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Comments

DIMINISHED RESPONSIBILITY

The idea of a law which excuses to some degree mentally abnormal offenders from blame for their offences would be fine were it not for psychopaths. It all obviously depends on what precisely the law says and it is fascinating how the wording of legislation can affect psychiatric opinion. My colleague in Edinburgh, Dr Derek Chiswick, has shown that in Scotland legal findings of unfitness to plead are ten times as common as in England and Wales. He suggests that after a bad night the draftsmen of section 63 of the Mental Health (Scotland) Act 1961 put "is found insane so that the trial cannot proceed" where what was perhaps meant was "is found so insane that the trial . . .". Psychiatrists will vary widely in their diagnosis of this 'insanity' and there are no legal criteria for fitness to plead.

The term unfit to plead appears as a marginal note to section 4 of the Criminal Procedure (Insanity) Act 1964 and likewise diminished responsibility does not appear in the wording of any legislation but as a marginal note to section 2 of the Homicide Act 1957. The actual wording of the section is "Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing".

If the plea (which must be raised by the defence) is successful the charge will be reduced to manslaughter. Because there is a mandatory sentence of life imprisonment for murder the judge's hands are untied and he is now free to dispose of the offender as he sees fit, including a psychiatric disposal.

Note again the imprecision of the wording from a psychiatrist's point of view, but this time he is being asked not only to give an opinion on an abnormality of mind but also on whether it affected the subject's 'mental responsibility' for his actions. What on earth does that mean? It has often been pointed out that the phrase can mean legal responsibility or moral responsibility, in either of which case a psychiatrist is hardly the best qualified professional to give an opinion. But psychiatrists frequently do give such opinions and are rarely challenged in court as to what precisely they mean. Today attention is focussed on the word substantial: was the abnormality of mind serious enough partially to excuse the defendant from responsibility for his actions? Lawyers have shied away from the word responsibility, perhaps recognizing the futility of measuring such a vague concept.

So which abnormalities of mind qualify for the plea? Cases which have been successful have been described by Barbara Wootton (1960) and include cases of mercy killing of a spouse after a prolonged period of worry, killing of spouses in a state of 'reactive depression' caused by infidelity or broken engagements, women killed in jealous frenzies by men subject to 'mood swings' or 'chronic anxiety states'. Obviously the more psychotic the defendant the greater the chance of the plea succeeding, but many of the above will be recognized as mental abnormalities differing from the normal only in degree. Power (1980) quotes law reports where the plea has failed including those of (1) a Ugandan with irresistible impulses (the judge ruled that impulsive behaviour was not peculiar to the accused but common to his racial group) (2) a man accused of killing his wife after suspecting her of infidelity: psychiatric evidence of a paranoid illness did not persuade the jury (3) a female homosexual who strangled her aunt. The accused had a long history of emotional instability and delinquency and the psychiatric evidence was of a diagnosis of 'incipient schizophreniform disorder'. The plea of diminished responsibility was rejected.

From these it will be seen that if the accused suffers from a mental disorder on which psychiatric opinion may disagree it is very much a matter of chance whether or not the plea will be successful. Much depends on the beliefs of the psychiatrists called to give evidence, how the defence solicitors go about obtaining psychiatric evidence to support their case, the way in which the judge directs the jury and the attitudes of the members of the jury.

Now there are two seeming anomalies in the system: first the presence of an undisputed psychosis is no guarantee of a finding of manslaughter, and second that those accused who have psychopathic disorder have a very good chance of succeeding. Here are two cases with which I have been personally involved:

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A.B. was a 39-year-old man charged with the murder of an elderly lady by stabbing her in a public park. From an early age he had been recognized as an eccentric individual and he was admitted to a psychiatric hospital at the ages of 16, 26 and 36 with a diagnosis of schizophrenia. At the time of the offence he was an out-patient receiving depot phenothiazines. He suffered from delusions of persecution by the police and during interrogation after the killing was said to have confessed to the homicide. All psychiatric reports supported a diagnosis of schizophrenia and a plea of diminished responsibility; a bed was made available for him in a Special Hospital.

C.D. was a 26-year-old man accused with two others of murder. He had a background of delinquency from age 11, a failure to sustain any employment, of alcohol and drug abuse, of participation in occult ceremonies and of gross sexual perversions—he earned a living as a homosexual prostitute specialising in sado-masochism. The offence with which he was charged was the killing by beating, whipping, hitting and kicking a young man following a homosexual orgy with his co-defendants. After the victim was killed his body was dumped in a back garden and the defendants went to bed.

A.B. received life imprisonment for murder with a Judge's recommendation that he serve not less than 30 years. C.D.'s plea of diminished responsibility was accepted and he was convicted of manslaughter. How, you may ask, did this come about?

In the first case the reason is simple: A.B. pleaded not guilty to the offence and there was no opportunity to raise the plea. On the accused being found guilty the judge was left with no option other than to sentence him to life imprisonment. In the case of C.D. psychiatric opinion was of a diagnosis of a psychopathic personality disorder which was an abnormality of mind which substantially impaired his responsibility for his actions. He, too, received life: there was no recommendation for a psychiatric disposal. Many would think there is something wrong with the law when a psychopath can, and a schizophrenic cannot, succeed with a plea which reduces the charge and opens up the possibility of a disposal which offers psychiatric treatment.

