DIMINISHED RESPONSIBILITY: A LESS VINDICATORY EXCUSE THAN PROVOCATION

The defences of diminished responsibility and provocation do not absolve the killer of all culpability. Both excuses, if successfully argued, only serve to reduce the killer's culpability from that of a murderer to that of an offender who commits culpable homicide not amounting to murder. Nonetheless, there is a substantive difference in the nature of the two excuses. Diminished responsibility requires a more subjective enquiry into the killer's state of mind at the time of the killing, making it an exclusive defence unique to the defendant. Provocation, on the other hand, focuses on an objective enquiry into the reason why the killer lost self-control. The aim of this article is to analyse how the development of these two excuses in Singapore has exposed their innate differences.

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I. The development of diminished responsibility in Singapore

1 Within the sphere of diminished responsibility, law and psychiatry work together by matching wrongful acts with the actor's appropriate level of culpability. These two disciplines help determine the actor's mental responsibility at the time the act was performed and assign an accurate level of culpability to the actor. The three limbs that need to be satisfied before the diminished responsibility defence can be successfully applied are:

(a) the offender must have been suffering from an abnormality of mind; and

(b) this abnormality of mind must have been caused by:

(i) a condition of arrested development of mind;

* I would like to thank my wife, Sharon, for encouraging me to write this article. The views expressed are my own and do not necessarily reflect the views of the Attorney-General's Chambers.

(ii) a condition of retarded development of mind;

(iii) any inherent causes; or

(iv) induced by disease or injury; and

(c) the abnormality of mind caused by any one of the above [(b)(i) to (b)(iv)] must have substantially impaired the offender's mental responsibility as regards the offender's acts and omissions in causing the death or being a party to causing the death.[1]

2 If the accused does not satisfy any one of these three limbs, he will not be able to take benefit of the defence. The burden of proving each limb lies on the Defence and the level of proof is only one of "a balance of probabilities".[2]

3 The authoritative judicial interpretation of the boundaries of these three limbs is found in the judgment of Lord Parker CJ in the case of *Regina v Byrne*.[3] His Lordship's judgment, cited with approval by the Singapore Court of Appeal in *Chua Hwa Soon Jimmy v PP*,[4] provided the scope of each of the three limbs.

A. "Abnormality of mind" limb

4 The classification "abnormality of mind" is a reasonable man's classification (*ie*, the question to ask is, "Would a reasonable man think of the offender's state of mind as so different from that of ordinary human beings?"). This is not a scientific classification but one drawn from the lay

1 Exception 7 to s 300 of the Penal Code (Cap 224, 1985 Rev Ed) states:

> Culpable homicide is not murder if the offender 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 causing the death or being a party to causing the death.

2 The Court of Appeal in *Chia Chee Yeen v PP* [1991] SLR 312 at 317, [32] held:

> It is trite law that proof on the balance of probabilities entails showing that it was more likely than not that there was such a delusion.

The level of proof for the whole defence – all three limbs – is one of a balance of probabilities. See also *Mansoor s/o Abdullah v PP* [1998] 3 SLR 719 at [13]; *Lim Chin Chong v PP* [1998] 2 SLR 794 at [34].

3 [1960] 2 QB 396 ("*R v Byrne*"). See Stanley Yeo, "Improving the Determination of Diminished Responsibility Cases" [1999] Sing JLS 27, who argues that a stricter adherence to *R v Byrne* will generate consistency in the judicial handling of diminished responsibility cases.

4 [1998] 2 SLR 22 ("the *Jimmy Chua* case").

and reasonable man's mind.[5] In coming to the decision as to whether there was an abnormality of mind, our judges are entitled to treat medical evidence as guides for their decisions.[6] This is an entitlement, in the same way that it is an entitlement for the judges to form their own conclusions if presented with evidence that conflicts with the opinion drawn from the medical evidence.[7] These other facts to which the judge is privy and upon which he can rely include the acts and demeanour of the accused surrounding the time of the killing, and any other conflicting psychiatric opinion.[8]

B. The "cause" limb

5 Nonetheless, the aetiology of the abnormality of mind (*ie*, how it arose, how it was caused or how it was induced) is solely a matter for the

5 See K L Koh, C M V Clarkson & N A Morgan, *Criminal Law in Singapore and Malaysia* (Malayan Law Journal, 1989) at p 470. In particular, the authors write:

> [*R v Byrne*] … therefore establishes that abnormality of mind is to be given a commonsense meaning …
>
> By not delineating strict categories of mental abnormality, the courts retain the flexibility to include new forms of abnormality which were not within the contemplation of the drafters.

6 It is for the Defence to lay a foundation of fact upon which the experts can give their opinion. See *Archbold Criminal Pleading, Evidence and Practice 2004* (Sweet & Maxwell, 2004) ("*Archbold 2004*") at para 19-75.

7 In *Walton v The Queen* [1978] AC 788 (Privy Council on appeal from Barbados), Lord Keith of Kinkel stated at 793:

> [The] cases make clear that upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the [accused] before, at the time of and after it and any history of mental abnormality. It being recognised that the jury on occasion may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence. ... In the present case their Lordships are of opinion that, in so far as they can judge of the medical evidence from the trial judge's notes, the jury were entitled to regard it as not entirely convincing.

8 In *Sek Kim Wah v PP* [1987] SLR 107 at 111, [33], Wee Chong Jin CJ stated:

> Even where such medical opinion is unchallenged, the trial judges would be perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so.

This approach was also taken in *Tan Mui Choo v PP* [1986] SLR 98 and *Contemplacion v PP* [1994] 3 SLR 834.

medical experts.[9] Thus, the satisfaction of the second limb depends solely on the conclusion of medical men.[10]

C. The "substantial impairment" limb

6 The judge must consider the extent to which the offender's mind is answerable for his physical acts. Such consideration must include an analysis of the offender's ability to exercise his will over his acts that led to the killing. The question as to whether the offender's mental responsibility was *substantially* impaired is a question for the judge. While medical evidence relating to the presence of mental impairment is important and constructive, the finding of the judge can legitimately oppose the conclusions of the medical men.[11]

7 In coming to his conclusion as to whether the accused's mental responsibility was substantially impaired, the judge is guided by the following distinction: In a case where the abnormality of mind is one which affects the accused's self-control, the step between "he did not resist his impulse" and "he could not resist his impulse" is an important one. The latter is more favourable to the accused.

9 These possible causes have been fairly liberally interpreted. In *R v Vinagre* (1979) 69 Cr App R 104, the accused was said by the medical witnesses to be suffering from "Othello syndrome", *ie*, unfounded suspicion that his wife was having an affair, and successfully pleaded diminished responsibility much to the displeasure of Lawton LJ in the Court of Appeal, who nonetheless felt unable to interfere with the verdict. See also *Blackstone's Criminal Practice 2001*, (Blackstone Press Limited, 11th Ed, 2001) para B1.16.

