court of Appeal endorsed this in *Sargeant*

79 Law Commission (n 8 above) [5.123]–[5.124].

80 David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* 15th edn (Oxford University Press 2018) 560.

81 Judicial College, Crown Court Compendium: Part One (December 2020) 19-1 at 12 which states: 'It is possible, however, for an argument to be advanced that a causal link does not need to be established. Subsection (1B) does not say that for the defence to succeed a sufficient explanation can *only* be provided if the abnormality of mental functioning is a cause. On this basis a causal link is just one of the ways in which the killing might be "explained." There may therefore be cases where the abnormality provides an explanation sufficient to mitigate the conduct to manslaughter even if there is no causal link.' Emphasis in original.

82 A P Simester et al, *Simester and Sullivan's Criminal Law* 7th edn (Hart Publishing 2019) 789–791.

83 *Golds* (n 2 above) [8]. See also his Lordship's remark at [32].

where in confirming this approach it emphasised that 'Whilst the effect of the changes in the law has certainly been to emphasise the importance of medical evidence, causation … is essentially a jury question.'[84]

However, this does not mean that experts do not offer an opinion on this matter and that these do not differ. Indeed, our empirical study revealed that, of those reports which addressed subsection (1)(c), 61 reports (55.5 per cent) referred to 'explanation' of which 54 gave a positive view.[85] A further examination of these 54 reports reveals that over 50 per cent (n=28) relied exclusively on subsection (1)(c) without any mention of 'cause' or 'significant contributory factor'. This may well be because the 'explanation' requirement is perhaps easier to apply than subsection (1B) and so can be exclusively relied upon if, as advocated above by Smith et al, that for an 'explanation' to be provided there is no additional need to prove that the abnormality of mental functioning must have 'caused or been a significant contributory factor in causing' the killing.

Turning now to subsection (1)(B), it is interesting to note that, when it came to applying this provision, 66 reports were silent on this issue, 28 of which as already mentioned had relied exclusively on the 'explanation' factor. Of those that did address the causal requirement, they did so in a variety of ways with some referring only to 'cause' (n=14), some only to 'contributory factor' (n=13) and others to both (n=11). Again this is perhaps not surprising in view of the fact that there is no guidance given on this issue. Thus, not only is the relationship between the two subsections unclear, but so also is the strange drafting of subsection (1)(B) which refers to 'causes' *or* 'a significant contributory factor'. Why it may be asked, is the latter alone not sufficient and at what stage will a causal link be insufficient thus triggering a need for a consideration of the 'contributory factor' requirement? This places experts in a difficult position when they are called upon to address this subsection, which itself is perhaps a good reason for avoiding it and relying only on the need for an 'explanation'. Interestingly, the Judicial College remarks with confidence that 'In the vast majority of cases the issue of a causal link will not generate special problems',[86] and it is true that to date the causal issue does not seem to have given rise to judicial scrutiny.

One thing that does seem to be clear about subsection (1)(B) is that the abnormality of mental functioning need not be the sole cause of the killing, otherwise there would be no need for the 'contributory factor'

84 [2019] EWCA Crim 1088, [29], [51] and [55] the trial judge's direction on causation is approved.

85 47 reports made no mention of the 'explanation' requirement. Mackay and Mitchell (n 11 above) 34.

86 Judicial College (n 81 above) 19.1 [11].

requirement which requires only that it be 'a significant contributory factor'. This is endorsed by the MOJ which remarks that 'a strict causation requirement ... would limit the availability of the partial defence too much'.[87] So it is clear that other factors may be relevant such as 'loss of control'[88] or the effects of intoxicants.[89] Finally, the use of the word 'significant' in the subsection is important. It cannot mean 'substantial' as, presumably, the draftsperson would have chosen that word had it been intended. So it must mean something less in terms of 'weight' than that given in *Golds* to 'substantial'. It is submitted that Maria Eagle was correct when she said 'We do not require the defence to prove that [the abnormality] was the only cause or the main cause or the most important factor, but there must be something that is more than a merely trivial factor.'[90] Accordingly, any 'contributory factor' which is more than trivial should be 'significant' for the purposes of subsection (1)(B).[91]

