

Criminal Responsibility, Abnormal Mental States, and the Functions of Expert Medico-Psychological Evidence

By

Hazel James (MSc, LLM, BA)

**Thesis submitted to the University of Nottingham for
the degree of Doctor of Philosophy, February 2005**



TABLE OF CONTENTS

Acknowledgements

Abstract

General Introduction page 1

Chapter One: Criminal Responsibility:

Legal Approaches to the Mind page 8

Introduction page 8

The Philosophical Underpinnings of Legal Responsibility page 9

Introduction page 9

The Legal View of the Mind page 10

The Rule of Law page 13

The Dialectical Challenge to Kantian Individualism page 15

Mens Rea page 18

Introduction page 18

Jury page 20

The Reform Debate page 21

The Defences of Insanity, Diminished Responsibility page 23

and Provocation: Morality and Determinism

Introduction page 23

Insanity page 24

General page 24

Mental States and Responsibility page 25

Procedural Issues - Status page 26

or Excuse Defence?

Disposal Options page 27

Reform Debates on Status or Excuse page 27

Mandatory Insanity Disposal page 30

in Homicide Cases

Diminished Responsibility page 31

General page 31

Responsibility page 31

Procedural Issues page 32

The Reform Debate page 33

Provocation page 37

General page 37

The Impact of *Smith* page 37

Responsibility page 38

Procedures page 39

Pleading Diminished Responsibility page 40

and Provocation Together

General page 40

The Reform Debate page 42

Detention: Policy Issues page 44

Introduction page 44

Government Initiatives on Dangerousness page 45

A Dialectical View Revisited page 48

Conclusion page 50

Chapter Two: Medico-Psychological Approaches to the Mind	page 52
Introduction	page 52
The Philosophical Parameters of the Debate	page 52
The Neuroscience of Consciousness	page 55
Foundations	page 55
The Mind/Body Link	page 56
Nature/Nurture	page 58
Dimensions to Cognition	page 60
Sense of Self	page 60
Emotion	page 63
The Unconscious	page 67
Acts of Will	page 69
Responsibility	page 73
Medico-Psychological Experts	page 76
Conclusion	page 78
 Chapter Three: The Interaction of Law and Science:	page 80
Common Law Rulings	
Introduction	page 80
Judicial Interpretation of the Insanity Defence	page 81
Introduction	page 81
Discussion	page 84
Judicial Interpretation of the Diminished	page 85
Responsibility Defence	
Introduction	page 85
Discussion	page 88
<i>Substantial Impairment: Judges, Juries and Experts</i>	page 91
Introduction	page 91
No Trial	page 93
Trial: Juries	page 94
Discussion	page 95
Legal Conundrums	page 97
Psychopathy	page 97
Responsibility	page 97
The Scottish Position	page 100
Detention	page 101
Intoxication	page 103
Responsibility: Biological Explanations	page 105
The State of Scientific Evidence	page 105
Genetics and Individualizing Responsibility	page 107
Evidence and Courts	page 108
The Jury	page 111
Genetics and Sentencing	page 112
Discussion	page 113
Conclusion	page 115
 Chapter Four: The Interaction of Law and Science: Courts,	page 117
Experts and Evidence	
Introduction	page 117
The Efficacy of Using Science in Law	page 117

The Rise of the Forensic Medico-Psychological Expert	page 120
Introduction	page 120
Experts and Responsibility	page 121
Experts: Detention, Punishment and Treatment	page 124
The Forensic Medico-Psychological Expert's Role	page 125
Introduction	page 125
Differences Between the Clinical and Assessments	page 125
The Admission of Expert Evidence	page 129
Introduction	page 129
Evidence: Fact or Opinion	page 130
The Adversarial Process	page 131
Professional Identity	page 131
Evidence	page 132
The Judiciary	page 134
Introduction	page 134
The Expert's Duties and Responsibilities	page 135
Expert Credibility	page 136
Evidence Credibility	page 137
Scientific Method	page 137
Established Scientific Community	page 138
The Judge and Jury	page 140
Admission of Evidence and the Jury	page 140
Judges' Directions and the Jury	page 141
The Jury and Expert Evidence	page 142
Jury Decision-Making	page 144
Discussion	page 147
Sentencing	page 149
Conclusion	page 152
 Chapter Five: Methods	 page 154
Introduction	page 155
Documentary Research	page 154
Introduction	page 154
Official Statistics	page 155
Crown Prosecution Service Case Files	page 157
Researching Practitioners	page 159
Introduction	page 159
Court Cases	page 160
Interviews	page 161
The Interview Sample and Access	page 161
Interview Method	page 163
Vignette	page 164
Data Analysis	page 169
Conclusion	page 172
 Chapter Six: Legal Interviews	 page 174
Introduction	page 174
The Law	page 174
<i>Mens Rea</i> – Guilty Intent	page 174
Reform Suggestions	page 176

The Defences of Insanity, Diminished Responsibility and Provocation	page 177
Insanity	page 177
Diminished Responsibility	page 177
Provocation and Diminished Responsibility	page 180
Psychopathy and Intoxication	page 180
Reform Suggestions	page 181
Procedural Considerations in a Case	page 184
The Police Station	page 184
Vignette	page 188
The Charge	page 190
Preparing the Case for Trial	page 191
Initial Defence and Prosecution Considerations	page 191
Choosing a Medico-Psychological Expert	page 193
Instructing the Expert	page 195
The Report	page 198
Legal Perceptions of Medico-Psychological Comprehension of the Law	page 200
Legal Comprehension of Medico-Psychology	page 201
Expert Reports and Case Decisions	page 202
Defence Perspective	page 202
Prosecution Perspective	page 204
Trial or No Trial: The Issue of Public Interest	page 205
Court	page 207
Judges	page 207
Judicial Attitudes	page 207
Experts in Court	page 208
Expert Qualifications	page 209
Admission of Expert Evidence	page 209
Judicial Directions and Expert Evidence	page 210
Juries	page 210
Understanding Expert Evidence	page 211
Understanding the Legal Rules	page 213
Perceptions of Non-Legal Influences on Jury Decisions	page 214
The Future of Jury Trials	page 216
Sentencing: Detention – Hospital v. Prison	page 217
Sentencing	page 217
Release	page 220
Reform Suggestions	page 220
Discussion	page 222
Conclusion	page 223
Chapter Seven: Medico-Psychological Interviews	page 225
Introduction	page 225
The Law	page 225
Introduction	page 225

<i>Mens Rea</i> – Guilty Intent	page 226
The Defences	page 227
Criminal Responsibility	page 229
Psychopathy	page 230
Intoxication	page 233
Reform Suggestions	page 234
The Forensic Expert	page 235
Expert Reputation and Titles	page 235
Pre-Trial Responsibilities	page 236
Initial Instructions	page 236
The Assessment	page 240
Procedural Issues	page 240
Diagnostic Issues	page 242
Assessments of Malcolm	page 244
The Report	page 246
CPS Case File Reports	page 249
Case One	page 249
Case Two	page 250
The Defence Report	page 250
The Prosecution Report	page 252
Reform Suggestions	page 254
Expert Reports and Case Decisions	page 254
Court	page 256
Judges	page 256
Judicial Attitudes and Responsibilities	page 256
Expert Qualifications	page 257
Admission of Expert Evidence	page 258
Juries	page 261
Expert Evidence, Barristers	page 263
and the Adversarial Process	
Reform Suggestions: Education and Communication	page 265
Introduction	page 265
Training Experts	page 266
Educating Legal Personnel	page 267
The Jury	page 268
Sentencing: Detention – Hospital v. Prison	page 269
Introduction	page 269
Detention	page 270
Psychopaths	page 271
Release	page 272
Discussion	page 274
Conclusion	page 275

Chapter Eight: The Interaction of Law	page 277
and Medico-Psychology: Conclusions	
Introduction	page 277
The Interaction of Law and Medico-Psychology	page 279
General	page 279
Judges as Legislative Interpreters	page 281
General	page 281

Psychopathy and Intoxication	page 284
Judges as Trial Arbiters	page 285
Inter-Professional Relationships: How the Incongruities are Managed	page 286
Introduction	page 286
Inter-Professional Understanding	page 287
Inter-Professional Relationships and Roles	page 290
The Legal Process	page 293
Introduction	page 293
Pre-Court Issues	page 294
The Police Station	page 294
Assessment	page 294
Reports	page 298
Trial or Accept the Plea	page 301
Court Issues	page 302
Judges	page 302
Barristers	page 303
The Jury	page 304
Jury Comprehension	page 305
Jury Role	page 307
Inter-Professional Relationships, Local Values And the Routine Nature of cases	page 308
Sentencing	page 311
Reform	page 314
Introduction	page 314
Interaction Between law and Medico-Psychology	page 314
Theory v Practitioners	page 316
Dialectics Revisited	page 319
Conclusion	page 321
Bibliography	page 324
Appendix 1: Vignette	
Appendix 2: Interview Letter	

Acknowledgements

I wish to thank my supervisors: Professor Robert Dingwall, Dr Peter Bartlett, and Dr Ellen Townsend for their support and input during the three years of the PhD process.

I wish to thank Geoffrey Kay for his diligence in proof reading the thesis, because through addressing the shortfalls in my secondary grammar education, he has made the ideas in my head more accurately mirrored on the page.

I want to thank all those that participated in this research for their time, co-operation and candour.

Finally, I want to say a heartfelt thank you to my two children, Mags and Etienne, and friends both old and new, who have supported me and accepted my lack of availability through various stages of doing the thesis. In particular, words cannot adequately express my gratitude for all the encouragement and backing I received, when in the final phase I withdrew from the usual round of social activities in order to finish the thesis. With special thanks to Doreen and Kathy.

Abstract

This thesis examines the interaction of law and medico-psychology in homicide cases, where the defences of insanity and diminished responsibility in particular are raised. If the defendant's mental state is subject to scrutiny through the defences, then expert medico-psychological evidence is required, yet law and medico-psychology have very different understandings on the mind and very different roles with regard to assessing individuals. Expert medico-psychological evidence can be submitted in the consideration of criminal responsibility, when sentencing is concerned with whether prison or hospital is most appropriate, and for release decisions involving judgments about the defendant's potential risk and dangerousness.

The examination of the interaction between law and medico-psychology incorporated three dimensions. First, an exposition of the respective theoretical positions of the two disciplines on the mind, detailing the pertinent legislative and common law rules. The second analysed the judicial interpretations of the medico-psychological terms and concepts contained in the substantive law, and in addition, the controls developed through judicial reasoning on the procedural role of the expert and the admission of expert testimony. Finally, the practitioners' perspective is explicated, which was obtained by conducting interviews with lawyers and medico-psychological expert witnesses.

There are two facets to the research conclusions, which simplistically stated are: first, in terms of the interaction between law and medico-psychology, the law uses medico-psychological concepts and evidence in a symbolic manner to facilitate legal objectives. Secondly, the examination of the nature of the interaction through the three dimensions exposed the fundamental difference between the theoretical legal debates and the practitioners' perspective. Although the former normally informs legislative and reform discussions, it seems from this research that consideration needs to be given to all the dimensions in future reform debates.

GENERAL INTRODUCTION

The thesis examines the determination of criminal responsibility when there are questions as to whether the defendant's mental state at the time of the offence can meet the objective standard required by law. Whilst the nature of criminal culpability varies between offences, it usually requires that the defendant have the requisite guilty mind, meaning that they intended the act, which is referred to as *mens rea*.¹ The law recognises that individuals with disordered mental states are not always wholly criminally responsible and the defences of insanity and diminished responsibility allow a subjective evaluation of a defendant's mental state. As diminished responsibility can only be invoked in respect of homicide, the remit of the thesis is restricted to murder cases. Both defences require expert evidence regarding the state of the defendant's mind at the time of the offence. For ease of reference throughout the thesis the term medico-psychology is used when referring to the experts that may come from psychiatry and/or psychology. However, this does not overlook the fact that there are distinctions between the two disciplines, outlined in chapter two, and theoretical divisions within each profession. For example, the Royal College of Psychiatry and the British Psychological Society, which constitute the main organisational bodies for each respective profession, contain numerous sub-divisions to represent the distinct theoretical positions.²

Significantly, whilst the focus within cases is the defendant's mental state, the disciplines of law and medico-psychology have different normative frameworks underpinning their conceptions of the mind. However, as this is an established area of law the initial research interest was premised on the assumption that there was an interaction between the law and medico-psychology in this context, and therefore the research would ascertain whether or not developments in the neuroscientific understanding of the mind had had an impact on the nature of the interaction between the two disciplines. The ensuing exploration of the evidence of the interaction in case law and through interviewing practitioners showed that the character of the interface was far more complex than had originally been anticipated, challenging the envisaged

¹ See chapter one

² The website for each organization is ordered around the different divisions.

perception of the relationship between the disciplines and therefore the anticipated research focus.

There are two analytical themes in the examination of the interaction between law and medico-psychology in the context of these cases. The first relates to the role, social significance of the legal and medical discourses to categorise individuals as mad or bad, and their ability for their particular discourse to prevail within the interaction. This thesis explores the implications from the current nature of the interface. Theoretically significant to this aspect of the analysis is Foucault's (1973; 1977; 1980) premise of the disciplinary society, which deals extensively with the involvement of the 'psy' professions in the legal system. Integral to his philosophy is the contention that knowledge is power (1980), an important factor in light of the dominant social position held by law and medicine. Foucault also asserted that power is the result of a "multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organisation" because he wanted to resist adopting a structuralist position (1978: 92). However, it cannot be overlooked that institutional relationships have an impact on secondary relations between individuals and particular social contexts created by the discourses (Freundlieb 1994: 165).

With regard to the era of the disciplinary society, Foucault maintained that the emergence of disciplines concerned with the body constituted a new form of regulation less overt than that of the juridico-sovereign era. Thus this thesis examines the interface between law and medico-psychology in the categorization process that occurs in the application of the law, as "juridical systems define juridical subjects according to universal norms, [and] the disciplines characterise, classify, specialise ... " (Foucault 1977: 223). Foucault argued that medicine, through diagnostic categories, generated 'truths' about normality and abnormality, and also created mechanisms to deal with the anomalies (1973: 53; 68: 1980). Crucially the inception of the relationship between law and psychiatry is, according to Foucault, not predicated on psychiatry seeking to annex crime, but its need to secure a basis for interventions by gaining recognition for itself, and the outstanding public disease that needed to be dealt with was mental disorder and the dangers

presented by madness (1980: 20). As a result a need for experts to identify homicidal mania emerged, or was constructed. Chapter four discusses how medico-psychological evidence has become integral to the legal assessment process because of the importance placed by society on the claims of science to speak the truth about aberrations (Foucault 1978: 53).

Foucault asserts that a consequence of incorporating medico-psychological professionals and their language into the legal process is that legal discourse is annexed to 'neutral' diagnostic categories, thereby precluding the use of overt force to meet social policy needs to ensure social order and public protection (1978: 41; 1977: 187). Similarly King and Piper allege that "legal concerns, in all their different varieties, tend increasingly to submerge policy objectives beneath a mass of codes, statutes, cases and procedures..." (1995: 3). This hypothesis is examined in chapter three. The research identifies normative and policy preferences incorporated into the legal practices that result in the application of labels to essentially feared sections of society, labels that appear in principle to be utilized universally (Foucault 1977: 273-6).

Notwithstanding this line of argument, Foucault also states that a consequence of moving to a disciplinary society is that the legal system now defers to medicine, which is particularly pertinent to this area of research (1978: 41). His dismissal of law's importance in the new disciplinary society is not unanimously accepted, for example Hunt and Wickham (1994: 22) maintain that medicine and law supplement each other, which reflects Hacking's claim that a matrix, an interactive process, develops around categories (1999: 29-30). However, Teubner argues that law is an autopoietic, a self-referential system that remains unaffected by the other disciplines that become part of the legal process (King & Piper: 10). "Each discourse or communicative network, according to Teubner, therefore, has its own procedures for generating and assessing the truthfulness of any statement" (ibid: 23). The research focus of the thesis enables an examination of the nature of the interaction to test the veracity of these competing positions in this particular legal context. An analysis of the relationship and the nature of the legal use of medico-psychological professionals and their incumbent diagnostic categories, as evident through case law is addressed in chapters three and four. This has

consequences for reform debates, which is a matter of discussion in chapter eight.

Within the cases under examination the verdict and sentence stages in the case process are distinguished as they give rise to different considerations. The first is the verdict stage, where the law distinguishes between those to be held fully responsible, and those considered either not guilty, or only partially responsible, based on evaluations of mental states. The second relates to the framing of risk and dangerousness with regard to mental disorders at the sentencing stage, which is so integral to the operation and application of the defences because of the legal necessity to take into account matters of social order and public protection. The decision regarding culpability has implications for decisions about whether or not the defendant should be detained, and if so should that be in prison or hospital. Thus the law is an important social institution in terms of the consequences of the normative framework underpinning decisions on mental states for the attribution of responsibility, labels regarding risk and dangerousness, which in turn affects detention decisions. As stated, essential to the operation of the defences is medico-psychological evidence, which extends the usual Doctor-patient relationship into this important social evaluation process.

The second, and related dimension is the application of the discourses in individual cases by the professionals from both disciplines. The analysis of the interaction of law and medico-psychological professionals is conducted through examining judicial precedent within reported case law, and through data obtained from qualitative interviews with practitioners from both disciplines. This enables an exploration of how practitioners manage the broader social institutional factors, the theoretical incongruences between the disciplines, the moral dimensions inherent within cases, and inter-professional relationships. However, it needs to be appreciated that just as the medico-psychologists who act as expert witnesses are not a homogenous group, likewise with the legal profession. Cases involve the police, solicitors, barristers and the judiciary, with each having their own professional concerns and responsibilities within the case. Thus case decisions result from an interaction between facets of the professions of law and medico-psychology as

well as the two institutions. Again, the analysis reflects on the different nature of the categorisation and practical concerns present at the verdict and sentencing stage of the case.

Furthermore, the assessment of the interface between the professions in applying the law considers the capacity to step outside the matrices of professional discourses (Foucault 1978: 95-7; Hollis 1994; Freundlieb 1994: 162; 168; 174-7; Hunt & Wickham 1994: 28). The two professions have different objectives, roles and perspectives on the mind. An important factor is the legal context forming judgments about criminal culpability and responsibility, and thereafter regulating the consequences for those held to have disordered mental states requires a fundamentally different social role to be undertaken by the medico-psychological professional. Critically their mental health concerns are drawn into legal responsibilities and provisions relating to matters of social order and public protection. Medico-psychological diagnostic categories are normally used to determine the most appropriate treatment. The Doctor-patient relationship is fundamentally altered in the context of a legal case because the practitioner has to link their diagnostic opinion with specified legal rules concerned with assessing responsibility. Their evidence is also likely to form the basis to detention and treatment considerations at the sentencing stage. Thus despite the fact that medico-psychology is concerned with descriptions of the natural world, of mental states, while the law establishes moral and ethical standards, the information on a defendant's state of mind is used in the regulation of behaviour in line with these legal standards. The thesis examines the proposition suggested by Foucault (1977) that it is hard to operate outside one's professional discipline because the training inculcates individuals into the profession's perspective and language.

Taylor and White's investigation of practitioner reflexivity claims that the "process is not dependent on the assessment of facts alone, but depends also on the complex practice processes by which plausibility, persuasiveness and morality are woven into the story presented to the professional and subsequently by the professional" (2000: 11). The normative foundations of a discipline influence what questions are asked to ascertain facts, which in turn

are negotiated and interpreted in light of personal perspectives and social constructs (ibid: 107). For example, there are identifiable legal tactics and considerations pertinent to the fulfilment of the roles of the police, prosecution and defence solicitors, barristers, and judiciary. Likewise, mental health labels used by experts are not objective descriptions of particular symptoms untainted by social and professional considerations. Consequently, the application of labels by both professions is not a precision exercise, as the interview respondents concede and the responses demonstrate.

In order to examine both the broader structural aspects and practitioners responses to the issues present in homicide cases where the defences of insanity and diminished responsibility are raised the analysis within the thesis is undertaken at three levels. First, the philosophical and normative foundations to legal and medico-psychological discourses on the mind are examined in chapters one and two. Within this aspect of the analysis the pertinent substantive law is elucidated. Chapter one outlines the philosophical and theoretical basis to the legal view of the mind and how this underpins the principle of *mens rea*, and the defences of insanity and diminished responsibility. This establishes the normative basis to the legal framework investigated throughout this thesis. Chapter two describes the latest neuroscientific thinking on the mind, explaining the basis to the medico-psychological perspective, which contrasts starkly with the legal perspective.

Secondly, because the thesis explores the negotiation between the different 'truths', investigating the power of the two professions to construct case narratives and formulate judgments about the defendant's mental state, the focus turns to the interpretation of the substantive law contained in case reports. A critical aspect of this dimension of the research is the role of judges. Judges in the House of Lords and Court of Appeal establish precedent through the interpretations they apply to legislation and common law rules. A significant feature of the legal deliberations has been the limitations developed to control the admission of expert evidence. The nature of these reported judicial arguments informs all related legal interactions. An illustration of the effect the judiciary can have on the legal landscape is evident in relation to the operation of the defence of provocation since *Smith* [2001], discussed in

chapter one. The decision was significant because of the extension of subjective mental considerations to an objective defence, which is increasingly being pleaded in conjunction with diminished responsibility. The second level of the investigation is contained in chapters three and four. Chapter three deals with the judicial interpretation of the defences, with particular attention to the conundrums presented by psychopathy, intoxication and biological explanations of behaviour. Chapter four examines the development of the medico-psychological expert's role in the legal system, and the judicial rules controlling the admission of evidence.

The third level of the study into the nature of the interaction between law and medico-psychology concerns the practitioner's translation and application of the law, which is explored through qualitative interview data. Cases pass through a number of significant stages and legal processes that permit different options. Understanding the nature of the interaction through the different dimensions, which includes practical procedures as well as theory, means that the "political and ethical conclusions which we would be able to draw from such theory ... more complicated and indeed uncertain than seem the prescriptions generated by normative philosophical theories which do not concern themselves closely with the actuality of criminal practices" are also highlighted (Lacey 1998: 49). Chapter five details the methodological issues relevant to the research, in particular those related to the interviews. Chapter six expounds the legal responses while chapter seven reviews the medico-psychological statements. The interviewees' responses are explored by dividing their remarks into commentary on the law and subsequently the various procedural phases of a case.

Thus the legal definitions of individual agency, responsibility and culpability that are negotiated within a particular framework of social concerns, incumbent legal and medico-psychological discourses and developed practices are comprehensively examined. Finally, chapter eight evaluates each of the three dimensions, illustrating the differences in the two professional perspectives, and briefly addresses the impact of the arguments for possible reform discussions.

CHAPTER ONE

CRIMINAL RESPONSIBILITY: LEGAL APPROACHES TO THE MIND

Introduction

This chapter forms part of the first dimension to the analysis of the interaction of law and medico-psychology. It examines the legal, philosophical and substantive framework that is the concern of academic debates and that founds the use of mental health discourse to support derogations from the usual standard of criminal responsibility, which in turn has implications for sentencing decisions. The law has developed a standard of rationality that is necessary for the attribution of culpability and apportionment of punishment, which is premised on a particular view of the mind. Essentially, *mens rea* constitutes a legal factor whereby that the defendant has the necessary guilty mind, by intending to commit the offence in question.³ Whilst *mens rea* is presumed to be an essential ingredient of all criminal offences, it is not an abstract phenomena, a particular statutory or common law requirement accompanies specific crimes (Dine & Gobert 1993: Ch.3). In the context of this research it is the *mens rea* for homicide, whereby murder requires the subjective specific intention to cause death or bodily harm. In addition the focus is further narrowed to the considerations raised through the defences of insanity and diminished responsibility.

Critically, the legal position and incumbent substantive law does not emerge in a social vacuum; particular political and philosophical positions are upheld through them. However, it is considered that there is a moral requirement for exceptions to the rule to allow for defendants whose mental state does not meet the objective standard of criminal responsibility. The defences of insanity and diminished responsibility have developed to address this need, with limited admission of evidence on the defendant's mental state now permitted in respect of provocation since *Smith* [2001].⁴ This shift, and the fact that diminished responsibility and provocation are increasingly being pleaded together, has

³ See Mackay (1995: 76) and *Lynch* [1975] at 933-4 and Cane (2002: Ch.3) as verification of this principle.