10 Koh, Clarkson & Morgan, *supra* n 5, at p 472 raise an interesting point which has not yet presented itself in the Singapore courts. They state:

> The abnormality of mind must be one which arises from "a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury". However, there have been a number of English cases where the courts have tended to gloss over the strict statutory requirements where the accused has been placed in such a distressing situation that a murder verdict with its mandatory sentence would be unjustly harsh. Although the Singapore courts have not yet faced such cases, they are of obvious importance.

It is difficult to envision how the Singapore courts are going to expand the ambit of the second limb to include more than just the five causes listed. It is the author's contention that the five categories should be treated as exhaustive as this is clearly what Parliament intends. Any broadening of limb two must come from Parliament.

11 See also Lee Kiat Seng, "Diminished Responsibility and Alcoholism: *R* v *Tandy*" [1990] 1 MLJ i.

D. *Judicial interpretation of substantial impairment*

8 In the *Jimmy Chua* case,[12] Yong Pung How CJ provided clear direction that "substantial" was a finite benchmark but one which also possessed the attribute of *degree*. Yong CJ ruled:[13]

> Turning to exception 7 to s 300 of the Penal Code, the determination of whether impairment of mental responsibility was substantial would involve a question of degree, to be tested against and ascertained from all the evidence of each individual case. That was why in *R v Lloyd* [1967] 1 QB 175 at pp 178–179, the English court gave only a broad direction to the jury:
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>> [Y]our own common sense will tell you what [substantial] means. This far I will go. Substantial does not mean total, that is to say the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you … to say on the evidence: was the mental responsibility impaired, and if so, was it substantially impaired?[14]
>
> The direction above may be broad, but it was useful for it at least set out the markers at the extremities of the scale which [the Court of Appeal] had to work within.

9 Importantly, the Court of Appeal in the *Jimmy Chua* case relied on the acts of the accused, his demeanour and his presence of mind at the time of the alleged offence to assist itself in coming to a conclusion about whether the offender was in fact suffering from substantial impairment of mental responsibility. The following extract from the judgment is insightful:[15]

> On the totality of the evidence, we concluded that the appellant could have restrained himself, even if we accepted that he was commanded by a voice. His abnormality of mind (if any) was not such as to substantially impair his mental responsibility for the offence committed. After all, he had the presence of mind to try and tie the deceased up

12 *Supra* n 4.

13 *Id* at [31]. Stanley Yeo, "Reformulating Diminished Responsibility: Learning from the New South Wales Experience" (1999) 20 Sing LR 159, provides an insightful account of the New South Wales Law Reform Commission's recommendations for the reformulation of the defence and how adoption of such reformulation will lessen the ambiguities surrounding the defence in our jurisdiction.

14 See *Archbold 2004*, *supra* n 6, at para 19-69.

15 *Supra* n 4, at [33].

> when assaulted; to avoid electrocution by using the telephone cord instead of pulling the plug; to look for the keys to make his escape; to put on his boots before leaving the crime scene; and to dispose of his bloodied clothes. His behaviour immediately after the murder was also inconsistent with a person who claimed to be out of control. Therefore, the entire episode, in our judgment, demonstrated that the appellant's mind was not *substantially* impaired as to absolve him of mental responsibility for his foul crime. [emphasis in original]

10 The entitlement of the court to look at the acts, demeanour and presence of mind of the accused at or around the time of the alleged offence[16] in order to come to a more thorough decision on the presence or absence of "substantial impairment" was further expressed in *Tengku Jonaris Badlishah v PP*,[17] *Zainul Abidin bin Malik v PP*,[18] *Contemplacion v PP*[19] and *Mohd Sulaiman v PP*.[20]

11 While the psychiatrists dictate the fulfilment of the second limb, it is for the judge to conclude whether the first and third limbs have been satisfied. Thus, even where the prosecution and defence psychiatrists agree, for example, that voluntary substance abuse by the accused has brought about a disease[21] which caused an abnormality of mind,[22] the judge is at total liberty to reject the fulfilment of the third limb. This was

16 For a commentary on the third limb, see Koh, Clarkson & Morgan, *supra* n 5, at pp 473 and 474.

17 [1999] 2 SLR 260 ("the *Tengku Jonaris* case") at [64] and [65].

18 [1996] 1 SLR 654. In dismissing the defence of diminished responsibility, the Court of Appeal in *Zainul Abidin bin Malik v PP* at 662, [31] relied on the trial judge's finding that, "[The offender's] actions showed a sustained ability to plot, to organize, to re-evaluate and to think on his feet."

19 *Supra* n 8. In dismissing the defence of diminished responsibility, the Court of Appeal in *Contemplacion v PP* stated that the trial judge had correctly relied on various factual matters established before him, in addition to Dr Chan's (prosecution witness) psychiatric evidence. The Court of Appeal relied on the fact that the trial judge found that the appellant's acts of throwing away the deceased's passports and air ticket, while retaining such items as watches and jewellery, revealed on her part a calculating shrewdness belying her claim of mental abnormality.

20 [1994] 2 SLR 465. In dismissing the defence of diminished responsibility, the Court of Appeal in *Mohd Sulaiman v PP* at 475, [36] relied on the fact that the offender had "demonstrated great presence of mind in continuing with his original plan of theft after the stabbing of the deceased and in disposing of the screwdriver he had used in the stabbing".

21 For the purposes of the second limb.

22 For the purposes of the first limb.

the exact scenario in the case of *PP v Zailani bin Ahmad*[23] where both the defence and prosecution psychiatrists agreed that the accused was suffering from acute intoxication with hypnotics. The accused, a seasoned drug addict, had taken 12 Nitrazepam pills (belonging to the Benzodiazepine class of drugs) before killing a Geylang rent collector. The general practitioner who prescribed the drugs testified that he had examined the accused, diagnosed him as suffering from insomnia, and prescribed him the sleeping pills the day before the killing. It was this evidence that prompted the psychiatrists to take a keen look at whether the accused was suffering from an abnormality of mind, brought about by an overdose of sleeping pills, at the time he killed the rent collector.

12 Both psychiatrists agreed that he was suffering from an abnormality of mind and that it was caused by a disease, as classified under under F13.0 of the International Classification of Diseases, vol 10. The learned trial judge agreed with the unanimous psychiatric evidence, and found that limb one was fulfilled. As regards the second limb, the trial judge was bound to accept the medical evidence that acute intoxication with hypnotics (the abnormality of mind) was indeed a disease. Thus, the second limb was fulfilled.

