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# IMPROVING THE DETERMINATION OF DIMINISHED RESPONSIBILITY CASES

This study of Singaporean cases on diminished responsibility reveals that our judges have generally dealt with the elements of the defence in a haphazard manner. Furthermore, they have placed too much reliance on medical expert opinion. The submission is made that a close adherence to the model formulated by the English case of *R* v *Byrne* for determining diminished responsibility cases will considerably improve the judicial handling of such cases in our jurisdiction.

THE defence of diminished responsibility was introduced into the Penal Code in 1961 in the form of Exception 7 to section 300. The provision reads as follows:

> Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

This provision was derived from the English law[1] which has also been introduced into the law of New South Wales.[2]

The determination of the defence of diminished responsibility involves several questions, some of which are to be decided by the triers of fact alone, others which are to be answered by triers of fact with the assistance of medical witnesses, and still others which are the sole domain of medical witnesses. Given the potential for confusion over the respective roles of triers of fact and of medical witnesses, a model for determination of these

1 Namely, s 2(1) of the Homicide Act 1957 (UK).

2 See s 23A of the Crimes Act 1900 (NSW) as introduced by the Crimes and Other Acts (Amendment) Act 1974 (NSW). The section has since been revised as a result of the Crimes Amendment (Diminished Responsibility) Act 1997. For a discussion of the benefits which adoption of this revised provision will have on Singaporean law, see S Yeo, "Reformulating Diminished Responsibility: The New South Wales Experience" (1999) 20 Sing LR (forthcoming).

various questions was devised by the English Court of Appeal in *R* v *Byrne*.[3] This model has been followed in a few Singaporean decisions but not in the vast majority of cases.

Recent Singaporean judgments on diminished responsibility tend to comprise a rendition of the alleged facts of the killing and surrounding circumstances, a presentation of the medical evidence for and against the defence of diminished responsibility, and a brief conclusion by the judges as to which facts or medical evidence they believed. The judgments contain little or no legal analysis of the elements of the defence, nor do they indicate clearly the relevance of the medical evidence to these elements. Indeed, expert witnesses are often permitted to say more than the defence strictly allows them to. I venture to suggest that this lackadaisical judicial approach to determining diminished responsibility would not have been allowed to develop had the jury system been retained in Singapore. Such a system would have required trial judges to provide clear instructions to the jury on the elements of the defence and the relevance of medical evidence, if any, to those elements. This is not at all to say that a jury system is imperative for the proper determination of the defence of diminished responsibility. What it does say is that trial judges should be careful not to relax their rigour of keeping separate the distinctive roles which they (as triers of fact) and medical witnesses play when dealing with the defence.

As indicated earlier, courts would be wise to apply the model propounded by the English Court of Appeal in *Byrne* when dealing with the defence of diminished responsibility. The model, which has the approval of Singaporean[4] and New South Wales decisions,[5] requires an accused to prove, on a balance of probabilities, the following three elements:

1. that at the time of the killing, the accused was suffering from an abnormality of mind. The existence of such abnormality of mind is to be determined by the trier of fact, being a matter of degree not capable of scientific measurement. Accordingly, the trier of fact is entitled to determine this issue in a broad commonsense way and not necessarily in accordance with the medical evidence. Thus, the trier of fact is not bound to accept the medical evidence

[3] [1960] 2 QB 396 at 403-404.

[4] For example, see *Cheng Swee Hin* v *PP* [1981] 1 MLJ 1 at 3; *Sek Kim Wah* v *PP* [1988] 1 MLJ 348 at 351; and *Chua Hwa Soon Jimmy* v *PP* [1998] 2 SLR 22 at 29-30.

[5] For example, see *R* v *Purdy* [1982] 2 NSWLR 964 at 965; *R* v *Tumanako* (1992) 64 A Crim R 149 at 159; and *R* v *Chayna* (1993) 66 A Crim R 178 at 190-191.

should there be other material before her or him which, in their judgment, conflicts with or outweighs it.

2. that the abnormality of mind arose from one of the causes listed within the parenthesis in Exception 7 to section 300, that is, from a condition of arrested or retarded development of mind, or from any inherent cause, or induced by disease or injury. This element is a matter which must be determined by expert evidence. That does not mean that the expert evidence will fail in its purpose "merely because the psychiatrist cannot be persuaded to adopt the statutory terminology".[6]

3. that the abnormality of mind substantially impaired the accused's mental responsibility for the killing. This element, like the first, is to be determined by the trier of fact since it involves a matter of degree which is not capable of scientific measurement. Furthermore, this element raises a moral rather than a scientific question. While medical evidence is admissible for the purpose of informing the trier of fact of the mental incapacity of the accused at the time of the killing, it is for the trier of fact alone, not a medical expert, to determine whether the incapacity was sufficiently severe to warrant reducing the charge of murder to culpable homicide not amounting to murder.

Adherence by judges to this model serves several important purposes. First, it makes judges comply diligently with the law by paying close attention to each of the three elements of the defence. This prevents them from wrongly subsuming one element under another or bypassing an element altogether. Second, the model requires judges to view the medical evidence in relation to particular elements of the defence rather than in a vague and general way. Thirdly, as a consequence of the second purpose, judges will more carefully restrict expert witnesses to what they are permitted to say under the defence.

