

Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law

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Introduction

Since its genesis, criticism of the doctrine of diminished responsibility has been extensive, both in respect of its underlying principles and practical effects. It has been called all sorts of names: “elliptical almost to the point of nonsense”,¹ inaccurate² and essentially illogical.³ Yet, in 2006, the Irish legislature deemed it appropriate to incorporate the partial defence into Irish law. To attempt to ascertain why, this paper reflects upon the development of the doctrine throughout the jurisdictions of the United Kingdom, and tracks its gradual progress to the republic under s. 6 of the Criminal Law (Insanity) Act 2006. With the doctrine now firmly enshrined in Irish law, the paper moves to consider the underlying rationale peculiar to s. 6, in addition to the early signs of its impact in practice.

The first part of this paper charts chronologically the fluctuating nature and scope of the doctrine in the jurisdictions discussed, showing the malleable margins pertaining to the defence in practice. It shows how the language used to define the doctrine, and its interpretation, are shaped not so much by academic agreement on how the wording should be understood, but on political and social issues of the time. Consideration is afforded to the foundational nature of the doctrine in Scotland in order to arrive at an understanding of its original intention. The impact of its mid-twentieth-century migration to the statute books of England and Wales, and later Northern Ireland, is then discussed as this marks an important shift in the status and interpretation of the doctrine. Following this, the ascent of the doctrine into Irish law is considered, in conjunction with more recent statutory developments affecting this area of law in England and Wales, Northern Ireland and Scotland.

The second part discusses in greater depth the nature and scope of the law in Ireland, in particular, its relationship with the insanity defence and its role as a means of mitigating the harsh effect of the mandatory life sentence for murder. Recent Irish caselaw is also taken into account, with a view to identifying the emergence of patterns in the

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1 E Griew, “Reducing murder to manslaughter: whose job?” (1986) 12 *J Med E* 18. Griew’s criticism was in the context of the definition under s. 2(1) of the Homicide Act 1957.

2 G H Gordon, *Criminal Law of Scotland* 3rd edn (Edinburgh: Green 2000), p. 451.

3 B Wootton, “Diminished responsibility: a layman’s view” (1960) 76 *LQR* 224, p. 236.

interpretation of the law since its introduction in 2006. The options available to the courts at the disposal stage are shown to be lacking and the approach of the judiciary inconsistent.

1 Historical reflections

1.1 SCOTLAND: ORIGINS TO MID-TWENTIETH CENTURY

That the doctrine was initially applied to both capital and non-capital charges⁴ suggests that at its core is a larger ideal, a more general expression of “tenderness to the frailty of human nature”.⁵ A pragmatic statement of the concept is evidenced as early as the late seventeenth century in Scotland,⁶ with an attitude in stark contrast to its neighbouring jurisdiction.⁷ Its incarnation in caselaw has been identified as early as 1704,⁸ and by the nineteenth century, the notion of diminished responsibility was established within the Scots law as a form of mitigatory plea, albeit somewhat informally.⁹

Flexibility was the order of the day in Scotland, but as the nineteenth century progressed, and with it the legal system, the doctrine took on a more structured countenance.¹⁰ Judges began to take the initiative by directing juries to provide recommendations as to mercy, as opposed to leaving judges to arrive at such a decision of their own accord.¹¹ Following this, it was not long before the verdict of murder with a recommendation to mercy was dispensed with altogether in this context in favour of the more potent verdict of culpable homicide.¹² This development marked a shift in disposal power from the Crown to the court, as there was no possibility that such a verdict could be rejected by the Crown, the significance being that it became the role of the judge to decide upon a suitable sentence in light of an accused’s mental state.¹³

Diminished responsibility as a flexible yet structured legal concept is epitomised in the landmark case of *HM Advocate v Dingwall*,¹⁴ where Lord Deas referred to culpable homicide as including “murder with extenuating circumstances”. In a series of further decisions, the notion that various types of “mental weakness” could have the effect of reducing what would otherwise be a conviction of murder to one of culpable homicide became

4 In respect of non-capital charges the court would grant a reduced sentence in light of the accused’s mental disorder, see *William Braid* (1835) 1 Hume Com, ch. I; *Thomas Henderson* (1835) (Bell’s Notes 5); and *James Ainslie* (1842) 1 Broun 25. For capital cases, mental disorder was taken into account only by way of the Royal Prerogative of Mercy, for example, see *Archd Robertson* (1836) 1 Swin 15.

5 *Commonwealth v Webster* (1850) 5 Cush 296.

6 Sir George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal*, vol. 1, 1–8 (1678): “It may be argued, that since the Law grants a total Impunity to such as are absolutely furious, that therefore it should by the Rule of Proportions, lessen and moderat the Punishments of such, as though they are not absolutely mad, yet are Hypochondrick and Melancholly to such a Degree, that it clouds their Reason.”

7 At around the same time in England Hale wrote that “partial insanity . . . seems not to excuse . . . in the committing of any offence for its matter capital”: M Hale, *The History of the Pleas of the Crown* (1736). See N Walker, *Crime and Insanity in England: vol. 1, The historical perspective* (Edinburgh: Edinburgh UP 1968) and J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh: Green 2006), p. 221.

8 *John Somerville* (1704) Hume, i, 42 and 44. See Chalmers and Leverick, *Criminal Defences*, n. 7 above, p. 222.

9 See Gordon, *Criminal Law of Scotland*, n. 2 above, pp. 458–9, for further discussion of the early origins of the doctrine.

10 The term “diminished responsibility” seems to have been first used by Lord Bell in *William Braid* (1835) 1 Hume Com, ch. I.

11 *Jas. Denny Scott* (1853) 1 Irv 132.

12 *John McFadyen* (1860) 3 Irv 650.

13 Gordon, *Criminal Law of Scotland*, n. 2 above, pp. 459–60.

14 (1867) 5 Irv 466.

entrenched.¹⁵ It is noteworthy, however, that Lord Deas did not regard the accused's weak mental state as the sole ground for a verdict of culpable homicide on the basis of diminished responsibility; it was rather one of a number of grounds or "elements" which he thought might justify the decision.¹⁶

The "golden age" of flexibility was not destined to last, however, and the twentieth century brought with it a marked shift in the attitude of the courts. There were growing concerns that diminished responsibility was becoming a loophole for murderers. A murder conviction resulted in hanging, and the usual outcome for a successful insanity plea at the time was indefinite incarceration in an asylum. Thus, diminished responsibility, as an alternative to an insanity plea, resulted in an accused evading either hanging or the asylum – a "win-win" so to speak. Diminished responsibility was given a bad reputation as it was seen to facilitate an escape from appropriate punishment for the accused who was not insane and who should, in fact, have been convicted of murder.¹⁷

The approach of the courts at this time may also be attributed to the rise of the psychiatric profession and the emphasis placed on expert evidence at trial.¹⁸ Whereas previously, a recognised mental condition or disease was not a prerequisite, now it was moving in that direction, a move which was spurred on by the progress of psychiatric medicine.¹⁹

Such scepticism culminated in the key decision of *HM Advocate v Savage*,²⁰ where Lord Alness set out the test for the doctrine which has since been taken as the definition of the plea:

that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility . . . that there must be some form of mental disease.²¹

A number of cases which followed supported this trend.²² Adding further to the restrictive tendency of the law at this time was the practice of the courts of interpreting the aforementioned set of factors so as to be collective in nature as opposed to alternatives.²³ As a result, the test to establish diminished responsibility became highly restrictive and the courts adopted the position that the scope of the plea was not to be further widened.²⁴

15 See *John McLean* (1876) 3 Coup 334.

16 For example, see *Granger* (1878) 4 Coup 86; *Ferguson* (1881) 4 Coup 552.

17 Gordon, *Criminal Law of Scotland*, n. 2 above, pp. 463.

18 For example, see *HM Advocate v Aitken* (1902) 4 Adam 88; *HM Advocate v Robert Smith* (1893) 1 Adam 34. For further discussion, see Chalmers and Leverick, *Criminal Defences*, n. 7 above, pp. 224–5.

19 *HM Advocate v Aitken* (1902) 4 Adam 88 (per Lord Stormonth Darling), 94–5; *HM Advocate v Higgins* (1913) 7 Adam 229.

20 1923 JC 49.

21 *Ibid.* at 51. *HM Advocate v Aitken* (1902) 4 Adam 88, a particularly restrictive interpretation of the doctrine, was the only authority quoted by Lord Alness, yet this formula has become the authoritative origin of the modern law notwithstanding its inconsistencies with the nineteenth-century cases. See Gordon, *Criminal Law of Scotland*, n. 2 above, pp. 465.

22 For example, see *HM Advocate v Braithwaite* 1945 JC 49, where Lord Cooper stated that "[t]here must be something amounting or approaching to partial insanity and based on mental weakness or aberration", at 51.

