

**DIMINISHED RESPONSIBILITY AND  
INTOXICATION:  
INTERPRETATION, POLICY AND AUTHORITY IN  
*R v DIETSCHMANN***

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**INTRODUCTION**

The latest decision of the House of Lords in relation to the interpretation and application of the defence of diminished responsibility in *R v Dietschmann*<sup>1</sup> is to be welcomed as clarifying the issue of what may be regarded as an adequate judicial direction to the jury. The analysis of the defence has been problematic ever since its introduction in s 2 of the Homicide Act 1957.<sup>2</sup> One possible explanation of the difficulties the defence has caused is the fact that it is an importation from Scots law, intended to ameliorate the dissatisfaction with the general defence of insanity. Accordingly, the defence has been shoe-horned into the complex common law in relation to homicide and sits uneasily with it.<sup>3</sup>

Be that as it may, a number of problems arising out of the introduction of the defence have never been satisfactorily resolved. While it is not the intention of the present article to offer a general review of the defence, the following points may be usefully made. The first pertains to the statutory definition of diminished responsibility as an “abnormality of mind”. This is restricted by the words contained in the parenthesis to s 2(1) as “arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury”. The definition is predicated on a psychiatric view of the

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<sup>1</sup> [2001] EWCA Crim 2052; [2003] UKHL 10.

<sup>2</sup> s 2(1) Homicide Act 1957: “Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such an abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing”. Ss (2) shifts the burden of proving diminished responsibility on to the defence, while ss (3) provides that the effect of the defence if successful is to reduce the charge to that of manslaughter. Subsequent case law has preferred to use the term voluntary manslaughter, to distinguish it from the various categories of involuntary manslaughter.

<sup>3</sup> In *R v Spriggs* [1958] 1 All ER 300 at 303, Lord Goddard CJ described the defence as “a novelty in English law”.

causes of mental illness, thus making expert evidence crucial.<sup>4</sup> Moreover, the definition incorporates both *psychological* causes (in terms of “syndromes”) as well as *physiological* causes (the underlying “organic” causes). This, however, is not sufficient of itself. It then becomes necessary for the jury to apply the remainder of the test in s 2(1), i.e. that the abnormality of mind had the causative effect of substantially impairing the mental responsibility of the defendant for his actions.<sup>5</sup> This becomes “a moral-legal judgment”<sup>6</sup> entirely separate from that of forensic psychiatry. It would appear that the judicial approach, in practice, has been to treat this in a rather elastic fashion. Ashworth puts it as follows:

“The wording with which the Homicide Act 1957 introduced diminished responsibility is rather unsatisfactory, but judges, counsel, doctors, and juries have approached it with a compassionate pragmatism rather than with the rarefied verbal analysis too frequently encountered in English criminal law.”<sup>7</sup>

This may be welcomed as a compromise of the policy issues involved. However, the analysis may be viewed rather differently, in the manner suggested by Norrie:

“The defence intermingles scientific and metaphysical discourses in a way that produces an amelioration of the law’s narrowness but on the basis of an intellectual muddle and compromise.”<sup>8</sup>

This is clear from cases such as *Ahluwalia* where a “major depressive

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<sup>4</sup> The requirement of expert medical evidence for insanity is provided for in s 1, Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. There is no specific statutory equivalent for diminished responsibility although *Dix* (1981) 74 Cr App R 306 makes it clear that a jury may not return a verdict of voluntary manslaughter on the ground of diminished responsibility unless there is medical evidence that one of the causes specified in s 2(1) exists.

<sup>5</sup> *Byrne* [1960] 3 All ER 1 makes it clear that the medical testimony is not conclusive: the jury is not bound to accept the medical evidence and may consider the evidence as a whole.

<sup>6</sup> Alan Norrie *Crime, Reason and History* (London Butterworths, 2<sup>nd</sup> edn 2001) p 183.

<sup>7</sup> Andrew Ashworth *Principles of the Criminal Law* (Oxford OUP, 3<sup>rd</sup> edn 1999), p 288.

<sup>8</sup> Norrie, *op cit*, p 184.

disorder” was considered capable of coming within the terms of the section.<sup>9</sup>

Second, and leading on from this, there is no clear indication of the way in which the partial/specific defence of diminished responsibility and the general defence of insanity are to be reconciled.<sup>10</sup> Both are, of course, legal and not medical concepts,<sup>11</sup> but there is no rational and satisfactory manner of deciding when a mental “disorder”, used in its widest terms, is properly to be treated as an abnormality of mind, and when an abnormality of mind shades into insanity. There have been valiant judicial attempts at a drawing the distinction. In *Byrne* Lord Parker CJ ruled:

“‘Abnormality of mind’, which has to be contrasted with the time-honoured expression in the M’Naghten Rules, ‘defect of reason’, means *a state of mind so different from that of ordinary human beings* that the reasonable man would term it abnormal.”<sup>12</sup>

In *Byrne* itself, three medical experts testified that the defendant, who had killed and mutilated a young woman, was a sexual psychopath suffering from “perverted sexual desires”.<sup>13</sup> Nonetheless, all three experts were of the opinion that he was not insane within the technical requirements of the M’Naghten Rules, although it could be said that he was suffering from an abnormality of mind. While a trained legal mind may be capable of appreciating the distinction, based as it is on judgments (not without controversy) of psychopathy, it is doubtful that the ‘ordinary human beings’ who sit on the jury are capable of doing so. This is even more so when the distinction would be equally incomprehensible to any psychiatrist called upon to testify for either the Crown or the defence.

According to Norrie:

“The law is essentially based on a conflict between two discourses. While ‘abnormality of mind’ requires the testimony of psychiatrists (although it is not a proper psychiatric

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<sup>9</sup> [1992] 4 All ER 889 at 900, *per* Lord Taylor CJ.

