Diminished responsibility

Law

1. Following amendments made by the Criminal Justice and Licensing (Scotland) Act 2010, the law of diminished responsibility is now governed by section 51B of the Criminal Procedure (Scotland) Act 1995 for proceedings which commenced on or after 25 June 2012. The common law plea of diminished responsibility was abolished by the 2010 Act but continues to have effect in relation to criminal proceedings commenced on or after 25th June 2012 **where the conduct giving rise to the proceedings took place before that date. Section 51B provides:**

> "51B Diminished responsibility
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> (1) A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.
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> (2) For the avoidance of doubt, the reference in subsection (1) to abnormality of mind includes mental disorder.
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> (3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—
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> > (a) constitute abnormality of mind for the purposes of subsection (1), or
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> > (b) prevent such abnormality from being established for those purposes.
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> (4) It is for the person charged with murder to establish, on the balance of probabilities, that the condition set out in subsection (1) is satisfied.
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> (5) In this section, "conduct" includes acts and omissions."

2. Section 51B **only** applies to a charge of murder unlike the common law which may also have allowed the plea of diminished responsibility on a charge of attempted murder.

Under section 51B(2) abnormality of mind includes mental disorder. Where the accused's condition at the time of an unlawful killing falls within the definitions of both the defence based on mental disorder under section 51A and diminished responsibility under section 51B, an accused has an option of advancing either the defence or the plea. The accused may plead both.

At common law, the condition required to fall short of insanity.

Diminished responsibility only applies where the accused raises it as a special defence. The principal change brought about by the 2010 Act amendments is that a personality disorder is not excluded from giving rise to diminished responsibility. However, the statute also clarified that whilst self-induced intoxication cannot by itself found a plea of diminished responsibility, its presence does not necessarily exclude diminished responsibility being made out on the basis of an underlying condition even where there is also intoxication.

That was always the position at common law (*Lindsay v HM Advocate* 1997 SLT 67). The Scots Law Times report contains the trial judge's directions (Lord Hamilton) which may be helpful to judges where the issue arises although part of his direction may have come close to amounting to what was later considered to be a misdirection in *Rodgers v HM Advocate* [2019] JC 150, 2019 JC 150 where the court did not notice *Lindsay*. In a case of statutory diminished responsibility, guidance is given by Lord Justice General Carloway as to how a judge should direct the jury where both intoxication and an underlying condition may be in play (Rodgers applying the common law case of *Graham v HM Advocate* [2018] HCJAC 57, 2018 SCCR 347 discussed below).

3. Diminished responsibility applies where some mental abnormality substantially impairs the accused's ability to determine and control his/her/their actings. In murder cases, the accused's responsibility for the killing is correspondingly reduced, and the accused falls to be convicted of culpable homicide, not murder (*Galbraith v HM Advocate* 2002 JC 1, at paragraphs [41] and [54]). At common law, in a case of attempted murder committed before 25 June 2012, diminished responsibility would lead to a verdict of "guilty of assault" [with aggravations held proved] under deletion of attempted murder on the ground of diminished responsibility (*HM Advocate v Kerr* [2011] HCJAC 17, 2011 SLT 430). Whether it was necessary that the criminal quality of an offence for which no fixed penalty is provided should have been modified may be questioned (in *Galbraith*, at paragraph [45], the court did not decide the matter

because it had not heard detailed submissions). In an unreported first instance decision of 17 January 2024, applying section 171 of the Criminal Justice and Licensing (Scotland) Act 2010, Lord Weir determined at the ballot hearing that, for an offence committed after 25 June 2012, diminished responsibility is not available on a charge of attempted murder, and that the special defence before the court was not competently stated; *HM Advocate v Archibald* 2024 for which there is no report.

4. The onus of establishing diminished responsibility rests on the accused, who requires to establish the existence of diminished responsibility on a balance of probabilities (*Lilburn v HM Advocate* [2011] HCJAC 41, 2012 JC 150). The trial judge must decide whether evidence led in support of the plea discloses, at its highest, a basis on which the law could regard the accused's responsibility for his/her/their actions as being diminished. If it does not, in charging them the judge must withdraw the issue from the jury's consideration. If it does, the judge in a murder case, must direct the jury that, in the event that they convict but accept the relevant evidence, their verdict must be guilty of culpable homicide; but, if they reject it, their verdict must be guilty of murder (*Galbraith*, at paragraphs [41] and [54]). Presumably this is on the basis that the jury considers that the crime would otherwise amount to murder.

