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THE DEFENCE OF DIMINISHED RESPONSIBILITY IN CANADIAN CRIMINAL LAW

By MARK GANNAGE*

I. INTRODUCTION

The nature of responsibility has always presented a problem to philosophers. Although it is used implicitly everyday, the concept is complex and elusive. The premise that individuals should be held responsible for their conduct is at the base of the criminal law; generally, legal responsibility refers to the offender's liability to be tried, to be convicted, to be punished.¹ Traditionally, legal insanity as defined by the *Criminal Code*² has been the chief exception to this principle. An individual may be held, due to his mental condition, to be totally lacking of responsibility for his actions; and under such circumstances, it is deemed that the guilty mind cannot be present. Contrary to what the established rules of Canadian criminal law suggest, however, responsibility is not an all or nothing quality. Rather, just as there are several shadings of mental stability, there are many degrees of responsibility for crime. Psychiatrists have recognized that there is no sharp division between soundness and unsoundness of mind. Wherever one draws the line, there are bound to be some individuals who, owing to their mental infirmity, are not wholly responsible for their actions.³ In the past few decades the Canadian courts have recognized this and have found the need to introduce into the criminal law a new test—that of partial or diminished responsibility.

The concept of diminished responsibility in Canadian criminal law raises

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¹ Hill, *Responsibility and the Mentally Abnormal Offender* (1976-79), 14 J. of the Soc'y of Pub. Teachers of L. 81 at 81-83.

² Section 16 of the *Criminal Code*, R.S.C. 1970, c. C-34 [hereinafter the *Code*] reads:

- (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.
- (2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has a disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.
- (3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.
- (4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

³ Cassels, *Diminished Responsibility* (1964), 7 Can. Bar J. 8 at 25.

several issues. It is beyond the scope of this analysis to investigate all the questions surrounding this matter.⁴ Specifically, this study will look at the case law to illustrate that the doctrine exists in Canada. For the purposes of understanding and comparison, the doctrine as it stands in Scotland and England, including its origin, development, definition and scope, will first be considered. Next, several Canadian cases will be analyzed in order to trace the nature and growth of the concept. There will be an investigation of some of the reasons for the development in Canada of the diminished responsibility doctrine and the various approaches revealed by the cases. Finally, the question whether the defence of diminished responsibility should be codified will be discussed from the viewpoint of certainty, uniformity and fairness.

II. DIMINISHED RESPONSIBILITY IN SCOTLAND AND ENGLAND

A. *Origin and Development*

The doctrine of diminished responsibility originated over one hundred years ago in the law of Scotland. As a judicial creation, the concept that "weakness of mind" can alter the character of a criminal offence was first recognized by Lord Deas in *H.M. Advocate v. Dingwall*.⁵ The accused in that case was charged with murdering his wife after he had consumed a substantial quantity of whiskey. It was established that Dingwall's mind had been weakened by repeated attacks of *delirium tremens* and that he had likely suffered from epileptic fits. In charging the jury, Lord Deas instructed that the defences of insanity and drunkenness were untenable, but that a verdict of culpable homicide (manslaughter) could be returned if weakness of the mind was found. According to his Lordship:

The state of mind of the prisoner might be an extenuating circumstance although not such as to warrant an acquittal on the ground of insanity; and he [the trial judge] therefore could not exclude it from the consideration of the jury here, along with the whole other circumstances in making up their minds whether, if responsible to the law at all, the prisoner was to be held guilty of murder or culpable homicide.⁶

The jury returned a verdict of manslaughter and the accused was sentenced to ten years imprisonment.

Although the doctrine of diminished responsibility was originally limited

⁴ This paper adopts a practical rather than a normative approach; that is, the central question is whether the concept of diminished responsibility exists in Canada and not whether it should exist. No attempt will be made to construct an ideal model of criminal responsibility. See Topp, *A Concept of Diminished Responsibility for Canadian Criminal Law* (1975), 33 U.T. Fac. L. Rev. 205 at 213-15. Also, the issue of disposition will not be addressed. Perhaps it would be beneficial to have separate criteria in determining each of criminal responsibility and disposition, but to investigate this complex issue is beyond the scope of this paper. There will be no analysis of the meaning, scope and application of section 16 and the rash of criticism of it. Finally, although there are various established defences of diminished responsibility in Canadian criminal law, such as infanticide, provocation and drunkenness, the focus here is on the specific defence based on some mental abnormality short of insanity.

⁵ (1867), 5 Irv. 466, 4 S.L.R. 249 (Ct. Just.).

⁶ *Id.* at 479-80.

to the crime of murder, the case of *H.M. Advocate v. M'Lean*⁷ extended the concept to lesser crimes. In that case, the accused was convicted of housebreaking but the jury recommended leniency due to his apparent imbecility.

The *Homicide Act, 1957*⁸ introduced diminished responsibility to English law. Section 2(1) of the Act declares,

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he 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 doing or being a party to the killing.

The burden of proving the defence on a balance of probability rests on the defendant, according to section 2(2). Under section 2(3), the defence of diminished responsibility reduces the crime from murder to manslaughter, which means that the judge has a wide range of discretion as to sentencing. The statute is intended to provide for mitigation of punishment in murder cases where the accused is mentally disordered but not insane.

B. *Definition and Scope*

Framing a statutory definition of diminished responsibility to satisfy both psychiatrists and lawyers is difficult. Indeed, the draftsmen of the *Homicide Act* have been criticized for using certain ill-chosen words in section 2(1). In particular it has been pointed out that "mental responsibility" is an inapt phrase since responsibility is a legal or ethical notion and not a clinical fact about a patient which a doctor can examine and assess.⁹ Moreover, the use of the word "substantial" compounds the difficulty since the question of substantial impairment involves a subjective estimation and not one of medical science.¹⁰

Ultimately, a finding of diminished responsibility is a question of fact to be decided by the jury. With this in mind, the courts in Scotland and England approve of directions telling the jury that what must be established is a mental state "bordering on insanity, although not reaching it; a mind so affected that the responsibility is diminished from full responsibility to partial responsibility"¹¹ or "not quite mad but a border-line case."¹²

Lord Parker C.J. interpreted section 2(1) in *R. v. Byrne*:

"Abnormality of mind" . . . means a state of mind so different from that of

⁷ (1876), 3 Coup. 334.

⁸ 5 and 6 Eliz. 2, c. 11 (U.K.) [hereinafter *Homicide Act*].

⁹ *Supra* note 1, at 88. See also, Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1978) at 624.

¹⁰ Williams, *id.*

¹¹ *H.M. Advocate v. Savage*, [1923] S.C.J. 49 at 51, 61 S.L.T. 13 at 13 *per* Clerk L.J. (Ct. Just.).