13 At the third limb, there was a difference in opinion between the defence and prosecution psychiatrists. The former opined that the abnormality of mind caused a further "temporary paradoxical stimulant effect" which in turn substantially impaired the accused's mental responsibility at the time of the killing. The prosecution psychiatrist disagreed, stating that a paradoxical stimulant effect was inconsistent with the facts surrounding the case.

14 The learned judge ruled that the accused's attempt to steal from the deceased's chest of drawers immediately before the time of the killing and the fact that the accused continued his attempt to steal immediately after the time of the killing showed that the accused's mental responsibility at the time of the killing was not substantially impaired. This was despite the accused's claims that he had "blacked out" in between the two attempts to steal from the chest of drawers and that it

23 [2004] SGHC 202. The accused and his girlfriend had intended to steal money from their rent collector's chest of drawers. The two broke into the Geylang rent collector's flat while he was sleeping, and attempted to prise open the chest of drawers. The rent collector woke up and confronted Zailani. The rent collector attempted to hit him, but the latter managed to avoid the strike before using a weapon to club the rent collector to death: at [62] and [63].

was during this blackout that he must have clubbed the victim to death.[24] The trial judge was not convinced that substantial impairment of mental responsibility could be so neatly sandwiched between two points of lucidity. Kan Ting Chiu J stated:[25]

> It was significant that when the accused's actions were examined a stage at a time, there were no signs of irritability, hyperactivity or aggressive behaviour for virtually the whole time. On the contrary, he was able to decide to rob or steal, to choose the drawers to steal from and to use the keys he found to try to unlock them. Even when that was interrupted by the deceased, he returned to the task of trying to open the drawers after he had disarmed the deceased.

15 The decision in the case of *PP v Zailani bin Ahmad*, upheld by the Court of Appeal,[26] re-confirms that the third limb is totally within the purview of the judge and that in such decision-making the court is guided, but not dictated, by medical men and their opinions – the court is also entitled to look at the acts, demeanour and presence of mind of the accused at or around the time of the alleged offence.[27]

E. Difficulty in controlling actions

16 If the evidence shows that because of the offender's abnormality of mind, he possessed the ability to control his physical acts but nonetheless found such control difficult, the court must ask itself whether the difficulty in controlling his physical acts or impulses constituted a substantial impairment of his mental responsibility at the relevant time. There is room for the court to conclude that (a) despite the offender possessing the ability to control his physical acts, (b) the difficulty in controlling his actions is sufficient to satisfy the third limb. This point was addressed by the Court of Appeal in the *Jimmy Chua* case where Yong CJ stated:[28]

24 Forensic evidence showed that the accused had hit the deceased nine times on the head. The accused maintained that he had attempted to open the deceased's chest of drawers when the deceased suddenly confronted him. The accused re-counted that he dodged the deceased's spanner swipe and remembered hitting him hard on the head. The accused said that after he delivered the first blow to the deceased's head, he (the accused) blacked out. He claimed that the next thing he remembered was his continued attempt to pry open the deceased's chest of drawers. *Id* at [6] and [43].

25 *Id* at [74].

26 In *Zailani bin Ahmad v PP* [2005] 1 SLR 356

27 Annex A, which appears at the last page of the article, summarises the legal tests applied for each of diminished responsibility's three limbs.

28 *Supra* n 4, at [32].

> We also thought that a distinction must be made here between whether the appellant 'did not resist his impulse' or 'could not resist his impulse', a distinction incapable of scientific proof which left the court free to make its own finding. As the court stated in *Byrne*'s case … at 404:
>
> > Inability to exercise will power to control physical acts, provided that it is due to abnormality of mind from one of the causes specified in the parenthesis of the subsection, is … sufficient to entitle the accused to the benefit of the section;[29] difficulty in controlling his physical acts depending on the degree of difficulty, may be. It is for the jury to decide on the whole of the evidence whether such inability or difficulty has, not as a matter of scientific certainty but on the balance of probabilities, been established, and in the case of difficulty whether the difficulty is so great as to amount in their view to a substantial impairment of the accused's mental responsibility for his acts.

17 Therefore, the distinction between "did not" and "could not" resist the impulse may have two consequences. First, such a distinction may aid the trier of fact in coming to the conclusion as to whether there was indeed an abnormality of mind to start with.[30] Second, the distinction aids in the decision making as regards whether the impairment of mental responsibility was substantial. Thus, the distinction is operative in the first and third limbs.

F. Distinct from unsoundness of mind

18 Unlike the defence of insanity, the defence of diminished responsibility operates as a partial defence, and one which comes into play only in situations where the accused is charged for murder.[31] As a partial defence, its application has the effect of reducing culpability for murder to blameworthiness for culpable homicide not amounting to murder. This partial effect of the diminished responsibility defence is best

29 The section referred to here is s 2 of the English Homicide Act 1957 (c 11) which is similar to our Exception 7 to s 300 of the Penal Code.

30 It is for this reason that *Archbold 2004*, *supra* n 6, at para19-68 lists the distinction under the "abnormality of mind" limb.

31 Section 84 of the Penal Code states:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

juxtaposed against the nature of a full defence, like insanity, which totally erases blameworthiness.[32]

19 The variance in the effect between the two defences can be attributed to the fact that the Penal Code requires as the qualifying standard of insanity "unsoundness of mind". This translates into a *virtual ignorance* as to the wrongfulness of the act done.[33] The Penal Code pegs a lower threshold for diminished responsibility, namely, "abnormality of mind which must *substantially impair* mental responsibility". The former and higher threshold, if met by the actor, has the effect of totally nullifying any culpability. The latter and lower threshold, if met, only chips at culpability, leaving some behind. The reason for this is because partial defences, like diminished responsibility, vitiate only part of the *mens rea* for the offence.[34]

G. Narrow scope for voluntarily sustained injuries

20 The abnormality of mind must have been brought about by one of the five expressly enumerated causes in the second limb. One of these causes is an "injury" as distinct from a "disease". The enquiry here is whether an injury sustained voluntarily through illicit substance abuse is sufficient to satisfy the second limb, if such an injury caused an abnormality of mind. In the *Tengku Jonaris* case,[35] the Court of Appeal addressed whether voluntary cannabis intoxication over a considerable number of years could cause injury to the brain sufficient enough to fulfil limb two. Yong CJ ruled:[36]

32 For a commentary on the diminished responsibility's nature as a partial defence, see Koh, Clarkson & Morgan, *supra* n 5, at pp 467–468.