5. Post 25 June 2012, a personality disorder, including psychopathic personality disorder can give rise to diminished responsibility but psychopathic personality disorders could not do so at common law (*Carraher v HM Advocate* 1946 JC 108; *Galbraith*, at paragraph [43]).

N.B. The specimen direction below is suitable for a case of statutory diminished responsibility but may require to be tailored, according to the circumstances, for diminished responsibility at common law on the question of personality disorder, given that psychopathic personality disorder could not, at common law, give rise to the plea.

Both under statute and at common law, diminished responsibility cannot arise from any self-induced abnormality such as the intoxicating effects caused by the taking of drink or drugs (*Brennan v HM Advocate* 1977 JC 38; *Galbraith*, at paragraph [43]). This can extend to taking prescribed medicines in defiance of the doctor's prescription, without taking medical advice or where they, or ordinary proprietary drugs, are taken in grossly excessive quantities or in combination with other more powerful drugs without seeking and complying with medical advice; *Ebsworth v HM Advocate* 1992

SCCR 671 at 679G to 670A. Neither do emotions such as anger, jealousy (*Galbraith*, supra, paragraph [51]), short temper, an unusually excitable nature, or lack of self-control constitute this partial defence (*HM Advocate v Braithwaite* 1945 JC 55, [57] to [58]). Diminished responsibility requires some abnormality of the accused's mind, affecting it substantially (*Muir v HM Advocate* 1933 JC 46, 49; *Galbraith*, at paragraphs [46] and [50]), permanently or temporarily, in such a way that it does not work like the mind of a normal adult, and substantially impairing the accused's ability to determine and control his/her/their acts and omissions (*Galbraith*, at paragraphs [44] and [54]). There must be something far wrong with the accused, which affects the way the accused acts (*Galbraith*, at paragraph [51]).

However, the fact that the ingestion of alcohol or drugs may have contributed to the impairment does not necessarily result in the exclusion of diminished responsibility. The live issue is whether the abnormality is an operative or substantial cause on any impairment of the ability of an accused to determine or control the conduct at the material time (*Rodgers v HM Advocate* [2019] HCJAC 27, 2019 JC 150).

The Lord Justice General put it this way in giving the opinion of the court in *Rodgers* at paragraphs [33] and [34]:

> "[33]…All that the jury had to be told in relation to the possible combination of causes, and once the standard Brennan direction was given, was that they could return a verdict of culpable homicide, based on the appellant's diminished responsibility, if they were satisfied on the balance of probabilities that "despite the drink, his mental abnormality substantially impaired" his ability to determine or control his conduct *(R v Dietschmann*, Lord Hutton at para.41).
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> [34] … As *R v Dietschmann* correctly analyses matters, the proper approach is to discount the effect of the drink and drugs both on their own or by reason of their combination with the appellant's underlying mental disorder. This flows from the application of the principle in Brennan v HM Advocate. An accused person cannot rely on the effect of the voluntary ingestion of drink and/or drugs whether that effect operates on its own or as a result of its combination with the appellant's underlying mental disorder to impair his ability. The question in practical terms is whether, if this appellant had not ingested the alcohol/drugs which he did, would he have acted as he did and delivered the fatal blow as a consequence of his mental abnormality?"

