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the Keeper of the Land Register in relation to the constitution of servitudes by prescription³² and there seems to be no reason why the same approach could not be adopted to a *Bowers* right of access. The bringing of such an action may involve expense for the developer and involve considerable time. The developer may not have such time available.³³

The issues of obscurity and cost are double edged. There will be nothing in the Land Register or Sasine Register to indicate the existence, extent, route or exact nature of the *Bowers* access right in any particular case. The servient proprietor may be faced with a claim that such a right exists but he may have little more specification as to the details of the access. In a sense his land will be subject to blight albeit in a micro form. Who would buy his land or wish to take any right from him if the land in question might be subject to a *Bowers* access? Obviously this pressure point will be most useful if the servient proprietor himself wishes to develop. However, even if the servient proprietor does not wish to develop, he faces the prospect of being engaged in a court battle which he may lose, with all that involves for payment of court expenses.

I. CONCLUSION

In the field of practice the true value of *Bowers v Kennedy* is best regarded as a negotiating tool. In the writer's view it does strengthen the negotiating hand of the landlocked proprietor to a considerable extent. It is best employed, however, only when all other title research has been done well, and not as a patch for mistakes. Quite apart from that practical aspect, however, the First Division is to be commended for taking a bold step which further emphasises the parallels between Scotland and other mixed jurisdictions such as South Africa.

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32 *Registration of Title Practice Book*, 2nd edn (2000), paras 6.52–6.59; "In Practice" (1997) 42 JLS 507 at 508; I Davis, "Positive servitudes and the Land Register" (1999) SLPQ 64; Cusine and Paisley, *Servitudes*, paras 6.03 and 10.23. It is doubtful that the Keeper would accept affidavit evidence of landlocking as sufficient.

33 See, for example, *Rubislaw Land Company Limited v Aberdeen Construction Group and Others*, interim proceedings briefly noted at 1999 GWD 14–647; full text available at <http://www.scotcourts.gov.uk/indexl.htm>.

Abnormality and Anglicisation: First Thoughts on *Galbraith v HM Advocate (No 2)*

Courts of appeal, as we have been reminded before now, are not law commissions. Their primary function is simply to consider (and answer) questions of law which

affect the outcome of a dispute between two parties.¹ Nevertheless, there will inevitably be cases where an appeal court is forced to take a broader view of the issues before it.

Such a case arose in *Galbraith v HM Advocate (No 2)*,² where a Full Bench of the High Court recently revisited the doctrine of diminished responsibility. By the time of the hearing, it was a matter of agreement between counsel for the appellant and Crown counsel that the established interpretation of the law was incorrect. But that, it seems, was as far as the position of counsel went. As the Lord Justice-General (Rodger) observed in delivering the opinion of the court:

... both counsel found it much easier to tear down the somewhat fragile structure that our predecessors had erected than to suggest what we should raise up in its place. In the end the Solicitor General said that the matter was one of difficulty and that, if the suggestions of counsel did not find favour, we should simply have to do what we willed. Wafted on some Continental zephyr, the doctrine that the court knows the law had, apparently, reached our shores. So, duly admonished, we set about our task.³

A. INTRODUCTION

Diminished responsibility is a particularly Scottish doctrine, which is generally thought to have originated in Lord Deas' charge to the jury in *Alex Dingwall*,⁴ although its roots can be traced back somewhat further than that.⁵ Furthermore, as the High Court observes in *Galbraith*, the terminology of "diminished responsibility" can be found elsewhere prior to its emergence in Scotland.⁶ The terminology has, in fact, only recently been fixed in Scotland itself. Lord Rodger is at pains in *Galbraith* to point out that no Scottish judge is reported as having used the phrase "diminished responsibility" itself prior to 1939,⁷ and although this is incorrect by at least six years,⁸ the point—that the doctrine has no fixed, absolute origin—remains a valid one.

1 See, for example, *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 per Lord Mustill at 265.

2 *Galbraith v HM Advocate (No 2)* 2001 SLT 953 (henceforth *Galbraith*).

3 *Galbraith*, at 939I–J.

4 (1867) 5 Irv 466.

5 G H Gordon, *The Criminal Law of Scotland*, 3rd edn, by M G A Christie, (2000), vol 1 at 458–459.

6 *Galbraith*, at 959L.

7 *Galbraith*, at 960B–C, citing *Kirkwood v HM Advocate* 1939 JC 36 per Lord Justice-General Normand at 37.

