

**Lord Justice Toulson: Can the courts provide a more holistic response to developmentally immature young defendants without comprising justice?**

The answer to this question is yes, but only if Parliament permits it and if at a practical level there are systems in place to enable it to be done.

An appropriate starting point is to consider the proposals currently before Parliament to amend the law of murder and, in particular, the partial defence of diminished responsibility which was introduced by section 2 of the Homicide Act 1957. That section provides:

- (1) 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;...
- (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

The Law Commission considered this defence in its reports on Partial Defences to Murder (Law Com 290) and on Murder, Manslaughter and Infanticide (Law Com 304). It received evidence from many consultees, including a number of eminent psychiatrists and the Royal College of Psychiatrists.

In its final report the Law Commission recommended a re-grading of murder and manslaughter by dividing murder into first and second degree murder; and it recommended that the definition of diminished responsibility should be amended so

as to make it clearer and better able to accommodate developments in expert diagnostic practice. Its proposed reformulation was:

- (a) A person who would otherwise be guilty of first degree murder is guilty of second degree murder if, at the time he or she played his or her part in the killing, his or her capacity to:
    - (i) understand the nature of his or her conduct; or
    - (ii) form a rational judgement; or
    - (iii) control him or her self,was substantially impaired by an abnormality of mental functioning arising from a recognised mental condition, *developmental immaturity in a defendant under the age of 18*, or a combination of both; and
  - (b) the abnormality, *the developmental immaturity*, or the combination of both provides an explanation for the defendant's conduct in carrying out or taking part in the killing.
- (Emphasis added)

The government has not yet reached a decision on the Law Commission's more radical proposals for a re-grading of the law of homicide, but the Coroners and Justice Bill proposes more limited amendments to the law. Clause 42 of the Bill substantially adopts the Law Commission's proposal for reformulating the definition of diminished responsibility, but with the significant omission of developmental immaturity in a defendant under the age of 18.

In its report on Murder, Manslaughter and Infanticide the Law Commission put forward its reasons for recommending the inclusion of developmental immaturity in the case of an offender under 18 as a possible basis for diminished responsibility as follows:

- 5.127 The recommendation was supported by large a majority of our consultees. It had the support of, for example, the Royal College of Psychiatrists, the Judges of the Central Criminal Court, the Criminal sub-committee of the Council of Her Majesty's Circuit Judges, the Criminal Bar Association, The NSPCC, the Youth Justice Board and the Law Society.
- 5.128 A very important aspect of this recommendation is that evidence of developmental immaturity can be combined with evidence of an abnormality of mental functioning, to make a case for a verdict of second degree murder. As we explained in the CP, experts may find it impossible to distinguish between the impact on D's mental functioning of developmental immaturity, and the impact on that functioning of a mental abnormality. To force experts – as the law currently does – to assess the impact of the latter, whilst disregarding the effect of the former, is wholly unrealistic and unfair.
- 5.129 We recognise that our recommendation may prove to be a controversial one, in spite of the level of support expressed for it. Some consultees considered that it was too generous to those who had killed with the fault element for first degree murder. By way of contrast, some consultees expressed doubts about the proposal because it did not go far enough to shield child Ds from conviction for serious offences of homicide.
- 5.130 It is important to recognise the nature and limits of what we are suggesting. In England and Wales, criminal liability for murder can be imposed on an offender if he or she was at least 10 years of age at the time of the offence. We are not suggesting that imposing liability for murder on a child of this age is always unfair or inappropriate. Some 10-year-old killers may be sufficiently advanced in their judgement and understanding that such a conviction would be fair.
- 5.131 What we are suggesting is that it is unrealistic and unfair to assume that all children aged 10 or over who kill must have had the kind of developed sense of judgement, control and understanding that makes a first degree murder conviction the right result (provided the fault element was satisfied). Instead, our recommendation is that it should

be for the jury to decide in the individual case whether D had such a sense of judgement, control or understanding. Moreover, it will be for the D to prove that his or her capacity for judgement, control and understanding was substantially impaired by developmental immaturity.

5.132 D may wish to prove substantial impairment by developmental immaturity through appeal either to biological factors, or to social and environmental influences, or to a combination of both. For example, D may wish to give evidence that his or her power of control over his or her actions was substantially impaired by a biological factor such as poor frontal lobe development. This is because, as the Royal College of Psychiatrists have put it:

Biological factors such as the functioning of the frontal lobes of the brain play an important role in the development of self-control and of other abilities. The frontal lobes are involved in an individual's ability to manage the large amount of information entering consciousness from many sources, in changing behaviour, in using impulsivity. Generally the frontal lobes are felt to mature at approximately 14 years of age.

5.133 As the final sentence implies, however, in an individual case involving a child under 14 years of age, it would be open to the prosecution to seek to rebut evidence of poor frontal lobe development by arguing that this particular D had matured to a sufficient degree to be fairly convicted of first degree murder. The jury should be trusted to reject implausible claims, as they are with other defences based on expert evidence.

...