In this article, I identify various shortcomings of Singaporean decisions which have resulted from non-compliance with the model. These shortcomings do not necessarily mean that the decisions were invariably wrong, although a different outcome may have been reached in some cases had the model been followed. The aim of this article is to convince judges of

6 *R* v *Purdy* [1982] 2 NSWLR 964 at 966.

the utility of adhering closely to the model in order to improve their handling and determination of the defence of diminished responsibility.

Each of the three elements of the defence will be considered in turn. Where the occasion permits, I shall refer to English and New South Wales authorities which have applied the model.

## I. Abnormality of Mind

The definition given by Lord Parker in *Byrne* to an "abnormality of mind" was:–

> A state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal. It appears to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.[7]

The opening sentence of this definition (henceforth described as the *Byrne* definition) makes it clear that the determination of whether an accused's mental condition amounted to an abnormality of mind is a question for the trier of fact (whether a judge or jury) to decide. The remainder of the definition provides three broad types of manifestations of an abnormality of mind. The first two manifestations may also satisfy the defence of unsoundness of mind under section 84 of the Penal Code[8] or its counterpart of insanity according to the *M'Naghten* Rules contained in the criminal laws of England and New South Wales.[9] Which defence best covers a case will depend on the degree of incapacity to perceive acts and matters or to judge the rightness or otherwise of an act. The more severe the incapacity, the greater the likelihood of unsoundness of mind/insanity succeeding, whilst less severe impairments of mental processes may either support the defence of diminished responsibility or provide no defence at all. It was this comparison

7 [1960] 2 QB 396 at 403.

8 Section 84 of the Penal Code provides that "[n]othing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

9 The relevant rule reads: "To establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."

with insanity which prompted the English Court of Appeal in *Byrne* to say that abnormality of mind "involves a mental state which in popular language (not that of the *M'Naghten* Rules) a jury would regard as amounting to partial insanity or being on the border-line of insanity".[10] Rather than rely on vague expressions like partial insanity and border-line insanity,[11] it is submitted that the law would be much clearer were our judges to speak of degrees of incapacity to perceive physical acts and matters, or to judge between right and wrong.

Unlike the first two manifestations of incapacities which comprise cognitive defects, the third manifestation in the *Byrne* definition covers volitional defects. Here, an accused is able to rationally perceive her or his acts and to know that those acts are wrong; however, the accused lacks the capacity to control her or his actions in accordance with that rational judgment. This third type of manifestation of abnormality of mind has no equivalent under the defence of unsoundness of mind/insanity and, as such, was a primary reason for implementing the defence of diminished responsibility.

These three manifestations of abnormality of mind were recently highlighted by the New South Wales Law Reform Commission reviewing the defence of diminished responsibility.[12] The Commission recommended various revisions to the defence, all of which were intended to clarify certain ambiguities in the defence rather than to change its nature. The relevant part of the Commission's reformulation of the defence, which has since been substantially adopted by the New South Wales legislature,[13] reads as follows:

> (1) A person, who would otherwise be guilty of murder, is not guilty of murder if, at the time of the act or omission causing death, that person's capacity to:
> (a) understand events; or
> (b) judge whether that person's actions were right or wrong; or

[10] [1960] 2 QB 396 at 404 and applied in *Cheng Swee Hin* v *PP* [1981] 1 MLJ 1 at 3; in *Sek Kim Wah* v *PP* [1988] 1 MLJ 348 at 351; and in *Zainul Abidin bin Malik* v *PP* [1996] 1 SLR 654 at 662.

[11] In this regard, it is noted that in *Rose* v *The Queen* [1961] AC 496 at 507, the Privy Council cautioned that "there may be cases where the words 'borderline' and 'insanity' may not be helpful". The Singaporean Court of Criminal Appeal quoted this cautionary note in *Chua Hwa Soon Jimmy* v *PP* [1998] 2 SLR 22 at 30.

[12] New South Wales Law Reform Commission, Report 82, *Partial Defences to Murder: Diminished Responsibility* (Sydney, 1997).

[13] See *supra,* note 2.

> (c) control himself or herself,
> was so substantially impaired by an [abnormality of mind][14] arising from an underlying condition as to warrant reducing murder to manslaughter.[15]

The Commission said that its formulation "spelt out what has generally been regarded since *Byrne* as the essential meaning of 'abnormality of mind' under the existing statutory definition".[16]

It follows from this discussion that a trier of fact examining the issue of an abnormality of mind should determine whether evidence exists of a reduced mental capacity to understand events, to judge the rightness or wrongness of one's actions, or to exercise self-control. Obviously, the evidence of medical experts will have an important role here. In order to ensure that such evidence is in keeping with the *Byrne* definition, trial judges should direct medical witnesses to identify the existence or otherwise of one or more of the three manifestations of an abnormality of mind. Unfortunately, as the ensuing study of several Singaporean cases will show, this has not generally been done.