<sup>10</sup> The position is further complicated by the fact that, under s 6 of the Criminal Procedure (Insanity) Act 1964, in those situations where the defence elects to present the defence of diminished responsibility, the prosecution may counter this by alleging insanity instead, or vice versa.

<sup>11</sup> This was a point made clear by the trial judge to the jury in the case under discussion; see [2001] EWCA Crim 2052, para 10.

<sup>12</sup> [1960] 3 All ER 1 at 4; emphasis added.

<sup>13</sup> *Ibid* at p 3.

concept), ‘substantial impairment of mental responsibility’ requires the moral judgment of the jury, and there is in logic no way of inferring the one from the other.... The question of the mental responsibility of the accused raises a metaphysical question of the freedom of the will which scientific discourse does not recognise and cannot answer.”<sup>14</sup>

To be fair, this is a matter recognised by the courts. In *Byrne*, Lord Parker CJ acknowledged that the issue of whether the mental abnormality of the defendant impaired his mental responsibility was “incapable of scientific proof”;<sup>15</sup> an accurate enough observation but not one guaranteed to advance the jury’s understanding or to assist in dealing with the question at hand.

Scots law may be prepared, reasonably enough, to treat diminished responsibility as “partial insanity”. In *HM Advocate v Braithwaite*, Lord Cooper, relying on a line of authority, explained diminished responsibility to a Scottish jury as requiring “a state of mind which is bordering on, though not amounting to, insanity”.<sup>16</sup> The English cases, however, are equivocal and sometimes even disapproving. While the Court of Appeal in *Byrne* was willing to tolerate terms such as “partial insanity” and “the borderline of insanity”, *Archbold* notes that it “will sometimes be inappropriate to direct the jury that the test is the borderline of insanity”<sup>17</sup> while in *Seers* the Court of Appeal made it clear that there would be circumstances where this would even amount to a material misdirection.<sup>18</sup> Referring again to the finding of the depression disorder in *Ahluwalia*, this could not in any way constitute either partial or borderline insanity. According to J C Smith:

“Diminished responsibility has been pleaded with success in cases where one would have thought there was no chance of a defence of insanity succeeding – mercy killers, deserted spouses or disappointed lovers who killed while in a state of depression, persons with chronic anxiety states and so on.”<sup>19</sup>

Clearly, a direction based on partial or borderline insanity in cases such as these would amount to a misdirection. However, does permitting the defence in

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<sup>14</sup> Norrie, op cit, p 183.

<sup>15</sup> Op cit, p 5.

<sup>16</sup> [1945] SC (J)55 at 57.

<sup>17</sup> *Archbold* para 19-73.

<sup>18</sup> (1984) 79 Cr App R 261.

<sup>19</sup> J C Smith *Smith and Hogan on Criminal Law*, (London: Butterworths, 10<sup>th</sup> edn 2002) p 236.

the above situations not amount to a clear distortion of the language of s 2(1)?

Third, a major difficulty arises when the defendant's possible abnormality of mind is accompanied by intoxication. The defence of intoxication itself remains problematic in terms of the policy to be adopted in the juridical allocation of culpability. The present broad-brush approach of utilising the distinction between crimes of basic and specific intent, is even at its best, open to sceptical analysis.<sup>20</sup> However, the scale of the complexity increases where the courts are faced with a defendant who, in addition to an abnormality of mind, has also voluntarily consumed either alcohol or drugs. It was this particular aspect of the defence of diminished responsibility that arose for resolution in the case of *R v Dietschmann*.

### **R V DIETSCHMANN: FACTS<sup>21</sup>**

The defendant, Anthony Dietschmann, had embarked on a sexual relationship with a woman named Sarah who was in fact his aunt and who was more than twice his age. She was, moreover, a drug addict. The relationship caused the defendant to be ostracized by the rest of the family and lasted for about six months from July 1998 to November 1998. Their cohabitation ended when the defendant was remanded in custody for an unrelated offence. Sarah visited, wrote to him in prison and gave him a watch. While he was still in custody, Sarah resumed her drug-taking. The defendant gave her an ultimatum: he would end their relationship unless she solved her drug problem. He even went so far as to cut his wrists, although without fatal consequences Sarah died in June 1999 while the defendant was still in custody. Although a post-mortem later revealed that she had died from natural causes, the defendant firmly believed that she had committed suicide as a result of his being in custody as well as because of the ultimatum he had given her. He was allowed to attend her funeral and a couple of weeks later was released from remand. As this recital indicates, there were clear indications that the defendant was, to put it mildly, under considerable mental strain.

After his release on the 2 July 1999, the defendant began to drink heavily. On the 13 July he was prescribed sleeping tablets and an anti-depressant, Prozac, by his GP. The later testimony of his sister was that throughout this period he was not behaving normally and was very insecure and upset. On the 16 and 17 July there was evidence of considerable drinking. On the evening of

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<sup>20</sup> The position may be summarised as follows: intoxication cannot be a defence to a crime of basic intent, while it may be taken into account in crimes of specific intent such as murder. See *DPP v Majewski* [1977] AC 443.

<sup>21</sup> The following facts are taken from the account in the reports of the Court of Appeal and the House of Lords.

the 17 July, the defendant and two companions had embarked on a drinking spree. By the time the eventual victim, Nicholas Davies, joined them, a bottle of whisky had been consumed while the defendant had also had a couple of pints of cider. Further alcohol was then purchased and drunk. Later, the defendant would tell the police that on the day in question he had drunk two bottles of cider, a bottle of whisky and about 8 cans of lager. The defendant and Davies started dancing, swinging their arms and jumping up and down. The watch given to the defendant by Sarah as a final gift was broken during this frenetic activity. The defendant alleged that Davies had broken the watch deliberately and punched him several times, insisting that he pay for it to be repaired. Davies refused. There then followed a particularly vicious and intense assault. Even after Davies stopped moving the defendant continued the assault, stamping and kicking his head, side and chest over 30 times. Throughout this episode the defendant kept repeating that Davies had “pissed on Sarah’s grave” and deserved to die. Then he and another of the men (who had been present but had not taken any part in the assault) rolled the body in a rug and moved it into the next room. A forensic examination later revealed that Davies had thirty-one head injuries as well as injuries to the back, neck, chest, arms and legs. His nose was broken on both sides, the brain was damaged and ribs were broken in seven places.