33 Section 85(2)(*b*) of the Penal Code dictates the applicability of the intoxication defence in situations where the accused is voluntarily intoxicated (whether by narcotics or drugs). The threshold which must be met before s 85(2)(*b*) is successfully applied is similar to the threshold needed for insanity. This threshold is explained in s 84, as pointed out by s 86(1). For s 85(2)(*b*) to apply, the intoxication must have brought about at least temporary insanity. Once the defendant proves temporary insanity, s 84 applies and the result is he committed no offence. For the purposes of diminished responsibility, the threshold is lower – the accused must have been suffering from an *abnormality of mind* caused by any one of five causes. The consequence of this lower threshold is that the accused will still be culpable, albeit for manslaughter instead of murder.

34 Argument can also be made that the *actus reus* of an offender who pleads diminished responsibility may be impaired in so far as his reduced capacity to control his actions is concerned.

35 *Supra* n 17.

36 *Id* at [62].

> As for abnormality of mind resulting from cannabis intoxication, such a state of mind, if it did exist in this case, would not have arisen from one of the causes stipulated in Exception 7. Both Dr Tsoi [defence witness] and Dr Chan (prosecution witness) agreed that an abnormality of mind brought about by cannabis intoxication could not be attributed to either 'a condition of arrested or retarded development of mind' or 'any inherent causes'. Before us, it was submitted that such a state of mind could nonetheless be said to be 'induced by disease or injury'. … [W]e were of the view that it had not been proved on the balance of probabilities that the appellant's cannabis consumption resulted in any harm or detrimental effects to his brain at all to start with.

21 It is clear from the Court of Appeal's ruling that there must be medical and scientific evidence of an injury before the court will deem the second limb fulfilled. A study of the Court of Appeal's judgment shows that the court is not closed to the idea that a voluntary injury may be sufficient to fulfil the second limb and consequently act as a "cause" for an abnormality of mind. All the court said in the *Tengku Jonaris* case was that there was *no proof* that voluntary substance abuse had caused an injury to the appellant's brain.

22 It can therefore be argued that if the court were presented with a situation where the defendant was suffering from abnormality of mind due to an injury sustained voluntarily, it may rule that the second limb is satisfied. This openness to injuries sustained voluntarily is admirable because it does not bar well-deserving candidates from taking benefit of the diminished responsibility defence. Take, for example, A, who signed himself up for a para-jumping course several years prior to committing the act of killing B. A knew at the time of signing up for the lessons that there could be a chance that he would sustain irreversible injury to his body. A jumps, and sustains head injuries. These injuries do not cause A to develop an arrested or retarded mental capacity but instead cause acute migraines at erratic times. It is argued that even if the migraines are not medically termed as diseases, A should be given the scope to advance the argument that the *injury* sustained to his brain is sufficient to fulfil the second limb.[37] Whether or not A satisfies the third limb – that the

37 *Archbold 2004* at paras 19-71 and 19-72. In *R v Sanderson*, (1993) 98 Cr App R 325, the Prosecution called evidence to the effect that whilst alcoholism might reach the stage where the brain itself was being injured, there was no medical science to indicate that such damage resulted from drugs as opposed to alcohol: In *R v Tandy* (1987) 87 Cr App R 45, it was held that, where alcoholism alone was relied on, an accused must establish: (a) that he was suffering from an abnormality of mind at the time of the killing, (b) that the abnormality of mind was induced by disease, namely

abnormality of mind caused by the injury substantially impaired A's mental responsibility at the time of the offence – is a separate enquiry.

23 What then of voluntary substance abuse? The Court of Appeal indicated in the *Tengku Jonaris* case that it requires proof that such abuse, over many years, had caused physical injury to the offender's brain. If no such evidence is given, then the court is at total liberty to rule that no injury had been proved by medical evidence, and that therefore the second limb remained unsatisfied.

24 Thus, we have an admirable situation where the court is open to injuries caused voluntarily and is equally open to having the second limb fulfilled by a disease caused by voluntary substance abuse if indeed the offender clears the hurdle of proving that an injury was indeed caused by such substance abuse.[38] The consequence is that the accused's culpability will hinge on the third limb.

H. Similarities in law relating to medical negligence and diminished responsibility

25 In the case of *Khoo James v Gunapathy d/o Muniandy*,[39] the Court of Appeal acknowledged the need for judges to pay heed to the conclusions of medical experts. This was in relation to the strength of the opinions of medical experts *vis-à-vis* the *Bolam* test and the *Bolitho*-

the disease of alcoholism, and (c) that the abnormality of mind induced by alcoholism was such as substantially impaired his mental responsibility for the act which caused death. *Archbold 2004* explains that:

> Element (b) is not established unless the evidence shows that the abnormality of mind at the time was due to the fact that [the accused] was a chronic alcoholic. If the alcoholism had reached the level at which the brain had been *injured* by the repeated insult from intoxicants so that there was gross impairment of judgment and emotional responses, then "diminished responsibility" is available, provided element (c) is established.

For an alternative view, see Stanley Yeo, "Intoxication and Mental Disorder Defences" (2004) 16 SAcLJ 488 at 497–499.

38 See *PP v Zailani bin Ahmad*, *supra* n 23, where the learned trial judge was bound to accept the medical evidence that voluntary acute intoxication with hypnotics was indeed a disease as classified under F13.0 of the International Classification of Diseases, vol 10. Importantly, the trial judge ruled that such disease did not substantially impair the accused's mental responsibility thereby sending the admirable signal that courts frown on the effects of voluntary substance abuse.

39 [2002] 2 SLR 414.

modification of the *Bolam* test.[40] The Court of Appeal suggested that where evidence is not easily digestible, it is best left to the experts. To this end, Yong Pung How CJ stated:[41]

> At the heart of the *Bolam* test is the recognition that judicial wisdom has its limits. A judge, unschooled and unskilled in the art of medicine, has no business adjudicating matters over which medical experts themselves cannot come to agreement. This is especially where, as in this case, the medical dispute is complex and resolvable only by long-term research and empirical observation. Furthermore, the lawyer-judge in 'playing doctor' at the frontiers of medical science might distort or even hamper its proper development.

26 This statement is consistent with the jurisprudence in the *Jimmy Chua* case.[42] In adopting the guidelines in *R v Byrne*,[43] the Court of Appeal in the *Jimmy Chua* case agreed that the fulfilment of the second limb of Exception 7 was solely for the psychiatrists to decide.[44]

27 The second similarity in the judicial attitudes towards expert evidence in cases involving medical negligence and diminished responsibility is that the court retains sovereignty over the question of fact. In the case of diminished responsibility, the third limb is undoubtedly a question of fact for the judge to decide.[45] In the case of

40 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 held that a doctor was not liable if he had acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that area of medicine ("the *Bolam* test"). *Bolitho v City and Hackney Health Authority* [1998] AC 232 held that a doctor could not escape liability for negligent treatment or diagnosis just because he led evidence from a number of medical experts who were genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice. See Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (LexisNexis, 2nd Ed, 2003) at p 190.

