DIMINISHED RESPONSIBILITY: BALM OR BANE?

I. INTRODUCTION

The defence of diminished responsibility has been at large in the common law of crimes for over 100 years.[1] As a legal concept, it denotes a state of mind falling short of legal insanity, but embracing a wide range of mental disorders, including defective volitional and emotional states.

In popular discussion, it is sometimes supposed that diminished responsibility is simply a convenient device for circumventing the harshness of traditional penalties for murder, in cases where there may be some dispute as to a particular defendant's sanity — such that, to punish on the basis of full responsibility, would seem unduly severe. On this view the doctrine has a certain practical value, although perhaps little justification as an independent legal concept. Many would argue that mitigation of penalty is a more appropriate means of making allowance for abnormal states of mind.[2]

Opposed to this seemingly negative view is the notion that diminished responsibility exists as a fully consistent legal concept, on the basis that the traditional boundaries of legal insanity are unnecessarily restrictive and fail to account for the great diversity and complexity of mental and emotional states with which the law is necessarily concerned. On this view the doctrine has legal validity going beyond mere convenience and providing a substantive defence in cases where responsibility is impaired by mental disorder.

There is a third view which essentially represents the present position in New Zealand law where the term "diminished responsibility" has "found no place".[3] This position, simply stated, suggests that there is no particular validity for such a defence, because the death sentence has already been abolished.[4] Such a view, it will be suggested, is somewhat shortsighted and fails to appreciate the potential breadth of this palliative defence.

Modern discussion in favour of the defence of diminished responsibility points to the fact that in those jurisdictions where the defence has been introduced, there has been a drop in the number of persons acquitted on the ground of insanity, with a corresponding increase in the number of convictions for manslaughter on the basis of diminished responsibility.[5] In the vast majority of cases convictions are entered upon the basis of pleas of guilty to manslaughter, without dispute over medical evidence. It is argued therefore that diminished responsibility represents a useful addition to the courts' means of disposing of mentally disordered offenders. Furthermore it is able to accommodate useful developments in modern forensic psychiatry, and to embrace "just about all types of pathological mental abnormality"[6] without sacrificing the notion of

1 The doctrine has its origin in Scots law "where it has apparently always been part of the common law of Scotland", *per* Lord Goddard in *R* v *Spriggs* [1958] 1 QB 270.

2 This, of course, is precisely what diminished responsibility does, except that in sentencing the accused is protected by law and not simply by the "rightmindedness" of the sentencing judge.

3 Garrow & Caldwell, *Criminal Law in New Zealand*.

4 ". . . if the clause relating to capital punishment goes out so also should the clause dealing with diminished responsibility", *per* H. G. R. Mason 10/328 *NZ Parit. Deb.*, 2691.

5 Susanne Dell observes that the high rate of success enjoyed by the defence is not a new phenomenon. It succeeded in more than 70% of the cases in which it was raised in the first two years of its operation. See Dell, *Diminished Responsibility Reconsidered* [1982] *Crim LR* 809 at 812.

6 Including "mercy killers, deserted spouses or disappointed lovers who killed while in a state of depression, persons with chronic anxiety state. . . ." Smith & Hogan, *Criminal Law* 4th ed London (1978), 181.

responsibility in the criminal law. The purpose of this paper is to suggest that the doctrine of diminished responsibility commends itself as a humane addition to the McNaghten rules, whose intellectual frame of reference has become an embarrassment to lawyers and a goad to psychiatrists.