8 See *Muir v HM Advocate* 1933 JC 46 per Lord Justice-General Clyde at 48. See also *HM Advocate v Edmonstone* 1909 2 SLT 223 per Lord Guthrie at 224: "his responsibility must be held as diminished by the enfeeblement of his faculties". The reporter's headnote in this case refers to "diminished responsibility", and this case almost certainly accounts for Lord Keith's observation that he had not found the term "used by a judge before 1909". See Keith of Avonholm, "Some observations on diminished responsibility" 1959 JR 109 at 112.

English law followed the lead of Scots law, introducing the doctrine of diminished responsibility by statutory reform in 1957.⁹ Indeed, the doctrine has now travelled as far as the International Criminal Tribunal for the Former Yugoslavia.¹⁰ Yet, despite its pedigree and its influence, the doctrine has never before been subjected to rigorous analysis by the High Court on appeal. *Galbraith*, therefore, is something of a legal landmark.

B. THE FACTS OF THE CASE

Kim Galbraith stood trial for the murder of her husband in 1999. She admitted that she had shot and killed him, but submitted that she should be convicted of culpable homicide, rather than murder, on the basis of diminished responsibility. She claimed that over a number of years she had been seriously abused by her husband, who had threatened to kill her. She had feared for her life and saw no way of bringing an end to her situation other than killing her husband.

In support of the defence of diminished responsibility, the defence led evidence from two psychologists. The first concluded that she “had indeed been the victim of horrifying sexual and psychological trauma”, and was “suffering from a form of post-traumatic stress disorder”. The second concluded that her responses “were wholly consistent with her having been the victim of abuse of the kind that she had described”, and that she had been in a state of “learned helplessness”, unable as a result of this abuse to “consider fully all the alternatives to remaining in the violent situation”. Medical evidence was also led, which was to the effect that Galbraith had been suffering from a clinical depression towards the end of 1998.

The Crown did not accept Galbraith’s plea of diminished responsibility and, indeed, led evidence which was intended to show that her account of abuse was untrue, and that the killing had been carefully planned and prepared. Evidence was led to the effect that Galbraith had “carried out certain steps, both before and after the killing, which were designed to suggest that the crime had been committed by two intruders in the course of an attack in which she had been raped and her handbag had been rifled”.¹¹ The jury, by a majority, convicted Galbraith of murder, and she appealed against conviction to the High Court, arguing that the trial judge had misdirected the jury on the defence of diminished responsibility.¹² In June 2001, a Full Bench of the High Court allowed the appeal and authorised the Crown to bring a new prosecution.

⁹ Homicide Act 1957, s 2.

¹⁰ See *Prosecutor v Delalic and Others* (IT-96-21), International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), 20 February 2001.

¹¹ *Galbraith*, at 956B–C.

¹² The grounds of appeal included an issue relating to prejudicial publicity during the trial, but it was unnecessary to deal with this point given that the court was prepared to allow the appeal on the issue of diminished responsibility.

C. HOW DOES DIMINISHED RESPONSIBILITY WORK?

Before turning to the grounds of decision, it may be helpful to examine briefly the theoretical basis of diminished responsibility. It is, in many ways, analogous to provocation. Both “defences” (if that is what they should be called)¹³ will, where successfully pled, result in a conviction for culpable homicide rather than murder.¹⁴ They have no special relevance to any offence other than murder, although evidence of provocation or diminished responsibility may be considered in mitigation of sentence for other crimes.¹⁵

It has previously been common to talk about diminished responsibility and provocation as “reducing” murder to culpable homicide. That terminology has, however, been thrown into doubt by the recent Full Bench decision in *Drury v HM Advocate*,¹⁶ where it was denied that provocation operates in this fashion. According to the court in *Drury*, provocation is not a partial defence in this sense, but rather evidence that the accused lacked the “wickedness” which is an integral part of the *mens rea* of murder.

There are serious objections to the *Drury* analysis, which I have discussed elsewhere.¹⁷ The important point for present purposes is that the *Drury* court appeared to consider that its analysis was also applicable to the law of diminished responsibility.¹⁸ And indeed, there is some historical support for the view that diminished responsibility negates the *mens rea* of murder, as is noted in *Galbraith*.¹⁹ But equally, as is also noted in *Galbraith*, there is support for the view that diminished responsibility is simply an extenuating circumstance, or a plea in mitigation.²⁰ What is curious about *Galbraith* is that, while the court notes these conflicting approaches and concludes that “[the judges] had not really settled the precise nature of the plea which they were describing”,²¹ there is no attempt to explain how the point should be settled, and no mention whatsoever of *Drury*.