23 *Connelly v HM Advocate* 1990 JC 349; *Williamson v HM Advocate* 1994 JC 149.

24 Scottish Law Commission, *Report on Insanity and Diminished Responsibility* No 195 (Scottish Law Commission: Edinburgh July 2004), para. 3.2. The courts established that intoxications (*Brennan v HM Advocate* 1977 JC 38), psychopathic personality disorder (*HM Advocate v Carruber* 1946 JC 109), or a combination of immaturity and personality difficulty (*HM Advocate v Connolly* 1990 SCCR 505) would not be sufficient to establish diminished responsibility in the absence of a specific mental illness.

From its origins, the doctrine appears to emerge from a desire to blame and punish those with a mental disorder, whether they be killers or not, in an appropriate and morally justifiable manner; a doctrine which makes a concession to the weakness inherent in the human condition. Over time, with the emergence of a more ordered legal system, a rising psychiatric profession and a more sophisticated public, such liberal ideals – fluid in nature – became difficult to locate within the legal system. And so diminished responsibility was tapered to fit.

It was during this episode of narrow interpretation of the doctrine in Scotland that the jurisdiction of England and Wales, followed shortly by Northern Ireland, decided to incorporate diminished responsibility into legislation.

1.2 England and Wales and Northern Ireland: new beginnings

It is assumed by most that the rationale behind the introduction of diminished responsibility in England and Wales was to assuage the restrictive nature of the insanity defence under the M'Naghten rules.²⁵ However, one commentator would argue that it is “a commonly held misconception” that the doctrine was introduced for such a purpose, and that it was instead incorporated to appease the abolitionist faction of the death penalty debate.²⁶ This can be supported by the fact that as early as 1883, Stephen suggested that when madness was proved, one of three verdicts could be brought in: “Guilty; Guilty, but his powers of self-control were diminished by insanity; Not Guilty, on the grounds of insanity”.²⁷ Yet the idea was not entertained again until the capital punishment debate ignited almost a century later.

The idea of incorporating the Scottish doctrine into English law was considered, and rejected, by the Royal Commission on Capital Punishment in 1953.²⁸ Although setting out strong arguments in favour of the doctrine of diminished responsibility, the commission appears to have lost its nerve upon recommendation, citing its limited mandate. Its overall conclusion was that: “the outstanding defect of the law of murder is that it provides a single punishment for a crime widely varying in culpability.”²⁹ The report did not receive the acclaim it perhaps deserved and was not debated in the House of Commons for two years following its publication.³⁰

After a brief interlude, light was again shone on the matter by a group of Conservative lawyers who published a pamphlet,³¹ inferior both in size and content when compared to

25 *R v McNaghten* (1843) 10 Cl and F 200. See A Ashworth, *Principles of Criminal Law* (Oxford: OUP 2006) who speaks of a “long-standing dissatisfaction” with the insanity defence, p. 277; S Prevezer, “The English Homicide Act: a new attempt to revise the law of murder” (1957) 57(5) *Columbia Law Review* 624, who considers s. 2 as an “addition to the M'Naghten rules”, p. 636. According to Ashworth, the primary criticism of the rules is their confinement to cognitive defects and exclusion of emotional or volitional disorders from the insanity defence (p. 207). The rules can be summarised as follows: “[T]o establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was labouring 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” (1843) 10 Cl and F 200, at 210.

26 F Boland, “Diminished responsibility as a defence in Irish law: past English mistakes and future Irish directions” (1996) 6(1) *ICLJ* 19, p. 19; T O'Malley, *Sentencing Law and Practice* 2nd edn (Dublin: Thomson Round Hall 2006), p. 408.

27 Sir J F Stephen, *History of the Criminal Law of England* (London: 1883).

28 *Report of the Royal Commission on Capital Punishment, 1949–53*, Cmnd 8932 (London: HMSO 1953).

29 *Ibid.* para. 790.

30 *HC Debs*, 10 February 1955, vol. 536, cols 2064–183.

31 Sir Lionel Heald, *Murder: Some suggestions for the reform of the law of murder in England* (London: Inns of Court Conservative and Unionist Society 1956).

the Royal Commission Report.³² Though not proposing any change to the insanity defence, it recommended that when mental abnormality did not come within the confines of the M'Naghten rules, diminished responsibility was a useful addition to the law in this area.³³ Largely due to a number of sensational cases,³⁴ the government took heed and published a Homicide Bill, in suppression of a Private Members' Bill to abolish the death penalty for murder. The following year, s. 2(1) of the Homicide Act 1957 incorporated the doctrine into law, with the following definition:

Where a person kills or is 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 or omissions in doing or being a party to the killing.

Ironically, for those such as Boland who argue that diminished responsibility was brought in to mitigate capital punishment and appease the abolitionists,³⁵ the Homicide Act abolished the capital penalty for about three-quarters of capital crime.³⁶ Even so, the doctrine was still limited to murder which had ceased to a significant extent to be a capital crime at all.³⁷ This serves to substantiate the claim that diminished responsibility in England and Wales amounts to "a peculiar balance between a number of vectors of policy, principle and understanding".³⁸

The ambiguous nature of the s. 2(1) definition was evident from the start, with one Member of Parliament remarking that: "[t]he Clause is disappointing, because it obviously sets out to do something that most of us want to do, but is intolerably vague and woolly".³⁹ This attitude found its way to the courtroom also, where judges either left the section to the jury to interpret or described the relevant state of mind as "borderline insanity" without further explanation.⁴⁰

It was not until 1960 that the courts provided an authoritative explanation of the definition. In *R v Byrne*,⁴¹ Lord Parker said that the concept of "abnormality of mind" was considerably wider than the concept of "defect of reason" under the McNaghten Rules. He went on to hold that the term was:

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 as to whether an act is right or wrong, but also the ability to exercise will-power to control his physical acts in accordance with that rational judgment.⁴²

32 S Prevezer, "The English Homicide Act", n. 25 above, p. 630.

33 B P Block and J Hostettler, *Hanging in the Balance: A history of the abolition of capital punishment in Britain* (Winchester: Waterside Press 1997).

34 For example, *R v Evans* [1950] 1 All ER 610; *R v Ellis*, *The Times*, London, 21 June 1955, p. 6, col. 3; *R v Craig*, *The Times*, London, 12 December 1952, p. 2, col. 4.

35 Boland, "Diminished responsibility", n. 26 above.

36 S Silverman, *HC Debs*, 28 November 1956, vol. 561, cols 433, 481–2.

37 *Ibid.* Suspension of the death penalty became permanent in England, Wales and Scotland in 1969 and in Northern Ireland in 1973.

38 A Norrie, *Crime, Reason and History: A critical introduction to criminal law* 2nd edn (London: Butterworths 2001), p. 185.

39 A Greenwood, *HC Debs*, 28 November 1956, vol. 561, cols 433, 491.

40 *R v Spriggs* [1958] 1 QB 270; *R v Walden* [1959] 1 WLR 1008. For commentary on early cases, see J E Hall Williams, "The psychopath and the defence of diminished responsibility" (1958) 21(5) *MLR* 544–9.

41 [1960] 2 QB 396.

42 *Ibid.* at 404, (per Lord Parker CJ).

The court appears to have had very little to say about the issue of aetiology, as represented by the bracketed words which follow it in s. 2(1).⁴³ Criticism from the medical profession was inevitable. For example, the phrase “abnormality of mind” was considered obscure and inadequate from a psychiatric perspective – it is not a medical term and so its meaning has had to develop in the courts on a case-by-case basis.⁴⁴

The *Byrne* case, and the body of caselaw which was to follow, however, engineered such ambiguity to its advantage so as to bring about flexibility in practice. As a result, the scope of the definition was deemed to cover a wide range of mental conditions, including psychopathy, volitional insanity and alcoholism.⁴⁵ The defence even applied to the mercy killer, of which Glanville Williams has remarked:

One may question whether leniency has not sometimes gone too far . . . there can be no doubt of the beneficial effect of the defence in [such] cases. Here it is invariably accepted by the jury on the flimsiest medical evidence, and thankfully used by the judge as a reason for leniency.⁴⁶

Turning to the situation in Northern Ireland, due to a dearth of murder cases and no executions for murder for 20 years, there was little public demand for the law to be amended along the lines of the 1957 Act.⁴⁷ However, two controversial hangings in the 1960s which would probably have resulted in life sentences in England and Wales brought an end to public indifference. Initial attempts to introduce diminished responsibility together with the abolition of the death sentence were unsuccessful,⁴⁸ however, the doctrine was eventually introduced in Northern Ireland under the Criminal Justice Act (Northern Ireland) 1966.⁴⁹

The next significant review of the law came in 1975, with the highly publicised and well-received Butler Report.⁵⁰ The Butler Committee remarked that: “the only substantial justification for maintaining the existing provision for a finding of diminished responsibility appears to be the continued existence of the mandatory life sentence for murder”.⁵¹ Its preferred solution was to abolish the mandatory life sentence for murder and with it, diminished responsibility.⁵² Failing such reform, it recommended a reformulation of the s. 2 definition.⁵³

Soon after, the Criminal Law Revision Committee⁵⁴ gave a majority view that diminished responsibility should be retained even if flexibility in sentencing for murder

43 R D Mackay, “The abnormality of mind factor in diminished responsibility” (1999) *Crim LR* 117, p. 117.

44 Law Commission Report, *Murder, Manslaughter and Infanticide* No 304 (Law Commission: London 2006), para. 5.111.

45 See Mackay, “Abnormality”, n. 43 above, p. 117; *R v Tandy* [1989] 1 All ER 267; *R v Wood* [2008] WLR(D) 204.

46 G Williams, *Textbook of Criminal Law* 2nd edn (London: Stevens & Sons Ltd 1983), p. 693. See also E Griew, “The future of diminished responsibility” (1988) *Crim LR* 75, pp. 79–80.