⁴ Dyzenhaus (2004) looks at the split in the legal process of developing law between legislation and the judiciary.

required the inclusion of provocation at some junctures in the debates to illustrate particular arguments. The chapter provides a review of the current legal position and proposed reforms to detail the basis of the law's attribution of responsibility, although insanity is not addressed in as much depth as diminished responsibility throughout the thesis because of the limited use made of the defence,⁵ supported by the fact that no respondent in the study had undertaken such a case. In addition, in line with the second dimension of the legal and medico-psychological interface referred to in the introduction, sentencing and detention priorities are addressed.⁶

The Philosophical Underpinnings of Legal Responsibility

Introduction

Theoretical perspectives emerge in particular social and historical circumstances, informing social norms and practices.⁷ The foundations to the current legal standpoint developed during the 18th and 19th centuries, as society moved from operating on the basis of customary norms to more centralised political control.⁸ Of significance was the shift to the secular study of science and humanism, marking the beginning of the positivist approach (Lloyd 1964: 95). Fundamental to legal positivism, elucidated by Austin, was the emergence of legal authority, and a differentiation between the laws of the physical universe and the normative, prescriptive laws governing human conduct. There are two aspects to the following section in line with the dual dimensions to the intersection of law and medico-psychology addressed throughout the thesis: the legal view of the mind, which underpins the approach to criminal responsibility and punishment, and is linked to the political philosophies of the state; and the rule of law. An important strand through both is morality. In the context of this work these complex debates cannot be developed in any substantial depth, but the significant themes will be identified as they underpin the legal approach.⁹

⁵ This is the case elsewhere too, for example when Lymburner & Roesch (1999) discuss the U.S. position.

⁶ See the government's current views on the operation of the Criminal Justice System (CJS), Justice for All (2002).

⁷ A useful summary of the teachings of the great philosophers, on the state, and mind and matter, can be found in Honderich (ed.) (1999) and Frost (1942).

⁸ Cotterell discusses the importance of understanding the institutions and concepts of law in relation to the social conditions that gave rise to them (1984: 26).

⁹ Norrie (1997) provides a good overview of the principles underpinning the criminal law and the moral dimensions inherent in them.

The Legal View of the Mind

The foundations to the legal view of the mind can be identified in the French Enlightenment ideology of the 17th century, encapsulated in Descartes's theory of *dualism*. The standpoint is that individuals are rational actors who have the capacity to choose their actions.¹⁰ An important dimension of this theory is Descartes's and Galileo's assertion that there is a sharp distinction between physical reality that can be described by science, which includes the body, and the mental reality of the mind that is beyond the province of science.¹¹ Descartes based this claim on the fact the mind is indivisible compared with the body. Therefore, as the mind is distinct from the physical it is not subject to the laws of nature. Dualism assigns an inferior status to the body compared with the mind and rational intellect (Trusted 1984: 35). The mind is self-moved, having no constraints. The immaterial mind interacts with the material body through activating the pineal gland (Gross 1995: 263). Additionally feelings were also believed to be thoughts, which is an important issue in chapter two (Dilman 1999: 125). Significantly for the law's assessment of the mental state of the defendant, whilst the mind was considered to be private, Descartes argued the mental state of another can be inferred from physical factors, so "a defendant's intentions must, therefore, always be inferred from 'external' or 'circumstantial' evidence" (Duff 1990: 117).

Inherent in this theoretical position is the premise that individuals have free will and therefore the ability to choose based on rational thought alone. Ginet describes *incompatibilism* (free will) as free action that is undetermined, which means the individual has the ability to choose other than they did, because their decision is not nomically necessitated by the state of the world at that time (1995: 69).¹² However, as Nozick (1995) argues, this does not mean that the individual has no agency, because the opposite of determinism does not mean chance, as Hobart (1966) suggests. This perspective of the mind informed the

¹⁰ His works are translated by Anscombe & Geach (1976), and discussed in Dilman (1999), Doney (ed.) (1968), Kenny (1968) and Ryle (1949).

¹¹ There were religious reasons behind this too, arguably because of the concerns about science intruding into matters of the mind and soul (Searle 1997: 6; Damasio 1994: 249).

¹² If something is nomically necessitated then the antecedent state, and the laws of nature, determine the event in question will occur, rather than any other.

legal perspective as it developed, hence the supposition that individuals can be held responsible. However, there are exceptions where decisions are affected by external factors, as Ginet concedes, which is a problem faced by this school of thought and therefore the legal system.

There have been extensive philosophical debates on the matter of agency in making choices centred on the possible factors that may influence decision-making.¹³ There are debates centring on the mind/body relationship. The legal viewpoint has just been discussed in relation to dualism and the issue is revisited in chapter two in relation to the medico-psychological position. Alternatively there are those that question such an abstract ability to reason and reflect on whether evaluations of agency, the *self*, need to take into account such factors as character, desire and motive as influences on the reasoning process.¹⁴ Frequently the debate becomes one of free will versus determinism, which is a simplistic debate that forces the argument into dichotomous choices. Yet, as chapter two will demonstrate, having a view that does not consider the mind as an abstract entity does not necessarily imply strict causal determinism that undermines the capacity to exert a choice between alternatives. For example, Campbell describes an *effort of will* as working against our desires when there is a conflict between desire and obligation (1966a: 358-360; 1996b). He states that making an effort of will requires an author, a *self*, whereby, although the *self* is related to the emotions and desires, it is still possible to choose to adhere to obligations such as those imposed by law, through an effort of will. As individuals we are the *conscious* originators of efforts of will and we can make conscious decisions to exert our will.¹⁵ These issues are followed up in chapter two. Interestingly Kant considered that there were two forms of will, the *autonomous* will can freely choose to act according to the moral law (Trusted: 64). The *heteronomous* will, determined by desire, is not free, so moral conflict will develop, which is the battle between these two forms of will, and is what someone makes of themselves. The second form of will enables the introduction of a moral dimension that permits a judgment to

¹³ Honderich (ed.) (1973); this perspective is developed in chapter 2 in relation to the medico-psychological approach.

¹⁴ The notion of the *self* is developed in chapter 2.

¹⁵ Loewenstein (2000) discusses the importance of willpower as an overlooked aspect of decision-making.

be made of an individual's choices, which is an important dimension to the legal process that is revisited in the following section on the rule of law.

The legal view on free will is represented by the standpoint of the *choice* theorists who argue that choice and causation are incompatible, which is challenged by the medico-psychological perspective outlined in chapter two. On the other hand the *character* school of thought challenges the legal position, maintaining that as our characters are not chosen individuals should not be held responsible for them. Mackay asserts that this argument means no one would be held responsible for their actions (1995: 86).¹⁶ Furthermore, he contends that even if it is the case that we do not choose our characters, it does not mean that we cannot be held responsible for actions that are in character. Duff suggests that the best way forward may be to combine the premises of choice, capacity and character (1993: 379).

Therefore, there are two aspects to the legal standpoint on criminal responsibility that are fundamental to the operation of the law. The *cognitive* focus related to the abstract view of the mind, which implies free will, and *volition*, the ability to exercise choice. The law also expects that an individual will have given thought to the consequences of their actions, which is enshrined in the *mens rea* principle through a foreseeability component.¹⁷ So the law distinguishes between voluntary and involuntary acts. The Austinian doctrine on the philosophy of will is used to distinguish between the two types of act in law. The law also needs to acknowledge certain factors that might have affected the mind on moral grounds and the theory of the mind, and criminal responsibility becomes blurred. The law only permits limited exceptions, for example by adopting a cognitive focus the law is not concerned with the motivations of the defendant,¹⁸ or physical causal factors (Dilman: 141-162), although subsequent chapters show in practice the exceptions deviate from the theoretical position identified in this chapter.

¹⁶ The arguments on genetic causes of behaviour discussed in chapter three have overtones of this debate.

¹⁷ Burr [1969]

¹⁸ See Hyam [1975]

The Rule of Law

The other crucial component of the legal position concerns the philosophical and normative standards against which our choices are judged, and the processes developed to assess culpability and the level of punishment.¹⁹ The political basis to the rule of law is the individualist liberal and utilitarian philosophies of Kant, Bentham, Mill and Hobbes.²⁰ The fundamental operational principles are *harm* and *fault*, whereby the conduct should have caused some harm and the individual deserves blame and punishment because they are sufficiently at fault. The legitimacy of the law invokes an obligation to obey the legal rules,²¹ and punishment can be administered to those who transgress them.²² Consequently the position with the legal perspective on the mind is that responsibility is attributed to individuals for their actions and choices because they have free will, linked into Bentham's utilitarian view that "the purpose and justification of punishment is deterrence, but it is only intentional actions that people can be deterred from performing, so it is only these that it can be rational to punish" (Mackie 1977: 209).²³

As intimated in the previous section, morality is a significant factor. Although the development of the law took place at a time of shifts towards secular thinking Christian beliefs relating to good and evil still existed. Consequently the moral overtones of the Christian prevailed in that where there is a conflict between one's desire and what one morally ought to do, choices should favour the latter. Furthermore, it is only morally appropriate to punish if the act is morally wrong and there has been some fault on the part of the individual. This perspective influenced the development of political and legal thinking about responsibility and punishment, and the resulting institutional structures. Significantly, this line of reasoning allows for the developments of defences based on excuse and justification, and law has an important symbolic role on moral issues (Van der Burg 2001).

¹⁹ See Honderich (1988) and Christman (2004) for a review of determinism in state and political philosophies.

²⁰ Dyzenhaus (2001) re-examines the interpretation of Hobbes theory of the rule of law. Kramer (2004) examines the moral status of the rule of law.

²¹ May (1997) analyses Raz's ideas on the obligation to obey the law.

²² See Rawls (1999) Theory of Justice & Duff & Garland (eds.).

²³ Different theories of utilitarianism have emerged, such as rule and act utilitarianism discussed by Hare (1963).

The moral dimension to the law provides an important aspect to the process of judging individuals and their actions, supporting the reinforcement of particular normative values and the social construction of permissible and proscribed behaviour through the rule of law. The incorporation of a moral aspect to choices about behaviour adds force by affecting individuals' perceptions of their actions; transgressing socially prescribed rules has implications for their character (Mackie: 209). However, it generates difficulties for the judgment role of the law because of the problems in establishing the degree of moral responsibility, and as a result Lloyd considers it should be concerned with the social purpose of protecting society and reforming the prisoner (pp.64-67). Lloyd's concerns are supported by Schopp, who, in the context of distinguishing justificatory defences from excuses, discusses the difficulties in identifying the precise nature and focus of moral condemnation in legislative codes, the scope of possible punishments, and the specific application of the law (1998: 22-4).²⁴ This dual nature of law dealing with individual normative standards and more general social objectives is a central theme in the operation of the defences that are focused on in the thesis. But Lloyd also concedes that the authority of the law is reinforced by linking guilt in criminal law to the idea of moral responsibility. Furthermore, as noted, it allows the possibility of introducing an excuse, which can affect the nature of the verdict and punishment. Morality demands and permits flexibility in the application of the law, and it is a very important aspect of the operation of the defences under scrutiny in this project, and the interface between law and medico-psychology.

These fundamental strands to the legal perspective on the mind and criminal responsibility, with overtones for the basis for punishments, which had emerged by the 19th century, have given rise to a number of debates (Lacey 2001). One that is central to the thesis is the fact that the concept of *mens rea*, the mental aspect of criminal responsibility, is a legal construct that is based on outmoded dualist assumptions (Duff 1990) and is altered to suit the law with respect to different offences (Katz 1987). There are those that have argued for its abolition (Hart 1968: Ch. 8). The foundations to the *mens rea* standard also influence the formation and application of the permitted exceptions, for

²⁴ See also Schopp (1991) for an evaluation of the moral status of the U.S. Model Penal Code in respect of insanity and automatism. McSherry (1998) compares dissociation and automatism in Australia and Canada.

example the *M’Naghten* rules of insanity. “... [*M*]ens rea is an element in criminal responsibility designed to secure that those who offend without carelessness, unwittingly, or in conditions in which they lacked the bodily or mental capacity to conform to the law, should be excused” (Hart: 173). However, with the emphasis on the distinction between voluntary and involuntary actions the law has practical difficulties in distinguishing between them, which can generate uncertainty and mistakes in law enforcement, (Mackie: 210), as will be seen in chapter three. Consideration will be given to how the legal perspective affects the operation of legal assessments of culpability, attitudes to mental disorders in relation to debates on risk and dangerousness through sentencing decisions, and the nature of medico-psychological involvement in both aspects of the legal process. The dialectical challenge to the current legal approach founds the subsequent examination of the substantive law.

The Dialectical Challenge to Kantian Individualism

An important aspect of this project, particularly in light of the different perspectives on the mind underpinning law and medico-psychology, is the dichotomous philosophical debate between the incompatibilists (free will) and compatibilists (determinists), along with the social role of the law.²⁵ Norrie takes issue with the Kantian alignment of legal and moral individualism, and the alternative compatibilist position from the dialectic standpoint (2000: 2-3).²⁶ He asserts that the debate results in a false dichotomy, one which favours the free will proponent, because if determinists argue that the experience of choice is illusory this excludes much of what it is to be human, and in the process, disproves or trivialises itself (pp.106: 229-32).

Norrie develops the moral psychological approach of Bhaskar and Harré to steer between the false alternatives, asserting individuals are part of a social context, and they are also active agents (pp.229-32). He maintains that the impact of the social context on individuals’ capacity for moral agency should not be overlooked. Accordingly the possibility of individual agency, and the

²⁵ See chapter two for a discussion on this perspective, and Gilbert (1999) develops a less individualistic and more pluralistic account than Hart’s.

²⁶ A succinct overview of his arguments can be found in Norrie (1998). Franck (1999) discusses individualism and political structures, emphasizing the social context of individual rights.

resultant nature of responsibility, is an ambiguous and ambivalent phenomenon. “This is a non-abstract, non individualistic, individual agent, and the conflict between (free) individual and (determining) context is replaced by a concept of shared responsibility between agent and context” (p.230). This reflects explanations of agency described in chapter two. The consequence of this perspective is that there has to be ‘blaming in relation’ because of ‘being in relation’. Therefore for the law to reflect moral thinking it needs to reflect and refract moral issues.

Significantly, “rights to make moral reproaches are very unevenly distributed and differ from context to context and situation to situation” (Norrie 2000: 216). Vocabularies of right and wrong have a social and historical context and the development of the use of medico-psychological evidence in respect of homicide is an example of this, which is discussed in chapter four. Norrie claims “[i]n Britain, we are torn between an ‘ethic of excusing’ (seeing individuals in context) and an ‘ethic of blaming’ (seeing individuals as responsible agents)” (p.219). In terms of how the law assesses the individual, the current objectivist stance, as an idealist position, ignores the social context and the individual in question. However, although separating out the individual from their social context gives the appearance of a neutral system of social control, the relational realities of individual and social life cut across and undermine both theory and practice (pp.227-8). Norrie concedes that there is a need for individualism within the legal system because “liberalism’s ideal individualism *represents* individuals *as well as* excludes them” (1998: 150). But dialectical philosophy is concerned with the internal relatedness of the personal and social, so Norrie advocates a relational dimension whereby the individual is viewed in context (2000: 4).²⁷

Norrie differentiates the dialectical approach from postmodernism and poststructuralism, by arguing that “[f]orms of responsibility need to be taken seriously, so the question is how best to understand them, not to reduce them to an effect of something else” (p.14). Dialecticism accepts that responsibility is an attribute of human agents, but it “exists both in and beyond individual moral agents in the same moment” (ibid). Thus, moral accountability rests not just

²⁷ This stance reflects that of the medico-psychological field discussed in chapter two.

with the individual, but the community too, as blame is also a social issue because individuals do not exist in a vacuum. Through the theories of Gergen and Lamiell, Norrie argues that human action lies between personal agency and social relationality (p.205). Significantly, in terms of this project, concepts of individual responsibility that permeate the current social context influence the perception of the sense of self and agency, which is central to issues discussed in chapter two. The legal and medico-psychological perspectives are both key institutional discourses in society, with different normative positions. The defendant, members of the jury, and professionals in the cases under scrutiny are all part of this cultural and social milieu.

The central dimension of this project is about the attribution of responsibility for those with mental disorders, which is part of the moral discussion on permissible exceptions to the objective standard of responsibility, and how this is linked to debates on risk and dangerousness. The defences of insanity and diminished responsibility form part of an important feature of the legal system and the dichotomous options of having either to blame or excuse. Norrie argues neither alternative is morally adequate with horrible crimes resulting from terrible circumstances (p.220). He maintains a fully moral account would have to recognise that social and structural factors were also effective in causing the crime, in addition to the agency of the defendant. This reflects the dialectical nature of the understanding of medico-psychology with regard to the interaction of nature and nurture in the construction of an individual's identity, sense of self and resulting agency, which is discussed in chapter two.

Thus, Norrie argues responsibility is attributable to the individual and the society of which he is a part. This is a more comprehensive view of responsibility than the Kantian position, which avoids acknowledging the relationship through the false separation inherent in the current legal stance on responsibility, which generates conflicts and limited legal logic. Therefore, Norrie claims that in order to understand law you need to examine the "inter-relationship between an 'internal' (the forms of law/legal phenomena) and an 'external' (their structural/historical foundations), to locate legal phenomena in a socio-political context, and to embark thereby upon a critical phenomenology of law" (p.229). Cane makes a similar point, arguing that a result of human

agency being the primary focus is the obscuring of the particular ethical, social and economic functions supported by the criminal law choices about which conduct attracts liability, and the entitlements and responsibilities established as a consequence (2002: 56: 187-8). Moreover, the law does not expand on the ontological function of responsibility, which is important for linking responsibility to identity (p.283). Thus the way that responsibility is ascribed and justice is distributed is not an abstract process but socially constructed, forming part of a complex set of social practices (p.41: 190: 279). Additionally, Villa (1997) develops a constructionist theory to facilitate the appreciation of the values inherent in legal knowledge, paying attention to the artificial distinction made between fact and value judgements.

This project examines the moral legal approach to responsibility in cases where the mental state of the defendant is evaluated. The process involves the medico-psychological profession who support a dialectical perspective, in contrast to the law. The research reveals that the interaction of the two disciplines is essentially constrained by the social norms and policy considerations fundamental to this area of law, and that moral derogations from the objective standard are deployed pragmatically.

Mens Rea

Introduction

Criminal responsibility is established through the common law principles of *actus reus*, that the accused did the act in question, and *mens rea*, that it was done intentionally.²⁸ The role of the judiciary in developing the law is an important consideration within the thesis because of the impact they have on the scope and operation of the law. Although the project is primarily focusing on the exceptions to the objective standard of *mens rea* because the research is concerned with the interaction of law and medico-psychology in respect of the defences of insanity and diminished responsibility, a brief analysis of the current position is necessary.

²⁸ Basic texts on this aspect of the law are Simester & Sullivan (2003); Card (2001).

There are two issues, the definition of intention and proving it. The scope of intention has been deliberated extensively because it affects the distinction between murder and manslaughter.²⁹ The law has developed a *legal interpretation* of intention that includes a provision about assuming an appreciation of the consequences of the intention, foreseeability, from which intention can be implied, which is referred to as *oblique intention*. In *Hyam* [1975] intent was held to be “knowledge that the act in question would probably produce certain consequences, so that the intention to do the act was the same as the intention to produce the result” (p.662). The court also held it is not concerned with purpose or motive (p.665), although the law has not always adopted this view on motive (*Heeson* 1878: 44). The scope of intent was subsequently revisited in the cases of *Maloney* [1985], *Hancock and Shankland* [1986], *Nedrick* [1986] and *Woollin* [1999]. The debate centred on the phrasing of the standard and how to include foreseeability. The *Woollin* direction is the current standard, which approved the definition by Lord Lane CJ in *Nedrick* except for one modification, the word ‘infer’ being changed to ‘find’. Thus:

“if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be *virtually certain*³⁰ (barring some unforeseen intervention) to result from his *voluntary* act, then that is a fact from which they may find it easy to find that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result...where the charge is murder and in the rare cases where the simple direction is not enough, *the jury should be directed that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case*” (emphasis added).³¹

Mens rea, intention, is approached as an abstract legal principle. Norrie argues the current stance ensures the form of law is not subject to “overt normative – moral and political – questions” (1997: 20; 1999), because the “cognitivist, subjectivist, factual or descriptive” language does not capture the moral distinctions that the criminal process is involved in (1999: 543). Yet the objective rules do not absolve the judiciary, or jury for that matter, from dealing with the moral issues. This arises because there is a tension between the concept of the free and moral individual and the need to ensure stability in society through safeguarding law and order. Thus the individual ideology

²⁹ See the Irish Consultation paper on Homicide: The Mental Element in Murder (2001:4-5).

³⁰ The phrase *virtual certainty* has replaced *substantial risk*, because it was argued it would blur the line between intention and recklessness.

³¹ Norrie (1999) identifies problems he considers still exist after *Woollin*. Also see Simester & Shute (2000).

underpinning *mens rea* is undermined by political ideology of social control.³² Likewise Lacey argues that by seeing the criminal law as a social practice, rather than just a body of doctrine, the contradictions within cases can be re-conceptualised and appreciated for the role that they play (1993: 640-641). Thus, by including oblique intention the principle of responsibility, as an ideological tool, is breached because of ethical and political choices (2001: 355). Significantly, the scope of intent affects whether individuals can be tried for manslaughter or murder.³³ In terms of the judicial perspective, Lord Goff (1988) states that the most powerful influence on the court when formulating legal principles is the desired result in the case, a matter also discussed by Williams (1989). Lord Goff argues for extending the mental element in murder.³⁴ Norrie cites this in support of his view that the judiciary are trying to resolve political tensions in an area that is supposed to be about individual responsibility and culpability, a recurrent theme through the thesis. The diverse range of opinions and possibilities are evident in the Irish Law Reform Commission's (2001) review of 'The Mental Element in Murder', which outlines the legal position in a large number of jurisdictions. Lacey maintains that clarifying the concepts underpinning the law enables lawmakers to be clearer about the behaviour that falls within the ambit of a particular law (p.624), which is a factor in the analysis undertaken in this project.

Jury

The jury are a significant aspect of the decision-making process. It is difficult to prove intention (McSherry 2003) but it is a question for the jury whether or not the defendant is held to have possessed the necessary *mens rea*.³⁵ The outline of the *mens rea* principle has shown that intention is given a legal meaning, which includes oblique intention. It is a legal matter, which provides an insight into the decision in the case of *Chard* (1972),³⁶ which held that if no

³² Norrie analyses the inconsistencies this has given rise to through analysing the cases of *Maloney*, *Hancock & Shankland*, & *Nedrick* (1989: 800 – 807).

³³ See the Irish Law Reform Commission's Report (2001) on this point and the comments of legal respondents in chapter 6.

³⁴ Williams (1989) disputes Lord Goff's arguments on the matter.

³⁵ Dine & Gobert argue that the distinction is not that clear because juries are likely to assess the state of the defendant's mind in terms of what they think is reasonable. This introduces an objective element, as the exercise of logical reasoning in inferring the defendant's subjective state of mind is an objective process (1993: 94).

³⁶ This is in line with Descartes's idea that whilst you cannot know someone's mind, it can be inferred from their behaviour.

medico-psychological evidence is being presented in support of a defence such as insanity or diminished responsibility, then the jury cannot hear such evidence on the issue of intention, and they have to decide the matter in line with the legal framing of the concept.³⁷ Lacey states the judiciary undertake a limited conceptual analysis of intent and foresight,³⁸ and then rely on ordinary usage to avoid settling the matter.³⁹ Notably though, in the cases of *Maloney*, *Hancock*, and *Nedrick*, the jury returned to ask for further clarification on the meaning of intention because of difficulties understanding it.⁴⁰ Lacey argues the rationale behind this judicial practice is that it provides legitimacy through appearing to represent commonly held beliefs, rather than verdicts being the result of the exercise of power. But the focus is developed to reflect legal needs and, as will be argued in subsequent chapters, the jury are an important rhetorical device regarding legal decisions, although it may not always be an accurate representation.