In *Sek Kim Wah* v *PP*,[17] the accused had admitted killing three victims of a robbery which he had committed. A psychiatrist for the defence gave evidence that the accused suffered from anti-social personality disorder which led him to kill his victims in order to enhance his self-esteem. In rebuttal, the psychiatrist called by the prosecution found no evidence to show that the accused suffered from any mental disorder. He opined that the accused had killed, not to feed his self-aggrandisement, but to eliminate witnesses of his robbery. The trial judges eventually preferred this latter opinion and accordingly rejected the defence of diminished responsibility. It is submitted that the judgment would have been improved considerably had the judges evaluated the competing medical evidence in the light of the *Byrne* definition. This would have required the defence psychiatrist to explain the way by which the anti-social personality disorder purportedly suffered by the accused reduced his capacity to understand events, judge the rightness or wrongness of his actions, or control himself. Without such an explanation, there was a danger of permitting the element of abnormality

[14] The Commission proposed that this expression be replaced by "abnormality of mental functioning". However, the New South Wales legislature retained the original expression.

[15] *Supra*, note 12, recommendation 4, at 51-52.

[16] *Supra*, note 12, para 3.52. The reference to the original statutory definition is to s 23A of the Crimes Act 1900 (NSW) which was introduced into New South Law in 1974 and is closely similar to the Singaporean and English provisions.

[17] [1988] 1 MLJ 348.

of mind to be determined by a medical diagnosis rather than by the judge representing the view of reasonable people. As for the opinion of the psychiatrist for the prosecution, simply saying that the accused had killed in order to prevent being identified told only half the story. For the sake of completeness, the psychiatrist should have been made to explain that this motive of the accused showed that he possessed full capacity to understand events, judge the rightness or wrongness of his actions, and control himself. In sum, the court's pronouncement in *Sek Kim Wah* that it preferred the opinion of the psychiatrist for the prosecution to that of the psychiatrist for the defence failed to adequately explain why the element of abnormality of mind was therefore not established.[18]

The next case for consideration is *Mansoor s/o Abdullah & Anor* v *PP*.[19] The defence psychiatrist testified that the accused suffered from schizophrenia at the time of killing which affected his ability to control his acts of stabbing. In contrast, the psychiatrist called by the prosecution was of the view that the accused did not suffer from an abnormality of mind because he had given a clear and consistent account of the stabbing. The trial judges based their rejection of the defence of diminished responsibility by preferring this latter opinion. Additionally, they noted that the accused had displayed complete self-control immediately after the stabbing.[20] By way of criticism, the judges appear to have lost sight of the disjunctive nature of the *Byrne* definition. The definition clearly envisages a person with an abnormality of mind who lacked the power of self-control although he or she may have fully understood the nature of the act performed and that it was wrong. Hence, just because the accused was fully aware of the event of stabbing did not negate his abnormality of mind since his abnormality took the form of an impaired capacity to control his actions. Regarding the finding that the accused had exercised complete self-control after the killing, the judges appear to have ignored or downplayed the defence psychiatrist's explanation

[18] For another case of a similar nature, see *Contemplacion* v *PP* [1994] 3 SLR 834. There, the court should have explained (at 841) that the accused's ability to select and steal valuable items from the house where the killings had occurred showed that she possessed full capacity to understand events, judge the rightness or wrongness of her actions, and control herself.

[19] [1998] 3 SLR 719.

[20] *Ibid,* at 731.

that the accused had regained his self-control after the stabbing which had served as a cathartic event.[21] A diligent judicial adherence to the *Byrne* definition would have avoided these errors.[22]

As a final example, I consider the case of *Tan Mui Choo & Anor* v *PP*,[23] At the trial, a psychiatrist gave evidence on behalf of the accused who had been charged with murder of two young children. The psychiatrist diagnosed her as suffering from reactive depressive psychosis at the time of the killings. He explained that "although [the accused] knew the nature of her acts and that they were contrary to law she nevertheless committed the offences under compulsion and the perceptual delusion that the ritual of consuming blood and child sacrifice was in keeping with her faith in the Hindu deity Goddess Kali".[24] The trial judges rejected this opinion by preferring the view of the psychiatrist called by the prosecution that the accused did not suffer from reactive depressive psychosis. This finding aside, the judgment would have been improved considerably had the judges queried whether the defence psychiatrist's diagnosis actually satisfied the *Byrne* definition. For instance, they could have asked the psychiatrist what he meant by "compulsion", bearing in mind that the *Byrne* definition only recognises volitional defects involving an incapacity to exercise self-control. Hence, compulsion from an external source, such as threats of violence from a co-accused as had happened in this case, will not suffice. On the other hand, the judges could have found that the psychiatrist's explanation of perceptual delusion was in keeping with the first two types of manifestations under the *Byrne* definition. Thus, by opining that the accused knew the nature of her act and that it was contrary to law, the psychiatrist was saying that he believed the accused not to be of unsound mind under section 84 of the Penal Code. However, consistent with the concept of an abnormality of mind under the defence of diminished responsibility, the psychiatrist was opining that the accused had suffered a reduced capacity to understand the nature of her act or that it was wrong. A judicial evaluation of the medical

[21] *Ibid*, at 728.

[22] For another case of a similar nature, see *Chua Hwa Soon Jimmy* v *PP* [1998] 2 SLR 22. There, the defence expert witness had testified that the accused was suffering from a psychosis which was borne out by auditory and visual hallucinations of him being confronted by a ghost. The court held (at 33) that the accused had not established an abnormality of mind because he was capable of exercising self-control. This runs counter to the *Byrne* definition which recognises an abnormality of mind in a person such as the accused in this case who possessed self-control but suffered from an impaired capacity to understand events or to judge that his conduct was wrong.

