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Diminished Responsibility Determinations in England and Wales and New South Wales: Whose Role is it Anyway?

Keywords: Benign conspiracy; Coroners and Justice Act 2009; Diminished responsibility; Intoxication; New South Wales; Substantial Impairment because of Mental Health Impairment or Cognitive Impairment; Substantial Impairment by Abnormality of Mind

[*Abstract: A decade has passed since changes to Homicide Act 1957, s.2 under s.52 of the Coroners and Justice Act 2009, s.52 were implemented. The issues that have arisen since implementation have resulted in significant role confusion in the operation of the partial defence, with the real risk of inconsistent outcomes in practice. The article argues that medicalisation of the partial defence in E&W has impacted the role of parties in reaching plea agreements pre-trial, rendered the delineation between legal and medical questions regarding the recognised medical condition requisite unclear, and produced significant role confusion between medical experts and jurors in assessing the partial defence. The position stands in stark contrast to the approach under Crimes Act 1900 (NSW) s.23A, where the legislation explicitly outlines the respective role of the medical expert and jurors and prohibits experts from commenting on whether murder ought to be reduced to manslaughter in such cases.]*

Introduction

A decade has passed since changes to s.2 of the Homicide Act 1957 ('HA 1957') under s.52 of the Coroners and Justice Act 2009 were implemented.[1] Since implementation, the revised plea has resulted in higher numbers of 'contested' diminished responsibility trials, despite the Law Commission's proposals and subsequent amendments being described as a 'mere modernisation' and 'clarification' of the law.[2] A review of the interpretation, operation, and application of the plea over the past ten years reveals evidence of public policy concerns, *constituit iudicem legi* (judicial activism),[3] and a lack of clarity providing a (potential) aperture for re-emergence of the benign conspiracy that had operated under its predecessor.[4] The benign conspiracy is seen in the judiciary, parties and medical experts reaching an outcome favourable to the defendant in 'deserving cases' that stretches the parameters of the partial defence, e.g. mercy killing cases.[5] Our references to the 'benevolent conspiracy'[6] herein, are to any instances where the ambit of the partial defence is stretched, and not solely to mercy killing cases. The Law Commission (E&W) made clear that it would prefer bespoke provisions for cases deserving of a (partial) defence that do not fit the parameters of extant (partial) defences and/or warrant the murder label.[7] The issues that have arisen since implementation of the revised plea have highlighted significant role confusion in the

* Thank you to XX for their comments on earlier iterations of this article. Any errors or omissions remain the authors'.

[1] The Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010.

[2] Ronnie Mackay and Barry Mitchell, 'The new diminished responsibility plea in operation: some initial findings' [2017] Criminal Law Review 1, 18-35; Hansard, HC, 3 March 2009, col 414 (Maria Eagle Parliamentary Under-Secretary of State for Justice); Ronnie Mackay, 'The New Diminished Responsibility Plea: More than Mere Modernisation' in A. Reed and M. Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge: Ashgate, 2011) 9; Ministry of Justice, *Partial defences to murder: loss of control and diminished responsibility; and infanticide* (MoJ Circ No 13, 2010).

[3] Beatrice Krebs, 'Diminished responsibility and unanimous psychiatric evidence' (2019) Journal of Criminal Law 83(5), 406-409. See also, Richard Percival, *Archbold Review* (2019) 5, 2-3.

[4] A primary concern was the extent to which the 'benign conspiracy' which allowed 'deserving' (not always mentally disordered) offenders to claim the partial defence could continue to operate under the increasingly medicalised language of the new plea; Ronnie Mackay, 'The Diminished Responsibility Plea in Operation – An Empirical Study' in the Law Commission, Partial Defences to Murder (Law Com No 290, 2004) Appendix B. See also, Edward Griew, 'The Future of Diminished Responsibility' [1998] Criminal Law Review 75, 79-80; Ronnie Mackay, 'The Coroners and justice Act 2009 - Partial Defences To Murder (2): The New Diminished Responsibility Plea' [2010] Criminal Law Review 4, 290-302; MacKay (n 2). See also, Matthew Gibson, 'Pragmatism preserved? The challenges of accommodating mercy killers in the reformed diminished responsibility plea' (2017) Journal of Criminal Law 81(3), 177-200.

[5] Amanda Clough, 'Mercy killing, partial defences and charge decisions: 50 shades of grey' (2020) Journal of Criminal Law 84(3) 211-227. For specific discussion of mercy killing cases, see, Amanda Clough, 'Mercy Killing: Three's a Crowd?' (2015) 79(5) Journal of Criminal Law 358-72; Gibson, ibid; and, Ben Livings, 'A New Partial Defence for the Mercy Killer: Revisiting Loss of Control' (2014) 65(2) Northern Ireland Legal Quarterly 187-204.

[6] Mackay (n 2).

[7] Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 2.34.

operation of the partial defence, with the genuine risk of inconsistent outcomes in practice. The amendments under s.2 have, arguably had significant 'unintended consequences'.[8]

This article compares new HA 1957 s.2(1) with s.23A of the Crimes Act 1900 (NSW) ('CA 1900'), Australia to assess whether more explicit legislative guidance regarding the respective roles of actors in diminished responsibility cases might have prevented some of the problems that have arisen in England & Wales (E&W). This comparator has been selected because it was one of the Law Commission's (E&W) posited options for reform, and unlike the other models proposed, this partial defence of substantial impairment because of mental health impairment or cognitive impairment (formerly known as substantial impairment by abnormality of mind, hereafter referred to as 'substantial impairment')[9] has been operating in New South Wales (NSW) since 1997. It thus provides a unique opportunity to review case law pertaining to the alternative partial defences across both jurisdictions. The defence of substantial impairment also makes an interesting comparator because of the NSW influence on the E&W partial defence; while the changes were described as a 'mere modernisation' and 'clarification' of the law in E&W,[10] the NSW reform in 1997 was intended to exclude 'trivial impairments' and thereby narrow the field of cases in which the equivalent partial defence could be raised.[11] The Law Commission (E&W) were also influenced by several aspects of the NSW Law Reform Commission proposals and subsequently s.23 CA 1900, albeit that not

[8] Mackay and Mitchell (n 2). See also, Ronnie Mackay, 'The impairment factors in the new diminished responsibility plea' Criminal Law Review [2018] 6, 462-471; Ronnie Mackay, *'R v Golds'* (2017) Archbold Law Review 1, 4-5; and, Law Com No 290, 2004 (n 7) para 5.8 (comment by consultee).

[9] This change in terminology was introduced through the Mental Health and Cognitive Impairment Forensic Provisions Act 2020, Schedule 3.7, [6]-[9] (Schedule 3 repealed after changes introduced), to, amongst other things, update terminology in the Crimes Act 1900 (NSW), see Mental Health and Cognitive Impairment Forensic Provisions Bill 2020, Explanatory Note, available <https://www.parliament.nsw.gov.au/bill/files/3753/XN%20Mental%20Health%20and%20Cognitive%20Impairment%20Forensic%20Provisions%20Bill%202020.pdf> accessed 15 September 2020.

[10] Mackay and Mitchell, (n 2); Hansard, HC, 3 March 2009, col 414 (Maria Eagle Parliamentary Under-Secretary of State for Justice); Mackay (n 2) 9; MoJ Circ No 13, 2010 (n 2).

[11] New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences* (Report 138, 2013), paras 4.59 and 4.60.

all recommendations based upon the NSW provision were subsequently enacted by Parliament.[12]

We begin in section one with an outline of the old and new law in E&W, and s.23A CA 1900. We consider the degree to which the medicalisation of the partial defence in E&W has undermined the scope for the normative role of jurors in diminished responsibility cases compared to NSW, where the role of the jurors as representatives of community values is made central to assessment of liability. Section two considers how the structure of the revised defence impacts the role of the parties in reaching plea agreements in diminished responsibility cases and, in NSW, by seeking a trial by judge alone. We then highlight oscillation between the role of legal and medical experts in determining which conditions are legally valid for the purposes of the respective partial defences. This is followed by a consideration of the respective role of the psychiatrist and jurors in both jurisdictions in section four. In our conclusion we suggest that the reforms in E&W have led to significant confusion in the role that respective parties play in determining diminished responsibility, much of which might have been avoided if a similar approach to distinguishing the responsibilities of medical experts and jurors adopted in NSW had been implemented in E&W.

1. Background to the reforms

Originally introduced to circumvent the mandatory the mandatory death penalty, then later life sentence, for murder – the partial defence has the effect of reducing murder to manslaughter and thus affording judicial discretion in sentencing.[13] In E&W, the revised partial defence requires the defendant to establish, on the balance of probabilities,[14] that at the time of the killing D was suffering from an 'abnormality of mental functioning' rather than,

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[12] Law Com No 290, 2004 (n 7) para 5.76. Mackay (n 2) 9.
[13] Law Commission, *Partial Defences to Murder* (Law Com CP No 173, 2003) paras 7.9 and 7.7.
[14] Homicide Act 1957 (as amended) s 2(2). See also, *Dunbar* [1958] 1 QB 1.

as under the old law, an ‘abnormality of mind’.[15] The ‘abnormality of mental functioning’ must have arisen from a ‘recognised medical condition’ instead of in response to ‘a ‘condition of arrested or retarded development of mind or inherent cause or [by being] induced by disease or injury’.[16] The moral question of whether the abnormality ‘substantially impaired the defendant’s responsibility for the killing’ now engages a higher threshold psychiatric test requiring that the ‘abnormality of mental functioning…substantially impaired D's ability to (a) understand the nature of D's conduct; (b) form a rational judgment; [or] (c) exercise self-control.’[17] The reform also statutorily mandates that the ‘abnormality of mental functioning provides an explanation for D's conduct’. An explanation is provided if the abnormality ‘causes, or is a significant contributory factor in causing, D to carry out that conduct.’[18]

Given the reluctance of the British Government to move away from the mandatory life sentence for murder[19] the key rationale for retention of the partial defence continues to be the need for both ‘fair and just labelling’[20] and affording judicial discretion during sentencing.[21] The extent of judicial discretion has arguably been reduced in the wake of Definitive Sentencing Guidelines, but the position is preferable to the mandatory sentence attached to murder.[22] Retention of the partial defence in NSW places specific emphasis on retaining the jury as a ‘moral barometer’[23] in such cases and the ‘fair labelling’ issue[24] given

[15] Gibson (n 4) 186. ‘Abnormality of mind’ was described in *Byrne* [1960] 2 QB 396, 403 as ‘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 physical acts in accordance with that rational judgment.’
[16] Homicide Act 1957 (as amended) s 2.
[17] Homicide Act 1957 (as amended), s 2 (1A). For further discussion on the impairment factors, see Mackay ‘The impairment factors in the new diminished responsibility plea’ (n 8) 462-471.
[18] Homicide Act 1957 (as amended) s 2 (1B).
[19] Law Commission, *A new Homicide Act for England and Wales: An Overview* (Law Com CP No 177, 2006) paras 1.2 and 1.43. See also paras 5.71-5.72.
[20] Law Com No 290, 2004 (n 7) para 5.18.
[21] ‘the *raison d’etre* of section 2 is to avoid the fixed penalty for murder and to afford the sentencing judge complete discretion that a verdict of manslaughter allows’; Andrew Simester and Bob Sullivan, *Criminal Law Theory and Doctrine* 1st ed (Hart 2000) 578.
[22] Sentencing Council, *Manslaughter by Reason of Diminished Responsibility* (SC, 2019) available <https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/> accessed 24 February 2020. See also, *Westwood* [2020] EWCA Crim 598 and *Rodi* [2020] EWCA Crim 330.
[23] See description of diminished responsibility in E&W as a ‘moral barometer’ in Alan Reed and Nicola Wake, ‘Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed, and Something New’ in A. Reed and M. Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge: Ashgate, 2011) 184.
[24] New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997) para 3.11.