Two further incidents should be noted at this point. The first was the defendant’s repeated, and unexplained, question of “where’s the ticket?” directed to the dead body. Second, the defendant telephoned his sister and told her that he had killed someone. His explanation was that he had been walking through a crematorium and had seen Davies pissing on the graves. His sister’s testimony was that the telephone conversation lasted for about 47 minutes and that the defendant did not make much sense. The defendant then left the scene of the killing. When found by the police, he was disheveled and smelt of alcohol. He was, however, able to give his correct name and was cautioned and arrested. He was examined by a police surgeon who, oddly, certified the defendant as fit for detention and interview. During the interview the defendant elected to exercise his right to remain silent on his solicitor’s advice. Instead, he read out a prepared statement. This claimed that he had seen Davies urinate on rosebushes in the crematorium, which he thought disrespectful. He repeated his claim that Davies had broken the watch Sarah had given him and felt that this was “taking the piss out of Sarah”. He stated that the next thing he could recall was seeing Davies on the floor; he checked for breathing and a pulse but he was dead. The defendant was charged with murder but chose to plead voluntary manslaughter as a result of diminished responsibility.

## THE DEFENDANT'S TESTIMONY

At trial the central facts relied on by the Crown were admitted. In particular, the defendant repeated his belief that the watch had been broken by the victim and that the victim had been urinating on Sarah's grave. He also testified that he had come to realise that the urinating incident had not actually happened. He further testified that, apart from the watch being broken and throwing a punch at Davies, he had no recollection of the events in question. However, he accepted that he must have been responsible for the injuries<sup>22</sup> It is worth noting that on his own testimony, the defendant admitted to "being angry but not fuelled by drink"<sup>23</sup> and that he was "not badly affected by alcohol"<sup>24</sup> at the time of the attack. The reason for this admission, presumably, was in order to avoid the conclusion being drawn that the reason for the killing was the intoxication, rather than any underlying abnormality of mind.

## EXPERT EVIDENCE

Lord Parker CJ in *Byrne* had opined that while the jury are not bound to accept the medical evidence, the "aetiology of the abnormality of mind ... does, however, seem to be a matter to be determined on expert evidence".<sup>25</sup> In the instant case two psychiatrists tendered medical evidence, one each for the Crown and for the defence. It may be convenient to set out their testimony as follows:

*Dr Palmer (for the Crown):*

Dr Palmer had examined the defendant within three days of his arrest. She came to the conclusion that he was suffering from an abnormality of mind at the time of the offence. This took the form of an adjustment disorder. She was also of the opinion that there was present an alcohol dependence syndrome. The psychiatrist called for the defence had come to the conclusion that the defendant had experienced a transient psychotic state. Dr Palmer did not agree with this view.

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<sup>22</sup> It would be interesting to speculate as to whether it would have been possible, on the basis of the facts and the defendant's testimony, to have run an insanity defence within the first limb of the M'Naghten Rules, in that he did not know either the nature and quality of his acts.

<sup>23</sup> [2001] EWCA Crim 2052 at para 6.

<sup>24</sup> [2003] UKHL 10 at para 12.

<sup>25</sup> [1960] 3 All ER 1 at 4.

*Dr El Azra (for the defence):*

Dr El Azra had examined the defendant about eight months after his arrest. He agreed with Dr Palmer that he was suffering from an abnormality of mind but did not consider that there was an alcohol dependence syndrome. Instead, he formed the view that the defendant had experienced a transient psychotic state.

It will be noticed that there was an essential agreement between the two psychiatrists that the defendant had been suffering from an abnormality of mind, even though there was disagreement as to its precise cause. The first limb of s 2(1) was, at least in the experts' opinion, satisfied. The next element that needed to be satisfied was whether this abnormality of mind "substantially impaired his mental responsibility". The generally accepted approach to this issue was set out in *Byrne* as drawing a distinction between a defendant who was capable of resisting the impulse to kill but who did not and the defendant who was incapable of resisting such an impulse. Dr Palmer testified that although in her view the defendant was suffering from alcohol dependence syndrome (sufficient to amount to an abnormality of mind), the alcohol had operated merely to remove his disinhibitions and facilitated the release of aggression. It was her opinion that the defendant had not lost touch with reality and that if he had been sober he would probably have exercised restraint. Although the issue was not put in this way by either the Court of Appeal or the House of Lords, her testimony effectively amounted to an opinion that this defendant was in the position of someone who *did not*, rather than *could not*, control his impulses.

Dr El Azra, was of the view that the defendant's transient psychotic state meant that he had lost touch with reality and falsely believed that his victim deserved to die. His opinion was that even if the defendant had had no alcohol, he would probably have killed Davies as he did. In short, Dr El Azra's opinion was that this was a defendant who *could not* control his impulse to kill.

The application of the defence of diminished responsibility in those situations where intoxication had been present, was to ask: would the defendant have killed if he had been sober. This analysis is an attempt to separate the effect of the intoxication from the "underlying causes" of any abnormality of mind. To this question Dr Palmer's answer was that neither the adjustment disorder nor the alcohol dependency syndrome would have prevented the defendant from forming the requisite *mens rea*, i.e. the defendant would not have killed if he had been sober.<sup>26</sup> Dr El Azra took a diametrically opposite view. The intoxication was irrelevant; the defendant would have killed even if he had been sober.<sup>27</sup>

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<sup>26</sup> [2003] UKHL10, para 14.

