The Homicide Act: Origins, Anomalies and Proposals for Change

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The fourth Forensic Psychiatry Specialist Section Conference of the College was held at Stratford-upon-Avon on 1 and 2 February 1985. The theme was the Homicide Act and the wider context of insanity legislation in theory and in practice. Not difficult to predict that so many differing 'expert' opinions would be expressed—a mirror of the 'ritual dance' of experts in court perhaps—but not so predictable that the papers should be so clearly expressed and mostly rigorous as they were, and that some degree of consensus should emerge. I shall attempt to summarize parts of the contributions and some of the suggestions made for change.

Dr J. Higgins (Mersey Regional Health Authority) began with an historical overview of homicide law, insanity and the attribution of responsibility, from medieval times to the present day. Acknowledging his debt to Nigel Walker,[1] he traced the development of such concepts as the 'wild beast test', the 'right-wrong test' and 'irresistable impulse' in some well known (e.g. Hadfield, Bellingham, McNaughton) and less well known (e.g. Arnold, Stafford, Broadric) English eighteenth and nineteenth century case histories. Even from the beginning, he pointed out, whilst the legal tests for insanity were strict in theory there was considerable variation in practice, decisions being influenced by factors other than mental disorder.

Dr Higgins discussed the divergence of Scottish law (more influenced by continental thought) from English law from the seventeenth century onwards and the early acceptance in Scotland, enshrined from the time of R. v Dingwell (1867), of the concept of 'partial insanity' and thereby of partial responsibility. In England, by contrast, the concept of degree of responsibility remained effectively dormant until the Gowers Commission and the Heald Committee's recommendations led to the passing of the Homicide Act (1957) and the creation of the defence of diminished responsibility.

Section 2(1) of the Homicide Act states that 'where a person kills or is party to the killing of another he shall not be convicted of murder if he was suffering from such an 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 party to the killing'. All the speakers were agreed at least that this law is an ass. None agreed entirely, however, on the best form for its re-incarnation.

Ms S. Dell's (Institute of Psychiatry) views were drawn largely from work contained in her recently published Maudsley Monograph.[2] Since Section 2 of the 1957 Act existed only to provide a means of escape for all concerned from the mandatory penalty for murder (now life imprisonment but previously death, prior to the suspension of the death penalty in 1965), if we could get rid of that we could be rid of the diminished responsibility defence and all its difficulties too. There should be no special defences particular to murder and the judiciary should be given the same discretionary sentencing freedom in homicide cases as they have in all others. The Insanity Defence (McNaughton), which is presently used in only a handful of cases annually, would once again (as prior to 1957) provide the sole psychiatric defence to murder as to other offences. Until such abolition, in her view, anomaly and injustice would continue to dominate criminal proceedings for homicide.

Professor E. Griew (Department of Law, University of Leicester) and *Dr A. Kenny* (Master, Balliol College, Oxford) in turn dissected the wording of the present Act, concluding it to be 'elliptical almost to the point of nonsense' (Griew). 'Mental responsiblity' had come almost to mean 'a mental state such that psychiatrists believe he (the defendant) ought to be convicted' (Kenny). The term confounded several ideas: the word 'mental' belonged with a term such as 'capacity', 'disorder' or 'disease'—some aspect of function; 'responsibility' is an evaluative word relating to 'culpability' (a moral concern) or liability (a legal notion). By linking the two words together in the Act the matter seems to be one proper for the expert evidence of the psychiatrist who is thus enabled, or inveigled, to testify upon whether the accused is considered suitable for conviction or punishment; i.e. the psychiatrist is invited to usurp the role of judge and jury, and frequently does so. Professor Griew questioned why such evidence, which is strictly inadmissible, is in fact allowed by courts: he suggested that it is often convenient for the court to allow the psychiatrist this expanded role. In this way both judge and jury are freed from having to wrestle with the difficult concepts and language of psychiatry. The 'elliptical' language of Section 2, by obfuscating fundamentally contentious issues, allowed the court to use the psychiatrist to get it off many a difficult hook. The term 'abnormality of mind' in the Act added further vagary to the confusion.

Professor R. Bluglass (University of Birmingham) provided several examples of the psychiatrists' role at present in providing just this service, quoting particularly telling examples of cases of mercy killing, where the psychiatrist is invited to perform prodigious stretching of the wording of the Act in order to exonerate the court, as well as the defendant, from a finding of murder and its inevitable consequences. For Professor Griew this was quite unacceptable; in the case of mercy killing, a separate category (as in the case of infanticide) might be created if this was what society and Parliament wished, but it was not for the psychiatrist to contort the process of Law. Professor Griew proposed the adoption of different wording in a revised Homicide Act as suggested by the Criminal Law Review Committee (CLRC)[3]—of which he was a member: the defendant's 'mental disorder' should be 'such as to be an