that the mandatory life sentence for murder was abolished in 1989.[25] A preponderance of respondents to the Law Commission (E&W) Consultation on Partial Defences to Murder 'favoured retention of the defence even if the mandatory life sentence were to be abolished'.[26] Respondents noted that, *inter alia*, the 'out-dated nature' and 'stigma' attached to the insanity defence reinforces the need for the partial defence; jurors may nullify a murder charge where an alternative partial defence is unavailable; and, the importance of ensuring that the culpability issue is determined by a jury, as moral arbiters, in cases involving disputes between medical experts.[27]

The wording of the partial defence bears strong similarities to s.23A CA 1900, but differs in significant respects. Section 23A CA 1900 requires a person to prove, on the balance of probabilities, that their capacity to understand events, or to judge whether their actions were right or wrong, or to control themselves, was substantially impaired because of mental health impairment or cognitive impairment.[28] The requirement of a mental health

[25] The *Crimes (Life Sentences) Amendment Act 1989* (NSW), amended s 18 of the *Crimes Act 1900* (NSW) to allow a sentence of 25 years or life for murder and s 19 was repealed and replaced by s 19A which provided a maximum sentence of life imprisonment. In 2011 s 19B was introduced which provides for mandatory life imprisonment for murder of a police officer in the course of their duty.
[26] Law Com No 290, 2004 (n 7) para 5.13.
[27] ibid, para 5.22.
[28] Crimes Act 1900, s 23A:

> (1) A person who would otherwise be guilty of murder is not to be convicted of murder if--
>
> > (a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by a mental health impairment or a cognitive impairment, and
> > (b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.
>
> (2) For the purposes of subsection (1) (b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.
> (3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.
> (4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.
> (5) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.
> (6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.
> (7) If, on the trial of a person for murder, the person contends--
>
> > (a) that the person is entitled to be acquitted on the ground that the person was not criminally responsible because of mental health impairment or cognitive impairment, or
> > (b) that the person is not liable to be convicted of murder by virtue of this section,
> > evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.
>
> (8) For the purposes of this section, a person has a cognitive impairment if—
>
> > (a) the person has an ongoing impairment in adaptive functioning, and
> > (b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
> > (c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (9) or for other reasons.
>
> (9) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons—
>
> > (a) intellectual disability,
> > (b) borderline intellectual functioning,

impairment or cognitive impairment appears narrower than the 'abnormality of mental functioning' mandate in E&W.[29] An 'underlying condition' refers to 'a pre-existing mental or physiological condition, other than a condition of a transitory kind'.[30] Finally, it must also be proven that 'the impairment was so substantial as to warrant liability for murder being reduced to manslaughter'.[31] Expert evidence is expressly admissible to determine the former elements of the defence but not the latter overarching moral question. This is the aspect of the partial defence which, in our view, might have significantly improved the operation of diminished responsibility in E&W had a similar clause been adopted.

Gibson notes that medicalisation of diminished responsibility in E&W has engendered a 'philosophical shift' in the rationale underpinning the partial defence.[32] The ambiguity of the original s2(1) HA 1957, combined with the requisite assessment of mental (moral) responsibility engaged jurors in a normative/value judgment regarding D's culpability.[33] As Gibson suggests, new s.2(1) HA 1957 poses a 'barrier to contextualising mental irregularities by reference to circumstantial pressures' indicating that the partial defence is 'less able to take account of how social norms exert psychological effects'.[34] Equally, however, as Hallet observes, 'the fundamental issue of moral responsibility remains and is [simply] obscured by the 'medicalising' of the defence'.[35] Problematically, 'moral responsibility' is cloaked in 'psychiatric terminology' which 'allows psychiatrists to usurp the function of the jury'.[36] The reforms have undoubtedly resulted in a more restrictive plea,[37] but an evaluation of case law

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(c) dementia,
(d) an acquired brain injury,
(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
(f) autism spectrum disorder.

[29] Mackay (n 2) 6.
[30] Crimes Act 1900 (NSW) s 23A(8).
[31] Crimes Act 1900 (NSW) s 23A(1)(b).
[32] Gibson (n 4) 189.
[33] ibid. See also, Law Com No 290, 2004 (n 7) para 5.55 (fn 61). Although cf. Rudi Fortson, 'The Modern Partial Defence of Diminished Responsibility' in A. Reed and M.Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge: Ashgate, 2011) 26.
[34] Gibson (n 4) 186.
[35] Nicholas Hallett, 'Psychiatric evidence in diminished responsibility' (2018) Journal of Criminal Law 82(6) 442-456, 443.
[36] ibid.
[37] Mackay and Mitchell (n 2). See also, Mackay, 'The impairment factors in the new diminished responsibility plea' (n 8) 462-471; Mackay, *'R v Golds'* (n 8) 4-5.

(highlighting public policy concerns, *constituit iudicem legi* (judicial activism)[38] and the (potential) re-emergence of the benign conspiracy through case law[39]) suggests that diminished responsibility, at least, in part, continues to ascribe to the 'moral and social barometer'[40] metaphor which pre-dated the 2009-Act reforms. Unfortunately, the problems associated with medicalisation of the partial defence not only cause role confusion in relation to medical experts and jurors,[41] but is manifest at every stage of the interpretation, operation, and application of the partial defence.

Potential clarification of the role of the medical expert and the jury had been considered by the Law Commission (E&W). During Consultation, the Law Commission outlined six potential options for reform, and a seventh 'other' category. Four of the six included what the Law Commission referred to as 'the pervasive 'ought to be reduced to manslaughter' test'.[42] One of the proposals, was based on a recommendation of the NSW Law Reform Commission,[43] which was enacted into law in 1997 (save 'mind' was substituted for 'mental functioning' by the NSW Parliament) under s.23A(1)(b),(2) CA 1900.

None of the options posited by the Law Commission drew widespread support.[44] Those who favoured the 'ought to be reduced to manslaughter' test, however, did so because of the moral/societal computation involved.[45] Members of the judiciary, in contrast, indicated that tests which 'give an undue normative role' to or engage jurors in 'a value judgment' are problematic.[46] The Law Commission agreed, stating that the test would allow 'the jury to set its own standard for what ought to reduce murder to manslaughter'.[47]

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[38] Krebs (n 3). See also, Richard Percival, *Archbold Review* (2019) 5, 2-3.
[39] See, for discussion, Gibson (n 4) 200.
[40] Reed and Wake (n 23) 184.
[41] Hallett (n 35) 442-456.
[42] Law Com No 290, 2004 (n 7) para 5.54.
[43] NSWLRC (Report 82, 1997) (n 24) Recommendation 4.
[44] Law Com No 290, 2004 (n 7) para 5.53.
[45] ibid para 5.54.
[46] ibid para 5.55 fn. 61.
[47] ibid para 5.56.

This stands in complete contrast to NSW where the Law Reform Commission noted that the controversial nature of such cases warrants community input.[48] The recommendation to cement the role of the jury as central to the determination of culpability in these cases was a response to comments by Gleeson CJ in *Chayna*.[49] Gleeson CJ expressed serious concern about the difficulty for juries in dealing with concepts contained in s 23A which 'medical experts find at least ambiguous and, perhaps, unscientific'.[50] Following this case the NSW Law Reform Commission was asked to investigate the partial defence.[51] The Commission recommended that the defence be retained but reformed. They were not in favour of removing the partial defence from the jury because of the role that juries play in considering issues of moral responsibility as representatives of the community.[52] It was also felt that community input was vital to enhance community acceptance of the due administration of criminal justice (including acceptance of sentences imposed).[53] The government therefore proposed that the Crimes Amendment (Diminished Responsibility) Bill 1997 would 'emphasise the role of the jury' in the defence of 'substantial impairment by abnormality of mind' (now, 'substantial impairment because of mental health impairment or cognitive impairment') .[54]

No further elaboration for the position of the Law Commission in E&W regarding the 'ought to be manslaughter' test was provided. The nature of the jury role was, therefore, left without legislative clarification as would have been the case if a test equivalent to s.23A CA 1900 had been adopted. This failure to place the role of the jury on statutory footing has led to a confused philosophical and operational basis for the partial defence. Howard noted that 'the defence still lacks the theoretical underpinning which should be required of any statutory

[48] NSWLRC (Report 82, 1997) (n 24) paras 3.11 and 3.22.
[49] (1993) 66 A Crim R 178.
[50] ibid 189-90.
[51] NSWLRC (Report 82, 1997) (n 24) para 1.3.
[52] ibid paras 3.11 and 3.12.
[53] ibid para 3.11.
[54] Gareth Griffith and Honor Figgis, *Crimes Amendment (Diminished Responsibility) Bill 1997: Commentary and Background* (Briefing Paper No 19/97) 3.

defence'.[55] The 'psychiatric tenor'[56] of the plea means that psychiatrists frequently comment on all aspects of the partial defence in E&W; '[w]here there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence then juries may not do so'.[57] As Laird articulates, the 'threshold' for departure is 'not high'; there must 'simply be a rational basis, which need not be supported by expert evidence'.[58] The tension across legal, medical and normative determinations, therefore, carries the real risk increased litigation and inconsistent outcomes in diminished responsibility cases. Howard's suggestion that 'to deny the importance of a sound underpinning rationale could render the defence vulnerable to inconsistent application' appears to be borne out in the revised plea.[59] The nature of the case will determine whether the ultimate outcome is predominantly a legal, medical, or normative decision. Given that the Law Commission was otherwise heavily influenced by the NSW Law Reform Commission and s.23A CA 1900, it is disappointing that greater consideration was not afforded to s.23A in relation to the tension across medico/normative aspects of diminished responsibility.