47 W N Osborough, “Homicide and Criminal Responsibility Bill (NI) 1963” (1965) 16 *NIJQ* 73, p. 73.

48 The Homicide and Criminal Responsibility Bill 1963 did not receive a second reading in the Northern Ireland House of Commons.

49 S. 5 (effect, in cases of homicide, of impaired mental responsibility); s. 6 (unlawful killing while under voluntary intoxication).

50 *Report of the Committee on Mentally Abnormal Offenders* (London: HMSO 1975). See H R Rollin, “Report of the Committee on Mentally Abnormal Offenders” (1976) 1(600) *BMJ* 48.

51 Butler Report, n. 50 above, para. 19.27.

52 *Ibid.* paras 19.14–16.

53 *Ibid.* para. 19.17: “the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter”.

54 Criminal Law Revision Committee, *Fourteenth Report: Offences against the person*, Cmnd 7844 (London: HMSO 1980), paras. 92–4.

were introduced.⁵⁵ Its proposed wording eventually formed the basis of the definition of diminished responsibility in the draft Criminal Code Bill,⁵⁶ however, despite bouts of progress, enthusiasm for codification, and indeed amendment to the law of murder, dwindled somewhat.⁵⁷ It was during this lull in England and Wales and Northern Ireland that matters took an interesting turn in Scotland.

1.3 A RETURN TO FLEXIBILITY IN SCOTLAND

The restrictive direction that the defence had taken in Scotland was not sitting easily. In 2001 some concerns were raised by the Millan Report⁵⁸ which recommended that the Scottish Law Commission should be invited to review diminished responsibility in conjunction with the insanity defence.⁵⁹ Before the commission had the opportunity to do so, however, the judiciary stepped in to reverse the trend with the decision in *HM Advocate v Galbraith*⁶⁰ which has broadened significantly the scope of the doctrine in practice. The court in this case provided a definitive common law definition of the plea to the effect that: “at the relevant time, the accused was suffering from an abnormality of mind which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts”.⁶¹ According to the Scottish Law Commission, the decision was welcomed on the whole in Scotland, and as such, it recommended that a new legislative definition should do little more than re-state the *Galbraith* criteria.⁶²

Prior to *Galbraith*, it was assumed that diminished responsibility in Scotland depended upon a finding that the accused had a mental illness or disease, however, this is not now necessary,⁶³ with the result that the reach of the plea has been considerably widened.⁶⁴ The commission’s recommendations in respect of diminished responsibility were taken on board by the Scottish Executive and implemented by the Criminal Justice and Licensing (Scotland) Act 2010.⁶⁵

It is noteworthy that the current Scots law test is very similar to the original English test under s. 2, although, as Chalmers and Leverick have remarked, that may not be entirely

55 Criminal Law Revision Committee, *Fourteenth Report*, n. 54 above, paras 76 and 42. See Griew, “The future”, n. 46 above; C Wells, “Criminal Law Revision Committee, 14th Report: Offences against the Person: Homicide” (1980) 43(6) *MLR* 681, p. 688.

56 Law Commission, *Report on Criminal Law: Codification of the criminal law – a report to the Law Commission*, No 143. HC270 (London: HMSO 1985).

57 Law Commission, *Report on a Criminal Code for England and Wales*, No 177 (London: HMSO 1989): “The present Government has, however, made it clear . . . that it sees no reason to alter the present constituents of the law of murder, nor indeed, to alter the mandatory life sentence for murder”, para. 1.28. The Law Commission’s programme of simplification has overtaken its codification mandate, see *Tenth Programme of Law Reform*, No 311 (London: HMSO 2007), para. 2.24.

58 Millan Committee, *New Directions: Report on the review of the Mental Health (Scotland) Act 1984* (SE/2001/56), ch. 29, paras 51–61.

59 *Ibid.* para. 29.6 (Recommendation).

60 2002 JC 1.

61 *Ibid.* at 21.

62 Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, SE/2004/92 (Edinburgh: Stationery Office 2004), para. 3.4.

63 In so far as the cases of *Connelly v HM Advocate* (1990) SCCR 504 and *Williamson v HM Advocate* (1994) SCCR 358 required mental illness or mental disease as a critical element of a successful diminished responsibility plea, they were disapproved in *Galbraith*, 20G, para. 52.

64 G H Gordon, *Criminal Law of Scotland* 3rd edn, Supp. Service (Edinburgh: Green 2005), p. 49.

65 S. 51B(1) provides that: “A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person’s ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.”

inappropriate given that s. 2 was drafted in order to “introduce into English law the Scottish doctrine of diminished responsibility”.⁶⁶ This implies that the current draft definition in Scotland is merely a clarification of the law as it was intended in the first instance. Yet, this comes at a time of further change in the definition in England and Wales and Northern Ireland.

1.4 A SURPRISING SHIFT IN ENGLAND AND WALES AND NORTHERN IRELAND

Debate surrounding the doctrine was revived in 2003, this time in the particular context of domestic violence and the partial defences, resulting in the Law Commission’s 2004 report.⁶⁷ In terms of diminished responsibility, the commission recommended that any amendment to the definition should be suspended until such time as the government should task the Law Commission with conducting a comprehensive review of the law of murder, at which time partial defences could be considered from first principles.⁶⁸

Thus, in its 2006 report on *Murder, Manslaughter and Infanticide*,⁶⁹ the Law Commission proposed a restructuring of the offence of homicide by setting out a hierarchy of categorised offences existing within the realm of homicide, reflecting the offences’ degree of seriousness.⁷⁰ There would be two degrees of murder, with the fixed penalty applying to first degree murder only.⁷¹ Diminished responsibility would be retained as a partial defence which would have the effect of reducing first degree murder to second degree murder if pleaded successfully.⁷² In terms of the definition itself, the commission was of the view that it required clarification and modernisation along the lines of current diagnostic practices.⁷³

However, the idea of a “full panoply of restructuring”⁷⁴ with regard to the law of murder proved too much for the government and, once again, diminished responsibility was utilised as a form of compromise by the legislature.⁷⁵ In its 2008 consultation paper,⁷⁶ the government was in agreement with the commission’s proposed definition; however, it diverged from the commission in terms of the scope of reform. The government was of the view that the proposed changes to diminished responsibility should be implemented within the existing structure pertaining to murder, notwithstanding that the commission’s recommendations were made only in the context of its proposed homicide offence.⁷⁷

66 *HC Debs*, 27 November 1956, col. 318 (statement of the Attorney General). See Chalmers and Leverick, *Criminal Defences*, n. 7 above, pp. 227–8.

67 Law Commission, *Report on Partial Defences to Murder*, No 195 (London: HMSO 2004).

68 It is only in the context of a full review that the commission proposed a definition of diminished responsibility based on its prior consultation process. The commission’s proposal received much support from academic commentators. For example, see “Editorial: adjusting the boundaries of murder: partial defences and complicity” (2008) 11 *Crim LR* 829.

69 Law Commission, *Murder*, n. 44 above.

70 *Ibid.* para. 1.64.

71 *Ibid.* para. 1.67.

72 *Ibid.* para. 5.83.

73 *Ibid.* para. 5.107.

74 M Eagle (then Parliamentary Under-Secretary of State for Justice), Coroners and Justice Bill, *HC Public Bill Committee Debs*, 3 March 2009, col. 413.

75 However, the door is not entirely shut on reform – see discussion of reforms on a “staged basis” in Ministry of Justice (MoJ), *Murder, Manslaughter and Infanticide: Proposals for reform of the law, summary of responses and government position*, responses to consultation (London: HMSO 2009), para. 120.

76 *Murder, Manslaughter and Infanticide: Proposals for reform of the law* CP(R) 19/08 (July 2008). For discussion see “Editorial”, n. 68 above.

