
Editorial

Murder, manslaughter and responsibility

Several of the forensic psychiatry symposium papers in this issue of the journal criticise those aspects of the law on homicide which concern killers who have some mental abnormality. In particular there seems a wide measure of agreement among the symposium participants – three forensic psychiatrists, a lawyer and a philosopher – that Section 2 of the 1957 Homicide Act is unsatisfactory and places psychiatric expert witnesses in an intolerable position. Psychiatrists are guided, it is claimed, by a meaningless piece of legislation which yet allows them excessive discretion and influence over the course of homicide trials. On the basis of psychiatrists' decisions a person may either continue to face a murder charge or be defended under Section 2 because of putatively 'diminished responsibility'. In the case of the murder charge the person must be sentenced to life imprisonment if found guilty: in the case of a successful plea under Section 2 the defendant is found guilty of manslaughter rather than murder, and his sentence is at the discretion of the judge.

The question of mandatory sentencing for murder and the problems of Section 2 are of course conceptually separate issues, and it is the latter which are of particular relevance to psychiatrists *qua* psychiatrists. Is Section 2 as bad and/or as meaningless as the symposiasts make it out to be?

Section 2 of the 1957 Homicide Act provides that if a person charged with murder '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 a party to the killing' he or she shall be guilty of manslaughter, not murder (1).

The main charge levelled by Professors Kenny, a philosopher, and Griew, a lawyer, is that 'mental responsibility' is not something that psychiatrists should be assessing because it is not a psychological state or entity but a legal or moral evaluation. In the words of the Butler Committee, as cited by Professor Griew, mental responsibility 'is either a concept of law or a concept of morality; it is not a clinical fact relating to the defendant'. Yet, as Professor Kenny states, 'The word "mental" *seems* to belong with "capacity" or

"disorder" or "disease" rather than with "responsibility".' Well of course if it is true that mental responsibility (or indeed mere responsibility) is a legal or moral evaluation then it follows that psychiatrists have no special competence to assess it, and that therefore they are being placed in an intolerable position if they are asked to assess it. Indeed Professor Kenny believes that Section 2 results a) in psychiatrists being constantly tempted to 'quasi-perjure themselves', b) in psychiatrists being allowed to 'quasi-legislate', and c) in bringing the profession into disrepute by, from time to time, showing its members 'contradicting each other on matters which look to the layman like elementary and fundamental features of their discipline'.

An alternative approach to Section 2 which is more sympathetic to its drafters, to Parliament which legislated it, and to the judges, lawyers and psychiatrists who accept and use it, involves recognition of the simple fact that the concept of responsibility is ambiguous. On the one hand it means, as Kenny and Griew and others take it to mean, a moral and or legal *evaluation* by others of whether or not a person should be blamed, convicted, punished or otherwise be held accountable for his actions and or omissions, and/or their results. But there is also another perfectly ordinary meaning of responsibility, readily to be inferred from the dictionary definitions of 'responsibility' and 'responsible', whereby responsibility is 'the state or fact' of being 'capable of rational conduct', as the Shorter Oxford English Dictionary puts it. Now of course dictionary definitions do not solve substantive philosophical problems – but they often do, as in this case, demonstrate conceptual ambiguities which themselves can produce merely the appearances of substantive philosophical problems.

Professor Griew asks rhetorically 'what would count as "knowledge about" mental responsibility' and answers himself. 'I do not think there is any possible answer. Responsibility (mental or otherwise) for acts refers not to a subject of knowledge but to an evaluative conclusion from that of which knowledge might meaningfully be claimed. It is not something that can itself be known about. This is not to express epistemological pessimism; it is rather to accuse

Parliament of pronouncing a kind of nonsense.'

