

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 7 - Mental Disorder and Unfitness for Trial

Section 168 - Criminal responsibility of persons with mental disorder

704. Sections 168 to 171 and associated minor amendments in Schedule 7 implement the Scottish Law Commission's Report on Insanity and Diminished Responsibility, published in 2004. The provisions directly reflect the draft Bill contained in the Commission's Report, with changes only to reflect the incorporation of the provisions within the larger Criminal Justice and Licensing (Scotland) Act, to deal with changes to the law since the Commission's Report, and to correct some minor errors and omissions.
705. Section 168 introduces a new statutory defence to replace the common law defence of insanity. It does so by inserting a new section 51A into the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). It provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the offence with which they are charged.
706. Subsection (1) sets out the test for the new statutory defence. It provides that there are two elements to the test. The first is the presence of a mental disorder suffered by the accused at the time of the conduct constituting the offence. Secondly, the mental disorder must have a specific effect on the accused for the defence to be available. This effect is the inability of the accused to appreciate either the nature or wrongfulness of the conduct constituting the offence. 'Nature' and 'wrongfulness' are alternative concepts and the defence may be established by proving lack of appreciation in respect of only one of them. The concept of appreciation is wider than that of mere knowledge. Failure to appreciate the nature of conduct would not therefore be precluded by knowledge of the physical attributes of the conduct. Similarly the defence may be available to an accused who knew that his conduct was in breach of legal or moral norms but who had reasons for believing that he was nonetheless right to do what he did.
707. Subsection (2) provides that the special defence does not apply to a person who at the time of the conduct constituting the offence had a mental disorder which consisted of a psychopathic personality disorder alone. The exclusion in this subsection applies only to psychopathic personality disorder. Other forms of personality disorder may give rise to the defence provided that the effect on the accused satisfies the test in subsection (1) above. The defence would also be available where psychopathic personality disorder co-existed with another mental disorder (including other personality disorders) provided that the effect of the other mental disorder falls within the test in subsection (1).
708. Under the common law insanity is classified as a special defence. Subsection (3) provides for a similar rule in relation to the new statutory defence based on mental disorder. The main effect of the characterisation of a defence as a special defence is

in relation to various procedural requirements under the 1995 Act (e.g. section 78(1) (giving of notice), section 89 (reading of the defence to the jury)).

709. Subsection (4) deals with who can raise the defence and with the relevant standard of proof. It provides that the special defence can be raised only by the person charged with the offence. It cannot be raised by the Crown or by the court of its own accord. This provision is in contrast to the common law defence, which can be raised by the Crown. The subsection also provides that the standard of proof on an accused person who states the defence is the balance of probabilities. This rule corresponds with that for the common law defence of insanity (*HM Advocate v Mitchell* 1951 JC 53).
710. [Section 168](#) introduces a statutory version of the plea of diminished responsibility in place of the common law plea. It does so by inserting a new section 51B into the 1995 Act. The test for the statutory plea is modelled on the common law as set out in *Galbraith v HM Advocate* 2002 JC 1, subject to some variations noted below.
711. Subsection (1) provides that a plea of diminished responsibility is applicable in cases of murder but not in respect of any other crime or offence. The effect of the plea, if proved, is that a person who would otherwise be convicted of murder is to be convicted instead of culpable homicide. The main difference between the two outcomes is that the court has a discretion in sentencing a person convicted of culpable homicide which it lacks in a murder case (a person convicted of murder must be given a sentence of life imprisonment as required by section 205(1) of the 1995 Act). The test for the plea is based on that laid down in *Galbraith v HM Advocate*, namely at the time of the killing the accused must have been suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct. Comments by the Court in the *Galbraith* case on this part of the common law test will be of use in interpreting the statutory test.
712. Subsection (2) makes two significant changes to the law on the plea of diminished responsibility. At common law the plea is not available where the relevant abnormality of mind falls within the scope of the insanity defence. The position is different under this Act where the accused's condition at the time of an unlawful killing falls within the definitions of both the defence based on mental disorder and diminished responsibility. In this situation, the accused has the option of advancing either the defence or the plea. Secondly the subsection allows for diminished responsibility to be based on the condition of psychopathic personality disorder. At common law this condition cannot be used as a basis for the plea (*Carraher v HM Advocate* 1946 JC 108). The subsection makes clear that this exclusion does not apply to the statutory test for diminished responsibility.
713. Subsection (3) clarifies the effect which a state of intoxication has on the availability of diminished responsibility. In the first place, the provision re-states the rule laid down in *Brennan v HM Advocate* 1977 JC 38 that a person who kills whilst in state of intoxication cannot found a plea of diminished responsibility on that condition. Secondly, it states that the presence of intoxication does not preclude diminished responsibility provided that there is a basis for the plea independently of the intoxication.
714. Subsection (4) deals with the burden and standard of proof in relation to a plea of diminished responsibility. The subsection follows the same approach as that for the defence based on mental disorder. Only the accused can raise the plea, and if raised the accused has to prove diminished responsibility on the balance of probabilities. The rule is in substance the same as the common law rule (*HM Advocate v Braithwaite* 1945 JC 55).