[23] [1987] 1 MLJ 267.

[24] *Ibid,* at 270.

evidence in this way would have enhanced the development and understanding of the law of diminished responsibility as well as the related defence of unsoundness of mind.[25]

The above cases show that there is much room for improvement in the handling of the element of abnormality of mind by both judges and medical experts. The ready solution is for our judges to keep clearly in mind the three possible manifestations of an abnormality of mind contained in the *Byrne* definition, and to require medical witnesses to present their findings and opinions according to one or more of those manifestations.

### *Relevant Time of Occurrence of Abnormality of Mind*

Since the question of whether an accused had suffered from an abnormality of mind is to be determined by the trier of fact, it follows that medical evidence is not conclusive of the issue. The English Court of Appeal in *Byrne* put the matter thus:

> Whether the accused was at the time of the killing suffering from any 'abnormality of mind' in the broad common sense which we have indicated above[26] is a question for the jury. On this question, medical evidence is, no doubt, of importance, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour.[27]

Similarly, the Privy Council in *Walton* v *The Queen* has held that:

> [T]he jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the accused before, at the time of and after it and any history of mental abnormality.[28]

[25] For another case example of a similar nature, see *PP* v *Vasavan Sathiadew & Ors* [1990] 1 MLJ 151 where the judgment could have been improved by requiring the defence psychiatrist to explain how the accused's acute reactive depression affected his capacity in one or more of the three ways mentioned in the *Byrne* definition.

[26] See the quotation in the main text accompanying *supra,* note 7.

[27] [1960] 2 QB 396 at 403.

[28] (1978) 66 Cr App R 25 at 30.

These rulings have been approved of and applied by our courts.[29] However, it is submitted that, when doing so, they have on occasions failed to fully appreciate that the evidence tendered must support or rebut the claim that the accused had suffered from an abnormality of mind *at the time of the killing*. This is especially so when the evidence was of the accused's conduct or demeanour a considerable period of time after the event of killing. Surely, while the judicial comments quoted above speak of the accused's acts, statements and demeanour after the killing, common sense requires these to be confined to a relatively short period after the killing. Hence, a psychiatrist interviewing an accused may properly take into account the accused's acts, statements and demeanour at the time of the interview. However, should the interview have occurred many months or even years after the event of killing, the psychiatrist must be very clear that these statements, acts and demeanour are only relevant if they reveal the accused's mental condition, not at the time of the interview, but when the killing occurred. Likewise, a court hearing the testimony of an accused or observing her or his demeanour while in the witness box, should be very sure that the accused's statements and demeanour reflect her or his mental condition at the time of the killing and not simply at the time of the trial.

An instance where the court may not have been sufficiently on guard against the above danger is *Contemplacion* v *PP*.[30] The trial judge, in rejecting the accused's claim that she was of abnormal mind, relied partly on his personal observation that when giving evidence, she was "nimble in thought and quick to answer questions, and that she was a wilful and cunning person".[31] Might not this observation have been of a mind which, having recovered fully by the time of the trial, was desperately seeking through lies to avoid a murder conviction? If so, while the accused's statements in the dock were perjurious, they should not have been treated as evidence of her mental condition at the time of the killings. In this respect, the trial judge should have given more weight to the defence psychiatrist's opinion that sufferers of temporal lobe epilepsy such as the accused "appear perfectly normal at all times other than immediately preceding, during and immediately

[29] For example, see *Tan Mui Choo* v *PP* [1987] 1 MLJ 267 at 269; *Sek Kim Wah* v *PP* [1988] 1 MLJ 348 at 351; and *Contemplacion* v *PP* [1994] 3 SLR 834 at 844.

[30] [1994] 3 SLR 834.

[31] *Ibid,* at 844 and subsequently endorsed by the Court of Criminal Appeal. For another case where the trial judge relied on the accused's demeanour at the trial to reject the claim of an abnormality of mind, see *Tan Mui Choo & Anor* v *PP* [1987] 1 MLJ 267 at 270-271.

[32] *Ibid.*

following a seizure".[32]

Another instance suggesting that our judges may be unduly lax in requiring the evidence to point to the accused's mental condition at the time of the killing rather than at a later time is *Lim Chin Chong* v *PP*.[33] The trial court received a report from the defence psychiatrist which stated in part that, in the psychiatrist's opinion, "[e]xamination of [the accused's] present mental state showed he was rational and relevant in his speech. He did not show any thought disorder and did not express any delusion or hallucination."[34] On appeal against the accused's conviction for murder, the Court of Criminal Appeal described this part of the report as "puzzling".[35] The court would not have been so puzzled had it appreciated that the psychiatrist was making observations of the accused's mental condition at the time of his interview with the accused and not, as the court seems to have thought, at the time of the killing.

Of course, these judicial slips have not always occurred. *Chia Chee Yeen* v *PP*[36] is a good case example where the court properly ensured that evidence relating to an accused's abnormality of mind revealed her or his mental state at the time of the killing and not after. There, the trial judges confined their observations to evidence of the accused's conduct "*shortly* before and after"[37] the killing to indicate his mental condition when the killed took place. Later on in their judgment, the trial judges expressed their appreciation that the reactive psychosis allegedly suffered by the accused could last for only a short duration and that it was very important to consider "the acts and the conduct of the person during the relevant period in question".[38] For a proper determination of the defence of diminished responsibility, our judges should be very careful to view the evidence of abnormality of mind strictly according to what it might reveal of the accused's mental state at the time of the killing and not at any subsequent time.