alleviating circumstance which ought to reduce the offence to manslaughter'. This is only a minor modification of the Butler Committee's[4] own suggested rewording. For both, 'mental disorder' as defined in the Mental Health Act (1959) should replace 'abnormality of mind' in the Act, despite the fact that the Homicide Act preceded the 1959 Act and the 1959 Act was not designed for this purpose. Professor Bluglass, whilst agreeing that the language of the Act is imprecise, took a more sanguine and pragmatic view—as was his remit. These are difficult issues with which the courts need our help; however, we might like to see the law changed, the immediate task for the psychiatrist is to decide what are the intellectual and ethical boundaries of forensic psychiatry and how he can best perform the present tasks asked of him. He quoted from Stone[5] (Professor of Law and Psychiatry, Harvard University), who has taken on the mantle of inquisitor and conscience, but also teacher, of forensic psychiatry in these matters.

Dr J. Hamilton (Medical Director, Broadmoor Hospital) widened the discussion by examining the grey area between complete lack of responsibility (the Insanity Defence) and diminished responsibility, the other side, as it were, of the debate. He believed that one could not approach reformulation of the Homicide Act without also considering the Butler Committee proposals for reforming the McNaughton Rules and disposals under the Criminal Procedure (Insanity) Act of 1964. Since he held the view that 'everyone is agreed that the McNaughton Rules are most unsatisfactory and are based on an outdated concept of mental disorder', he clashed with what Dr Kenny described as his own antediluvian views. Dr Kenny would scrap the Homicide Act and not replace it, and, further idiosyncratically, argued for the adequacy of the McNaughton rules in their original form: his views have been set out elsewhere.[6]

Dr Hamilton cited clinical examples of the confusion presently surrounding the legal status of automatism and epilepsy, particularly since the ruling of R. v Sullivan (1983). One of his examples drew out the possible conflict of legislation that the Mental Health Act (1983) and new powers of Mental Health Review Tribunals pose to recent insanity rulings in regard to epilepsy and the categories of insane and non-insane automatism. He asked for debate of these specific and topical issues in addition to a general review of insanity legislation.

Conclusion

It will no doubt be agreed—particularly, perhaps, after this brief and superficial gloss—that these issues are conceptually complex and often elusive. They are also emotive and contentious, touching as they do on questions of our most fundamental human values. Frequently they have only a tangential relation to psychiatric theory.

Whitlock[7] has drawn attention, as have others, to the different language usage and philosophy of ideas which layman, psychiatrist, jurist and philosopher bring to these arguments, of which there was ample evidence at this meeting—although never totally irreconcilably. He also comments that 'there is no room for extremes of opinion or over-riding rights in the controversy over criminal responsibility'.

There is no ideal model available—only approximation. Peremptory changes in the insanity law elsewhere, e.g. in certain States of the USA following the Hinckley trial, have produced more rather than less anomaly, and in some cases these changes have had to be revoked (Caplan[8]).

Even so, a debate on the now ten-year-old Butler Committee proposals, those of the CLRC and those of many individual critics would seem to be overdue, although it is doubtful how much will be achieved where there appears to be a lack of political and judicial will.

My own view is that ideas and policies change but do not always progress, and that this subject has more of a cyclical history than many. All proposals for change made at this Conference, for example, would exclude provision for any special pleading for states of extreme emotion—which can qualify within the present Homicide Act. It was salutary to hear Dr Higgins cite the judge's summing up in R. v Walker (1784)—the case of a pauper who had murdered his wife: 'Rage, which is the effect of distemper', he said 'is brought upon them by the Act of God, and not by themselves, and they are not answerable for what they do in those moments'. Walker was acquitted. Would we really want our 'reforms' to exclude the possibility of such a humane verdict, in whatever exceptional circumstances, two hundred years on?

References

[1]Walker, N. (1968) *Crime and Insanity in England.* Edinburgh University Press.

[2]Dell, S. (1984) *Murder into Manslaughter.* Maudsley Monograph, No 27. Oxford University Press.

[3]Criminal Law Revision Committee: Home Office (1980) *Offences Against the Person* (14th Report). Cmnd 7844. London: HMSO.

[4]Home Office; DHSS (1975) *Report of the Committee on Mentally Abnormal Offenders* (The Butler Report). Cmnd 6244. London: HMSO.

[5]Stone, A. (1984) The ethics of forensic psychiatry: A view from the Ivory Tower. In *The Law, Psychiatry and Morality.* American Psychiatric Press.

[6]Kenny, A. (1984) The psychiatric expert in Court. *Psychological Medicine,* **14**, 291–302.

[7]Whitlock, F. (1963) *Criminal Responsibility and Mental Illness.* London: Butterworths.

[8]Caplan, L. (1984) Annals of law: The insanity defense. *New Yorker,* July , pp. 45–78.

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