2. The burden of proof and the plea bargaining process

Psychiatric evidence is a necessity in diminished responsibility cases.[60] The partial defence engages a reverse burden of proof that is regarded as ECHR compatible where it is 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.[61] Noting the problems associated with the reverse burden, Ashworth points out that the most 'compelling' reason for the reverse burden, established in *Foye,*[62] is that it would be 'wholly impractical…if the Crown had to bear the onus of disproving

[55] Helen Howard, 'Diminished Responsibility, Culpability and Moral Agency: The Importance of Distinguishing the Terms' in Ben Livings, Alan Reed and Nicola Wake (eds) *Mental Condition Defences and the Criminal Justice System* (Cambridge Scholars Publishing, 2015) 318.
[56] *Conroy* [2017] EWCA Crim 81[7].
[57] *Brennan* [2014] EWCA Crim 2387 [44].
[58] Karl Laird, 'Homicide: R. v Hussain (Imran) Court of Appeal (Criminal Division): Hallett LJ, VPCACD, Russell and Goss JJ: 2 April 2019; [2019] EWCA Crim 666' Criminal Law Review [2019] 10, 877-879.
[59] Howard (n 55) 323.
[60] *Byrne* (n 15) 403 ; *Vinagre* (1979) 69 Cr App R 104 (CA) ; *Dix* (1982) 74 Cr App R 306, 311 (Shaw LJ) ; *Bunch* [2013] EWCA Crim 2498. See also, Tony Storey, 'No defence without evidence' (2014) Journal of Criminal Law 2014, 78(2) 113-116.
[61] *Salabiaku v France* (1988) 13 EHRR 379. See also, *Sheldrake v DPP* [2004] UKHL 43; [2005] 1 AC 264 [21].
[62] [2013] EWCA Crim 475.

diminished responsibility whenever it was raised on the evidence.'[63] The Law Commission explained that this is because the defendant's state of mind 'can only be investigated with his cooperation' and 'weak' medical evidence may be very difficult to disprove to the criminal standard.[64]

In cases where the medical evidence indicates diminished responsibility, the parties may agree on a plea of guilty to manslaughter, thereby avoiding a murder trial.[65] Fortson explained that under the old law, this led to a 'benign conspiracy' between parties which had 'worked satisfactorily' and predicted the benign conspiracy would continue under the revised plea.[66] According to Fortson, the ability to 'exercise discretion' in such cases is 'commend[able]' particularly in 'borderline cases', [67] but prosecutorial 'decisions…to accept such a plea are not taken lightly'.[68]

Notwithstanding that the benign conspiracy may continue to operate through the plea bargaining process, 'the stakes for offenders' pleading diminished responsibility appear to be higher under the new law.[69] Mackay and Mitchell's 2017 empirical study identified that 43.3% of cases proceed to trial by jury compared to 22.9% under the original s.2(1) HA 1957. As Mackay and Mitchell observe: 'more cases are being contested under the new law'; 'fewer diminished responsibility pleas are now being accepted';[70] and, defendants are arguably finding it more difficult to persuade prosecutors that diminished responsibility applies. The potential for 'a merciful but just disposition of certain types of case where all parties consider it meets the justice of the case', a key rationale for retaining the plea, appears to have been

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[63] Andrew Ashworth, 'R. v Foye (Lee Robert): diminished responsibility - Homicide Act 1957 s.2(2) Court of Appeal (Criminal Division): Lord Hughes, Gloster L.J. and Hickinbottom J.: April 24, 2013; [2013] EWCA Crim 475' [2013] Criminal Law Review 10, 839-844. See also, *Wilcocks* [2016] EWCA Crim 2043. Other reasons presented in Foye included: '(i) Diminished responsibility is an exceptional defence available in an appropriate case with a view to avoiding the mandatory sentence which would otherwise apply, so that a discretionary sentence can be imposed, tailored to the circumstances of the individual case. (ii) Diminished responsibility depends on the highly personal condition of the defendant himself, indeed on the internal functioning of his mental processes'.
[64] Law Com No 290, 2004 (n 7) para 5.90. See also, Ashworth (n 63).
[65] *Cox* [1968] 1 WLR 308.
[66] Fortson (n 33) 27.
[67] ibid.
[68] ibid.
[69] Ashworth (n 63).
[70] Mackay and Mitchell (n 2).

reduced.[71] The increased number of trials also has significant resource implications.[72] Benevolent plea bargaining may continue to operate, albeit in a more restrictive form than under the old law. In the context of the respective roles of the parties, more cases are being left to jury determination, notwithstanding increased emphasis on the use of expert medical evidence. This can be viewed as positive given the controversy surrounding the use of plea bargaining. As Clough articulates:

> 'Perhaps we should have more trials and less bargains because in the end, the jury get it right. Justice is to be valued over efficiency, and plea bargaining undermines the fundamental principles of the criminal justice system.'[73]

In NSW, before diminished responsibility was replaced by substantial impairment in 1997, there was a concern that defendants were opting for trial by judge alone rather than a jury trial because juries found it difficult to deal with the concepts contained in s 23A (pre-1997 version). Criticism of diminished responsibility peaked in *Chayna*[74] where the expert evidence of seven psychiatrists differed significantly, with diagnoses favouring insanity, diminished responsibility, both and neither defence. Gleeson CJ noted that this confusion disadvantaged the accused, who carries the onus of proving the defence on the balance of probabilities. To avoid this situation accused persons were often opting for a trial by judge alone.[75] In investigating this matter, the NSW Law Reform Commission found that 'between

[71] Law Com No 290, 2004 (n 7) para 5.22.
[72] Clough, 'Mercy killing, partial defences and charge decisions: 50 shades of grey' (n 5).
[73] ibid.
[74] (1993) 66 A Crim R 178.
[75] This is provided for in s 132 Criminal Procedure Act 1986. This will be granted if the accused and the prosecutor both agree to trial by judge alone (s 132(2)). It may be granted even if the prosecutor does not agree if the court considers it in the interests of justice to do so (s 132(4)) but not if the accused does not agree (s 132(3)).

1990 and 1993, only five of a total of 256 sentenced homicide offenders were tried by judge alone, all five relying on the defence of diminished responsibility to a charge of murder'.[76]

In reformulating the defence, the NSW Law Reform Commission regarded that leaving the determination of the ultimate issue for the jury 'was the "centrepiece" of substantial impairment when it was introduced to parliament and was the 'principal and fundamental reason' for [its] recommendation to retain and amend the defence of diminished responsibility in Report 82'.[77] The NSW Law Reform Commission noted that trial without a jury should be the exception 'since it is now clear that the application of that defence requires a value judgment as to whether there was substantial impairment of the accused's responsibility, which is a question of degree reflecting community standards, and not a question which medical experts can properly answer'.[78]

Defendants opting for trial by judge alone, however, continues to be ongoing issue even after the 1997 reform. In its 2013 Report the NSW Law Reform Commission noted that there were concerns that the central objective of community involvement was weakened by the reduced rate at which juries are used in substantial impairment cases.[79] It was found that between 2005 and 2011 just under half (43%) of all substantial impairment cases were heard by jury while 18% were heard by judge alone. A significant number of cases (39%) proceeded on the basis of a negotiated plea with of the Office of the Director of Public Prosecutions ('ODPP').[80] It was noted that while the ODPP has 'strict guidelines that prescribe that the prosecution must consider community values inherent in the requirement of s 23A CA 1900 when negotiating a plea in cases of substantial impairment' such an assessment relies on prosecutor's 'expertise and experience but lacks the legitimising force of

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[76] NSWLRC (Report 82, 1997) (n 24) para 3.26, fn 48.
[77] NSWLRC Report 138, 2013 (n 11) para 4.43, referring to NSW, Parliamentary Debates, Legislative Council, 25 June 1997, 11 066 (J W Shaw) and NSWLRC (Report 82, 1997) (n 23) para 3.11.
[78] NSWLRC Report 82, 1997 (n 24) para 3.27, see also paras 3.41-3.43.
[79] NSWLRC Report 138, 2013 (n 11) para 4.44.
[80] ibid.

a jury decision'.[81] Despite this observation, the NSW Law Reform Commission noted that most cases do still proceed to trial by jury, and the ODPP is required to consider community values. [82] The situation has been noted to be similar in E & W, though it is unclear how such an assessment of community values are is to be made.[83]

3. Abnormality of mental functioning arising from a recognised medical condition

In order to establish diminished responsibility under s.2 HA 1957 (E&W), D must have been suffering from an 'abnormality of mental functioning' arising from a 'recognised medical condition'. The Law Commission (E&W) anticipated greater clarity in the operation of diminished responsibility by substituting 'abnormality of mind'[84] with 'abnormality of mental functioning.' The Law Commission (E&W) had been influenced by the NSW Law Reform Commission who preferred the latter as the term 'abnormality of mind' had caused disagreements between experts.[85] The NSW Law Reform Commission noted that most of the criticisms of the defence had been directed at the term 'abnormality of mind', 'which has been described as 'largely…meaningless' because it lacks legal or medical basis. Further, disagreement between experts means that 'abnormality of the mind' risks inconsistent application and too wide an interpretation' (the term was recently amended in 2020 to 'because of mental health impairment or cognitive impairment').[86] Under s.2(1) HA 1957, the 'abnormality of mental functioning' must arise from a 'recognised medical condition' rather than the 'out-of-date set of causes' that operated under the old law which had 'never had an agreed psychiatric meaning'.[87] The Law Commission (E&W) had recommended that the

[81] ibid.
[82] ibid, referring to NSW Office of the Director of Public Prosecutions, Prosecution Guidelines (2007) Guideline 20, 24.
[83] Mackay, 'The New Diminished Responsibility Plea: More than Mere Modernisation' (n 2) 16.
[84] *Byrne* (n 15).
[85] Law Com No 290, 2004 (n 7) para 5.78 referring to the NSWLRC (Report 82, 1997) (n 24) para 3.34.
[86] NSWLRC Report 138, 2013 (n 11) para 4.56 [references omitted].
[87] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) paras 5.114 and 5.111.

‘abnormality of mental functioning’ should arise from an ‘underlying condition’[88] as was the position in NSW before 2020.

The term ‘underlying condition’ was defined was ‘a pre-existing mental or physiological condition, other than a condition of a transitory kind.’[89] This definition was designed to exclude transient emotional states, such as, anger, rage or jealousy.[90] Hemming asserted that the NSW Commission’s rejection of an exhaustive list of conditions effectively ‘put in the “too hard” basket any attempt to limit the number of conditions falling within the scope of the defence preferring to stand behind the rubric of maintaining flexibility’.[91] Despite these concerns, the NSW Law Reform Commission found that since 1997 the reformed definition of the defence ‘is meeting the objective of narrowing the field of cases where it can be raised, and in doing so, restricting the application of the substantial impairment defence to serious cognitive and mental health conditions’.[92] Nonetheless, in 2020 a list of conditions which amount to, or may amount to, cognitive impairment replaced the former definition of ‘underlying condition’ in the Crimes Act 1900 (NSW).[93] The British Government considered, in contrast, that the term ‘recognised medical condition’ would contribute to the precision of the plea by ‘encourag[ing] defences to be grounded in a valid medical diagnosis linked to the accepted classificatory systems’[94] (the ICD and DSM)[95] whilst remaining flexible enough to ‘accommodate future developments in diagnostic practice’.[96]

3.1 Recognised medical condition: A medical question until it becomes a legal question

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[88] Crimes Act 1900 (NSW) ss 23A(1)(a), (8) [old version].
[89] Crimes Act 1900 (NSW) ss 23A(8).
[90] NSWLRC (Report 82, 1997) (n 24) para 3.51.
[91] Andrew Hemming, ‘It’s time to abolish diminished responsibility, the coach and horses’ defence through criminal responsibility for murder’ (2008) 10 University of Notre Dame Australian Law Review.
[92] NSWLRC Report 138, 2013 (n 11) para 4.60.
[93] Crimes Act 1900 (NSW), ss 8 and 9.
[94] Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law* (MoJ, CP 19/08/2008) para 49.
[95] ibid.
[96] ibid.