## II. Causes of Abnormality of Mind

The second element required to be established for the defence of diminished responsibility to succeed is that the accused's abnormality of mind must

[33] [1998] 2 SLR 794.
[34] *Ibid,* at 804.
[35] *Ibid.*
[36] [1991] 3 MLJ 397.
[37] *Ibid,* at 399. Emphasis added.
[38] *Ibid.*

have stemmed from one of the prescribed causes listed in Exception 7 to section 300 of the Penal Code.[39] These are an arrested or retarded development of mind, an inherent cause, and a disease or injury. This element is, by its very nature, to be determined solely by medical experts. A study of Singaporean cases shows that, while medical witnesses do provide detailed reports to the courts on the accused's mental condition, these nearly always involve scientific criteria and terminology with little or no reference to the prescribed causes listed in the Exception. It is submitted that the determination of diminished responsibility cases would be improved considerably were trial judges to require medical witnesses to identify which prescribed cause, if any, in their opinion gave rise to the accused's abnormality of mind. This is because a finding that an accused suffered from a particular mental disorder recognised by the medical profession may not always establish a prescribed cause mentioned in the Exception. Furthermore, requiring expert witnesses to identify the relevant prescribed cause will ensure that this second element of the defence is not overlooked altogether by the court.

The judgment in *Zainul Abidin bin Malik* v *PP* [40] provides a good illustration of the above criticism. During the trial, the psychiatrist called by the prosecution testified that the accused suffered from a sexual disorder which caused him to indulge in sexual fantasies and to masturbate excessively. The accused also had a body dysmorphic disorder due to his pimple scars causing him great distress. In the psychiatrist's opinion, the accused's sexual disorder provided him with an outlet for his frustrations with the result that he was able to possess tremendous self-control at the time of the killing. The court, when accepting this opinion, did not require the psychiatrist to decide whether these disorders fell within one of the prescribed causes under the Exception. Nor did it ask the psychiatrist to confirm whether he believed that these disorders could not have given rise to one of the manifestations of an abnormality of mind under the *Byrne* definition. The judgment in this case would have been improved considerably had the court made the psychiatrist attend to these matters. This would have resulted in a clear and detailed examination of the second element of the defence, not just in the identification of a prescribed cause, but also in the need to have such a cause connected causally to the accused's abnormality of mind for the defence to succeed.

[39] See *R* v *Byrne* [1960] 2 QB 396 at 403 and approved of in *Cheng Swee Hin* v *PP* [1981] 1 MLJ 1 at 3; *Sek Kim Wah* v *PP* [1988] 1 MLJ 348 at 351; and *Chua Hwa Soon Jimmy* v *PP* [1998] 2 SLR 22 at 30. See also the New South Wales cases of *R* v *Purdy* [1982] 2 NSWLR 964 at 966; *R* v *Tumanako* (1992) 64 A Crim R 149 at 160.

[40] [1996] 1 SLR 654.

[41] [1988] 1 MLJ 348.

Another case worthy of examination is *Sek Kim Wah* v *PP*.[41] In the course of the trial, a psychiatrist called by the defence opined that the accused had, at the time of killing, suffered from an abnormality of mind arising from a retarded development brought about by the absence of a stable family structure throughout his childhood and adolescence. Another defence psychiatrist testified that the accused had suffered from a psychopathic personality disorder which arose from an inherent cause as well as from environmental causes. In rebuttal, the psychiatrist called by the prosecution opined that the accused did not have an abnormality of mind because "there was no evidence to show that he suffered from any mental illness or psychopathic personality disorder".[42] Ultimately, the court preferred the opinion of the psychiatrist for the prosecution and rejected the defence of diminished responsibility. This may well have been the correct conclusion in the light of all the evidence. However, the judgment could have been improved had the court spelt out fully what it was that the psychiatrist for the prosecution was saying in relation to the second element of the defence. Unlike the two defence psychiatrists, the psychiatrist for the prosecution appears not to have presented his opinion according to the prescribed causes under the Exception. Certainly, the psychiatrist's statement that the accused did not suffer from any mental illness or psychopathic personality disorder might imply that, in his opinion, the accused had not suffered from a "disease" nor from an "arrested or retarded development of mind". However, in addition to these causes, the Exception recognises "inherent causes" and "injuries". Accordingly, the court should have required the psychiatrist to indicate clearly whether it was his opinion that none of the prescribed causes recognised by the Exception were present in the accused.