41 *Supra* n 39 at [144].

42 *Supra* n 4.

43 *Supra* n 3.

44 *Supra* n 4, at [21].Yong CJ cited with approval the following ruling of Lord Parker CJ in *R v Byrne* at 403:

> The aetiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence.

45 See para 4 of the main text above.

medical negligence, Yong CJ ruled:[46]

> The second and final comment we would make relates to the right of the trial judge to make a finding of fact preliminary to the application of the *Bolam* test. It is a well-settled principle that a question of fact, as opposed to a question of the standards of medical practice, does not fall within the province of the *Bolam* test. Questions of fact are therefore rightly capable of adjudication by the judge. This point is best illustrated on the facts of the recent case of *Penney v East Kent Health Authority* [2000] PNLR 323.

28 Therefore, in medical negligence cases and cases where diminished responsibility is raised, the judge (a) actively decides certain questions of fact, the answers to which affect the defendant's negligence liability or his right to the partial defence of diminished responsibility, while he also (b) defers to the evidence of medical men in a separate enquiry into the overall assessment of culpability.

II. A comparison between provocation and diminished responsibility

29 The successful operation of the provocation defence to murder requires the defendant to have acted reasonably, as a member of a similar class of persons would have. The exercise of pegging the defendant's conduct to the behaviour of a reasonable man has the effect of legitimising, to an extent, the actor's response to the provocation. The reasonable man is society's benchmark. He provides society with legitimate boundary markers. In acknowledging that a reasonable man of the same class as the defendant would have acted in the same way the defendant did, the court (and therefore society) provides the community's endorsement for the act – albeit a limited endorsement. This link between society and the provoked offender is seen in the

46 *Supra* n 39, at [70]. In *Penney v East Kent Health Authority* [2000] PNLR 323, the plaintiffs underwent cervical smear tests, but the cytology screeners employed by the defendants did not diagnose that they were potentially cancerous. As a result, the claimants developed invasive adenocarcinoma of the cervix, which necessitated a hysterectomy. Lord Woolf MR in the Court of Appeal held that the question of what was to be seen on the slides was a question of fact, which was answerable by the trial judge. The trial judge had, after hearing expert evidence, made his finding on the balance of probabilities that there were cancerous cells on the slides. Having accepted this fact, the judge could then apply the *Bolam* test (*supra* n 40) to the question of whether the reasonably competent screener would have observed this result on the slide. On the facts, it was held that the reasonable screener could not have missed this diagnosis and that the defendant health authority was accordingly negligent.

jurisprudence of Yong Pung How CJ in the case of *PP v Kwan Cin Cheng*[47] where his Honour held that the objective test demands only that the accused should have exercised the same degree of self control as an *ordinary person* and that care had to be taken not to peg the standard of self-control and the degree of provocation required at an unrealistically high level.

30 The only question *qua* reasonableness in diminished responsibility features when the judge asks, "Would a reasonable man think of the offender's state of mind as so different from that of ordinary human beings?" Therefore, the reasonable man does not strike an association with the offender but differentiates him altogether. The reasonable man singles out the diminished responsibility offender as odd or abnormal. In provocation, on the other hand, the reasonable man puts himself in the shoes of the defendant and *becomes* the objective benchmark of how he or she should have acted. In diminished responsibility, the reasonable man is nothing more that an analyst. In provocation, he is the embodiment of the analysis.

31 Society's representative – the reasonable man – plays a largely detached role in the diminished responsibility defence. The public has no identifiable relationship with the defendant who pleads diminished responsibility. The defence's enquiry is largely a subjective one. Because no empathy can be struck with the defendant *through* society's reasonable man, the consequence is that diminished responsibility does less to redeem the reputation of the defendant than does provocation.

A. Provocation: A justificatory excuse

32 Both provocation and diminished responsibility, as defined in Exceptions 1 and 7 to s 300 of the Penal Code, have the consequence of reducing the culpability of the actor from that of a murderer to that of a man-slaughterer. Thus the exceptions chip at culpability rather than extinguish blameworthiness altogether. This is the nature of an excuse. The writer argues that the more subjective an excuse is (*ie*, the scope of the reason for the wrong done is limited to the actor rather than being generally endorsed by society) the more excusatory in nature the excuse is. Conversely, the less subjective the excuse is (*ie*, the more the reasons for the wrongdoing resonate in society) the more justificatory the nature of

47 [1998] 2 SLR 345 at [65].

the excuse is.[48] This premise can only be understood by juxtaposing the genetic make-up of an excuse with that of a justification.

33 A justification is a reason for doing a wrong – a reason which society objectively judges as wholeheartedly valid. An example would be the doing of a wrongful act because the actor was compelled to act by threats.[49] Because society objectively judges the reason to be completely valid, the effect of the justification is not merely to chip away at the actor's culpability; rather, the justification annihilates culpability altogether.

34 It is argued that because provocation involves a reasonable man who puts himself in the shoes of the killer, the defence, while still excusatory in nature, is more vindicatory than diminished responsibility. The reasonableness test, if passed, paints the actor responding to the provocation as more of a rational being, since the reasonable man provides the explanation, "I too would have lost self control if provoked in that way."[50] The objectivity the reasonable man gives and the innate

48 It must be stressed that the resonance or endorsement discussed here is of a limited nature, since complete resonation or endorsement would translate into a justification.

49 Section 94 of the Penal Code states:

> Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence …

50 John Gardner, "The Mark of Responsibility" (2003) 23 OJLS 157 argues that to successfully argue provocation, one need not argue that one had valid, let alone adequate reasons to kill. The man provoked need not argue that his actions were justified. He needs to make an excusatory case; he needs to make the case that even if he had no sufficient reason to kill, he had sufficient reason to lose his self control to the point of killing the provoker. As Gardner explains the point succinctly at 160:

> In the term favoured by law, one needs to argue that getting angry to a murderous extent was *reasonable*. No such reasonableness test applies in the defence of diminished responsibility. This is the main reason why diminished responsibility is less complicated to plead. But at the same time the absence of any reasonableness test is also the main reason why any rational being would resist making use of the diminished responsibility defence if the provocation defence were available to her instead, all else being equal. By making use of the diminished responsibility defence she demeans herself as a rational being. She opts for a non-rational explanation of what she did, one that makes do with attributing the fact that she killed to her disturbed emotional condition. [emphasis in original]

See also Donald Nicolson & Rohit Sanghvi "Battered Women and Provocation: The Implications *of R.* v. *Ahluwahlia*" [1993] Crim LR 728 for an analysis of how diminished responsibility may succeed where provocation fails. The authors also argue that the way forward is to have the battered women rely neither on provocation nor diminished responsibility but on the self-defence justification.

link he provides between society's endorsement and the reason for the killer's act help shape provocation as a justificatory excuse.