<sup>27</sup> *Ibid* para 13.

## DIRECTIONS TO THE JURY

Needless to say, it was the content of the trial judge's directions to the jury that formed the basis of the instant appeal. In early cases such as *Spriggs*, it was reckoned sufficient for a trial judge to simply read the s to the jury and invite them to apply the law.<sup>28</sup> Ever since the leading decision in *Byrne*, this was no longer true; the trial judge is under an obligation to adequately guide the jury.<sup>29</sup>

The trial judge summarised the medical evidence and directed the jury as follows:

“As you have been told, diminished responsibility is not a medical diagnosis, it is a legal concept which ultimately only a jury can decide. All that doctors can do is to assist you with the benefit of their expertise and experience. As experts they are permitted to express opinions But this is trial by jury and you, the jury, must decide whether or not diminished responsibility has been established.”<sup>30</sup>

Both the Court of Appeal and the House of Lords saw no reason to criticise this part of the direction.

In relation to the effect of intoxication, the direction was in two parts The first related to the issue raised by Dr Palmer's opinion that the defendant was suffering from an alcohol dependence syndrome, while the second dealt with the impact of the intoxication on the abnormality of mind:

“First, if you are persuaded by Dr Palmer that there was an alcohol dependence syndrome, you include that in the abnormality of mind but only if the defendant's drinking had become involuntary, that is to say he was no longer able to resist the impulse to drink. Secondly, - this is an issue of crucial importance in this case – once you are satisfied that there is an abnormality of mind, whether on the basis of an adjustment disorder alone or coupled with a transient psychotic state or alcohol dependence syndrome, or however, you must

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<sup>28</sup> “I cannot see that a judge dealing with this matter can do more than call the attention of the jury to the exact terms of the s parliament has enacted and leave the jury to say whether, on the evidence, they are satisfied that the case comes within the s or not”, Per Lord Goddard in *Spriggs* [1958] 1 All ER 300 at 303.

<sup>29</sup> [1960] 3 All ER 1.

<sup>30</sup> [2003] UKHL 10 at para 15.

ask these questions: have the defence satisfied you on a balance of probabilities that if the defendant had not taken drink (1) he would have killed if, in fact, he did; and (2) he would have been under diminished responsibility when he did so. If they have satisfied you that the answer to both questions is “yes” then this is a case of diminished responsibility. But if the answer to either question is “no”, then it is not.”<sup>31</sup>

It is worth noting, as was pointed out by the Court of Appeal when dealing with the merits of the appeal, that counsel as well as the jury were provided with the trial judge’s directions on murder and manslaughter in writing; no objections were actually made at trial to those directions.<sup>32</sup>

## THE APPEAL CHRONOLOGY

The jury rejected the defence and convicted the defendant of murder. The defence sought to appeal on the basis that the above direction was flawed. However, leave to appeal was refused by the single judge. This went to appeal before the full bench of the Court of Appeal.<sup>33</sup> The skeleton argument presented at this point submitted that both parts of the direction, above, were not appropriate.<sup>34</sup> Mr. Gibson, for the appellant, argued that the possibility that the intake of alcohol was involuntary was something that should have been put more forcefully to the jury. It was also submitted that a reconsideration of the authorities was necessary. In particular, criticism was made of the test suggested in *Tandy*<sup>35</sup> (which was to the effect that the question of voluntariness was to be tested by reference to the test of whether the first drink was voluntary or not); this test was submitted to be illogical. Waller LJ was willing to accept that all the issues required consideration and granted leave to appeal. In particular, his Lordship accepted that there was “some measure of force” in the submissions relating to *Tandy*.<sup>36</sup> The Court of Appeal, however, dismissed the appeal.<sup>37</sup> The House of Lords then granted an application by the defendant seeking leave to appeal to the House. This appeal was heard, and, finally,

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<sup>31</sup> The directions are taken from the judgment of the Court of Appeal [2001] EWCA Crim 2052 at para 10.

<sup>32</sup> *Ibid* para 8.

<sup>33</sup> [2001] EWCA Crim 502.

<sup>34</sup> See, in particular, para 8–9.

<sup>35</sup> [1989] 1 All ER 267.

<sup>36</sup> [2001] EWCA 502 at para 9.

<sup>37</sup> [2001] EWCA Crim 2052.

allowed.<sup>38</sup>

## DECISION OF THE COURT OF APPEAL

The judgment of the Court of Appeal was delivered by Rose LJ, sitting with Garland and Sachs JJ. In a ruling, marked by its brevity, the following points were made.

### *The expert evidence*

The defence expert, Dr El Azra was of the opinion that the defendant was suffering an adjustment disorder and a transient psychotic state. The Court of Appeal noted that defence counsel had conceded that the jury had rejected this evidence. Defence counsel had submitted, however, that the manner in which the jury had been directed, with regard to the possibility that the alcohol dependence could have rendered the actions of the defendant involuntary, had been inadequate. Rose LJ pointed out, correctly, that this was an issue which went to the evidence that had been presented.<sup>39</sup> Dr Palmer, for the Crown, had testified as to her opinion that the defendant was suffering from alcohol dependence syndrome. This, however, was not sufficient evidence:

“The factors relied on by Dr Palmer as demonstrating alcohol dependence syndrome did not include either damage to the brain or involuntary intoxication arising from an irresistible craving for alcohol. The high point of her evidence, from the defendant’s point of view, was that the defendant had “a strong desire almost a compulsion” and “he couldn’t stop once he had started”. There was no evidence from Dr Palmer on which the jury could find that the defendant’s drinking was involuntary.”<sup>40</sup>

At first sight, this conclusion seems inconsistent with the *Tandy* test. If the defendant’s first drink was “almost a compulsion” and “he couldn’t stop once he had started”, then it would appear that there *was* evidence that his drinking was involuntary. What appeared to be crucial, however, was the defendant’s own testimony which, as pointed out above, demonstrated a clear desire to downplay the part played by alcohol. This had unfortunate consequences for the appeal. According to Rose LJ:

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<sup>38</sup> [2003] UKHL 10.

