DURESS AND MENTAL ABNORMALITY

"In the crooked timber of humanity, nothing completely straight can be made."
-Kant-

INTRODUCTION

1. I have simply been asked to present a paper on duress and mental abnormality. However, given the breadth of these issues in legal theory and practice, I have found it necessary for the sake of brevity (given time constraint and my personal limitations) to focus on these specified issues within the context of the criminal law. Accordingly, other aspects of these issues that touch and concern other areas of the law and other disciplines are outside the scope of this paper.

2. As far as is reasonably practicable, the focus will be on duress and mental abnormality as they relate to our jurisdiction. It is recognized that there is no statutory regime governing the area of duress and one or so directly addressing the issue of mental abnormality in criminal law. Consequently, we have to seek our guidance from the common law and from the principles distilled in relevant decided cases. Where appropriate, whatever obtains in other jurisdictions may be mentioned.

3. The relevance of these issues could be viewed against the background of the existence in the number of cases both locally and internationally where the state of mind of the accused person has been called into question on the grounds that he was forced by threats or by circumstances to do a particular criminal act or that he suffers from some mental deficiency that caused him to commit the act in question. *CASE of TODAY: The U.S.A. "Texas Mom Case" - The People v. Andrea Yates.*

THE BACKGROUND: CRIMINAL RESPONSIBILTY

4. It is trite law that every person of the age of discretion is, unless the contrary is proved, presumed by law to be sane and to be accountable for his actions: ***R.v Layton*** (1849) 4 Cox 149. Indeed, legal history has taught us that until the 12th century a man might be held liable for many harms simply because his conduct caused

them, without any proof of any blameworthy state of mind whatsoever on his part.

5. Over time, this has changed and it is now an entrenched general principle of our criminal law, subject to certain exceptions of course, that a person may not be convicted of a crime unless the prosecution proves beyond reasonable doubt that:

   (a) he by his action has caused a certain event or that he is responsible for the existence of a certain state of affairs which is prohibited by criminal law (the actus reus), and
   (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs: (the mens rea).

6. This requirement for the actus reus to coincide with the mens rea to ground criminal liability has been the subject of much judicial discourse universally as in many instances one is present without the other. Accordingly, there are instances when the actus reus of a crime is produced but said to be without the requisite mental element. Then, there are instances where a person by his act or conduct brings about the actus reus of a crime with the requisite mens rea but is absolved of criminal responsibility for that particular crime.

7. When that occurs there are elements present in the commission of that crime that affect the foundation of criminal responsibility and caused the criminal law to make a concession to the offender (D). To quote from the summing up of Coleridge, J in ***Reg. V. William Kirkham*** (1837) 8 C&P. 115, 117:

> "The law has at once a sacred regard for human life and also a respect for man's failings and will not require more from an imperfect creature than he can perform; and therefore as it is well known that there are certain things which so stir up a man's blood that he can no longer be his own master, the law makes allowance for them."

8. Against this background, I submit that the defences of duress and some of those involving mental abnormality can be viewed in the circumstances in which they operate to affect criminal responsibility as evidence of the imperfection of mankind and of the recognition of human frailty so that the law makes allowance for them. It is to a brief examination of the nature and scope of these issues that this paper now turns.

DURESS

9. For our purposes, I would propose that a working definition of duress be an abbreviated version of that given by Lord Simon in ***Lynch v. D.P.P. of Northern Ireland*** [1975] A.C. 653 at 686 as **such well grounded fear produced by threats of death or serious bodily harm [or possibly imprisonment] if a certain act is not done as overbears the wish of a person (D) not to perform the act:**

10. It therefore consists in actual or threatened violence that could lead to death or at least serious bodily harm which could possibly include imprisonment.

11. Two types of duress have been recognized in criminal law :
    a. **duress by threats**
    b. **duress of circumstances.**

DURESS BY THREATS

12. Typical duress of threat is where D is told "do this or you will be killed" and fearing for his life D does the act required.

13. It is said that D's will must have been overborne by the threat. The Supreme Court of Canada described the act as "morally involuntary" the "involuntariness" being measured on the basis of society's expectation of appropriate and normal resistance to pressure": ***Perka*** (1984) 13 DLR (4th) 1.