Potential ambiguity associated with the 'recognised medical condition' requirement, however, was extrapolated in *Dowds*[97]. Their Lordships explained that the usefulness of the ICD and DSM in forensic contexts is necessarily limited.[98] The classificatory systems are designed primarily for use by doctors, clinicians and health professionals.[99] There may be a 'divergence between the level of impairment which may bring a patient within a…classification and the level necessary to have legal impact.'[100] The Court of Appeal explained that a number of conditions, for example, paedophilia, kleptomania, intermittent explosive disorder, etc., raise important questions for the courts.[101] Accordingly, the presence of a 'recognised medical condition' is a necessary but not always sufficient basis to found diminished responsibility.[102] Problematically, this approach implies that defendants would need evidence of 'something beyond a recognised medical condition' to establish that aspect of the defence, but not necessarily in all cases.[103] Where medical experts are of the view that D's mental abnormality arising from a recognised medical condition substantially impaired D's abilities, it is unclear on what basis that condition ought to be excluded. The result is that this determination will need to be made on a case-by-case basis, reinforcing the fact that diminished responsibility ultimately remains a legal rather than a medical question, notwithstanding the medicalised language of the partial defence. The terminology has further added to the confusion regarding when the decision will constitute more of a legal rather than a medical determination.

3.2 Prior fault: a legal determination

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[97] [2012] EWCA Crim 281 (CA).
[98] ibid [31].
[99] ibid [29]-[30].
[100] ibid [30].
[101] ibid [31].
[102] ibid [41].
[103] Nicola Wake, 'Diminished Responsibility and Acute Intoxication: Raising the Bar' (2012) Journal of Criminal Law 76(3) 197-202.

In *Dowds*, acute intoxication was precluded from founding diminished responsibility, but that decision accords with established intoxication doctrine, (intoxication is not a defence, save in the limited context of whether a 'specific intent' has been formed[104]) and case law pre-2009.[105] The outcome is unsurprising, but 'not in every sense an obvious one'.[106] Under the civil law, acute intoxication is a recognised 'mental disorder' for the purposes of s.136 of the Mental Health Act 1983 (amended 2007). A 2017 study of 245 individuals detained under s.136 revealed that nearly half were intoxicated.[107] Accordingly, '[a]n intoxicated person is at the time of intoxication suffering from an abnormal state of [mental functioning] which does affect his ability to determine or control his conduct'.[108] As such, 'the basis of the exclusion [in criminal contexts] is not the definition of the plea but the clear policy of the criminal law'.[109]

In NSW, s 23A (3) CA 1900 replicates the common law position in providing that the effects of self-induced intoxication do not amount to an abnormality of the mind and are to be disregarded in assessing whether or not the defence of substantial impairment is applicable. However, the partial defence is available in cases where the accused can prove that it was the underlying condition (brain damage) not the short-term effects of intoxication which caused the abnormality of mind resulting in the substantial impairment.[110] The NSW Law Reform Committee recommended that this position be clarified by defining mental health impairment as including 'substance induced mental disorders', which 'should include ongoing mental health impairments such as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances'.[111] This

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[104] Andrew Simester, 'Intoxication is never a defence' (2009) Criminal Law Review (1) 3-14.
[105] *Dowds* (n 97). See also, *Majewski* [1977] AC 443.
[106] Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Scottish Law Com No 195, 2004) para. 3.40.
[107] Jennifer Burgess, Sarah-Jane White and Aileen O'Brien, 'Retrospective cohort follow-up study of individuals detained under Section 136' British Journal of Psychology (2017) 3(6) 281–284.
[108] Scottish Law Com. No. 195, 2004 (n 106) para. 3.40.
[109] ibid para. 3.40.
[110] *Jones* (1986) 22 A Crim R 42; *De Souza* (1997) 41 NSWLR 656; *Zaro v Regina* [2009] NSWCCA 219.
[111] NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* (Report 135, 2012) Recommendation 5.2; also NSWLRC Report 138, 2013 (n 11) Recommendation 3.2, para 3.88.

recommendation was adopted in 2020. The Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) establishes that a mental health impairment may arise from ‘a substance induced mental disorder that is not temporary’ but does not include ‘a substance use disorder’ or ‘the temporary effects of ingesting a substance’.[112] This approach runs counter to the position in E&W which has recognised dependence syndrome (addiction) as founding a basis for diminished responsibility since prior to the reforms to s.2 HA 1957.[113]

In NSW, a person who has a psychiatric disorder may fall under the definition in instances where a disorder was brought on by substance abuse (or addiction), as identified in *Woutersz.*[114] While *Woutersz*,[115] is a case from the Australian Capital Territory (ACT) it was noted that it seemed that s23A CA 1900 and the current provision in the ACT are intended to have essentially the same operation. In *Woutersz*,[116] Penfold J found that the acute psychotic episode which led to the killing ‘emerged from either an underlying functional illness (most likely schizophrenia), or an underlying mental condition, that was either aggravated, or caused, by Ice [crystal methamphetamine] use over a period of two or more years before the killing’.[117] Penfold J was, therefore, ‘satisfied on the balance of probabilities that Ms Woutersz was suffering from schizophrenia (or possibly another psychiatric illness) which had been aggravated or exacerbated by drug use, rather than a drug-induced psychotic disorder’.[118] As a result ‘the particular psychotic episode that became apparent on the day of the killing, but that seems to have been developing over at least several days before that, impaired Ms Woutersz’ mental responsibility for the killing of her mother sufficiently to justify a verdict of manslaughter by reason of diminished responsibility’.[119]

[112] Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) s 4(2)(d) and (3).
[113] *Wood* [2008] EWCA Crim 1305 (CA). More recently reaffirmed in *Lindo* [2016] EWCA Crim 1940 (CA) and *Foy* [2020] EWCA Crim 270 (CA). For further discussion, see Natalie Wortley, ‘New Cases: Evidence and procedure: Appeal (fresh evidence): R. v Foy‘ (2020) Criminal Law Weekly CLW/20/10/1.
[114] [2018] ACTSC 36.
[115] ibid [144].
[116] ibid.
[117] ibid [290].
[118] ibid [289].
[119] ibid [291].

The approach to co-morbidity in NSW appears to be progressive in recognising that 'there is a high correlation between mental illness and substance use disorder'.[120] The resistance to regarding addiction (substance use disorder) as a basis for diminished responsibility in the NSW proposals, however, marks an outdated view of mental impairment. The NSW Law Reform Commission notes that behavioural scientists define substance use disorder as 'the abuse of, and dependence on, drugs, alcohol and/or other substances "to the extent that the person's functioning is affected"'.[121] This is distinguished 'from casual substance use or temporary intoxication' and also 'from a substance-induced mental disorder, an impairment that is caused by a person's "substance use, abuse, intoxication or withdrawal"'.[122] The defence will only apply in this context where 'prolonged use of alcohol or drugs led to brain damage that substantially impaired their ability to control their actions'.[123] In 'such cases, the defendant must prove that it was the brain damage (being the underlying condition) that caused the abnormality of mind'.[124]

An equivalent approach had applied in E&W in the 1989 case of *Tandy*[125] in which Linda Tandy, a chronic alcoholic, fatally strangled her daughter following the consumption of almost a full bottle of vodka. The appellate court confirmed that D must have been acting in a an state of automaton[126] (i.e. every drink consumed on the day of the killing must have been involuntary) or the drink must have induced brain damage before the partial defence could apply. It is the latter that is most similar to NSW's requirement that the alcohol or drug consumption results in a mental impairment, for example, drug or alcohol induced brain damage before the partial defence would apply; substance use disorder (including addiction)

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[120] NSWLRC Report 135, 2012 (n 111) para 5.95.
[121] ibid para 5.94 [references omitted].
[122] ibid para 5.94.
[123] ibid para 5.99.
[124] ibid para 5.99, citing *Jones v The Queen* (1986) 22 A Crim R 42 [44]; *Ryan v The Queen* (1995) 90 A Crim R 191, 196-197.
[125] [1989] 1 WLR 350 (CA).
[126] See, for discussion, *Wood* (n 113) [37] (Sir Igor Judge P).

would be excluded.[127] The Court of Appeal ruling in *Tandy* was criticised for failing to appreciate the 'concept of alcoholism as a disease',[128] and this criticism can be equally levelled at the approach of the NSW Law Reform Commission and post-2020 iteration of the defence. As Reed and Wake explained: '[t]he determination in *Tandy* fundamentally undermined the rationale underpinning the partial defence by failing to recognise that a complete destruction of the defendant's free will was not required for her liability to be substantially impaired'.[129]

The decision in *Tandy* was subsequently reversed in *Wood* (considered further below), where the appellate court confirmed that brain damage was not required for the partial defence.[130] Addiction, or alcohol dependence syndrome, *per se* could potentially satisfy the partial defence where the extent of the condition met the remaining requirements of the partial defence. In making such determination, jurors are directed to 'focus exclusively on [the addiction/dependence syndrome and accordingly] the effect of alcohol consumed by the defendant as a direct result of his illness or disease and ignore the effect of any alcohol consumed voluntarily.'[131]

Despite E&W offering a more medically valid approach to addiction (dependence syndromes) than the NSW Law Reform Commission, recent case law in E&W has highlighted that tension across prior fault principles and diminished responsibility continues to pose problems for the courts. Kay stabbed V to death in a 'frenzied and brutal' attack following a 'three day bender',[132] where he imbibed 'cocaine, amphetamines, methamphetamine, morphine, cannabis, and ecstasy.'[133] Medical experts agreed that Kay suffered from paranoid schizophrenia and heroin dependency, both recognised by the ICD-

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[127] NSWLRC Report 138, 2013 (n 11) para 5.99, citing *Jones v The Queen* (1986) 22 A Crim R 42, 44; *Ryan v The Queen* (1995) 90 A Crim R 191, 196-197

[128] Jonathan Goodliffe, *'R v Tandy and the Concept of Alcoholism as a Disease'* (1990) 53 Modern Law Review 809, 809-14.

[129] Reed and Wake (n 23) 187.

[130] *Wood* (n 113) [41] (Sir Igor Judge P).

[131] ibid.

[132] *Joyce; Kay* [2017] EWCA Crim 647, 2017 WL 02212863 [6].

[133] ibid [8].

10.[134] The issue at trial was whether Kay's responsibility was diminished by an 'abnormality of mental functioning' arising from a 'recognised medical condition'. The trial judge put the following question to the jury:

> '…was the psychotic episode leading to the killing caused by the voluntary consumption of drink or drugs or was it caused by, or significantly caused by, the schizophrenia *made worse by the intoxication* against a background of dependency syndrome?'[135]

The jury returned a verdict of murder. The defence appealed arguing that a 'more nuanced approach' to diminished responsibility ought to be undertaken given increased understanding of mental disorder.[136] In particular, defence argued that the court erroneously 'excluded…the possibility that [Kay] was suffering from an abnormality of mental functioning (a psychotic state) which arose from a medical condition (schizophrenia) and which, *in combination with voluntary intoxication*, substantially impaired his responsibility for his actions'.[137]

The Court of Appeal rejected Kay's application on the basis that the trial judge's direction followed 'a long line of [binding] authority' which pre-dated the 2009 Act amendments.[138] Ironically the trial judge's direction appeared to be more lenient than previous authorities in allowing jurors to explore whether 'the schizophrenia [was] *made worse by the intoxication* against a background of alcohol dependency syndrome'.[139] In potentially implying that *any* intoxication set against D's background of dependence syndrome would satisfy the partial defence, the direction appears equivocal on the issue of

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[134] ibid [9].
[135] ibid.
[136] ibid.
[137] ibid [14].
[138] ibid [19].
[139] ibid.

voluntariness/involuntariness (i.e. intoxication is only relevant where the intoxicants are consumed as a direct result of the illness), whereas the law pre-dating 2009 was not.