II. DIMINISHED RESPONSIBILITY AND THE CRIMES ACT 1961

The New Zealand Crimes Bill 1960 contained a provision that would have introduced a type of diminished responsibility defence to murder into New Zealand law. By Clause 180 of the Bill, the defence would have been established if "the jury are satisfied that at the time of the offence the person charged, though not insane, was suffering from a defect, disorder, or infirmity of mind to such an extent that he should not be held fully responsible". The clause signified an apparent rejection of the English criteria of diminished responsibility. In addition, Clause 187(2) provided that where the jury returns a special verdict of manslaughter, on the ground of diminished responsibility, the sentence is to be one of detention during Her Majesty's pleasure.[7] The clause was initially inserted in the Bill during the Labour Administration, but was omitted when the Crimes Act was passed in 1961. The deletion of the diminished responsibility clause appears to have been primarily attributable to the then Attorney-General, the Hon. J. R. Hanan, who expressed the intention, during the Parliamentary readings of the Bill, that in the event of the death penalty being abolished he would move the omission of the diminished responsibility clause.[8] The argument, as it appears from the Parliamentary Debates, was that, while diminished responsibility provides in effect an easing of the rigid McNaghten rules, the demise of capital punishement renders the putative effects of diminished responsibility superfluous. However, it is the writer's view that the omission of diminished responsibility provisions from the Crimes Act 1961 suggests a failure by the legislature at the time to understand the wider implications of the doctrine, and an unwillingness to come to grips with the inadequacies of the McNaghten rules.

It is noteworthy that as early as 1879 the Criminal Code Bill Commission, in its Report on the Law relating to Indictable Offences, had acknowledged the principle that, where an offender was inflicted with some unsoundness of mind, but not to such a degree as to render him irresponsible, the judge should have the power to apportion punishment to the degree of criminality, making allowance for the weakened or disordered intellect.

Although regrettably this principle was not ultimately reflected in the Criminal Code Act of 1893 and in subsequent enactments of the Crimes Act, it is a principle which has found its way in statutory form into many common law jurisdictions through variants of the diminished responsibility defence.[9] It is regrettable that successive New Zealand administrations have hitherto failed to seriously consider this defence in the wider context of the criminal insanity provisions. The recent suggestion of the Minister of Justice[10] — that the

7 As opposed to the position in England where, instead of being compelled to send the mentally abnormal person to a mental hospital, the Court may sentence him to imprisonment, put him on probation, or make a hospital order as it thinks appropriate.

8 *Cf* Comments of Hon. H. G. R. Mason, n 4, *supra*.

9 *Cf* Homicide Act (1957) (UK), s 2; s 234 New South Wales Crimes Act, Act No 50 (1974); Queensland Criminal Code, s 304A; Offences Against the Person (Amendment) Act (1973), s 314 (Barbados); Bahama Islands Homicide (Special Defences) Act (1959), s 2(1).

10 [1981] NZLJ 113 at 114.

McNaghten rules and Crimes Act provisions may not remain relevant in the light of modern medical knowledge — is therefore not without significance. The Minister's assessment that the present rules are "black and white in approach, long-winded and obscure in application, and downgrade the relevance of an offender's mental state generally at trial and at sentencing"[11] suggests a more expansive approach to the problem of mental abnormality and crime, and may also suggest — at least tentatively — an inclination towards the concept of diminished responsibility. Indeed, in the same context, it is suggested that the Minister's primary concern is not with those who are mentally disordered in terms of the Mental Health Act 1969, but "with those who suffer a lesser degree of mental disturbance".[12] It is to be hoped, therefore, that the growing concern regarding the relevance of the McNaghten rules will also coincide with the willingness to widen discussion of diminished responsibility and to examine its claims with more earnestness than has been evident in the past.

It should perhaps be noted that the McNaghten rules have been the subject of perennial criticism since their formation 150 years ago. They are criticised as legally hidebound in their definition of what constitutes mental disorder, unrealistic in the exclusion of many persons suffering from delusions, and unduly restrictive in concerning themselves only with intellectual disfunction. While these rules have served the law by providing an objective means of evaluating criminal responsibility, movements in modern psychiatry have rendered them increasingly anachronistic.

In advocating diminished responsibility, therefore, the writer's purpose is not to suggest the complete abolition of the present rules but rather their supplementation by provisions which reflect the totality of modern understanding of the functioning of the mind in all its aspects.

III. SOME THEORETICAL CONSIDERATIONS

Essentially, diminished responsibility is a recognition of the fact that a mentally abnormal defendant, who has difficulty in controlling his anti-social impulses or appreciating the moral significance of his actions, is already less culpable in the law's evaluation. It allows the Court to make a more individualised judgment as to culpability.[13] On the other hand, it is sometimes argued against the doctrine that, in appearing to establish a middle ground of partial responsibility, diminished responsibility is inconsistent with the criminal law's view that the defendant is either criminally responsible for his act and therefore liable to punishment, or *not* responsible and entitled to acquittal.