6. The abnormality can take many forms. A sufferer may perceive physical acts and matters differently from the normal person. The accused may have delusions. His/her/their ability to judge rationally as to whether an action is right or wrong, or to perform it, may be affected (*Galbraith*, at paragraphs [51] and [54]). The abnormality can have many causes. For example, these may be congenital, or induced by illness, injury or shock (*HM Advocate v Ritchie* 1926 JC 45, 49). Examples of such may be: - epileptic fits, low intelligence, brain tumours affecting the sufferer's consciousness and producing personality changes, strokes which result in aggressive tendencies, the consequences of some thyroid disorders, hypoglycaemia causing disinhibition and aggression, chronic drinking bringing on delirium tremens (DTs), or head injuries. Therapeutically administered drugs may induce drowsiness, confusion, euphoria or depression. Schizophrenia and some types of depression can also cause the relevant degree of mental abnormality (*Galbraith*, at paragraph [51]). Sexual or other abuse inflicted on an accused, resulting in some recognised mental abnormality, may also be a cause (*Galbraith*, at paragraph [53]). The abnormality must always be one which is recognised by the appropriate science (*Galbraith*, at paragraphs [53] and [54]).

7. There must be opinion evidence from a skilled witness that the accused suffered from a recognised abnormality of mind if diminished responsibility is to be considered by the jury (*Galbraith v HM Advocate* 2002 JC 1 at paragraphs [53] and 54; *Graham v HM Advocate* [2018] HCJAC 57, 2018 SCCR 347 at paragraph [116]). In *HM Advocate v Andrew Innes* 2023, leave to appeal against the trial judge's decision to withdraw a defence of diminished responsibility on the basis that it was unsupported by such evidence was refused. At second sift, three judges explained: "The trial judge was perfectly correct to withdraw the special defence in the absence of any evidence from a skilled witness that the appellant was, at the material times, suffering from an abnormality of mind which substantially impaired his ability to control his acts."

8. In giving directions to the jury, it is no longer appropriate simply to recite the formula in *HM Advocate v Savage* 1923 JC 49, 50 per Lord Justice Clerk Alness. Instead, the judge must tailor the directions, so far as possible, to the facts of the particular case (*Galbraith*, at paragraph [54]). Thus, where a mother was convicted of culpable homicide by countenancing her cohabitee's murderous attack on her infant daughter, it was held in relation to both the issues of her diminished

responsibility and her wilful failure to take such steps as reasonably could have been taken to protect the child, the jury should have been directed that:

> "in the context of the question of whether a parent witnessing an assault on a child could reasonably have acted to protect the child, it is not appropriate to test the matter by reference to a hypothetical reasonable parent; rather the test is whether the particular parent, with all her personal characteristics and in the situation in which she found herself, could reasonably have intervened to prevent the assault" (*Bone v HM Advocate* 2006 SLT 164 at paragraph [9], and see paragraph [11]).

9. In *Graham v HM Advocate* [2018] HCJAC 57, 2018 SCCR 347 observations were made on whether the evidence required to be given by psychiatrists in relation to certain medical issues. Lord Justice General Carloway observed at paragraph [124]: -

> "In terms of *Galbraith v HM Advocate* (supra), evidence from psychologists was regarded as admissible, even if the matter was not the subject of debate, for the purposes of establishing more than just a diagnosis of personality disorder but the impact of the abnormality on the accused at the time of the incident. It is for the court to determine, following *Kennedy v Cordia (Services)*(supra), whether a particular clinical psychologist has the appropriate qualifications, by training and experience, to give evidence on such matters, which are otherwise generally within the expert province of the consultant forensic psychiatrist. In that regard, although a clinical psychologist may well be able to diagnose a personality disorder, it might a different matter if the psychologist is being asked to give evidence about the interaction of alcohol, and more especially certain drugs, with the disorder. The same may apply where the psychologist purports to speak to organic changes in the person's brain."

Whilst this is a cautionary note for judges hearing evidence from psychologists, it is not thought that there is any suggestion that a psychologist could not give opinion evidence about the existence of a disorder which he or she is competent to diagnose, and which may give rise to diminished responsibility.

See also chapter on Insanity/Lack of criminal responsibility by reason of mental disorder at the time of the offence.

Possible form of direction on statutory diminished responsibility

[NB: These directions are based on section 51B. At the conclusion of the chapter "Murder and attempted murder" there is a style for directing on diminished responsibility at common law. That will only arise on a charge of murder, and perhaps attempted murder, committed before 25 June 2012]

"In this case the defence raise the issue of diminished responsibility. They say that, if the accused killed the deceased, the accused was not fully responsible for his/her/their actions because of his/her/their mental condition. So the criminal quality of his conduct is reduced.