14. The threat may be of immediate or future death or injury including possibly, imprisonment. The threat must be effective at the time the crime was being committed although it need not be of immediate injury in the event of non-compliance.

> **SEE:** ***Hudson and Taylor*** (1971) 2 Q.B. 202 : Here the two accused were charged for perjury. On their trial for perjury they raised duress as a defence. Both accused at their trial admitted giving false evidence in an earlier trial in which they appeared as witnesses.
> In their defence they claim that they had been approached by another (F) and other persons who warned them that if they told on the defendant in the earlier case they would be "cut up". During the earlier trial F was sitting in Court while they were giving evidence. The trial judge ruled that duress was not opened to them as a matter of law.
>
> Held on appeal: duress should have been left to the jury. Convictions were quashed.

SEE ALSO: ***Abdul- Hussain and others*** [1999] Crim. L.R. 570

The appellants were Shiite Muslims from Southern Iraq and all except one were fugitives of the Sadam Hussein regime having offended against its laws. They were living in Sudan and feared return to Iraq where they believed they would face death. By August 1996 after unsuccessful attempts to leave Sudan using false passports, they all overstayed and feared deportation to Iraq. They decided to hijack an aeroplane. They boarded the aeroplane and once the aeroplane was in Egyptian air space they gained control of the aircraft by threatening the crew with imitation knives and grenades. The plane eventually landed after 12 hours of negotiation. At their trial, they admitted the charge of hijacking but contended that they did it at last resort to escape death either of themselves or their families at the hands of the Iraqi authorities.

The trial judge ruled that the defence of duress was not available on the ground that the threat was not sufficiently close and immediate to give rise to a spontaneous reaction to the physical risk arising. They were convicted.

On appeal it was held, inter alia, that the defence was available in relation to the offence and that imminent peril of death or serious injury to the defendant or his dependants had to operate on the mind of the defendant at the time he committed the act so as to overbear his will but the execution of the threat need not be immediately in prospect. The Judge ought to have left the defence for the jury's consideration.

15. Hussain therefore confirms **Hudson & Taylor** and decides that the threat must be imminent but need not be immediate. The appellants were in no immediate danger of death or serious bodily injury but the threat was hanging over them.

16. It seems from the cases that the only threat or danger which will found a defence in duress is either one of death or serious personal injury. Lord Simon in Lynch states in this regard:

> "this at least seems to be established that the type of threat which affords a defence must be one of human physical harm (including possibly imprisonment) so that a threat of injury to property is not enough"

17. Where it is proved by the prosecution that D had an opportunity to take action to diffuse the threat (example seeking the protection of the police) and he failed to avail himself of that opportunity, the threat in question can no longer be relied on by him to ground duress as a defence. So, if a person can avoid the effects of duress by escaping from threats, without damage to himself, he must do so.

18. So too, D must desist from the unlawful conduct as soon as possible as he come aware that the threat is no longer operative: **SEE: *D.P.P. v Bell*** [1992] Crim.L.R. 176

19. The test whether a defendant was compelled to act as he did is objective not subjective. Accordingly, D is required to have the self control reasonably to be expected of an ordinary citizen in his situation : ***R.v. Howe*** [1987] 1 AER 771.

20. The threat must be of such gravity that it might well have caused a sober person of reasonable firmness sharing the defendant's characteristics and placed in the same situation to act in the same way the defendant acted: (per Lord Lane, C.J. in ***R.v. Graham*** 74 Crim App.Rep.235.

21. Since the standard by which a persons reaction to duress is to be judged contains an objective element, it follows that expert evidence that D's personality lacked reasonable firmness is said to be irrelevant to any issue a jury would have to determine: ***R.v. Hurst*** [1995] 1Cr. App. Rep 82.

22. However, psychiatric evidence might be admissible to show that that D was suffering from mental illness or impairment or recognized psychiatric condition provided that persons generally suffering from such condition might be more susceptible to pressure and threats thereby assisting the jury to decide whether a reasonable person suffering from such a condition might have been compelled to act as D did: ***R.v. Bowen*** [1996] 2 Cr. App. R. 157.