Where diminished responsibility is claimed, there is not absolute incapacity with regard to elements of control. Yet there is a deviation from normal capacity which is sufficiently great to make a limitation on accountability desirable. As a palliative doctrine it "offers a path for receiving into the law insights about many varieties of limited impairment affecting control and conduct".[14] Its rationale can be simply expressed. If a person who is incapacitated cannot have blame imputed to him, a person who is seriously impaired short of incapacitation is blameworthy only within limits.[15] Where there is such a diminishment of

11 *Ibid.*
12 *Ibid.*
13 Arenella, *The Diminished Capacity and Diminished Responsibility Sentences* 77 *Col LR* 827 at 856.
14 Gross, *A Theory of Criminal Justice*, New York, 1979, 310.
15 *Ibid*, 311.

resources required for culpability, it is inappropriate that full responsibility should be imputed against inappropriate conduct. However, while the logic of this reasoning seems unarguable, there exists one theoretical difficulty that has never been adequately answered. In a lecture delivered at Cambridge under the auspices of the Institute of Criminology in February 1960, Barbara Wootton has argued that responsibility is essentially a metaphysical concept that is incapable of being assessed by psychiatric science or indeed any other means.[16] Her suggested solution is to allow the concept of responsibility to wither away by refraining from raising the issue of responsibility at all. "Psychiatrists need no longer masquerade as moralists, but can return to their proper role of applied scientists analysing courses, predicting developments, and indicating methods of control".[17] We are invited to forget responsibility and ask not whether an offender ought to be punished, but simply whether he is likely to benefit from punishment. Wootton's concern is that, while psychiatric science is well able to detect abnormal propensity to crime, to infer diminished responsibility from such increased propensity to crime is not a matter of scientific inference but an act of faith. Her argument is that science is unable to say whether a person can or ought to control conduct but can only answer the question of whether or not a person does in fact control his or her conduct. On this basis she argues diminished responsibility is a meaningless concept because it is powerless to investigate matters of will where the "evidence lies buried in another man's consciousness, into which no human being can enter".[18]

From the point of view of strict logic, Wootton's arguments may well be unanswerable, but as a matter of practical necessity the law has often shown itself willing to accommodate logical inconsistencies in order to secure the fair administration of justice.[19] The very nature of the concept of diminished responsibility may suggest one of those occasions where the strict requirements of logic may need to bend in favour of a fair and humane means of dealing with mentally abnormal offenders.

In any event, insofar as English common law is concerned, the doctrine of diminished responsibility owes its development primarily to pragmatic considerations rather than to reasoned juristic analysis. In the same way as the exculpatory rule in intoxication evolved as the result of a long desired mitigation of punishment of grossly inebriated homicides,[20] so it may be argued, diminished responsibility was conceived as a means of reducing the finality and harshness of the penalty for murder in cases where the moral blameworthiness of the act of killing had been reduced by some identifiable mental aberration.

IV. MEDICAL EVIDENCE

One of the immediate problems which the defence of diminished responsibility

16 Wootton, "Diminished Responsibility: A Layman's View" 76 *LQR* 224.

17 *Ibid*, 239. However, there is still argument as to whether the question of mental responsibility is a clinical, moral or legal question. The Butler Committee on Mentally Abnormal Offences (Cmnd 5698) noted that it is not a clinical matter but a legal *or* moral one, while Glanville Williams is firmly of the view that it is really a moral question. Nevertheless "doctors grapple with it" (see Dell, *supra*, 5 at 813).

18 Wootton, *supra*, 232.

19 *Cf* "This illogicality is, however, acceptable to me because the benevolent part of the rule [that intoxication may excuse . . . one type of intention and not another] removes undue harshness without imperilling safety and the stricter part of the rule works without imperilling justice": *DPP v Majewski* [1976] 2 All ER 142 at 158, *per* Lord Salmon.