B. Provocation's reasonableness

35 In the case of *PP v Kwan Cin Cheng*[51] the Court of Appeal re-emphasised that the two distinct requirements for the provocation defence were (a) a subjective requirement that the accused was deprived of his self-control by provocation, and (b) an objective requirement that the provocation should have been "grave and sudden". The second requirement involved the application of the "reasonable man" test.[52] The Court of Appeal adopted the Privy Council's approach in *Luc Thiet Thuan v The Queen*[53] that any characteristics of the accused, including mental infirmities, could be taken into account *if they affected the gravity of the provocation*.

36 The court clarified that such characteristics must be contrasted with the individual peculiarities of the accused which merely affected his power of self-control but not the gravity of the provocation. Such peculiarities could not be taken into account for the purposes of the objective test.[54] It is here that we see the objective nature of the reasonableness test. While the reasonable man must be placed in the "same circumstances and background events as the defendant",[55] he must also not be saddled with the defendant's individual peculiarities which had no bearing on the gravity of the provocation. This is diametrically opposed to diminished responsibility where there is no enquiry into how a fellow member of society would have acted if placed in similar shoes. The empathetic reasonable man is replaced with the diagnoses of medical men and the judge's scrutiny of how the defendant's own behaviour is different from that of an ordinary man. The reasonable man in

51 *Supra* n 47.

52 The Court of Appeal applied the *ratio decidendi* in *Vijayan v PP* [1975–1977] SLR 100 at 107, [30], which was cited in *Ithinin bin Kamari v PP* [1993] 2 SLR 245 at 250, [34]:

> In our judgment, under our law, where an accused person charged with murder relies on provocation and claims the benefit of Exception 1 of s 300, the test to be applied is, would the act or acts alleged to constitute provocation have deprived a reasonable man of his self-control and induced him to do the act which caused the death of the deceased and in applying this test it is relevant to look at and compare the act of provocation with the act of retaliation.

53 [1997] AC 131 (PC on appeal from Hong Kong) ("*Luc Thiet Thuan*").

54 *Supra* n 47 at [49].

55 *Id* at [50].

diminished responsibility therefore merely validates the excuse – he does not justify it.

37 While the Privy Council's decision in *Luc Thiet Thuan* entrenched the objectivity of the reasonableness test, the House of Lords in *Regina v Smith*[56] severely challenged it. In *Smith*, the majority of the law lords (Lords Slynn of Hadley, Hoffmann, and Clyde) adopted the view that the defendant's state of depression should have been considered by the jury when deciding whether a reasonable person would have done as the defendant had done by way of reaction to the taunts of the victim. Their Lordships came to this conclusion even though the victim's taunts were not directed at the defendant's depression.

38 This introduced a schism in the jurisprudence of provocation, to say the least. The danger of the *Smith* route is that it gives the defendant a never ending list of *personal* considerations which he could argue should go to lowering his self-control threshold. There seems to be no limit to the number of factors that can be raised as they need not be specific to the gravity of the provocation. *Smith* therefore re-engineered the provocation defence to be an enquiry into the congenital inabilities of defendants, thus making it akin to diminished responsibility.[57]

56 [2001] 1 AC 146 ("*Smith*").

57 This argument was made by Lord Millett in his dissent in *Smith* (*id*, at 214), where he stated:

> Professor Andrew Ashworth [in "the Doctrine of Provocation" [1976] CLJ 292] … concludes that "congenitally incapable individuals have an independent claim to mitigation", and that "the defence of provocation is for those who are in a broad sense mentally normal". I agree with my noble and learned friend, Lord Hobhouse, that *R v Ravern* [1982] Crim LR 51 was a plain case of diminished responsibility. The jury should not have been asked to consider the extent of self-control capable of being exercised by an "ordinary" 22-year-old with a mental age of nine.

This argument resonates with the stance taken in John Gardner & Timothy Macklem, "Compassion without Respect? Nine Fallacies in *R. v. Smith*" [2001] Crim LR 623, that the House of Lords in *Smith*, while genuinely concerned for the dynamic problems of social pluralism and human diversity, destroyed the all-important objective (impersonal) standard of the reasonable man by their superficially liberal ruling. However, R D Mackay & B J Mitchell, "Provoking Diminished Responsibility: Two Pleas Merging Into One?" [2003] Crim LR 745, argue that the law should take *Smith* to its rational conclusion and henceforth merge the two defences. This line of thought was met with heavy criticism from John Gardner & Timothy Macklem, "No Provocation without Responsibility: A Reply to Mackay and Mitchell" [2004] Crim LR 213, who argued, *inter alia*, that Mackay and Mitchell (a) did not fully appreciate the difference between provocation's nature as a partial excuse and diminished responsibility's nature as a partial denial of responsibility and (b) their argument that both defences involve "rationality defects" failed to grasp the fact that the loss of self control in provocation is at least partly justified. These criticisms were met with louder calls for a hybrid defence –

39 MPH Rubin J's judgment in *PP v Sundarti Supriyanto*[58] confirmed that the Singapore courts are adopting the objective *Luc Thiet Thuan* route instead of the alternative *Smith* route. This path preserves the justificatory nature of the provocation excuse in Singapore. Rubin J ruled that for the accused to successfully rely on the defence of provocation, there were essentially two requirements to be met. The first was the subjective requirement that the accused must have been deprived of her self-control by the provocation, and the second was the objective requirement that the provocation must have been grave and sudden.

40 As regards the second requirement, Rubin J held that the deceased's provocative acts formed a "mental background" in the accused.[59] The court was convinced that the accused, an Indonesian maid, was telling the truth with respect to some, if not all, of her accounts of abuse by her employer, the deceased. The instances of abuse added up over a period of time and weighed on the mind of the accused – this formed the "mental background" of the accused.

41 Importantly, Rubin J ruled that the enquiry had to ultimately lead to the following question:[60]

> [W]hether a reasonable maid in the position of the accused, that is a maid with this sort of "mental background", would have been so provoked by the acts of the deceased at the material time.

R D Mackay & B J Mitchell, "Replacing Provocation: More on a Combined Plea" [2004] Crim LR 219. See also Chan Wing Cheong, "The Present and Future of Provocation as a Defence to Murder in Singapore" [2001] Sing JLS 453 who argues *Smith* gives Singapore courts the chance to make allowance for human nature and the power of emotions while at the same time expecting people to exercise control of their emotions.