Prior to reform, the House of Lords in *Dietschmann,* made clear that jurors should consider whether, *despite the drink*, D's abnormality of mind substantially impaired his mental responsibility for the killing.[140] As noted, the Court of Appeal similarly ruled, in *Woods,* that jurors ought to 'focus exclusively on the effect of alcohol consumed by the defendant as a direct result of his illness or disease and *ignore the effect of any alcohol consumed voluntarily*'.[141] Their Lordships in *Stewart,* provided further guidance, whilst reaffirming the position; assuming the necessary *mens rea* was established, murder could be reduced to manslaughter '*notwithstanding the consumption of alcohol*, on the basis of diminished responsibility'.[142] The Court of Appeal, in *Kay* did not criticise the initial trial judge's direction, but confirmed that the position pre-2009 had not changed, the partial defence would only be available where the recognised medical condition (schizophrenia) was 'of such severity that, *absent intoxication*, it substantially impaired [D's] responsibility', or 'where the RMC (schizophrenia) coupled with drink/drugs dependency syndrome substantially impair[ed] D's responsibility'. [143]

Hallet LJ further opined that:

> 'The approach (in Kay and the authorities pre-dating reform) is neither binary nor simplistic but is flexible enough to encompass a wide variety of factual circumstances in a manner that is fair to all. It takes full account of the kind of mental health issues under

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[140] *Dietchmann* [2003] 1 AC 1209 [41] (Lord Hutton) 41.
[141] *Wood* (n 113). See also, *Richardson* [2016] EWCA Crim 577.
[142] *Stewart* [2009] EWCA Crim 593.
[143] *Joyce; Kay* (n 132).

> consideration and our increased understanding of them. In our view, it rightly does not necessarily provide even a partial defence to everyone diagnosed with schizophrenia, who, *well aware* of the possible consequences, *chooses to abuse drink and or drugs to excess* and then kills.'[144]

Three key issues arise from this observation. First, requiring jurors to 'separate out each drink of the day' does appear somewhat 'binary' and does not seem to accord with 'increased understanding' of medical conditions. The difficulty associated with requiring jurors to separate mental disorder from voluntary intoxication and dependence syndrome is palpable in the testimony of the medical experts. Dr Collins explained that Kay's condition was 'analog[ous] to a pot of hot water simmering away (schizophrenia) brought to boiling point by the intoxication', whereas Dr Barlow was of the view that Kay's schizophrenic condition was stable, and the psychotic state was induced by voluntary intoxication.[145]

Second, evidence of 'choice' in taking alcohol or drugs may in some instances be illusory and related in large part to the condition (i.e. self-medication).[146] This observation was addressed by the Sentencing Council in the distinct but related context of the Definitive Sentencing Guideline for Manslaughter by Diminished Responsibility in 2017.[147] In terms of assessing culpability, the guideline stipulates: 'where an offender exacerbates the mental disorder by *voluntarily* abusing drugs or alcohol [("self-medication")] or by *voluntarily* failing to follow medical advice this will increase responsibility' ('medication non-

[144] ibid [20].
[145] ibid.
[146] There was evidence to suggest that Kay was 'well aware' that '[d]rug use (particularly amphetamines)…led to acute episodes, including at least one psychotic episode', and that he had previously 'refrained from taking amphetamines, because he recognised that they had a markedly deleterious effect on his behaviour;' ibid [5].
[147] For discussion of the Sentencing Guideline see, Martin Wasik, 'Reflections on the Manslaughter Sentencing Guidelines' [2019] Criminal Law Review 4, 330-332.

compliance').[148] Respondents to the Consultation were concerned that this clause alone was insufficiently nuanced, and further clarification was provided in the published guideline:

> 'In considering the extent to which the offender's behaviour was voluntary, the extent to which a mental disorder has an impact on the offender's ability to exercise self-control or to engage with medical services will be relevant'.[149]

The above observation further highlights the complexity of the task jurors are expected to engage in when separating voluntary intoxication from intoxication directly related to the condition. In addition to being relevant to the culpability assessment in the Sentencing Guidelines, the aggravating factor, 'Commission of offence whilst under the influence of alcohol or drugs'[150] was similarly amended following respondents' concerns:

> '*drugs can sometimes be used to 'self-medicate' to try and reduce symptoms.* It should also be noted that patients with serious mental illness may have little insight into their disorder which leads them into behaviour that can exacerbate their condition. They may stop their treatment as a consequence of symptoms such as auditory hallucinations or paranoid beliefs leading them to believe they are being poisoned. Although the Court may wish to consider the role of

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[148] Sentencing Council Consultation, *Sentencing Guideline: Manslaughter by Diminished Responsibility* (2018) available <https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter_consultation_paper_Final-Web.pdf> 38 accessed 29th June 2020.

[149] Sentencing Council Consultation Response, *Sentencing Guideline: Manslaughter by Diminished Responsibility* (2018) available <https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-consultation-response_WEB-1.pdf> 17 accessed 29th June 2020. See, generally, *Edwards* [2018] EWCA Crim 595.

[150] Sentencing Council Consultation (n 148).

drugs and alcohol before sentencing, we advocate against enshrining this as an aggravating factor in these circumstances'.[151]

To address these observations, the Sentencing Council added the following caveat to the aggravating factor: 'the extent to which a mental disorder has an effect on offender's ability to make informed judgments or exercise self-control will be a relevant consideration in deciding how much weight to attach to this factor'.[152] The Sentencing Guideline highlights the complexity in assessing prior fault issues where the defendant suffers from a recognised medical condition and either self-medicates or fails to comply with a prescribed medication regimen. These issues are not exclusively the domain of the sentencing judge. By implication, an ostensible choice to self-medicate may potentially relate directly to D's condition, further highlighting the mental gymnastics jurors are required to engage in when assessing whether the intoxication is a direct result of the illness in determining diminished responsibility.

The Court of Appeal also alluded to the problem of medication non-compliance, noting that Kay had been in 'contact with mental health services', but had 'not responded meaningfully to the many offers that were made to help him'.[153] The relevance of medication non-compliance on diminished responsibility is arguably negligible given that the focus should be on the mental impairment, and, as such, the Court did not explore the potential impact of medication non-compliance that exacerbates a pre-existing recognised medical condition. However, D's lack of 'meaningful' engagement with mental health provision is viewed pejoratively, notwithstanding that a variety of factors, for example, 'certain medications, religious beliefs, paranoia, side effects, and depression', may contribute to an

[151] Sentencing Council Consultation Response (n 149) 18.
[152] ibid.
[153] *Joyce; Kay* (n 132) [5].

offender's apparent *choice* not to engage meaningfully with such services.[154] The Definitive Guideline adopts a similarly negative view of medication non-compliance by only addressing circumstances where D's 'mental disorder was undiagnosed and/or untreated… For example: - where an offender has sought help but not received appropriate treatment this may reduce responsibility'.[155]

As a final point of note, given this more detailed exposition of interpretation of voluntariness/involuntariness (in the sense of a direct link to the dependence syndrome rather than automatism) and recognising that self-medication may be inextricably linked to the medical condition, it seems that the flexibility referred to by Hallett LJ is likely to continue to be tested in future cases, particularly in light of the increased medicalisation of the partial defence. Such disputes between medical experts will undoubtedly make it more difficult for jurors to reach a verdict.[156]

In the Australian case of *Woutersz*[157] there was discussion of whether prior fault should be considered in assessing whether a manslaughter verdict is appropriate. The Crown submitted that in assessing culpability/moral responsibility 'the court must consider not just the level of the offender's impairment but also the offender's moral responsibility for the development of the abnormality of mind, or the acute episode of that abnormality, that resulted in the impairment of the person's "mental responsibility"'.[158] The argument was that the defendant's conduct 'is "more blameworthy" if the psychosis, or the psychotic episode, that resulted in the killing was caused by her drug use'.[159] In effect, there should a discount on the reduction in her culpability 'for the contribution made to the mental impairment by

[154] Arlie Loughnan and Nicola Wake, 'Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication' in Alan Reed, Michael Bohlander, Nicola Wake and Emma Smith (eds) *General Defences in Criminal Law Domestic and Comparative Perspectives* (Ashgate Publishing, 2014) 131.
[155] Sentencing Council Consultation Response (n 149) 17.
[156] Olivia Quick and Celia Wells, 'Getting Tough with Defences' [2006] Criminal Law Review 117.
[157] [2018] ACTSC 36
[158] ibid [168].
[159] ibid [168].

Ms Woutersz' drug use'.[160] The prosecution also argued that the reduced culpability should be discounted (or rather her culpability raised) because of the tension between Woutersz and her mother and Woutersz arguing with her mother contributed to the killing.[161] The defence disagreed, claiming that 'the person's culpability is to be assessed by reference to the degree of impairment and not by reference to the offender's responsibility for the development or existence of the mental impairment'.[162] Penfold J rejected the argument of the Crown and emphasised that the authorities suggest that 'what is relevant in assessing the person's culpability is the degree of impairment, not the origins of the impairment.'[163] Her Honour was of the opinion that 'looking for the real origin or the first cause of a mental impairment is so fraught with problems that it could produce nothing on which an assessment of culpability could fairly be based'.[164]

3.3 Developmental immaturity and learning difficulties

Notwithstanding the foregoing observations regarding the problems associated with the ICD and DSM in the context of intoxicated offending, the British Government initially considered the breadth of the classificatory systems a benefit. The Ministry of Justice (E&W) explained that the classificatory systems would encompass 'conditions such as learning disabilities and autistic spectrum disorders which can be particularly relevant in the context of juveniles', albeit conceding that this labelling is inappropriate, and disappointingly declining to extend diminished responsibility to developmentally immature offenders.[165] The Law Commission (E&W) proposals would have included 'an abnormality of mental functioning arising from a recognised medical condition, *developmental immaturity in a defendant under the age of*

[160] ibid [169].
[161] ibid [179].
[162] ibid [173].
[163] ibid [240].
[164] ibid [241].
[165] MoJ, CP 19/08/2008 (n 94) paras 52-55.

eighteen, or a combination of both.'[166] Policy concerns regarding addressing developmentally immature defendants continue to the present date with the current government recently asserting that '[v]ictims of serious crimes committed by 10 and 11 year-olds must feel assured that those responsible can be proceeded against by the courts.'[167] The government's position is unwavering despite five bills in five consecutive Parliamentary sessions adopting a single clause which would raise the minimum age of criminal responsibility from 10 to 12.[168] The current Age of Criminal Responsibility Bill 2019-2021 is tabled, but even if the Bill were to receive the Royal Assent[169], there remains a need for an in depth review of how the criminal justice system deals with children with developmental delays/neurodevelopmental disorders.[170]

Research shows that there is a higher prevalence of young people with neurodevelopmental disorders in the juvenile justice sector than in the general population.[171] In an Australian context, the Royal Commission into the Protection and Detention of Children in the Northern Territory echoed these concerns and particularly noted that the rate of developmental vulnerability in Aboriginal Children was twice that of non-Aboriginal children.[172] The Royal Commission, therefore, found that it was essential to recognise and treat neurodevelopmental disorders when children are young in order to divert them 'from a potential trajectory into the youth justice system'.[173]

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[166] Law Com No 304, 2006 (n 87) Para 9.20

[167] HL Deb, *Age of Criminal Responsibility Bill* 8 Sept 2017, Vol 783, Col 2211 (Baroness Vere of Norbiton (Con)).