The Reform Debate

What follows is an overview of the reform debate to illustrate the theoretical concerns at the legislative stage of the legal process. As stated, the judiciary have developed the current definition of intention, but there have been numerous English Law Commission (LC)⁴¹ debates on developing an acceptable and comprehensible legislative definition, although it has proved difficult securing agreement. For example, the LC Draft Criminal Code (1989: No.177) was criticised for being ambiguous,⁴² resulting in the most recent definition, found in the LC report on Non-Fatal Offences (1993: No.218). The amended clause 18 states that:

“a person acts intentionally with respect to a result when (i) it is his purpose to cause it; or (ii) although it is not his purpose to cause that result, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result”.

Oblique intention is also retained.

³⁷ See also *Reynolds* (1989)

³⁸ See the comments by the Judge in chapter 6 and the difficulties still experienced by the judiciary using *Woollin* in *Matthews & Alleyne* [2003]

³⁹ See chapters 4 and 8 for further discussions on the symbolic use of the jury role.

⁴⁰ See the Judge's comments in Chapter 6.

⁴¹ Law Commission No. 10, 31, 89, 143, 177, 218 & Cmnd. No. 7844 & 6244.

⁴² For example J.C. Smith (1990). Interestingly the 1989 report rejected the definition that most closely resembles the current *Woollin* definition.

“If [the accused] acts in order to achieve a particular purpose, knowing that that cannot be done without causing another result, he must be held to cause that other result.”

Two matters are in contrast to the current common law position. First the choice of the word *purpose*, which in *Hyam* was held not to be of concern to the law, and was also rejected in the 1989 report. Furthermore the definition does not include the term *virtual certainty* contained in the *Woollin* directions. However, there are no fundamental changes to the nature of the definition.

The Irish Law Commission (ILC) has undertaken the most recent review of *mens rea* in relation to murder (2001). In the development of their recommendations they compare the English and Irish positions, and also provide information on the legal position and reform proposals in other countries (pp.10-17). In terms of their justification for reform, they concur with the English LC that a legislative definition is needed, on the basis that it is such an important term in relation to such a serious crime, which can result in severe consequences. They also welcome the ability of the legislature to debate the policy issues, which are not technically meant to be a matter for the judiciary, when considering a suitable definition. Another of the ILC's concerns relates to the role of the jury. It is argued that without a definition juries may impose their own meaning, which could include factors that the law does not want considered, such as premeditation. It is stated that intention has a more restrictive meaning in the legal context than it has in common usage, which contrasts with the arguments of Lacey, who maintains recourse to jury decisions on the basis of common usage is an important part of the operation of this aspect of the law. Furthermore, evidence from recent cases suggests that by trying to provide a guide that restricts the focus, the jury are left unsure.

In terms of the definition developed by the LC, the ILC criticise the use of the phrase *would occur in the ordinary course of events*, claiming that it is 'somewhat ambiguous'. They refer to the phrase developed by Smith and Hogan, '*will occur in the ordinary course of events*'. There is also criticism of the word *purpose*, as the accused may have other purposes, and suggest the phrase *conscious object or purpose*. They also state that oblique intention should be *foresight of a virtual certainty*, reflecting the wording in *Woollin*.

The debate is further muddled by the inclusion of serious injury, which the ILC usefully review (pp.24-27).

Lacey maintains that having a legislative definition would be more democratic, but as stated previously, there are those that argue for the abolition of *mens rea* because of the difficulties in knowing the mental state of offenders, especially with regard to distinguishing between the mad and bad. Reznick examines these points of view, arguing against them (1997: 295-310). Additionally Schopp and Patry (2003) suggest a basis for having psychological input on *mens rea*, related to the fact that having a 'guilty mind' underpins the imposition of punishment. Malle and Nelson (2003) examine how a systematic folk conceptual approach based on social psychology could clarify the *mens rea* concept.

The Defences of Insanity, Diminished Responsibility and Provocation: Morality and Determinism

Introduction

It seems to be a universal, whether one's stance is determinist, or premised on free will, that those suffering from mental illness should be excused from criminal liability (Mackay 1995). As noted before, the moral overtones to the operation of the law are a significant factor. There are degrees of responsibility and moral heinousness, as is highlighted in Wilson's (2000) discussion of murder and the structure of homicide.⁴³ Therefore, even though the objective *mens rea* test does not invite, or permit, an exploration of the actual capacity of the individual to act as a 'normal/reasonable' person, culpability does not necessarily mean that the individual will be considered morally blameworthy.⁴⁴ But there are practical difficulties in establishing the distinction between voluntary and involuntary actions.⁴⁵

The following analysis is concerned with the theory informing the substantive law. It is an examination of how the defences are influenced by moral grounds and the legal perspective on the mind, namely the requirement that to be

⁴³ See Ch. 2 of Ashworth & Mitchell.

⁴⁴ Kingston [1995] focused on the issue of *mens rea* when the accused is involuntarily intoxicated.

⁴⁵ This was evident in Byrne [1960], which dealt with the matter of irresistible impulse. See also Yeo (2002) on automatism.

responsible the individual has to have the capacity for free will, which is then linked to the utilitarian idea that people can only be deterred from performing intentional actions, so it is only rational to punish voluntary actions. An important aspect of the defences, therefore, is the opportunities they provide for alternative sentencing options. Thus, the focus of the discussion will be on the manner in which the law concentrates on the defendant’s mental state, and how it manages the exceptions in terms of the theories on responsibility and punishment. These defences question the responsibility and ability of the accused to comply with normative standards, but the problem is assessing where the line should be drawn around what qualifies as a sufficient degree of mental disorder (Ashworth & Mitchell 2000: 18). The operation of this area of law involves expert evidence from medico-psychological professionals.⁴⁶ Interpretation of the terms by the judiciary is addressed in chapter three.

Insanity

General

The insane offender is not deemed morally blameworthy as they lack the rationality for autonomous free will that the law requires. The availability of an insanity defence on the grounds of humaneness was developed through common law in the 19th century.⁴⁷ Although there are now an insignificant number of cases it does raise profound issues for the criminal law.⁴⁸ Tables one and two provide an indication of the number of insanity and diminished responsibility homicide cases that have recently been recorded on the Home Office Index.

Table 1: Diminished Responsibility and Insanity Cases 2000-2003

	Diminished Responsibility	Insanity
2000-2001*	15/20	1/5
2001-2002*	10/15	0/2
2002-2003**	6	0

⁴⁶ In fact it is mandatory for the insanity defence, where reports are required from 2 practitioners, one of whom has to be Home Office approved. The need for medical reports in cases involving diminished responsibility was established in *Dix* (1981)
⁴⁷ See Walker Vol. 1 (1968) & Vol.2 (1973); *Report of the Royal Commission on Capital Punishment* (1953); Butler Report (1975) para.18.2
⁴⁸ See Walker (1968) for an erudite historical perspective on insanity.

* The first figure is based on statistics supplied directly for the research by the Home Office, whilst the latter is from the Report on Homicide and Gun Crime (Cotton 2004:10).
** Statistics obtained from the National Statistics report on Homicide and Gun Crime.⁴⁹
These are not complete statistics for the year; they are accurate as at November 2003.

Table 2: Diminished Responsibility and Insanity Cases 1993 - 2003

	Diminished Responsibility	Insanity
1993	66	1
1994	75	4
1995	58	3
1996	50	1
1997	47	4
1997/98	50	6
1998/99	40	6
1999/00	26	6
2000/01	20	5
2001/02	15	2
2002/03	6	0

This table is a comparison of diminished responsibility and insanity cases for the last 10 years, based on statistics provided by the National Statistics report on Homicide and Gun Crime (2004).

Again, the insanity rule was developed through common law and it was defined in the *M’Naghten* case of 1843, which states:

that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a *defect of reason*, from *disease of the mind*, as not to know the *nature and quality* of the act he was doing, or, if he did know it, that he *did not know he was doing what was wrong* (emphasis added).⁵⁰

It is not denied that the defendant did the act,⁵¹ the issue is that they lacked the necessary *mens rea*. The following discussion explores the legal approach to mental states and responsibility.

Mental States and Responsibility

In line with the dualist view of the mind, the law focuses on cognitive function, which restricts the scope of the defence. Thus in law irrationality is about ‘an aberration of normal mental functioning’, whereby the lack of capacity for rational choice excuses on the basis that the person is mad, and therefore

⁴⁹ The statistics in row three of the table were taken from p.10, although there appears to be a difference on p.18, where it is said there were five s2 convictions.
⁵⁰ p.210. The Law Commission (2003) provides an historical overview in Part VI of their review of the partial defences of diminished responsibility and provocation.
⁵¹ See *Attorney-General’s Reference (No.3 of 1998)* [2000]

unable to obey the rules laid down by the law (Mackay 1995: 77-79).⁵² The *M’Naghten* rules require a connection between the *defect of reason* and *disease of the mind*,⁵³ although this may be difficult to ascertain as some mental illnesses are not a continuing state of affairs. Morse makes the point that as all behaviour is caused, causation is not the issue in these cases, but non-culpable lack of rationality is (1985: 789). Expert testimony is provided on the matter, which constitutes the first dimension of medico-psychological involvement. Mackay believes expert evidence has overshadowed debates on the theoretical grounds for excusing the insane. However, the jury are the final arbiters.

Procedural Issues - Status or Excuse Defence?

The defence is concerned with the moral stance to be adopted towards those held insane.⁵⁴ Whilst they have caused harm, are they at fault? There is disagreement, with the debates focusing on whether it should be an automatic *status* defence, or an *excuse*. Should the defence provide an *excuse* after it has been established that the defendant’s actions were wrong, or operate as a *status* defence, whereby evidence of insanity automatically results in diversion from the criminal system (Mackay 1995: 83-92)? Moore argues it should be a *status* defence because it is recognising that the person is so irrational they cannot be considered responsible for their actions (1984: 245; 1985: 1137-1139). With causality implied there would be no attempt to establish moral agency. Morse (1985: 788) and Schopp (1991: 16) take a similar approach. However, because a connection is required between the *disease of the mind* and the *defect in reason*, a matter examined in chapter three, currently *M’Naghten* operates as an *excuse*, with all the inherent problems of proving the connection that that involves. The requirement that there is a connection, which will be founded on expert evidence as to the link, may explain Mackay’s claim that expert testimony is so important, as is the case with diminished responsibility discussed below.

⁵² Hart’s *Concept of Law* is a classic text on jurisprudence. Wasserstrom (1999) comments on his approach. Tamanaha (2001) develops Hart’s theory of law to incorporate a socio-legal point of view.

⁵³ Sullivan [1984] p.677

⁵⁴ See Morse (1999a) on this principle in terms of the U.S. constitution.

Disposal Options

The other significant legal consideration concerns the consequences of a finding of insanity. Although the utilitarian idea of punishment is important, a major issue in such cases is the state's duty to protect society if the individual represents a danger, which according to Lord Diplock in *Sullivan* [1984] has been the basis of the defence since 1800. The person is held not guilty, but by reason of insanity; this does not result in an acquittal, and they are under the control of the court. A finding of insanity in homicide cases automatically results in a hospital order of indeterminate length. A consequence of it being a *status* defence, with no moral overtones, would be a focus solely on treatment rather than punishment, as a result of diversion from the criminal justice system. The inter-relationship between punishment and treatment is a complex matter in cases where the defendant's mental state is at issue, as evidenced throughout this thesis. This is the second dimension to medico-psychological involvement. Detention decisions have political implications as indicated by Mitchell's study of public opinion on the matter, which found that the majority view is that those found not guilty of murder by reason of insanity should be taken 'out of circulation' for the protection of society (2000: 820).

Reform Debates on Status or Excuse

As with *mens rea*, the *M'Naghten* rule has arisen through common law, and reform would require the development of a legislative foundation. Whilst the defence is not used frequently, especially in murder because of the mandatory hospital disposal, the defence is still fundamental to debates on criminal responsibility and the defendant's mental state. The Butler Report (1975) recommended that insanity be made a *status* defence, as opposed to an *excuse*, and that the special verdict should be returned if it is proved that at the time of the offence the accused was suffering from *a severe mental illness or severe sub-normality* (para. 18.17). The report recommended that it be established which abnormal mental phenomena arise with each mental illness, and then which ones, when present, would constitute evidence of severity (para. 18.34). Symptomatology would become the defining factor and the list would include the phenomena associated with impairing cognition. However, making the insanity defence into one of *status* rather than *excuse* would remove the question of causality, and although medical *opinion* would not be deciding the

issue of criminal responsibility, it is arguable that diagnostic categories would. Mackay argues this is not an acceptable way to resolve an ethico-legal question because criminal responsibility would no longer be linked with moral guilt (1995: 88-89; 137). However, Hart believes that more satisfactory results would be produced (1968: 229). This illustrates that the disagreements centre on the matter of moral culpability with regard to the seriously mentally ill, and the significance to be assigned to medico-psychological evidence evaluating a defendant's mental state as a foundation to culpability.

The subsequent 1989 LC reform proposals, contained in clauses 34-36 of the Draft Criminal Code, advocate a verdict of 'not guilty on evidence of mental disorder' (para. 11.17).⁵⁵ Critically they argued there would need to be some measure of causality to avoid people being excused for acts that are not influenced by their mental state (para. 11.16). Mitchell's study found that the unanimous response was that the killer should not be subject to criminal prosecution if he would not have killed but for his mental illness (2000: 820). Thus, public opinion is that there does not need to be a direct link, it can be a status-based defence. Mackay, a leading expert in this area of law, has made reform suggestions (2000:83; 1995:141). Significantly he retains a cognitive orientation and also preserves the need for a link between the mental state and the incident. What stands out is the different form of words he proposes; in particular he recommends the word *aberrant*. It is an unusual word, and it would seem that the crucial issue would be the interpretations that would be applied. Notably, in the second option that he provides there is potentially the introduction of an objective standard with the incorporation of the term *ordinary, reasonable people*, unless this is qualified as it has been in provocation, which is discussed below.

The most recent consideration of the insanity defence has been conducted by the SLC (2003).⁵⁶ Although the Scottish position is different, their discussion of the issues is undertaken on a comparative basis with the English situation, and illustrates current thinking. Of major concern is the archaic language, and

⁵⁵ No. 177: Vol. 2

⁵⁶ The government has claimed that it will redraw the test as part of reforming mental health law, although nothing has been drawn up as yet (DoH & HO 2002: para 4.3). Mills (2003) reviews the latest Irish reform discussions.

the fact that medico-psychological thinking is not adequately reflected in the legal interpretation of the terms, which is said to be creating problems both for expert witnesses providing evidence for the legal test, and the jury. However, they also make the point that insanity is a legal device that serves a different function from medical approaches to mental disorders (p.14). They suggest using the term *mental disorder* instead of insanity. The term would not be defined, although exclusions would be listed, such as psychopathy. This indicates recognition of the outdated state of the wording and operation of the defence in relation to current mental health knowledge. However, as subsequent chapters demonstrate, there is a fundamental philosophical divergence between the two disciplines' view of the mind, and it is not suggested that there should be a wholehearted embracing of the medico-psychological perspective because it is also made clear that the defence is serving legal ends.

The SLC support the *excuse* basis to the defence, advocating a link between the mental disorder and the event, focusing on the effect the mental disorder has had. However, they criticize the current restrictive cognitive focus, suggesting a wider approach, concentrating on the defendant's *appreciation* of his conduct. They argue, "appreciation is a wide enough term to cover all aspects of the conduct – its nature, its consequences, its moral value, and its legal effect" (p.24). They propose a number of versions, on which they invite comment. Currently there is no volitional dimension to insanity. The SLC maintain that as their reform suggestion would provide a wide test, there would be no need to introduce a specific volitional element, although they are aware that this is a vital aspect to medico-psychological thinking on the matter. However, they do provide an example of a possible volitional test for comment. The approach of the SLC is much simpler, which may augur well for jury comprehension. Additionally there is recognition of the need to reflect the medico-psychological understanding, which may also provide more coherence in cases.⁵⁷

It would seem the consensus is that insanity should continue to be an *excuse* rather than *status* based defence. There are suggestions for changes in language

⁵⁷ McSherry (1997) discusses the problems that have accompanied Australian reforms.

to reflect more modern terminology, but judicial interpretation is the critical matter, as it is conceded the terms remain legal ones that do not necessarily reflect the medico-psychological perspective, which is explored in chapter three in relation to the current defences of insanity and diminished responsibility. There are those, such as Morris (1999) and Spring (1998), however, who argue for the abolition of the insanity defence. The proposition is that it would be more accurate to say that the defendant did not have the necessary *mens rea* and acquit, and leave detention matters to be dealt with under civil provisions. However, Morse (1999b) and Bartlett and Sandland (2003: 275) challenge this proposal. The latter two argue for a distinct insanity defence because other defences focusing on mental states are not concerned with the same issues.

Mandatory Insanity Disposal in Homicide Cases

Despite the previous discussion, it would seem that the most pressing issue with insanity in homicide cases is the fact it is rarely used because of the mandatory sentence, leading to defendants pleading guilty and trying to sustain the diminished responsibility defence.⁵⁸ Thus, any proposed change to the format of the defence may be an important one symbolically, but it may not have much of an impact procedurally if this aspect of the operation of the defence is not changed. Yet the pleas of diminished responsibility and insanity are separate and distinct (Mackay 2000: 82-83). Mackay proposes that the jury should be required to consider if the accused is legally insane, regardless of whether this has been raised by the accused or the prosecution, because it is "unacceptable to allow potentially irresponsible defendants to continue to plead guilty to manslaughter".⁵⁹ If the prosecution or defence do not raise it then the responsibility would fall to the judge. Yet if the judge invokes the matter the experts would not have reported the necessary evidence, nor have been questioned appropriately. If the judge has raised the defence would he also question the experts? Moreover, it has to be asked whether the jury would cope, as different evidence would be presented for the two defences, which is seen as a problem in respect of pleading diminished responsibility and

⁵⁸ Although the Criminal Procedure (Insanity and Unfitness to Plead) 1991 Act allows more flexible disposals this does not apply to cases of murder.

⁵⁹ The present defence of insanity must always come before a jury. *Maidstone Crown Court, ex p. Harrow LBC*

provocation together. Mackay also suggests abolishing the mandatory disposal related to insanity. The SLC discuss how the detention provisions are not in line with the European Convention on Human Rights 1998 (ECHR),⁶⁰ which may provide a basis for reform of this aspect of insanity sooner rather than later (pp.30-31; *Magalhaes Pereira v Portugal* (2003)).

Diminished Responsibility

General

The defence of diminished responsibility, found in s2(1) of the Homicide Act 1957 states that:

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* in doing or being a party to the killing (emphasis added).⁶¹

Diminished responsibility only applies to the offence of murder.⁶² It is an optional defence, raised by the accused,⁶³ of a plea of guilty-to-manslaughter on the basis of their mental responsibility being substantially diminished owing to an abnormality of mind. The manslaughter verdict avoids the mandatory life sentence that accompanies a finding of murder. Symbolically it is important that whilst the mental state of the defendant affects the verdict in that the defendant is convicted of manslaughter rather than murder, they are still admitting guilt and the mitigating mental health matters are dealt with at the sentencing stage (Eastman 2000: 94).

Responsibility

This defence contains a cognitive and volitional element. There has been extensive debate on the way *mental responsibility*, which is acknowledged to be a legal matter, is defined, particularly in light of s2(1) being considered “elliptical almost to the point of nonsense” (Griew 1988: 18). The defence

⁶⁰ Which the Jersey court held in *Attorney General v Prior* (2001), discussed by Mackay & Gearty (2001), but in an appeal on another matter in the case it was stated that this needs to be revisited (Mackay 2002).

⁶¹ The background to the introduction of this defence is outlined in Part VI of the LC report (2003) on the partial defences of diminished responsibility and provocation.

⁶² This is also supposed to the case in Scotland, established in *HM Advocate v Cunningham* (1963). However in *HM Advocate v. Blake* (1996) a diminished responsibility plea succeeded in reducing an offence of attempted murder to an ‘assault to severe injury’. See Mackay (2000: 66).

⁶³ *Dunbar* [1958]

covers those suffering from a *mental abnormality* rather than *disease of the mind*, which has been interpreted widely, because the defence does still impose partial responsibility on the defendant. Problems have arisen because the defence encompasses mental disorders as well as mental illnesses, and in particular because of the requirement in s2(1) that the accused has to be experiencing *substantially* greater difficulty in controlling their behaviour than someone without the mental abnormality.⁶⁴ Morse argues that if both elements of murder, the *actus reus* and the *mens rea* are present then defendants deserve to be convicted and punished (1985: 30-1). He claims that as it takes so little self-control and rationality to obey the law only the legally insane should have their criminal liability negated. However, he concedes it is difficult to measure the difficulty that someone has had exercising their willpower in order to control their actions, a debate that arises in respect of irresistible impulse.⁶⁵ The majority of attention in this project is centred on examining how the law has interpreted the terms and approaches the determination that someone has established the defence, as it is the most commonly used defence, as Tables 1 and 2 show.

Procedural Issues

In terms of the verdict, it is an *excuse* because it is established that the defendant did the act in question, but they are not held completely morally blameworthy because of their impaired mental state, which provides mitigation for the sentencing decision. “The policy behind these developments has been to shift the emphasis in criminal proceedings from a consideration of the exculpatory nature of mental disorder to one where the primary role of mental disorder is one relating to the sentencing process” (Mackay 1995: 79).⁶⁶

There are a number of important aspects to the operation of the defence that involve the admission and role of expert evidence, and the role of the jury. The expert establishes if their clinical diagnosis falls within one of the legally defined aetiological categories and gives an opinion on whether the abnormality of mind is such that it substantially impairs the defendant’s mental

⁶⁴ Smith & Hogan (1999: 214)

⁶⁵ This point was raised in *Byrne*, 403.

⁶⁶ For an elaboration of this historical shift see Walker (1968; 1973).

responsibility. Since the 1968 case of *Cox* it is possible, if the medical evidence on both sides supports the requirements of the diminished responsibility plea, for the prosecution to accept a plea, and the case need not go to trial. This is now the most common practice, because judges rarely contest the Crown Prosecution Service (CPS) decision, although they did in the *Sutcliffe* (1981) case.⁶⁷ This means that expert evidence and opinion is forming the basis of the assessment of the defendant's criminal responsibility, which is being evaluated by CPS lawyers. Thus the nature of expert evidence in relation to what are considered to be the ill-defined categories contained in s2 is very important. Yet as the 1975 Butler Report noted, *mental responsibility* may be a moral or legal concept, but it is not a clinical fact (para. 19.5). Furthermore, expert opinion is a value judgment, not a clinical one and there was concern about the implication that the ability to conform to the law can be scientifically measured, as they considered it is not. However, in theory the jury are still the ultimate arbiters.

In *Byrne* [1960] it was held that the *jury* are responsible for deciding if the accused had established the defence. It has just been noted that few cases go to trial. Another factor that impacts on the jury role is the requirement for the experts to give an opinion on whether or not they consider the defendant's mental responsibility is substantially impaired.⁶⁸ The Butler committee expressed surprise that experts were asked to comment on the matter of legal and moral responsibility, and that the court was happy to hear the testimony. Now jury decisions are being made in the shadow of expert opinion on the issue. This demonstrates procedural shifts are having significant implications for the operation of the defence. As subsequent chapters show, the defence is operating in a liberal way, enabling the law to secure moral outcomes, without much public scrutiny.⁶⁹ The nature of the interaction between law and medico-psychology is fundamental to the operation of the process.

The Reform Debate

Reform of the diminished responsibility defence has been discussed extensively in, for example, the Butler Report, the Criminal Law Revision

⁶⁷ There are no specific figures in the Home Office statistics.

⁶⁸ *Stockwell* (1993) discusses accepting expert opinion when it is considered it will be helpful.

⁶⁹ See discussion in subsequent chapters, but in particular chapter 8.

Committee (CLRC) report, and more recently the LC report on Partial Defences (2003). The debates usually include deliberations on the mandatory sentence for murder, because the defence arose in order to provide justice in particular cases as a result of the mandatory sentence. The Butler Report argued for the abolition of the diminished responsibility defence, along with the mandatory life sentence for murder (paras. 19.14-16). The report recommended 'conviction of murder, or manslaughter by reason of extenuating circumstances, which would not be defined'. However it was said that if the mandatory sentence for murder was retained then s2 should remain, but the wording should be improved. It was suggested that the definition be tied in with the term *mental disorder*, as defined in the Mental Health Act (MHA), rather than a legally defined format of aetiologies, so experts would have a better basis for their testimony. As now, the jury would be charged with deciding if it constituted an extenuating circumstance, but with no requirement that the mental disorder had to be *substantial* to reduce the offence. Subsequently the CLRC argued that such a standard was needed otherwise the judge would be required to give directions on the matter for the jury, which would not necessarily produce the same level of consistency.