¹² *R. v. Spriggs*, [1958] 1 Q.B. 270 at 276, [1958] 2 W.L.R. 162 at 167, [1958] 1 All E.R. 300 at 304 *per* Lord Goddard L.J. (C.C.A.).

ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough 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 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.¹³

The types of mental condition that fall within the doctrine of diminished responsibility are difficult to classify. The case law suggests, however, that where there is clear evidence of mental abnormality, whether it be psychosis, epilepsy, subnormality or in some instances neurosis, a plea of diminished responsibility will be accepted. In the case of psychopathy it seems unlikely that a plea of diminished responsibility will be allowed. But, if there is evidence of other mental abnormality along with the psychopathic disorder, there is a good chance that the verdict will be reduced to one of manslaughter.¹⁴ Clearly the courts in Scotland and England have indicated a desire, based on implicit policy grounds, to restrict the ambit of mental weaknesses that fall within the diminished responsibility category. For instance, in *H.M. Advocate v. Braithwaite*¹⁵ Lord Cooper made the important qualification:

that it will *not* suffice in law for the purpose of this defence of diminished responsibility merely to show that an accused person has a very short temper, or is unusually excitable and lacking in self-control. The world would be a very convenient place for criminals and a very dangerous place for other people, if that were the law.¹⁶

Ultimately, as Williams points out, the defence of diminished responsibility may often be interpreted in accordance with the morality of the case rather than as an application of psychiatric concepts.¹⁷

III. DIMINISHED RESPONSIBILITY IN CANADA

Leggett observes that "diminished responsibility does not exist [in Canada]. Perhaps the better terminology might be that it does not exist in so many words."¹⁸ There is no general statutory provision in Canada that sets out this concept. There are a number of Canadian cases decided in the past few decades, however, that indicate a basis for this doctrine. An examination of these cases reveals that an accused may be able to advance a defence based on a lack of intent resulting from a mental disorder not amounting to the *Code's* definition of insanity. It is essential to trace the development of these cases.

Traditionally, the *de facto* rule of criminal responsibility in Canadian law has been that a man is presumed to intend the natural or probable con-

¹³ [1960] 2 Q.B. 396 at 403, [1960] 3 W.L.R. 440 at 443-44, [1960] 3 All E.R. 1 at 4 (C.C.A.).

¹⁴ Whitlock, *Criminal Responsibility and Mental Illness* (London: Butterworths, 1963) at 96-97.

¹⁵ [1945] S.C.J. 55 at 57-58, [1944] S.N. 70, [1945] S.L.T. 209 (Ct. Just.).

¹⁶ *Id.*

¹⁷ Williams, *supra* note 9, at 629.

¹⁸ Leggett, "Diminished Responsibility," *Crown's Newsletter* (Ontario: Crown Attorney's Association, September, 1977) at 2.

sequences of his acts unless he clearly falls within a recognized defence such as insanity or intoxication.¹⁹ This common law maxim has been held in recent years to be misleading²⁰ and fallacious.²¹ Lord Denning stated in *Hosegood v. Hosegood* that it was merely a "proposition of ordinary good sense" and that "if on all the facts of the case it is not the correct inference, then it should not be drawn."²² In 1956, Mr. Justice Roach imported this statement into Ontario law in *R. v. Giannotti*.²³ More recently, the Ontario Court of Appeal held in *R. v. Orti*²⁴ that the word presumption should be avoided altogether and that juries should be told that they may infer the intent required for a conviction if it is supported by the facts of the case. The maxim has been seen as no more than a rule of common sense that is to be used as an aid in determining what was in a particular man's mind. Martin comments that the rule to be followed in determining what was present in this accused's mind is that one must take the person as he is; if he is a borderline mental defective then that will have a bearing on whether or not he really did foresee the consequences of what he was doing.²⁵ Indeed, the view expressed by Martin underlines the whole question of diminished responsibility and will be considered further in the latter part of this paper.

A statutory exception to the traditional common law presumption exists with respect to the offence of infanticide.

The *Code* defines infanticide in the following terms:

A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.²⁶

This section, in conjunction with section 590, is significant in that it reveals a legislative recognition of diminished responsibility as being a mitigating factor in reducing what would normally be murder to infanticide. In contrast to the mandatory life sentence attached to murder, the punishment for infanticide is no more than five years.

A. *The Early Cases*

The first reported decision in Canada in which the doctrine of diminished responsibility was raised is the 1926 case of *Bigaouette v. The King*.²⁷

¹⁹ Martin, *Insanity as a Defence* (1965-66), 8 Crim. L.Q. 240 at 256-57.

²⁰ *Vallance v. The Queen* (1961), 108 C.L.R. 56 at 82 (H.C. of Aust.); *R. v. Mulligan* (1974), 18 C.C.C. (2d) 270 at 274-75, 26 C.R.N.S. 179 at 184-85 (Ont. C.A.), *aff'd* [1977] 1 S.C.R. 612.

²¹ *Supra* note 19, at 257.

²² (1950), 66(1) T.L.R. 735 at 738 (C.A.).

²³ [1956] O.R. 349 at 364, 115 C.C.C. 203 at 213, 23 C.R. 259 at 269 (C.A.).

²⁴ [1969] 1 O.R. 461 at 463, [1970] 1 C.C.C. 223 at 225, (1968) 6 C.R.N.S. 233 at 235 (C.A.).

²⁵ *Supra* note 19, at 255-56. See also, Carter, *Annotation* (1967), 1 C.R.N.S. 299 at 301.

²⁶ R.S.C. 1970, c. C-34, s. 216.

²⁷ (1926), 46 C.C.C. 311 (Que. K.B.) *rev'd on other grounds*, [1927] S.C.R. 112.

In that case the Quebec King's Bench, Appeal Court dealt with an appeal against a conviction of murder. Greenshields J. stated that he did not understand the defence counsel's submission that "[the trial judge] confounded the plea of insanity with that of *mental debility*, rendering the accused incapable of committing the act of which he is accused.'" ²⁸ There was no psychiatric evidence provided on the accused's behalf. The appeal judge held:

It is the first time that it has, to my knowledge, been suggested, that mental debility, not amounting to insanity or degeneracy, falling short of irresponsibility, is a defence to a criminal charge. It is probably true that a large proportion of criminals are drawn from the mentally weak and the degenerate. A person endowed with a strong mentality and a vigorous, active, moral sense, as a rule, is more unlikely to become a criminal than the degenerate and the mentally weak. It may be the crime is committed because he is mentally weak and morally degenerate, but, nevertheless, he is a criminal. ²⁹

Greenshields J. supported his position by quoting two authorities, neither of which dealt with the point counsel was trying to make. ³⁰ One case concerned uncontrollable impulse and the other dealt with insanity. ³¹ Indeed, *Bigaouette* reveals not only a rejection of the concept of diminished responsibility, but also a lack of understanding of its essence. It is submitted that because of this fundamental lack of understanding the case is not a strong authority for the proposition that diminished responsibility does not exist in Canadian law.