[168] The single clause in the Bill would substitute '12' for '10' In section 50 of the Children and Young Persons Act 1933 (age of criminal responsibility).

[169] This is unlikely given the current Government's intention to maintain the status quo, not to mention its current focus on Brexit and the Covid-19 pandemic.

[170] Nicola Wake, Raymond Arthur, Thomas Crofts, and Sara Lambert, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' [2020] Public Law Review *(pending publication).*

[171] Office of the Children's Commissioner (United Kingdom), *Nobody Made the Connection: The Prevalence of Neurodisability in Young People who Offend* (October 2012) para 3.1 available <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Nobody-made-the-connection.pdf> accessed 2nd September 2020. See also. Royal Commission into the Protection and Detention of Children in the Northern Territory (2017), Vol I, 135; Eileen Baldry, Damon Briggs, Barry Goldson and Sophie Russell, ''Cruel and Unusual Punishment': An Inter-Jurisdictional Study of the Criminalisation of Young People with Complex Support Needs' (2018) Journal of Youth Studies 21, 636, 640-1.

[172] ibid, Royal Commission into the Protection and Detention of Children in the Northern Territory (2017).

[173] ibid.

In NSW the minimum age of criminal responsibility is ten as in E&W[174] but in NSW from ten until the age of fourteen the presumption of *doli incapax,* applies.[175] The NSW Law Reform Commission notes that this presumption has repercussions both for fitness to plead and the defence of mental illness (and by extension substantial impairment).[176] To rebut the presumption in NSW, the prosecution must prove beyond reasonable doubt that the child understood their behaviour to be seriously wrong as opposed to merely naughty or mischievous.[177] In recent years there have also been calls for an increase in the age of criminal responsibility in Australia.[178] In response to such calls, a Working Group initiated by the Attorney-General's Department and chaired by the Department of Justice, Western Australia was set up in 2019 to examine whether there should be a change in the age of criminal responsibility across Australia.[179] At its meeting on 27th July 2020 the Working Group 'identified the need for further work to occur regarding the need for adequate processes and services for children who exhibit offending behaviour' and deferred making any decisions about raising the age of criminal responsibility.[180]

The United Nations Committee on the Rights of the Child now recommends that states set the minimum age of criminal responsibility at 14.[181] The UN Committee has also commented that children with developmental delays or neurodevelopmental disorders should not be in the criminal justice system.[182] Increasing the minimum age of criminal

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[174] Children (Criminal Proceedings) Act 1987 (NSW) s 5.
[175] See, for example, *RP v The Queen* [2016] HCA 53. The presumption was abolished in England and Wales in 1998; Crime and Disorder Act 1998, s 34.
[176] NSW Law Reform Commission, Young people with cognitive and mental health impairments in the criminal justice system (Consultation Paper 11, 2010), para 5.2.
[177] *C v DPP* (1996) AC 1at 38; *RP v The Queen* (n 173) [9]; for further discussion of proof in relation to the presumption of *doli incapax*, see Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of Doli Incapax' (2018) Sydney Law Review 40(3) 339-365.
[178] For discussion see Thomas Crofts, 'Will Australia raise the minimum age of criminal responsibility?' (2019) Criminal Law Journal 43(1) 26-40.
[179] Council of Attorneys-General, 'Age of Criminal Responsibility Working Group Terms of Reference' available at <https://www.department.justice.wa.gov.au/_files/TOR-age-criminal-responsibility.pdf> accessed 14 August 2020.
[180] Council of Attorneys-General, 'Communiqué' available at <https://www.ag.gov.au/sites/default/files/2020-07/Council%20of%20Attorneys-General%20communiqu%C3%A9%20%E2%80%93%20July%202020.pdf> accessed 14 August 2020.
[181] United Nations Committee on the Rights of the Child, General Comment No 24 (2019): on children's rights in the judicial system (UN Doc CRC/C/GC/24) [22].
[182] ibid [28].

responsibility might not go far enough and there is a case for wholesale review of the approach to youth offending.

It could be argued that meritorious cases absent a medical basis, such as, developmental immaturity, should (as the Law Commission (E &W) contend in relation to mercy killings) 'be addressed openly [as a separate defence or via appropriate social service routes] rather than disguised as issues of diminished responsibility',[183] which has become synonymous with mental disorder rather than 'normal' developmental immaturity.

3.4 Fair Labelling and Mercy Killers

In terms of the moral veracity of the partial defence, the fair labelling issue is pertinent. That the mercy killer could only avoid the mandatory life sentence through 'connive[ance]' between the parties and medical experts was described as 'a blight on [the] law'.[184]

Mercy killers and other 'deserving cases' may potentially be afforded a partial defence through benevolent plea bargaining (as above), or through compassionate psychiatrist and/or jury determinations (considered further below).[191] The loss of control defence may be(potentially) benevolently applied in mercy killing cases, dependent upon the specific facts of the case, as predicted by Livings[192] and reaffirmed in *Knight*.[193] The most effective way to address the stretching of partial defences in this context, however, has less to do with reform to diminished responsibility and much more to do with the implementation of appropriate defence(s)/diversionary schemes. The lack of additional defences in cases that garner public sympathy could result in further stretching of the partial defence, which may (again) depend largely on whether the decision is legal, medical or normative.

[183] Law Com No 290, 2004 (n 7) para 5.94.
[184] ibid para 2.34.
[191] Gibson, (n 4) 177-200.
[192] Livings (n 5).
[193] Jessica Carpani, "Son who threw his terminally ill 79-year-old mother to her death spared jail" The Telegraph, 20 September 2019; and, Clough (n 73).

The foregoing analysis indicates that the 'recognised medical condition' requirement appears to raise more questions than it resolves. The broader issue regarding the limits of the 'recognised medical condition' requisite remain open to conjecture, whilst the classificatory systems provide a veritable shopping list of potential conditions that might be tried by defence counsel. This is arguably antithetical to Parliament's intention to clarify the law. Further, it highlights that the level of legal, medical, and juror input will differ depending on policy issues pertinent to the particular case, with the genuine risk of inconsistent application and outcomes in diminished responsibility cases.

The NSW Law Reform Commission recommended that the phrase 'underlying condition' be changed to 'mental health or cognitive impairment' for substantial impairment by abnormality of mind (and the defence of not guilty by reason of mental illness).[194] Based on this recommendation, the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 replaced the term 'by abnormality of mind' with 'because of mental health impairment or a cognitive impairment' and has defined these terms.[195] A mental health impairment covers as 'a temporary or ongoing disturbance of thought, mood, volition, perception, or memory [that] would be regarded as significant for clinical diagnostic purposes, and the disturbance impairs the emotional wellbeing, judgment or behaviour of the person'. A non-exhaustive list of such impairments includes anxiety disorder, affective disorder, psychotic disorder and substance induced mental disorders that are not temporary – this excludes substance use disorders (addiction to substances) or the temporary effects of ingesting substances.[196] A cognitive impairment is defined as where a person has: 'an ongoing impairment in adaptive functioning, and … an ongoing impairment in comprehension, reason, judgment, learning or memory, and the impairment results from damage to or dysfunction, developmental delay or deterioration of the person's brain' that

[194] NSWLRC Report 138, 2013 (n 11) Recommendation 3.2, para 3.88 and Recommendation 4.1, para 4.65.
[195] Sections 4 and 5.
[196] Mental Health and Cognitive Impairment Forensics Provisions Act 2020, s 4.

may arise from a range of conditions. These conditions include, but are not limited to intellectual disability, borderline intellectual functioning, dementia, acquired brain injury, drug or alcohol related brain damage (including foetal alcohol spectrum disorder) or autism spectrum disorders.[197]

The advantages of this definition are that it covers appropriate conditions (save the comments regarding the exclusion of addiction (dependence syndrome) considered above), is consistent with the definition recommended in other areas of law, reflects contemporary psychological and psychiatric understandings, is respectful of people with such impairments, and is tighter and more precise than the current outdated terminology.[198]

4. The role of the psychiatrist

As noted, the role of the psychiatrist has been expanded under revised s.2(1) HA 1957 (E&W). Under the old law, it was recognised that medical experts sometimes entered into a benign conspiracy regarding the applicability of diminished responsibility.[199] The ultimate issue, namely whether D's responsibility had been substantially impaired, was frequently commented on by experts despite it not being within their province under the law. [200]The unenforced restriction on psychiatric testimony on the ultimate issue under the old law has effectively been repudiated under the new law since 'most, if not all of the aspects of the new provisions relate entirely to psychiatric matters.' [201] As identified in *Brennan,* it is often 'both legitimate and helpful' for an expert psychiatrist to comment on whether the defendant's abilities are substantially impaired.[202] Mackay and Mitchell observe that experts commenting on the ultimate issue has increased under the new law (72.7% providing a positive view, and

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[197] Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) s 5, Crimes Act 1900 NSW, s 23A(8) and (9).
[198] NSWLC Report 138, 2013 (n 11) para 3.50.
[199] Empirical research by Mackay suggests that in 69.7% a positive view was expressed, and 8.5% admitted a negative view; Law Com No 290, 2004 (n 7) para 2.34.
[200] ibid, Appendix B. See also, Mackay and Mitchell, 'The new diminished responsibility plea in operation: some initial findings' (n 2) 18-35.
[201] *Brennan* (n 57) [49], [51].
[202] ibid.

18.2% holding a negative view, compared to 69.7% and 8.5% respectively under the old law). In only 11 out of 100 reports, the expert stipulated that the ultimate issue was for the jury.[203] As Hallett observes 'the medicalisation of the Diminished Responsibility defence adds to the role confusion' between legal, medical and normative determinations by 'encourage[ing] psychiatrists to comment on the ultimate issue and to tread on the domain of the jury.'[204] This runs the risk that in some cases a verdict will be reached based on who the 'jury find more convincing--the expert testimony provided on behalf of the defence or that provided for the Crown.'[205]

The ambit of the role of the psychiatrist was clarified in *Brennan*: '[w]here there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence then juries may not do so.'[206] The ruling highlights that 'in criminal trials cases are decided by juries, not by experts' but 'juries must base their conclusions on the evidence.'[207] Similarly, in *Blackman* it was noted that *Golds* had placed emphasis 'not only on the prosecution's right (if not duty) to assess the medical evidence and to challenge it, where there is a rational basis for doing so, but also on the primacy of the jury in determining the issue'.[208] As Gibson identifies, where medical 'experts offer uncontradicted and unchallenged evidence-including that which is *sympathetically motivated*-the jury must accept it'.[209] Yet, the number of cases in which 'uncontradicted and unchallenged evidence'[210] is advanced is limited. Mackay and Mitchell's empirical research highlights that 54 to 52 expert reports were supported by the defence and prosecution, respectively, compared with 160 and 129 respectively under the old law.[211]

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[203] Mackay and Mitchell (n 2) 23.
[204] Hallett (n 35).
[205] Nicola Wake, *'Psychiatry and the new diminished responsibility plea: uneasy bedfellows?'* Journal of Criminal Law (2012) 76(2) 122-129.
[206] *Brennan* (n 57) [44]. See also, *Matheson* [1958] 1 WLR 474; *Bailey* [1961] Crim LR 828; (1978) 66 Cr App R 31.
[207] *Brennan* (n 57) [43].
[208] *Blackman* [2017] EWCA Crim 190 [43].
[209] Gibson (n 4) [authors' emphasis added].
[210] *Brennan* (n 57) [44]. See also, *Matheson* (n 203); *Bailey* (n 206).
[211] Mackay and Mitchell (n 2) 12.