23. In **Bowen** consideration was given to the questions as to what are the relevant characteristics of D the court should have regard to in determining the effect of the threat on him. It is said that the mere fact that the accused was more timid than the ordinary person is irrelevant. It would be relevant that the accused falls into a category of persons who are less able to resist pressure than persons outside of that category. For example youth, pregnancy, physical disability, recognized mental illness or psychiatric condition. A low intelligence quotient, short of mental impairment or defectiveness is irrelevant since it does not make a person less able to withstand threats than an ordinary person. Characteristics due to self-imposed abuse are also irrelevant.

24. It seems to be settled law that duress by threats is a general defence except it does not apply to murder, attempted murder or some forms of treason whether as a principal or secondary party. In **Howe** Lord Hailsham declared that one who takes the life of an

innocent person cannot claim that he is choosing the lesser of two evils.

25. In the Jamaican case of ***R.v. Wayne Spence*** (1990) 27 J.L.R. our Court of Appeal reiterated the same principle. Here the accused on charges of murder, robbery and rape in his defence contended that he was present when the incident occurred but was forced at gun point to participate in the robbery. He denied taking part in the rape and murder. The Court of Appeal per Rowe, P, said:

> "in our opinion if a man has such a high regard for his own life and for that of his loved ones he ought as a member of his society to have an equally high regard for the lives of innocent third parties. We adopt and apply the decision of the House of Lords in Rv. Howe to Jamaica."

Consequently, the Court held that the defence of duress is not available to a person charged with murder whether as a principal in the first or second degree.

26. The defence is not opened to persons who voluntarily join an organization which he knows might compel him to commit crimes similar to those with which he is charged. It is indeed a common feature of modern society that gang members are often quoted as saying they did a particular act because they were forced to do so by other gang members. This may often times be so but the law does not give this concession to them.

> **SEE**: ***R.v. Sharp*** (1987) Q.B. 853: The appellant, who joined a gang of robbers, knew that they used firearms and he participated in a robbery during which the gang leader shot and killed the victim. The appellant was tried on a count charging murder. He contended that duress was available to him since he had wished to pull out of the robbery but had participated in fear because a gun had been pointed at his head by the gang leader with a threat to blow it off if the appellant did not participate. Held on appeal that the defence was not available to him.

27. Case law has revealed that duress is capable of constituting a defence to an allegation of contempt of court: ***R.v. K*** [1983] Crim.L.R. 736 C.A.

> Here a witness was punished for contempt of court after refusing to give evidence against another who allegedly assaulted him. K's refusal to testify arose in fact from a genuine fear for the safety of a relative. He was however denied legal representation and given no opportunity to explain his refusal. His conviction was quashed.

28. Within the same vein, it has been shown also to apply on a charge of perjury: ***Hudson & Taylor*** **(supra)**. I would submit that this principle could well be extended with equal force on a charge of

creating public Mischief against D who has retracted from an earlier statement given to the police alleging the commission of a crime by another. This is a common occurrence within our jurisdiction and often times investigations reveal that the defendant on such a charge has been threatened with death or serious bodily harm to himself or loved ones.

DURESS OF CIRCUMSTANCES

29. With duress of circumstances D does the act alleged to constitute a crime out of fear but this time no one is demanding he does it. It has nothing to do with one person being told to commit a crime "or else." It speaks to a situation where a person is compelled to commit a crime by force of circumstances. Given the nature of the defence, legal theorists seem all agreed that it is a species of the defence of necessity.

30. It is in fact said that duress, by threats or circumstances, is an example of necessity and that whether duress of circumstance is called duress or necessity does not matter: SEE: Lord Hailsham's dictum in ***Howe*** [1987] A.C. 417 at 429 :

31. In either case D does the act because his life is threatened and the only way to escape is to do the act which would be a crime but for the duress.

32. The law pertinent to duress by threats is admittedly well developed while duress by circumstances is relatively of more recent vintage. All the early cases relating to duress of circumstances related to driving offences. It was first recognized in ***Willer*** (1986) 83 Cr. App. R. 225 where the accused drove onto a pavement and in and out of a shopping center in order to escape a gang of youths seeking to attack him and his passengers.

