

Substantial Impairment of Responsibility

Partial defence to murder, burden on D to prove all the elements of the substantial impairment defence on the balance of probabilities.

s 23A Crimes Act 1900

An accused will not be guilty of murder but guilty of manslaughter, if at the time of the act:

1. The accused was suffering from an abnormality or impairment of the mind arising from an underlying condition, giving rise to (s 23A(1)(a))
2. A substantial impairment of; (s 23A(1)(a))
 - a. Their capacity to understand events
 - b. Their ability to judge whether their actions were right or wrong
 - c. Their ability to control themselves, AND
3. The impairment was *so substantial* that it warrants the liability for murder being reduced to manslaughter. (s 23A(1)(b))

Underlying conditions

- “Abnormality of the mind” means state of mind ‘so different’ from that of ordinary human beings that the reasonable man would term it abnormal: Byrne
- The abnormality must arise from an ‘underlying condition’, which is defined as a pre-existing mental or psychological condition, other than that of a transitory kind: s 23A(8)
 - o Must be present before the act but not permanent (eg. Curable but severe depressive illness)
 - o Does not include impulses, cannot arise in the moment
 - o Does not include:
 - Road rage
 - Alcohol/drug intoxication
 - o Does include: brain damage, hallucinations
- Definition is circular, broad and unhelpful
- Captures wide range of people would not meet the *M’Naghten* rules but should not be held responsible for their actions

Degree of substantial impairment

- Substantial has its ordinary meaning, ie. of substance, not slight or insignificant
- “Less than total, but more than trivial”: Lloyd
- Must be nexus between the offence committed and the underlying condition
- (3) relates to culpability — value judgment of the jury, should be simple as to whether the person is considered a murderer

#NOTE: Cannot use self-imposed intoxication and that is to be disregarded for assessing whether they are liable (s 23A(3)) but you can include alcohol induced brain damage:

Goodridge

Policy: Substantial impairment of responsibility, reform or repeal?

Abolishing the defence

Model Criminal Code (Fatal Offences Against The Person), Model Criminal Code Officers Committee: Against the defence

1. Substantial impairment poses significant practical problems
2. Public confidence in defence diminished as killings seem deplorable
 - by perception it operates to exclude persons because of the deplorable manner in which they kill, functionally viewed as murder
3. State of mind is already considered in sentencing

Responses:

1. These killings are no more deplorable than other killings, manner has little legal relevance, why is substantial impairment targeted?

Keeping the defence

New South Wales Law Reform Commission: For the defence

1. Important distinction between the concepts of murder and manslaughter
 - Discursive power of the label murderer
 - Manslaughter is lesser degree of blameworthiness and manslaughter and commensurately has lower sentence
2. Transparency and confidence increased through public involvement
 - Confidence is likely to be increased if the public represented via the jury are able to decide themselves the degree to which individuals are culpable and how mentally impaired they were
 - Meaningful way of assessing culpability
3. Risk of disproportionately high sentences and increasing sentences
4. Criticism that allows people off the hook / reduces sentences unfounded
 - Critical underpinning of criminal justice system is coincidence of mens rea and actus reus, and that culpability is assessed by measuring the mental state in relation to the offence
 - People who kill whilst substantially impaired should not be considered “murderers”
 - Risk of fabrication is always present, can be tested, bearing burden of BRD
5. Criticism that its better to redefine mental illness, and we shouldn't broaden it too far with this defence
 - It allows flexibility to determine responsibility according to degrees of mental impairment, rather than according to strict contrast of ‘sanity’ and ‘insanity’
 - Intermediate defence, not so extreme so as to allow acquittal and consequent indefinite detention in “strict custody” but mental state that does not warrant murder

Statistics

- From 1998 to 2011, it was raised 177 times, 6% of murder cases since 1997; 63% of these were successful and received manslaughter finding
- 45% were conducted with jury, returning manslaughter in 33% of cases
- Overall success of the defence decreased following reform in 1997, successfully narrowed the scope of the defence
- Almost a quarter of successfully claiming had schizophrenia, psychosis, 26% had severe depression or bipolar; none had personality disorders.