The Select Committee of the House of Lords on Murder and Life Imprisonment (1988-9) also recommended the abolition of the mandatory penalty (paras. 81-3)⁷⁰, but agreed with the CLRC⁷¹ that even if this were the case the defences of diminished responsibility and provocation should remain as they did not exist only because of the mandatory penalty.⁷² The 1989 draft criminal code, clause 56, in line with the Butler report recommendations, replaces the word *abnormality* used in s2 with *disorder*, linking the definition to the term *mental disorder* in section 1(2) of the MHA 1983, which is, '*mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind*'.⁷³ However, intoxication is specifically excluded. The proposals do indicate recognition of the need to

⁷⁰ See also House of Lords, *Report of the Select Committee on Medical Ethics* (1993-4: para. 261).

⁷¹ See para. 76

⁷² Mackay (1995) states that the fundamental question of whether there should be such a defence is never tackled. The LC maintains that it is, but admits in the context of whether we have mandatory sentence (2003: 213-214).

⁷³ However reform of the MHA is currently being debated.

make the law more coherent, and use more current language, but again the issue is one of subsequent interpretation and application of the law.

Debates centre on whether the wording within the defence should continue to cover a wider range of mental conditions, or try and restrict the current remit. Mackay believes the draft code provides an improvement on the current inconsistent approach, but questions whether the inclusion of '*any other disorder or disability of mind*' would extend the range of conditions coming within the rubric of diminished responsibility, advocating a narrower but more clearly defined defence (1995: 79).⁷⁴ Yet it would seem the phrase *inherent cause* within the present s2 has already been interpreted liberally. In contrast to Mackay, Griew argues the proposals may be more restrictive, for example excluding mercy killing, those killing as a result of morbid jealousy, or the severely stressed (1988: 87). However, overall the reform suggestions appear to provide similar opportunities to those that currently exist, as the rewording does not change the existing theoretical position, although it does try to tie in the definitions to another legally devised format contained in the MHA, which is significant for detention decisions. Procedurally, as with the current law, the matter of whether the condition is *substantial* enough to reduce the charge to manslaughter is left to the jury.⁷⁵ However, it seems unlikely that there would be any obvious change in current practices as a result of the new format of the defence so the caveats raised previously regarding the jury role are still likely to apply.

Again Mackay has made reform suggestions, but they essentially leave the nature of the defence unchanged (2000: 64-9). As with insanity he uses the word *aberrant*, and he retains the word *substantial*, both of which are likely to be contested. In addition there are no defined aetiologies in which to locate the expert evidence. Arguably the proposal would not change the legal position that has developed.

⁷⁴ He already takes issue with the way that judges and psychiatrists have conspired over mercy killers to ensure that they have not acquired a murder conviction (p.186).

⁷⁵ Griew questions how the jury might respond to having to make the decision about whether to make a finding of murder or manslaughter without the expert testimony on the matter (1988: 85).

The SLC (2003) is currently reviewing the defence, which in Scotland is still located in common law. Scotland had taken a restrictive approach until the case of *Galbraith* [2001]. The SLC supports the approach taken in *Galbraith*, except for the exclusion of psychopathy on policy grounds. The SLC argue that there is no reason to distinguish it from other personality disorders, as it is possible to impose severe sentences and there is a proposal to introduce the possibility of detention on the basis of risk (pp.41-42). Substantively there are no major derogations from the English defence. The terms are reminiscent of the current English definition, except for *unsoundness of mind*, and the interesting phrase, *medical or other evidence*. It also allows for the specific exclusion of intoxication unless the court holds otherwise based on the facts of the case.

The recent English LC discussions on the partial defences speculate whether reform should follow the recommendations of the Butler report, the CLRC, the New South Wales Law Reform Commission, Professor Mackay, or an amended version they present (2003: 239-240). However, again there is a discussion on whether or not to abolish the defence because it only applies to murder; it is a compromise because of the insanity restrictions and the mandatory murder sentence, providing as it does mitigation at sentencing, and therefore the mandatory sentence should be abolished; it discourages the insane from pleading insanity; and, they claim that it is open to manipulation, covering as it does individuals who commit mercy killings, for example (pp.237-238). The reasons they present for not abolishing it are that the insanity defence would be the only option left and it is restrictive; there are those that are not legally insane who are not fully responsible for their actions; that if defendants are pleading diminished responsibility rather than insanity then the mandatory disposal can be removed; and that just because the defence is used in a benign way with the consent of the prosecution, defence and court this is not a sufficient reason to abolish it. The reasoning encompasses both theoretical and procedural matters, demonstrating the problems arising from the inter-relatedness of the provisions of the law of homicide and the philosophical basis of dealing with exceptions to the rule. Mackay argues that there is a reluctance to get rid of these defences because they mark out an important distinction between those who are 'fully' and 'partially' responsible (2000: 81). It would appear that the existence of the defence is contingent on

other aspects of the law of murder. Mackay questions why if diminished responsibility is such an important principle, it is not extended beyond the law of murder.

Provocation

General

A brief depiction of provocation has been included because since the case of *Smith* [2001] if the defendant has mental health problems such evidence can enter into court, again illustrating the importance of judicial interpretation for the application of the law. In addition it is frequently pleaded alongside diminished responsibility, which has led to the LC debating an integration of the defences.⁷⁶

Section 3 of the Homicide Act 1957 states:

where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

The Impact of Smith

This has always been considered an objective defence, about the reaction of the defendant to provoking conduct, and not directly about the mental state of the defendant in the way that insanity and diminished responsibility are. There are two aspects to the provocation test: the jury are required to consider the level of provocation, and the defendant's self control, compared with that of a *reasonable man*.⁷⁷ Mackay had contrasted the reduced role of the jury in diminished responsibility cases with their active role in provocation cases, which he attributed to the lack of expert involvement (2000: 63). However, in *Smith* [2001] a subjective aspect to the issue of self-control was introduced, whereby abnormal mental characteristics of the defendant can be taken into account by requiring comparison with an ordinary reasonable man with the same abnormal mental characteristics. Previously only the age and sex of the defendant were considered relevant. Having the self-control aspect of the defence as an objective standard fits in with the legal idea of the mind, which

⁷⁶ Mackay discussed the trend towards this tendency in 1988.

⁷⁷ Valverde (2003) looks at the use of this concept.

assumes that we can and should exert self-control in order to behave in accordance with social rules. The characteristics of the defendant were part of the assessment of the provocation. In *Turner* (1975) it was held that if mental illness was an issue then medico-psychological evidence could be admitted into court. Thus the decision in *Smith* has changed the nature of the defence, and introduced another opportunity for the admission of scientific evidence.

The bases to this legal move were detailed by Lord Hoffman, who cited three authorities to support his arguments. First, Lord Diplock had stated in *Camplin* [1978] that the distinction between the two aspects of the defence was simply a nicety. In addition, according to Thomas J (dissenting) in the New Zealand Court of Appeal case of *Rongonui* [2000], it was a difficult thing for the jury to apply subjective elements to only one part of the defence. Finally, Lord Hoffman referred to claims by Yeo that behavioural scientists argue that the defendant's personality has to be taken as a whole, because it will affect both how they see the provocative conduct, and their emotional response to it (1998: 60-61). He made specific reference to classes of people such as battered women, who have been through experiences that affect their powers of self-control. "The boundary between normal and abnormal is very often a matter of opinion. Some people are entirely normal in most respects and behave unusually in others" (p.308). It can be seen from the dissenting judgments that there are authorities for keeping the status quo.⁷⁸ This decision is evidence of the law trying to achieve *justice* in cases that do not fall readily into the current defences, and relying on theories emerging from the medico-psychological field to do so. This area of law has become particularly problematic because of the increasing tendency to plead provocation and diminished responsibility together, which is discussed below.⁷⁹ Lord Hoffman specifically remarked on the distinction between diminished responsibility, where the jury can consider abnormal mental aspects of the defendant, and provocation where they cannot.

Responsibility

The change described above reflects the moral position inherent in the insanity and diminished responsibility defences, where the focus is on the rational

⁷⁸ Gardner & Macklem (2001) has written on what he sees as the nine fallacies of *Smith*.

⁷⁹ This was first raised in *Matheson* [1958] and endorsed in *Thornton* [1992]

capabilities of the individual. The basis and justifiability for the shift in assessing responsibility in such cases is being hotly debated, but the parameters of the discussion are around the differences and similarities between diminished responsibility and provocation. Morse considers that provocation is in principle an objective test as it is necessary to establish that a reasonable man would have lost his self-control in similar circumstances, whilst diminished responsibility looks specifically at the mentally abnormal defendant. Certainly the dissenting view in *Smith* was that there is an objective standard of self-control that can be expected. But Lord Hoffman claimed in *Smith* that the same standards of behaviour could be expected of everyone regardless of their psychological make-up, yet this rule may sometimes have to be overridden by the *need to do justice in the individual case* (p.313). Admittedly both provocation and diminished responsibility are partial defences, but they are very different types of defences. Horder argues that provocation should be seen as a partial excuse, while diminished responsibility should be classified as a partial exemption from liability, because it is similar to insanity (1999: 149). He claims that the insane and those suffering from diminished responsibility are moral objects, needing moral concern and humane treatment.

However, the judicial initiative is arguably explainable if the changes in *Smith* are viewed in relation to the initial philosophical discussions at the outset of this chapter, and in light of the operation of the diminished responsibility defence. The changes introduced to the provocation defence draw upon the exceptions to rationality already established in relation to mental states. Furthermore, it makes use of expert evidence, which subsequent chapters identify works well at a number of levels in the context of diminished responsibility to ensure a moral outcome in line with views on the just outcome for the case. On the other hand if there are no arguments about the defendant's mental state then the operation of the defence retains coherence in line with the *mens rea* principle.⁸⁰

⁸⁰ However, McSherry suggests an alternative to the current approach of admitting evidence on mental disorder to negate voluntariness and intention. She contests the dichotomous approach of the law, arguing it requires the allocation of individuals into categories, which does not reflect the continuum perspective of the medico-psychological field (2003: 599). This is discussed further in chapter two.

Procedures

With regard to *expert evidence*, it is still the case that if the defendant has no mental disorder and the objective test for provocation is relevant, then *Turner* (1975) applies. In such circumstances the jury are not thought to need the assistance of psychiatrists on how ordinary people react to the stresses and strains of everyday life (*Smith*: 841). Lord Clyde used this rule in *Smith* to state that “evidence is not admissible to show what effect such a characteristic might have on a person’s self-control or whether the characteristic did in fact have an effect on the self control of the accused” (*ibid.*).⁸¹ This is not in line with *Turner* or *Camplin*, and was not accepted by the majority position in *Smith* (Mackay & Mitchell 2003: 754-5). “[P]sychiatrists can now be called upon to give evidence not only about how the depression impacted on the accused’s own powers of self-control, but also on the issue of whether such a depressed person was able to exercise a reasonable degree of self-control in the light of the alleged provocation to which he was subjected at the time of the killing” (*ibid*: 756). This introduces an important role for medico-psychological expert opinion in relation to legal questions. Responsibility for deciding matters rests with the jury. Currently the procedural means by which cases involving diminished responsibility may avoid being tried in court are not available in cases where the defence of provocation is pleaded.

Pleading Diminished Responsibility and Provocation Together

General

Mackay and Mitchell claim “that the decision [in *Smith*] signals a move away from the criminal law’s traditional approach regarding provocation and diminished responsibility as two separate pleas towards a recognition of the fact that such separateness is no longer practical” (2003: 745). There are a number of factors that have been identified as supporting the trend. For instance, when the defences are pleaded together it enables medico-psychological evidence into a provocation case that would not have been possible without the diminished responsibility defence. An important consequence, acknowledged by Beldam L.J. in *Thornton* [1992], is that it is inevitable that the jury will consider the medico-psychological information

⁸¹ p.319

when evaluating the provocation issues.⁸² Furthermore, Lord Hoffman in *Smith* held that if the jury cannot be told to ignore evidence that they have heard in respect of the diminished responsibility defence, then it could not be said that the defences are mutually exclusive. As subsequent chapters demonstrate, it is unlikely that a jury will be able to separate out the expert evidence in respect of the two defences.⁸³

Yet there are differences in the *burden of proof* between the two defences. With diminished responsibility the accused has to raise and prove the defence, whilst with provocation the prosecution must satisfy the jury that the accused was not provoked.⁸⁴ Thus, in *Luc Thiet Thuan* [1997] Lord Goff⁸⁵ made the point, reiterated in the dissenting view of Lord Hobhouse in *Smith*,⁸⁶ that combining the defences enables someone who fails to satisfy the standard in s2 to subsequently use s3. Lord Hobhouse also held that an objective standard in s3 is the policy of the statute, “and it would be contrary to that policy to extend s3 to give him the defence advisedly denied him by s2” (p.329). However, now that provocation requires the characteristics of the accused, such as depressive illnesses, to be taken into account in the reasonable person test it is more likely that the two defences will be combined.

While procedural practice had resulted in the practice of the two defences being pleaded together, the case of *Smith* shows that the judiciary had the power to decide one of two ways. The judiciary are significant in the development of the law and it would seem that with regard to *judge’s directions*, the statements of the majority in *Smith* indicated a judicial discomfort with having to routinely apply an objective standard. Lord Clyde stated “[s]ociety should require that he exercise a reasonable control over himself, but the limits within which control is reasonably to be demanded must take account of characteristics peculiar to him which reduce the extent to which he is capable of controlling himself” (p.318). Lord Hoffman argued, if judges

⁸² Although the appeal case of *Roberts* [2002] indicates the troubles that can occur with being clear that the jury appreciate that they are considering two possible defences.

⁸³ See chapter’s 6, 7 and 8 on this issue.

⁸⁴ Additionally with provocation the judge has to ensure that the defence is raised if there is evidence that the defendant was provoked. The defence was unhappy when this happened and challenged it in *The Queen (On application by Nicholas Farnell)* [2003].

⁸⁵ p.1046

⁸⁶ p.329

were freed from always having to invoke what he views as an unreasonable set of characteristics, then “they will be able to explain the principles in simple terms” (p.313). However, *Weller* [2003]⁸⁷ illustrates that juries are still facing problems understanding the judge’s directions, as it would seem are judges in deciding how to direct the jury.⁸⁸ In response to this situation the Law Commission (2003) are now looking at the operation of the two defences.

The Reform Debate

Current rules have, and therefore reform in one area will have, implications for the principles and practices in another (Ashworth & Mitchell (eds.) 2000).⁸⁹ The LC’s consultation paper identifies difficulties with the current uncertain boundaries around mental states, particularly with regard to BWS,⁹⁰ where in cases such as *Ahluwalia* [1992], *Thornton (No.2)* [1996] and *Hobson* [1998] the provocation defence was rejected but a plea of diminished responsibility succeeded.⁹¹ The two primary problems the LC identifies are the reluctance of psychiatrists to classify BWS as an abnormality of mind, and the fact the focus moves from the deceased’s conduct to the victim’s state of mind. However, as the LC concedes, the diminished responsibility defence often results in no trial, and therefore the prosecution are frequently deciding matters (p.200).

Reform suggestions include: abolishing the defence of provocation; abolishing the mandatory sentence; and changing s2(1) so that experts are not commenting on the matter of substantial impairment, but on whether the defendant’s abnormality of mind was a *significant cause* of his acts or omissions in doing or being a party to the killing. So the role of the medical witness would be to comment on the causal link between the abnormality of mind and whether, from a medical viewpoint, it caused or materially contributed to the killing (pp.153-154; Part XII). This appears to make what

⁸⁷ See Barsby & Ashworth (2003)

⁸⁸ See chapter 4

⁸⁹ The January editorial of the CLR (2004) discusses the difficulties faced.

⁹⁰ In terms of securing efficacy within the law for battered women, Edwards (2004) argues for the abolition of provocation and the reframing of self-defence. Casey (2003) looks at the use of expert testimony for women who are battered in the context of self-defence. However self-defence is a justificatory defence whereas provocation is a partial exemption, a distinction addressed by Schopp (1998: 53).

⁹¹ Casey (2001) looks at BWS in relation to the diminished responsibility defence as outlined in *Galbraith*, compared with the Australian and English provisions.

experts currently do implicitly in drawing links between clinical diagnoses and legal considerations more overt, but with the rewording experts are linking their clinical view not to the matter of responsibility but to the act. It would still be a powerful influence for the jury and it is questionable whether those cases which are decided by the CPS would be affected.

The LC does not develop a hybrid defence itself, but cite Mackay and Mitchell's proposals. Mackay and Mitchell suggest a plea which recognises that the issue is one of defects in rationality. They suggest the following, which reflects the American Model Penal Code.⁹²

A defendant who would otherwise be guilty of murder is not guilty of murder if, the jury considers that at the time of the commission of the offence, he was:

- (a) under the influence of extreme emotional disturbance and/or
- (b) suffering from unsoundness of mind

either or both of which affected his criminal behaviour to such a material degree that the offence ought to be reduced to one of manslaughter.

This formulation removes issues of *self-control* and *impairment of mental responsibility*, so the focus is on *disturbance in reasoning*, which is in line with the philosophies discussed earlier. The cognitive focus can be assessed under either subsection (a) or (b). Subsection (a) will cover such situations as BWS. Emotion is intended to encompass more than anger (Mackay & Mitchell 2004). Significantly, emotion does not fit easily into the legal perception of acceptable influences on rationality discussed previously.⁹³ Subsection (b) is not a term that has been advocated in other reform discussions, the meaning of which would need to be established through judicial reasoning.⁹⁴ The jury are still charged with deciding when the condition affects culpability through the term *material degree*, which, if current practice is followed, will become a matter of expert opinion in practice, whatever the section states about the role of the jury.

The LC's reasons for merging the defences are procedural and concerned with justice (pp.241-242). With the recent changes to the defence of provocation it is difficult to disentangle the psychiatric aspects of the two defences, therefore the law is too complex for directing juries. Both defences are concerned with those who kill in disturbed states of mind, thus there is a logic and justice in

⁹² Model Penal Code, The American Law Institute, s210. (3)(1)(b)

⁹³ See chapter 2 for further discussions on the importance of emotion to decision-making.

⁹⁴ The discussions on judicial initiatives in this area in chapter 3 will provide some insights.

having a combined defence, with the twin concepts of extreme emotional disturbance and abnormality of mind. Arguments against a single partial defence are that diminished responsibility and provocation are fundamentally different defences, so combining the two would not reflect the ethical difference between them. Provocation is a partial *excuse*, whereas diminished responsibility is a partial *denial of responsibility*, and the fact that they are not mutually exclusive is not necessarily a reason to combine them. In this respect it could be said that the view of the majority in *Smith* is flawed because they do not pay enough attention to the differences between the defences, and a single defence such as that suggested would lack a clear boundary, and be unacceptably wide.

The LC's reasons identified for and against reform of these defences are reflected in the academic debates taking place, Chalmers (2004) argues against Mackay and Mitchell's suggestions for merging the two defences, as do Gardner and Macklem (2004). Chalmers challenges the theoretical basis put forward by Mackay and Mitchell for a 'merged' defence, and provides information on the proposed defence, developed in the U.S., which challenges the context and efficacy of the provision. Gardner and Macklem focus on the theoretical distinctions between the two defences. What becomes evident is that the operation of the defences lack coherence, particularly where the law is trying to achieve justice using the discourse from another discipline that does not take the same limited cognitive stance on the mind. It also depends on one's stance on the theoretical nature and foundations of the defences.

Detention: Policy Issues

Introduction

Whilst the issues cannot be dealt with in detail,⁹⁵ it is necessary to outline the way that the law looks at the sentencing consequences of a defence as these have a moral inter-relationship with the verdict, because by establishing the defence there has to be a moral recognition that responsibility is partial (Walker 1985). Norrie suggests that it is at this juncture that issues such as

⁹⁵ Bartlett & Sandland (2003) address in detail the options in relation to those with mental health problems. Also Eastman & Peay's (1999) edited work provides a comprehensive conceptual and procedural critique of the operation of the current MHA.

motive can be taken into account (2000: 24). An additional backdrop to decisions on punishment and treatment are legal concerns with philosophical matters of retribution, deterrence, social order and public protection (Walker 1991; Hudson 1987).⁹⁶ For example s2(2) of the 1991 Criminal Justice Act requires a longer than normal sentence if in the opinion of the judge it is necessary to protect the public from harm. These issues show the inter-related nature of the theory of responsibility and punishment, and the ritualistic and moralistic nature of the trial and sentencing.⁹⁷ Judges' decisions in such cases are usually informed by medico-psychological opinion, but the ultimate decision remains with them (Harding & Koffman 1988).⁹⁸ Significantly, judicial decisions are being made in the context of increasing concerns with dangerousness and risk, with the possibility of compulsory detention, on treatment grounds, in the public interest.⁹⁹ Likewise these legal issues provide an important backdrop to the experts' recommendations. Peay claims that the "long-standing acceptance of professional discretion is being progressively outweighed by demands of accountability and a fear of responsibility" (2003: xi; 142).¹⁰⁰ But questions arise as to the efficacy of the current legal process when consideration is given to the high numbers of mentally disordered offenders in prison, who arguably should be receiving treatment (Simester & Sullivan 2003: 572). Mackay claims that many pleas of diminished responsibility result in punishment rather than treatment, and asks, although there can be partial responsibility, can there be partial exemption from punishment (2000: 73-74).¹⁰¹

Government Initiatives on Dangerousness

Concerns about risk and dangerousness also pervade debates on release. Critically the law also constitutes a proactive force and the government is giving effect to election manifesto promises (Bartlett & McHale 2003) in the proposed reforms to the MHA. The Mental Health Bill (MHB) (2002)

⁹⁶ Powers of Criminal Courts (Sentencing) Act 2000; see Thomas (2001)

⁹⁷ For example, Worrall (1990) and Chambers & Millar (1987)

⁹⁸ So for example, if sentence is required to be given under s2(2) Crime (Sentences) Act 1997, the amended s37(1) and additional s45A(1) of the MHA 1983, means a hospital order can only be given in exceptional circumstances for a serious offence, which cannot be based on mental illness alone.

⁹⁹ For example see the shifts in emphasis from the Richardson Committee report (1999) to the Green Paper (1999) and White Paper (2000). Peay (2003) discusses the modifications in chapter five.

¹⁰⁰ The roles for medico-psychological professionals would also be extended should the MHB (2002) be implemented, although at the moment that is not an imminent prospect (Peay: 156-7).

¹⁰¹ Decisions about detention in hospital or prison were examined in *Hutchinson* [1997]

incorporates a distinct approach to mental health and diagnostic categories to meet social order and public protection concerns, illustrating the importance of the role of law and acknowledging that the law is not a neutral set of rules.¹⁰² The MHB is concerned with compulsory treatment for those suffering from mental disorders, including mentally disordered offenders (Department of Health (DoH) p.6).¹⁰³ Furthermore, the reasoning given for the introduction of the Bill associates treatment and protection issues, arguing that “[t]he need to protect others from further harm committed by dangerous offenders means that safety considerations must be paramount in their management” (ibid). As a result the courts will be given more comprehensive powers than under the current 1983 MHA. There is unease about the balance of individual rights, treatment and public protection within the new MHA (Eldergill 2001).¹⁰⁴ Similarly there are concerns about the impact of the emotive response that portrays the mentally ill in terms of their potential harm to others (Eastman & Peay 1999: 212-3).

Of interest to this research are the changes introduced within the MHB in respect of psychopaths. For example, while the current MHA uses the term ‘psychopath’, it is proposed to use the term ‘personality disorders’ under the new Act. An important matter here concerns the issue of treatment. Under the current MHA the hospital detention of psychopaths and those with non-serious mental impairments beyond 28 days, is linked to a requirement that the condition is treatable. Yet clause 6(4)(a) of the MHB would require imposition of compulsory detention where there is a ‘substantial risk of causing serious harm to other persons’. The Consultation document claims this avoids the situation whereby “some dangerous mentally disordered people have not been made subject to the Act as it has been possible for them to argue that they are not personally benefiting from it” (p.7). The Fallon Committee (1999) concluded that whether or not psychopaths are treatable, there ought to be provision to ensure that they are confined if they represent an ongoing danger to the public. The sentence could be assessed periodically to determine if they are still dangerous. However, within psychiatric circles, whether personality

¹⁰² See Vol. 25, no. 4 of the Journal of Social Welfare and Family Law, 2003, which is a special edition on reforms on mental capacity and mental health.