33. Willer was followed in ***Conway*** (1989) 88 Cr. Appeal R. 159, where the Court of Appeal quashed a conviction on a charge of reckless driving. The Court of Appeal after reviewing the authorities concluded that necessity can only be a defence to a charge of reckless driving where the facts establish 'duress of circumstances'.... i.e . where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or to some other person..." The Court states that to admit a defence of duress of circumstances is a logical consequence of the existence of the defence of duress of threats.

34. It is thus established to be a potential defence to an allegation of dangerous or careless driving. In ***Martin*** 88 Cr. App. R.343 D was charged with driving whilst disqualified and asserted he drove as he did because his wife who was suicidal threatened to kill herself. He relied on duress of circumstances which was upheld.

35. In Martin the following principles in relation to duress of circumstances were restated thus:

a. duress of circumstances arise from objective dangers threatening the accused or others;

b. the defence is available only if from an objective standpoint the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury;

c. The jury is to consider whether the accused may have been impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious injury would result; and

d. If that is so they have to go further and say whether a sober person of reasonable firmness sharing the characteristics of the accused would have responded to the situation as the accused acted.

If the answer to 3 &4 above are in the affirmative then the defence would be established.

36. In ***R.v. Pommell*** [1995] 2 Cr.App.R.607, the Court of Appeal (U.K.) approved above statement in Martin and recognized that there is a general defence of necessity or duress of circumstance save that it is not available on a charge of murder, attempted murder or some forms of treason. In that case it was held that the defence was opened to the accused on a charge of possession of firearm.

37. In ***R.v. Rhone Warren*** S.C.C.A. No.78/99 del. Feb. 23, 2000 (unreported) the Jamaica Court of Appeal per Forte, P. considering the application of duress on a charge of manslaughter declared:

> "We accept as good law for this jurisdiction the principles as outlined by Simon Brown, J in the case of R.v. Martin (supra). We recognize that a person acting under threats to his life, or serious injury, which is either expressed or implied from the conduct of others in circumstances where he reasonably believes that his life is in danger or that he might be seriously injured would be entitled to avail himself of such a defence in

respect of the offence of manslaughter, arising out of the driving of a motor vehicle."

SUMMARY: DURESS BY THREATS/CIRCUMSTANCES

38. By and large, It is noted that duress by circumstances is developing by analogy to duress of threats: (Smith & Hogan, 7th ed.) and so the same principles pertaining to the characteristics of D discussed above under duress of threats (paras 21-23) would be applicable to duress of circumstances.

39. The essence of duress is that D is saying I was able to control my actions and chose to do the act for which I am charged but I am not responsible. I had no choice." But D has a choice the fact is that the alternative to committing the crime may have been so unattractive that no reasonable person would have chosen it. It is the choice between evils. D's compulsion to do the act is exactly the same whether the threat comes from someone demanding that he does it or from circumstances.

40. Decided cases have shown that the threat or circumstances compelling D to act is not limited to the life or safety of D himself but could be to a family member of his or to any person for whose safety he would reasonably regard himself as being responsible. **SEE: *R.v. Wright*** (2000) Crim. L.R. 510.

41. In ***Hurley and Murray*** [1967] VR 526 the Supreme Court of Victoria held that threats to kill or seriously injure D's de facto wife amounted to duress. In ***Martin*** *(supra)* D's wife's threat to commit suicide if he did not drive while disqualified was held capable of founding a defence of duress of circumstances. In ***Conway*** (supra) the threat was to the passenger in D's car.

42. In sum it can be concluded that threats against the life or safety of D's family and others to whom he owes a duty almost certainly will be taken as sufficient evidence of duress.

43. It seems too that perhaps in an appropriate case, threat to a stranger could be accepted as sufficient evidence of duress: consider a hypothetical case against D for malicious destruction of property where he, a bank employee, under an immediate threat on the life of a fellow worker obeyed an order of another to throw a bomb on the Bank of Jamaica thereby destroying the building.

