

# Mental Health Defences & Representing Clients With Mental Health Issues Webinar



DGLE<sup>AL</sup>

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# Agenda

We will:

- a) Go through the various mental health defences that can be raised in the Crown Court;
- b) the sentencing options available when a defendant has mental health issues and / or is successful in a mental health defence;
- c) Flag the issues to consider when instructing experts as to Fitness to Plead

# Presenters

## **Clare Ashcroft | Barrister | Garden Court North Chambers**

Clare is ranked in the 2021 edition of the Legal 500 as a leading junior in general crime. She is experienced in dealing with complex and voluminous evidence which often encompasses expert evidence regarding cell site, encrypted devices, firearms and ANPR evidence. To view Clare's full bio, please click [HERE](#).

## **Rebecca Filletti | Barrister | Garden Court North Chambers**

Rebecca specialises in criminal defence and has acted as counsel to defendants accused of the most serious criminal offences including murder, manslaughter, rape, historic sexual allegations, child cruelty, drug offences, fraud and offences relating to serious violence and firearms. To view Rebecca's full bio, please click [HERE](#).

## **Richard Brigden | Barrister | Garden Court North Chambers**

Richard is a criminal defence advocate with an excellent reputation. He is ranked in the 2021 edition of the Legal 500 as a leading junior in general crime. He is involved in a wide range of work in the Crown Court, High Court (quasi criminal matters) and Court of Appeal. To view Richard's full bio, please click [HERE](#).



# Fitness to Plead

- Written or oral evidence at least 2 medical practitioners approved s.12(2) MHA 1983 (s.4(6) Criminal Procedure (Insanity) Act 1964);
- BOP where raised by Defence;
- Pritchard Criteria (*Pritchard* (1836) 7 C& P 303 - able to instruct lawyers; to plead to the indictment; to challenge jurors; to understand the evidence; to give evidence;
- Finding judge alone; trial of issue before jury (adverse finding results in 3 permissible disposals pursuant to s.5 Criminal Procedure (Insanity) Act 1964, same as successful defence of insanity, see above);
- Criminal Procedure Rules 2020, r.25.10 (3): where the court determines that D is not fit to be tried, it must exercise its power to appoint a person to put the case for the Defence etc (*implications for fees*)

# Fitness to Plead

- Issues to watch:
- Crown experts partial to saying D fit “if provided with intermediary”
- Instruct defence expert to consider this within the context of *Pritchard* criteria;
- Keep in mind the difficulties in obtaining funding for intermediaries;
- Criminal Procedure Rules 2020 Part 18 (intermediaries)
- Practice Direction I: General Matters 3F: Intermediaries (inserted by amendment no.1 4<sup>th</sup> April 2016 and amendment no.7 1<sup>st</sup> October 2018)
- *R v Thomas (Dean)* [2020] 2 WLR 66 para 38, Fulford LJ: determination as to the necessity of an intermediary is one for the court. It is a fact sensitive decision requiring assessment of the Defendant’s relevant circumstances and within the context of the proceedings that the Defendant faces.
- No guarantees that an intermediary will be granted for whole or even part of the proceedings – inform experts as to the likelihood of this!

# The Defences

- Diminished Responsibility
- Insanity
- Automatism

# Diminished Responsibility

S2 Homicide Act 1957 (Persons suffering from diminished responsibility) reads.

(1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder

if D was suffering from an abnormality of mental functioning which—

(a) arose from a recognised medical condition,

(b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and

(c) provides an explanation for D's acts and omissions in doing or being a party to the killing.

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## DR (cont)

S2(1A) and (2) Homicide Act 1957 (Persons suffering from diminished responsibility) reads.

(1A) Those things are—

(a) to understand the nature of D's conduct;

(b) to form a rational judgment;

(c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an ***abnormality of mental functioning*** provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

# 'Abnormality of the mind – Medical Condition'

The law now requires that the abnormality arises out of a 'recognised medical condition'.

An abnormality of mental functioning means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It is wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and the ability to form a rational judgment whether those acts are right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment (*R v Byrne* [1960] 3 W.L.R. 440)

# 'Abnormality of the mind – Medical Condition'

Can arise from a number of recognised medical conditions for instance:

- Schizophrenia;
- Bi polar disorder;
- OCD;
- Dependence syndromes;
- “Battered women” syndrome (Re Challen)

Must be medical evidence before the jury to satisfy them on the BOP that an abnormality did exist.

A jury can reject medical evidence (*R v Bunch* [2013] EWCA Crim 2498 and *R v Byrne* [1960] 3 W.L.R. 440) – and in fact did so in *Golds*.