77 MoJ, *Murder, Manslaughter and Infanticide*, n. 75 above, para. 9.

Whether or not the government will further reform the law of murder any time soon is a moot point. In any event, our focus for present purposes is upon the introduction of a new definition of diminished responsibility under s. 52 of the Coroners and Justice Act 2009.⁷⁸ Much can be said of the legislature's choice of vehicle for redefining diminished responsibility,⁷⁹ suffice it to say that a more fitting course of action would have seen a framework of reform dedicated to a complete re-evaluation of the law of murder.

Section 52 replaces the existing definition under s. 2(1) of the Homicide Act 1957 as outlined above, with the following definition:

- (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.

Although certainly fulfilling the aims of clarity and modernisation in line with current diagnostic practices with the introduction of terms like "mental functioning" and "recognised medical condition", the new definition is far from flawless.⁸⁰ Its overall effect on diminished responsibility in England and Wales and Northern Ireland⁸¹ is to curb the scope of the doctrine to a considerable degree.

As discussed above, the 1957 definition of diminished responsibility facilitated a broad interpretation of the doctrine by the courts. Indeed, the Law Commission describes its use by legal and medical experts as a "benign conspiracy"⁸² in circumstances where the mental condition of the offender was not strictly recognised as a mental disorder or medical condition, such as the case of the mercy killer.⁸³ The curtailment of the definition under

78 The Act received Royal Assent on 12 November 2009. The commencement date was 4 October 2010 (Commencement No 4). Many provisions of the Act are applicable to Northern Ireland, with some also applicable to the Scottish Executive.

79 The Act consists of seven parts in all, which address a miscellany of subject matters both inside and outside the realm of criminal justice, for example, coroner law and practice, data sharing, legal aid and child pornography offences. For a summary of the parts, see "Editorial: the Coroners and Justice Act 2009" (2010) *Crim LR* 1, pp. 1–2. For discussion, see J Miles, "The Coroners and Justice Act 2009: a 'dog's breakfast' of Homicide Reform" (2009) 10 *Arch News* 6, p. 6.

80 For a detailed review of the wording, see R D Mackay, "The Coroners and Justice Act 2009 – partial defences to murder (2) the new diminished responsibility plea" (2010) *Crim LR* 290.

81 S. 53 (persons suffering from diminished responsibility (Northern Ireland)) replaces s. 5 of the Criminal Justice Act (Northern Ireland) 1966.

82 Law Commission, *Partial Defences*, n. 67 above, para. 2.34.

83 See R D Mackay, "The diminished responsibility plea in operation – an empirical study", in Law Commission, *Partial Defences*, n. 67 above, Appendix B, where Mackay's study of 157 cases in which diminished responsibility was raised suggests that six were cases of mercy killing.

the new Act, to internationally recognised and documented medical conditions, may result in such defendants being convicted of murder and sentenced to life imprisonment, notwithstanding that he or she may have been a “highly stressed killer”.⁸⁴

It remains to be seen whether s. 52 will in practice have a detrimental bearing upon a particular type of offender who would have been convicted of manslaughter rather than murder under the 1957 definition of diminished responsibility. Furthermore, in the section there is no link to the special verdict under the M’Naghten rules, and indeed the Law Commission expressed concern that “there is a need to reconsider the relationship between . . . diminished responsibility and insanity”.⁸⁵

In terms of scope, the journey so far for the doctrine has oscillated from broad to narrow and back again within the jurisdictions of Scotland, Northern Ireland and England and Wales. It seems torn between analysis in the context of the mandatory life sentence for murder, and its relationship with the insanity defence, with the result that its true aim or nature is often left unmentioned, i.e. an acknowledgment of the frailty of human nature. With this in mind, the next part examines the Irish experience of the doctrine.

1.5 DIMINISHED RESPONSIBILITY IN IRELAND

The closest resemblance to diminished responsibility in Irish law prior to the 2006 Act was the Infanticide Act 1949, whereby the jury is entitled to return a verdict of infanticide, in lieu of murder, the punishment for which is as for manslaughter.⁸⁶ Indeed, the 2006 Act amends the definition of infanticide⁸⁷ and provides that a woman found guilty of the offence may be dealt with in accordance with the diminished responsibility section.⁸⁸

Throughout the twentieth century, a few attempts were made to recognise diminished responsibility as forming part of the Irish common law, none of which were successful. The origins of the possibility of a reduced sentence for a murder conviction based on the presence of “mental abnormality” can be traced to the 1931 case of *AG v O’Shea*.⁸⁹ Here, the jury found the accused guilty and added a rider to its verdict recommending that special consideration be given to the fact that the crime was unpremeditated and committed during a period of mental abnormality. On appeal, however, it was held that the rider did not contain anything which constituted a qualification of the crime of murder, and the verdict was not modified.⁹⁰

Of relevance also is the 1974 decision of *Doyle v Wicklow County Council*,⁹¹ wherein a volitional insanity test was approved of which would question whether the accused was debarred from refraining from committing the act because of a defect of reason due to mental illness. The test was in addition to the M’Naghten rules under the ambit of insanity, as opposed to existing as a form or element of diminished responsibility.

84 See “Editorial”, n. 68 above, p. 830.

85 Law Commission, *Tenth Programme of Law Reform: Project 7 unfitness to plead and the insanity defence*, No 311 (London: HMSO 2008–11).

86 S. 1, Infanticide Act 1949.

87 S. 22, Criminal Law (Insanity) Act 2006.

88 S. 6(3), Criminal Law (Insanity) Act 2006.

89 [1931] IR 728.

90 *Ibid.* (Kennedy CJ).

91 [1974] IR 55, approving *The People (AG) v Hayes* (Central Criminal Court, November, 1967) noted in R J O’Hanlon, “Not guilty because of insanity” (1968) 3 *Irish Jurist* 61. The test had previously been held as not forming part of Irish law in *(People) AG v Michael Manning* [1955] 89 ILTR 155.

Diminished responsibility was more overtly canvassed by defence counsel in the 1985 case of *DPP v Joseph O'Mahony*.⁹² Here the accused was charged with murder and at trial the defence argued that he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts as to entitle the jury to consider the alternative of finding a verdict of manslaughter instead of murder.⁹³ On appeal, it was argued that there always had been a defence of diminished responsibility at common law and that it should, if necessary, be expanded by the court so as to equate with the formula proposed by the accused in light of modern psychiatric expertise. This argument involved necessarily a suggestion that the Homicide Act of 1957 was declaratory only and not the introduction of a new legal principle.⁹⁴ However, Finlay CJ disagreed, adding that the Act was introduced in order to liberalise the rigid M'Naghten rules.⁹⁵

This decision put to an end the possibility of introducing diminished responsibility by means of judicial activism⁹⁶ and certainly impeded any progress that had been made on a legislative basis by the Henchy Committee following its 1978 report.⁹⁷ Indeed, despite that committee's recommendation, which included a draft Criminal Justice (Mental Illness) Bill – introducing the doctrine together with a new insanity formula⁹⁸ – no such legislation was enacted.⁹⁹

Eventually, the implementation of the Criminal Law (Insanity) Act 2006 gave legal standing to the partial defence of diminished responsibility in Irish law. Section 6 provides that:

- (1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person–
 - (a) did the act alleged,
 - (b) was at the time suffering from a mental disorder, and
 - (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act, the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.

“Mental disorder” is defined so as to include “mental illness, mental disability, dementia or any disease of the mind but does not include intoxication”.¹⁰⁰

92 [1985] IR 517.

93 The formula suggested was that proposed by the Butler Report, n. 50 above, in 1975.

94 *Ibid.* p. 521.

95 *Ibid.* p. 522.

96 Boland, “Diminished responsibility”, n. 26 above. See also B Chubb, *The Politics of the Irish Constitution* (Dublin: Institute of Public Administration 1991).

97 Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons: The Henchy Committee (chair: S Henchy), *Treatment and Care of Persons Suffering from Mental Disorder who Appear before the Courts on Criminal Charges* (Dublin: Stationery Office 1978). The purpose of the report was to set out, in draft legislative form, its recommendations as to the changes deemed necessary in the law as it affects persons suffering from mental illness or serious personality disorders who come before the courts on criminal charges.

98 See 2.1.1 below for further discussion.

99 Of note, is the fact that, notwithstanding the decision in *O'Mahony*, the courts have not always accepted this situation. For example, *In Re Ellis* [1990] 2 IR 291, the Court of Criminal Appeal stated obiter that the circumstances of the case: “[highlighted] the necessity for [Parliament] to examine as a matter of real urgency whether legislation is now needed to define the nature and scope of the plea of insanity and, possibly, of diminished responsibility, as a defence in criminal trials”, at 295.