44. Thus far, having reviewed the authorities in the area, I think it safe to conclude that the defence of duress could be of wide application in the criminal sphere within our jurisdiction barring cases of murder, attempt murder and some forms of treason.

MENTAL ABNORMALITY

45. The term mental abnormality is employed in this paper to cover all those conditions that operate on the mental condition of D ultimately leading to such an abnormality of mind that substantially impairs his mental responsibility.

46. The recognition of mental abnormality on the question of criminal responsibility has deep roots seat in the history of English common law and so by extension our law.

47. The concept 'abnormality of mind' was, in my view, aptly defined in ***R.v. Byrne*** [1960] 2 Q.B. 396, 44 as:

> "A state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the minds activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment 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."

48. The question of D's mental capacity may become relevant at different stages of the criminal process. In the same vein, abnormality of mind operates at different levels of the process with varying effects on the question of criminal responsibility.

PRE- TRIAL STAGE: competence to stand trial

49. In the first place the mental status of D may be such as to give rise to the question as to his fitness to stand trial- the issue of his fitness to plead. The issue of fitness to plead has a well established legal background set by the case of ***R.v. Pritchard*** (1836) 7 C&P.303.

50. Invariably fitness to plead is likely to be called in question where the accused is "so disordered in mood, thought processes or cognition that comprehension and communication are seriously impaired." (Zapata, Remember Chile: Disputing the Medical Report on Pinochet's Fitness to Plead)

51. In the U.K. and the U.S.A., for example, legislative enactments exist to deal with the procedure when an accused seems and is found unfit to plead. In the U.K. there are for example the Criminal Procedure (Insanity) Act 1964, the Mental Health Act (1983) and The Criminal Procedure (Insanity and Unfitness To Plead Act) 1991. There are no related provisions within Jamaica (to the best of my knowledge at any rate) and so the common law principles would seem to apply.

52. In law the criteria for unfitness to plead rest on the question of D's ability to participate in the proceedings. It refers to all those factors that might operate to render a defendant unfit to stand his trial. Practically speaking this boils down to the capacity of D to:

1) instruct his lawyer so as to assist in his defence;
2) to understand the charge and the difference between guilty and not guilty;
3) to challenge jurors;
4) to understand the evidence so as to cross- examine and to testify in his own defence or to remain silent if he so desire.

If D is able to do these things, he has a right to be tried if he so wishes even though he is not capable of acting in his best interest: ***R.v. Robertson*** [1968] 3 AER 557.

53. In ***Podola*** [1959] 3 All ER 418 it was said that a man is fit to plead where an hysterical amnesia prevents him from remembering events during the whole of the period material to the question whether he committed the offence alleged but is otherwise of normal mind.

54. From ***Podola*** it seems to be that where D is of normal mind at the trial and thus able to instruct counsel as to what submissions to put forward in his defence, he will be held fit to plead. The effect of Podola according to Smith and Hogan (7th ed.) is that a man may be convicted although a jury was not satisfied that he was able to make a proper defence at the trial. This is so because if D cannot remember what happened at the time the offence was allegedly committed then he will not be able to raise a defence (without a witness on his behalf) that might well have been available to him if he could remember. For instance a person could well set up an alibi if he could remember what he was doing at the time the offence was committed. Arguably, this could lead to an injustice.

55. But then, there is the other side of the coin, where D, for example drove dangerously and caused an accident injuring another. He could suffer a concussion as a result of the accident thereby causing him not to remember what happened at the time the accident occurred but is otherwise normal at his trial. Can we say it would be in the interest of justice to declare him unfit to stand his trial because of his amnesia and so avoid penalty for his wrongful act? The same could be asked of a person who committed an offence while drunk and at day of trial is of normal mind but cannot remember the incident leading to the alleged crime.

56. ***Podola*** also decides that where D raises the issue of fitness to plead, the onus is on him to prove that he is unfit to plead on a balance of probabilities. If the issue is raised by the prosecution and disputed by the defence then the burden is on the prosecution and the standard is proof beyond reasonable doubt. It is also said that where the issue is raised by the judge and disputed by D, the onus, presumably, is on the prosecution.