5.136 Offenders under the age of 18 commit a very small proportion of the 850 or so homicides that occur each year (around 4%). We find it hard to imagine that more than a low proportion of the even smaller number from this group finding themselves charged with first degree murder will be in a strong position to claim that they were suffering diminished responsibility, in virtue of developmental immaturity alone. Even those who do succeed in persuading the jury of the merits of their

claim – and they are likely to be the younger age group, who commit the fewest homicides – will still be convicted of second degree murder, and can be sentenced to anything up to and including life imprisonment.

5.137 Our recommendation is, therefore, likely to affect only a very few cases, and only by reducing the crime from top-tier homicide to middle-tier homicide. However, for the few cases that do meet the criteria, we believe our recommendation meets requirements of justice recognised as fundamental in civilised legal systems across the world.

The Law Commission attached to its report a template, provided by Professor Sue Bailey, which offered a guide to the ways in which the nature and degree of a young person's developmental immaturity could be assessed by experts in the field. The report suggested that there should be no shortage of experts sufficiently well versed in the subject to provide expert opinions of the kind that will be needed by both sides, were diminished responsibility to be reformed as the report recommended, and it suggested that the jury should be trusted to reject implausible claims..

The inclusion of the phrase “ a recognised medical condition” in the definition of diminished responsibility would represent a tightening as well as a clarification of the defence, but to include that requirement while excluding developmental immaturity in the case of a young offender has consequences which I do not think could have been thought through.

It produces the bizarre result that if a 25 year old killer has the developmental age of a 12 year old, that is something which the jury may take into account because it would be a recognised medical condition; but if a 12 year old killer has the developmental age of a 12 year old, it is apparently not something which the jury can take into

account. This is particularly significant since we have one of the lowest ages of criminal responsibility of the western world.

To give another more specific example, psychopathy (or whatever other name is given to it) is a recognised medical condition and accounts for a significant number of diminished responsibility cases. But it is my understanding from psychiatrists who specialise in this area that they will not make such a diagnosis in a case of a young person, precisely because it would be premature to do so, since the behaviour may be due to developmental immaturity. If so, one has the prospect that a person aged 15 who kills because of a condition which will subsequently be diagnosed as a recognised medical condition will not be able to rely on that condition because he is too young for the diagnosis to be made.

It may be that in practice such injustice would be overcome by psychiatrists arguing that developmental immaturity in a young person may properly be regarded as a recognised medical condition. But the government obviously considers that its position is likely to be in line with general public opinion at a time when there is much fear about the gang culture and young people committing violent crimes. It may indeed be right about that. A recent survey commissioned by Barnardo's reported that 49% of people agree that children are increasingly a danger to each other and adults and that the same proportion disagree with the statement that children who get into trouble are often misunderstood and in need of professional help (Barnardo's, 17 November 2008).

Turning more generally to the way in which the courts deal with young offenders, I would highly recommend reading the Sentencing Advisory Panel's recent consultation paper on Principals of Sentencing for Youths, dated 18 December 2008. The Sentencing Advisory Panel has a statutory responsibility for giving advice on sentencing matters to the Sentencing Guidelines Council and it consults widely before doing so. Its recent consultation paper on youths contains

1. a brief summary of the development of the youth justice system in England and Wales from the 19<sup>th</sup> century to the present day;
2. a summary of our international obligations, in particular under the UN Convention on the Rights of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and the UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules);
3. statistics about young offenders or alleged young offenders in custody, their backgrounds, gender and ethnic groupings, and the categories of offence for which custody is most frequently imposed; and
4. a discussion of the principles of sentencing.

The latest legislation is the Criminal Justice and Immigration Act 2008. Part 2 of the Act lays down the purposes of sentencing of offenders under 18. It does so by amending the Criminal Justice Act 2003. Section 142a of the 2003 Act, as amended, now provides:

- (2) The court must have regard to –
  - (a) the principal aim of the youth justice system (which is to prevent offending or re-offending by persons aged under 18 ...),

- (b) in accordance with section 44 of the Children and Young Persons Act 1933, the welfare of the offender, and
  - (c) the purposes of sentencing mentioned in subsection (3)...
- (3) Those purposes of sentencing are –
- (a) the punishment of offenders,
  - (b) the reform and rehabilitation of offenders,
  - (c) the protection of the public,
  - (d) the making of reparation by offenders to persons affected by their offences.

Section 143, as amended, provides that in considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.

Part 1 of the 2008 Act introduces a single form of community order in the case of a young person. It is now to be called a Youth Rehabilitation Order ("YRO"). A YRO can include a variety of requirements, including an activity requirement, a supervision requirement, an unpaid work requirement, a curfew requirement, a residence requirement, a mental health treatment requirement, a drug treatment requirement or an education requirement. A YRO may make provision for intensive supervision and surveillance. A residence requirement may require the offender to reside in local authority accommodation or with a local authority foster parent.

When the 2008 Act was at the committee stage in the House of Lords, Lord Hunt said:

“I hope I have made clear that the government believes that custody is the last resort, that the construct of the Youth Rehabilitation Order is to strengthen the whole community sentencing structure and that we see YRO’s and the general policy direction we wish to see embraced as one where punishment can be constructive”.