100 S. 1, Criminal Law (Insanity) Act 2006.

In 2003, the Law Reform Commission stated that the scope of the doctrine in Ireland is narrower than that of s. 2(1) of the Homicide Act 1957, and is instead more similar to the Scottish definition. It adds that in order to be in a position to bring a defence, the accused would have to be suffering from a mental disorder “just short of insanity”. Thus, for instance, it is likely that psychopathy does not fall within the scope of s. 6.¹⁰¹

Since the introduction of s. 6, the defence has been invoked in the Irish courts on several occasions, four of them successfully.¹⁰² Though it is perhaps too early to tell what will be its enduring effect, a theoretical and practical analysis at this time is useful, in that it gives context to emerging judicial attitudes towards the law in question and the offenders upon whom it impacts.

2 Present day analysis of the law in Ireland

2.1 THE NATURE OF DIMINISHED RESPONSIBILITY UNDER S. 6

A cross-jurisdictional, historical analysis of the doctrine reveals that there is no one principle underlying the law relating to diminished responsibility. Instead, its nature appears to juxtapose two core positions: firstly, as a partial defence which offsets the restrictive nature of the insanity defence and facilitates degrees of criminal responsibility, rather than an all-or-nothing approach; and, secondly, as a form of extenuating circumstance in murder cases, necessitated by the existence of the mandatory life sentence for murder. This part considers each position in turn, with reference to the Irish experience.

2.1.1 Compensating for the insanity defence

The draconian verdict of “guilty but insane” under the Trial of Lunatics Act 1883 was replaced by s. 5 of the 2006 Act,¹⁰³ which allows a special verdict of “not guilty by reason of insanity” in the following circumstances:

- (1) (a) the accused person was suffering at the time from a mental disorder, and
- (b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she—
 - (i) did not know the nature and quality of the act, or
 - (ii) did not know that what he or she was doing was wrong, or
 - (iii) was unable to refrain from committing the act

The special verdict does little more than enshrine in legislation the Irish common law position relating to the insanity defence. The first two parts retain the substance of the M’Naghten rules, which do not amount to the sole or exclusive test for insanity in Ireland. The third part reflects this by incorporating the volitional control test as set out in the

¹⁰¹ See, Law Reform Commission, “Synopsis of Irish law relating to the defence of diminished responsibility” in Law Commission, *Partial Defences to Murder – Overseas studies*, appendices to Consultation Paper 173 (London: HMSO 2003), p. 111, p. 116. See D Whelan, *Mental Health Law and Practice: Civil and criminal aspects* (Dublin: Round Hall 2009), pp. 468–76; L Campbell, S Kilcommins and C O’Sullivan, *Criminal Law in Ireland: Cases and commentary* (Dublin: Clarus Press 2009), ch. 24.

¹⁰² *DPP v Patrick O’Dwyer* (18 June 2007, unreported), Central Criminal Court; *DPP v Leigh Crowe* [2009] 2 ILRM 225; *DPP v Stephen Egan* (21 April 2009, unreported), Central Criminal Court; *DPP v Anne Burke* (23 March 2010, unreported), Central Criminal Court.

¹⁰³ S. 5, Criminal Law (Insanity) Act 2006. The Trial of Lunatics Act 1883 was repealed in full by s. 25 of the 2006 Act.

decision in *Doyle*. Thus, the Irish insanity defence extends its reach significantly beyond its English counterpart and is more akin to the position in Northern Ireland.¹⁰⁴

While the continued extension of the M'Naghten rules is welcomed, it should not be assumed that an "irresistible impulse" type defence solves the M'Naghten conundrum.¹⁰⁵ An opportunity to re-evaluate this much criticised approach was not availed of by the legislature, despite the proposed definition by the Henchy Committee which suggested simpler and more flexible wording. The committee recommended that, where a person is suffering from a mental disorder at the time of the act such that he or she should not be found guilty of the offence, a verdict of "not guilty by reason of mental disorder" should apply.¹⁰⁶

In any event, the Irish legislature constructed a position whereby the diminished responsibility defence would be necessary in order to supplement a still unsatisfactory insanity defence. Even at the Bill stage, the legislature alluded to potential problems with the special verdict. The Explanatory Memorandum to the Criminal Law (Insanity) Bill 2002 states that the availability of the verdict of diminished responsibility:

should reduce the danger that a jury will return an insanity verdict when faced with a person whom they regard as not being completely sane, even if he or she does not meet the legal criteria for insanity.

This statement suggests that a major purpose of the 2006 Act was to appease a perceived danger (or risk) that juries are returning insanity verdicts in respect of murder cases where the accused has a mental disorder, but does not satisfy the legal criteria for insanity. It contrasts markedly with the concerns of the Henchy Committee, to the effect that offenders with mental disorders were being treated as "normal" people at sentencing.¹⁰⁷

In any event, the statement can be undermined on a number of bases. Most obviously, it is difficult to appreciate the source of the concern voiced by the government in light of the secrecy surrounding jury deliberations. Furthermore, the number of insanity acquittals in Ireland has declined markedly from the nineteenth century¹⁰⁸ to the present day,¹⁰⁹

104 Ss. 1 and 3, Criminal Justice Act (Northern Ireland) 1966. The Irish defence is less comparable with that in the Scottish jurisdiction, which is based on the "alienation of reason" test; see *HM Advocate v Kidd* 1960 JC 61, at 70–1; *Brennan v HM Advocate* 1977 JC 38, at 45.

105 The Butler Report, n. 50 above, highlights the central criticism of the test when it asks: "How can one tell the difference between an impulse which is irresistible and one which is merely not resisted?", para. 18.16. See, further, Royal Commission, *Report*, n. 28 above, pp. 313–14; E R Keedy, "Irresistible impulse as a defence in criminal law" (1952) 100(7) *University of Pennsylvania Law Review* 956–93.

106 S. 13, Draft Criminal Justice (Mental Illness) Bill.

107 Henchy Report, n. 97 above, p. 3.

108 P Gibbons, N Mulryan and A O'Connor, "Guilty but insane: the insanity defence in Ireland 1850–1995" (1997) 170 *British Journal of Psychiatry* 467. See also E Dooley, *Report on Homicide in Ireland 1992–1996* (Dublin: Stationery Office 2001). Dooley examines the 205 homicide incidents that arose in Ireland for the five-year period between 1991 and 1996. He reports that in all only 1.5% of the 205 cases received a legal psychiatric disposal, which was a marked decrease from the proportion 5.1% in the period of his previous study from 1972 to 1991, p. 26.

109 See Dooley, *Report*, n. 108 above, p. 26. In 15 of the 205 cases Dooley examined, the primary motive for the incident was considered to be some form of psychotic illness or other mental disorder. Only 4 of the 15 resulted in a court verdict, and 2 in a psychiatric verdict (either "unfit to plead" or "guilty but insane"). The Courts Service Annual Reports (Dublin Courts Service 2000–08) show the Central Criminal Court received 51 new murder cases, 24 of which went to trial. Of the 24, 2 defendants were found not guilty by reason of insanity. Of the 44 cases disposed of in 2007, again, 2 resulted in verdicts of not guilty by reason of insanity, p. 26. Figures for 2009 provided by the Central Criminal Court Registrar, Mr Liam Convey, to the *Irish Times* show 53 murder and murder-related cases, 3 of which resulted in an insanity acquittal and committal to the Central Mental Hospital, see C Coulter, "Drop in new Central Criminal Court cases", *Irish Times*, Dublin 14 January 2010.

which suggests that either juries have not been over-zealous with their acquittals, or defendants are slow to plead the special defence, or both.

The statement is further challenged by the apparent unpopularity of the insanity defence in Ireland, as illustrated by *DPP v Redmond*.¹¹⁰ In this case, the accused purposefully did not plead “not guilty by reason of insanity” on the basis that he would prefer to have a definite sentence rather than a situation whereby he would be detained at the pleasure of the government in the Central Mental Hospital under the Trial of Lunatics Act 1883. Although a successful plea of insanity no longer results in automatic detention under the 2006 Act, uncertainty as to the consequences of such a verdict remains.

An additional point also raises questions about the accuracy of the government’s statement. During the second-stage debate of the 2002 Bill, Senator Tony Kett highlighted the fact that Central Criminal Court lawyers are critical of the narrow remit of the insanity verdict because they find it difficult to convince a jury to return the special verdict on that basis (citing the controversial *Gallagher* and *O’Donnell* cases)¹¹¹ as they fear that the individual may walk free. This implies that juries are less likely to acquit and more likely to convict if they have doubts about the mental condition of an offender.¹¹² More than this, it suggests that both the senator’s view and the government’s statement are largely conjecture and, while this may be forgiven in the context of a Seanad debate, it is less easy to excuse in an Explanatory Memorandum.