Psychopathic disorder was the basis of the first diminished responsibility case after the Homicide Act 1957 became law (Walker, 1968) but it was the trial of Patrick Byrne in 1960, which benefited psychopaths more than any other. Byrne was an Irish labourer who broke into a YWCA hostel in Birmingham, strangled a girl, then mutilated her body. In the Court of Criminal Appeal, Lord Chief Justice Parker gave the now authoritative interpretation of the term abnormality of mind, this being

> A state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether the act was right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.

Since then a plea can be based on evidence of 'irresistible impulse', of the accused's difficulty in controlling his impulses, and "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".

What are the chances of a successful plea altering the disposal of the offender, remembering the Judge may still sentence to life imprisonment someone convicted of manslaughter? In the three years 1961–64 when both the Homicide Act 1957 and the Mental Health Act 1959 were in operation, 121 were found guilty of manslaughter due to diminished responsibility: half went to prison and half received a hospital order. In 1965–68 and 1969–72 the number similarly convicted rose to 153 and 195 respectively and in both periods one-third went to prison (half for life) and two-thirds received a hospital order, the vast majority with a restriction order without limit of time. In the next three years the tide had turned: of 242 convictions 38 per cent were made subject to a hospital order and 50 per cent received prison sentences. (Every year a few received psychiatric probation orders). It will be interesting to see how the trend develops. The increase in diminished responsibility cases reflects the fall (by 75 per cent in the 10 years from 1957) in cases of legal findings of insanity (Home Office Research Unit, 1979). It is encouraging to note that a higher proportion of diminished responsibility lifers are made subject to transfers to psychiatric hospitals under section 72 of the Mental Health Act (generally early in their sentence) than any other category of life sentence prisoners.

Clearly the situation is not very satisfactory, but what are the alternatives? In Scotland, where the concept originated in 1867 in common law rather than by statute, the interpretation of the plea is left entirely to the judges and the trend seems to be for psychopathic disorders to be less successful (Walker, 1968). The most precise Scottish judicial declaration was made in 1923 by Lord Alness who referred to those completely responsible, those completely irresponsible and a third group who "while they may not merit the description of being insane, are nevertheless in such a condition as to reduce the quality of their act from murder to culpable homicide. There must be mental unsoundness; there must be a state of mind bordering on, though not amounting to insanity. There must be a mind so affected that responsibility is diminished

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from full responsibility to partial responsibility". I can't find 'mental unsoundness' in the ICD but note the absence of reference to mental responsibility. Culpable homicide is equivalent to manslaughter but the epithet still carries an unreserved connotation of blameworthiness.

In the Netherlands, offenders assessed as having *some* degree of responsibility for their actions *must* be punished. In other words the offender can have psychiatric treatment, but only after he has had his 'obligatory retribution of guilt'. There is however a Bill currently in front of the Dutch Parliament to remove this latter requirement. Legislation in the USA varies considerably between states, and Morse (1979), an American Professor of Law, after reviewing American concepts, has commended the British doctrine for "its honesty and conceptual coherence".

It has sometimes been suggested that the restriction of the defence to cases of murder deprives some (e.g. those convicted of arson, sexual offences or assault) of receiving a psychiatric disposal. In Scotland the defence has been used for such other offences in days gone by. Whilst the philosophy of extending the plea (to help the offender and society recognize the degree of culpability) is understandable, the main point is that the defence is there to help a mentally disordered offender escape a life sentence. In cases where there is no mandatory sentence there is nothing to stop psychiatrists offering to take patients on hospital orders or probation orders: it is a question of putting your money where your mouth is.

The Butler Committee (Home Office and DHSS, 1975) thought the whole issue was bedevilled by the obligatory life sentence for murder, and they favoured its abolition as such a punishment was not always indicated. The inhumane disposal of patient A.B. above is a case in point. The Butler Committee proposed replacement of the mandatory life sentence (and therefore of diminished responsibility as it would have outlived its usefulness) with complete discretion as to sentence and disposal left to the judge. Failing such abolition, the Committee proposed a rewording of section 2 of the Homicide Act to the effect that if the accused was found by the jury to have a mental disorder (as defined in section 4 of the Mental Health Act) that was such as to be "an extenuating circumstance", then the charge could be reduced to manslaughter.

The Criminal Law Revision Committee (1980) have expressed reservations about this proposal: together with Bluglass (1980) they point out that many mentally disordered people at present dealt with as cases of diminished responsibility would be excluded unless a wide interpretation of mental illness were allowed or there was a rider to the definition of mental disorder with the words "or any other disorder or disability of mind".

Moreover the Butler Committee do not seem to have realised that this would make the position of those with a psychopathic personality disorder even more anomalous. At present such a patient may well be rightly considered to have diminished responsibility and yet not to be susceptible to medical treatment, as was the case with C.D. above. Using the definition of psychopathic disorder in section 4 of the 1959 Act would imply that the accused warrants psychiatric treatment and failure to meet those criteria (or the new wording proposed in the White Paper "prospect of benefit from treatment") will lead to those undoubtedly psychopathic but untreatable being unable to put forward the defence. And this is where we came in.

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