20 Hall, *General Principles of Criminal Law*.

brings into focus is the function and weight to be given to medical evidence. Delivering the judgment of the Court of Criminal Appeal in *R v Bryne*[21], Lord Parker CJ observed:

> There is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses.[22]

However, because of the broad sense in which abnormality of mind has been interpreted in England, psychiatric evidence is unavoidable if even a minimal inquiry as to whether an accused's conduct comes within the definition of diminished responsibility is to be undertaken. As one commentator has observed:

> The presence or absence of mental abnormality is a technical psychiatric question and one on which doctors as experts could on occasion be expected to disagree.[23]

When the insanity defence is in view, expert witnesses and jury are invited to distinguish between a large group of offenders whose acts are punishable in spite of their mental deficiencies, and a small group of offenders so mentally ill that they cannot be held accountable because they completely lack in capacity to act voluntarily.[24]

However, when diminished responsibility is in issue, the psychiatric witnesses are required to make a more subtle description which may be, and often is, the source of substantial disagreement. They are, in effect, required to distinguish between a group of "normal" fully culpable criminal offenders and a group of mentally abnormal but legally sane offenders with reduced culpability.[25] But since, as Dell cogently argued,[26] questions of mental responsibility are not clinical but legal or moral matters, the differences between experts are as likely to be matters of moral or ethical perspective as matters of medicine. She gives the example of a case of an offender seen by both the prison's medical officer and an independent psychiatrist, both of whom found him to be afflicted with an abnormality of mind which they both described in terms of hysterical psychopathy associated with impulsive and manipulative behaviour. But while the independent psychiatrist found no indication of diminished responsibility, the prison's medical officer considered the defendant's responsibility to be substantially diminished. In the event, neither gave evidence and a plea of guilty to diminished responsibility was accepted.

In *Bryne*'s case, Lord Parker defined the elements that must be established if a defence of diminished responsibility is to be successfully pleaded. He said:

> To satisfy the requirements of the subsection the accused must show (a) that he was suffering from an abnormality of mind; and (b) that such abnormality of mind (i) arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease of injury; and (ii) was such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing.[27]

21 [1960] 3 All ER 1.
22 *Ibid*, 5.
23 Dell, *op cit, supra*, 813.
24 Arenella, *op cit, supra*, 860.
25 *Ibid*, 860.
26 Dell, *op cit*, 813.
27 *R* v *Byrne* [1960] 3 All ER 1 at 4.

While *Byrne's case* appears to leave open the question of whether evidence is essential in establishing whether at the time of the offence the accused was suffering from abnormality of mind, it would seem that scientific evidence is necessary on the issue of substantial impairment.[28]

> Yet there is no scientific test of substantial impairment so the issue cannot be one on which medical testimony — even uncontradicted medical testimony — is paramount.[29]

Because the evaluation of substantial impairment is essentially moral or metaphysical and not scientific, some juries in England have tended to ignore psychiatric evidence altogether and follow their own lights on the issue of substantial impairment. However, this "Maverick" approach will generally not be countenanced by the courts unless there is other factual material which entitles a jury to reject or differ from the medical evidence. In *Walton* v *R*,[30] Lord Keith, delivering the opinion of the Privy Council, suggested the type of evidence a jury might consider in determining the existence of diminished responsibility in addition to or instead of medical evidence.

> These include the nature of the killing, the conduct of the defendant, before, at the time of, and after it, and any history of mental abnormality.[31]

However, while juries are not bound by what medical witnesses say, they must act on evidence and if there is nothing for them to throw doubt on medical evidence they must accept that evidence.[32] The problem of juries rejecting uncontradicted medical evidence is illustrated in the decision in *R* v *Vernege.*[33] The appellant, who had been released on bail on a charge of murder, was examined by a consultant psychiatrist and a report stating that he suffered from diminished responsibility came in four days before trial. The Crown did not challenge the psychiatrist's findings of diminished responsibility, which were supported by the prison doctor who had also examined the accused. The jury nevertheless convicted of murder.

The appeal, which was supported by the Crown, was on the basis that there was no evidence upon which the jury, properly instructed, could have rejected the evidence of the psychiatrist. The Court of Criminal Appeal upheld the appeal on the grounds stated and substituted a verdict of manslaughter. However, circumstances may exist where it would be improper to upset a jury's finding which is contradictory to psychiatric evidence. So in *R* v *Shearmith*[34] the Queensland Court of Criminal Appeal refused to disturb a verdict of guilty of murder. A psychiatrist called by the defence gave evidence that, as a result of seeing his wife with a leg dismembered following a car accident, the accused had suffered a state of acute confusion which involved an acute mental disturbance. The Court held:

> The jury were entitled and indeed bound to consider the medical evidence in the light of what they regarded as the proved facts and circumstances sur-

28 See *R* v *Dix* [1982] 74 Cr App R 306 and Commentary on *R* v *Vernege* [1982] *Crim LR* 598 at 599.
29 *Ibid* 599.
30 [1977] WLR 902.
31 *Ibid* 906.
32 *Cf R* v *Clarke* Unrep CA 37/83 (Woodhouse P).
33 [1982] *Crim LR* 598.
34 [1967] *Qd LR* 576.

rounding the actions of the accused.[35]

Nevertheless, it is submitted, a jury must be given an adequate direction by the judge embracing the scope of the defence, including a review of evidence in detail before it can be permitted to reject psychiatric evidence. It has long been established that it is insufficient to simply furnish the jury with the text of the diminished responsibility section and copies of the notes of evidence.[35a]

V. PLEADING GUILTY TO DIMINISHED RESPONSIBILITY

Following the passing of the Homicide Act 1957, the question arose whether the courts could accept pleas of guilty to manslaughter on grounds of diminished responsibility. It had been decided by the Court of Criminal Appeal in *Matheson*[36] that the practice was unacceptable. Thereafter, in 1962, in all such cases a verdict had to be taken. However, a number of cases determined between 1957 and 1962, in which distraught defendants were required to endure long court hearings while in a state of mental imbalance, apparently persuaded some judges that rejection of the practice of receiving guilty pleas to manslaughter was wrong. From that time in Britain judges have generally accepted such pleas unless medical opinion is divided and the practice was officially approved by the Court of Appeal in *Cox*.[37]

According to Dell,[38] in the years 1976–77, the defence of diminished responsibility was raised in 194 cases, in the overwhelming majority of which prosecution doctors did not dispute the appropriateness of the defence. In only 29 of the 194 cases were the court or prosecution not prepared to accept a plea of guilty.

However, in *R* v *Vinagre*,[39] Lord Justice Lawton speaking for the Court of Criminal Appeal, suggested a cautionary approach to the practice by intimating that it was never intended that pleas should be accepted on flimsy grounds:

> Cases are tried by the courts and not by psychiatrists. Pleas to manslaughter on the grounds of diminished responsibility should only be accepted where there is clear evidence of mental imbalance.[40]

V. INTOXICATION

The relevance of intoxication to the issue of diminished responsibility has always been a matter of difficulty. An examination of the case law suggests that there has been no judicial enthusiasm to extend the scope of the defence of diminished responsibility, *a fortiori* as regards self-induced intoxication. However, the case law has always differentiated situations where an excess of alcohol is one of the causes of an abnormality of mind from those cases where evidence showed that a defendant is subject to a craving for drink. Hence in the early Scottish case of *Dingwall*,[41] although the accused was not certifiably

35 *Ibid* 590. See also *R* v *Chester* [1981] 5 *ACrimLR* 296, where the Queensland Court of Criminal Appeal held that, while the decision on the question of diminished responsibility is one for the jury and not the doctor, the jury would only reject the doctor's opinion if there are facts in issue that would entitle it to do so.

35a *R* v *Terry* [1961] 2 All ER 569 at 573–574.

36 (1958) Cr App R 145.

37 (1968) Cr App R 130.

38 *Op cit* 809.

39 [1979] 69 Cr App R 104.

40 *Ibid*, 106–107.

41 5 Irv 466, cited in J. B. Smith, *Diminished Responsibility*, [1957] *Crim LR* 554 at 556.

insane, it was established that his mind had been weakened by successive attacks of delirium tremens which was sufficient to justify reduction of the quality of the crime from murder to manslaughter.

This principle was more recently approved by the Court of Criminal Appeal in *R* v *Fenton*[42] where the Court accepted the view that there may be cases where an accused person "proves such a craving for drink or drugs as to produce in itself an abnormality of mind".[43]

Although it is doubtful whether the effect of drink — even if it does produce a toxic effect on the brain — can amount to an injury within the meaning of s 2 of the Homicide Act 1957, the difference between abnormality of mind caused by a craving for drink and evidence of drinking as merely a contributory cause of impairment of mental responsibility must necessarily be a fine line and a difficult task for a jury.