The Sentencing Advisory Panel’s consultation paper quotes an academic commentator, L Zedner, who said in 1998 that

“the sentencing of young offenders continues to enjoy (or, perhaps better, to endure) a rapidity of change and innovation not found in the rest of the system. It is as if the sentencing of young offenders represents an experimental laboratory where new ideas flourish with little regard to research findings still less to any theoretical or conceptual framework”.

From my own experience since first studying criminology over 40 years ago I would agree, but with the qualification that there are relatively few truly new ideas. More often they are variants of old ideas rediscovered and re-cycled under a new name.

In the decade since Zedner’s criticisms were made the statistical evidence about young offenders in custody has been depressing.

The Sentencing Advisory Panel’s consultation paper quotes figures published by the Council of Europe based on the position in September 2002 as showing that England and Wales had 2869 convicted person under the age 18 in a custodial establishment; this was 46.8 per 100,000 of eligible population, a number exceeded only by the USA and South Africa. More recent figures from the United Nations indicate that England and Wales has the highest incarceration rate in Europe for those aged below 18 and was the 5<sup>th</sup> highest in the world behind the USA, South Africa, Belize and Swaziland.

Between 1996 and 2006 there was an increase of over 40% in the 15-17 year old custodial population. Young black people are over represented (particularly for robbery and drug offences).

It has been estimated that 50% of young people in custody have lived in care or had previous involvement with Social Services, compared with 3% in the general population. 83% of young people in custody have been excluded from school (compared with 6% of young people in the general population), 86% have engaged in substance misuse (compared with 21%), and 31% have a recognised mental disorder (compared with 10%).

Research has consistently identified a range of factors regularly present in the background of juveniles who commit offences: low family income, poor housing, poor employment records, low educational attainment, early experience of violence or abuse and the misuse of drugs.

The rate of reconviction within 1 year after release from custody over the period between 2000 and 2006 varied from 73-77%.

It remains to be seen whether the provisions of the 2008 Act, when implemented, will lead to a change of direction.

The Sentencing Advisory Panel's consultation paper observed:

The overarching dilemma has been whether to regard the offender essentially as a criminal to be held responsible (albeit with some concessions for youth)

and punished accordingly or whether to give wider consideration to the young person's problems, character and potential in a marketedly different way. In England and Wales, the latter approach was most clearly seen in developments up to and including the Children and Young Persons Act 1969; subsequently, the movement was more towards the former, more punitive, approach but now, by virtue of the provisions in the 2008 Act, the approach seems likely to settle somewhere towards the middle ground.

I would not place any bets on that, not out of cynicism but out of the sober recognition that this is not a field in which governments have historically shown a stable approach. On the one hand, the approach put forward by the minister in the passage of the 2008 Act was measured and considered. But at the same time an understandable fear about young people carrying knives produced an instant demand for the imposition of custodial sentences in such cases. A few years ago theft of mobile phones led to similar demands.

In short, long term policies for dealing with juvenile crime are liable to be knocked off course by immediate worries about particular forms of crime and a belief in the value of deterrent sentences which is particularly questionable in the case of immature young offenders.

The Sentencing Advisory Panel addressed this point in its consultation paper:

Whilst there is no consensus in research literature concerning the impact of deterrent sentencing on youths who offend, there appears to be a general assumption that when youths are considering whether or not to commit an offence "they lack the maturity to fully understand the consequences of their harmful acts" and, typically, they are viewed as "impassive, inexperienced emotionally volatile or vulnerable, and more easily influenced by negative

family members, peers, negative culture values and poverty than older adolescents and young adults”.

An illustration of the effect of a wide range of factors on the decision to offend can be seen in relation to the offence of possession of a knife. Considerable emphasis has been placed on the deterrent effect of increasing the likelihood both of prosecution and of the imposition of a (longer) custodial sentence. However, the reasons for carrying a knife commonly cited include protection, fear and the anticipation of being attacked as well as experiences of personal victimisation. Where that accurately reflects the situation, the most effective way to reduce the number of young people carrying weapons is likely to be to focus on addressing those social factors; changes in prosecution or sentencing practice are likely to have a lesser impact.

The upshot is that I would give a cautious welcome to the provisions of the 2008 Act as potentially a step in the right direction.

I welcome the flexibility of the provisions by which an offender can be kept under tight supervision and control, short of custody. There is much in the YRO framework which is constructive and I believe that the number of young people in custody could be significantly reduced without putting the public in real danger. In the case of those who have to receive custodial sentences either because they represent a real danger or because of the sheer gravity of their offending, the time when the majority are most likely to re-offend is within a short period of release. Common sense suggests that everything which is done with the offender while in custody should be directed towards that time. But working effectively with immature and damaged young offenders can be intensely demanding. One can only express the hope that the provisions of the 2008 Act for a more holistic approach will not suffer a death of a

thousand cuts either from more legislation or from shortage of resources at a time of unprecedented strains on the public finances.

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