The law presumes that if you are of sound mind, you are responsible for your actions. But sometimes your mind can be affected, permanently or temporarily, so that it works abnormally. The law recognises this and as a result your responsibility for what you have done is diminished. That can arise if your ability to control your behaviour is substantially impaired by reason of abnormality of mind.

The law sets out that if the ability of an accused to determine or control conduct for which the accused would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind, then that person is to be convicted of culpable homicide on the grounds of diminished responsibility.

The courts have determined that the abnormality must be a recognised mental disorder.

Abnormality of mind includes mental illness, personality disorder and learning disability. However, it covers more than this. If you are afflicted, you might:

- perceive things differently from the normal person
- suffer from delusions
- lose the ability to judge rationally between right and wrong..

Some things do not give rise to diminished responsibility, such as:

- commonly experienced emotions like anger, jealousy, short temper,
- an unusually excitable nature,
- lack of self-control.

[Where appropriate]

Further the fact that a person who was under the influence of alcohol, drugs, or any other substance at the time of the alleged conduct does not of itself constitute abnormality of mind to substantially impair the ability to control or determine conduct.

[In a situation where both intoxicants and a relevant condition may be in play, an appropriate direction may be tailored according to guidance in *Lindsay* where the directions were given at first instance and not subject of appeal and so long as care is taken to avoid falling into the error found to have been made by the trial judge in *Rodgers*. The safest course may be to adapt the decision in *Rodgers*, which applied *Graham, fn 2 above,* all referred to in paragraph 1 of the LAW section, both appeal decisions where these issues were discussed. Paragraph 34 of the opinion in *Rodgers*, quoted above, offers a useful model.

Any such directions are inevitably case specific, and the Jury Manual does not recommend a particular style for addressing the situation where there is both intoxication and a recognised abnormality. Judges will find one model which formed part of directions given in *HM Advocate v Czapla* in a trial in 2022 where no appeal was taken against conviction for murder.]

While the Crown has to prove beyond reasonable doubt that the accused committed this crime, the burden of proving diminished responsibility is on the accused. The accused has to prove that only on a balance of probabilities. Proof on a balance of probabilities is a lower burden than beyond reasonable doubt. It means it is more probable or more likely than not. If, on balance, you thought it was more probable than not that the accused was suffering from diminished responsibility at the time the crime was committed, that would be enough. The accused does not need to prove that by corroborated evidence.

To establish diminished responsibility, the defence must prove four things:

1. That at the time of committing the crime the accused was suffering from a mental abnormality.
2. That mental abnormality is scientifically or medically recognised.
3. Whether permanently or temporarily, it must have affected the accused's mind substantially, so that it did not work like the mind of a normal adult: i.e., there

must have been something far wrong with the accused which affected the way the accused acted.

4. As a result of that, the accused's ability to determine and control his/her/their behaviour was substantially impaired."

- ***(Where evidence of diminished responsibility sufficient in law)***

"In this case, there is enough evidence in law to show that the accused was of diminished responsibility at the time of the crime. But whether you decide that was so depends on how you view the evidence about this. The defence say you should hold diminished responsibility has been established. It relies on these factors ... If you decide that diminished responsibility has been established, the result is not an acquittal, but a reduction in the criminal quality of the act. Your verdict would be guilty of culpable homicide. On the other hand, the Crown says you should not reach that conclusion. It relies on these factors.... If you decide that the accused was not suffering from diminished responsibility, your verdict would be guilty of murder if you are otherwise satisfied that the crime amounts to murder as I have defined it."

- ***(Withdrawal of issue of diminished responsibility)***

"I direct that, in law, diminished responsibility does not arise for your decision in this case and must play no part in your deliberations."

An alternative style for statutory diminished responsibility also addressing intoxication in a case where acquittal was not sought and the verdict could only be guilty of murder or culpable homicide

Diminished responsibility

In this case the defence raise the issue of diminished responsibility. Senior counsel has submitted to you that, when he killed his son, the accused was not fully responsible for his actions because of his mental condition so that the criminal quality of his actions is reduced.

I gave you a written direction at the start of the trial but it was only introductory and I will now say a bit more about diminished responsibility which includes recapping some of what I told you earlier.