A case involving evidence similar to *Fenton*'s case is *R* v *Turnbull.*[44] Here the jury had to consider whether the inherent mental condition (evidence that Turnbull was a psychopath) had substantially impaired his mental responsibility apart from the influence of drink which he had earlier consumed. Upholding the trial judge's direction, the Court held that the correct test for the jury to apply in the circumstances was "what is the substantial cause of the accused's inability to control his behaviour — do we think it more probable than not that at the time Turnbull's responsibility was substantially impaired by the fact that he suffered from a psychopathic disorder, even though, at the time, he had taken drink?"[45]

The principle deriving from these decisions would seem to be that evidence of drunkenness in itself is not sufficient to establish substantial impairment in terms of s 2 of the Homicide Act 1957. If such conduct is factually in issue as a contributing cause to the harm in issue, an evaluation must be made as to whether the drinking was merely a contributing cause or whether it was a substantial cause of an accused's inability to control his behaviour. If the former is true, then the Court may look at other evidence of psychiatric disorder as tending to prove "substantial impairment". If the latter, then it would seem that, irrespective of the nature of other contributing causes, evidence of alcoholic excess will not amount to substantial impairment.

It is arguable that a killing committed while an actor is under the influence of drink or drugs should not be murder, on the basis that murder as a category of offence should be reserved for deliberately vicious and calculated killing.[46] On this basis intoxication might constitute a form of mental disorder sufficient to reduce murder to manslaughter. The Victorian Law Commission suggests an accommodation of this approach to intoxication by an amendment to its proposed definition of mental disorder to be included in its Crimes Act. However, while recommending that intoxication should be a matter to be taken into account in the defence of provocation, the Commission hesitates insofar as diminished responsibility is concerned in endorsing the proposition that intoxica-

42 (1975) 61 Cr App R 261.

43 *Ibid.* However, in the Commentary [1975] *Cr LR* 712, the writer notes that the decision seems to say that the judge must tell the jury to ignore the taking of drink, unless the craving for it is in itself an abnormality of mind; and to consider only the abnormality arising from other causes. This seems a difficult, if not an impossible task for a jury.

44 (1977) 65 Cr App R 243 CA.

45 *Ibid.*

46 Law Reform Commission, Victoria, *Report on Provocation and Diminished Responsibility as Defences to Murder*, Melbourne, (1982), 39.

tion by itself should extenuate crime.[47]

This argument against admitting intoxication within the embrace of diminished responsibility is the intractable and controversial nature of the debate surrounding intoxication which it considers should be subject to further detailed investigation.

The problem, it seems, in admitting intoxication within the overall framework of the defence of diminished responsibility, is the nature of the disability of impairment claimed. Intoxication is by nature generally a transitory condition, while a claim based on diminished responsibility presupposes an abnormal mental condition which inhibits full criminal responsibility permanently or at least indefinitely. The concept of intoxication, therefore, unless it can be taken also to include a craving for liquor such as substantially impairs responsibility, may seem to be incompatible with diminished responsibility. Furthermore, a claim based on intoxication is a claim of full exculpation alleging absence of intention. A claim of diminished responsibility, however, is a palliative claim which necessarily seeks a finding of reduced responsibility but not an abrogation of responsibility.

The confusion which arises when the substantive claims of intoxication and diminished responsibility are assimilated is illustrated in the Queensland case of *R* v *Peter*.[48] The case concerned a 24-year old aborigine charged with the murder of his de facto wife on Queensland Aboriginal Reserve. Peter pleaded diminished responsibility in terms of s 304A of the Queensland Criminal Code and upon the defendant pleading guilty to manslaughter the Crown withdrew the indictment for murder. Although intoxication alone cannot constitute an abnormality of mind under the Queensland Code, the mitigation advanced by defence counsel suggested that alcoholism was an implicit factor in the psychological disturbances and arrested development of mind of the accused. The latter phrase was defined as meaning in relation to the accused his being "untrained by any process of socialisation to fit within a society into which he was born".[49] The analysis of responsibility presented in the case is "situationist" insofar as the accused's responsibility was presented not in terms of accountability to established rules or laws, but rather in terms of society's failure to provide him with the resources to live in a multicultural society. It is this factor which appears to undergird the claim of diminished responsibility.