58 [2004] 4 SLR 622.

59 The accused was a maid, the deceased her employer. The court accepted the accused's story that the deceased had ordered her to eat noodles in the toilet. Here, the court noted that the accused's story was corroborated by the fact that the police had actually discovered the noodles in the toilet. The court found that the accused must have felt humiliated by being disallowed to eat on a chair like a normal person. Further, the court also accepted the accused's assertions that the deceased had refused to give her food. In addition, the court accepted a witness's account that the deceased prevented other people from giving the accused food. See *id* at [140]–[143].

60 *Id* at [161].

This question was answered in the positive. Importantly, the "mental background" was specific to the gravity of the provocation,[61] and thus the court's approach was consistent with *PP v Kwan Cin Cheng*'s application of *Luc Thiet Thuan*. The court in *PP v Sundarti Supriyanto* therefore preserved the objective nature of the provocation defence.

42 Had Rubin J injected into the reasonable maid characteristics and idiosyncracies specific to the accused which did not affect the deceased's provocation, the Singapore courts would have taken the slippery *Smith* slope, of giving effect to a menu of wholly irrelevant traits and in so doing would have metamorphosed the provocation defence into a defendant-focused congenital-disability enquiry.[62] But, Rubin J did not do this. His Honour preserved the all-important objectiveness of the defence. This ensures that defendants who possess mental or personality disorders, whose disorders do not affect the gravity of the provocation, will not have their disorders injected into the reasonable man, but will instead become candidates for the diminished responsibility defence.

43 By taking into consideration the accused's mental background for the purposes of the reasonableness test, and ensuring that this mental background (the milieu of abuse) did affect the deceased's final provocation, Rubin J entrenched the following principles about the

61 The fact that all the acts of abuse and humiliation, termed "mental background" by Rubin J, went to the *gravity of the provocation* is proved by the evidence that the accused told the deceased "Ma'am why you do to me everyday like that, I very pain." The accused said this just before she physically responded to the deceased's provocations. Her months of abuse at the hands of her employer, which according to the court came to a climax on the fateful day, provided the "mental background" which affected the gravity of the provocation. This is clearly the *Luc Thiet Thuan* approach, and not the *Smith* stance. See *supra* n 58, at [50]–[52].

62 This was exactly the concern of the majority of the Privy Council in the case of *Attorney General for Jersey v Holley* [2005] 3 WLR 29. Lord Nicholls of Birkenhead, delivering the leading judgment, stated at [22] that the majority view in *Smith* involved a significant relaxation of the uniform, objective standard adopted by Parliament and advised:

> Under the statue the sufficiency of the provocation ("whether the provocation was enough to make a reasonable man do as [the defendant] did") is to be judged by one standard, not a standard which varies from defendant to defendant. Whether the provocative act or words and the defendant's response met the "ordinary person" standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable. The statute does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant's conduct is "excusable".

Thus, the Privy Council reinforced the need to maintain the objective nature of the reasonableness test.

provocation defence in Singapore. First, human diversity is relevant in the reasonable man test. The accused was compared to a reasonable *maid*, which reflected the Judiciary's willingness to take into consideration the unique peculiarities and features of the relationship between the accused and the deceased. The relationship was an "employer-subordinate" relationship, where the subordinate was a maid. Second, with regard to how grave and sudden the provocation was, it was relevant whether the accused possessed the characteristic about which she was taunted. The relevant characteristic, as found by the court, was that she had been abused by her employer for several months. This characteristic, termed the "mental background" by the court, affected the gravity of the provocation because the provocation *itself* was abuse. Third, in respect of whether the accused should have lost self-control to the point at which she killed, it was relevant to know what role she was occupying at the time. The accused was occupying the role of a *maid* and care-giver. The provocation kindled within the employer-maid relationship and therefore the normative question, "Should she have lost her self-control to the point of killing?" should be judicially answered with recognition and knowledge that she responded *qua maid*.[63]

44 Therefore, while Rubin J gave effect to human diversity and the cultural milieu of the accused, which was the primary concern in *Smith*, he did not allow provocation to slip down the slope of subjectivity. This is because the *Luc Thiet Thuan* principle of objectivity was preserved. This position, which entrenches the benefits of both approaches, must be commended, for in the words of Gardner and Macklem:[64]

> [F]acts about the defendant and his background are needed, not to make the objective standard of reasonableness any the less objective, but to identify exactly what would count as meeting the objective standard of reasonableness in the defendant's case. For the excusatory logic of the provocation defence is not the logic of lowering standards but the logic of upholding them.

By giving effect to (a) the accused's human diversity, (b) her mental background formed out of an abusive employer-maid relationship, and requiring (c) the link between this mental background to the gravity of the provocation, Rubin J preserved the logic of upholding the objective

63 She did not, for example, respond as an ex-employee: *supra* n 58, at [161].

64 Timothy Macklem & John Gardner, "Provocation and Pluralism" (2001) 64 MLR 815 at 830.

and rigorous standards of the provocation defence. Such preservation was strongly advocated by Lord Millett in his dissent in *Smith*:[65]

> I agree with Professor Ashworth … that, while mitigation of the offences of those who are incapable of exercising ordinary self-control is desirable, the defence of provocation is not an appropriate vehicle. Where an individual who is congenitally incapable of exercising reasonable self-control is provoked by a petty affront, his loss of self-control must be ascribed to his own personality rather than to the provocation he received.

Rubin J's judgment in *PP v Sundarti Supriyanto* converted Lord Millett's concern into law and clarified provocation's status as an objectively empathetic excuse.

C. Arguing the provocation excuse or the diminished responsibility excuse is not a denial of responsibility

45 As rational beings we must take responsibility for our actions. Where a consequence is caused by A's act, he must take full responsibility for it. The notion of full responsibility must not be equated with "taking all the flak" but must instead be understood as being responsible to the full extent for the fault committed. In legal language, A's fault shapes his culpability.[66]

46 Therefore, when A kills B, he will examine himself to ascertain whether his act of killing was "correct" in any way. Correctness here comes in the form of an excuse or a justification. If A considers himself totally justified in doing the act, he has a choice of several complete legal defences to argue, such as the defence of necessity under s 81 of the Penal Code.[67] If, however, A acknowledges that his reason for killing B was strong but not one that went to the extent of absolving him from fault, he may choose to argue an excuse, such as provocation or diminished

65 *Supra* n 56, at 214, referring to A J Ashworth, "The Doctrine of Provocation" [1976] CLJ 292 at 312.