<sup>39</sup> [2001] EWCA Crim 2052 at para 15.

<sup>40</sup> *Ibid.*

“The defendant did not suggest that he had a craving: his evidence was that, on this evening, he had drunk rather less than usual. Accordingly, the evidence in this case was not capable of establishing alcohol dependence syndrome as being an abnormality of mind within s 2.”<sup>41</sup>

This was a conclusion supported, according to Rose LJ, by Dr Palmer’s further opinion that the alcohol dependence syndrome did not substantially impair the defendant’s mental responsibility. Issue may be taken on this point. First, the ultimately crucial question as to the existence of substantial impairment is a decision to be made by the jury. This would be dependent on a proper direction. Since both the experts had concluded that there was an abnormality of mind (Dr Palmer basing this on the alcohol dependence syndrome; Dr El Azra basing this on a transient psychotic state), the trial judge should have given proper directions and left it to the jury. Second, it could be argued that while it was proper for the experts to give their opinion as to the first limb of s 2 (the possible existence of an abnormality of mind), the experts should not have been asked their opinion as to the second limb (whether it substantially impaired mental responsibility). Under the rules of evidence, this relates to the “ultimate issue” that lies within the province of the jury. For the experts to answer this question would amount to the usurpation of the jury’s proper function, quite apart from the fact that, as *Byrne* puts it, this is a matter “incapable of scientific proof”.<sup>42</sup> Admittedly, there is considerable doubt as to whether the evidential prohibition relating to the ultimate issue (which has been abolished in civil matters) still exists in criminal cases. The Criminal Law Revision Committee had recommended abolition<sup>43</sup> but this had never been enacted. The prevailing view has been that such questions may be permitted, and the answers received but only if the jury is properly directed that they are entitled to disregard the opinion. This is an unsatisfactory position. A jury cannot but be influenced unduly by expert evidence on matters as complex as mental capacity. Moreover, there was here a submission that this proper direction was lacking.

### *The decision in Tandy*

In granting leave to appeal, Waller LJ had accepted that there was some force in the submission that the decision in *Tandy* needed to be reviewed. Rose LJ took

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<sup>41</sup> *Ibid.*

<sup>42</sup> Below n 45.

<sup>43</sup> *Eleventh Report* (Cmnd 4491), clause 43.

the view that there was no incompatibility between *Tandy* and the previous case law:

In line with those authorities, *Tandy* established that drink is only capable of giving rise to a defence under s 2 if it either causes damage to the brain or produces an irresistible craving so that consumption is involuntary.<sup>44</sup>

In other words, a *difficulty* in resisting the craving is not sufficient; it has to be an *inability* to resist. The problem lies in distinguishing “difficulty” from “inability” when dealing with the issue of rational choice. It is, at least, arguable as to whether even a properly directed jury would be capable of drawing a distinction which is not merely semantic but raises profound questions as to a moral / blameworthy exercise of choice. Moreover, the Court of Appeal in *Byrne* had been willing to accept that a difficulty in exercising self-control in certain circumstances may be sufficient.<sup>45</sup> Rose LJ, however, sought to distinguish this part of the case by pointing out that in *Byrne* no question of intoxication arose or was even considered. It is submitted that this point of distinction was irrelevant.

### *The “Smith” questions*

In the case of *Gittens* the Court of Appeal had considered the appropriate direction to be given to the jury in those situations where there was some evidence of intoxication:

“[T]he jury should be directed to disregard what, in their view, the effect of the alcohol or drugs upon the defendant was, since abnormality of mind induced by alcohol or drugs is not (generally speaking) due to inherent causes and is not therefore within the s. Then the jury should consider whether the combined effect of the other matters which do fall within the s amounted to such abnormality of mind as substantially impaired the defendant’s mental responsibility.”<sup>46</sup>

In his *Commentary* on *Gittens*, Professor Sir John Smith QC had reformulated this ruling into what came to be referred to as the “Smith questions”.<sup>47</sup> The consequent judicial reliance on this formulation had converted it into, to all practical purposes, a model direction. The trial judge in the instant case had followed this practice. It is worth setting out the questions

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<sup>44</sup> [2001] EWCA Crim 2052, para 13.

<sup>45</sup> *Byrne* [1960] 3 All ER 1, 5, at para *D - E*.

<sup>46</sup> *Gittens* (1984) 79 Cr App R 272, at 277.

<sup>47</sup> *Commentary* [1984] Crim LR 553.

again:

“... you must ask these questions: have the defence satisfied you on a balance of probabilities that if the defendant had not taken drink (1) he would have killed if, in fact, he did and; (2) he would have been under diminished responsibility when he did so. If they have satisfied you that the answer to both questions is “yes”, then this is a case of diminished responsibility. But if the answer to either question is “no”, then it is not.”<sup>48</sup>

Counsel for the defendant now submitted that Professor Smith had misunderstood the decision in *Gittens*. He further submitted that the “Smith questions” placed undue pre-eminence to causation, which is not the same thing as impairment of mental responsibility. The essence of the submission was that the “Smith questions” could operate only if it was first accepted that an abnormality could impair mental responsibility if, and only if, it was the *sole* cause of the killing. It was contended that such an interpretation was unsupported either by the Act itself or the cases.

