



New Park Court

## Criminal Briefing

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*"Respected practitioner who is highly regarded for his advocacy in serious criminal cases. He is especially familiar with cases involving drugs conspiracy and people trafficking."*

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### Disentangling the balance of the mind: infanticide reconsidered.

In 1938 when the Infanticide Act was enacted creating the offence of infanticide as an alternative verdict to murder it was recognised that this was an area where law and medicine meet albeit uncomfortably.

The offence created a term which appears nowhere else in criminal law and only one other place in law<sup>1</sup>. 'The balance of her (mother's) mind was disturbed' is neither a familiar legal term nor a medical term. It has, until recently, been restrictively interpreted by the courts.

Section 1(1) of the Infanticide Act 1938 provides:

'Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but **at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child** or by reason of the effect of lactation consequent upon the birth of the child, then, if the circumstances were such that but for this Act the offence would have amounted to murder or manslaughter, she shall be guilty of felony, to wit of infanticide'

Section 1(2) provides that infanticide may be an alternative verdict to a charge of murder or manslaughter. The Court of Appeal reconsidered the extent of the infanticide in the case of *R v Tunstill [2018] EWCA Crim 1696*.

Late one evening in January 2017 Rachel Tunstill gave birth alone to a daughter in her flat in Burnley. She had been in the bathroom for several hours before giving birth. She then killed the baby using a pair of scissors causing 14 separate stab wounds mainly to the neck and chest. She put the body in a carrier bag, which she then put in the kitchen bin.

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<sup>1</sup> The verdict of a coroner's jury returning a verdict of suicide



After the killing she went to the living room and sat with her partner who 'as was his wont, ....engrossed in playing video games'<sup>2</sup>. He had thought she was having a miscarriage, something which she repeated when attending hospital the following day.

It was clear to medical staff that she had recently given birth and the police were contacted. In police interviews Rachel Tunstill said she had been suffering a miscarriage, the baby had been born with no signs of life and she had put the body in a plastic bag and into the bin. She said she believed she was about four weeks pregnant. Later analysis of her Ipad revealed search terms such as 'late term miscarriages at home', 'how to cut umbilical cord' and the location of an early pregnancy unit.

At her first trial in June 2017 she raised the partial defence of diminished responsibility and the alternative verdict of infanticide relying upon expert evidence of two consultant psychiatrists. Both psychiatrists supported the partial defences whereas the Crown's psychiatrist did not support either.

Dr Khisty diagnosed she was suffering from paranoid schizophrenia, Dr Bashir that she was suffering from severe depression with psychotic symptoms. All agreed that she had been diagnosed with Asperger's Syndrome.

In the period leading up to the birth Dr Khisty considered she was suffering from a severe depressive episode, Dr Bashir that there was evidence of depression but this was secondary to paranoid psychosis. All doctors agreed that the period immediately prior to the killing would have been extremely stressful with Dr Bashir considering she had been suffering from an acute stress reaction at the material time.

At the conclusion of the evidence the trial judge ruled that there was insufficient evidence for infanticide to be left to the jury and withdrew it from the jury. The jury rejected the partial defence of diminished responsibility and she was convicted of murder. She appealed on the grounds that infanticide should not have been withdrawn from the consideration of the jury.

As the Court of Appeal set out, 'the purpose of the Infanticide Act was to ameliorate the potential harshness of the law of murder by recognising that in a period after birth a mother's balance of mind may be affected'<sup>3</sup>

The critical words highlighted in s1(1) had been considered by the Court of Appeal in 2005 by Judge LJ in *R v Kai-Whitewind*<sup>4</sup> in *obiter* observations.

'...it does however require evidence that 'the balance of her mind was disturbed' either because the mother has not recovered from giving birth to the child or the effect of lactation on her. **No other circumstances are relevant.**'

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<sup>2</sup> Treacey LJ- *R v Tunstill* [2018] EWCA Crim 1696 at paragraph 3

<sup>3</sup> *R v Tunstill* – paragraph 30

<sup>4</sup> [2005] 2 Cr App R 31



In withdrawing infanticide from the jury Davis J held that the most that could be said was that the balance of Rachel Tunstill's mind was disturbed (if it was disturbed at all) by pre-existing mental disorder exacerbated by the circumstances of the birth and thus amounted to 'other circumstances'.

In other words, none of the experts could disentangle any pre-existing psychiatric conditions from any disturbance of the mind as a result of not recovering from giving birth. It would, of course, be an almost impossible task in many cases to separate what may in fact have been a pre-existing condition exasperated by not having recovering from the effects of giving birth and the onset of a psychiatric condition brought on solely by not having recovered from the effects of giving birth.

The second and more important effect of the narrow interpretation of s1(1) is that it put a mother who had a pre-existing mental disorder in a worse position than one who did not.

That disparity was recognised by Treacey LJ<sup>5</sup> coupled with the fact that the purpose of the Act was reduce potential harshness led to the Court of Appeal interpreting s1(1) in a wider manner.

The Court stated that the words 'by reason of' does not have to be read as if it said 'solely by reason of'. It was sufficient that a failure to recover from the effects of giving birth were an 'operative or substantial cause' of the disturbance of the mind. The Court drew the analogy with other areas of criminal law such as road traffic collisions and homicide where in considering causation a person's conduct need not be the sole cause of harm.

What this means is that the ambit of the offence of infanticide has been significantly broadened. Infanticide remains an important factor when considering murder of a baby by its mother.

Whilst the language belongs to another era and some of the thinking outdated (the idea that the effect of lactation disturbs a mother's mind sufficient to partly justify a killing) the concept of infanticide has remained untouched. Amendment was made by the Coroners and Justice Act 2009 and the Law Commission considered it but ultimately recommended retaining it without amendment.

Does infanticide matter when there is ample protection for a mentally unwell defendant through diminished responsibility?

Although there is superficial overlap with diminished responsibility there are critical differences. First, the burden of proof lies with a defendant for diminished responsibility to the civil standard whereas the prosecution have to negate infanticide to the criminal standard. Second the conditions requiring proof are considerably different with causation critical. In considering infanticide there is no required causal link between disturbance of the balance of the mind and the act or omission causing death in contrast to diminished responsibility.

Whilst the range of defendants whose case requires consideration of infanticide remains small, its importance remains as it was when enacted in 1938. Its purpose was to relieve potential harshness to mothers of new born babies.

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<sup>5</sup> R v Tunstill paragraph 29



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The judgement in *Tunstill* extends that relief so that all mothers whatever their previous mental health are caught by it and there is no longer the need to for psychiatrists to perform the impossible task of disentangling a mother's mind.

Footnote: After the Court of Appeal overturned Rachel Tunstill's conviction for murder in July 2018 she was retried before King J at Liverpool Crown Court in December 2018. The trial lasted 7 weeks during which the jury heard evidence from seven psychiatrists and psychologists. The issues of diminished responsibility and infanticide were left to the jury. Rachel Tunstill was subsequently convicted of murder.