CONCLUDING REMARKS

In *Golds*, Lord Hughes emphasised the importance of the Crown's entitlement in appropriate cases to 'accept that the correct verdict is guilty of manslaughter on the grounds of diminished responsibility and no trial need ensue'.[92] In support of what he referred to as 'this responsible course',[93] his Lordship cited my empirical research for the Law Commission under the old plea which revealed that this took place in 77.1 per cent of cases in the research sample. By way of contrast, our empirical study of the new plea reveals that the percentage of cases where the prosecution accepted a guilty to diminished responsibility plea was 56.7 per cent.[94] This, in turn, means that 43.3 per cent of these cases were contested compared to 22.9 per cent under the old plea with murder convictions being returned in 34.4 per cent of the new plea contested cases as opposed to a murder conviction rate of 14 per cent under the old plea.[95] The reasons for this increase in contested pleas and murder convictions is unclear. However, what

87 MOJ (n 44 above) [51].
88 *Caddick* (n 77 above).
89 *Kay and Joyce* (n 24 above).
90 *Hansard*, 3 March 2009, cols 416–417.
91 *Sargeant* (n 75 above) [51], [55] where the trial judge's direction considered 'appropriate' by the Court of Appeal states: 'It does not have to be the sole cause of her conduct but she must prove that it was more than a trivial cause.'
92 *Golds* (n 2 above) [48].
93 Ibid.
94 Mackay and Mitchell (n 11 above) 26, table 3.
95 Ibid 27, table 4.

is clear is that one of the policy reasons for abolishing provocation and introducing a narrower 'loss of control' plea was to increase the number of convictions for murder. Thus the MOJ in its remarks about the effects of abolishing provocation stated:

> We think trials would be likely to be affected in two ways by the new, narrower partial defence. *On the one hand, the CPS would accept fewer pleas to manslaughter, thus increasing the number of trials.* On the other hand, some defendants who currently plead manslaughter unsuccessfully would plead guilty to murder in future (because their chances of succeeding with a manslaughter plea would be so reduced).[96]

But when discussing diminished responsibility the MOJ made the following remark:

> The Law Commission recommended that the law be clarified and updated to reflect developments in medical knowledge. The Government's proposals aim to do this. Given the nature of the changes proposed, *we do not expect any significant shifts in the numbers or types of cases which benefit from the partial defence of diminished responsibility, and our analysis of the 2005 cases supports this conclusion.* We do not therefore think that there will be an impact on the courts or prison population as a result of the changes.[97]

So an increase in murder convictions was not in any way a reason for reformulating section 2. Rather the remark emphasises that the reasons given for reforming diminished responsibility were to clarify and update the original plea. In support of the view that there was no expectation of shifts 'in the numbers or types of cases', the MOJ refers to its 'analysis of the 2005 cases'.[98] However, this study of some 39 diminished responsibility cases[99] which is limited to sentencing remarks gives the reader little detail on how these cases were dealt with, and, in particular, no information is given as to how many were full trials as opposed to guilty pleas which were accepted by the prosecution. So what is the basis of the MOJ's conclusion that there will be no impact on numbers or types of cases? The lack of any rationale to support this conclusion is troubling. Indeed, the conclusion reached in relation to provocation about an increase in murder convictions seems to be also applicable to diminished responsibility having regard to the radical nature of the changes introduced in the new

96 MOJ, *Impact Assessment* – Coroners and Justice Bill – homicide clauses (14 January 2009) 4, emphasis added.

97 Ibid 5–6

98 Ibid 6.

99 Ibid 15–16.

section 2. These changes surely go beyond mere 'modernisation' and 'clarification' as they require proof of a number of new elements that also involve greater psychiatric input.[100] Taken together, what this means is that experts may be more likely to disagree over one or more of these new elements. Granted that the results of our empirical study into the operation of the new plea should be treated with caution, however, with this in mind what they suggest is that there are now more contested cases, more jury trials and a corresponding increase in rejections by the prosecution of diminished responsibility resulting in more murder convictions. On the face of it, as the new section 2 clearly narrows the scope of the defence, surely this consequence, of a possible increase in convictions for murder, should have been anticipated and catered for in the drafting. Instead, such an increase is an unintended consequence which seems particularly regrettable as there was never any suggestion that the old plea was somehow being manipulated or used in an unacceptable manner such as to warrant the type of change, as took place with the abolition of provocation, which would increase the number of jury trials and consequent murder convictions. Will this be a continuing legacy of the new diminished responsibility plea? Taken together with the decision in *Golds* which adds to the problems now facing the accused – as it makes it more difficult for D to prove that any impairment suffered was 'substantial'– this now seems likely, but only time will tell.

100 See Hallett (n 49 above) 455, who argues that the new s 2 requirements 'have encouraged psychiatrists to step outside their area of expertise and usurp the function of the jury'.