Let me make it clear that whilst the evidence of a psychiatrist of a mental disorder would be a necessary precondition of your finding diminished responsibility, the decision on whether the accused has established diminished responsibility is

ultimately a question for you the jury to decide and not the doctors. This is trial by jury.

There are two important principles which form the background to this issue in this case.

First

The law presumes that everyone is responsible for their intended actions. Accordingly, if on a charge of murder someone suggests that his responsibility is diminished, then it is for him to establish that on the balance of probabilities. Establishing something on a balance of probabilities means showing that it is more likely than not. Let me remind you that the accused does not need to provide corroboration, a single source of evidence is enough.

Secondly

Intoxication

I must also tell you this. Being intoxicated by alcohol and/or drugs voluntarily taken is not a defence and it does not reduce what would otherwise be murder to culpable homicide.

This applies to illegal drugs, but it also applies to taking prescribed medicines in grossly excessive quantities or taking them in defiance of medical advice such as a recommended prescription dose. It is not in dispute in this case that the accused took his prescribed Mirtazapine and Amitriptyline in grossly excessive quantities and I will refer to them as drugs. There may have been evidence from Dr X that alcohol may increase the potency of such drugs and vice versa.

If you commit a crime after knowingly taking drink and/or drugs, you are just as accountable for your actions as a sober person. So, you could not regard the accused's criminal responsibility as diminished just because he was intoxicated by alcohol and drugs.

As I have explained, the law presumes that if you're of sound mind, you are responsible for your actions. But sometimes your mind can be affected, permanently or temporarily, so that it works abnormally. The law recognises this. If the effect on your mind is extreme, the law may treat you as lacking any responsibility for what you've done.

On a charge of murder, if the effect is not that severe, but is still substantial, your responsibility for what you have done is diminished.

These issues are governed now by an Act of Parliament, the relevant parts of which I will read to you.

> 1. A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind. Abnormality of mind includes mental disorder.
>
> 2. It is for the person charged with murder to establish, on the balance of probabilities, that his ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.

The courts have determined that the abnormality must be a recognised mental disorder and in this case Dr X has suggested depression and Dr Y has suggested Emotionally Unstable Personality Disorder.

Commonly experienced emotions like anger, jealousy and short temper to which any normal person may be subject do not give rise to diminished responsibility.

The Act goes on to provide that:

> (3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—
>
> > (a) constitute abnormality of mind for the purposes of subsection (1), or
> >
> > (b) prevent such abnormality from being established for those purposes.

It follows that if the accused was under the influence of alcohol and drugs at the time of the killing, that cannot of itself amount to diminished responsibility. On the other hand, even if he was under the influence of alcohol and drugs, that does not mean that there cannot be diminished responsibility.

If you conclude that the accused was affected by alcohol and drugs, but you also conclude on the basis of the evidence that he was suffering from a mental disorder

at the time he killed his son, then it would be possible that both the disorder and his consumption of drugs and alcohol had a part to play in what the accused did.

In this situation, what the law says you must do is this. First, you discount the effect of the drink and drugs, both on their own *and* by reason of their combination with any mental disorder which you find the accused had at the time. That is because the accused cannot rely on the effect of his voluntary taking of drink and drugs whether that effect operates on its own or as a result of its combination with an underlying mental disorder to impair his ability to control his conduct.

So in practical terms, the question is this:

If the accused had not taken the drink and drugs which he did, would he have acted as he did in killing his son as a consequence of mental abnormality?

Taking account of the need for the accused to show this on a balance of probabilities, and given what is suggested by the accused in this case, relying primarily on the evidence of Dr X, but the evidence of Dr Y is also available to you, the question becomes:

Are you satisfied that it is more likely than not that if the accused had not taken the drink and drugs which he did, he would have acted as he did in killing his son as a consequence of mental abnormality, whether it be depression or EUPD, which at the time of the killing substantially impaired his ability to determine or control his conduct?

If your answer to that question is yes, then you would find there to be diminished responsibility and your verdict would be guilty of culpable homicide.

If your answer to that question is no, then you would find him guilty of murder.