## Substantial Impairment – R v Golds

In *R v Golds* [2016] UKSC 61 the Supreme Court ruled on the meaning of ‘substantial’

The court concluded that the test that should be applied is that an impairment is substantial if it is ‘weighty or important’.

*“It is just that where a substantial impairment is demonstrated, the defendant is convicted of the lesser offence and not of murder. But it is appropriate, as it always has been, for the reduction to the lesser offence to be occasioned where there is a weighty reason for it and not merely a reason which just passes the trivial.”*

# Substantial Impairment

The abnormality of mental functioning must have **substantially impaired** D's ability:

(a) to understand the nature of his conduct;

(b) to form a rational judgment; and/ or

(c) to exercise self-control.

In reaching a conclusion on the above the jury may properly assess all relevant circumstances preceding the killing, as well as any relevant circumstances following the killing (see *R. v. Conroy* [2017] EWCA Crim 81; [2017] 2 Cr.App.R. 26).

## DR and Intoxication

A person who kills while (voluntarily) intoxicated can rely on the defence of diminished responsibility if their recognised medical condition was of such severity that, even without intoxication, it would have impaired their responsibility (see *Dietschmann* [2003] UKHL 10 and *R. v Joyce (Trevor)* [2017] EWCA Crim 647).

# Insanity

The insanity defence is not a defence in the usual sense. If accepted by the jury, it leads to a special verdict of not guilty by reason of insanity (s2(1) *Lunatics Act 1883*).

Onus is on the defence to establish the defence on the balance of probabilities (see *Smith (Oliver)* [1911] 6 Cr. App R.19)

A verdict of not guilty by reason of insanity requires evidence from 2 registered medical practitioners at least one of whom has to be registered under s12 Mental Health Act 1983 (S1(1) Criminal Procedure (Insanity and Unfitness to Plead) Act 1991)

# Insanity

Governed by the rules laid down in *M'Naghten* and codified in later cases (see variously *R v Sullivan* [1984] A.C 156, HL).

- a. that every man is to be presumed to be sane,
- b. at the time of the committing of the act, the defendant was:
  - i. labouring under such a defect of reason,
  - ii. from disease of the mind,
  - iii. such that he did not 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

# Insanity

A psychotic episode (even in the absence of underlying issues such as schizophrenia etc), if accepted, can be enough to meet the tests of 'defect of reason' and 'disease of the mind.'

The defence will have to establish that the defendant did not know that the act was unlawful or morally wrong.

If the jury are satisfied that a defendant knew what he was doing was wrong, irrespective of the extent and degree of the disease of the mind then the defence will fail (see *Loake v CPS* [2017] EWHC 2855 (Admin))

# Insanity and *mens rea*

*Provided the M’Naghten test is met, the defence of insanity is available in relation to strict liability offences or offences with an objective mens rea requirement*

In *Loake* it was held that it is an oversimplification to suggest that insanity operates simply on the basis that someone who is suffering from a disease of the mind will always lack the mens rea for the offence; it is possible for someone to have full mens rea for a criminal offence whilst at the same time, because of a defect of reason arising from a disease of the mind, not know what he is doing is wrong:

*“If a man intentionally kills his wife because of his deluded belief that he is under threat from a representative of Satan and has received a divine order to slay, and that it is lawful to comply with divine orders, then he possesses the mens rea for murder but is not guilty of murder because he does not know that what he is doing is unlawful.” [41]*

# Insanity and Voluntary Intoxication

Voluntary intoxication will not necessarily negate insanity

(see *R. v Coley* [2013] EWCA Crim 223.)

# Automatism

The essence of it is that the movements or actions of the defendant at the material time were wholly involuntary.

The better expression is complete destruction of voluntary control: *Watmore v Jenkins* [1962] 2 QB 572 and *Attorney-General's Reference (No 2 of 1992)* [1994] QB 91 . Examples which have been given in the past include the driver attacked by a swarm of bees or the man under hypnosis. 'Involuntary' is not the same as 'irrational'; indeed it needs sharply to be distinguished from it

# Automatism

The difference between insanity and non insane automatism is that with insanity the failure to understand or act rationally is internal and caused by the defect of the mind.

In non-insane automatism the malfunctioning mind is caused by external factors (*R v Quick* [1973] 3 WLR 26 and *Sullivan* [1984] A.C. 156)

## Automatism – Non Insane

Where non insane automatism is raised the jury will have to consider was there a total loss of control or was control merely impaired? Could the suspect have reasonably foreseen the condition? Were there any sign of its onset? What could have been done to avoid it? Was it self-induced?