The ease by which the government’s rationale for the introduction of the doctrine is undermined suggests a further purpose to the law, which extends beyond any perceived danger of juries acquitting in borderline insanity cases. It is suggested that a primary function of diminished responsibility is to compensate for a rigid and largely unworkable insanity law, and a reluctance on the part of the legislature to re-evaluate from first principles the efficacy and relevance of a dwindling defence.¹¹³ This can be supported to some degree by the fact that there is little evidence to suggest that the courts instruct the jury on the issue of insanity in cases where diminished responsibility is raised, notwithstanding that s. 6 requires that “the mental disorder was not such as to justify finding him or her not guilty by reason of insanity”.¹¹⁴

Coonan and Foley argue that this procedure is too unwieldy as it technically seems to require the trial judge when directing the jury on diminished responsibility to first direct it on insanity and then, if it is satisfied that the insanity defence does not apply, to continue to direct it on diminished responsibility. Both are based on the existence of the same definition of mental disorder, while the insanity defence incorporates the M’Naghten rules together with a volitional insanity wing, the diminished responsibility definition’s relation to the special defence suggests that the same test can be applied, but in the context of a lesser degree of responsibility.

Coonan and Foley highlight the unprecedented nature of this approach,¹¹⁵ yet some logic can be garnered from the position if one considers the definitions put forward by the Henchy Committee. Both draft sections required the accused to suffer from a mental disorder at the time of the offence; the insanity defence such that the accused should not

110 [2006] 3 IR 188.

111 See, *Application of Gallagher (No 1)* [1991] 1 IR 31; *Application of Gallagher (No 2)* [1996] 3 IR 10.

112 *Seanad Éireann Debs*, 19 February 2003, vol. 171, para. 777 (Criminal Law (Insanity) Bill 2002: second stage).

113 Boland views diminished responsibility “as a solution to the problems inherent in the insanity defence”, Boland, “Diminished responsibility”, n. 26 above, p. 183.

114 See G Coonan and B Foley, *The Judge’s Charge in Criminal Trials* (Dublin: Round Hall 2008), pp. 318–20.

115 *Ibid.* For example, see *Galbraith v Her Majesty’s Advocate* [2001] SCCR 551, at para. 47, where the court criticised any approach which interpreted diminished responsibility by reference to insanity.

be found guilty; and the diminished responsibility defence not such as to find the accused not guilty by reason of mental disorder, but such as to diminish substantially his or her responsibility.¹¹⁶ Each definition is drafted with the other in mind, with a view to focusing on levels of guilt, in a manner similar to Stephen.¹¹⁷ The ambiguity pertaining to the relationship between the definitions under the 2006 Act may be due to the “cut and paste” mentality of the legislature.

Though still in its infancy, the caselaw in this area to date appears to indicate that diminished responsibility is not an issue in so-called “borderline” insanity cases, and that they are not cases where the jury is likely to acquit. For example, two successful diminished responsibility cases, *O'Dwyer*¹¹⁸ and *Crowe*,¹¹⁹ which were both based on “weak” mental diagnoses, did not see the insanity defence entertained.¹²⁰ Furthermore, in the case of *Seamus Fitzgerald*,¹²¹ a defendant with a major psychiatric history was convicted of murder, despite a number of psychiatrists testifying to the effect that the accused had an anti-social personality disorder.¹²²

2.1.2 Mitigating the mandatory life sentence for murder

The question under consideration is whether, in Ireland, mitigation of sentence in respect of diminished responsibility is a mere procedural effect of a successful defence, or goes to the nature of the doctrine itself. If it is a procedural effect in order to “get around” the mandatory penalty in the context of murder, then the doctrine is a symptom of an arguably outdated homicide structure with an ever-diminishing shelf-life.¹²³ If, on the other hand, the doctrine exists for a more fundamental purpose, it matters not as to the existence of the mandatory penalty and diminished responsibility stands as a partial defence in its own right. The evidence appears to be in favour of the former contention.

The government makes its position clear. The Explanatory Memorandum to the Criminal Law (Insanity) Bill 2002 states that:

[t]he effect of [its application to murder only] will be that if diminished responsibility is successfully pleaded, a conviction for manslaughter will be recorded with the sentence, at the discretion of the court . . . [t]here is no need to apply the concept in the case of other crimes where there is no mandatory sentence.

Furthermore, the Law Commission of England and Wales has said that the concept of a “partial defence” such as diminished responsibility is “something of a misnomer”, and a means by which the law has facilitated discretion in sentencing in respect of murder convictions.¹²⁴ It adds that such an outcome could equally have been achieved by “making proof of the exceptional mitigating circumstances relevant to whether the sentence for murder was still mandatory, without affecting the verdict of murder”. Indeed, most

116 See ss. 13 and 18 of draft Criminal Justice (Mental Illness) Bill.

117 Stephen, *History*, n. 27 above.

118 See n. 102 above.

119 See n. 102 above.

120 In *O'Dwyer*, the accused was diagnosed with depersonalisation disorder and temporal lobe epilepsy and a psychiatric assessment of the accused in *Crowe* revealed a post-traumatic stress disorder.

121 (30 May 2008, unreported), Central Criminal Court.

122 See “Man pleads not guilty to murder of his father”, *Irish Times*, Dublin, 23 May 2008.

123 On two occasions the Law Reform Commission has recommended the abolition of the mandatory life sentence. See *Report on Sentencing* No 53 (Dublin: LRC 1996) and *Report on Homicide: Murder and Involuntary Manslaughter* No 87 (Dublin: LRC 2008).

124 Law Commission, *Murder*, n. 44 above. para. 2.150.

commentators would argue that the very existence of the doctrine is dependent upon the retention of the fixed penalty for murder, and that if the fixed penalty was abolished, diminished responsibility could be dispensed with. For example, Dell has remarked that diminished responsibility exists “only to provide a means of escape from the mandatory penalty for murder” – a situation which she describes as a “fundamental anomaly”.¹²⁵

However, Wasik¹²⁶ maintains that it is a mistake to regard the fixed penalty and partial excuse as causally dependent on each other; it is rather that both phenomena stem from a third consideration, the fact that murder is marked as a “crime standing out from all others”.¹²⁷ Wasik’s view is based on the premise that murder is considered to be the most serious of crimes, and it is perhaps appropriate that the punishment too is correspondingly serious to reflect this.

This argument is an oversimplification of the situation. There exists in Ireland and elsewhere strong support for the more realistic and humane contention that, just as with manslaughter, there is considerable moral variability within the offence category of murder.¹²⁸ For example, Bacik has argued that the mandatory life sentence gives rise to injustice as it does not reflect the varying degrees of culpability in the crime of murder.¹²⁹ Some murders are more heinous than others and differing levels of heinousness should be reflected in sentencing.¹³⁰ Of course, this was also the view of the Law Commission of England and Wales in its murder report.¹³¹

A second factor which undermines Wasik’s view is that most claims pertaining to murder as a “crime apart from all others” are born from a sensationalist journalistic and political culture. Murder is habitually depicted as a “charismatic” word in the vocabulary of popular legal discourse, such that often anything less than the maximum penalty can result in a torrent of criticism for the courts from the media and the political sphere.¹³² Blom-Cooper and Morris allude to this when they describe politicians as “prisoners of orthodoxy” who cause the stagnation of the resolution of the mandatory life debate due to their reluctance to think “outside the box” for fear it would “spell some form of cataclysmic disaster” in terms of public confidence.¹³³ Such an attitude inhibits the introduction of important criminal justice reform by reason of the superficial aim of appearing “tough on crime”.

125 S Dell, “The mandatory sentence and section 2” (1986) 12(1) *Journal of Medical Ethics* 28, p. 28.

126 M Wasik, “Partial excuses in the criminal law” (1982) 45 *MILR* 516, p. 520.

127 Criminal Law Revision Committee, *Fourteenth Report*, n. 54 above, para. 84.

128 Law Reform Commission, *Report on Homicide*, n. 123 above, para. 1.46. The commission has noted elsewhere that if the fixed penalty for murder were removed, the problem of heterogeneity within offence categories could be seen in its proper perspective, that is, as a normal feature of the criminal law, Law Reform Commission, *Seminar Paper on Homicide: The mental element in murder* SP1 (London: LRC 2001) at 59.

129 *Ibid.*

130 See S Breen, “Issue is for politicians not judges, says reform commission”, *Irish Times*, 30 October 2003.

131 Law Commission, *Murder*, n. 44 above.

132 “Editorial: a flexible approach to sentencing” (1998) 148 *New LJ* 685. For a more thorough analysis of this issue, see J E Stannard, “Murder and the ruthless risk-taker” (2008) 2 *Oxford University Commonwealth Law Journal* 137, where the author highlights the tension between competing objectives of the law in the particular context of the ruthless risk-taker. That is, the principle of legality on the one hand, and the demands of public policy on the other, pp. 156, 157.

133 L Blom-Cooper and T Morris, *With Malice Aforethought: A study of the crime and punishment for homicide* (Oxford: Hart Publishing 2004), p. 171.