The next case that raised a *mens rea* defence based upon mental disorder short of insanity was *R. v. Flett*. ³² The accused was convicted at trial of assault with intent to rob. Several psychiatrists had testified that Flett suffered from "infective exhaustive psychosis." ³³ On appeal, defence counsel submitted the accused's mental condition had affected his capacity to form the specific intent to rob. ³⁴ Sloan J.A. stated:

I do not consider it necessary to reach any conclusion as to whether or not the theory advanced by him [defence counsel] is good in law as a defence . . . there is no evidence to support the suggested theory. . . . ³⁵

Hence, the British Columbia Court of Appeal left open the question whether the result would have been different if there had been some evidence to support a diminished responsibility position. At the same time, however, the Court implicitly indicated a willingness to entertain the submission, and unlike the Court in *Bigaouette*, it understood the essence of the plea. ³⁶

In *Regina v. Hoodley*, ³⁷ two psychiatrists testified that the accused, who

²⁸ *Id.* at 316 (C.C.C.).

²⁹ *Id.* at 317.

³⁰ Mewett and Manning, *Criminal Law* (Toronto: Butterworths, 1978) at 214.

³¹ *Supra* note 27, at 324: referring to *R. v. Creighton* (1908), 14 C.C.C. 349 (Ont. H.C.); *R. v. Jessamine* (1912), 19 C.C.C. 214, 1 D.L.R. 285 (Ont. C.A.).

³² [1943] 2 D.L.R. 656, [1943] 1 W.W.R. 672, 79 C.C.C. 183 (B.C.C.A.).

³³ *Id.* at 660 (D.L.R.), 676 (W.W.R.), 187 (C.C.C.).

³⁴ *Id.* at 661 (D.L.R.), 677-78 (W.W.R.), 188 (C.C.C.).

³⁵ *Id.* at 661-62 (D.L.R.), 678 (W.W.R.), 187 (C.C.C.).

³⁶ *Supra* note 30.

³⁷ (1955), 15 W.W.R. 397, 111 C.C.C. 210, 21 C.R. 281 (B.C.C.A.).

was charged with murder, was an aggressive psychopath. There was no evidence, however, that the accused suffered from mental disease or was affected by any mental deficiency to weaken his mental capacity. On behalf of the British Columbia Court of Appeal, O'Halloran J.A. held:

Appellant's counsel has asked this Court to hold the learned Judge did not instruct the jury adequately upon s. 259(b) to include what was described as the Scottish doctrine of diminished responsibility occasioned by mental abnormality. But even if such a doctrine is available in Canada (and I refrain now from indicating a view one way or the other) in my judgment no foundation has been laid in this case for its application: see *R. v. Flett*, 79 Can. C.C. 183 . . .³⁸

Thus, the Court again left the issue open. Significantly, the Court's finding of no evidence of mental abnormality is consistent with the law of Scotland and England where it has been noted that an aggressive psychopath would likely be unable to plead diminished responsibility.

B. *More v. The Queen: The Breakthrough*

The first case in Canada to directly confront the question of intent and mental disorder short of insanity was *More v. The Queen*.³⁹ Whereas some prior Canadian decisions had indicated a reluctance, based upon the nature of the evidence presented, to adopt the doctrine of diminished responsibility, the Supreme Court in *More* took a novel approach. There was no mention of specific intent, nor was an emphasis placed on the need for an incapacity in the accused to perform the mental processes involved in the crime. Rather, the jury was asked to consider only whether the defendant, who was charged with capital murder punishable by death, had in fact planned and deliberated.⁴⁰ Because of its powerful impact on the development of subsequent case law and the concept of diminished responsibility in Canada, *More v. The Queen* should be examined in some detail.

The accused was charged with the capital murder of his wife. Medical evidence established that More was suffering from "depressive psychosis." This mental condition is characterized by feelings of hopelessness and despair and an impaired ability to reason, think or decide even inconsequential matters. The defence of insanity was expressly disclaimed. It was contended that the medical evidence was adduced to assist the jury in deciding whether the accused's action in pulling the trigger was a deliberate act. The trial judge directed the jury that the evidence of experts was of slight weight. At his first trial More was convicted of capital murder. Without citing authorities, the Supreme Court ordered a new trial on the ground that the trial judge had misdirected the jury with regard to the "deliberate nature" of the killing. Mr. Justice Cartwright, using words often quoted in subsequent cases, wrote for the majority:

The evidence of the two doctors and particularly that of Dr. Adamson . . . that in his opinion, at the critical moment the appellant was suffering from a depres-

³⁸ *Id.* at 400 (W.W.R.), 213 (C.C.C.), 284 (C.R.).

³⁹ [1963] S.C.R. 522, 41 D.L.R. (2d) 380, [1963] 3 C.C.C. 289.

⁴⁰ Reynolds, *MENS REA and Mental Disorder* (1979), 37 U.T. Fac. L. Rev. 187 at 200.

sive psychosis resulting in 'impairment of the ability to decide even inconsequential things, inability to make a decision in a normal kind of a way' would have a direct bearing on the question whether the appellant's act was deliberate in the sense defined above [i.e. 'considered, not impulsive']; its weight was a matter for the jury.⁴¹

Fauteux J. (Taschereau C.J.C. concurring) wrote the dissenting judgment and concluded that impairment of mental capacity short of insanity was not a defence to capital murder.⁴² To hold otherwise, as the majority had done, would be to establish a concept of diminished responsibility in Canada. Fauteux J. specifically dealt with the doctrine, briefly reviewed the English and American positions and rejected it. He reasoned that it was improbable that Parliament had intended such a substantial change in the law in the absence of an explicit alteration. The failure of the majority to agree with him, however, suggests that the diminished responsibility concept was recognized in *More*.⁴³

In his comment on *More*, Macdonald argues that the acceptance of the medical evidence does not introduce into our law the concept of diminished responsibility in the sense defined by the British *Homicide Act*.⁴⁴ Rather, he contends that such evidence, by negating the element of deliberateness, functions in a manner internal to the charge of capital (now first degree)⁴⁵ murder itself; by contrast, in Britain a plea of diminished responsibility involves the external function of such evidence.⁴⁶ This distinction is confusing and artificial. Certainly in the British statute the abnormality of mind resulting in a substantial impairment of mental responsibility is instrumental in negating the requisite intent to murder. Similarly, in Canada planning and deliberation are necessary elements of capital (now first degree) murder. In both cases, the evidence can be said to operate in a manner internal to the charge itself although the required degrees of *mens rea* may differ. Furthermore, the evidence in both cases may be said to function externally in that it relates to the state of mind and hence, to the responsibility of the particular accused. In addition, and contrary to Macdonald's suggestion,⁴⁷ Cartwright J.'s contention in *More* that there is no danger of affecting the interpretation of the *Code's* insanity defence does not mean that the diminished responsibility doctrine has not been introduced. The introduction of section 2 of the *Homicide Act* certainly did not affect the interpretation of the *M'Naghten*⁴⁸ rules, the British equivalent to the Canadian insanity defence.