### *Intoxication as a Cause of Abnormality of Mind*

Directly related to the above criticism of our judges' failure to deal properly with the second element of the defence, is their poor handling of cases involving intoxicated accused persons claiming the defence. Unlike the law in Singapore, the laws of England and New South Wales on the relevance of intoxication in diminished responsibility cases is clear. In these jurisdictions, intoxication on its own does not come within the defence of diminished responsibility. It has been excluded on the basis that such intoxication

[42] *Ibid,* at 350.

does not cause damage or destruction of brain cells but only temporarily affects the way they function and is therefore not an "injury" under the statutory provision.[43] The defence may, however, succeed where an accused suffers from a pre-existing condition such as substantial brain damage arising from past substance abuse. In such a case, it must be shown that it is the brain damage and not simply the temporary state of intoxication which has caused the abnormality of mind.[44] As an English court has put it, the trier of fact must be asked:

> Has D satisfied you on the balance of probabilities 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?[45]

Where drug addiction is concerned, the English courts have held that an involuntary craving for alcohol may fall within the defence.[46] This is because the abnormality of mind stems from chronic alcoholism which may be described as a "disease" under the statutory provision.

This brief outline of the laws of England and New South Wales shows that the courts of those jurisdictions were able to resolve the connection between intoxication and diminished responsibility by adhering closely to the second element of the defence. Unfortunately, the same development has not occurred in Singapore because our judges have given scant attention to this element. The examination of a few cases will bear this out.

In *Tan Mui Choo* v *PP*[47] the defence psychiatrist had testified that at the time of the killings the accused was suffering from reactive depressive psychosis. The psychiatrist also testified that at the material time, the accused's

[43] *R* v *Tandy* [1989] 1 All ER 267; *R* v *Jones* (1986) 22 A Crim R 42; *R* v *DeSouza* (1997) 41 NSWLR 656. Alternatively, it has been held that there is no evidence of an abnormality of mind arising from intoxication so as to satisfy the first element of the defence: see *R* v *Fenton* (1975) 61 Crim App R 261. In other words, a reasonable person would not regard as abnormal the temporary effects of alcohol or other drugs on the mind of a mentally healthy person.

[44] *R* v *Egan* [1992] 4 All ER 470 at 476; *R* v *Jones* (1986) 22 A Crim R 42 at 44; *R* v *Ryan* (1995) 90 A Crim R 191 at 196.

[45] *R* v *Atkinson* [1985] Crim LR 314, approving the commentary by JC Smith of *R* v *Gittens* [1984] QB 698 in [1984] Crim LR 553 at 554.

[46] *R* v *Tandy* [1989] 1 All ER 267. There is no New South Wales case authority on this point. See Lee Kiat Seng, "Diminished Responsibility and Alcoholism: *R* v *Tandy*" [1990] 1 MLJ (i) who, having observed that this area of Singaporean law is uncertain, calls for *Tandy* to be adopted by our courts.

[47] [1987] 1 MLJ 267.

psychosis "persisted by 'the continual use of psychotropic drugs, electrical shocks and threats of psychological and physical assaults' which were all administered by" the co-accused.[48] The criticism was made earlier that the judges should have rejected compulsion from threats of violence because it was not a manifestation of abnormality of mind falling within by the *Byrne* definition.[49] Having now discussed the second element, I note that the judges could also have rejected this evidence for failing to come under one of the prescribed causes listed in the Exception. For the same reason, the judges should have excluded the intoxicating effect of psychotropic drugs on the accused. They would then be left to consider whether the accused would still have been suffering from reactive depressive psychosis at the time of the killing had she not been threatened by the co-accused or been under the influence of drugs.

*Jamaludin bin Ibrahim* v *PP*[50] is another case where evidence of intoxication was admitted for the purpose of establishing the defence of diminished responsibility when it should not have been. The defence psychiatrist had testified that there was a possibility that the accused suffered from schizophrenia which, when combined with an overdose of valium, resulted in paradoxical rage.[51] The trial judge eventually rejected the defence, partly on the ground that he disbelieved the accused's story that he had overdosed on valium.[52] A proper application of the law would have required the judge to reject the alleged overdose of valium outright (quite apart from whether such overdose had occurred or not) on the ground that it was not a prescribed cause of abnormality of mind recognised by the defence. The judge would then have been left to examine in greater detail the claim of schizophrenia to determine whether such a recognised form of prescribed cause (namely, a "disease"), standing on its own, had caused the accused to suffer from an abnormality of mind at the time of the killing.

This brief survey of Singaporean cases on diminished responsibility reveals that the judicial determination of the second element of the defence leaves much to be desired. Only when our judges give their full and proper attention to this element, as required by the model propounded in *Byrne*, will cases involving the defence be properly decided. Under this model,

48 *Ibid,* at 270.
49 When discussing the case of *Tan Mui Choo* v *PP:* see the main text accompanying *supra,* note 23.
50 [1995] 2 SLR 47.
51 *Ibid,* at 52-53.
52 *Ibid,* at 55.

medical witnesses will be required to frame their opinions by reference to the prescribed causes listed in the Exception, and evidence of intoxication will be rejected outright[53] unless it supported a prescribed cause such as brain injury[54] or a drug-related disease.[55]

## III. Substantial Impairment of Mental Responsibility

The third element of the defence, as outlined by the model devised in *Byrne*, involves the determination of whether the accused's abnormality of mind so substantially impaired her or his mental responsibility for the killing that a murder conviction was unwarranted. Since this is a moral question, it is for the judges rather than medical experts to determine. Yet, expert witnesses often give evidence in our courts as to whether or not they consider the accused's mental responsibility to be substantially impaired, and our judges appear to rely heavily on these opinions.[56] Hence, the criticism made elsewhere,[57] that the defence of diminished responsibility opens the way to abdication of responsibility by the jury because of excessive reliance on the opinions of expert witnesses, applies equally to our judges who have replaced the jury.