Section 169 - Acquittal involving mental disorder: procedure

715. **Section 169** inserts a new section 53E into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The new section deals with the procedure where an accused is acquitted by reason of mental disorder.
716. Subsection (1) of the new section 53E replaces the existing statutory procedure under section 54(6) of the 1995 Act for acquittal involving mental disorder. Under section 54(6) of the 1995 Act (before its repeal by this Act), where the defence of insanity is raised in a solemn case, there must be a verdict returned by the jury. A consequence of section 54(6) is that a jury requires to be empanelled and directed to return a verdict even where the Crown accepts a plea of insanity. This subsection provides for a different procedure for the statutory defence based on mental disorder. Where the Crown accepts a plea by the accused based on the defence, the court is to declare that the accused has been acquitted by reason of the special defence. This provision assimilates the procedure for solemn and summary cases. A declaration setting out the special nature of the acquittal is necessary in order to trigger the provisions in Part VI of the 1995 Act which deal with disposals.
717. Subsections (2) and (3) of the new section 53E provide for the situation where the Crown has not accepted a plea by the accused of the defence based on mental disorder. The defence does not become an issue for the court or jury to consider unless there has been evidence to support it. If the defence falls to be considered, in solemn cases the court must direct the jury to make a finding whether or not they accept that the defence has been established. Where the jury find that the defence has been established they must also declare whether their verdict of acquittal is based on the defence. A similar procedure applies in summary cases, where the court must state whether it finds that the defence has been established. If it has, the court must also declare whether the accused has been acquitted on that ground. The purpose of the declaration, in both solemn and summary cases, is to deal with the possibility that a jury might acquit the accused on some other ground. In this situation, even if the defence has been proved, the acquittal is not a special one triggering the disposal provisions of Part VI of the 1995 Act.

Section 170 - Unfitness for trial

718. Subsection (1) inserts a new section 53F into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The new section replaces the existing common law rule on insanity as a plea in bar of trial, with a new statutory plea of unfitness based on the mental or physical condition of the accused.
719. Subsection (1) of the new section 53F sets out a general test for the new statutory plea of unfitness for trial. The effect of the provision is that a person is unfit for trial if he cannot effectively participate in the proceedings because of his mental or physical condition.
720. This Act does not change the common law rule that the issue of an accused’s fitness for trial may be raised by the accused, the Crown, or by the court. However, this subsection makes clear that the appropriate standard of proof for a finding of unfitness for trial is on the balance of probabilities.
721. Subsection (2) of the new section 53F lists various inabilities which if proved in respect of the accused indicate his unfitness for trial. The list in paragraph (a) is illustrative, and not exhaustive, of the types of inabilities which constitute lack of ability to participate effectively in proceedings. Paragraph (b) provides that other factors may be relevant to making a determination.
722. Subsection (3) of the new section 53F applies to the statutory plea a common rule laid down in *Russell v HM Advocate* 1946 JC 37. It makes clear that a person is not unfit for trial simply because he cannot remember what happened at the time of the offence with which he is charged. However the rule does not apply where the accused is suffering from problems affecting memory of events at the time of the trial itself.

*These notes relate to the Criminal Justice and Licensing (Scotland)
Act 2010 (asp 13) which received Royal Assent on 6 August 2010*

723. Subsection (4) of the new section 53F explains the meaning of “the court” when used in the new section 53F.
724. Subsection (2) of section 170 amends the title of section 54 of the 1995 Act and introduces some amendments to that section.
725. Subsection (2)(a)(i) repeals part of section 54(1) of the 1995 Act. Section 54(1) of the 1995 Act contained a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of subsection 2(a)(i) is that this requirement does not apply to a finding by a court that a person is unfit for trial.
726. Subsections (2)(b) and (c) amend section 54 to reflect the names for the new defence and plea in bar of trial. References to insanity as a plea in bar are changed to refer to unfitness for trial.
727. Subsection (3) of section 170 repeals subsection (6) of section 54 of the 1995 Act. That provision dealt with procedure on insanity as a defence. The repeal follows on from the introduction by section 169 of this Act of the new statutory defence based on the accused’s mental disorder. By placing the defence in provisions separate from section 54, the definition of “court” in section 54(8) no longer applies to the procedure relating to the defence. The effect is to make clear that the provisions for recording an acquittal based on the defence apply to proceedings in the district/justice of the peace courts.
728. Subsection (3) of section 170 also repeals subsection (7) of section 54 of the 1995 Act. The effect is that the procedure in summary cases for the giving of notice of a plea of unfitness for trial is governed by the general rules for intimation of pleas in bar (see section 144 of the 1995 Act).

Section 171 – Abolition of common law rules

729. The effect of section 171 is to abolish any existing common law rules regarding the special defence of insanity, the plea of diminished responsibility and the plea of insanity in bar of trial.