Similarly, the NSW Law Reform Commission noted that there was concern under the pre-1997 version of the defence that allowing experts to give evidence on whether or not they consider the accused's mental responsibility to be substantially impaired opens the door to the jury abdicating their duty to decide this issue in favour of a reliance on expert opinion.[212] To overcome this problem the NSW Law Reform Commission recommended that 'the definition of diminished responsibility omit the term "substantial impairment of mental responsibility" and focuses instead on the question of whether there was a sufficiently substantial effect on the accused to warrant reducing the charge to manslaughter'.[213] It was felt that this would make clear that ultimately the question was one for the jury as it 'is not a medical question but one of culpability and liability'.[214] Therefore, expert evidence is not relevant to the ultimate issue. Instead, expert evidence would only be admitted to help determine '(a) whether or not there was an abnormality of mental functioning arising from an underlying condition and the relationship of that abnormality to the accused's capacity to understand events, or to judge whether his or her actions are right or wrong, or to control himself or herself; and (b) assessing the effects of self-induced intoxication under our proposed subsection (2)'.[215]

Following these recommendations, the second limb of the partial defence in NSW, expressly provides that expert evidence is inadmissible to determining whether there was a sufficiently substantial effect on the accused to warrant reducing the charge to manslaughter.[216] This makes clear that the ultimate question is for the judge or the jury. It is also a question of fact not a medical question.[217] *Potts*[218] gave guidance on how this issue should be determined by the jury: 'It has been said that the issue under s 23A(1)(b) is a task

[212] NSWLRC Report 82 1997 (n 24) para 3.61.
[213] ibid para 3.63.
[214] ibid para 3.63.
[215] ibid para 3.63.
[216] Crimes Act 1900 (NSW) s 23A(2).
[217] *Trotter* (1993) 35 NSWLR 428, 431.
[218] [2012] NSWCCA 229.

for the tribunal of fact, which must approach that task in a broad commonsense way, involving a value judgment by the jury representing the community, and not a finding of medical fact'.[219] It was commented that 'the distinction between murder and manslaughter is both a legal distinction and a moral one' with manslaughter being regarded as less morally culpable.[220]

In NSW the question of whether a decision by the judge or jury must be consistent with expert evidence was addressed in *Ukropina*[221]. In *Ukropina,* it was argued that the judge had erred in finding that appellant 'was not impaired to an extent that was significant beyond that required to make out the partial defence of substantial impairment by abnormality of mind' and had failed to provide adequate reasons for this finding.[222] The basis for the appeal was that the sentencing judge's finding 'was not consistent with the body of psychiatric evidence tendered by both the Crown and the applicant'.[223] The findings therefore 'amounted to a rejection of the unchallenged opinions of relevantly qualified experts' and submitted that ''it was not open to his Honour to reject this evidence without providing adequate reasons'.[224] The applicant relied on the Western Australian case *Hone v State of Western Australia*[225] in which the Court of Appeal of Western Australia found that a judge or jury should not reject or ignore medical opinions which were honest, competent and unchallenged. Alternatively, the applicant argued that if the finding were inconsistent with the uncontradicted opinions of expert witness then this required the judge to give reasons for that finding.[226] The NSW Court of Appeal agreed with the applicant and allowed the appeal on the basis that reasons should have been given for a finding which was apparently inconsistent with the expert evidence.[227]

[219] ibid [33].
[220] ibid [34] (Kirby J directions to jury).
[221] [2016] NSWCCA 277.
[222] ibid [28].
[223] ibid [30].
[224] ibid [30].
[225] [2007] WASCA 283.
[226] *Ukropina* (n 221) [32].
[227] ibid [38].

The basis on which jurors reach such a finding, however, remains elusive as jurors do not have to provide reasons for their determination.[228]

Despite the differences in approach in E&W and NSW, the ultimate decision in the vast majority of cases continues to reside with the jury. As Davis LJ explained, in *Brennan* (E&W), 'a defence of diminished responsibility which is unequivocally supported by reputable expert evidence but…not contradicted by any prosecution expert evidence should…become relatively uncommon'.[229] In contested trials, increased reliance on expert testimony regarding all aspects of the plea 'should be taken as an encouragement for the Crown to adduce its own expert evidence to support its stance'.[230] If the Crown reject a plea, the most compelling evidence to do so is (arguably) expert evidence which contradicts the defence.[231] Even in the absence of conflicting expert testimony, it remains within the province of the jury to 'properly assess all relevant circumstances preceding, and perhaps preceding over a very long period, the killing as well as any relevant circumstances following the killing' providing a significantly broader temporal period in which to assess liability.[232]

Implicit within *Brennan* is the potential to seek expert testimony that supports the case of the respective party *pre-trial*. The potential issue is that parties with more resources (arguably) having a better chance of locating and funding the costs of an expert supportive of their stance.[233] This issue was poignantly highlighted in *Foy*[234] where the Court of Appeal refused to adduce fresh expert witness evidence in support of diminished responsibility after the appellant's psychiatrist at the initial trial had been adverse to such a plea.

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[228] See, Laird's comments in the context of s 2 HA 1957 regarding the desirability of such a position; (n 58).
[229] *Brennan* (n 57) [67].
[230] *Brennan* (n 57) [67].
[231] Oliver Quick and Celia Wells, 'Getting Tough with Defences' [2006] Criminal Law Review 117.
[232] *Conroy* (n 56) [32].
[233] Thank you to XX for making this point. See also, Wortley (n 113).
[234] *Foy* (n 113)

Foy had stabbed the victim to death whilst suffering 'a substance-induced psychotic' episode, after imbibing large amounts of alcohol and cocaine.[235] The first psychiatrist approached by the defence prior to trial was not instructed because the Legal Aid Authorities declined to agree the fee.[236] No dispute was raised regarding the 'qualifications, competence or expertise' of Dr Isaac who was subsequently instructed.[237] Dr Isaac concluded pre-trial that the paranoid psychosis experienced by Foy was insufficient without the voluntarily consumed intoxicants to substantially impair Foy's ability to form a rational judgement and/or exercise self-control.[238] The defence, therefore, were not in a position to advance diminished responsibility and the only issue at trial was that of intent.[239] The jury convicted.

Post-trial, Foy's family raised sufficient funds to instruct Dr Philip Joseph, the psychiatrist who had been approached by the defence team pre-trial.[240] Upon reviewing the relevant evidence, including Dr Isaac's reports, and interviewing Foy, Dr Joseph was of the opinion that diminished responsibility was available based upon an emerging psychotic disorder, independent of the voluntarily consumed intoxicants.[241]

The issue on appeal was whether the fresh evidence should formally be admitted in evidence.[242] The Court of Appeal explained that there was 'no question of any legal oversight or legal error at trial…the issue of diminished responsibility was fully examined; the opinion of a reputable psychiatrist obtained; and the legal view that, in the light of that opinion, a defence of diminished responsibility could not be made out was correct.'[243] The court were effectively left with two opposing expert opinions based on 'essentially the same material'.[244] Dr Joseph accepted that Dr Isaac had all of the relevant material before him, that he had not

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[235] ibid [25].
[236] ibid [22].
[237] ibid.
[238] ibid [35].
[239] Ibid [36].
[240] ibid [40].
[241] ibid [41].
[242] ibid [49]. See also, Criminal Appeal Act 1968, s.23.
[243] ibid [51].
[244] ibid [52].

missed anything, and that his view was a reasonable one that any responsible psychiatrist could hold.[245] Dr Blackwood, for the Crown, agreed that Dr Joseph's conclusion was equally tenable.[246] The Court of Appeal concluded that it was not in the interests of justice to allow the fresh evidence. LJ Davies stated:

> 'this case is, in its fundamentals, a case where, following conviction, an attempt has been made to instruct a new expert with a view to securing – as has happened – an opinion on diminished responsibility different from that of the previous expert instructed before trial. It is, bluntly, expert shopping.'[247]

LJ Davies noted that if there had been any dissatisfaction with the report obtained pre-trial, funds could have been raised to obtain a second report.[248] As Thomas notes, the ruling is designed to prevent 're-litigat[ion]' and aligns with numerous authorities 'pronouncing that the Court of Appeal will not lightly permit the admission of "fresh" evidence on the basis of a mere difference in opinion.' [249] Differences of opinion between experts 'can be resolved by the trial process'[250] and, as such, the outcome is a sensible one. Notwithstanding these observations, the case highlights that 'expert shopping' may occur, but it must do so pre-trial.[251]

Foy also indicates the potential for an increase in cases where medical experts disagree. As Judge LJ explained in *Cannings,* where 'the outcome of the trial depends

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[245] ibid.
[246] ibid, [89].
[247] ibid, [60] Relying on Hallett J's observation in *Challen* [2019] EWCA Crim 916 , LJ Davies explained: '…As a general rule, it is not open to a defendant to run one defence at trial and, when unsuccessful, to run an alternative defence on appeal relying on evidence that could have been available at trial. This court has set its face against what has been called expert shopping….'
[248] ibid.
[249] Mark Thomas, '"Expert shopping": appeals adducing fresh evidence in diminished responsibility cases' Journal of Criminal Law (2020) 84(3), 249-254, 252-253.
[250] *Evans* [2009] EWCA Crim 2243 (Thomas LJ) [71] cited in Thomas ibid 253.
[251] Thank you to XX for making this point.

exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed.'[252] The Law Commission (E&W) expressed concern that when expert evidence is presented as scientific 'there is a danger that juries will abdicate their duty to ascertain and weigh the facts and simply accept the experts' own opinion evidence, particularly if the evidence is complex and difficult for a non-specialist to understand and evaluate'.[253] Alternatively, as Gibson suggests jurors may engage in a 'benign conspiracy' by rejecting 'unfavourable evidence in place of amenable expert testimony.' [254]

Jurors may go further by rejecting unanimous expert evidence, where there is 'some rational evidential basis for doing so'.[255] For example, in *Hussain*, jurors rejected unanimous expert evidence that the defendant suffered from diminished responsibility based on the Crown's assertion, *inter alia,* that evidence of planning, concealing the weapon, and lying to the police negated the partial defence. Lady Justice Hallett explained, however, that jurors should be cautioned against turning 'themselves into amateur psychiatrists'[256] and the Crown should not 'simply…invite the jury to convict of murder without suggesting why the expert evidence ought not to be accepted.'[257] Laird notes that the trial judge has 'an onerous obligation' in ensur[ing] that the Crown outlines the grounds for inviting jurors to reject expert evidence, and ensuring that those grounds are appropriate.[258] Jurors may engage in 'nullification', on benevolent grounds or otherwise, provided there is a rational evidential basis.[259] The ruling highlights that despite the medicalisation of the plea, the ultimate decision rightfully resides with jurors, so it remains unfortunate that this position was not made clear in the legislation, as in NSW.