¹⁰³ To show the extremes to which this can be taken, Pannick (2003) discusses the judicial decision in the States to allow treatment of a prisoner on death row so he is sane enough to be executed.

¹⁰⁴ See also Laver (2002), and Mason et al (1999: Ch. 21).

disorders are treatable is a contested matter, and raises issues about the use of hospital beds for those that are not.¹⁰⁵ It also overlooks the diverse views held about the possibility of accurately predicting dangerousness and violence in psychopaths (Peay (ed.) 1998: Part V), a matter that is re-visited in subsequent chapters.¹⁰⁶

In addition to the trends identifiable in the MHB, there are initiatives being developed by the Home Office (HO), Prison Service (PS) and DoH. Within the HO there is a Mental Health Unit whose mission is “to protect the public from further offending by dangerous mentally disordered offenders and severely personality disordered people” (2003). This Unit carries out the functions of the Home Secretary, where the individual is subject to a *restriction order* by the court, conferred by the MHA. In addition, the PS’s Offending Behaviour Programmes Unit (OBPU) has been developing interventions to reduce recidivism in *violent offenders* who score over 25 on the Psychopathy Checklist. These endeavours are concerned with overcoming the problems identified with treating psychopaths, whereby treatment can be administered if it would provide protection to others, even though it offers no health benefit to the patient (Peay 2003: 154). Furthermore, there is the introduction of the concept of Dangerous and Severe Personality Disorder (DSPD), and the DSPD programme, as a result of collaboration between the DoH, HO and the PS. The aim is to develop mental health services for people who are dangerous as a result of a severe personality disorder. Concerns are focused on the detention of people who pose a high risk, and the development of more rigorous procedures for assessing the risk. Furthermore the Home Office DSPD team and the PS’s OBPU have been working together. The aim of the collaboration is to develop a Violence Programme for Psychopaths to be available in two DSPD sites, Rampton Hospital and Frankland Prison. Bartlett and Sandland maintain that the preventative detention of those with a DSPD demonstrates a shift towards a criminal rather than a medical model (2003: Ch. 6).¹⁰⁷ The debate centres on risk management rather than treatment, but Hodgins (2001)

¹⁰⁵ This was evident in the interviews with medico-psychological experts.

¹⁰⁶ The difficulties faced by both professions and the matter of the defendant’s rights is ably demonstrated in the case of *The Queen on the Application of P* [2002]. Also McGuire (2000) illustrates the complex nature of assessing risk because of the range of theories available and considerations that can form part of the evaluation.

¹⁰⁷ This chapter maps out the government initiatives that inform the approach to those with mental disorders within the CJS, illustrating the tensions between detention and treatment.

challenges this approach, arguing for the need for better treatment options, and a focus on prevention.

It can be seen that current legal reforms support detention on the grounds of risk and dangerousness. It is a shift away from the rights of the individual towards coercion in the interests of public order (Eastman 2000: 90).¹⁰⁸ The initiatives use diagnostic categories to support such interventions, co-opting the medico-psychological terminology, but interpreting and using them as legal categories, as with the defences of insanity and diminished responsibility.¹⁰⁹ Correspondingly explanations for criminal behaviour within criminology encompass both individual and social factors, which form part of the debate around interventions for those caught (McGuire 2000; Muncie et al 1996). Governments work with various agencies to introduce measures and impose sentences that address these factors. The collaborations provide support for the legal initiatives, but arguably submerge policy objectives beneath a mass of codes, statutes, cases and procedures (King & Piper 1995: 3). Therefore, decisions to get tough on those held to constitute a danger to society involve political judgements to affix responsibility on individuals to deal with a social problem, crime (Norrie 2000: 220). Peay argues for the need to balance individual rights to liberty, with the collective right to protection from harm (1989: 1-3). In this context the interaction of law and the medico-psychological role represents a use by the legal system of the scientific discipline of the mind to meet social and political policy objectives, which arguably compromises the role of the medico-psychological practitioner and the rights of the individual patient. Moreover, Peay's study, in which practitioners assess case studies, illustrates the disparity and difficulties in decision-making that pervades this area of law (2003). Critically, all these issues pervade release decisions too.¹¹⁰

A Dialectical View Revisited

The discussion of the substantive law, especially in relation to provocation and diminished responsibility, provides support for Norrie's challenge of the false division of form and the moral position within Kantian philosophy, whereby

¹⁰⁸ For a review of arguments against similar provisions in the U.S. see Fitch & Ortega (2000)

¹⁰⁹ See chapter three.

¹¹⁰ *R (on the application of N)* [2001] explains the position on the nature of expert evidence on risk in relation to release decisions with regard to psychopaths. The assessment of medical evidence and risk by parole boards was discussed in *R (on the application of Martin)* [2003].

discussions of the issues are not resolvable (2000: 7-15). [C]ategories of *mens rea*, ... are designed in cognitive, Kantian, 'morality of form' terms precisely in order to exclude the substantive moral information required ..." (ibid: 180). Legal language is cognitive, factual and descriptive, and therefore inadequate to the criminal law task of making moral judgements, which has created a contradictory language and role. For example, the inclusion of oblique intention allows moral judgements not possible through the inadequate legal cognitive language. Furthermore, because the defences remain on the periphery of criminal law, descriptive terms such as *intent*, *state of mind* and *mental state*, which refer to issues that require a normative judgement by both legal and mental health professionals, are not frequently challenged (Norrie: 157). The nature of the judgments is examined in this research. Norrie argues for a recognition that the moral exceptions provided by the defences are not just exceptional, but complementary to the matter of intention (1997: 13).

Norrie maintains that although individual justice requires a system of rules that are in principle clear, coherent and consistent, the dialectical viewpoint challenges the existence of such a state of affairs in the traditional rational approach. From the dialectical position it is argued that the legal form of analytical thinking produces contradictions, which is a performative contradiction, because it is meant to resolve them.¹¹¹ Therefore by making explicit the Kantian idea of responsibility, and the inherent false separation it supports, it is possible to develop a different way of understanding the nature of legal and moral reasoning. Norrie claims he is not just adopting a sceptical approach, but locating the problems "in the social, political, and historical context of modern liberal society", because the perspective taken for asking a question, and searching for the answer, is critical (p.9). However, Sullivan's (2002) review of Norrie's arguments proposes that developing a code would redress many of these issues, and there is no need to revolutionise the law, as Norrie is suggesting, in order to improve it. The evidence in this research shows that a more explicit understanding of the law and its contradictions requires an examination of not just the academic debates discussed in this chapter, but the impact of judicial interpretation, and the approach of

¹¹¹ Norrie acknowledges that contradictions are associated with the dialectical approach but these are a subset within the broader theoretical framework concerned with the internal and inseparable connection between phenomena.

practitioners to the application of the law. It would seem that simply introducing a new legislative code would not necessarily result in fundamental reforms without an appreciation of all the dimensions of the application of the law, as it might not change matters if current practices are not addressed.

Conclusion

The analysis of *mens rea* and the defences describes the substantive law that has been developed to give effect to the philosophical principles on which the law is founded. There are two dimensions that pervade the debates, views of the mind and the theories underpinning the rule of law, which introduce wider policy considerations to the application of individual justice as well as moral considerations. Although the law supports the idea of free will, it can be seen on examination that the defences in question have determinism implied in them. Ashworth and Mitchell argue that this threatens the normative nature of the law's judgements and evaluations (2000: 15). The operation of the defences relies on expert evidence and its terminology, even though the medico-psychological disciplines have a very different theoretical perspective on the mind, which is explained in chapter two. In addition the operation of the defences constitutes a juxtaposition of two different professional discourses, alongside the inherent shared social understanding applied by the jury. Valverde remarks, "what science-and-technology studies in law do not even consider is the ways in which scientific 'truths' coexist, in legal arenas, with such non-scientific facts as what the reasonable person ought to have known" (2003: 18).¹¹² Nor is it just the legislative format that is important, because the various debates show the significance of the procedures that develop in relation to the normative legal position, which are elaborated on in subsequent chapters. Thus it becomes evident that there are value choices in the parameters of offences, defences, and at each juncture of the legal process as they are interpreted and applied.

Nor does the position remain static, as is demonstrated by changes in the operation of each of the examined defences. Significantly, recent changes in the application of the provocation defence, introduced through *Smith*, illustrate how the judiciary can change the moral and policy orientation of legislation,

¹¹² Also see the discussion on p.225.

which may undermine the policy objectives of the government enshrined in legislation. This reveals the reflexive nature of the law as an institution, with the recourse to scientific theories providing support and legitimation for the legal process and case decisions. The Law Commission are now looking at the defences of diminished responsibility and provocation in light of changes in practice whereby the two defences are increasingly being pleaded together, and the judicial innovations. But reform discussions highlight how choices are being made between the possible normative positions that can be supported. King and Piper attribute the limits of the law's effective action to "the intrinsic nature of law and [to] law's own concept of its role" (1995: 12-13).

CHAPTER TWO

MEDICO-PSYCHOLOGICAL APPROACHES TO THE MIND

Introduction

Chapter one indicated that the operation of the defences of insanity, diminished responsibility, and on occasion provocation, rely on medico-psychological evidence. However, the mental health sphere adopts a different view of the mind from that underpinning the law. This viewpoint will be examined in this chapter, with specific reference to the neuroscientific theories of consciousness. The mind is an elusive phenomenon to study, but neuroscience, which incorporates a number of neurologically based disciplines working together to provide a comprehensive understanding of the brain/mind,¹¹³ is a rapidly developing field, although still in its formative years.¹¹⁴ In light of the plethora of material on the mind, attention is paid to the theories of key figures, to elucidate the main themes of concern to this project. This discussion enables an appreciation of the distinction between the two disciplines that is followed up in the discussions on the interaction between law and medico-psychology in the cases being scrutinised in this thesis. Originally it was also intended that the project would be considering the extent of the inclusion by the law of the latest views on the mind, but the findings from the research revealed that this is simply a facet of a broader set of suppositions about the interaction of law and medico-psychology, as subsequent chapters show.

The Philosophical Parameters of the Debate

Philosophy has debated the matter of the mind at length, centring on the free will/determinist debate.¹¹⁵ Although in the dialectical discussion in chapter one the point was made that comparing the incompatibilist and compatibilist arguments is not helpful, it is useful to establish at least very briefly the remit of the debate that accompanies discussions on current scientific investigations and their ramifications for responsibility.

¹¹³ Zeman (2001) provides an overview of the field of consciousness. An excellent website for articles deposited by authors on the philosophy of consciousness and the mind and the science of consciousness can be found at <http://www.u.arizona.edu/%Echalmers>

¹¹⁴ Van der Henst et al (2002) analyse how the study of reasoning strategies has barely begun.

¹¹⁵ A valuable collection of essays can be found in Chalmers (ed.: 2002) & Nagel (ed.: 1995). See also Schaffer (1968).

First, what of determinist views on *will*? Trusted argues actions are not logically inevitable, in the strict sense of specific cause and effect, but nor are they uncaused as the *will*, which she equates with *reason*, causes an action (1984: 38). However, this perspective differs from the free will standpoint because it relates the *will* to other aspects of the individual. The rationale being, as Hobart argues, that if the volition of the *self* is not determined, if the *will* acts independently of wishes and motives, it is as if free will is not from the *self* (1966: 66-71). Thus by separating out the moral 'I' from its propensities, can you have a morally responsible *self*? Hobart's position is that if volition is the product of the *self* then determinism is reconcilable with free will, when expressed in the passive voice. Nor does the determinist standpoint challenge the fact that we *feel* that we have free will. Hume claims that we know we have a will through our own experience, which tells us that cause (will) and effect (action) follow one another (Trusted: 36). However, Mill speculates on whether the issue that is important is consciousness of our moral responsibility, which free will implies, or/and consciousness of our free will (1966: 167).

The conundrum for the compatibilist standpoint is locating which factors are influential in respect of the mind/will. Mill considers that it cannot be argued that man acts without nature (p.159). Likewise Schlick claims it is nonsense "that freedom means "exemption from the causal principle", or "not subject to the laws of nature", but causality is not the same as compulsion (1966: p.58). But what does this incorporate? One commonly cited stimulus is character. But there are two aspects to the issue, the measure of influence such aspects of the *self* has, and how to measure its effect in judgments about responsibility. For example, there is concern about the fact that character develops as a result of treatment received as infants, for which we are not responsible. Therefore, how can we be held responsible for its effect (Hospers 1966: 41-2; 45)? Nor is it possible to assess the contribution of others. Furthermore, Broad notes that there would be problems in deciding how far back to go to establish what would have given rise to a different course of action (1966: 150-1). Mill also believes that it is impossible to conceive of infinite regress of the chain of causation back to eternity (p.159). Schlick suggests that when mental illness

affects normal functioning it is the disease rather than the person which is responsible for the actions (p.60). But if there is an option to exercise our *will* then the issue is at what point is the *will* overcome?

In terms of the resolution of the matter of responsibility, morality is a central issue. Mackie argues for a soft determinist position, whereby “it is a factual, psychological, question whether an action is intentional or voluntary, but it is a moral or legal question whether or in what ways an agent is to be held responsible” (pp.208; 226).¹¹⁶ Schlick suggests, as Hume did, that the issue of whether or not man is morally free is different to the problem of determinism, which is about natural laws. Schlick argues there are two distinct aspects, freedom of *will* and freedom of *conduct*, and morality is only an issue for the latter. Hosper’s solution is to divide the moral discourse into an upper level relating to actions, and a lower level incorporating the springs of action. Moral talk applies to the upper level, this is the level at which the “Hume-Mill-Schlick-Ayer analysis of freedom fully applies” (p.43).¹¹⁷ Inherent in this argument for moral accountability is the assumption that it is possible to make an *effort of will* and choose to act in accordance with social rules.¹¹⁸ For example Mill claimed that whilst our character is important it is open to modification by our will. Likewise Hume believed morality was not about the action but the aspects of self, being a virtuous person (Pink 2004: 11). In addition Schlick maintains that punishment is about influencing the motives, which are the causes of actions. So the legal theories of responsibility and punishment are not undermined by the determinist stance, but nor is *will* seen as a freestanding phenomenon, there being recognition of the inter-related nature of the whole of the individual. This challenges the “Hobbesian caricature of human action – a caricature that reduces action to nothing more than an effect imposed on us by our desires” (Pink: 119). This position is supported by evidence underpinning the medico-psychological and neuroscientific theories of the mind, which is embraced by many philosophers (Chalmers (ed.) 2002). However, the question still remains, how do you determine when a person has tried hard enough (Nowell-Smith 1966: 364-5)?

¹¹⁶ Campbell (1997) outlines differences between strong and weak compatibilism.

¹¹⁷ However, it should not be overlooked that the historical and cultural backdrop is important to the scientific construction of diagnostic categories (Foucault 1973; Szasz 1972; Horwitz 2003).

¹¹⁸ Although Fischer’s (2004) compatibilist account of moral responsibility does not require genuine access to alternatives. Glannon (1999) comments on the theory.

This complex spectrum of views does not help the legal need to make a definitive judgment. The context and process by which this is undertaken is the focus of this project.

The Neuroscience of Consciousness

Consciousness, the capacity to reflect on matters, is a complex phenomenon to explain, as the following discussion highlights. It has to be conceived as having a number of levels that arise from a synthesis of a variety of biological processes, together with the higher brain processes. Critical to the medico-psychological process is the importance of emotion as well as cognition for decision-making, and the social concepts that enable a personal narrative of the self and one's experiences and values.

Foundations

Dualism¹¹⁹ argues that the mental, the source of our volition, is beyond the province of science (Trusted: 35).¹²⁰ However, in addition to the philosophical challenges to the dualist position, during the last 15 years neuroscience has begun to provide empirical evidence as a result of research into the brain and human consciousness.¹²¹ Recent advances in technology, such as brain scans,¹²² have enabled scientists to investigate the brain/mind in a way previously impossible.¹²³ The study of consciousness is important because it is concerned with the brain/mind processes that enable us to evaluate options and make informed choices between moral positions. It supports our subjective sense of self and agency, which are important dimensions of responsibility, accountability and morality. The neuroscientists Edelman and Tononi suggest that the epistemology of the mind should now move from philosophy to neuroscience because we are grounded in biological processes (2000: Ch.17). However, the debates on the issues still involve both disciplines.

¹¹⁹ Searle explains there are currently two schools of dualism; *substance* dualists claim that there are two types of substances, the mind and the body (1997: 135). *Property* dualists claim that mental and physical are two different properties within the same substance, humans, which exist simultaneously.

¹²⁰ There were religious reasons behind this arguably because of the concerns about science intruding into matters of the mind and soul (Searle 1997: 6; Damasio 1994: 249). Although Albuquerque et al (2002) argue aspects of Descartes's viewpoint is still valid for psychiatry.

¹²¹ Polger & Flanagan (1999) explore how many positions exist within this school of thought, highlighting the lack of agreement. See also Chalmers (1995); Dennet (2001; 1996; 1991).

¹²² Lloyd (2002)

¹²³ Greenfield explains the different types of scans (2000: 23). For a commentary on the limitation of fMRI scans see Uğurbil et al (2003).

Significantly, the neuroscientific theories of consciousness locate cognition in physiological processes, and as part of a complex inter-relationship with the environment. For example, Solms and Turnbull divide consciousness into the *content* or channels of consciousness, and levels or *states* of consciousness, linked to brainstem activity (2002: 84-90).¹²⁴ The *content* of consciousness is the processing of the outside world by the posterior cortical channels, whereas the *state* of consciousness is the product of the ascending activating system of the brainstem, which monitors the internal milieu of the body. Thus thoughts are in response to the content of consciousness, which is an awareness of the outside world, and change in the internal milieu. The goal of the following description of consciousness is to illustrate how it challenges the dualist hypothesis. Therefore, the complex theories of how the neurological processes unite to produce consciousness are not dealt with because of the limited space available.¹²⁵

The Mind/Body Link

Science is endeavouring to explain the mind/body relationship, but it is a contentious issue.¹²⁶ In contrast to the dualist claims of two types of things,¹²⁷ the mental and the physical, science is pervaded by the *monist* tradition, which claims that there can only be one kind of substance, mental or physical (Searle 1997: 135). Solms and Turnbull argue that most neuroscientists are *material monists*, who assume that mental life is the product of neurons (p.55).¹²⁸ Certainly in terms of challenging the separation of mind and body, Damasio, in his book *Descartes' Error* specifically takes issue with the famous phrase, 'I think therefore I am' (1994: 248). It implies that thinking is the basis to being, which is the antithesis of Damasio's outlook. He points out how late in the evolutionary scheme of things thinking and consciousness came. *Being* came before *thinking*. Likewise Edelman and Tononi argue that consciousness is a

¹²⁴ See also Vogeley & Fink (2003: 2).

¹²⁵ These can be found in the texts discussed, and also in works such as Bieberich (2002); John (2001); Hardcastle (1999); Kurthen (1999); Revonsuo (1999).

¹²⁶ Differing perspectives can be found in Varela et al (1995).

¹²⁷ Searle provides an adroit explanation of materialism, in particular functionalism, the most prevalent theory of mind amongst philosophers today (1997: 139-40).

¹²⁸ Solms & Turnbull make this point using Crick as a reference (p.52). Searle however argues that Crick (1994) can be read to see mind as an emergent property (ch.2), in addition quantum mechanics, the position of Penrose (1994) is critiqued by Searle. See also Stapp (1999) who devises three levels to his challenge to the mind/brain/body split centred round quantum physics.

physical process because embodiment is how we know things. They define their position as *qualified realism* and *biologically based epistemology*, founded on the idea that concepts are not initially sentential because the brain develops constructs prior to language, with language developing by epigenetic means to enhance conceptual and emotional exchanges (pp.215-19).¹²⁹

However, there are those who challenge material monism because of a concern about the implied lack of agency, compared with sense of agency. For example, Searle argues that consciousness is not reducible to anything else because it is an *emergent property* of the neurons in our brain (pp.18; 22; 160-1; 210-14).¹³⁰ However, he argues against the premiss within philosophy which states that by accepting the irreducibility of consciousness you have to accept dualism (pp.194-5).¹³¹ For Searle what makes consciousness special, and irreducible, is that it is a first person subjective ontology, and therefore cannot be reduced to a third person or objective ontology. Biological experiences of the brain only exist when a human agent feels them. Thus he is trying to take account of the sense of agency that we experience.

However, Solms and Turnbull contest the *emergent property* hypothesis, arguing it does not explain the mind/body relationship. They propose *dual-aspect monism*, which holds that the brain appears physical when it is viewed from the outside, as an object, and mental from the inside when viewed subjectively (pp.54-8). This distinction between body and mind is therefore *an artifact of perception* because the observer is the instrument that does the observing, through perceptual modalities. They suggest the question is: what brain processes correlate with subjective processes? In addition Tye (1999) maintains subjective phenomenal experience is not conscious until it is framed by *phenomenal concepts*, the objective labels for our experiences, which are only available in consciousness.¹³² Thus experience is physical, but cognitive concepts enable us to reflect on how we are feeling, which gives the sense that there is a gap between mind and body. This also points to the inter-relationship

¹²⁹ Damasio also attributes our capacity for memory, the coding of knowledge in language form and manipulation of what we know intelligently as the key factors in this higher order thinking (2000: 310-11).

¹³⁰ See also Jones (2002); Lowe (1999).

¹³¹ See Lowe (1999), Tattersall (2001: 665); Alper (1998: 6).

¹³² See also Solms & Turnbull: Chs. 2; 3, and Musacchio (2002).

of the physical and social, indicating that prevailing social concepts are important to the way we construct our experiences and sense of self. Thus neuroscientists such as Damasio (1994: xiv), Edelman and Tononi (Ch.17), and Greenfield (2000: 197) attempt to link the body, brain and mind without following the materialist or dualist hypothesis.¹³³

But this linking of the mind and body results in debates about the level of impact the physical has on our *will*, particularly in relation to genetics.¹³⁴ The Nuffield report discusses how *behavioural genetics* challenge the traditional view of free will founded on the separation of mind and body by asserting that genes, which are physical, affect the motivations of the immaterial self (2002: 121-3).¹³⁵ Therefore, whilst genetic research on illness does not distort our view of ourselves, behavioural genetics arguably might. But little is known about the influence of genes on behaviour, although it is accepted that they contribute to behavioural traits, which include fundamental aspects of character. This raises issues highlighted in the philosophical context of attributing responsibility, because if individuals are not responsible for their genes are they responsible for those aspects of their character? This could have ramifications for the conceptualization of the moral subject. But, as the following section shows, our genetic makeup, in most cases, simply gives rise to a predisposition towards, or risk of developing, abnormal behaviour and/or disease, because of the inter-relationship of nature and nurture.

Nature/Nurture

Martin argues that the neuro-reductionist approach ignores the complexity of social learning, with discussions of the body assuming it is “universal, unhistorical, unconscious of its own production, and possessed of many of the characteristics of modernist scientific accounts...”, whereas with ethnography, the technology of sociality, individuals are seen as subjects who participate in cultural and social activities (2000: 576; 584). However, neuroscientific analysis of the influence of genes on the structure of the brain does acknowledge the importance of experience and the environment (Damasio

¹³³ For example Greenfield: 198; Damasio: 12-14; Edelman & Tononi: 10-11.

¹³⁴ This is followed up in the context of defences in chapter 3.

¹³⁵ Godfrey-Smith (1999) provides a different way of conceptualizing the debate on ‘genes for’, challenging the assertion that genes code for particular things.