Rose LJ dismissed the submissions on a number of grounds<sup>49</sup>. First, in his judgement the “Smith questions” accurately reflected the decision of the Court of Appeal in *Gittens*. Second, in subsequent cases (such as *Atkinson*<sup>50</sup> and *Egan*<sup>51</sup>) the “Smith questions” were not only expressly approved but the challenge to their compatibility with the decision in *Gittens* was firmly rejected. These decisions were binding on the present Court. Third, as noted above, there has to be an inability, not just a difficulty, in exercising self-control.

On this basis Rose LJ ruled that there was no grounds for regarding the conviction as unsafe and dismissed the appeal.

## **DECISION OF THE HOUSE OF LORDS<sup>52</sup>**

Having concluded that the decision of the Court of Appeal raised a point of law of general importance which ought to be considered by the House of Lords, the certified question was as follows:

(1) Does a Defendant seeking to prove a defence of diminished

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<sup>48</sup> [2001] EWCA Crim 205, at para 10.

<sup>49</sup> *Ibid* at para 13.

<sup>50</sup> (1985) Cr App LR 314.

<sup>51</sup> [1992] 4 All ER 267.

<sup>52</sup> [2003] UKHL 10.

responsibility under s 2(1) of the Homicide Act 1957 in a case where he had taken drink prior to killing the victim, have to show that if he had not taken drink

- (i) he would have killed as he in fact did; and
- (ii) he would have been under diminished responsibility when he did so?

(2) If not, what direction ought to be given to a jury as to the approach to be taken to self-induced intoxication which was present at the material time in conjunction with an abnormality of mind which falls within s 2(1) of the 1957 Act.

Lord Hutton delivered the unanimous opinion of the House of Lords.<sup>53</sup> After summarising the facts and the expert evidence, Lord Hutton began by considering the interpretation of s 2(1) of the Act and then dealt with the relevant authorities and the appropriate jury directions.

#### *Interpretation of s 2(1)*

The starting point was simple enough. If the defendant was able to satisfy the jury that, regardless of the alcohol he had consumed, the killing was caused by an abnormality of mind which substantially impaired his mental responsibility, then he was entitled to a verdict of manslaughter. Lord Hutton explained the basis of his view:

“I take this view because I think that in referring to substantial impairment of mental responsibility the subs does not require the abnormality of mind to be the sole cause of the defendant’s acts in doing the killing.”<sup>54</sup>

This view, which accords with the submissions that had been made before the Court of Appeal, is entirely consistent with s 2(1): the defendant “shall not be convicted of murder if he was suffering from such an abnormality of mind ... as substantially impaired his mental responsibility...” This is a crucial point, one ignored by the Court of Appeal, and further explained by Lord Hutton:

“In my opinion, even if the defendant would not have killed if he had not taken drink, the causative effect of the drink does not necessarily prevent an abnormality of mind suffered by the defendant from substantially impairing his mental

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<sup>53</sup> Lords Nicholls, Lloyd, Hobhouse and Rodger all concurred.

<sup>54</sup> Para 18.

responsibility for his fatal acts”.<sup>55</sup>

In other words, and it is a point worth emphasising, even if the consumption of alcohol had played a part in the killing (i.e. the defendant would not have killed if he had not taken drink), this would not prevent an underlying abnormality of mind suffered by the defendant from substantially impairing his mental responsibility. This marks a departure from the analysis that had previously been accepted as standard practice.

It is submitted that this approach is correct. A number of different situations may arise.<sup>56</sup> First, there is the situation which arises when the defendant pleads the “defence” of intoxication. This may be taken into account in deciding whether it negates the *mens rea* for murder but is irrelevant to s 2(1) of the 1957 Act. The second situation occurs where the defendant presents evidence that the consumption of alcohol is involuntary and represents an alcohol dependence syndrome. This may amount to the “inherent cause” or “disease” contained within the parenthesis in s 2(1). The Court of Appeal in the instant case had ruled that the evidence was not capable of establishing such a syndrome. While this may be open to some dispute, as argued above, this ruling was not challenged before the House of Lords. Consequently, the attempt to review the decision in *Tandy* had to be abandoned for the time being at least. The third situation would occur where a defendant, who may be suffering from an underlying condition of abnormality of mind, goes on to consume alcohol and then pleads the s 2(1) defence. To ignore the underlying abnormality of mind would be to require that it had to be the *sole* cause for the killing, instead of accepting, as a matter of causation, that it was sufficient if it was a *substantial* cause (i.e. anything other than a minimal cause). It was the failure by the previous cases to fully acknowledge these distinctions that had caused the confusion.

### *Review of the authorities*

*Fenton*:<sup>57</sup> here was no doubt that the alcohol had played an important part. In fact, The defendant, having consumed a large quantity of alcohol, shot and killed four people. The medical witnesses all agreed that he was suffering from an abnormality of mind based on four ingredients. First, he was an aggressive psychotic with marked paranoid traits. Second, the various stresses to which he had been subject had produced a state of reactive depression. The

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<sup>55</sup> Ibid.

<sup>56</sup> A similar set of distinctions is drawn in Wilson *Criminal Law: Doctrine and Theory* (London: Longman, 2<sup>nd</sup> edn, 2003) p 246.