57. Where D is found fit to plead, then the trial will proceed while if he is unfit in Jamaica for instance to the best of my knowledge he is committed for psychiatric treatment either at Bellvue or at the hospital section of the adult correctional center to be held for an unspecified time until he is considered fit to plea. In this situation, D can be detained for a very long time.

58. In England, the law has changed with legislative intervention with the 1991 Act (supra) and so where D is found to be unfit to plead but not to have done the act or made the omission charged, he simply goes free. Where he is found unfit to plead but found to have done the act or made the omission a wider range of disposals is now generally available. Where for instance the penalty is fixed by law, like for murder, the court must make an hospital order restricting discharge without limitation of time. In any other case the court may:

i) make a hospital order and an order restricting discharge either for a specified time or without limitation of time; or in appropriate circumstances,
ii) a guardianship order under the Mental Health Act 1983;
iii) a supervision and treatment order under the 1991 Act; or
iv) an order for absolute discharge.

AT TRIAL: defences to commission of crime

59. It is settled law that mental abnormality in a criminal defendant at the time of the alleged offence can give rise to two major types of mental defences at his trial: insanity and diminished responsibility.

INSANITY

60. Absolute madness was recognized in English common law in the 1600's. It was thereafter enunciated that an insane person who does not know what he is doing is lacking in mind and reason and not far removed from the beast.

61. The fact that D is insane in the medical sense is not in itself sufficient to afford a defence in law. There is a legal criterion of responsibility defined by the common law and was set out in authoritative form in 1854 in ***R. v. M'Naghten,*** the reknown **'M'Naghten Rules'.** The rules were accepted by the House of Lords in ***R.v. Sullivan*** as providing a comprehensive definition since 1843.

According to the M'Naughten Rules:

"To establish a defence on the ground of insanity, it must be clearly proven that at the time of committing 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 was wrong."

62. The **M'Naghten Rules** therefore excuse D on two separate bases: i) he must be acquitted if because of disease of the mind, he did not know the nature and quality of the act he was doing; ii) even if he did know the nature and quality of his act, he must be acquitted if because of a disease of the mind, he did not know it was wrong.

63. The two limbs of the rule require separate consideration but the fundamental question common to both limbs is whether D was suffering from "a defect of reason from disease of the mind."

64. The question as to whether a particular condition arises from a disease of the mind within the Rules is not a medical but a legal one. So the question whether the defence of insanity is raised is ultimately one for the judge and as such medical expert may testify to the factual nature of the condition but it is for the judge to say

whether that is evidence of a "defect of reason from disease of the mind."

In ***Sullivan,*** the defence to a charge of assault occasioning actual bodily harm was that D attacked P while recovering from a minor epileptic seizure and did not know what he was doing. The House of Lords held that the judge had rightly ruled that this raised the defence of insanity.

65. The disease in question need not be a disease of the brain but any disease that produces a malfunctioning of the mind is a disease of the mind. It is said that a malfunctioning of the mind is not a disease of the mind when it is caused by some external sources- for example, blow on the head causing concussion, by intoxication or administration of drugs.

66. With defect of reason, the powers of reasoning must be impaired and that a mere failure to use powers of reasoning that one has is outside the rules. Example D taking articles from supermarket shelf and left without paying due to absentmindedness resulting from depression. Held: even if she was suffering from a disease of the mind, she had not raised insanity but was simply saying she had mens rea. SEE***: Clarke*** [1972] 1All ER 219.

67. The nature and quality of the act refers to the physical nature and quality of the act and not to its moral or legal quality: ***Codere*** (1916) 12 Cr. App. Rep. 21

68. Where it is said in the Rules that D must not know the nature and quality of the act, the question is not whether the accused is able to appreciate the wrongness of the particular act he was doing at the particular time. If D knew his act was contrary to law, then he knew it was wrong for the purposes of the Rule. Even if D did not know his act was contrary to law, he is still liable if he knew it was wrong " according to the ordinary standard adopted by reasonable men." : ***Codere*** (supra). The fact that D thinks his act is right is irrelevant if he knew that people generally considered it wrong.