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[252] *Cannings* [2004] 1 All ER 725 (Judge LJ).
[253] Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (Law Com No 325, 2011) para 1.9.
[254] Gibson (n 4) 192.
[255] *Hussain* [2019] EWCA Crim 666, 2019 WL 01645639 'there must be some rational evidential basis for challenging agreed expert evidence but the decision as to whether a defendant falls within the provisions of section 2 is for the jury not the doctors to determine.'
[256] ibid.
[257] *Golds* [2016] UKSC 61 [49].
[258] Laird (n 58).
[259] Gibson (n 4) 192-193

A more controversial aspect of the ruling in *Hussain*[260] is the practice of *constituit iudicem legi* (judicial activism) operating within the Court of Appeal, as identified by Krebs and Percival,[261] which highlights the extent to which the court is prepared to protect normative evaluation in diminished responsibility cases. Defence counsel argued that there was no proper rational evidential basis for rejection of the partial defence, and the case should have exceptionally been withdrawn from the jury.

The Court of Appeal ruling in *Brennan* confirmed that trial judges may withdraw a murder charge on three grounds: no jury, properly directed, could be satisfied that the Crown has proved the relevant offence beyond reasonable doubt; where medical evidence is uncontradicted and no other evidence rebuts the partial defence; and, where 'other evidence' is 'too tenuous or…insufficient (set in the light of the uncontradicted expert evidence) to permit a rational rejection of the defence.'[262]

Defence counsel's submission was rejected based on the Supreme Court's *obiter* ruling in *Golds* which affirmed that there must be some 'rational evidential basis' for rejecting uncontradicted medical evidence, but the a murder charge ought not to be withdrawn 'simply on the basis the medical evidence points one way'.[263] According to the Court of Appeal, reliance should no longer be placed on any decision pre-dating the *obiter* ruling in *Golds*, including *Brennan*.

At a procedural level, Krebs notes:

> 'Commentators will be divided as to whether this development is deeply concerning (from a procedural propriety, rule of law and separation of powers perspective) or to be welcomed (as a means of

[260] *Hussain* (n 255) and the earlier judgment in *Blackman* (n 208).
[261] Krebs (n 3). See also, Percival (n 3) 2-3.
[262] *Brennan* (n 57) [65].
[263] *Hussain* (255), citing *Golds* (n 257) [50].

> keeping the common law tidy and updated, when legal aid cuts might prevent cases that raise the issue directly from making it to the appellate courts.'[264]

At a practical level, the judgment highlights the importance of the normative evaluation of juries and the extent to which the Court of Appeal will protect the role of jurors in diminished responsibility determinations.[265] *Golds* and *Hussain* also imply that any potential engagement in a benign conspiracy with experts regarding the application of the partial defence is secondary to maintaining the primacy of the role of jurors in making the ultimate determination.

4.1 Substantial impairment

The ultimate issue in diminished responsibility is whether the defendant's abnormality substantially impaired their responsibility (formerly) or their ability to: understand the nature of D's conduct; and/or, form a rational judgment[266]; and/or exercise self-control (latterly).[267] As confirmed in *Conroy*[268] the 'ultimate issue' remains one for the jury. The Supreme Court, in *Golds* (E&W) explained that 'substantial impairment' means 'an impairment of consequence or weight…, and not any impairment which is greater than merely trivial.'[269] According to *Golds*:

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[264] Krebs (n 3).
[265] Mackay (n 8).
[266] The term has been described as 'a considered decision based on reason' ; *Conroy* (n 56) [27]. The example posited in *Conroy* is as follows: 'There may be cases where an entirely "irrational" decision may be taken: for example, to kill one's neighbour because of a fixed belief that he is an alien from Mars intent on blowing up innocent people in the village. But that decision and the motivation for it may then be accompanied, in terms of giving effect to the decision, by ostensibly logical and rational decisions with a view to carrying out the intended killing: for example by buying a knife, by waiting for the neighbour to be at home alone and so on.' [30]
[267] Homicide Act 1957 (as amended Coroners and Justice Act 2009, s.52), s.2(1) (1A).
[268] *Conroy* (n 56) [6].
[269] *Golds* (n 257) [29].

'the judge need not direct the jury beyond the terms of the statute and should not attempt to define the meaning of "substantially." Jurors are expected to understand the term is an ordinary English word, that it imports a question of degree, and that whether in the case before it the impairment can properly be described as substantial is for it to resolve.' [270]

A similar approach applies in NSW. In *Antaky* it was stated that:[271]

> 'Some impairment may be gross, some may only just fall within the description of "substantial" so as to warrant the reduction. The presence and relative weight of other factors has also to be taken into account'.[272]

Direction in E&W may be provided in cases involving confusion, but no model direction was articulated.[273] In contrast, the NSW Bench Book provides a standard suggested oral direction: '"Impaired" has its ordinary meaning and requires proof of a capacity less or lower than the normal range. "Substantial" also has its ordinary meaning of being of substance and not slight or insignificant'.[274] A standard model in E&W might ensure more consistent application of the provision.

The Court of Appeal appeared to accept a lower threshold test regarding the meaning of the term substantial in the case of *Squelch*[275]:

> ''Substantially' is an ordinary English word on which you will reach a conclusion in this case, based upon your own experience of ordinary

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[270] *Golds* (n 257) [29].
[271] [2007] NSWSC 1047.
[272] ibid [35].
[273] ibid [41].
[274] Criminal Trial Courts Bench Book, *Substantial Impairment by Abnormality of Mind* [6.580] available at <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/substantial_impairment_by_abnormality_of_mind.html> accessed 8 July 2020.
[275] [2017] EWCA Crim 204, 1753 WL 86.

life. It means less than total and more than trivial. Where you, the jury, draw the line is a matter for your collective judgment.'[276]

The Court of Appeal suggested that the initial trial judge's direction, which pre-dated *Golds*, 'commendably' complied with Lord Hughes' ruling in *Golds* which advocated for no undue elaboration to the term, and 'an appreciable impairment' rather than something more than trivial where further guidance is sought.[277]

The trial judge's direction in *Squelch* , however, appears to imply that depending on the nature of the case a lower threshold test than that advocated in *Golds* might be applied. The Supreme Court's suggestion in *Golds* that it was 'neither necessary nor appropriate…to mandate a particular form of words in substitution for the language used by Parliament'[278] may result in jurors applying different threshold tests depending upon whether additional elucidation is provided or not, and in cases where it is, based upon the nature of the language used. A specimen direction, akin to that in the NSW Crown Court Bench Book might have been preferable.

4.2 An explanation for the killing

As explained by their Lordships in *Golds*, whilst 'the effect of the changes in the law has certainly been to emphasise the importance of medical evidence, causation (in the context of the partial defence and not in the sense of whether an offence had been committed, as above) is essentially a jury question'[279] as is 'whether the impairment of relevant ability(ies) was substantial.'[280] The final requirement of s.2 HA 1957 (E&W) requires is that the abnormality of mental functioning provides an explanation for D's acts or omissions in doing or being a

[276] ibid [36].
[277] *Squelch* (n 275) [38].
[278] *Golds* (n 257) [40].
[279] *Golds* (n 257) [50].
[280] *Golds* (n 257). For further discussion on the impairment requirements see, Mackay, 'The impairment factors in the new diminished responsibility plea' (n 8).

party to the killing. '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.'[281]

In NSW, in contrast, there is no express requirement of establishing a causal connection between the mental health impairment or cognitive impairment and the act or omission causing death. Rather, it must be shown that the impairment was operating or relevant at the time of killing. It should be kept in mind, however, that the final requirement for the defence to succeed is that the jury find that the impairment was sufficient to warrant liability being reduced to manslaughter. It is arguably unlikely that jurors will find in favour of the defence where there is little or no connection between the impairment and commission of the fatal act.

The NSW Bench Book makes clear the value judgement that jurors are required to undertake, in particular they should be reminded to apply 'prevailing community standards', keeping in mind that the 'community places less blame and condemnation upon a person guilty of manslaughter than of murder.' [282] This approach is preferable to the causal requirement in E&W which at best offers little where all other elements of the partial defence are established. At worst, it creates a further hurdle for the defendant in diminished responsibility cases depending upon how it is applied by jurors. The approach in NSW to the distinction between the role of medical experts and jurors would have gone some way in preventing the role confusion that currently operates in the context of the partial defence in E&W.

Conclusion

[281] Homicide Act 1957 (as amended) s 2(1B).
[282] Criminal Trial Courts Bench Book (n 274) [6.580].

In 2010, Mackay queried whether we 'through the back door, not just updated but also made our plea stricter' particularly in the light of the influence of NSW on the reforms combined [283] The NSW model for substantial impairment by abnormality of mind was driven by a concern to narrow down cases in which the defence can be raised to serious cognitive and mental health conditions. It is perhaps unsurprising, therefore, that the changes to s.2 HA 1957 have made the partial defence more difficult to plead as in NSW but unlike NSW have also produced role confusion in the interpretation, operation and application of the partial defence.

A key feature of the NSW model is that the role of the jury is made central to the defence and that there is a clear division of the roles of judge/jury and expert. This centrality is made clear in the ultimate question of whether the impairment was so substantial as to warrant liability for murder being reduced to manslaughter being reserved solely for the jury. For this question expert evidence is expressly excluded and therefore there is no confusion about who is to make this decision and on what basis. This is not a medical question it is one of culpability and liability and should be determined by applying community values. It is disappointing that after being so heavily influenced by s.23A CA 1900, that greater consideration was not given to the 'pervasive' question regarding whether the charge ought to be reduced from murder to manslaughter. The explicit direction within the legislation regarding the ambit of the role of the jury and medical experts, respectively, serves to prevent the role confusion that is manifest in the operation of s.2 HA 1957 (E&W), in NSW. Further, it highlights the importance of jurors as moral arbiters in such cases.

Beyond the above observation, there remains some room for improvement in both the E&W and NSW provisions. In respect of the former, the 'recognised medical condition' requirement is beneficial in its flexibility, but greater consideration ought to be have given to

[283] Mackay, 'The New Diminished Responsibility Plea: More than Mere Modernisation' (n 2) 19.

the categories of medical condition that are or ought to be excluded from the partial defence. Specific exclusionary clauses pertaining to abnormal states of mental functioning, such as, intoxication, ought to be provided. Deserving conditions/circumstances that do not, *prima facie,* fall within diminished responsibility without its definitional elements being stretched, such as, mercy killing and developmental immaturity ought to be reviewed and alternative diversionary/defence models considered, as appropriate. Clear judicial guidance should be provided on how jurors should be directed in relation to 'substantial impairment' with such provision being utilised consistently in each case. The causal mandate should be repudiated on the basis that it offers very little in respect of the partial defence, particularly where all remaining defence elements are established. Finally, a specific clause stipulating that medical experts should not comment on the ultimate issue, which is a jury determination ought to be provided.

In respect of NSW, the fact that a substantial proportion of cases proceed on the basis of trial by judge alone or by negotiated plea somewhat undermines the aim of making the jury as representatives of the community central to determinations of liability. However, requiring that the prosecution consider community values inherent in the requirement of s 23A mitigates this concern somewhat. Further guidance could be provided in respect of how the Prosecutor should manage this assessment. Replacing the term 'abnormality of mind' with 'cognitive impairment or mental health impairment' and including a definition of mental impairment as recommended should also improve the clarity about what sort of impairments are sufficient to found the defence. Nevertheless, this approach is not without its problems. Whilst the exclusion introduced by the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) on substance abuse/use disorders (including addiction) aligns with the NSW Law Reform Commission's aim to restrict the partial defence, it remains fundamentally at odds with medical and emerging legal understanding of addiction

(dependence syndromes) and how they ought to be treated in the context of mental condition defences.