1994: 112; Greenfield: 63; Solms & Turnbull: 217; Wahlsten 1999).¹³⁶ For example, Solms and Turnbull explain the transcription function of genes in terms of the inter-relationship of nature and nurture, through an examination of the development of sexual differences during foetal development, and the effect it has on the brain (p.219). Our genes cannot specify the whole structure of our brains because there are not enough genes available (Damasio: pp.108-9). Therefore, whilst the brain of a foetus initially forms subject to genetic influences, the mother's actions and what happens among cells will also affect development.¹³⁷ Greenfield says that the environment can influence whether a gene is turned on or off (p.52). "Genes do not have function locked up inside them any more than do neurotransmitters or brain cells. Instead, they work together in complex ways, producing a bewildering variety of effects depending on context, with only partially predictable results" (ibid: 190). Moreover, the adaptability of the brain throughout life is attributable to the "mind-boggling increase in connections" that takes place as a result of experience, particularly in the cortex (ibid: 55). Greenfield maintains that whilst nature and nurture are mutually interactive roles there is "an increasing emphasis on nurture as we become more individualistic, more human" (p.63).¹³⁸

Damasio explains that although the innate mechanisms established by the genes are influential, it is also necessary that an evaluation of experiential factors can be undertaken in light of survival priorities. Therefore many connections are forged after birth in response to experience, enabling adjustments (1994: 111; Greenfield: 55). This stance is supported by Edelman and Tononi's *global mapping theory*, which states that the strength of synapses is developed through previous behaviour (p.98). Also, whilst regular use stimulates connections¹³⁹ neglect has the opposite effect (Greenfield: 57).¹⁴⁰

¹³⁶ Plomin (2002) looks at individual differences in relation to genomics, and Griffiths (2002a) discusses the arguments of Baldwin on social heredity.

¹³⁷ Greenfield provides an outline of how the brain forms in a foetus and evidence for environmental influences (2000: 449; 54-5).

¹³⁸ Damasio (2000: 309-11)

¹³⁹ Long-term potentiation (LTP), whereby the cell has been subject to stimulation and molecular change and the neuron can then change and remember the change for a long period. Kindling is a similar process that appears to complement LTP, but seems slower to develop but then to be permanent and therefore is likely to be part of the learning process. (Greenfield 2000: 59-60)

¹⁴⁰ Although this is not possible to test out in terms of ethical considerations around deprivation there have been studies on the impact on children that have congenital cataracts by Professor Daphne Maurer of McMaster University, Toronto and psychologist Terri Lewis.

This signifies the importance of the impact of environmental experiences, especially in childhood. This interaction results in a *pattern* of evaluating the environment, with the higher parts of the brain concerned with such matters as goodness and badness, and the more primitive areas of the brain with survival (Damasio 2000: 309-11). This demonstrates how important it is to view what and how we are as individuals in terms of biological processes that operate in a social context (Ridley 2003; Elman et al 1998). However, this holistic perspective is not how the gene debate is usually presented (Griffiths 2002(c)(d); Frankel & Teich (eds.) 1994). This inter-related viewpoint supports the dialectical position that the social context is an important dimension to judgments of the individual, and that responsibility and blame should be conceived as an individual and social matter.

Dimensions to Cognition

Another concern with neuroscientific explanations, expressed for example by the *eliminativists*, is that objective theories of genetic and neurocognitive science are incompatible with our everyday *subjective* understanding of being rational beings acting for particular reasons (Nuffield Report 2002: 125).¹⁴¹ Furthermore, there is concern that the reductionist debate is simply replacing the determinist focus on causation. However, *rationalists* claim that a complete explanation is not being provided by biochemistry, that our subjective understanding of the world is not inferior to an objective scientific viewpoint (ibid: 127-8).¹⁴² The Nuffield report suggests that there is nothing problematic with gaining insight from science, which can inform our subjective perspective on thought and action (p.126). The neuroscientific conceptualisation of the sense of self and agency would seem crucial to the debate on the attribution of responsibility.

Sense of Self

Consciousness studies are investigating how the brain generates a sense of self in the act of knowing (Damasio 2000: 9-11; 312).¹⁴³ Damasio's explanation attributes it to the fact that consciousness has simple and complex levels

¹⁴¹ See also Rose et al (1990)

¹⁴² Rose (1999) eruditely challenges this reductionist perspective.

¹⁴³ Taylor (2002) expresses concern that attention has been overlooked in the explanations of ownership of experience.

(pp.16-7). Again, the foundations of consciousness are located in biological processes. He believes “the self is a repeatedly reconstructed biological state...”, but that there is constancy within the homeostatic internal milieu. The maintenance of life is the anchor to what becomes the self in the mind (2000: 136; 1994: 226-7).¹⁴⁴ This viewpoint is similar to Edelman and Tononi’s neural basis of consciousness that states the biological self is imbued with value (p.244).¹⁴⁵ Likewise Vogeley and Fink’s description of our first person perspective (IPP) is “the ability to become aware of one’s own mental and bodily states (e.g. perceptions, attitudes, opinions, intentions to act) as one’s own mental and bodily states”, which is a matter of space, action, interaction and body representation (2003: 38). Different areas of the brain are identified as important. For example, Farrer and Frith suggest the two regions of the brain most “involved in the perception of complex representations of the self and of its interactions with the external world” are the *anterior insular* area, when there is an awareness of causing an action, and the *inferior parietal cortex* when the action is attributed to another (2002: 596). Platek et al (2004) focus specifically on the right frontal lobe. In addition, Cicchetti’s (2002) study of psychopathology in maltreated children is concerned with illustrating how the interaction of social experience and neurobiological systems results in our individual social construction of experiences.

However, awareness of the physical is viewed in terms of the concepts available to construct the sensation of the sense of self. As Tye asserted, phenomenal concepts are important to the perception and construction of our subjective experience. Likewise Gallagher (1999) states our sense of self is the culmination of physical processes, the *minimal self*, and labelled through culturally available language, the *narrative self*.¹⁴⁶ Owing to the translation of our subjective feelings into concepts we objectify and own the ‘I’.¹⁴⁷ Crucial is how experience shapes this process, which affects how we present ourselves through narrative.¹⁴⁸

¹⁴⁴ W.B. Cannon coined the term early in the twentieth century (Damasio 2000: 138).

¹⁴⁵ Damasio, Edelman & Tononi, Carter (2002) and Scott (1999) use dissociative identity disorder to illustrate the connection between body and self.

¹⁴⁶ See also Gottfried & Jow (2003); Strawson (1997).

¹⁴⁷ Deikman (1996) also discusses ‘I’ and awareness.

¹⁴⁸ He provides diagrams to illustrate his point.

In order to illustrate this theory of the sense of self, frequent reference is made to schizophrenia. For example, Vogeley et al (1999) argue that the fact that schizophrenia results in disturbances in the sense of self demonstrates the connection between the brain and our subjectivity, with specific reference to the pre frontal cortex (PFC).¹⁴⁹ Gerrans (2001) develops theories to explain the lack of a sense of authorship in delusions, whereby actions are owned, but not the authorship, which is explained in terms of feelings and cognitive beliefs. This is supported by Atkinson's study of brain injuries, which can give rise to erroneous beliefs, providing evidence of the relationship between the physiological and the narrative (2001: 225). However, Atkinson argues there is interaction without reduction. He claims that deficits in phenomenal experience can lead to deficits in the content of our reasoning and beliefs, especially about the self and others. It is proposed that the crucial factor is a lack of exposure to language, especially about mental states.¹⁵⁰ However, Stanghellini expresses concern that by focusing on the sufferer's lack of a sense of self the importance of the inter-subjective to our sense of self is overlooked (2001: 201).¹⁵¹

In terms of understanding the difference between good and evil, Dr. Adshead (2002), a forensic psychiatrist, specifically explores the matter in the context of dissociation, incoherence of mind and lack of empathy. In particular she examines the different ways the word evil has been approached because "[w]hat is most striking about the people [she] meets is not that they are amoral but rather that their accounts of morality are incoherent" (p.3).¹⁵² She stresses the importance of language to the formation of the autobiographical self, illustrating her point by an analysis of the impact a mental illness label has on agency.¹⁵³ However, she also highlights how the attendant expression of *affects*, is contingent on developmental and attachment processes, which influence the capacity for self-reflection and empathy.¹⁵⁴ This is seen as a critical matter in respect of psychopaths, which is discussed in chapter three.

¹⁴⁹ See Damasio (2000), & Edelman & Tononi (2000). Vogeley et al's views have been the subject of review by Gallese (1999); Pribram (1999); Proust (1999).

¹⁵⁰ This is demonstrated through research on children who are deaf or suffer from autism.

¹⁵¹ Sass (2001) challenges Stanghellini's arguments.

¹⁵² See also Adshead (2003)

¹⁵³ See also Hacking's (1999) theory of 'bio-looping' to explain this phenomenon.

¹⁵⁴ Adshead cites Schore's (2001) work on the importance of the PFC for relational development.

This discussion illustrates that scientific knowledge does not deny we have a sense of *self*, and *will*, and it is showing that our awareness of our agency is not independent of the body, but grounded in it. But it is also informed by discourses within society, from which we construct our personal narrative. The following two sections discuss the importance that is now being placed on emotion and the unconscious.¹⁵⁵

Emotion

Until recently emotion, *affect*, was seen as too vague and subjective to study, and rational reason was venerated and assumed to be independent of emotion. However, since the early 1960s emotion has been seen as a fundamental aspect of the development of the subjective sense of the self and subsequent relational patterns (Cole 2001; Abrams Faude et al 1996: 229-230).¹⁵⁶ But the ability of science to study phenomenological factors such as feelings and emotions, from a purely theoretical, abstract, objective position was questioned because it is not the same as subjectively experiencing the emotion (Goldie 2002).¹⁵⁷ Nevertheless emotion became a focus of science, but initially it was about the brain and the body was ignored. However, neuroscience argues that consciousness is not just a cognitive process (Solms & Turnbull: 92-4). It is exploring how personal *affect* experience, and responses to emotional expression in others, is innate and learned, highlighting the inter-relationship of the physical and social.

In biological terms for example, Solms and Turnbull discuss two areas of the brainstem, which enable us to be aware of our internal and musculoskeletal state, in relation to the world.¹⁵⁸ They link their theories to Panksepp's SELF-

¹⁵⁵ Platt (2002) explains the difficulties presented in identifying the mechanisms at play in the neural correlates of decisions.

¹⁵⁶ Tomkins (1962; 1963) following the work of Darwin established this. Kendall & Speedwell (1999) translate key Freudian concepts into a relational framework that reflects the modern views of the significance of the developmental period.

¹⁵⁷ For a philosophical view see Evans (2002).

¹⁵⁸ There are neuronal and neurochemical reactions with different emotions produced by different brain systems. Few brain sites are involved and most are located below the cerebral cortex and known as subcortical; the brain-stem, hypothalamus and basal forebrain. The periaqueductal gray (PAG) is a major coordinator of emotional responses, along with the amygdala. Induction sites can be found in the cerebral cortex, including the anterior cingulate region and the ventromedial prefrontal region (Damasio: 60-9). The neuronal areas of the brain that are involved in emotional responses send messages throughout the body via the chemical messengers in the bloodstream as well as the electrochemical signals along the neural pathways. This results in a global change in the organism. This will give rise to a feeling, that is the imaging of all the changes and then core consciousness acts so that there is then the knowing of the emotion, a feeling of a feeling.

theory of emotional expression (pp.109-111).¹⁵⁹ Alternatively Damasio links emotions with the homeostatic process (1994: 39-40).¹⁶⁰ Additionally temperament is connected with homeostatic states, which are seen as an indicator of later emotional and behavioural disorders (Abrams Faude et al: 222-5). In terms of the social dimension to emotions, Schore refers to social intelligence, which derives from emotional interaction in infancy resulting in emotional literacy, and is important for the ability to cope in later life (2001: 47-8).¹⁶¹ Integral to this process are the social emotions of guilt, shame and pride in the formation of first person attitudes to responsibility (Eisenberg 2000; Brock & Buchanan 1999). Hacking discusses how these are socially constructed and culturally located concepts (1999: 18).

Thus developmental experiences influence the range of emotional states we have access to, in terms of the sense of self, and empathy for others. The latter is often said to be missing in psychopaths (Thompson 2001; Herpertz & Sass 2000).¹⁶² Chapter three discusses the allegations about the inability of psychopaths to learn in the context of detention decisions, which could also indicate the importance of emotional information for assessments of risk. However, if the sense of self is derived from cognitive phenomenal concepts and *affect*, what of their relationship?¹⁶³ Campbell explores this through the empiricist and rationalist theories on altered beliefs from brain injuries (2001: 96-8). He favours the rationalist position, centred on Wittgenstein, whereby ideas and beliefs flatten affect. In addition he cites Gerran's analyses of conditions such as depression, which also flatten affect, which in turn impacts on the sense of self.

Significantly though, Damasio specifically challenges the prevailing view that the best decisions are made in the absence of emotion. He maintains that decisions are very difficult, or impossible to make if this is the case (1994:

¹⁵⁹ Panksepp believes "that *affect* emerges from the way vertebrate brains are designed as a result of evolution – with a core neural matrix for primordial SELF – representation, which imbues the rest of psychological life with various forms of valenced arousal" (2001: 160). Also see his chapter in Carter (2002).

¹⁶⁰ Thompson (2001) who discusses consciousness in terms of empathy and the whole body and inter-relational aspect of affect has usefully developed this idea.

¹⁶¹ Griffiths (2002b) looks at the importance of basic emotions to inter-relational social episodes. See also Nielsen (2002)

¹⁶² Psychopathy is discussed in the following chapters.

¹⁶³ This is an important issue for therapeutic interventions.

170-3).¹⁶⁴ Similarly Greenfield believes that emotions affect thought (p.107). Damasio has developed the *somatic marker hypothesis*, to explain the ‘gut reaction’ feelings that we experience when we consider a bad outcome in decision-making.¹⁶⁵ His theory is based on findings from patients with damage to selected areas of the prefrontal region, especially the ventral and medial sectors, and right parietal regions, because these injuries affect the capacity to experience emotions, and therefore, he believes, the capacity to make rational choices (pp.41-2).¹⁶⁶ However, he acknowledges that irrational decisions can also emerge from emotionally loaded moments, but maintains emotion is integral to good decision making.¹⁶⁷ Similarities are evident in Edelman and Tononi’s primary and higher order consciousness, labelled mental life I and II (Ch.16).¹⁶⁸

Again social context and experience are fundamental to the operation of the process. Childhood and adolescence are the most important phases for establishing somatic markers, although the process does not stop until we die. “The buildup (*sic*) of adaptive somatic markers requires that both brain and culture be normal” (Damasio 1994: 177). If either is defective then the somatic markers are likely to be maladaptive. Again there is a distinguishing between physiological and cognitive awareness. Damasio’s theory claims emotional reactions, which are physical, are different from feelings, which is the process of knowing about them (pp.128-33). However, whilst knowing is a higher brain function, Damasio does not think that it is simply a process of the higher brain, concerned with reason and willpower, deliberating on the emotional reaction, because nature has not built the mechanisms for rationality on top of the regulatory mechanisms, but the former have emerged from, and are connected to the latter. Feeling, therefore, is becoming conscious of the emotion generated by the older brain core, which allows choices in terms of actions and reactions to the environment.

¹⁶⁴ Greene et al undertook an fMRI investigation of emotional engagement in moral judgments.

¹⁶⁵ The neural network for somatic markers is explained on pp.180-7.

¹⁶⁶ See Damasio on the impact on patients with particular lesions, for example (2000: 301-2).

¹⁶⁷ Greenfield claims that if individuals function in a strong emotional state then there may be an absence of thought and logic, which could account for crimes of passion. (2000: 177-8)

¹⁶⁸ See Damasio’s comments on similarities and differences between their theories (2000: .338 n.10: 347, n.4: 348-9, n.11).

The basic limbic system, which supports primary emotions, is supplemented by the higher functioning of the prefrontal cortex and somatosensory cortices by means of secondary emotions. They emerge once connections have been made between categories of objects and situations, and primary emotions (ibid: 134-139). Thus social experiences generate subtle variations on basic emotions, which, combined with cognitive content, give rise to such feelings as remorse and embarrassment (ibid: 149-150).¹⁶⁹ Bar-On et al (2003) expanded Damasio's theory to argue for a distinguishing between emotional, social and cognitive intelligence.¹⁷⁰ Alternatively Solms and Turnbull assert that emotion is internally directed perception, so emotional reactions to events are perceptions of the state of the subject, not the external event (p.105). However, they recognise the social dimension of some emotional responses by suggesting experiences become overlaid with 'emotion', affecting our perception of events, people and objects. Thus, emotion is not just an internally directed perceptual modality, it is also a form of motor discharge, and decision-making involves both emotion and cognition.

Whilst support for these theories is escalating, concern about the veracity of the tests used to test the impact of emotion in the decision-making process is also emerging. Cubitt and Sugden (2001) argue that the tests have not generated enough tension to elicit strong emotional reactions in order to adequately test the impact of emotion in the decision-making process. They devise what they see as a more rigorous test. Significantly their study highlights how judgment influences affect responses, which ties in with previous arguments about cognition flattening *affect*. More specifically, although Damasio's somatic marker theory is widely cited, the various physiological bases said to underpin it have been disputed (O'Carroll & Papps 2003; Papps et al 2003; North & O'Carroll 2001).

The discussion further illustrates how different the law and medico-psychological understanding of decisions is. However, the law is still concerned with the point at which these processes can be said to impinge on the capacity to act in accordance with social rules. Clearly there is a belief in

¹⁶⁹ Franks & Smith (1999) explore the significance of the neuroscientific studies of emotion for sociology.

¹⁷⁰ Also Panksepp (2003)

the capacity of cognition to affect emotional responses, but some incidents invoke strong emotional responses. Merzhanova investigated differences between the exercise of self-control and tendencies to impulsivity through experiments with cats (2003: 168-70). The central claim is that if the information part of the brain is the most active then self-control is exhibited, whereas if it is the motivational part then you get impulsivity. Still, this cannot help the courts. The issue is not just in terms of cognitive impairment at the verdict stage because the legal system is interested in risk and impulsive behaviour as a result of its overriding responsibility to support social order and protection of the public.

The Unconscious

Another important factor concerns the distinction made between automatic acts and those undertaken using more conscious control (Eysenck & Keane 1998: 118-9; Gross 1995: 267-9). It is widely accepted within cognitive neuroscience that most mental functioning operates unconsciously because of the limited information consciousness can hold (Solms & Turnbull: 79-83). But even though matters do not always enter into consciousness the “representations are processed sub rosa, they can influence the course of the thought process, and even pop into consciousness a bit later” (Damasio 1994: 106). Edelman and Tononi’s *dynamic core hypothesis* distinguishes between the neural processes that underpin consciousness and the unconscious, but they claim “[u]nconscious aspects of mental activity, such as motor and cognitive routines, and so-called unconscious memories, intentions, and expectations play a fundamental role in shaping and directing our conscious experience” (p.176).¹⁷¹ In support of this proposition, reference is usually made to Libet’s experiments on identifying when patients became conscious of stimuli to their thalamus.¹⁷² Libet demonstrated that the cerebral initiation of an act starts unconsciously because he found the conscious intention to act appears 350 milliseconds after the onset of the cerebral activity preceding the voluntary act.¹⁷³ This means there are at least 100-500 milliseconds of cerebral activity

¹⁷¹ Edelman & Tononi believe that their view could provide an explanation for the process of repression of factors seen as threatening to the self.

¹⁷² For example Damasio, Greenfield, and Edelman & Tononi.

¹⁷³ There have been evaluations and reinterpretations of Libet’s experiments, i.e. Kitazawa 2002; Pockett 2002; Klein 2002; Trevena & Miller 2002. Libet (2003) has responded.

before awareness. Damasio claims that “[t]he present is never here. We are hopelessly late for consciousness” (p.240).

An important facet of this discussion is the operation of memory. “What you remember, consciously or unconsciously, depends solely on which memory systems are engaged when the memories are being encoded and retrieved” (Solms & Turnbull: 167; 160-76). An important aspect of the operation of memory is the way that it is consolidated over time because what fires together wires together (pp.139; 146-8).¹⁷⁴ Previous sections have shown the importance of experience, which affects the wiring preferences in the brain. Thus the wiring circuits of childhood underpin the adult ones but they are essentially unconscious because of the developmental limitations of the brain at the time that they were established. Episodic memory, where feelings are consciously experienced and therefore form part of higher consciousness where labels/concepts are applied to our experience and memory, is the only type we will be able to consciously remember. These constitute a semantic memory, framed through concepts, linked to a felt experience.¹⁷⁵ However, as most of our introspective reflections are likely to be reconstructions that did not have the level of rationality we impose on them, it is hard to assess the impact that the experience may have had on us unconsciously. In fact Ward (2003) goes so far as to suggest a theory to explain evil behaviour located in unconscious beliefs.¹⁷⁶

This means that in terms of emotional influences on decision-making, we are unlikely to be conscious of what induced an emotion and often we are not (Damasio 2000:47-9; 60). Because emotions are induced unconsciously they appear to the conscious self as unmotivated. Damasio claims it is hard to suppress the expression of an emotion, although cultural influences, and arguably immediate environmental ones, may mean we are able to disguise some of the external manifestations, but we will not be able to block the automatic internal reactions.

¹⁷⁴ McGaugh & Roozendaal (2002) discuss the neurochemicals involved in establishing memories.

¹⁷⁵ On pp. 163-5 there is an outline of the role of the hippocampus in episodic memory. They discuss the impact of the fact that the hippocampus is not fully functional during the first two years of life.

¹⁷⁶ Sverdluk (2003) & Mullen (2003) challenge Ward's theory.

Acts of Will

Thus the theories on the mind expounded in this chapter reveal the significance of the body, and social context, rather than viewing it as some abstract process. However, having demonstrated the complexity of the decision-making process,¹⁷⁷ what of free will? Despite the range of factors that have been identified, many of which are not reflected on consciously, there is no denial of the capacity to make choices as the explanations on the sense of self reveal. Thus whilst in psychology *beliefs* that arise from perception, and *desires*, which are linked to basic emotions, provide necessary internal mental causes for our actions, *intention constitutes mediation between desires and actions, through cognitive activity and information processing* (Campbell 2000: 108-9; Gross: 6). The process can be more complex involving choice, deliberation and planning too.¹⁷⁸ However, intentions can be evaluated, and judged as rational or irrational. Rationality can be subjective, that is related to the agent's own goals, or objective when judged against a social standard.

A number of people have specifically addressed the link between consciousness, free action and intention. For example, Searle's (2000) theory of *volitional consciousness* explains rational behaviour, and the existence of self, within the context of neurobiological research findings. But he challenges the idea of linear causality, as does Freeman (1999).¹⁷⁹ The theories suggest there are two levels to the process, but we are only aware of one. For instance, Freeman suggests there is an *intentional limb* and *awareness of self* and actions. The former arises from self-organising neuronal activity, whereas awareness is a macroscopic and subsequent part of the process. Likewise Crick's two levels include one we are unaware of, involving the brain's ceaseless computations about future plans, and the other, which we are conscious of, the decision (1994: 266-8).¹⁸⁰ We may introspect to explain why we have made the decision that we have, but this tends to be a process of confabulating because we are not actually conscious of why we made the

¹⁷⁷ Hastie (2001) undertakes a review of the matter from a number of perspectives. See also Shafir & LeBoeuf (2002); Stuss & Levine (2002).

¹⁷⁸ See for example Koriath 2000, Graham & Neisser 2000, & Rosenthal 2000 discuss the importance of metacognition.

¹⁷⁹ Kriegel (2003) and Marcoulatos (2003) takes issue with Searle's linking of consciousness and intentionality.

¹⁸⁰ There would seem to be reflections of Crick's line of reasoning in Damasio (2000: 296-302).

decision.¹⁸¹ But for Crick a vital part of the process is that despite evidence regarding biological processes that take place before we are conscious of making a decision, we have a subjective sense of self that feels like there is a conscious inner self that is able to make free choices (pp.184-5).¹⁸² Greenfield concurs. Additionally Solms and Turnbull argue we have the capacity to make an effort of will over desires (pp.280-2). The primitive levels of consciousness do involve compulsive reactions, so at this level we are passive, the primitive self is devoid of free will. However, higher levels of consciousness, and self, located in the prefrontal lobe, are inhibitory mechanisms. This constitutes the executive system, the development of which is very experience dependent. The problem is that an objective analysis of the brain means that the agent is invisible.