69. In the U.S.A. there are other standards of the insanity defences that have been recognized from state to state. In 1896, the Alabama Legislation adopted the ***Irresistible Impulse Rule*** that states that mental disease may impair volition or self control even when cognition is relatively impaired. The result of this is similar to the ***"New Hampshire Rule"***: Not Guilty by reason of insanity if the act was offspring or product of mental disease.

70. In 1954 in ***US v. Durham*** it was laid down that an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect: **The Durham Rule**

71. In 1972 in ***US v. Brawner*** the rule was established that D is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise anti social conduct: **The Ali Rule**

72. Regardless of the terms use or whatever variant of the defence is adopted it constitutes a complete defence to a criminal charge. However, it has been said that the rule has become obsolete in the U.K. since the abolition of the death penalty and the introduction of the defence of diminished responsibility. This is so because according to some writers persons resent the stigma attached to an insanity verdict and the indefinite detention that might follow.

73. It is said that the Rules almost from their formulation have been subject to rigorous criticisms from doctors and lawyers. The primary contention is that the Rules are too narrow and thus exclude many persons who ought not to be held responsible. They are concerned only with defect of reason and take no account of emotional or other factors whereas modern science is unwilling to divide the mind into separate compartments and to consider the intellect apart from the emotions and the will.

74. However, according to Smith and Hogan (7th ed), the Rules remain of great importance both because they set a limit to the defences of automatism and, in theory, diminished responsibility and so still have their defenders.

75. In our jurisdiction as well as in the U.K. the burden of proof rests on D to establish insanity with the standard of proof being on a preponderance of probabilities.

DIMINISHED RESPONSIBILITY

76. The 1957 Homicide Act (UK) and our Offences Against the Person Act (section 5.) create the defence of diminished responsibility in further recognition of the effect of mental abnormality on an accused person.

77. ***Section 5 of The Offences Against The Person Act*** provides that where a person kills or is party to the killing of another he shall not be convicted of murder but instead of manslaughter if "he is 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 or omissions in doing or being a party to the killing."

78. As such, diminished responsibility is not a general defence and so is restricted to a charge of murder. In the U.S.A. the defence applies in differing forms in many states. In some, such as in New Hampshire it is said to be applicable to negate the mental element of *any* crime. In others such as Iowa it is said to apply only to negate the mental element in "specific intent crimes". In all other states, such as Virginia, it is applicable only in murder cases to negate a mental element of malice or pre –meditation.

79. As with insanity, the decision as to whether there is diminished responsibility is to be made by the jury and not medical experts.

80. The abnormality must arise from one of the causes specified in the statutory provision in parentheses and so an abnormality arising from some other cause will not suffice. Alcoholism is enough if it injuries the brain causing gross impairment of judgment and emotional responses or causes the drinking to be involuntary: **SEE:** ***Tandy*** (1987) 87 Cr. App. Rep. 45.

81. In ***Byrne*** (supra) the defence of irresistible impulse was introduced into the law of murder by diminished responsibility. Here it was basically held that D's inability to exercise will power to control his physical acts could amount to such abnormality of mind as substantially impaired his mental responsibilities. The difficulty which D experience in controlling his impulse, or failing to control his impulse, should be substantially greater than would be experienced in like circumstances by an ordinary man not suffering from mental abnormality.

82. Of course it seems evident that if the defence is to be relied on at all, medical evidence is a practical necessity. Like insanity, the onus of proof is on the defence on a balance of probability.

83. Diminished responsibility is said to have embraced many mental conditions in situations where one would have thought there was no chance of a defence of insanity succeeding- mercy killers, deserted spouses or disappointed lovers who killed while in a state

of depression, persons with chronic anxiety states and so forth. In fact, intoxication resulting from the cravings for drink or drugs could well itself be an abnormality of mind to fit within diminished responsibility.

CLOSING COMMENTS

***Having reviewed the law in the areas selected, it is evident that the law indeed makes some allowance for human frailty illustrating Kant's words that "from the crooked timber of humanity nothing completely straight can be found. It also reveals that urgent legislative reform is needed in our jurisdiction to deal with offenders suffering from mental abnormality.

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