Ignoring the contentious implicit claim that an 'evaluative conclusion' is not something that can be known about, it is quite clear that Professor Griew is concerned only with one sense of 'responsibility' whereby it is a legal-moral evaluation. But suppose the other sense was intended by Parliament, whereby the word 'responsibility' in Section 2 refers to a state or fact of being capable of rational conduct. Suppose further that the very purpose of calling it 'mental' responsibility was precisely to indicate that it was this sense of responsibility which was intended rather than the moral-legal evaluative sense. Such suppositions seem not unreasonable. If they are made, does Section 2 then still suffer from the sort of incoherence alleged by its critics? Surely not. Under this reading the word 'mental' as a qualifier of 'responsibility' does indeed also belong with 'capacity', as Professor Kenny says it ought to belong – notably, with a capacity for rational conduct. Under this reading Section 2 offers reduction of a verdict of murder to a verdict of manslaughter if the defendant's capacity for rational conduct was, in relation to the killing in question, substantially impaired by an abnormality of mind.

What sort of mental capacities would the psychiatric expert witness assess in order to decide whether the defendant's capacity for rational conduct was substantially impaired in relation to the killing? It would probably be fairly uncontentious to assert that in order to be capable of rational conduct a person must be capable of reasoning, of coming to decisions based on such reasoning, of intending to act on the basis of such decisions, and finally of acting upon the basis of such intention. (To use another terminology, in order to be capable of rational conduct one must be capable of being an autonomous agent). Surely it does not put psychiatrists into an invidious position, or 'beyond their proper role', to ask them to assess the degree of impairment of these various mental components of responsibility in the sense of a capacity for rational conduct? Such assessments would be analogous to forensic psychiatric assessments of people's mental states in a variety of other legal circumstances including assessment of the 'defects of reason' specified under the McNaughton Rules (2), the state of mind including 'voluntariness' necessary for the commission of a tort (3), the lack of understanding caused by insanity which can invalidate a contract (4), the soundness of mind, including memory, intention and understanding, necessary for a person to make a valid will (5), and the nature and degree of 'mental disorder' required under the Mental Health Act for compulsory admission to hospital for assessment and/or treatment (6).

If 'mental responsibility' is understood as capability of rational conduct the considerations attributed with some scorn to Professor Hart by Professor Griew – notably the defendant's capacities to control his actions and conduct, to reason, and to understand – are all perfectly appropriate aspects of the assessment of impaired responsibility, and also apparently entirely appropriate assessments for expert psychiatric witnesses to make. An enormous variety of conditions are likely to impair a person's capability of rational conduct or mental responsibility so that *prima facie* it would seem appropriate to *consider* the defence in all cases of homicide. Dr Dell's finding that psychiatrists differ on virtually identical facts as to whether a Section 2 defence is appropriate would not seem to constitute a criticism of Section 2 so much as of those defence lawyers who fail to find a sympathetic psychiatrist who understands the scope offered by Section 2.

However, the requirement of Section 2 is for *substantial* impairment of mental responsibility and here there is always likely to be disagreement even between experts about how much impairment of capability of rational conduct constitutes 'substantial' impairment. *Pace* Professor Griew, there seems no reason, on this reading of the section, to disallow such experts their opinion, any more than there would be if the question was whether a person's sense of smell had been substantially impaired by some injury. Nor, under this reading of the Section, would the criticism that psychiatrists had usurped the function of judge and jury be applicable – psychiatrists would be offering their professional expertise in the assessment of the nature and magnitude of impairment of various mental capacities whose presence is necessary if a person is to have a capability of rational conduct, or 'mental responsibility'. It would always remain possible for the court to reject such expert assessment – a possibility which, as several of the symposiasts point out, is by no means unprecedented.

Thus given a more sympathetic interpretation perhaps Section 2 of the 1957 Homicide Act may be judged not guilty after all?

References

- (1) Newton C R. *General principles of law* (3rd ed). London: Sweet and Maxwell, 1983; 138.
- (2) See reference (1): 137–138.
- (3) See reference (1): 162.
- (4) See reference (1): 263.
- (5) See reference (1): 354–355.
- (6) Mental Health Act, 1983. London: Her Majesty's Stationery Office.