Furthermore, the individual exercises their *will* in a social context. Damasio uses the consequences of brain injuries to illustrate how the brain is involved with anticipating the future and planning accordingly within a complex social environment (1994: 10). He argues that the *suprainstinctual survival strategies* transmitted by culture are the result of our higher levels of consciousness, our abilities for reasoned deliberation and willpower (pp.123-6).¹⁸³ These capacities mean socially undesirable behaviour resulting from basic drives and instincts can be avoided. But unlike Descartes, who attributed control to non-physical processes, Damasio sees it as based on the biological structures of the organism. Solms and Turnbull discuss how things come to be seen as good or bad as a result of the introspective and evaluative levels of consciousness, which attaches value (pp.91-2). Baron-Cohen et al (1999) through scanning try and identify the areas of the brain implicated in the operation of social intelligence. They conclude that the amygdala is crucial, which is central to emotional processing. This is important in terms of psychopaths, whose capacity for empathy is questionable. But as always, concepts are an essential dimension to consider. Thus, whilst McCrone's bifold model of the mind acknowledges neurology, it also recognizes the way that culture exploits

¹⁸¹ Damasio and Crick are agreed on the area of the brain that they associate with will, the anterior cingulate sulcus, next to Brodmann's area 24, which connects to the corpus stratum. It is acknowledged that there will be other areas of the brain involved but this area is clearly important. (See Ch.8 of Crick for explanations on this area of the brain.)

¹⁸² This is a crucial line of argument within philosophy (Trusted: 36; Mill: 167; Mackie: 219).

¹⁸³ This viewpoint is lucidly highlighted and developed in his chapter on emotions and feelings (1994: 127).

capabilities found within the brain, claiming “free will is a socially-potent word which we attempt to live up to” (1999: 254). Additionally Zhu (2004) argues that developing a unified concept of volition would help make sense of the empirical findings on the brain.

But Damasio is keen to make the point that love, compassion or free will are not any less important or real because they are premised on biological factors (1994: 175). It is simply that humans have automatic survival mechanisms, which are added to through education and acculturation. The *suprainstinctual survival strategies* make it possible to have a moral point of view, a perspective that goes beyond the interests of the immediate group and even species.¹⁸⁴ So notwithstanding that biology and culture often determine our reasoning, directly or indirectly, it is still possible to go against them both. Willpower is related to the ability to choose in accordance with long-term outcomes rather than short-term ones.¹⁸⁵ Although consciousness allows us to deliberate on good and evil, it does not constitute conscience; it is the foundation for higher thinking that enables us to appreciate the moral aspects of a situation (Wilton 2000). “The consciousness of most criminals is not impaired. Their conscience may be” (Damasio 2000: 310).¹⁸⁶ Damasio (2003) has extended his theory on how ethical norms depend on circuitry in the brain, whereby categories of personal and social knowledge are connected to feelings, in particular joy and sorrow.¹⁸⁷ But clearly studies are being conducted into whether or not different trait tendencies, such as impulsivity do affect reasoning (Schweizer 2002), which are discussed in chapter three.

Thus, what becomes clear for our acts of *will* in this elucidation on the mind is the development and operation of our physical processes, and the phenomenal, normative and moral concepts available for the formulation of our *narrative self*. The social concepts available inform our evaluation of sense of self and behaviour, and those we make of others. However, the concepts are not value-

¹⁸⁴ Casebeer & Churchland (2003) critically review the theory of the neural mechanisms of moral cognition. Uchii (2002) discusses Darwin and the evolution of morality.

¹⁸⁵ Ridley (2003) also explored the result of this inter-dependence of nature and nurture.

¹⁸⁶ Also see Spence et al (2002) on the neuroscience and the will.

¹⁸⁷ Gunther (2004) also looks at the importance of emotional value for intentional actions.

free, as they are experientially¹⁸⁸ and socially imbued. An important part of the social context is the normative standards of the law, and medico-psychology.

Foucault questioned the capacity of individuals to exert their *will* in contradiction of the culture they live in. He was hostile to the view of the Enlightenment period that “the individual [is] .. a well-willing and intentional actor, .. the primary agent of social action”, which is the foundation of the legal position (Hunt & Wickham 1994: 28). Significantly, Foucault’s discourse theory supports the idea that the position articulated by an individual is not the result of genuine beliefs, it is merely an adopted position from within a discourse (Freundlieb 1994: 167).¹⁸⁹ Foucault’s position did alter as he progressed from what he termed archaeology to genealogy, such that in *Power/Knowledge* (1980) he asserted individuals are not simply the result of external forces but are actively engaged in the production process. Nonetheless Freundlieb believes that “Foucault was very reluctant to grant the subject any real self-determination” (p.177).

On the other hand Campbell (1999) explores power as will power. Furthermore, Neff and Helwig (2002) present a more complex picture through their examination of how cultural practices are evaluated because of the multiplicity of concepts available, which is illustrated through the differing discourses of law and medico-psychology. This line of argument is supported by Midgley’s (2001) view of wickedness as a multifaceted matter, and as a result it is possible to explain conduct using a variety of motives. Working them out is complex in terms of identifying natural and cultural motivations. She argues a “good understanding of the psychology of motives is a great help...” (p.207). Likewise the philosopher Dennett (2003) has claimed that the natural sciences are an important ally to understanding and extending our freedom of will. As the Nuffield report concludes, acting of one’s own free will is, “one’s action is the outcome of one’s choice, and, secondly, this choice is itself the outcome of one’s deliberations regarding what to do” (p.125). The issue is always one of balancing the objective and the subjective. Therefore the

¹⁸⁸ See Barsalou et al (2003)

¹⁸⁹ This contrasts with Habermasian interpretation of speech acts which states that these are the result of a genuine belief by someone taking responsibility for their claim (Freundlieb: 162; 168; 173 & Hollis 1994).

Nuffield report argues that it is about actions which are the result of one's own rational deliberations, not based on an abstract notion that someone could have acted differently, although the law adopts this form of evaluation. Individual rational considerations result from the combination of factors outlined in this chapter, not all of which are not acknowledged by the law.

Responsibility

In terms of the current state of knowledge, Brock and Buchanan conclude that simple genetic explanations for behaviour will not emerge, but it is likely that information about the influences on our human motivational and character traits will be discovered, which is supported by the information provided in this chapter. But it is unclear what will constitute enough evidence to question the current perceptions of responsibility. For example, Herculano-Houzel's (2003) study of Post-Traumatic Stress Disorder (PTSD), which included twin studies, illustrates that it is too difficult to separate out the impact of nature and nurture, brain and society, because of problems verifying whether the brain was already different, or if the social trigger generated the difference. Likewise Leppert (1999) talks about how complex genetic factors are, and how little we still know about them. He argues that environmental factors are more influential than genes in criminal behaviour. It would seem that behavioural genetics is showing that there are only differences of degree between 'illness' and 'health', illustrating the spectrum approach that pervades medico-psychological thinking rather than the dichotomous stance of law. This research does not adopt a fatalist or determinist position that absolves individuals of responsibility because of their character.

Arguably a more informed theory of responsibility would avoid the impact that pre-existing bias against particular groups currently has on the attribution of responsibility. In fact, the importance of neuroscientific theories for sociological analysis of the issues has been presented by Franks and Smith (eds.: 1999), and Dennett (2003) has discussed this in respect of philosophical inquiries. But Barratt and Felthous (2003) talk about the need for a review of the knowledge that is being produced by different disciplines on intention and motivation, suggesting a discipline neutral model that integrates the data designated as cognitive neuroscience. However, as indicated previously, there

is concern about the effect the biological reconstruction of the mind might have on the social construction of responsibility.¹⁹⁰ It would appear there are two dimensions to consider, the impact on individual perceptions of responsibility and the social responses from such institutions as law.

The social construction of the individual is important, as it has repercussions for our understanding and perception of our *self* (Rose 1998). Currently the term *individual* does not incorporate a view beyond the simple make-up of the individual organism (Wilson 1999), which is challenged by Jenkins (2001). Brock and Buchanan speculate on the effect genetic information has on our *beliefs* about our freedom to act, as ‘responsibility attitudes’ are the result of beliefs and feelings, which in turn affect our actions (1999: 70-1). Whereas Schopp considers how genetic information concerning predispositions could make us more responsible through imposing a liability to attempt to minimize factors that will exacerbate possible negative traits (1999: 88; Novas & Rose 2000). Parker (1999) also raises the issue of how much responsibility we can expect individuals to take for addressing the difficulties raised by their predispositions and how much responsibility society should take to help its disadvantaged members. This issue of balancing blame and responsibility was raised as part of the dialectical debate in chapter one because the individual should not be seen in isolation from their social context. Thus legal norms, the operation of the law, and the presentation of the findings of science contribute to our sense of self, and the responsibility we sense that we have, and take, for our actions (Hacking 1999; 14-15). The Nuffield report says that by explaining the materials and structures of human life science informs our understanding, which will permeate cultural phenomena (p.129). The neuroscientific explanations of the sense of self and agency are about the interaction between accepted social norms, experiences and genetic predisposition, supporting a dialectical approach.

Parker (1999) stressed how important the social construction of free will is, and, therefore, the social response to genetic information. Parker poses the question as to whether genetic predispositions are substantially different to those that arise from environmental factors, which the legal system already

¹⁹⁰ Chapter 3 contains a discussion on the possible impact of biological explanations on the legal system.

assesses in cases such as those involving battered women. Parker argues it needs to do the same with genetic factors. Only mental health conditions that are judged by law to undermine the capacity for intent enable the defendant to cross the line from one of responsibility to lack of culpability, which ignores the multi-faceted and spectrum approach of medico-psychological views of the mind (Denno 2003). Yet the law uses medico-psychological information and expert evidence. Medico-psychological professions translate the neuroscientific information into diagnostic categories to be applied to individuals in a therapeutic setting. Crucially the legal setting uses medico-psychological terms but they are given legal meanings, and it is the medico-psychological experts' transposition of their clinical view onto legal categories that is so fundamental to the process of law. The medico-psychological information encapsulated by the diagnostic category is not sought by the legal system; it is the effect it has on the defendant's capacity to form intent that is the issue.

Therefore it is the social practices and the norms underpinning them which are important, because these practices are the manner through which the metaphysical issues are addressed. "Were it not for those social practices it is inconceivable that the metaphysical questions would arise" (Parker: 80). The law has an important social role in this process through the normative values that are upheld, and the nature of the process through which assessments of responsibility are conducted. Significantly where there are questions regarding the defendant's mental state medico-psychological experts are used to support the legal role. The manner in which this is done is the focus of this thesis through the evaluation of the interaction between the two disciplines. Although Smilansky claims "that it is the reality of compatibilist distinctions in control that influence our knowledge when a reaction is *appropriate* (2003: 278), it would appear from the research conducted as part of this project that legal practice constructs particular distinctions as to what will be considered an appropriate reaction.

There are individuals who even with psychiatric help cannot alter some of their personality traits. The diagnosis of these individuals is important with regard to treatment and punishment (Murphy & Lappé 1994: 124). This range of research founds the second dimension to medico-psychological involvement in

the legal process. Discovering connections between genes and behaviour could provide opportunities for intervention to overcome the undesirable behavioural traits. In light of concerns about social control and public protection finding the neural correlates could offer the possibility of developing new interventions. The discussion on the detention interventions in the name of social order in chapter one demonstrates the necessity to appreciate the significance of the social framing of issues and the importance of the strategic use of scientific information. Chapter three reviews the different issues of medico-psychological involvement in the construction and interventions associated with what are held to be undesirable traits, and supplying evidence on a defendant's capacity to form the necessary legal intention.

Medico-Psychological Experts

The perspective on the mind depicted in this chapter is represented through theories and diagnostic categories within the mental health professions of psychology and psychiatry. *Psychiatry* is the study and treatment of mental disease,¹⁹¹ whereas *psychology* is the science of the nature, functions and phenomena of the human mind. Significantly neuroscientific research is being synthesized into the two disciplines.¹⁹² Notwithstanding the differences between the professions, they each refer to generic clinical diagnostic categories for defining and distinguishing mental health problems and treatment initiatives. Differentiating between the natures of mental health problems can be important for the defences because insanity is concerned with *diseases* of the mind, and diminished responsibility with *abnormalities* of the mind. How the judiciary have interpreted these terms and the range of expert evidence that has been held pertinent to them will be discussed in chapter three. The essential aspects of the medico-psychological clinical position are as follows.

The UK favours the World Health Organisation diagnostic manual, International Classification of Diseases (ICD) 10 (1992, 1993, 1994), rather than the American Diagnostic and Statistical Manual (DSM) IV – TR (2000).

¹⁹¹ There is a useful breakdown of concepts and vocabulary in relation to psychiatric illnesses in the Nuffield Report (2002: 96-7).

¹⁹² How much it is entering into the diagnostic and treatment process is unclear to date but the work of Rose (2004) indicates changes in treatment with neuropsychopharmacology. Also discussions on the content of DSM V recognize the need to incorporate neuroscientific research findings.

However, there is increasing collaboration in the development of the two diagnostic manuals to try and build a more standardised set of diagnostic terms and definitions.¹⁹³ An important distinction between the categories is that made between what are referred to as mental (organic) and personality (functional) disorders. *Mental disorder* is described as a partial or complete breakdown of control that a person normally has over his or her behaviour, emotions and thinking. The significant factor is the reduced capacity through impaired judgment or reduced impulse control (Gross: 141). These are normally *organic* disorders, referred to as *mental illnesses*. *Functional* disorders, formerly referred to as neuroses, encompass anxiety and personality disorders, which are concerned with phenomenological evidence about the way that the person functions, which is disadvantageous/abnormal. *Personality disorders* are concerned with *personality traits*, which influence patterns of behaviour and inform our interpretation and prediction of other people's behaviour, when the traits interfere with the ability to function optimally in society. Gross concedes that knowledge about the aetiology of diagnostic categories is constantly developing and current neuroscientific evidence would seem to be providing fundamental challenges to the divided viewpoint just explained.¹⁹⁴ For example, Damasio argues that the Cartesian split has had a big impact on western medicine, resulting in a lack of appreciation of the impact that physical diseases have on us psychologically, and vice versa. However, this chapter also demonstrates the current possibilities for the objective scientific classification of the body through scanning technologies,¹⁹⁵ and current research is beginning to inform debates on mental health (Cooper 2001).

However, the social construction of illness should not be overlooked, as the cultural variations in the perception of behaviours illustrates (López & Guarnaccia 2000; Widiger & Sankis 2000). Barnard (2000) argues that psychology has been slow to appreciate the way that bodies are social, cultural and political objects. It can be seen with the changes to the remit of Anti-Social Personality Disorder (ASPD) and Hacking explores it with reference to intermittent explosive disorder (1999: 100). Language is not neutral, and

¹⁹³ See the introduction of DSM IV – TR. Kupfer et al (2002) detail the current focus for the DSM revisions, which places a heavy emphasis on incorporating neuroscientific research findings.

¹⁹⁴ However Gross challenges the idea of simply adopting the medical viewpoint, arguing that the social dimension of the issue of normality and abnormality needs to be appreciated (1995: Ch.7).

¹⁹⁵ See Rabinow (ed.) (1991) on Foucault's views on technologies of the body.

furthermore labels have repercussions in the reactions that they invoke in the individual and institutionally, affecting the sense of self of the individual (bio-looping), and the disciplinary measures meted out by professional bodies (ibid: 104-113; Heinimaa 2000). It would appear that some disorders are more comments on character and moral matters than they are on physical disorders of the mind (Zachar 2000; Mathews 1999; Spitz 1999).

In addition, the application of diagnoses in the therapeutic setting reflects the individualistic perspective of the law. Kaplan (2000) discusses how the medical model individualises and precludes consideration of social factors, which is a claim the dialectical position makes against law. Thus whilst chapter one explored the normative base used by law to distinguish between those who are mad or bad, this chapter includes descriptions about the optimal functioning of the mind, discussed by reference to those whose mind is dysfunctional. But, as will be seen in the following chapters, the clinical role and application of diagnostic categories differs in the legal context. There, diagnostic categories are reviewed in terms of legal questions rather than diagnostic and treatment concerns. For example, personality disorders constitute a contested matter within the legal system because of the legal objective of limiting exceptions to escaping criminal responsibility, and the manner it has established to achieve this objective. There is also the use of diagnostic opinions on the risk and danger an individual represents at the sentencing stage. The analysis of the form of the interaction of law and medico-psychology is undertaken in the remainder of this thesis.

Conclusion

This chapter has outlined the medico-psychological understanding of the mind and perceived foundations and influences on the formation of intention. In contrast to the law's assumption that cognition operates in an abstract manner, medico-psychologists believe we cannot react to the world without treating it as a "meaningful system of situations, contexts and relations; this meaningfulness depends not only on the world's physical properties, but also on our own biological, psychological, social and cultural properties" (Gross: 302). Intentions are based on internal mental states, such as beliefs, desires, perceptions, wishes, fears, and ideas, and objects and states in the world, not all

of which we are necessarily aware of (Gross: 267-9). However, there is no denial of agency or free will. Thus consciousness provides the permit into civilization, but it is not considered to be civilization itself (Damasio: 311). Damasio, for example, considers “[e]thics and the law, science and technology, the work of the muses and the milk of human kindness, those are my chosen summits for biology” (p.28).

Notwithstanding the differences in theory and the understanding of the mind between the two disciplines, expert evidence is used to support the current legal position. Significantly, the existing state of science, particularly with the emphasis on the inter-relationship of a multitude of biological processes, which in turn are affected by the social context, does not provide sufficiently concrete evidence to satisfy the dichotomous legal need for a definitive cut off point. Scans have enabled insights into the workings of the brain and added considerably to our understanding, but as Polger and Flanagan (1999) state, whilst neuroscience is very important, so are phenomenology, psychology and cognitive science. The following chapters examine the interaction of law and medico-psychology, exploring how the legal system negotiates and uses medico-psychological evidence, even though the latter seems to buttress the dialectical view of responsibility and individualism, which chapter one shows is a broader conception of responsibility than is currently adopted within the law. It is important to take into account how social and medical concepts are interpreted, and the significance of values for the framing of concepts.

CHAPTER THREE

THE INTERACTION OF LAW AND SCIENCE: COMMON LAW RULINGS

Introduction

Chapters one and two analysed the philosophical foundations to the understanding of the mind within law and medico-psychology, the legal position on criminal responsibility, the delineation of the common law *mens rea* principle, and the exceptions permitted based on the state of the defendant's mind. The theoretical discussions established that there is a distinct difference to the perspectives on the mind and the normative issues being addressed by the legal and medico-psychological professions. This chapter, along with chapter four, contains the next level of analysis, an examination of the judicial interpretations¹⁹⁶ of the legal concepts and rules in the insanity and diminished responsibility defences,¹⁹⁷ and procedural controls on the admission of evidence, enabling a review of the reasoning and process whereby individuals become categorised and problematised, be it in medical or legal terms.¹⁹⁸ Fundamental to the operation of this area of law is the use of expert evidence.

Reported case law embodies the courts' determinations on the exceptions to attributing responsibility and show how the different conceptual positions represented by the legal and medico-psychological professions are dealt with. Reported case law details the rules developed by the judiciary prevailing in that particular area of law. The judicial role is unique in that they have a professional role within the trial process alongside the other legal participants, as illustrated in chapter six, and they also interpret the remit of legislation and establish common law rules, the role dealt with in this chapter and chapter four. With regard to the higher courts, such as the House of Lords and the Court of Appeal, judges make authoritative precedents that need to be followed by the lower courts, such as in the provocation case of *Smith* (2001). This can lead to

¹⁹⁶ Lyons (1999) reviews central theories on the issue of interpreting the law.

¹⁹⁷ Attention is paid in particular to diminished responsibility as insanity is symbolically important but is primarily used in pleas of Unfitness to Plead.

¹⁹⁸ Rose discusses what he calls the technologies of medical truth (1994: 57-63). Flew (1973) looks at the way that physical and mental diseases have become equated, and interventions are justified on the basis of the disease label.

unintended consequences in respect of legislation, as discussed in chapter one.¹⁹⁹

Initially the chapter examines the legal interpretations of the mental health terms contained in the insanity and diminished responsibility defences. Then, in order to illustrate the fact that the moral position is also overlaid with other legal objectives which can give rise to legal conundrums, psychopathy, intoxication and the trend to biological explanations will be examined in detail. These discussions demonstrate that the law obscures contradictions and pragmatic responses to achieving moral outcomes, as the dialectical paradigm outlined in chapter one asserts. Extension of the debate beyond judicial interpretation of the defences to significant aspects of legal process that define and constrain the experts' role and the admission of expert evidence, in addition to those imposed by the legal interpretation of medico-psychological terms in the defences occurs in chapter four.

Judicial Interpretation of the Insanity Defence

Introduction

As chapter one showed, the *M'Naghten* (1843) rule states that:

To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a *defect of reason, from disease of the mind*, as not to *know* the *nature* and *quality* of the act he was doing, or, if he did know it, that he did not know he was doing what was *wrong* (p.210: emphasis added).

The judiciary, to establish the remit of the phrases, has deliberated each aspect of the rule. It was held in *Codere* (1916) that 'knowing' the *nature* and *quality* applies to the physical not legal or moral nature and quality of the act, which is a narrow interpretation (pp.26-27).²⁰⁰ In *Windle* [1952] the word *wrong* was interpreted as meaning a legal rather than moral wrong, ensuring an objective focus. Lord Goddard CJ claimed it would be unfortunate to leave a jury to decide if an act was morally wrong (p.833). This strand of the defence is the most frequently used, but it is not concerned with *mens rea*, as it is not about intention but comprehension (Mackay 2000: 67). For example, the reasoning in

¹⁹⁹ See also the most recent Law Commission (2004) debates on provocation.

²⁰⁰ Simester & Sullivan note problems that have arisen in the U.S. from taking a broader approach (2003: 578-9), whereas Mason et al discuss the benefits of the broader Canadian interpretation (1999:30-1).

Antoine [2000]²⁰¹ and *Moore* (2001)²⁰² claims that someone can have the intent to kill, whilst not appreciating the act is wrong because of the delusion induced by the *disease of the mind*. In contrast, cases on the *nature* and *quality* of the act are about *mens rea* because if the defendant does not understand what the act means they cannot intend to kill.

The law adopts a cognitive focus to the terms ‘*defect of reason* from *disease of the mind*’ (Eastman 1998: 117-118). There is no volitional element in this defence, it being simply concerned with impairment of reasoning. In *Clarke* [1972], *defect of reason* was held to be a cessation of the capacity for deliberation, for however brief a period. With regard to *disease of the mind*, *Rabey* (1980) confirmed Devlin J’s opinion in *Kemp* [1957] that what abnormal mental state qualifies is a legal matter, and is not determined by the opinions of medical witnesses (p.426).²⁰³ Yet s1 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 requires evidence from two or more medical practitioners before the special verdict can be returned, although this by necessity has to be based on legal criteria. Furthermore, Devlin J in *Kemp* opined that the law is not concerned with the brain but the mind, namely the faculties of reason, memory and understanding, because the phrase is *disease of the mind* not *disease of the brain* (pp.407-408). In *Sullivan* [1984] Lord Diplock upheld this view of the *mind* (pp.667-668). This plainly contradicts the position underpinning the experts’ perspective that was outlined in chapter two.

As just stated it has been held that what mental state qualifies is a legal matter. The judiciary’s interpretation of the word *disease* is, according to Lord Devlin in *Kemp* for example, that it does not matter if the aetiology of the impairment is *organic*, as with epilepsy, or *functional*; it is a matter of whether the faculties are impaired so that either of the consequences in the latter part of the *M’Naghten* rules arises (p.407). He maintained that the distinction between *organic* and *functional* is irrelevant because the law is not concerned with the origin or cause of the mental condition, but the mental condition itself. Furthermore, in *Cooper* (1980) it was held “that in a *legal sense* ‘disease of the mind’ embraces any illness, disorder or abnormal condition which impairs the

²⁰¹ p.108

²⁰² p.5

²⁰³ Slovenko (1999) discusses similar arguments by the U.S. judiciary.

human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion” (p.61; emphasis added). In addition, it was held in *Rabey* to be any malfunctioning of the mind, or mental disorder, where the primary source is a subjective condition or weakness that is *internal* to the accused. Again, it was said that this *does not need to be fully understood*, the crucial thing is it stopped the accused from knowing what they were doing (pp.519-520). Similarly, in *Sullivan* it was said that the legal concept *disease of the mind* is wide-ranging, encompassing all forms of mental impairment that can give rise to a defect of reason. If the effect of the disease is substantial enough to have the effect laid out in the latter part of the rules then it does not matter if the cause is *organic* or *functional*, but it has to persist at the time of the act even if the impairment is of a transient or intermittent nature.

