Diminished Responsibility
New Vs Old

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Five parts

- Introduction
- ‘Old’ Diminished Responsibility
- Process of change and new DR
- Uncertainties
- Case Vignettes and Discussion
Introduction
MENTAL DISORDER AND VERDICT/SENTENCE

- Historical recognition of relevance, in natural justice
- Information from a discipline, medicine, with different purposes and constructs from law
- Legal purposes and constructs, justice
- Medical purposes and constructs, welfare
- Legal ‘artifices’ v. medical ‘reality’
- Legal v. medical method, adversarial v. investigative
- Law variously ‘reflects’/does not medical constructs
- ‘Translation’ as an exercise in ‘construct relations’
Defences, partial defences and charges with mental concepts embedded...

- capacity to have formed specific intent
- insanity
- automatism
- infanticide
- provoked (Holley modification of ‘reasonable man’)
- duress (Bowen)
- loss of self control?

- diminished responsibility
  - ‘old DR’
  - ‘new DR’
Old DR

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Diminished Responsibility provision 13/04/2011
The defendant “shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition or arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing”

Significance of ‘two limbs’

One is ‘almost medical’

The other is not
Abnormality of mind is

“A state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal.

It appears to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgement whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgement”.

(Byrne [1960])
Includes medically therefore...

- Disorders of cognition, perception, affect, volition and consciousness.
- [as categorisation of mental malfunctions]
- Defined ultimately for ‘welfare’, not legal purposes

Within

- Diagnostic categories of psychosis, neurosis, personality disorder, learning disability, plus brain disorder.
Abnormality of mind

Jury entitled to consider further evidence including acts, statements and the demeanour of the accused;

if required they could reject the medical evidence.

(Byrne [1960])
Legally accepted clinical examples under ‘old’ DR

- Psychosis (most obviously)
- ‘Reactive depression’ ([Seers 1984]; [Reynolds 1988])
- ‘Pre-menstrual syndrome’ ([Craddock 1981])
- Elements of ‘battered woman syndrome’
- ‘Chronic post traumatic stress disorder’, severe anxiety symptoms
- Learning disability
- Personality disorder ([Byrne 1960])
- ‘Substance dependence syndrome’, but must have been ‘brain damage’ or ‘irresistible craving’ if intoxicated ([Tandy, Stewart, Wood])
Raising the defence of Diminished Responsibility

- **R v Campbell (Colin Frederick) [1987] 84. Cr. App. R. 255.**
- ‘it shall be for the defence to prove’ diminished responsibility.’
- it is for, ‘the defence to decide whether the issue should be raised at all.’
- ‘it seems to us that the most that a trial judge should do if he detects, or thinks that he detects, evidence of diminished responsibility is to point out to defence counsel, in the absence of the jury,’
Standard of Proof

- **R v Byrne (Patrick Joseph)[1960] 2 QB 396**

  ‘on the balance of probabilities that the accused was suffering from "abnormality of mind" from one of the causes specified in the parenthesis of the subsection.’

- Civil Standard (not the criminal standard – proof beyond reasonable doubt)
The Homicide Act 1957 sets the burden of proof upon the accused, ‘it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.’ section 2(2).

‘an optional defence.’

innocence within article 6(2) of the European Convention??
– Appeal Court  -No breach
Acceptance of Plea

  - all cases of diminished responsibility needed to be decided by the jury.

  - Crown is permitted to accept a plea of manslaughter on the grounds of diminished responsibility.
How Played Out...

- **Diagnosis** often not the issue (often agreement on ‘first limb’) (the ‘almost medical’ limb)

- **Moral/legal inference** often the issue (within ‘second limb’) (the ‘non-medical’ limb)
Substantial Impairment

- ‘substantial impairment of mental responsibility’ - the ‘ultimate issue’
- R v Byrne (Patrick Joseph)[1960] 2 QB 396
- ‘This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant.’
- The jury -‘may quite legitimately differ from doctors’ in their opinion.’
Substantial Impairment

  - ‘it does not, of course, mean at one extreme total impairment of the mental responsibility’
  - ‘At the other extreme it is something that is more than a trivial insignificant impairment of his mental responsibility.'
Substantial Impairment

- Should psychiatrists comment??

- The Butler Committee (1975) commented on the issue stating it is, ‘odd that Psychiatrists should be asked and agree to testify as to legal and moral responsibility. It is even more surprising that Courts are prepared to hear that testimony.’
Legal determining of ‘substantial impairment of mental responsibility’

- Moral/legal, clearly not medical
- Jury decision
- ‘Balancing’ abnormality of mind against other factors
- Room ++ for jury variation (a search for ‘natural justice’?)