Contrary to Macdonald's view, the underlying concepts of *More* and section 2 of the *Homicide Act* coincide. Although the former addresses the

⁴¹ *Supra* note 39, at 535 (S.C.R.), 382 (D.L.R.), 291 (C.C.C.).

⁴² *Id.* at 533 (S.C.R.), 391 (D.L.R.), 300 (C.C.C.).

⁴³ *Supra* note 30, at 218.

⁴⁴ Macdonald, *More v. The Queen* (1965), 23 U.T. Fac. L. Rev. 152 at 153-54.

⁴⁵ The term "first degree" appeared for the first time in the *Criminal Law Amendment Act (No. 2)*, 1976, S.C. 1974-75-76, c. 105, s. 214.

⁴⁶ *Supra* note 44, at 154.

⁴⁷ *Id.*

⁴⁸ (1843), 10 Cl. & Fin. 200, 8 E.R. 718 (H.L.).

issue of reducing capital murder to non-capital murder, the provision in the English statute is concerned with the murder-manslaughter dichotomy. Both stand for the principle, however, that mental abnormality short of insanity may diminish the seriousness of the offence. Moreover, the two elements of the defence of diminished responsibility, as defined in section 2 of the *Homicide Act*, can be found in *More*. There was evidence of an abnormality of mind and a resulting substantial impairment of mental responsibility. To be sure, depressive psychosis is a type of mental condition that has been held to fall within the doctrine of diminished responsibility in England and Scotland.

The decision in *More* established another milestone in the field of Canadian criminal law. In permitting an accused to introduce psychiatric evidence of the kind presented in *More*, the Supreme Court has shown a much greater appreciation of psychiatric and psychological theories than ever before. As Nemiroff suggests: "[t]he Court, in effect, has stated that what on the surface may appear to be a deliberate act may in fact not be deliberate by virtue of an accused's mental deficiencies."⁴⁹ This outlook defies the common law maxim of presumed intent discussed previously.

C. *The Aftermath*

It is essential to examine the extent to which the principle in *More* has been applied or expanded in subsequent Canadian cases. Such an investigation will aid in assessing the validity of Topp's statement that "notwithstanding the Supreme Court decision in *Hore*, there seems to be a trend towards disallowing diminished responsibility as a defence."⁵⁰

Shortly after *More* the Supreme Court was confronted with the issue of diminished responsibility in *McMartin v. The Queen*.⁵¹ As in *More*, medical evidence of a mental disorder not amounting to insanity was relied upon by defence counsel to support the submission that the crime, if committed by the accused, was non-capital rather than capital murder. The Court held that the Court of Appeal had erred in rejecting the evidence of a mental deficiency which made *McMartin* prone to impulsive and unpredictable behaviour. With explicit reference to the judgment in *More*, Ritchie J. wrote:

Under all the circumstances, it appears to me that the evidence of Dr. Tyhurst, like that of the doctors in *More v. The Queen* . . . might have caused the jury 'to regard it as more probable that the accused's final act was prompted by sudden impulse rather than by consideration.'

For these reasons I am of opinion that the evidence of Dr. Tyhurst should have been admitted . . .

In my opinion, without the evidence of the appellant's mental history and condition, it cannot be said that all the circumstances bearing on the question of whether the murder was planned and deliberate have been passed upon by a jury . . .⁵²

⁴⁹ Nemiroff, *Case and Comment: More v. The Queen* (1965), 11 McGill L.J. 174 at 177.

⁵⁰ Topp, *supra* note 4, at 210.

⁵¹ [1964] S.C.R. 484, 46 D.L.R. (2d) 372, 43 C.R. 403.

⁵² *Id.* at 495 (S.C.R.), 383 (D.L.R.), 413-14 (C.R.).

The reasoning in both *More* and *McMartin* was that "since 'planned and deliberate' means 'considered not impulsive', psychiatric evidence to show that the accused was prone to impulsive actions, or that his judgmental faculties were impaired was relevant to the issue of whether he had the required mental element."⁵³ *R. v. Mitchell*⁵⁴ was decided shortly after *McMartin* and it, too, applied this reasoning. Spence J. wrote:

I am of the opinion that the judgments in these two cases have as their *ratio decidendi* the principle that in determining whether the accused committed the crime of capital murder in that it was 'planned and deliberate on the part of such person' the jury should have available and should be directed to consider all the circumstances including not only the evidence of the accused's actions but of his condition, his state of mind . . .⁵⁵

More, *McMartin* and *Mitchell* clearly import some concept of diminished responsibility into the law of capital murder as it existed in the early Sixties. Reynolds maintains that the decisions in *More* and *McMartin* "represent a choice by the Supreme Court of Canada to embark on one possible road rather than another, and the view of *mens rea* which their choice entails cannot rationally be confined to cases involving capital punishment or first degree murder."⁵⁶ Certainly the case of *R. v. Blackmore*⁵⁷ supports this view. In that case the accused was charged with non-capital murder of a small child. There was evidence that Blackmore suffered from reactive depression which could lead him to strike out against almost anything or anybody. Citing *McMartin*, the Nova Scotia Court of Appeal held that this evidence should have been placed before the jury in order that they could have considered whether the accused, suffering from such a disorder of the mind and with all the other circumstances, had the intent to cause bodily harm which he knew was likely to cause death and was reckless whether death ensued or not. The question whether the decision in *Blackmore* views a mental deficiency short of insanity as negating specific intent, or as affecting *mens rea* generally, is subject to debate. Carter submits that it is clear from *Blackmore* that a mental disorder not amounting to insanity is sufficient to affect the accused's capacity to form the necessary specific intent to kill or cause bodily harm which he knows is likely to cause death.⁵⁸ As Reynolds observes, however, there is no mention of specific intent in the case. The decision indicates the Court felt that if the mental element for murder was not found, then a conviction for manslaughter would result. On the other hand, Reynolds notes that the facts in this case clearly showed that the accused had intended to cause unlawful bodily harm; thus, the Court was not invoking a "partial defence" like drunkenness which would not apply to a general intent offence.⁵⁹ The principal issue raised here will be further considered in the latter part of this analysis.

⁵³ *Supra* note 40, at 194.

⁵⁴ [1964] S.C.R. 471, 46 D.L.R. (2d) 384, 43 C.R. 391.