Judicial elaboration of the way this third element of the defence is to be determined is scant. The available authorities state that "substantial impairment" does not mean total nor minimal but is somewhere in between and this is matter for the judge/jury to decide in a commonsensical way.[58]

[53] See further *Somwang Phatthanasaeng* v *PP* [1992] 1 SLR 850 at 853; *Mohd Sulaiman* v *PP* [1994] 2 SLR 465 at 475; and *Chua Hwa Soon Jimmy* v *PP* [1998] 2 SLR 22 at 31 for other examples of cases where the court should have rejected evidence of intoxication on the ground that such evidence did not constitute a prescribed cause recognised by the defence.

[54] A possible Singaporean case example of this is *Ng Soo Hin* v *PP* [1994] 1 SLR 105 at 117 where the accused had alleged that he suffered brain damage due to long term exposure to glue-sniffing.

[55] There does not appear to be any Singaporean case law on this issue.

[56] For example, see *Freddy Tan* v *PP* [1969] 2 MLJ 204 at 204; *Mimi Wong* v *PP* [1972] 2 MLJ 75 at 80; *Tan Mui Choo* v *PP* [1987] 1 MLJ 267 at 272; *Contemplacion* v *PP* [1994] 2 SLR 834 at 838; *Zainal Abidin bin Malik* v *PP* [1996] 1 SLR 654 at 660.

[57] Law Reform Commission of Victoria, Report 34, *Mental Malfunction and Criminal Responsibility* (Melbourne, 1990), at para 143; New South Wales Law Reform Commission, *supra*, note 12, at para 3.60.

[58] See *Chua Hwa Soon Jimmy* v *PP* [1998] 2 SLR 22 at 33, following *R* v *Lloyd* [1967] 1 QB 175 at 178-179. See also the New South Wales cases of *R* v *Trotter* (1993) 35 NSWLR 428; and *R* v *Ryan* (1995) 90 A Crim R 191.

Furthermore, it was said in *Byrne* that "[t]he expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts".[59] It will be evident that these rulings say the obvious and are not particularly helpful.

Law reform bodies reviewing this third element of the defence have observed that the present wording fails to emphasize sufficiently the moral nature of the inquiry and, specifically, whether the accused's abnormality of mind at the time of the killing warranted the exercise of compassion by having her or his charge reduced from murder to manslaughter. This has led the English Criminal Law Revision Committee to propose reformulating this element in terms of there being "substantial enough reason to reduce his offence to manslaughter".[60] Similarly, the New South Wales Law Reform Commission proposed replacing the present formulation with the words:

> that person's capacity to (a) understand events; or (b) judge whether that person's actions were right or wrong; or (c) control himself or herself, was so substantially impaired by an abnormality [of mind] ... as to warrant reducing murder to manslaughter.[61]

The New South Wales reformulation is to be preferred to the English one because it directly connects the moral question of reduced moral culpability with the degree of mental incapacity in the accused to understand the event of the killing, judge the rightness or wrongness of the killing, or to control the act of killing. In so doing, this reformulation, unlike the English proposal, indicates the nature of the criteria which are to guide the decision to acquit of murder and to convict of manslaughter on the ground of diminished responsibility.[62]

It is submitted that there is nothing whatsoever to prevent our judges from adopting the New South Wales reformulation.[63] This is because the reformulation merely clarifies the third element of the defence without altering its nature. What it does is to flush out in detail the requirements

[59] This statement was cited with approval in *Sek Kim Wah* v *PP* [1988] 1 MLJ 348 at 351; and *Chua Hwa Soon Jimmy* v *PP* [1998] 2 SLR 22 at 29.

[60] Criminal Law Revision Committee, Report 14, *Offences against the Person* (London, HMSO, Cmnd 7844, 1980) at para 93. See also the English Law Commission, No 177, *Criminal Law: A Criminal Code for England and Wales* (London, 1989), cl 56 of the draft Criminal Code.

[61] New South Wales Law Reform Commission, *supra,* note 12, recommendation 4, at 51.

[62] See *ibid,* at para 3.58.

[63] Except, of course, to replace the expression "manslaughter" with "culpable homicide not amounting to murder" so as to accord with the wording of the Penal Code.

of the third element, namely, an examination of the degree of mental incapacity suffered by the accused (in terms of the three manifestations of abnormality of mind under the *Byrne* definition), and a determination of whether such incapacity was substantial enough to warrant reducing the charge of murder to culpable homicide not amounting to murder.

When the New South Wales legislature came to adopting the recommendations of the Commission, it was of the view that the statutory provision should be very clear that it was for the jury, not medical experts, to determine the third element. To achieve this, the legislature added the following clause to the revised provision on diminished responsibility:

> Evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.[64]

There is again nothing whatsoever to prevent our judges from adopting this clause in practice. They could do so by refusing to admit medical expert opinion on whether an accused's abnormality of mind was such as to substantially impair her or his mental responsibility for murder. Doubtless, such a ruling would quickly cause medical experts to desist from giving such opinions.