Expert evidence is a practical necessity (see *Hill v Baxter* (1958) 1 Q.B. 277, 42 Cr. App. R. 51).

# Sentencing – Mental Health

Sentences that may be imposed in Crown Court matters will normally include:

- a) Hospital Orders;
- b) Limitation (“Hybrid”) Orders;
- c) Discretionary Life sentence (where the partial defence of DR is successful or accepted);
- d) EDS;
- e) Determinate sentences.

# Insanity

Where a court has reached a not guilty verdict by reason of insanity, the court must make one of the following orders (section 5 Criminal Procedure (Insanity) Act 1964):

- i. a hospital order (with or without a restriction and/or limitation order);
- ii. a supervision order; or
- iii. an order for absolute discharge.

# Hospital Order - section 37 Mental Health Act 1983

A Hospital Order can be imposed:

- a) on conviction for any imprisonable offence, other than for an offence where the sentence is fixed by law; or
- a) where a special verdict is returned that the accused is not guilty by reason of insanity or a finding that the defendant is under a disability and that they did the act or made the omission charged against him (Section 5 Criminal Procedure (Insanity) Act 1964).

# Hospital Order - section 37 Mental Health Act 1983

- The court must be satisfied on the written or oral evidence of two registered medical practitioners that the defendant is suffering from a mental disorder the nature or degree of which makes it appropriate for the defendant to be detained in hospital for medical treatment and appropriate medical treatment is available.
- And the court is of the opinion having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that it is the **most suitable method** of disposal for the case (section 37(2)).
- Can only be made if the court is satisfied that arrangements have been made for the defendant to be admitted to a hospital within 28 days of the making of the order (section 37(4)).

# Hospital Order - section 37 Mental Health Act 1983

- The order authorises the detention of a patient in hospital for medical treatment.
- The order initially lasts for 6 months but can be renewed by the hospital for a further 6 months at a time if the conditions for making the order are still satisfied
- Whether or not a patient is fit to be released and the order discharged will be a matter for a mental health tribunal.
- Once imposed the patient becomes the responsibility of Mental Health services rather than the CJS.
- Note interim orders under section 38 gives medical professionals a chance to assess a patient before reaching a conclusion with the test in s37 is met.

# Restriction Order - section 41 Mental Health Act 1983

Can be imposed when the test for a hospital order is met and:

- a) at least one of the doctors whose evidence is taken into account by the court has given evidence orally; and
- b) If it appears to the court, having regard to:
  - (i) The nature of the offence
  - (ii) The antecedents of the offender, and
  - (iii) The risk of the offender committing further offences

that it is necessary for the protection of the public from serious harm for the person to be subject to a restriction order, namely restrictions on discharge, transfer or leave of absence from of the offender from hospital, without the consent of the Secretary of State

# Limitation Orders

Sometimes referred to as a hybrid order under s45A MHA 1983.

This allows a court to order that an offender is sent to a secure hospital for treatment (the restriction) and sets a minimum term (the limitation period) that must be served.

*R v Edwards* [2018] 2 Cr. App. R. (S.) 17 is the guideline authority. See also *R v Vowles (Lucinda)* [2015] EWCA Crim 45 regarding the approach to be taken by the courts:

- (1) Extent to which D needed treatment for his mental disorder;
- (2) Extent to which the offending was attributable to the mental disorder;
- (3) Extent to which punishment was required (assessment of culpability);
- (4) Protection of the public

NB – s.117 MHA 1983 applies to those subject to such Orders (aftercare) *Reynolds v Regina* [2021]

# Discretionary Life Sentence where DR has been accepted / successful

If a defendant succeeds in the partial defence of DR they will be found guilty of manslaughter.

Where a hospital order is not appropriate, the court will first consider whether a discretionary life sentence per s225(2) CJA 2003 should be imposed.

The court will impose a discretionary life sentence where the court is of the opinion that:

- a) there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences and
  
- b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life.

# Discretionary Life Sentence where DR has been accepted / successful

The tariff will be half the notional determinate sentence.

There are specific sentencing guidelines which cover manslaughter in case of diminished responsibility.

The central issue is the extent to which culpability was reduced or the extent to which responsibility was diminished. This will be an entirely fact specific and can vary widely from case to case.

# Extended Sentence

In the case of a manslaughter conviction by reason of DR, where the test for a discretionary life sentence is not met the court will consider whether an extended sentence should be imposed.

If the court considers that the defendant presents a substantial risk of causing serious harm through re-offending by committing a further specified offences he will be found 'dangerous'.

The line between a life sentence and EDS will be entirely fact specific. As noted in *R v Zana Assad Yusuf* [2018] EWCA Crim 2162. '

# QUESTIONS