⁵⁵ *Id.* at 474-75 (S.C.R.), 390 (D.L.R.), 393 (C.R.).

⁵⁶ *Supra* note 40, at 195.

⁵⁷ (1967), 53 M.P.R. 141, 1 C.R.N.S. 286 (N.S.C.A.).

⁵⁸ Carter, *supra* note 25.

⁵⁹ *Supra* note 40, at 200.

Blackmore is significant in that it extends the diminished responsibility concept in Canadian law beyond the offence of capital, or first degree, murder. It establishes the principle that evidence of mental disorder short of insanity is relevant and admissible to raise doubt about a lesser degree of *mens rea* than the highest form of "planned and deliberate" required to prove capital murder. In effect, the decision in *Blackmore* parallels section 2 of the *Homicide Act* for it holds that in certain circumstances abnormality of mind may reduce a charge of murder to manslaughter. It will become evident that several subsequent Canadian cases have confirmed this principle.

D. Recent Cases

The decisions of Canadian courts in the past decade have exhibited diverse attitudes toward the question of diminished responsibility. Whereas some cases have embraced the concept, or a concept similar to it, others have shown a reluctance to accept it. Some of the recent cases will now be examined in a chronological order.

*R. v. Mulligan*⁶⁰ is cited by Topp to support his view that the trend in Canada is towards disallowing diminished responsibility as a defence.⁶¹ Indeed, in *Mulligan* the doctrine was not invoked, although there was a suggestion that it would have been had the facts been different. During the trial of the accused for second degree murder, a psychiatrist testified that at the time of the stabbing, the accused had an acute "dissociative reaction" caused by a combination of psychological stress and alcohol. This order was said to have constituted a disease of the mind as defined by the *Code* because the accused could not form the necessary intent or be sensitively aware of the nature and consequences of his action. On appeal the defence argued that the trial judge had failed to relate the evidence as to mental state to the issue of necessary intent. Martin J.A., writing for the Ontario Court of Appeal stated:

I do not consider that there was non-direction on the part of the learned trial Judge by reason of his failure to relate the evidence of the accused's emotional state separately to the issue of intent . . . There was not in this case any mental disorder or defect not amounting to insanity which might, in some circumstances, be relevant to the issue of intent.⁶²

It is arguable, that, not unlike the earlier cases of *Flett* and *Hoodley*, the decision in *Mulligan* held that the defence of diminished responsibility was not supportable on the evidence of the particular case, but that such a doctrine could be invoked if the circumstances warranted it. Topp maintains that the facts in this case fall within the principle established in *More*.⁶³ Surely there are obvious differences between the two cases, including the nature of

⁶⁰ (1974), 18 C.C.C. (2d) 270, C.R.N.S. 179 (Ont. C.A.), *aff'd* [1977] 1 S.C.R. 612.

⁶¹ Topp, *supra* note 4, at 211.

⁶² *Supra* note 60, at 276 (C.C.C.), 185-86 (C.R.N.S.).

⁶³ Topp, *supra* note 4, at 212.

both the mental disorder and the offence charged. Although the latter difference would likely not constitute a valid reason for departing from the principle, especially in the light of *Blackmore*, it is not clear whether or not the "dissociative reaction" of the accused would justify a finding of diminished responsibility. Certainly Martin J.A. sees this disorder as an "emotional state" and not an abnormality of mind as provided in the English *Homicide Act*.⁶⁴ This is indeed a murky area over which even the experts may disagree. The fact that the jury was not charged to at least consider the evidence perhaps suggests a reluctance on the part of the Court to admit to the doctrine.

The Supreme Court unanimously rejected the defence of diminished responsibility and denied the relevance of any abnormality of mind short of the *Code's* definition of insanity in *Chartrand v. The Queen*.⁶⁵ At issue was whether the accused was insane. The Court held that since Chartrand, though mentally ill with a psychopathic personality, could appreciate the nature and quality of his act and that it was wrong, he could not succeed with the defence of insanity. By way of *obiter*, de Grandpré J. wrote on behalf of the Court:

What the witness adds on the subject of the inner pathological process cannot be taken into consideration under our criminal legislation, which does not recognize the diminished responsibility theory.⁶⁶

Chartrand is similar to *Bigaouette* in that both cases directly deny the existence of the defence of diminished responsibility in Canadian law. Moreover, the defendants in both cases suffered from a psychopathic personality which by itself would not support a plea of diminished responsibility even in England and Scotland. It should be noted that *Chartrand* is not conclusive authority as far as the application of diminished responsibility is concerned since the issue of lack of intent was never raised.⁶⁷

In *R. v. Meloche*⁶⁸ the Quebec Court of Appeal accepted the argument presented by defence counsel that the accused "had never formed the specific required intent to commit murder under section 212(a)."⁶⁹ The court declared admissible the testimony of the doctors who would have said at trial that Meloche had a reaction of self-destruction in stress situations. This evidence supported the accused's claim that he was going to his place of employment to commit suicide and not to kill his bosses. Citing *R. v. Lupien*⁷⁰ and *R. v. Kuzmack*,⁷¹ Brossard J.A. concluded that acceptance of such evidence by the jury may have led to a conviction for manslaughter instead of murder. The case is unclear as to the true nature of the accused's state of

⁶⁴ 5 and 6 Eliz. 2, c. 11, s. 2(1) (U.K.).

⁶⁵ [1977] 1 S.C.R. 314, 64 D.L.R. (3d) 145, 26 C.C.C. (2d) 417.

⁶⁶ *Id.* at 318 (S.C.R.), 148 (D.L.R.), 420 (C.C.C.).

⁶⁷ *Supra* note 40, at 204.

⁶⁸ (1975), 34 C.C.C. (2d) 184 (Que. C.A.).

⁶⁹ *Id.* at 189.

⁷⁰ [1970] S.C.R. 263, (1969), 9 D.L.R. (3d) 1, 9 C.R.N.S. 165.

⁷¹ [1955] S.C.R. 292, 111 C.C.C. 1, 20 C.R. 377.

mental weakness. Significantly, *Meloche* invoked the concept of specific intent that is characteristic of the drunkenness defence.