<sup>57</sup> (1975) 61 Cr App R 261.

third ingredient was the excessive quantity of alcohol with a resulting state of disinhibition and confusion. Fourth, there had been a police car chase and a final sensation of being trapped. This was considered as a “last straw” phenomenon. The medical evidence was that in the absence of *any* of these four ingredients, the killings would probably not have occurred. Lord Widgery CJ stated that:

“the jury later disclosed in reply to an observation of the learned judge that they were unanimously of the view that the killings would not have occurred if the appellant had not had so much to drink.”<sup>58</sup>

However, this did not prevent a possible conclusion that the effect of the remaining ingredients was sufficient to cause a substantial impairment of mental responsibility. As Lord Hutton commented:

“This was a case where it was clear that the killings would not have taken place if the appellant had not taken drink, but nevertheless the trial judge left it to the jury to consider if the combined effect of the factors other than alcohol was sufficient to amount to a substantial impairment of his mental responsibility, and the Court of Appeal held that the trial judge had properly left this issue to the jury.”<sup>59</sup>

*Turnbull (Launcelot)*<sup>60</sup>: The defendant had gone drinking with his victim, subsequently killing him. He sought to rely on diminished responsibility on the basis of medical evidence that he was a psychopath. This was rejected by the jury. The trial judge had begun with a direction based on *Fenton*. Then, dealing with the impact of the alcohol, the trial judge told the jury that if they took the view that,

“if he had not taken drink this would not have happened, then the defence would have failed to prove that the abnormality of mind substantially diminished Turnbull’s responsibility for his act in killing.”<sup>61</sup>

Lord Widgery, delivering the judgment of the Court of Appeal, refused to

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<sup>58</sup> *Ibid* at 263.

<sup>59</sup> Para 21.

<sup>60</sup> (1977) 65 Cr App R 242.

<sup>61</sup> *Ibid* at 246

accept the criticisms that were made of these directions and ruled that the jury had not been misled from the proper approach. Lord Hutton, did not take the same benevolent view, describing the trial judge's directions as inconsistent with that of *Fenton*. Moreover, he ruled, the Court of Appeal in *Turnbull* did not intend to lay down any principle. This was, indeed, the conclusion reached by a subsequent Court of Appeal in *Gittens*.

*Gittens*:<sup>62</sup> The defendant had been suffering from depression and had attempted to hang himself. He had been hospitalised and on a visit home, after consuming a quantity of alcohol as well as pills that had been prescribed for him, he killed his wife and step-daughter. Three doctors called by the defence testified that he was suffering from an abnormality of mind which substantially impaired his mental responsibility. Two of these witnesses considered that this was due to a depressive illness, the third concluded that this was due to a disorder of the personality induced by psychological injury. The expert called on behalf of the prosecution also agreed that there was an abnormality of mind but concluded that this was brought on by the alcohol and the drugs and was neither inherent nor the result of illness. It is apparent that the trial judge's directions borrowed heavily on *Turnbull (Launcelot)*. This time, however, the Court of Appeal took a different view:

“Even assuming that the direction approved in *Reg v Turnbull (Launcelot)* taken as a whole was correct, we consider that it is not a direction which should in future be copied.”<sup>63</sup>

Lord Hutton summarised the four points which emerge from the decision in *Gittens* as follows:

- (i) Where a defendant suffers from an abnormality of mind arising from arrested or retarded development of mind or inherent causes or induced by disease or injury and has also taken drink before the killing, the abnormality of mind and the effect of the drink may each play a part in impairing the defendant's mental responsibility for the killing.
- (ii) Therefore the task for the jury is to decide whether, despite the disinhibiting effect of the drink on the defendant's mind, the abnormality of mind arising from a cause specified in subs 2(1) nevertheless substantially impaired his mental responsibility for his fatal acts

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<sup>62</sup> [1984] QB 698.

<sup>63</sup> *Ibid* p 701

- (iii) Accordingly it is not correct for the judge to direct the jury that unless they are satisfied that if the defendant had not taken drink he would have killed, the defence of diminished responsibility must fail. Such a direction is incorrect because it fails to recognise that the abnormality of mind arising from a cause specified in the subs and the effect of the drink may each play a part in impairing the defendant's mental responsibility for the killing.
- (iv) The direction given by the trial judge in *Turnbull (Launcelot)* should not be followed.

*The "Smith questions"*

Professor Sir John Smith, as noted above, had formulated the questions that have to be put to the jury as follows:

"Have the defence satisfied you on the balance of probabilities – that, if the defendant had not taken drink –

- (i) he would have killed as he in fact did? And
- (ii) he would have been under diminished responsibility when he did so?"<sup>64</sup>

In two subsequent cases, *Atkinson*<sup>65</sup> and *Egan*,<sup>66</sup> the Court of Appeal approved of the "Smith questions". Lord Hutton, however, expressed reservations as to both these decisions. In the light of his Lordships views these cases must now be regarded as of limited value.<sup>67</sup> While paying tribute to the legal scholarship of the late Professor Sir John Smith, Lord Hutton was forced to conclude that the "Smith questions" were not entirely correct:

"I consider, with respect, that this commentary placed undue reliance on the direction by the judge and the judgment of the court of Appeal in *Turnbull* and did not give sufficient weight to the subsequent judgment of the Court of Appeal in *Gittens* which makes it clear that the direction in *Turnbull* should not in future be followed ..."<sup>68</sup>

Lord Hutton went on to point out that even if the jury came to the

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<sup>64</sup> Commentary [1984] Crim LR 554.

<sup>65</sup> [1985] Crim LR 314.

<sup>66</sup> [1992] 4 All ER 470.

<sup>67</sup> See, in particular, para 37.