The case of *Lim Chin Chong* v *PP* [65] is examined here to illustrate the vague and disorganised manner in which our judges have dealt with this third element of the defence. During the trial, the defence psychiatrist opined, without demur from the court, that the accused was suffering from acute adjustment disorder which was an abnormality of mind of such severity as to have substantially impaired his mental responsibility for his acts.[66] The court heard that this disorder was the cumulative effect of the accused being sent for adoption at a young age, his adoptive mother dying when he was four years of age, his adoptive father remarrying and the lack of love which the father and his new wife gave to the accused, and the accused running away from home and being duped into becoming a male prostitute when he was really a heterosexual. The court also heard that the breaking point came when the deceased propositioned the accused to kiss and engage

[64] Revised s 23A(2) of the *Crimes Act* 1900 (NSW).

[65] [1998] 2 SLR 794.

[66] *Ibid,* at 803-804. Following the preceding discussion, the court should have rejected this opinion outright.

in anal intercourse with him. The court rejected this evidence in the following terms:

> If this is all it takes to set up the defence of diminished responsibility then society will run amok with many of these 'sufferers' killing others at the spur of the moment and then hiding behind a shield of 'abnormality of the mind' to lessen the gravity of their crimes.[67]

This comment confuses rather than clarifies the nature and function of the defence. For one thing, it appears to ignore the excusatory nature of the defence with its emphasis on just deserts (and thus the need to reflect the accused's impaired mental capacity in the charge), stressing instead the need for deterrence. Furthermore, the comment is a generalised one without any real reference to the elements of the defence. The judgment would have been much improved had the court based its rejection of the defence psychiatrist's evidence by reference to the first and third elements. In relation to the first, the court could have required the psychiatrist to indicate which of the three manifestations, if any, of abnormality of mind under the *Byrne* definition a person suffering from acute adjustment disorder would experience.[68] If the court was satisfied that the first element had been established, it could then have proceeded to consider the third element. This would have required the court to determine whether the identified manifestation of abnormality of mind was of such a degree as to warrant reducing the charge of murder to culpable homicide not amounting to murder.[69] The court could then have explained why it had decided to reject the defence by recasting the above quoted comment to say that it did not regard the accused's abnormality of mind as warranting such a reduction.

## IV. Conclusion

[67] *Ibid,* at 804.

[68] Later in its judgment, at 804-805, the court referred with approval to the evidence of the psychiatrist called by the prosecution. That psychiatrist had said that symptoms of acute adjustment disorder included "significant impairment in personal, social or vocational functioning". To a layperson, such a description looks as if it covers one or more of the manifestations under the *Byrne* definition, Yet, the psychiatrist had opined that the disorder did not constitute an abnormality of mind and the court agreed with his opinion without elaboration. The court should have clarified the matter by requiring the psychiatrist to explain why he thought that those symptoms fell outside the *Byrne* definition.

[69] The psychiatrist for the prosecution, at 805, gave his opinion on this third element. He said that, since he believed that the accused was not suffering from an abnormality of mind, there could be no impairment of mental responsibility by such an abnormality as required by the third element. This may be so, but the court should have disallowed the psychiatrist from opining about this element.

This survey of Singaporean cases on the defence of diminished responsibility shows that our judges have generally dealt with the elements of the defence in a haphazard manner, and placed undue reliance on medical expert opinion. The solution to these deficiences is the simple one of following the model formulated by the English Court of Appeal in *Byrne*. Bearing in mind the various shortcomings of our judges when handling the defence, the model may be presented to our judges as a series of questions which they should be careful to answer:–

1. Whether, at the time of the killing, the accused was suffering from an abnormality of mind which manifested itself in a reduced capacity to understand events, or to judge between right and wrong, or to exercise self-control.
   When answering this question, judges should take into account any evidence, including medical expert opinion, which revealed the accused's mental state *at the time of the killing*, and not at any other time.

2. Whether the abnormality of mind had arisen from one of the causes listed in Exception 7 to section 300, namely, a condition of arrested or retarded development of mind, an inherent cause, or a disease or injury.
   When answering this question, judges should rely solely on the opinions of medical experts. However, they should require these experts to frame their opinions according to those prescribed causes, and not just in medical terms. Judges should also require medical experts to exclude the intoxicating effects of alcohol or other drugs from their deliberations.

3. Whether the abnormality of mind arising from one of the prescribed causes was so substantial as to impair the accused's mental responsibility for murder.
   When answering this question, judges should determine whether the manifestation of abnormality of mind suffered by an accused was of such a degree as to warrant the exercise of compassion by reducing the charge of murder to culpable homicide not amounting to murder. Judges should refuse to allow medical witnesses to give their opinions about this matter.

In conclusion, it is worthwhile recalling the following comment by Thomson LP when presiding over the first Singaporean case on diminished responsibility:

> The law relating to murder [of which the defence of diminished responsibility is a part] ... is the most fundamental portion of all our law. It governs the conditions in which society may take away life; an error in its application may be such that it can never be repaired.[70]

Doubtless, his Honour had in mind the carrying out of the mandatory death penalty on persons convicted of murder. In order to guard against any errors in the application of the defence of diminished responsibility, our judges should henceforth follow closely the clear and systematic approach devised in *Byrne*.

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[70] *Mohamed bin Jamal* v *PP* (1964) 30 MLJ 254 at 256.

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