Although, as the commentator observes, "the invitation of the defence of diminished responsibility in the *Peter*'s case represents an interesting development and would seem to point towards some extension of that doctrine"[50] it is questionable whether the case actually advances the theoretical understanding of the doctrine which is presented, it seems, in an entirely sociological guise.

While this sociological approach may have a superficial appeal, its formal adoption would do severe damage to traditional concepts of criminal responsibility which locates the determinants of responsibility squarely within the individual and only exceptionally in environmental factors.

VII. EXTENDING DOCTRINE OF DIMINISHED RESPONSIBILITY

Recent discussion on diminished responsibility in New Zealand has included a

47 *Ibid.*
48 13 *Melb ULR* 648.
49 *Ibid*, 649.
50 *Ibid*, 650.

suggestion that the McNaghten rules should be abolished and substituted with a general defence of diminished responsibility. This suggestion is not new and there is evidence in Scots law where the defence originated that diminished responsibility has never been restricted to murder alone. An early expression of this position appears in the case of *H. M. Advocate v McLean*.[51] The accused, an imbecile, had been found guilty of murder. Speaking for the High Court of Justiciary, Lord Deas said:

> I am of opinion that without being insane in the legal sense, so as not to be amenable to punishment, a prisoner may yet labour under that degree of weakness of intellect or mental infirmity which may make it both right and legal to take that state of mind into account not only in avoiding punishment, but in some cases even in considering within what category of offences the crime shall be held to fall.[52]

Nigel Walker[53] has advocated the extension of diminished responsibility to offences other than murder as a means of circumventing the ''artificial distinction'' created by the insanity defence, between the defendant who ought to be excused conviction and the defendant who ought *not*, but was nevertheless disordered enough to deserve to be protected by law and not merely by the right-mindedness of the sentencer, from a normal sentence''.[54] He notes the popular objection to extending diminished responsibility to other offences expressed in the fact that convicting of a lesser offence would be illogical, but argues that the solution is to simply provide that diminished responsibility limits the choice of severity of sentence.[55] Walker advocates that the English legislature should provide that diminished responsibility should reduce the permissible sentence to one half of what the Court would otherwise impose or, alternatively, that determinate sentences could be expressed in terms of a maximum penalty of, for example, three years for an indictable offence and three months for a non-indictable offence.

There does not appear to be any strong reason why diminished responsibility should not be extended as a general offence. Although it is possible for defendants convicted of a lesser offence who suffer from impairment of responsibility to receive a substantially just result by mitigation reflected in sentencing, a diminished responsibility defence would require a specific finding of impairment and would avoid the stigma of an unqualified conviction.

CONCLUSION

If it is accepted that diminished responsibility exists as a separate legal concept, it must also be considered that it is a concept replete with difficulties, not the least of these being the propriety of the law or of medicine seeking to make determinations of mental responsibility at all. However, it has apparently proved its worth in those jurisdictions where it has been adopted and, in the U.K. at least, has virtually replaced the verdict of insanity under the McNaghten rules. This has permitted the Court to distinguish between categories of murder by making due allowance for those who commit violent crimes while in a state of

51 (1876) 3 Coup 334.
52 *Ibid.*
53 *Butter v The CLRC and Others* [1981] *Cr LR 596.*
54 *Ibid* 967.
55 As in the Italian Code where 'partial defect of mind' reduces the length of the permissible prison sentence.

deep depression or other mental perturbation falling short of legal insanity.

Whether the defence should be extended to offences other than murder and in what form, is a matter of debate. Some would argue that it should be available for the full range of offences, as is the exculpatory rule in intoxication. However, these are matters of policy and although, as a matter of law reform, it may be strongly argued that the McNaghten Rules are in urgent need of re-evaluation or replacement, the adoption of a palliative defence like diminished responsibility presupposes some acceptance of modern psychiatric theory concerning the functioning of the mind in its cognative, volitional and emotional aspects. Before such a defence could be enacted, there would need to be full discussion and debate between the medical and legal professions to ensure that the putative benefits of any new doctrine clearly outweigh the existing rules and principles of responsibility that have served the needs of the community for many generations.

WARREN BROOKBANKS
Faculty of Law
University of Auckland