Thirdly, this attitude may be criticised on the basis of the constitutional principle of proportionality.¹³⁴ The caselaw in this area, in particular, raises questions about the fairness of mandatory sentencing in light of the centrality of the proportionality principle.¹³⁵ As O'Malley observes, a mandatory sentence essentially prevents the courts from fulfilling their constitutional obligation to impose a proportionate sentence.¹³⁶

The above arguments support the contention that a key purpose of the introduction of the doctrine in Ireland is to offset the harsh effect of the mandatory life sentence for murder, while evading the need to deal with its abolition. Although the abolition of the mandatory life sentence would obviate the need for the defence of diminished responsibility, this is unlikely to happen anytime soon due to a number of factors, most notably the novelty of the doctrine in Irish law and political inertia in relation to the mandatory sentence.

2.2 A NOTE ON JUDICIAL INTERPRETATION OF S. 6

Two key questions go to the heart of the interpretation of diminished responsibility in practice: firstly, the notion of what amounts to a mental disorder for the purposes of s. 6; and, secondly, the question of causation, that is, does the mental disorder have to be the primary or the sole cause of the offender's diminished responsibility, or is a significant cause sufficient? This section briefly considers each in turn in light of the new caselaw in this area.

Most cases have dealt with the issue of diminished responsibility by relying on psychiatric evidence in an uncontroversial manner. The case of *DPP v John Collins*,¹³⁷ however, is of particular interest in this regard, as during the trial two experts clashed on the fundamental issue of the definition of mental disorder: they could not agree on whether the ICD 10¹³⁸ definition or the DSM IV¹³⁹ definition should be followed.¹⁴⁰ Alexander summarises the problem relating to psychiatric definition within the courtroom when she says:

experts are free to interpret these legal terms in light of their professional beliefs. Without guidance . . . there is a lack of uniformity and predictability in the application of these terms . . . this encourages unseemly battles of experts in court, [and] inconsistency of findings between judges.¹⁴¹

This suggests that the discrepancy in expert findings may be a factor which feeds the inconsistency which is evident at the sentencing stage of cases involving convictions of manslaughter on the grounds of diminished responsibility, but this issue will be considered further in the next section.

134 According to a strong body of caselaw, the principle of proportionality at the sentencing stage is a requirement of the Irish Constitution, for example: *The State (Healy) v Donoghue* [1976] IR 325, at 353; *Deaton v Attorney General and Revenue Commissioners* [1963] IR 270; *The State (O) v O'Brien* [1973] IR 50, at 67; *DPP v C(W)* [1994] 1 ILRM 321, at 324, among others. For in-depth analysis of Irish sentencing policy, see T O'Malley, "Principles of sentencing" (1991) 1(2) *ICLJ* 138.

135 See *DPP v M* [1994] 2 ILRM 541, and the earlier case of *People (AG) v O'Driscoll* (1972) 1 Frewen 351.

136 See T O'Malley, "Sentencing murderers: the case for relocating discretion" (1995) 5(1) *ICLJ* 31.

137 (28 March 2007, unreported), Central Criminal Court. See also, S Griffith, "Alcoholic given life for 'grudge' murder of boxing coach", *Irish Independent*, Dublin, 28 March 2007.

138 World Health Organisation, *International Classification of Diseases*, 10th revision (Geneva: WHO 2007).

139 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th edn, text revision (Washington DC: American Psychiatric Association 2000).

140 S Griffith, "Murder accused 'normal' doctor tells trial", *Irish Independent*, Dublin, 23 March 2007; S Griffith, "Alcohol caused accused to shoot coach", *Irish Independent*, Dublin, 24 March 2007; D Duggan, "Law shows maturity with hints of grey", *Irish Independent*, Dublin, 1 April 2007. A similar situation arose in *O'Dwyer*, n. 102 above; "A tale of two mental experts, two theories and a jury's dilemma", *Irish Independent*, Dublin, 20 April 2007.

141 C Alexander, "Oregon's Psychiatric Security Review Board – trouble in paradise" (1998) *Law and Psych Rev* 22.

In terms of the extent to which the mental disorder must diminish the responsibility of the accused in order to bring a successful defence, the case of *O'Dwyer*¹⁴² is instructive. The accused brutally killed his teenaged sister in motiveless circumstances, following an evening spent watching television together. The psychiatric experts for the defence were successful in arguing that the accused was suffering from temporal lobe epilepsy and depersonalisation disorder, the latter condition, according to one expert,¹⁴³ being under-recognised by the professional psychiatric community.¹⁴⁴ The prosecution pointed to several other factors apart from the mental disorder which may have provided an explanation, or been the cause (in whole or in part) of the actions of the accused. It was the prosecution's contention that the accused was suffering from a severe alcohol problem, but nonetheless knew what he was doing at the time of the killing.¹⁴⁵ The prosecution's expert, Dr Kennedy, undermined the defence expert's diagnosis of depersonalisation disorder and said that it was an attempt to find an explanation for the tragic outcome of the offence. He further added that even if he was wrong and the accused did suffer from depersonalisation disorder, he did not see its relation to the offence in question, the more likely reason for the killing being that the accused was overcome with "profound feelings of shame and embarrassment" having been extremely drunk that weekend.¹⁴⁶

The jury accepted that the accused was suffering from a condition amounting to a mental disorder, which substantially diminished his responsibility for the killing. However, it is difficult to say with certainty that the depersonalisation disorder did substantially diminish the accused's responsibility for the act. Given strong prosecution evidence, it may be that the accused had his charge reduced to manslaughter not alone due to the defence psychiatrist's diagnosis, but perhaps also due to his individual circumstances, or the "tragic outcome" of the case. This underlying sense of humanity over strict legal principle is reminiscent of the early origins of the diminished responsibility doctrine which emerged from the Scottish jurisdiction.¹⁴⁷

Considering the various elements at play in this case, it would appear that the mental disorder must essentially amount to a significant contributory factor in causing the diminishment in responsibility, as opposed to the sole factor. This would be in line with s. 52 of the Coroners and Justice Act 2009 as discussed above in the context of England and Wales and Northern Ireland. This provides that, not only must mental disorder substantially impair the accused's ability to understand the nature of his or her conduct, to form a rational judgment or to exercise self-control, but it must also provide an explanation for the act, in that it must either cause or be a significant contributory factor in causing the defendant to carry out the killing.¹⁴⁸ It will be interesting to see what future cases may bring to the interpretation of the definition under Irish law as this body of law develops.

142 See n. 102 above.

143 Dr Paul O'Connell, Central Mental Hospital.

144 See, "A tale of two mental experts", n. 140 above.

145 It is unlikely that an alcohol problem could amount to a "mental disorder" within the meaning of the 2006 Act, as s. 1 expressly states that "mental disorder" does not include intoxication, unless there is an underlying mental disorder, alcohol dependency syndrome or another mental disorder which the court might find does not come under the ambit of "intoxication" as defined in s. 1 of the Act. See Whelan, *Mental Health Law and Practice*, n. 101 above, pp. 473–5.

146 S Griffith, "Doctors 'clutching at straws' in murder case", *Irish Independent*, Dublin, 20 April 2007.

147 *Alex Dingwall* (1867) 5 Irv 466.

148 See also *R v Dietschmann* [2003] 1 AC 1209, at 1217, per Lord Hutton: "I think that in referring to substantial impairment of mental responsibility the subsection does not require the abnormality of mind to be the sole cause of the defendant's acts in doing the killing."

2.3 CONSEQUENCES OF A S. 6 VERDICT

The result of a diminished responsibility verdict is that the general law concerning manslaughter applies, in that the court may apply any sentence up to a maximum of life imprisonment and/or a fine.¹⁴⁹ Needless to say, sentencing for manslaughter resulting from a successful diminished responsibility defence is highly discretionary, as it should be, but its effectiveness depends on the range of suitable dispositions available to the courts¹⁵⁰ which are somewhat lacking in the Irish criminal justice system.¹⁵¹ It is unfortunate that the opportunity was not seized by the legislature to ameliorate this position with the implementation of the 2006 Act.

Post-2006, the *O'Dwyer* case demonstrates the dearth of options available when sentencing the mentally disordered offender and the resultant frustration of the court. At the sentencing hearing, Carney J stated that he had to examine similar cases in England and Wales for guidance where he said that the law relating to sentencing in diminished responsibility cases was more “sophisticated” than its Irish counterpart, the expression of which he labelled as “crude” in that it boiled down to a question of imprisonment (there being no alternatives such as a hospital order available).¹⁵² O'Dwyer was sentenced to six years' imprisonment. Counsel for the DPP informed the sentencing judge that, were it not for the defence of diminished responsibility, the DPP would consider the killing on the “top end” of the range of manslaughter cases, and that it was for the sentencing judge to assess the degree to which the defence brought the offence down the scales of the hierarchy of manslaughter cases.¹⁵³

In *Crowe*, the DPP accepted the accused's plea of not guilty to murder but guilty of manslaughter on the grounds of diminished responsibility, despite arguably “weak” evidence of mental disorder.¹⁵⁴ At trial, the court imposed a sentence of life imprisonment. The accused appealed against the severity of the sentence and the Court of Criminal Appeal found that the appropriate sentence was 20 years. Understandably, the significant alcohol and drug problems of the accused,¹⁵⁵ together with his 23 previous convictions, would have weighed heavily on the mind of the trial judge – perhaps to the extent that he dismissed the psychiatric evidence altogether. Indeed, the Court of Criminal Appeal held the view that the sentencing judge did not even take into account the plea of guilty to

149 Manslaughter is punishable with a maximum sentence of life imprisonment, a fine at the discretion of the court, or both. See O'Malley, *Sentencing Law and Practice*, n. 26 above, p. 248.