66 This equation becomes less visible for strict liability offences. For a riveting account of the basis for strict liability offences, see Tony Honoré, "Responsibility and Luck, The Moral Basis for Strict Liability" in *Responsibility and Fault* (Hart Publishing, 2002).

67 Section 81 of the Penal Code states:

> Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

responsibility, if this fits the circumstance of his case. A, as a rational being, will attempt to peg his actions to an accurate level of culpability.

47 When A argues that he should be given the benefit of an excuse, he is not shirking all responsibility. To the contrary, he is standing up and saying, "The full extent of my responsibility is encapsulated in this legal excuse." Of course there are defendants who argue that they were provoked at the time of the killing when they are aware that they were in absolute self-control. Similarly, there are those who fake psychiatric illnesses in their attempt to clench the diminished responsibility excuse. We are not concerned about this dishonest lot, because they betray the basic assumption that fault equates to culpability. We are concerned with A, who genuinely feels that he is entitled to an excuse. A is responsible in a basic sense because he is responding to what he thinks ought to be his level of culpability. A's attempt to accurately state his level of blameworthiness makes him an extremely responsible defendant *because* he argues he is entitled to an excuse, not in spite of such argument.

48 The courts meet A's profession of responsibility by analysing the excuse argued and coming to a fair conclusion about its legal applicability. Therefore, A, if true to his belief that he deserves to be excused for killing B, is articulating his responsibility for the death of B. He is not shirking it. John Gardner makes this point succinctly:[68]

> You may ask: How can offering an excuse serve as an assertion, rather than a denial, of responsibility? The answer is breathtakingly simple. Only those who are responsible in the basic sense *can* offer excuses. That's because responsibility in the basic sense is none other than an ability to offer justifications and excuses. In the idioms we more often use, it is the ability to explain oneself, to give an intelligible account of oneself, to answer for oneself, as a rational being. [emphasis in original]

It must be stressed that defendants who lie about their true level of culpability are (a) not responsible in the basic sense because (b) they dishonour the equation between fault and culpability and therefore (c) are shirking their responsibility. These persons are unlike A.

49 Nonetheless, there is still a substantive difference between pleading provocation and pleading diminished responsibility. Although both excuses attribute an accurate level of responsibility to the killer, diminished responsibility generates less empathy for him. This is because

68 *Supra* n 50, at 161.

diminished responsibility isolates the killer as one who suffers from specific congenital disabilities. Such exclusivity reduces the objectivity of the excuse and makes more tenuous the chord that links society to the reason behind the killing. As a result, less public empathy is generated.

50 On the other hand, provocation's objective reasonable man forces an enquiry by society into whether the reason for the killing is, to an extent, acceptable. This earnest link between society and the reason for the killing, in the form of the reasonable man, cultivates more empathy for the offender.

51 Nonetheless, it must be emphasised that litigants like A, who argue an excuse such as provocation or diminished responsibility, should not be deemed shirkers of responsibility. To the contrary, they genuinely seek full responsibility commensurate to their fault. It is then for the court to decide how culpable they actually are.

III. Conclusion

52 Provocation, while an excuse, is more justificatory than diminished responsibility. The presence of the connected and empathetic reasonable man who puts himself in the shoes of the defendant does not feature in the latter defence. This creates a vacuum between society and the defendant who argues diminished responsibility – the reasonable man is not present to "strike a chord" with the defendant, and this detachment generates less societal-vindication. The first part of the article analysed diminished responsibility's three limbs. None of these three limbs invites the vindicatory reasonable man in.

53 The court's approach in the recent case of *PP v Sundarti Supriyanto*[69] confirmed the Singapore Judiciary's preference for the *Luc Thuat Thien*[70] approach to provocation over the *Smith*[71] methodology. This must be commended because it retains provocation's objective reasonable man who provides the justificatory and vindicatory ingredients in the excuse. Such retention prevents provocation from metamorphosing into a defendant-focused congenital-disability enquiry, akin to diminished responsibility.

69 *Supra* n 58.
70 *Supra* n 53.
71 *Supra* n 56.

Annex A

Diminished responsibility's enquiries into the defendant's congenital disabilities

Limbs	Tests
The accused must have been suffering from an abnormality of mind	The question the judge is to ask is: "Would a reasonable man think of the offender's state of mind as so different from that of ordinary human beings?" This is not a scientific classification but one drawn from the lay (and reasonable) man's mind. Judges are entitled to treat medical evidence as guides for their decisions.[72] But they need not be dictated by such evidence.[73] Where there is unanimity between defence and prosecution psychiatrists as regards the presence of an abnormality of mind, such evidence strongly suggests that the first limb is fulfilled.[74]
The abnormality of mind must arise from any of the five causes listed	The aetiology of the abnormality of mind is dictated by medical experts. Thus, the satisfaction of the second limb depends solely on the conclusion of medical men. If the psychiatrists' evidence is that the accused's abnormality of mind is not linked to any one of the five causes, the second limb is not fulfilled.[75]

72 The *Jimmy Chua* case, *supra* n 4, applying *R v Byrne*, *supra* n 3.

73 *Sek Kim Wah v PP*, *supra* n 8; *Tan Mui Choo v PP*, *supra* n 8; *Contemplacion v PP*, *supra* n 8; *PP v Juminem* [2005] SGHC 165. See also *supra* n 8.

74 *PP v Zailani bin Ahmad*, *supra* n 23.

75 The *Jimmy Chua* case, *supra* n 4, applying *R v Byrne*, *supra* n 3. See *PP v Zailani bin Ahmad*, *supra* n 23, where the learned trial judge was bound to accept the medical evidence that voluntary acute intoxication with hypnotics was indeed a disease as classified under F13.0 of the International Classification of Diseases, vol 10. Importantly, the trial judge ruled that such disease did not substantially impair the accused's mental responsibility.

The abnormality of mind induced by any one of the five causes listed must have substantially impaired the accused's mental responsibility at the time of the offence.	While medical evidence pertaining to mental impairment is important, the finding on the issue of substantial impairment is for the judge. It is a finding of fact which can legitimately oppose the conclusions of medical men.[76] The judge is entitled to analyse the acts, demeanour and presence of mind of the accused at or around the time of the killing when forming his conclusion on whether the accused's mental responsibility was substantially impaired.[77]

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76 The *Jimmy Chua* case, *supra* n 4, applying *Regina v Lloyd* [1967] 1 QB 175.

77 The *Tengku Jonaris* case, *supra* n 17; *Zainul Abidin bin Malik v PP*, *supra* n 18; *Contemplacion v PP*, *supra* n 8; *Mohd Sulaiman v PP*, *supra* n 20.