The most recent decision by the Supreme Court that may be seen to touch upon the diminished responsibility issue is *MacDonald v. The Queen*.⁷² This case involved an appeal by a youth from a conviction of robbery, or assault with intent to steal. The defence at trial was that the accused's mental disorder, described as "adjustment reaction of adolescence," negated his "capacity to form specific intent." The court recognized the relevance of such evidence to the question of guilt and stated "it is impossible to conclude that the trial Judge was unaware of the centrality of intent to which the evidence of the psychiatrist was addressed."⁷³ It is not clear whether the judgment was referring to a specific-general intent dichotomy such as that used in the defence of drunkenness. It is certain, however, that in contrast to its decision in *Chartrand* the previous year, the Supreme Court in *MacDonald* did not deny the relevance of mental disorder short of the *Code's* definition of insanity to the issue of criminal liability.⁷⁴

*R. v. Baltzer*⁷⁵ appears to allow in through the back door a type of defence that *Chartrand* barred at the front. This case concerned an accused suffering from schizophrenia who was charged with murder. The Nova Scotia Court of Appeal held that evidence of mental illness not amounting to the *Code's* definition of insanity was relevant to the issue of whether the accused had the mental capacity to formulate the specific intent. If the jury, having determined what was in the accused's mind at the time of the act, found that Baltzer was incapable of forming the specific intent to murder, then a manslaughter verdict was appropriate. This is perhaps the most outright acceptance of the defence of diminished responsibility in Canadian case law to date. Yet, somewhat ludicrously, Mr. Justice MacDonald commented: "I want to make it very clear that in saying the foregoing I am not bringing into our jurisprudence the law of diminished responsibility."⁷⁶

In the cases of *R. v. Browning*⁷⁷ and *R. v. Hilton*⁷⁸ the Ontario Court of Appeal recognized the existence of a defence based upon a mental disorder not amounting to the legal definition of insanity to negate specific intent. In the latter case Jessup J.A. held:

[E]vidence of mental illness or mental disorder falling short of insanity should be considered along with all the other evidence in determining whether the accused had the intent requisite for murder, and in the event that a jury entertained a reasonable doubt on the issue of intent, the verdict would be one of manslaughter.⁷⁹

⁷² [1977] 2 S.C.R. 665, (1976), 68 D.L.R. (3d) 649, 29 C.C.C. 257.

⁷³ *Id.* at 675 (S.C.R.), 657 (D.L.R.), 265 (C.C.C.).

⁷⁴ *Supra* note 40, at 204.

⁷⁵ (1974), 10 N.S.R. (2d) 561, 27 C.C.C. (2d) 118 (S.C. App. Div.).

⁷⁶ *Id.* at 590 (N.S.R.), 141 (C.C.C.).

⁷⁷ (1976), 34 C.C.C. (2d) 200 (Ont. C.A.).

⁷⁸ (1977), 34 C.C.C. (2d) 206 (Ont. C.A.).

⁷⁹ *Id.* at 208.

A similar principle was expressed in *Browning* by Gale C.J.O. who referred to "a specific intent or ulterior intent set out in s. 212(a)."⁸⁰ It is not clear upon which of the following two assumptions the rule upheld in these cases is based. One assumption is that the jury, before considering the offence of murder, will already have concluded from the totality of evidence, including evidence of mental disorder, that a conviction for culpable homicide is appropriate. Another assumption is that even if the accused, by reason of mental disorder, may not have possessed the requisite mental element for murder, he must still necessarily have possessed the mental component required for the included offence of manslaughter. According to Reynolds: "[t]he latter assumption—that mental disorder is not in law capable of providing a defence to manslaughter—corresponds to the specific intent doctrine in the defence of drunkenness."⁸¹ In its effect it is similar to that of section 2 of the *Homicide Act*.

The most recently reported case in Canada dealing with the issue of diminished responsibility is *R. v. Lechasseur*.⁸² In this decision the Quebec Court of Appeal implicitly rejected the contention of the trial judge that the defence of diminished responsibility did not exist in Canada by holding that psychiatric evidence of the accused's incapacity to formulate the specific intent to murder was relevant to a possible verdict of manslaughter. The Court quoted from *More* to support its proposition and referred also to the cases of *Browning* and *Hilton*.

E. *Nature of Diminished Responsibility in Canadian Case Law and Reasons For Its Development*

The above analysis supports the proposition that the doctrine of diminished responsibility exists in Canadian case law. The cases have certainly not exemplified a monolithic approach to the concept. Indeed, some cases such as *Bigaouette* and *Chartrand* deny the existence of the defence and others, including *Flett*, *Hoodley* and *Mulligan*, are reluctant to apply it. A significant number of cases, however, uphold a principle akin to the defence of diminished responsibility as it exists in England and Scotland without referring to it by that name. For instance, from the viewpoint of the particular mental disorder involved, the evidence in *More*, *Blackmore* and *Baltzer* would surely support a plea of diminished responsibility in these jurisdictions. The mental abnormality in the above-mentioned Canadian cases is of such a type as to fall within the ambit of the English statutory definition and the Scottish judge-made law. Other cases, such as *Meloche* and *MacDonald*, seem to adopt the principle although the specific mental deficiencies involved do not fit into the English and Scottish mould as readily as the above cases. Perhaps the courts in Canada base their decision on the morality of the case as opposed to the psychiatric evidence. But whatever specific parallels can be drawn between the Canadian criteria of mental illness short of insanity and

⁸⁰ *Supra* note 77, at 202.

⁸¹ *Supra* note 40, at 201.

⁸² (1977), 38 C.C.C. (2d) 319 (Que. C.A.).

that of established diminished responsibility jurisdictions, the essential fact remains that, contrary to Topp's view, the doctrine does exist in Canada in some form. To truly understand the nature of this concept as it is applied in Canada, it is necessary to trace the reasons for its development in Canadian case law.

The sudden appearance and widespread acceptance of the doctrine of diminished responsibility was the result of a combination of factors. One concern that may have affected earlier decisions such as *More* was the existence of capital punishment following a conviction for capital murder. The relationship between criminal responsibility and sentencing is a complex and difficult one, the analysis of which is beyond the scope of this paper. But it is noteworthy that during the time of the decision in *More*, the first case dealing with the new "capital murder" section, the existence of capital punishment was seen as an impetus for a change in the strict rules governing responsibility. The emotional impact of the issue is summed up by Cassells who wrote, "[t]he conviction and hanging of an 'almost' insane prisoner can hardly be described as a spectacle of which Man can be proud."⁸³ It is difficult to speculate on the degree of importance this issue played in *More* and subsequent decisions.⁸⁴ Certainly the acceptance of the doctrine of diminished responsibility in cases involving offences not punishable by death suggests the issue was of minimal influence in the development of the diminished responsibility theory in Canada.

A more important reason for the adoption of diminished responsibility is the increasing acceptance on the part of the courts of expert psychiatric evidence when determining whether an accused has the requisite mental element for a particular offence. This phenomenon has been labelled by Schiffer as the "'psychiatization' of contemporary criminal law."⁸⁵ Judgments like *More* indicate a further continuation of the trend towards approaching the whole problem of mental illness in relation to criminal liability in a much more realistic manner.⁸⁶ The courts have recognized that advances in medical science indicate that conditions of mind can exist which may significantly affect the responsibility of the accused for his acts and further, that such conditions do not necessarily fall within the legal definition of insanity as set out in the *Code*.⁸⁷ Just as there is no sharp division between a sound and an unsound mind, the courts have recognized that there is not always a clear demarcation between total responsibility for one's acts and no responsibility at all. In recognizing that responsibility is not by nature an all or nothing quality and that the statutory definition of insanity does not encompass a significant number of mental illnesses, the Canadian courts have found the need to introduce a new test of partial or diminished responsibility.