<sup>68</sup> At para 32.

conclusion that the effective cause of the killing was the intoxication, this did not prevent a further finding of diminished responsibility:

“... even if the jury answered “No” to the question: “Have the defence satisfied you on the balance of probabilities that, if the defendant had not taken drink, he would have killed as he in fact did? – it is still open to the jury to find the defence of diminished responsibility established.”<sup>69</sup>

In other words, while the defendant’s consumption of alcohol is to be left out of account (in those instances where it does not amount to an inherent cause i.e. amounting to alcohol dependence syndrome), it may have a disinhibiting effect. The jury may take this into account in coming to a conclusion as to whether, despite the alcohol consumed, the defendant’s underlying mental responsibility did or did not substantially impair his mental responsibility. Support for this approach was gleaned from Simester and Sullivan in their text on *Criminal Law Theory and Practice*:

“... the taking of intoxicants should not disentitle D from successfully pleading diminished responsibility if the abnormality of mind caused by factors internal to [him] is sufficient, of itself, substantially to impair [his] mental responsibility. ... The drink does not supervene over his underlying subnormality. That underlying condition remains, and so does the question whether that condition substantially impaired his responsibility for the killing.”<sup>70</sup>

This does not alter the policy of the criminal law: a defendant who is “merely” intoxicated would not be excused. The essential difference between a person who is brain-damaged but is also intoxicated and a defendant who is intoxicated but not brain-damaged, is maintained.<sup>71</sup> Moreover, as Lord Hutton rightly pointed out, in the majority of cases “if the jury concluded that the defendant would not have killed if he had not taken drink they will also find that his abnormality of mind had not substantially impaired his mental responsibility for his fatal acts.”<sup>72</sup>

The first part of the question before the House of Lords asked: “does a defendant have to show that if he had not taken drink, he would have killed as

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<sup>69</sup> Ibid.

<sup>70</sup> Para 34.

<sup>71</sup> At para 40 this was a point made by Lord Rodger during the Crown’s submissions.

<sup>72</sup> Para 34.

he in fact did?" In the light of the above analysis, Lord Hutton answered this question in the negative.<sup>73</sup>

*The appropriate jury directions*

The second part of the certified question asked for the appropriate jury direction in those situations where self-induced intoxication was present in conjunction with an abnormality of mind. Lord Hutton began with the aphorism that it was not possible to lay down a precise form of words; much depends on the facts that are before each trial judge. Nonetheless, it was possible to provide guidelines. It is worth setting this out in full:

“Assuming that the defence have established that the defendant was suffering from mental abnormality as described in s 2, the important question is: did that abnormality substantially impair his mental responsibility for his acts in doing the killing? You know that before he carried out the killing the defendant had had a lot to drink. Drink cannot be taken into account as something which contributed to his mental abnormality and to any impairment of mental responsibility arising from that abnormality. But you may take the view that both the defendant’s mental abnormality and drink played a part in impairing his mental responsibility for the killing and that he might not have killed if he had not taken drink. If you take that view, then the question for you to decide is this: has the defendant satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or has he failed to satisfy you of that? If he has satisfied you of that, you will find him not guilty of murder but you may find him guilty of manslaughter. If he has not satisfied you of that, the defence of diminished responsibility is not available.”<sup>74</sup>

## CONCLUSION

The House of Lords then remitted the case to the Court of Appeal for a decision as to whether the conviction for murder ought to be quashed and a new trial ordered or to substitute a verdict of guilty of manslaughter. The Court of Appeal subsequently held that the public interest, in the context of the serious

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<sup>73</sup> Para 41.

<sup>74</sup> Ibid.

offence of murder, required a retrial. The Court acknowledged that a substantial amount of time had elapsed but, nonetheless, a retrial could be fair. The failing of the law had now been corrected, a trial judge would now be equipped with a proper direction and a new jury needed to decide if the defendant should still be convicted of murder.<sup>75</sup>

Welcome as this decision may be, the fact remains that many issues remain unresolved. The basic tensions between the legal and psychiatric analyses continue. This has a fundamental impact on the reception of expert evidence. As this case illustrates, both the experts for the Crown as well as the defence agreed that the defendant was suffering from an abnormality of mind. Is it not the case that even a properly directed jury will continue to have difficulties with drawing a distinction between the expert conclusion and their own view as whether this went on to cause a substantial impairment of mental responsibility? In the light of the ruling in *Byrne* that the jury should take a “broad common sense approach” when dealing with the abnormality of mind, the proper place of the expert psychiatric evidence remains problematic.

Moreover, a number of policy and analytical issues were not addressed. Two of these are worth noting. First, the House of Lords makes no comment on whether it continues to be permissible to direct the jury on diminished responsibility in terms of “partial insanity”. Second, in *Tandy*<sup>76</sup>, the Court of Appeal had dealt with the issue of whether the consumption of alcohol was voluntary or not by posing the so-called “first drink of the day” question. It had been argued in the courts below that this approach was illogical and incorrect. The House of Lords chose not to deal with this issue. Since other parts of the *Tandy* ruling were treated with approval, may it be assumed that this approach was also to be approved?

In terms of wider policy, the question still remains: what difference does it make whether insanity or diminished responsibility is used? As far as the disposal and sentence of the defendant is concerned, the end result is likely to be the same. This is illustrated by the *Peter Sutcliffe* case. Here the trial judge refused to countenance the prosecution’s acceptance of a plea of guilty to manslaughter on the grounds of diminished responsibility. Following a full trial and a conviction for murder, he was within a matter of months, transferred to a secure mental hospital, where he would have been if the original plea had been accepted. It is true, of course, that the trial for murder had a symbolic function but as Norrie puts it:

“At the end of the court process, when the symbolic games have been played, the practical effects of the different findings

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<sup>75</sup> LTL 11/4/2003 Extempore.

<sup>76</sup> [1989] 1 All ER 267.

in law are largely irrelevant. Having struggled to understand the elaborate and confusing categories of insanity and diminished responsibility, law students are often bemused to find that, practically, at the end of the day, it does not make much odds one way or another which legal category is applied.”<sup>77</sup>

The progress of the instant appeal had been, to say the least, tortuous. After the original trial there had followed: an application for leave to appeal before the Court of Appeal; an appeal on the merits before the Court of Appeal; an appeal to the House of Lords; a further hearing by the Court of Appeal to decide whether to order a re-trial; and finally a re-hearing before the Crown Court. All in all, sixteen judges, Lords Justices and Law Lords had been involved in this case in one way or another. There ought to be a better way to manage a modern criminal justice system.

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<sup>77</sup> *Loc cit*, p 196.