13 Cf *Lindsay v HM Advocate* 1997 JC 19.

14 Or, it should be noted, a conviction for aggravated assault rather than attempted murder: *Brady v HM Advocate* 1986 JC 68; *HM Advocate v Blake* 1986 SLT 661. But this cannot always be the case, as it is possible to attempt to kill without committing an assault. The point, however, is perhaps unlikely to arise in practice.

15 See, for example, *Andrews v HM Advocate* 1994 SCCR 190 (diminished responsibility, or something close thereto); *MacNeill v McTaggart* (1976) SCCR Supp 150 at 151 (provocation).

16 2001 SLT 1013. The judgments in *Drury* were handed down more than five months prior to the judgment in *Galbraith*, but were subject to a publication embargo pending *Drury*'s retrial.

17 J Chalmers, “Collapsing the structure of criminal law” 2001 SLT (News) 241.

18 *Drury v HM Advocate* 2001 SLT 1013 per Lord Justice-General Rodger at 1017, and per Lord Nimmo Smith at 1031.

19 *Galbraith*, at 960J, citing *HM Advocate v Tierney* (1875) 3 Coup 152 per Lord Ardmillan at 166.

20 *Galbraith*, at 960I, citing *Alex Dingwall* (1867) 5 Irv 466 at 479–480. This is probably the better view: see *Lindsay v HM Advocate* 1997 JC 19 per Lord Justice-General Hope at 21.

21 *Galbraith*, at 960H.

The point may not matter very much, because the consequences of the *Drury* analysis, which may remove the requirement for defences such as self-defence to be based on reasonable grounds,²² have no application to diminished responsibility. Nevertheless, it is regrettable that the *Galbraith* court does not address the manner in which the defence of diminished responsibility functions—and indeed, reverts to the former terminology (disapproved in *Drury*) of murder being “reduced” to culpable homicide.²³

D. THE KEY TO GALBRAITH

Prior to *Galbraith*, the accepted definition²⁴ of diminished responsibility (and that which was offered to the jury in *Galbraith*) was a portion of Lord Justice-Clerk Alness’ charge to the jury in *HM Advocate v Savage*:²⁵

it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility—in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied . . . that there must be some form of mental disease.²⁶

The initial point raised by *Galbraith* is a simple one. Is Lord Alness’ charge to the jury to be regarded as laying down a series of cumulative criteria, all of which must be met before the defence of diminished responsibility must be applied? Or is it simply a series of alternatives? Recent decisions, primarily *Connelly v HM Advocate*,²⁷ had taken the view that Lord Alness’ charge amounted to a series of cumulative criteria—and, accordingly, the defence could not operate unless there was evidence of mental disease.²⁸ The trial judge in *Galbraith* had directed the jury in accordance with this view.

However, as the *Galbraith* court recognises, that view is simply untenable. The basis for the diminished responsibility defence which was pled in *Savage* was the accused’s extreme intoxication—something which, of course, would no longer be recognised as a basis for the defence.²⁹ Clearly, if Lord Alness had

22 See J Chalmers, “Collapsing the structure of criminal law” 2001 SLT (News) 241.

23 *Galbraith*, at 960I–J and 963D.

24 See, for example, Gordon, *Criminal Law of Scotland*, vol 1 at 464; T H Jones and M G A Christie, *Criminal Law*, 2nd edn (1996) at 224; R A A McCall Smith and D Sheldon, *Scots Criminal Law*, 2nd edn (1997) at 143.

25 1923 JC 49.

26 *HM Advocate v Savage* 1923 JC 49 at 51.

27 1990 JC 349.

28 In *Connelly* itself, the court referred to a “mental disorder or a mental illness or disease”. It was subsequently held, in *Williamson v HM Advocate* 1994 JC 149, that these terms should not be read disjunctively, but were simply different expressions of the same concept.

29 *Brennan v HM Advocate* 1977 JC 38; *Galbraith*, at 963I.

meant to say that a mental disease was always required as a basis for the defence, there would have been no question of the defence being left to the jury in *Savage*.