150 Ibid. p. 409. See also Whelan, *Mental Health Law and Practice*, n. 101 above, pp. 477–9.

151 For example, see *DPP v Donnan* (8 July 2003, unreported) Central Criminal Court, where Carney J contended at the sentencing hearing that the accused suffered from a mental illness and that he therefore wished to impose a hospital order but was unable to do so. Instead, the judge suspended the sentence, on certain conditions which “might be of benefit to him” on the basis that he did not attribute any moral blame to the accused.

152 S Griffith, “Judge rejects mother's plea that her son had ‘no control’”, *Irish Independent*, Dublin, 19 June 2007.

153 “Man jailed for six years for killing sister (17)”, *Irish Times*, Dublin, 19 June 2007.

154 Following the implementation of the 2006 Act, there were conflicting views on whether or not it is possible for the accused to plead guilty of manslaughter on the grounds of diminished responsibility, for example, see D Robinson, “Crazy situation” (2003) 97 *LSG* 12, p. 15, which argues that only the jury can return a verdict of diminished responsibility, so strictly it cannot be put forward by way of an “acceptable plea”. However, it is now accepted that a plea of guilty to manslaughter on the grounds of diminished responsibility is possible; see Whelan, *Mental Health Law and Practice*, n. 101 above, p. 469. This procedure is standard practice in England and Wales and Northern Ireland.

155 For further comment, see: “Father of two jailed for life for shotgun killing”, *Irish Times*, Dublin, 9 October 2007, and “Life term for ‘execution’ cut to 20 years”, *Irish Times*, Dublin, 28 May 2009.

manslaughter on the grounds of diminished responsibility, which had been accepted by the DPP, when imposing the life sentence.¹⁵⁶

The difficulty for the appeal court lay in the fact that the trial judge had rejected the very basis upon which the DPP had accepted a plea of manslaughter by reason of diminished responsibility due to mental disorder.¹⁵⁷ As in *O'Dwyer*, the appeal court too was left without an answer when it asked counsel for the DPP whether he felt that the case was at the upper end of the scale of manslaughter. In the opinion of the court, a plea to manslaughter *simpliciter* would certainly have permitted the trial judge to impose the maximum sentence of life imprisonment notwithstanding the plea of guilty. It went on to hold, however, that:

implicit in the acceptance of a plea to manslaughter by reason of diminished responsibility due to mental disorder is the recognition that the applicant can not and should not be treated in precisely the same manner as a person fully responsible for his own actions. It would be utterly destructive of s. 6 of the Criminal Law Insanity Act, 2006, to hold otherwise.¹⁵⁸

Kearns J concluded that at the very least, the applicant should expect to receive a sentence “*short* of life imprisonment” (emphasis added), due to the “associated stigma” attached to a life sentence.¹⁵⁹

Inconsistency in the sentencing of individuals found guilty of manslaughter on the grounds of diminished responsibility is also evident when one considers the judgment in *DPP v Egan*,¹⁶⁰ where the accused was given a sentence of life imprisonment without recourse to the fact that the diminished responsibility element should normally act to shorten the sentence, as stated by Kearns J (above).¹⁶¹ The accused, who suffered from schizo-affective disorder, was found guilty of manslaughter on the grounds of diminished responsibility for beating to death his cellmate in Mountjoy Prison. He carried out the attack in a holding cell which the two men were sharing with five other prisoners.¹⁶² Evidence was tendered that the accused had been transferred to the prison from the Central Mental Hospital just days before the attack without the anti-psychotic medication prescribed to him to manage his condition.¹⁶³

The prosecution and the defence both urged the jury to find the accused not guilty of murder but guilty of manslaughter by reason of diminished responsibility in light of his mental disorder. Although the defence was successful, the accused was nonetheless sentenced to life imprisonment.¹⁶⁴ In imposing the sentence, the judge indicated that it was “best calculated to protect the public”.¹⁶⁵ The accused has since failed in his attempt to overturn his sentence.¹⁶⁶

156 See n. 102 above, at 230–1.

157 This action would have amounted to a sentencing error in England and Wales, see *R v Lawrence* (1981) 3 Cr App R (S) 49.

158 See n. 102 above, p. 234.

159 *Ibid.*

160 (21 April 2009, unreported), Central Criminal Court.

161 See, n. 102 above, at 234.

162 In response to the appalling circumstances of the case, the government has appointed a commission (headed by barrister Grainne McMorrough) to investigate the killing and examine the management of prisoners with mental disorders.

163 “Prisoner acquitted of murdering cell mate”, *Irish Times*, Dublin, 22 April 2009.

164 Sentence was imposed on 29 June 2009, Central Criminal Court.

165 “Prisoner gets life sentence for killing cellmate”, *Irish Times*, Dublin, 30 June 2009.

166 “Man who killed cellmate fails to have sentence overturned”, *Irish Times*, Dublin, 30 October 2010.

Although intrinsically inconsistent, the early caselaw is still of value in terms of assessing the level of punishment to be applied by the courts within the manslaughter scale at this time. It also goes toward highlighting the gross inadequacy of the options available to the sentencing judge under the 2006 Act and in Irish sentencing law generally;¹⁶⁷ options which neither recognise the special nature of such offences, nor take into account the particular needs of the offender with a mental disorder.

Conclusion

Diminished responsibility is an unusual legal animal. It has become a necessity in the jurisdictions discussed in this paper, due in the most part to the inability of legislatures to provide the radical reforms required both in respect of the insanity defence and of murder law.¹⁶⁸ And while the introduction of the doctrine into Irish law is a welcome development in that it stays true to its principle of acknowledging the frailty of the human condition, its manifestation in s. 6, while tipping the scales towards flexibility, is flawed both in terms of its language and effect.

When introducing the 2006 Act, the legislature gave much weight to the fear that juries might be utilising the special verdict to acquit individuals with mental disorders in cases which amount to “borderline” insanity.¹⁶⁹ This is undermined by the fact that there has been a decrease in the raising of the insanity defence in Ireland since the nineteenth century. Furthermore, we have seen how, in the cases since 2006, there is little evidence to suggest that the courts instruct the jury on the issue of insanity in circumstances where diminished responsibility is raised, despite the fact that s. 6 appears to indicate that for a jury to proceed to consider a diminished responsibility defence, it must have found that the accused is not legally insane.¹⁷⁰ Thus, it would appear that in terms of insanity, the diminished responsibility defence is merely acting to compensate for a largely unworkable and archaic special defence.¹⁷¹

That the diminished responsibility defence was introduced essentially to offset the harshness of the insanity defence and the mandatory life sentence for murder respectively is not, in itself, unhelpful. Indeed, it is welcome if it results in improved provision (no matter how minimal) for defendants with mental disorders within the criminal justice system. The problem, rather, is that diminished responsibility merely patches over deeper problems pertaining to this area of law (most notably, the inadequacy of the insanity defence and the continued existence of the mandatory life sentence); and also impedes any possibility of a much needed re-evaluation from first principles of the position of individuals with mental disorders within the criminal justice regime. But that is a subject matter for another time and place.

167 For further discussion, see Law Reform Commission, *Report on Sentencing*, n. 123 above.

168 For example, in the context of England and Wales see *Report of the Committee on Mentally Abnormal Offenders* (London: HMSO 1975), Law Commission, *Murder*, n. 44 above. For Ireland, see Law Reform Commission, *Homicide*, n. 123 above.

169 See 2.1.1 above.

170 Coonan and Foley, *The Judge's Charge*, n. 14 above, p. 319.

171 Criticism of the insanity defence in recent years is rife, particularly in relation to the retention within the law of the term “insanity” itself, which is seen by many as outdated and pejorative. It is noteworthy that in 1978 the Henchy Committee recommended that the insanity verdict be replaced by a verdict of “not guilty by reason of mental disorder”; s. 13, Criminal Justice (Mental Illness) Bill. For further discussion, see L. Kennefick, “What the doctor ordered: revisiting the relationship between psychiatry and the law in the UK and Ireland” (2008) *COLR* 58.