⁸³ *Supra* note 3, at 55.

⁸⁴ *Supra* note 1, at 87, 92; Weiler, *The Supreme Court of Canada and the Doctrines of Mens Rea* (1971), 49 Can. B. Rev. 280 at 338-40.

⁸⁵ Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978) at 1.

⁸⁶ *Supra* note 19, at 254.

⁸⁷ *Supra* note 3, at 9.

The acceptance by the courts of psychiatric evidence in assessing responsibility is part and parcel of a more significant change in judicial attitudes toward the concept and proof of *mens rea*.⁸⁸ Indeed it has already been noted that the judiciary has significantly altered its view of the traditional presumption that a person intends the natural and probable consequences of his or her acts. The following comments by Martin perhaps best exemplify this modified approach by the courts:

The crucial problem is to determine what was in the particular accused's mind, and in order to determine what was in his mind you have to look at his whole personality, including any mental disorder or disturbance from which he may be suffering, and the jury are entitled to have that evidence to consider along with all the other evidence in determining whether or not the Crown has established beyond a reasonable doubt that the accused did have the requisite state of mind. This is altogether apart from the defence of insanity.⁸⁹

The decisions in the cases that have been examined are in part the result of a change in attitude as revealed in Martin's words.

Another factor in the development of diminished responsibility in Canadian law has been the evolution during the past sixty years of the defence of drunkenness. This evolution has affected the whole sphere of *mens rea*. Several of the cases supporting the diminished responsibility doctrine have borrowed such concepts as "capacity" and "specific intent" from the law governing the defence of self-induced intoxication.⁹⁰

In *R. v. George*⁹¹ the Supreme Court distinguished between general and specific intent in dealing with the defence of drunkenness. As the law has developed, drunkenness resulting in incapacity to form a specific intent may provide a defence to a charge where the offence involves a specific intent; such drunkenness, however, cannot negate the general intent or ordinary *mens rea* of an offence. Several cases apply this reasoning to situations where the accused suffers from a mental abnormality short of insanity, holding that the defendant could not form the specific intent necessary for certain offences.

The preceding investigation into the reasons for the development of the defence of diminished responsibility is an aid in determining the nature of the concept as it exists in Canadian law. The cases considered reveal four general approaches to the doctrine.

The traditional view that mental disorder is irrelevant unless it falls within the *Code's* definition of insanity is supported by *Bigaouette* and *Chartrand*. This conservative approach, rooted in the common law maxim of presumed intent, has become untenable in recent years as greater emphasis has been placed on the need for the Crown to prove all the elements of the case.⁹²

⁸⁸ *Supra* note 40, at 188, 198.

⁸⁹ *Supra* note 19, at 257; see also, Carter *supra* note 25, at 301.

⁹⁰ *Supra* note 40, at 198.

⁹¹ [1960] S.C.R. 871, 128 C.C.C. 289, 34 C.R. 1. This case relied heavily on the case of *D.P.P. v. Beard*, [1920] A.C. 279, [1920] All E.R. 21, 14 Cr. App. Rep. 159 (H.L.).

⁹² *Supra* note 40, at 205.

A second perspective is that revealed in *Flett*, *Hoodley* and *Mulligan*. These cases indicate a reluctance to apply the doctrine, perhaps out of a fear of opening the floodgates to a deluge of such pleas, but suggest it may exist nevertheless.

The third possible approach is the adoption of a "capacity to form specific intent" test like that used in the defence of drunkenness. The cases of *Lechasseur* and *Baltzer* clearly embrace this principle; the test has also been influential in the reasoning in *Meloche*, *Browning* and *Hilton*. Its effect is to reduce such crimes as murder, for example, to a lesser included offence, in this case manslaughter. This approach is much like that outlined in section 2 of the English *Homicide Act*. The specific-general intent dichotomy has been attacked by numerous commentators⁹³ as anomalous and confusing. Indeed, the House of Lords, in *D.P.P. v. Majewski*,⁹⁴ in effect admitted that such a distinction was illogical but sound policy. It has been argued quite convincingly by several critics⁹⁵ that though the specific-general intent dichotomy may be sound policy regarding voluntary intoxication, it is illogical to apply it to situations of lack of intent resulting from mental disorder. *Majewski* is based on the premise that there is something blameworthy connected with becoming dangerously drunk; however, there is surely no such fault connected with being mentally disturbed.⁹⁶

A fourth approach focuses upon the mental disorder of the accused as one factor that, with all of the other relevant circumstances, should be taken into account in determining whether the requisite mental element is present. Depending upon the trier of fact's opinion of the state of mind of the defendant at the relevant time, the operation of this principle could result in a conviction for a lesser included offence or in a complete acquittal. This view was intimated by Laskin C.J.C. in *Macdonald* and it can be argued that it is consistent with the decisions in *More*, *McMartin*, *Mitchell* and *Blackmore*, as well as being supported by several commentators.⁹⁷

F. *Should The Defence Of Diminished Responsibility Be Codified*

It has been suggested that the doctrine of diminished responsibility exists in Canadian case law. The question remains whether this defence should be codified. Clearly this issue invokes a multitude of related concerns. These include: the appropriate definition and mechanics of applying the defence of diminished responsibility;⁹⁸ the disposition of convicted offenders found par-

⁹³ *Id.* at 207, 208; see also, Gold, *An Untrimmed Beard. The Law of Intoxication as a Defence to a Criminal Charge* (1976-77), 19 *Crim. L.Q.* 34.

⁹⁴ [1977] A.C. 443, [1967] 2 All E.R. 142, (1976) 62 *Cr. App. Rep.* 262 (H.L.).

⁹⁵ *Supra* note 85, at 155, 187; *supra* note 18 at 5.

⁹⁶ *Supra* note 40, at 202.

⁹⁷ *Id.* at 203; see also, *supra* note 19, at 257; Carter, *supra* note 25; lecture by J.L.L.J. Edwards, *Automatism: Clinical Entity and Psychiatric Defence*, to the Clarke Institute of Psychiatry (February 13, 1980).