Lord Alness was simply giving a series of examples of the “kind of thing” which must be proven for the defence of diminished responsibility to operate—a point which the *Galbraith* court demonstrates by identifying each of the earlier cases from which the four examples given are drawn.³⁰

The instinctive solution to this misinterpretation of Lord Alness’ observations might be simply to overrule *Connelly* and to hold that the four *Savage* “criteria” are disjunctive, and that any one of them may be met in order for the defence to succeed. That, however, would be unsatisfactory. First, they are a non-exhaustive list of examples, rather than criteria (although they have been called “criteria” in the past).³¹ Second, they are not satisfactory tests. The first—“aberration or weakness of mind”, or “some form of mental unsoundness”—gives no indication of how severe the condition must be. The second—“borderline insanity”—is of little use unless a real question of insanity has arisen at the trial,³² and there may well be cases where a defence of diminished responsibility should succeed even though the accused’s condition does not approach insanity.³³ The third—“responsibility is diminished from full responsibility to partial responsibility”—is simply tautologous.³⁴ The fourth—“some form of mental disease”—suffers from the same problem as the first, in that it gives no indication of how serious the effects of the disease must be.

The *Galbraith* court was, therefore, required to formulate a test to encapsulate the essence of diminished responsibility, and came up with the following. The jury must decide whether “by reason of the abnormality of mind in question, the ability of the accused, as compared with a normal person, to determine or control his actings was substantially impaired”.³⁵ One may, of course, question where this terminology of “abnormality of mind” and “substantially impaired” comes from. It does not appear to have direct roots in any earlier Scottish case, and the closest equivalent which the *Galbraith* court finds is Lord Sands’ reference to “great peculiarity of mind” in *Muir v HM Advocate*.³⁶ Rather, the terminology appears to

30 *Galbraith*, at 961B–D.

31 It is, perhaps, unhelpful that the *Galbraith* court continues to refer to them as “criteria” in the paragraph heading at 961A–B, although the text of the judgment makes it clear that they are no longer to be regarded as anything of the sort.

32 Cf *Lindsay v HM Advocate* 1997 JC 19, where the trial judge avoided this problem by directing the jury as to the definition of insanity, although there was no suggestion of insanity in that case. The trial judge’s directions are not included in the *Justiciary Cases* report, but can be found in the *Scots Law Times*: 1997 SLT 67 at 69.

33 See *R v Seers* (1984) 79 Cr App R 261, which is cited with approval in *Galbraith*.

34 *Connelly v HM Advocate* 1990 JC 349 per Lord Justice-General Hope at 358.

35 *Galbraith*, at 966G–H.

36 1933 JC 46 at 49.

come (unacknowledged) from s 2 of the (English) Homicide Act 1957, which provides as follows:

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.³⁷

Those wishing to rebut a charge of anglicisation may point to the fact that the “normal person” is invoked as an appropriate comparator, unlike in the English legislation. But that objection will not hold: the “normal person” differs little from the “ordinary human beings” to which Lord Parker CJ alludes in the leading case of *R v Byrne*.³⁸

We can sum up the position as follows. The doctrine of diminished responsibility has its origins in decisions of the Scottish courts in the nineteenth century. In 1957, a version of the doctrine was imported into English law by statutory reform. In 2001, the High Court of Justiciary, in a remarkable process of circularity, has imported the English definition into Scots law.

There is, in all probability, little wrong with this. Diminished responsibility has, in Scotland, long been a doctrine in search of a definition, and the English statutory language might be considered as accurate a rendition of Scots law as any other. After all, the language of s 2 of the Homicide Act was drafted in order to “introduce into English law the Scottish doctrine of diminished responsibility”.³⁹ There could have been little objection if the *Galbraith* court had simply taken the view that the draftsman’s job had been executed admirably⁴⁰ and that the result should be taken as expressing not only English, but also Scots law. However, it would have been better if the use of the English phraseology had been acknowledged and explained by the High Court, rather than hidden in a handful of oblique references.

E. THE CONSEQUENCES OF THE REFORMULATION

In essence, the consequences of the reformulation are rather straightforward. First, the jury will be provided with clearer (although perhaps still rather unspecific) guidance as to how severe the effects of the abnormality must be for the plea of

37 The Lord Justice-General does state, at 964E–F in *Galbraith*, that the requirement of “substantial impairment” is “reflected” in the English legislation. That appears to be disingenuous, however. The English legislation is the origin of this terminology, not a mirror image of it.

38 [1960] 2 QB 396, at 403. One can, it should be noted, find references to the “normal person” in both *R v Seers* (1984) 79 Cr App R 261 and *R v Spriggs* [1958] 1 QB 279, two of the four English cases to which the *Galbraith* judgment refers.