And
- ? Should be ‘no comment’ on ultimate issue by experts, merely description of nature of mental state abnormalities, and extent of impact

Because of
- contested data
- contested narrative
- need to ‘balance’ factors
- ‘translation’ from medical to moral/legal

Avoiding ‘the thirteenth jury person’
Advantages and Critique of ODR

Advantages:

- Allows for ‘natural justice’
  - Broadly defined
- [medical-legal benign conspiracy]

Disadvantages:

- Too loosely defined
  - No standardised and defined medical diagnosis required
  - [Although must be some psychiatric evidence to suggest presence of abnormality of mind (Dix [1981])]
- Uncertain law/results?
- Inter-case inconsistency?
- [Not reflective of medical ‘disabilities’]
Process of change and New DR
Calls for reform

- Various versions of reform proposed over the years
- Butler Committee report, Criminal Law Revision Committee Report, Professor Mackay
- The Law Commission's recent proposal
- The Govt. requested the Law Commission again to examine partial defences to murder in 2005. The Law Commission expanded to cover wholesale review of the law of murder but not the mandatory life sentence. It also decided not to examine law of insanity, euthanasia or abortion.
Reform process

- Reasons for reform...

- Intention to ‘modernise’ and bring more in line current psychiatric and psychological knowledge

- Psychiatry may inform legal development (see Law Commission, ‘Partial Defences to Murder’, 2004, quoting Royal College of Psychiatrists re coincidence of fear and anger)

- The College emphasised the inherent ‘mismatch’ between legal and medical (including psychiatry) constructs and methods of inquiry.
The Commission proposed a new definition which received substantial support.

“so long as the law of murder remains as it is and conviction carries a mandatory sentence of life imprisonment the partial defence of diminished responsibility should be retained”

In its final report, Murder, Manslaughter and Infanticide, the Commission proposed the following amended definition:
(a) a person who would otherwise be guilty of first degree murder is guilty of second degree murder if, at the time he or she played his or her part in the killing, his or her capacity to:

- understand the nature of his or her conduct; or
- form a rational judgement; or
- control him or herself,

was substantially impaired by an abnormality of mental functioning arising from a recognised medical condition, developmental immaturity in a defendant under the age of eighteen, or a combination of both; and
(b) the abnormality, the developmental immaturity, or the combination of both provides an explanation for the defendant’s conduct in carrying out or taking part in the killing.
(1) In section 2 of the Homicide Act 1957 (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute:

“(1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—

(a) arose from a recognised medical condition,

(b) substantially impaired D’s ability to do one or more of the things mentioned in subsection (1A), and

(c) provides an explanation for D’s acts and omissions in doing or being a party to the killing.
1A) Those things are—
(a) to understand the nature of D’s conduct;
(b) to form a rational judgment;
(c) to exercise self-control.

(1B) For the purposes of subsection (1) (c), an abnormality of mental functioning provides an explanation for D’s conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.”
(2) In section 6 of the Criminal Procedure (Insanity) Act 1964 (c. 84) (evidence by prosecution of insanity or diminished responsibility), in paragraph (b) for “mind” substitute “mental functioning”.

Coroners and Justice Act 2009
Was there a need for a change?

- 77.1 percent of all successful diminished responsibility cases are plea bargains and that the cases which go to the jury are more likely than not to be convicted of murder.

- Over the past decade the numbers of successful pleas have been in the range of 13 to 35 with the trend showing progressively lower successful pleas.
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1. As at 12 November 2007; figures are subject to revision as cases are dealt with by the police and the courts, or as further information becomes available.
2. In addition there were 480 suspects in 2006/07 for whom court proceedings were not completed by 12 November 2007.
Summary of a Medical Perspective on NDR versus ODR

- NDR requires tighter specification of the mental disorder presented as its basis,
- of its impact on abilities
- and of its causal contribution to the killing than effectively did ODR.
- The introduction of causation also infers the potential for explicit reference to the role of ‘triggers’ acting upon the amf.
- NDR appears to downgrade/?abandon the flexibility of ‘balancing’ of the role of mental abnormality against other factors, in favour of a ‘threshold’ approach to the role of such abnormality.
How May Expert Medical Evidence Play Out Under New DR?

Inevitably strays into matters of legal interpretation of the Statute

- The ‘vagueness’ of ODR had its merits in allowing/encouraging juries to weigh medical evidence against other evidence, towards determining a moral calculus

- NDR offers far more specificity/complexity? [? Appeals ++]

Distinguish 2 issues
- Medical translated into legal: ‘what is it?’
- Role of doctors versus jury: ‘who decides?’
Uncertainties...

- (1) introducing *abnormality of mental functioning*, a *dynamic* notion, in place of the status of having had an ‘abnormality of mind’;
- (2) requiring the abnormality of mental functioning to *arise from a recognised medical condition* [and not merely being ‘anything that the reasonable man would term abnormal’];
- (3) resulting in *substantial impairment* to (specified *abilities*) to (see 4 below)

All aspects are *far more consistent with medical thinking*

- (4) limiting the defence to disabilities in *understanding* (D’s) *conduct or forming a rational judgment* (both somewhat akin to *M’Naghten*) or in the exercise of *self control* (preserved from *R v Byrne*);
But

(5) inclusion of an explicit causation element, ? more than a narrative of the offence, expressed (at least partly) in terms of the ‘abnormality of mental functioning’ (and ‘disabilities’).