⁹⁸ Topp, *supra* note 4, at 213-15.

tially responsible for their acts;⁹⁹ the aims of the criminal justice system;¹⁰⁰ the justification and relative merits of rehabilitation, punishment and deterrence, including the advantages and disadvantages of imprisonment and treatment for various classes of offenders;¹⁰¹ the interpretation, application and suggested alterations of the insanity defence of the *Code*; and the utility and degree of success of the defence of diminished responsibility in other jurisdictions.¹⁰² Although these issues do exist and are important, an analysis of them is beyond the ambit of this paper. From the viewpoint of such highly cherished values in our legal process as certainty, uniformity and fairness, however, a strong argument can be made for the introduction of the defence of diminished responsibility into the *Code*. In addition, the reasons previously discussed for the development of the doctrine in the case law apply equally to support the enactment of the defence in a statute.

The fact that one can trace at least four different approaches to the question of mental illness which do not fall within the ambit of the *Code*'s definition of insanity indicates a lack of certainty and uniformity in this area of the law. The courts in the various jurisdictions of the country have applied a diversity of tests and the Supreme Court has failed to provide guidance. Indeed, its last two decisions, *Macdonald* and *Chartrand*, are neither definitive nor even particularly lucid.¹⁰³ Although the Court in *More* supported a test of diminished responsibility with regard to capital murder, the extent of offences to which such a test applies and its consequences is uncertain. Given the present state of the law in this area it is possible that all participants in the legal process—judge, jury, defence counsel, prosecutor, and the accused—find themselves in a dubious, if not totally confused, position. A statutory provision laying down what constitutes a mental state short of insanity which affects responsibility and which the law recognizes either as a partial or total defence to all or some offences would provide more certainty and uniformity to the whole question of diminished responsibility.

To avoid injustice to the accused, the criminal system reflects a deliberate policy decision to not hold individuals guilty of wrongdoing if they lack the requisite mental elements of the offence. The legislature has adopted

⁹⁹ Edwards, "Diminished Responsibility—A Withering Away of the Concept of Criminal Responsibility?" *Essays in Criminal Science* ed. Mueller (New Jersey: Rothman, 1961) at 317, 331, 334-35; Williams, *supra* note 9, at 624-25; *supra* note 14, at 104-105.

¹⁰⁰ C.L.R.C., *Mental Disorder in the Criminal Process* (Ottawa: Information Canada, 1976), at 2-3; Edwards, *id.* at 337.

¹⁰¹ C.L.R.C., *id.* at 23; Edwards, *supra* note 99, at 337; *supra* note 85, at 295-98; Del Buono, *Mental Disorder: A Crime* (1976), 18 *Can. J. of Criminology and Corrections* 502; Swadron, *Criminal Responsibility—A Secondary Problem* (1962), 11 *Chitty's L.J.* 274 at 275-76.

¹⁰² *Supra* note 3, at 12; Smith and Hogan, *Criminal Law* (4th ed. London: Clowes & Sons, 1978) at 176, 181. For statistical data regarding the application of s. 2 of the *Homicide Act* in England, see *supra* note 14, at 96-97, 104-105; see also *supra* note 1 at 88.

¹⁰³ *Supra* note 40, at 204.

certain provisions negating or reducing criminal responsibility under circumstances where the accused suffers from a mental disorder rendering him or her unable to satisfy the level of *mens rea* required for the crime. Specifically, section 16 regarding insanity and section 216 concerning infanticide address this issue. Evidently Parliament has recognized the strong influence of mental disorder on responsibility in the limited cases of the insane offender and of the female during post-natal depression. It can be argued that from the viewpoint of fairness and uniformity, the theoretical bases underlying these sections should extend to include *all* offenders.

One may argue that mental disorder not within section 16 of the *Code* is relevant to the basic issue of proving *mens rea*¹⁰⁴ and that it is unnecessary to codify such a widely-accepted principle. Surely the requirement of *mens rea* is one of the main threads that runs through the criminal law and needs no codification. The importance of mental illness in relation to the proof of *mens rea*, however, is by no means a clearly established criminal law maxim. For a system concerned with stability and predictability, it would indeed seem logical and fair to dispel the uncertainties regarding the relevancy of mental illness short of insanity by introducing in the *Code* provisions for diminished responsibility.

When advocating the codification of a new defence, one is inevitably confronted by problems of definition. The criticisms of the English test for diminished responsibility as worded in section 2 of the *Homicide Act* have been noted. It is a difficult task to draft a workable definition to satisfy both psychiatrists and lawyers. At the same time the fact that a concept is difficult to define is not reason to avoid trying altogether. Surely some rational guidelines as to the method of determining the nature of diminished responsibility and whether it applies to a particular accused are better than no guidelines at all. The question of diminished responsibility, like insanity, rests on the specific set of facts in each case. But, as with insanity, some direction as to the legal position regarding the concept is preferable to an approach moulded totally by judicial discretion.

Traditionally the courts have been accused of being conservative and slow to recognize changes in society. In the area of diminished responsibility, however, it is Parliament that has been guilty of inactivity and the courts have had to find ways to circumvent such apathy. For instance, in commenting on the decision in *More*, Nemiroff noted that "the Supreme Court of Canada is one step ahead of the Legislature."¹⁰⁵ Surely there is a lesson for Parliament to learn from this observation. If the highest court in the country is responding favourably to the growing prominence of psychology and psychiatry by considering an accused's mental condition in relation to his or her criminal responsibility, perhaps Parliament should do likewise. By enacting a provision dealing with diminished responsibility, the Legislature will be keeping abreast of the changes in the courts, and in society as a whole.

¹⁰⁴ Edwards, *supra* note 99, when asked about the existence of the defence of diminished responsibility in Canada.

¹⁰⁵ *Supra* note 49, at 179.

IV. CONCLUSION

Whether or not we choose to acknowledge it, the doctrine of diminished responsibility exists in the Canadian criminal process. By looking to the laws of Scotland and England as examples, Canadian courts have recently imported into our judicial system a concept of diminished responsibility not unlike that found in these two countries. Indeed, an analysis of some leading criminal cases of the past few decades indicates a trend supporting the recognition of mental abnormality short of the *Code's* definition of insanity as a relevant factor in determining criminal responsibility. The traditional common law maxim of presumed intent has been somewhat overshadowed as the courts have become increasingly more concerned with probing what was present in the mind of the particular accused at the time of the alleged act. From an initial reluctance to admit to the concept, to the acceptance and expansion of the doctrine in *More* and subsequent cases, the courts have indicated a variety of approaches to the defence of diminished responsibility. The development of the doctrine in the case law was clearly a response to such factors as the growing prominence and recognition of psychiatric evidence and deep-seated changes in the approach to the concept and proof of *mens rea*, particularly in regard to the defence of drunkenness. Such factors were part of a shifting view of the whole concept of responsibility. Having realized that responsibility is a matter of degree, the judiciary has adopted a more humane and just approach through the incorporation into Canadian criminal law of diminished responsibility. It now remains an open challenge to Parliament to keep in step with the courts and introduce the doctrine into the *Code*. Only then will the law governing this area be more certain, uniform and fair.