39 HC Debs 27 Nov 1956, col 318 (statement of the Attorney-General). See also HC Debs 15 Nov 1956, col 1153 (statement of the Home Secretary).

40 I.e. that he or she had accurately rendered the Scottish doctrine—not necessarily that this is how a defence of diminished responsibility should ideally be defined.

diminished responsibility to be successful, something which has up until now been missing. Second, there is no longer any requirement that the “abnormality of mind” be a mental illness, although it must be “recognised by the appropriate science”.⁴¹ A number of issues must still be noted, however.

(1) Limiting the recognised abnormalities

Notably, Lord Rodger does not adopt into Scots law the English proviso that the abnormality of mind must arise “from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury”. This proviso, most obviously, excludes the transient effects of intoxication from the scope of the defence,⁴² and appears to achieve little else aside confusion amongst judges, juries, expert witnesses and courts of appeal.⁴³

Instead, Lord Rodger invokes a different limiting factor, stating that the court may, for “policy reasons”, exclude certain abnormalities of mind from the ambit of the defence.⁴⁴ Voluntary intoxication, therefore, is explicitly excluded,⁴⁵ but this suggests that *involuntary* intoxication could provide a sound foundation for a defence of diminished responsibility where the accused’s responsibility has been “substantially impaired” but he or she lacks the “total alienation of reason” which is essential for the defence of automatism.⁴⁶ The policy issues involved, however, are not articulated in *Galbraith*, although the reasons for excluding any defence of voluntary intoxication have been discussed elsewhere.⁴⁷

What is not explained in *Galbraith* is how these policy issues may be held to exclude other conditions. The court explicitly excludes “psychopathic personality disorder” from the scope of the defence for “policy reasons”,⁴⁸ citing *Carraher v HM Advocate*.⁴⁹ This conclusion is, however, questionable. First, a simple assertion is made that “psychologists and psychiatrists acknowledge the existence of a condition described as psychopathic personality disorder”, a statement which is highly dubious and probably

41 *Galbraith*, at 966D.

42 *R v Di Duca* (1959) 43 Cr App R 167.

43 See R D Mackay, “The abnormality of mind factor in diminished responsibility” [1999] Crim LR 117; S Dell, *Murder Into Manslaughter* (1984), 38–40. But cf *Prosecutor v Delalic* (IT-96-21), International Criminal Tribunal for the Former Yugoslavia (Trial Chamber II), 16 November 1998, at para 1166, where it is suggested that this proviso operates to exclude “killings motivated by emotions, such as those of jealousy, rage or hate”. It would, however, be mischievous to suggest that, because this proviso has not been incorporated into Scots law by *Galbraith*, such motivations might provide a foundation for a defence of diminished responsibility.

44 *Galbraith*, at 963H–K and 966E–F.

45 *Galbraith*, at 963H–I and 966E–F.

46 *Cardle v Mulrainey* 1992 SLT 1152, applying *Ross v HM Advocate* 1991 JC 210. This might be more of a problem for the English courts: cf *R v O’Connell* [1997] Crim LR 683.

47 *Brennan v HM Advocate* 1977 JC 38; *Ross v HM Advocate* 1991 JC 210.

48 *Galbraith*, at 963I–K.

49 1946 JC 108.

simply incorrect.⁵⁰ Second, *Carraher* does not, on the face of it, conclusively rule out the use of such a disorder as a foundation for a defence of diminished responsibility, as the Faculty of Advocates (in evidence to the Royal Commission on Capital Punishment), Lord Keith, and Professor T B Smith have all pointed out before now.⁵¹ Third, there is no attempt to identify what the “policy reasons” for excluding this condition are. They are not explained in *Carraher*, and neither the English courts, the Law Commission, nor the Royal Commission on Capital Punishment appear to have had any difficulty with the idea that a defence of diminished responsibility might be founded upon such a condition.⁵² For all these reasons, it is to be hoped that the comments in *Galbraith* regarding psychopathy will be regarded as obiter, and will not preclude re-examination of the issue at a future date.