In more detail...
‘abnormality of mental functioning’ (amf) arising from ‘a recognised medical condition’ (rmc)

- ‘abnormality of mental functioning’ clearly includes ‘the mind in all its aspects’ (R v Byrne) (albeit restricted in terms of particular ‘disabilities’)

BUT

Who decides presence of each?

- Re ‘recognised medical condition’, distinguish contested
  - diagnosis per se
  - data (medical and ordinary)

- Re 'abnormality of mental functioning', ? should be solely for experts to determine (if there is medical unanimity), in that the abnormality of mental functioning must arise from a 'recognised medical condition'.

Diminished Responsibility provision 13/04/2011
Uncertainties...

However

- if the *amf* is read necessarily *in conjunction with* consideration of alleged resultant ‘impairment of ability(s)’, there might then be obvious room for rejection by a jury of unanimous medical evidence

- because there may be ordinary evidence of *exercising the ability*
substantial impairment in ability to... 

understand (D’s) conduct

- Very rare, even in severe psychotic illness defendant will not have ‘understood’ his own conduct.
- [Equivalent to ‘not knowing the nature or quality of (one’s) actions’ (within M’Naghten), such that most psychotic defendants will not qualify]
- Surprisingly, NDR does not allow for the defendant who substantially cannot ‘understand the victim’s conduct’, which is likely often to be relevant to psychotic defendant (eg, paranoid).
- Some deluded defendants may, however, come within a different ‘disability’ (eg ‘to form a rational judgment’ or ‘to exercise self control’).
Uncertainties...

form a rational judgment

Could be narrowly or broadly interpreted, with different implications for the types of amf and rmc to which it might relate.

- Narrowly interpreted, could be restricted to psychotic disorders which result in ‘delusions’, or to certain types of brain damage or degeneration (in a ‘M’Naghten mode’).

- Interpreted more broadly, it might include serious non-psychotic (neurotic) conditions which result in distortion of the manner of reasoning, the ‘way of weighing’.

Legal interpretation of ‘substantial’ will likely set the threshold in terms of the breadth of interpretation.
Exercise self control

- Potentially a broad concept applicable to a wide variety of psychotic, neurotic, learning disability, personality disorder and brain conditions.

- Although clearly a psychotic person might be disabled in this way (albeit he may not be), so might a defendant with a neurotic depressive illness, or a woman with ‘pre menstrual syndrome’, for example.

- Here again, the word ‘substantial’ is likely to be important in limiting successful NDR to cases where the ‘disability’ is ‘more than trivial’

[NB Compare with ‘loss of self control’, ? ‘impaired inhibition’]
Provides an explanation... (meaning) caused, or was a significant contributory factor in causing...

What does ‘causes’ mean?

? ‘scientific’ standard

? ‘legal’ meaning

Compare ‘narrative’ approach

And

? Distinguish

- ‘balancing’ mental disorder against other factors (ODR)
- ‘threshold’ approach (NDR)
Finally who decides?

- Once the test of *amf arising from a rmc* and *substantial impairment* of one of the three specified *abilities* is accepted by the jury...

  then,

- if there is unanimous expert evidence that the *amf* also *provides an explanation* of the killing,

- ? the fact of *competing explanations* being contenders (as under ODR) logically falls away from possible jury consideration.

Or

- Does *significant contributory factor*, or *provides an explanation*, allow jury to ignore unanimous medical evidence, because of consideration of *other* contributory factors (as in ODR)?
NDR requires tighter specification of the mental disorder presented as its basis, of its impact on abilities and of its causal contribution to the killing than effectively did ODR.

The introduction of causation also inferred the potential for explicit reference to the role of ‘triggers’ acting upon the amf.

NDR appears to downgrade/?abandon the flexibility of ‘balancing’ of the role of mental abnormality against other factors, in favour of a ‘threshold’ approach to the role of such abnormality.
Uncertainties...

- There is also apparently no room for ‘translation’ from medical description into moral implications.
Uncertainties...

BUT

- The Court of Appeal will decide, not experts
Uncertainties...

Albeit...

Adherence to the ‘right of jury’ ultimately to decide. ‘whatever the medical evidence’ might be said to run counter to the essence of the reform of DR...

... which was clearly aimed at increasing the objectivity of the defence, including by basing it upon recognised medical disabilities.

Diminished Responsibility provision
Case Vignettes / Discussion

Diminished Responsibility provision 13/04/2011
Case Vignettes

- Case 1: Schizophrenia, or prodrome
- Case 2: Depressive illness (neurotic) plus taunts and jealousy
- Case 3: Post natal depressive psychosis
- Case 4: Personality disorder plus alcohol
Thank you