(2) The interaction with other defences

There are three other issues related to the defence of diminished responsibility which are not directly raised in *Galbraith* but which will probably have to be addressed by the High Court at some point in the future. Limitations of space preclude a full exploration of these points here, but they may be briefly identified as follows: first, if voluntary intoxication cannot provide a foundation for a defence of diminished responsibility, how should the courts deal with an abnormality of mind which has been exacerbated by voluntary intoxication?⁵³ Second, can abnormalities of mind be attributed to the “ordinary person” for the purposes of the objective test in defences such as provocation, self-defence or coercion?⁵⁴ Third, if diminished responsibility can now be founded on an “abnormality of mind”, rather than the more restrictive criterion of “mental illness”, does the same apply to insanity?⁵⁵

50 Psychopathic personality is not included in the two major international classifications of mental disorders (ICD-10 and DSM-IV), and the Royal College of Psychiatrists has recently recommended that in most contexts, the use of the term should be abandoned. See Royal College of Psychiatrists, *Offenders With Personality Disorder* (Council Report CR71: 1999), at 11. See also the Report of the Committee of Inquiry into the Ashworth Special Hospital (Cmnd 4194-2: 1999), at para 6.5.1 (“considerable agreement” that “psychopathic disorder” is a “redundant term”).

51 Minutes of Evidence Taken Before the Royal Commission on Capital Punishment (1950), Q 5628; Keith of Avonholm, “Some observations on diminished responsibility” 1959 JR 109 at 115; T B Smith, “Diminished responsibility” [1957] Crim LR 354 at 359. See also *HM Advocate v Gordon* (1967) 31 *Journal of Criminal Law* 270.

52 See J E Hall Williams, “The psychopath and the defence of diminished responsibility” (1958) 21 MLR 544; *R v Byrne* [1960] 2 QB 396; A Criminal Code for England and Wales (Law Com No 177, 1989), clause 56 of Draft Criminal Code Bill; Report of the Royal Commission on Capital Punishment (Cmd 8932: 1953), at 139.

53 See *Carraher v HM Advocate* 1946 JC 108; *HM Advocate v McLeod* 1956 JC 20; G R Sullivan, “Intoxicants and diminished responsibility” [1994] Crim LR 156.

54 Cf *Cochrane v HM Advocate*, High Court of Justiciary (on appeal), 13 June 2001 (available at <http://www.scotcourts.gov.uk/>). I have discussed this issue briefly elsewhere: J Chalmers, “Redefining provocation” (2001) 53 *Greens Criminal Law Bulletin* 2 at 3.

55 See, for example, *MacLeod v Mathieson* 1993 SCCR 488 (hypoglycaemia), and *Finegan v Heywood* 2000 JC 444 (somnambulism). Are these properly dealt with as instances of insanity or as automatism?

F. CONCLUSION

The *Galbraith* judgment is a curious document. On the one hand, the detail of the analysis is highly impressive, and well informed by historical study. There is little doubt that, in establishing that diminished responsibility need not be founded on a “mental illness”, the High Court has reached a valuable and correct result. On the other hand, it is also a disappointing opinion, which fails to address the theoretical basis of the doctrine of diminished responsibility, borrows from an English statute without acknowledgement or explanation, and includes questionable statements regarding psychopathy. Most importantly, however—and regardless of one’s views on the merits of the judgment—it is clearly not the last word on the subject.

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(The author is indebted to Professor Christopher Gane and Margaret Ross for their advice. The usual caveats apply.)

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Effusa vel deiecta in Rome and Glasgow

A. INTRODUCTION

Little can be so fascinating to the student of Roman law as seeing it being applied or at least invoked in modern practice, as it still is in a limited number of countries, Scotland amongst them. This article considers a recent Scots case, *McDyer v The Celtic Football and Athletic Co Ltd*,¹ in which a relatively obscure area of Roman law, involving the fundamental division between fault-based and strict liability, was considered.

The facts of the case are fairly simple. In 1990, a sports event, the European Summer Special Olympic Games, took place in Celtic football stadium in Glasgow. The opening ceremony was held on 21 July 1990, and Colin McDyer was among the crowd. While he was seated in the stand, a piece of wood fell on his hand and wounded him. The wood had come loose from a temporary construction attached to the roof of the stadium.

McDyer raised an action against Celtic Football Club, as the owners of the stadium, against the organisers of the event, European Summer Special Olympic

1 2000 SC 379. This article was originally presented as a paper at the IV Congreso Internacional y VII Iberoamericano de Derecho Romano, Burgos 1–3 February 2001, and a Spanish version will be published in the *Acta* of this congress. The author wishes to thank those who contributed to the discussion on the paper at that congress, and also Professor Hector MacQueen who originally provided a copy of the case report of *McDyer*.