However, despite these expansive remarks the fact that disease of the mind is a legal matter was reiterated in *Burgess* [1991] when reference was made to the case of *H.M. Advocate v Cunningham* (1963), where the court had held that the judge has to rule whether the medical evidence shows disease of the mind or not (p.95). In addition, the reasoning in *Kemp* was upheld despite scientific progress in the intervening years. In fact it was conceded by Lord Lane CJ in *Burgess* that “[w]hat the law regards as insanity for the purpose of these enactments may be far removed from what would be regarded as insanity by a psychiatrist” (p.97). So the judge is significant in two ways. First in terms of his capacity to control the evidence allowed into court, as it is not necessary simply to accept diagnostic categories the expert thinks applicable. Secondly through ruling whether the evidence establishes disease of the mind, which will form part of the judge’s directions to the jury. The focus in this respect is the effect on the mind, with no consideration of the details of the diagnosis.

In terms of judicial judgments on what qualifies, although previous statements imply a broad point of view, the defence is seen as important for protecting society from recurring dangerous conduct so indications of violence are seen as significant. Lord Denning in *Bratty* [1963] held that whilst major mental diseases such as psychoses and schizophrenia clearly are diseases of the mind, “any mental disorder which has manifested itself in violence and is prone to

recur is a disease of the mind” (p.412).²⁰⁴. In *Burgess* it was held that whilst danger of recurrence may be an added factor, the absence of the possibility is not a reason for saying it cannot be a disease of the mind (p.99).

As a result of the limited interpretation of each aspect of the rule, and concerns with dangerousness, the situation has arisen whereby conditions such as arteriosclerosis meet the criteria for the insanity defence (*Kemp*). Likewise the development of arguments distinguishing between whether the cause of the condition was internal *Hennessy* [1989] or external *Quick* [1973] to the defendant has complicated matters further (*Rabey*; *Roach* [2001]), with significant ramifications for sane and insane automatism (Simester & Sullivan 2003: 577-8).²⁰⁵ Primarily, the defence is now raised in relation to pleas of Unfitness to Plead.²⁰⁶ Table 1 provides examples of the diagnostic conditions that have been accepted by the courts.

Table 1: Case examples of Qualifying Medico-Psychological Conditions²⁰⁷

<i>Case Name</i>	<i>Year</i>	<i>Defence</i>	<i>Condition</i>
Kemp	1957	Insanity	Arteriosclerosis
Bratty	1963	Insanity	Psychomotor Epilepsy
Sullivan	1984	Insanity	Psychomotor Epilepsy
Burgess	1991	Insanity	Sleep-walking
Attorney General's Reference 1998	1998	Insanity	Schizo-affective Psychosis
Moore	2001	Insanity And Diminished Responsibility	Psychotic Affective Disorder + paranoid Psychosis

Discussion

The rules have been subject to much criticism. For example, the limited cognitive focus means the rules have a very narrow remit (Mackay 1995:96-7; Simester & Sullivan: 571). The fact the law takes no notice of medico-

²⁰⁴ The case also discussed the fact it was not just the defence that can raise insanity as the prosecution have a duty to ensure dangerous individuals are not at large.

²⁰⁵ See McSherry (2003) for suggestions for a general defence of mental disorder to avoid these anomalous consequences of the current legal approach. See also Arboleda-Flórez (2002)

²⁰⁶ Simester & Sullivan: 572-4.

²⁰⁷ Slovenko (1999) discusses the U.S. position

psychological definitions of terms supports the continued existence of such an outdated defence, along with the limited questions the law asks. The outdated division between mind and brain, outlined in chapter one, results in a limited focus on the impairment of reasoning faculties, which is reflected in the judicial reasoning. It contrasts starkly with current medico-psychological knowledge dealt with in chapter two.²⁰⁸ Critically, a true understanding of the mind and diagnostic conditions is not considered necessary (*Rabey*), it is held to be a legal matter, with the focus simply on the effect of the condition (*Kemp; Sullivan*). Thus this initial analysis of the intersection of law and medico-psychology in practice through the interpretative role of the judiciary indicates a symbolic use of expert evidence, an issue followed up throughout this thesis. It appears that the aim of judicial interpretation of phrases such as *disease of the mind* is to ensure that they serve a limited legal purpose, principally to deal with those deemed dangerous, while still permitting a moral exception to the usual standard of criminal responsibility. The operation of the defence shows that it is not simply supporting a moral position that the insane are not morally blameworthy because of the incongruities that have arisen through the restrictions placed on the terms within the rule. Is the causal connection of the mental state with the act necessary if the defendant would not have done the act without the mental disorder, which comes back to the issue of whether the defence should be one of status or excuse? It is possible to detain such individuals without the possibility of deterrence so the question should insanity be a status defence has to be asked (Mason et al 1999: 528- 34). Mackay and Kearn's (1999) research on insanity reports indicates a liberal approach has emerged through the generous psychiatric interpretation of the 'wrongness' limb, which has been accepted by the judiciary. The strategic use of experts and their evidence is discussed further in chapter four, along with issues about the ethics for the profession.

Judicial Interpretation of the Diminished Responsibility Defence

Introduction

²⁰⁸ See Denno (2003) on insanity in the U.S. and consciousness.

The operation of this defence is particularly important because it is the most frequently used. The definition of diminished responsibility in the Homicide Act 1957 s2(1) 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* in doing or being a party to the killing (emphasis added).

Unlike insanity, with diminished responsibility there are two cognitive strands to this defence because in addition to concerns with the capacity to comprehend the nature of the act and whether it is legally wrong there is a volitional dimension concerned with *the ability to exercise will power*. The latter has permitted the introduction of *irresistible impulse* into English law (Mackay 1999: 118). Assessing impulsivity presents problems for experts because the assessment of the defendant's thought processes is a retrospective evaluation, and

"it truly is difficult to determine whether a defendant was unable to resist an impulse to commit a criminal act or simply failed to resist it. Such difficulty exists regardless of whether the basis for the incapacity is neurochemical, genetic, neurologic, psychiatric, or psychodynamic" (Wettstein 1999: 112).²⁰⁹

The court acknowledged this in *Byrne* when it was held that there is no scientific proof on such matters and therefore the jury should approach it in a common sense way (pp.403-404).

Each aspect of the section has been debated vociferously. In *Byrne* [1960] Lord Parker CJ held that *abnormality of the mind*:

means 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 whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment (p.403: emphasis added).

In addition, the term abnormality of mind is qualified by reference to one of four specified aetiological categories within the statute. In *Byrne* it was held that these are not based on psychiatric meanings but they have to be determined by experts (p.403). The first aetiology is *arrested and retarded*

²⁰⁹ As an example he looks at the difficulty in trying to determine a link between mental illness and violence, referring to the DSM IV diagnosis of intermittent explosive disorder, which is very controversial.

development of the mind, which was included to encompass those not covered by the insanity defence because it was considered inappropriate to hold them morally responsible (Law Commission (LC) 2003: 142-144). Judicial interpretation of the categories of *disease* or *injury* was stated, in *Sanderson* (1994), to refer to organic or physical injury, or disease of the body, including, in this context, the brain (p.336). Conditions such as epilepsy, pre-menstrual syndrome and PTSD are included, which from a medico-psychological perspective are very different types of conditions. For example, PTSD comes within the remit of functional disorders in diagnostic manuals. However, whilst in *Sullivan* it was held the word *disease* for the purposes of insanity includes functional disorders, it was argued in *Sanderson* that functional disorders are covered by the other category, *inherent cause* even though PTSD is a functional disorder.²¹⁰ This shows how the judicial lack of understanding leads to technical mistakes. Mackay criticizes this interpretation of *disease* because it results in s2 having a narrower remit than the *M’Naghten* rules, and it implies that psychological injury is not an injury (2000: 61; 1999: 122-123).²¹¹ He argues that this has arisen because of the vagueness of the aetiological categories contained in s2.²¹² The LC claims that the position is unclear and “prefer the view that it does...” include functional disorders (2003: 146). Table 2 provides examples of the diagnostic categories that have been accepted by the courts.

Table 2: Case Examples of Qualifying Medico-Psychological Conditions

<i>Case Name</i>	<i>Year</i>	<i>Defence</i>	<i>Condition</i>
Dietschuman n	2001	Diminished Responsibility	Adjustment Disorder Alcohol Dependency
Galbraith	2001	Diminished Responsibility	Post Traumatic Stress Disorder
Fathi	2001	Diminished Responsibility	Depression with Psychotic Features
Martin	2001	Diminished Responsibility	Paranoid Personality

²¹⁰ It was argued in *Sanderson* that this was the intention of parliament (p.336).
²¹¹ Thomas-Peter & Warren consider the matter of personality disorders in terms of diminished responsibility (pp.86-9).
²¹² Also see the LC report (2003:140-6).

Moore	2001	Insanity and Diminished Responsibility	Disorder with Depression Psychotic Affective Disorder + Paranoid Psychosis
Muscroft	2001	Diminished Responsibility	Anti-social Psychopathic Disorder
Antoine	2000	Diminished Responsibility	Paranoid Schizophrenia
Sanderson	1994	Diminished Responsibility	Paranoid Psychosis

Discussion

It would appear that as with the insanity defence adopting the true meaning of the medico-psychological terms is unnecessary, indicating that again they serve the policy objectives of the legal system. The LC acknowledges that the fact that the term *abnormality of the mind* is based on a legal, as opposed to a medical, concept presents problems for experts and juries (2003: 135). Notwithstanding these issues the defence has actually been interpreted generously with less serious mental conditions included within its scope (Mackay 1999: 118-9; Eastman 1998: 118-121). Thus, despite the debates highlighted in chapter one mental conditions centred on emotional states, such as depression, anger and jealousy have been included, if they are not the result of some external cause. Yet these emotional states are frequently concerned with secondary social emotions, such as shame, which develop in response to particular social conditions, and become classified as conditions such as battered woman syndrome (BWS). Similar developments may occur in relation to the recently developed American psychiatric ‘culture bound syndromes’ (Parzen 2003). This category, which is only an appendix within the diagnostic manuals at present, covers clinical conditions concerned with psycho-social stressors. Parzen examines the legal possibilities this classification of conditions might provide for lawyers working in immigration and with minority groups. In contrast Reddy (2002) expresses concern that it also constitutes a pathologising of other cultures.

With regard to BWS Thomas-Peter and Warren argue that no other psychological theory has its foundations in the actions and intentions of a third party (1998: 88-9). They concur with Bowker’s viewpoint that the problems of

the battered woman are social not psychological, but forensic psychologists help the court understand the psychological consequences of the circumstances that prevailed prior to the offence.²¹³ Faigman refers to this as “politics masquerading as science” (1999: 71).²¹⁴ BWS emerged from the legal setting and it was not recognised as a diagnostic category until 1994, and formed the basis to the *Hobson* [1998] appeal. The condition can found both a diminished responsibility and provocation defence. Thus in practice the law is operating in certain circumstances to ensure that the consequences of social factors are a mitigating factor even though this contradicts legal theory, by presenting BWS, a legal rather than psychological concept, as psychological in order to support the legitimacy of the law.

In addition to the law’s derogation from the strict legal position, there are clearly experts providing the necessary evidence to support this practice. Mitchell’s interviews with nineteen forensic psychiatrists found that they considered BWS a convenient label to define a group of cases whose facts tended to vary considerably (1997: 628). It was not considered to be a psychiatric category so the facts of each case needed to be examined carefully, in particular the relationship of the defendant and victim. Mitchell’s respondents claimed there had to be some form of abnormality, such as reactive depression, but they considered the proportionality of the killer’s response to the abuse was a significant factor. Mitchell makes the point that proportionality is an aspect of provocation and self-defence, not s 2. The respondents maintained that many of these cases deserved sympathy but they cut across legal boundaries and some felt that it would better if the defences of provocation and self-defence were revised. In addition there was concern about the political use of s 2 to cover such cases, with the inherent loosening of the remit of ‘abnormality of the mind’ enabling undeserving cases to qualify. There was considerable variation in the responses to mercy killings coming within the remit of the diminished responsibility defence (p.629). Some considered that there ought to be sympathy towards this group of killers whereas others were more critical, depending on their attitude towards using

²¹³ L.H. Bowker, (1993) ‘A Battered Woman’s Problems are Social, Not Psychological’, in Gelles, R.J. & Loseke, D. R. (eds.) *Current Controversies in Family Violence*. California: Sage.

²¹⁴ Faigman also discusses the negative implications to using science as a solution to political and policy issues (1999: 72-6).

the law and psychiatrists to exculpate such individuals because it was thought to be morally right to do so. Ultimately it was suggested that there ought to be more reliance on a psychiatric investigation to establish genuine abnormalities rather than taking into account wider considerations and the gravity of the homicide. What can be seen is the moral evaluation that inheres in the expert's role of assessing the defendant's state of mind in relation to legal criteria.

It is clear that the issue is that of allowing moral exceptions through a legal set of rules which have to be seen to uphold particular principles. In fact in *Lindsay* (1997) the Scottish court held that it is more accurate to regard diminished responsibility as a mitigating factor than as a defence. Thus the defence is more concerned with the morality of the case than psychiatric concepts (Mackay 2000: 60). It seems that this is possible because the law focuses not on the causal foundations of the condition, but on the link that can be made between the effect of the condition and the requirements in the defence. A crucial aspect of this defence is the judgment about whether or not the condition *substantially impairs* the defendant's *mental responsibility*. The Butler report stated that it is a matter of degree but "the effect of the present law is to put strong pressure on the psychiatrist to conform his medical opinion to the exigency of avoiding a very severe sentence, fixed by law, for a person for whom everyone has the greatest sympathy" (1975: para.19.7). Thus the process by which the law can operate in such a liberal manner needs to be analysed.

Substantial Impairment: Judges, Juries and Experts

Introduction

In *Byrne* it was held that the jury are responsible for deciding if the accused has established the defence. Therefore how does the law achieve the liberal results that it does? Critical to the operation of the law is the nature of expert evidence, which is significant both for pre-trial decisions and the potential impact of that expert evidence on the jury in court. Expert evidence consists of testimony on the abnormality of the mind, and the ultimate issue of whether or not, in their *opinion*, the condition substantially impairs the defendant's mental responsibility. As noted in chapter one, Lord Goff states that the most

important influence on the court in formulating legal principles is the desired result in the case, therefore consideration has to be given to the judicial innovations regarding expert evidence in terms of general rules and the application in individual cases.

The two aspects to the expert's testimony need to be examined. The first concerns abnormality of the mind. Legal flexibility is provided by the fact the court focuses on the link that can be drawn between the condition, which includes non-psychiatric based aetiologies, and the legal rule that forms the basis of the second aspect of expert evidence. The judiciary has the capacity to include or exclude evidence, and the operation of their discretion is discussed in further detail in chapter four. It is clear from preceding discussions that it is not necessary that the law understand the meaning of the diagnostic categories or accept what the expert considers qualifies, as it is a legal matter. Thus the judicial role is an important one in terms of interpretations of the defence and with regard to the evidence entering into court before the jury. The second dimension to the expert's evidence refers to the matter of whether the abnormality of mind substantially impairs the defendant's 'mental responsibility', another legal concept, in the *opinion* of the expert. In *Lloyd* [1967] it was held that the impairment has to be more than trivial or minimal (p.175). It is an important development within procedural practice that the expert is *required* to give their opinion on the ultimate issue.

Again the matter of the medico-psychological co-operation required within this legal process is a significant issue.²¹⁵ Forensic psychiatrists are giving an opinion not only on the diagnosis, but also on whether the plea of diminished responsibility should succeed or not (Mitchell 1997: 622). Mitchell claims as a result of interview data that psychiatrists are not just using mental illness to rate individual responsibility, but also their own personal judgment about justice, blameworthiness and the most socially desirable outcome. Substantial impairment is about measuring responsibility and it was unanimously agreed that it is not possible to do this by any objective or scientific test. In Mitchell's study all but one of the respondents thought that the question was a moral and/or legal philosophical one (p.625). It was acknowledged that they had no

²¹⁵ The interviewees in this study in chapters 6 & 7 address the matter.

special knowledge or expertise to decide this matter and that the jury should decide, although it could be argued that the jury's competence to decide this is also questionable. The majority of the respondents claimed that they were not comfortable with expressing their opinion on such matters, especially if they were going to be subject to cross-examination. The experts did feel secure when relying on their professional skills and they were focused on the degree of (ir)rationality and the ability to exercise will-power, choice and self-control (p.627). It was claimed by the interviewees that psychosis was relatively easy to assess, whereas personality disorders were considered more difficult, as was depression, because there was not such a marked difference with 'normal, healthy' people.

Thus the emphasis was on adopting a common sense approach of considering how different the killer was to ordinary individuals or through linking the illness and act and reflecting on whether there would have been a killing without signs of a disorder or depression. Again, there was evidence that social and political factors were taken into account, such as the possibility of justifying one's opinion in court, judging how the court was likely to react and whether the circumstances made the outcome clear in advance. However, it is still an application of a diagnosis to a question about comprehension and choice by reference to a defendant's 'mental responsibility', which is an oblique term that has no determinate meaning. Therefore it can only be a value judgment about a connection between a descriptive mental state to a legally devised one, and then saying if the latter was substantially diminished. The fact that at no point is there an actual understanding of the medico-psychological view of the mind or term provides ample legal flexibility and considerable ethical difficulties for experts.

No Trial

In terms of pre-trial decisions, the requirement that the expert give an opinion has to be viewed in conjunction with the procedural change introduced through the 1968 case of *Cox*. In *Cox* it was held if the medical evidence from both sides supports the diminished responsibility requirement, the prosecution could accept a plea of guilty to manslaughter so the case need not go to trial (p.310). This appears to be the position in the majority of cases (Simester & Sullivan:

587). Thus the impact of the expert's evidence and opinion cannot be underestimated and this is despite what is considered to be the ill-defined nature of the categories contained in s2 whereby the expert is required to address legal conceptions of the mind. Furthermore, the legal scepticism about the accuracy of the mental health diagnostic process, and the problems lawyers have understanding the evidence, discussed in subsequent chapters, do not necessarily undermine the process either.²¹⁶

This practice has a number of important ramifications. First, although technically the jury are the ultimate arbiters they rarely are in practice. Therefore, the reference in *Byrne* to it being a state of mind that no reasonable person would think of as normal is somewhat redundant as experts more often than not make the decision. Secondly, while cases can be appealed and the judge oversees matters at the sentencing stage it undermines judicial control of expert evidence and the conditions qualifying for the defence. Judicial concern was expressed about this in the 1979 case of *Vinagre* where Lawton LJ said that pleas should only be accepted where there is clear evidence of mental imbalance (pp.106-7). This was in response to the acceptance of a condition known as 'Othello syndrome' (LC 2003: 134).²¹⁷ However, Lynch (1997) argues that judicial status influences tactical choices even when the judge is not physically present. But the main point is that vague legal interpretation of the defence permits liberal practices, whereby the moral judgements and legal objectives of those preparing the case can prevail.

Trial: Juries

Furthermore, when cases go to trial, although it is for the jury to decide whether the defendant's mental responsibility is substantially impaired, experts give a professional opinion on the matter.²¹⁸ The weight to be attached to the evidence has to be considered in light of rulings in *Byrne* where Lord Parker CJ stated that the jury were bound to accept the medical evidence if there is no other conflicting evidence that outweighs it (p.403). Similarly, in *Matheson* [1958] the court of appeal held that although juries make the decisions not experts, if the Doctor's evidence is unchallenged then the jury should accept it.

²¹⁶ See chapters 4, 6 & 7 on this last point.

²¹⁷ See arguments raised in chapters 6 and 8.

²¹⁸ See discussions in chapters 7 and 8.

However, this was qualified in *Din* [1962] where it was held that the jury could reject evidence where it assumes facts that have not been proven; if it has been severely challenged under cross-examination, *Walton* (1977); and if the evidence lacks weight and quality, *Kiszko* (1978).²¹⁹ In *Khan* (2000) the jury decision showed that they had rejected the expert evidence and the appeal court held that the jury could evaluate the expert's opinion in light of all the evidence about the defendant's actions both before and after the incident to arrive at their decision. So the jury can have grounds to reject medico-psychological evidence, but essentially if the experts ultimately agree, having taken all the facts into consideration, then the jury is not expected to reach an alternative conclusion. However, as a result of the possibility that the case will not go to trial if the experts agree then in the majority of cases reaching trial the expert evidence will be contested, although the court process has particular devices to control the admission of evidence, as chapter four discusses.

This illustrates another way in which legal control is sought. The practice of experts commenting on mental responsibility has been challenged since 1975, when the Butler report stated that “[i]t is either a concept of law or a concept of morality; it is not a clinical fact relating to the defendant...” (para.19.5). Griew suggests that the practice is permitted because it is a device that allows the court to stretch the scope of the section (1988: 84). The LC concede that there is a paradox because as a matter of principle the expert witness should not testify on the matter of whether or not there was substantial impairment of the defendant's mental responsibility at the time of the killing, but “it is felt that the concept is so difficult for juries that they require the assistance of expert testimony” (2003: 148-149). This line of argument supports the practice.

Juries also have a summary of the evidence as part of the judge's directions at the end of the trial. This could influence jury perceptions of the evidence by the manner in which the judge conceptualizes it, and presents it in relation to other evidence and the facts of the case (*Moore* (2001); Peay 2003: 166). Thus, while Winter (2002) examined the framing of femininity and sexuality, similar arguments could be made for the significance of attitudes towards the mentally ill, the medico-psychological professions, risk, treatment, culpability and

²¹⁹ The data chapters suggest this level of evaluation is not so easy for the jury.

punishment for the form the judge's directions take. It is also possible for the judge to withdraw consideration of the defence from the jury if he considers that there is no evidence for a reasonable jury to conclude that the defendant's mental responsibility was substantially impaired (*Campbell* (1986): 255). This is an important option. Factors that might inform judicial interpretations of expert evidence and inform their decisions have already been discussed in part in preceding chapters, but there are additional observations in chapters four, six and seven.

Discussion

It is constitutionally important to be clear who is deciding whether or not a syndrome is to be classed as a mental disorder because it constitutes the basis to being classified as a mentally disordered offender, with all the consequences that brings (Mustill 1998: 82). This chapter shows that judges are shaping the remit of the medico-psychological terms within the defences without appropriate training, so they can only ascribe a legal meaning in line with their legal training, which will be based on the viewpoint outlined in chapter one. If the law is not trained to understand the science, and if the issue is only about the effect that the condition has, and the expert is making the link by stating that the condition has the effect the legal criteria seek to determine, there is a question mark over limiting the conditions that can qualify if they are in the diagnostic manual. Moreover, the scope of factors that inform medico-psychological understanding of the mind, which were described in chapter two, that are far more extensive than the legal perspective, could satisfy the defence as the technicalities encompassed by a label are not overtly acknowledged, so theoretical legitimacy of the law remains unchallenged. For example, BWS and Othello syndrome are emotional and social oriented conditions couched as medico-psychological conditions. However, it would seem that having a congruent legal process would undermine the legal control that has developed that enables a flexible response to individual cases, in legal terms.

It appears that the courts are using psychiatric evidence to secure what they see as a just outcome, for example in mercy killings and cases involving battered wives. Critically, from the discussions it is plainly a benevolent conspiracy between psychiatrists, judges and prosecutors to stretch the evidence provided

by the humane medical profession (Butler report para.19.5; Mackay 2000: 79; Simester & Sullivan 2003: 587). Furthermore, as most cases do not go to trial then this is not going to become public knowledge as the grounds for the defence are not debated and the law maintains its legitimacy because the legal position is not overtly undermined. On the other hand Mackay suggests that one explanation for the statistics in chapter one showing that there are very few cases of diminished responsibility compared with ten years ago could be that psychiatrists, the prosecution and juries are taking a more sceptical view of the plea (1999: 117).

It should not be overlooked that with the diminished responsibility defence there is a guilty plea, with the defendant's mental state a significant factor at the sentencing stage, which is dealt with by the judiciary. Problems have arisen over deciding whether the defendant should be punished or receive treatment, which were discussed in chapter one and will be examined further in chapter four. The legal view stated in *Smalling* (2001),²²⁰ was that it is important that the defendant is sentenced for the crime committed and not for psychological failings to which he may be subject. This implies just deserts rather than a focus on treatment. The central issue is one of public protection and the assessments made of the potential risk the defendant presents.

Legal Conundrums

There are currently two mental states that present problems for the courts, psychopathy and intoxication, which will now be explored. In addition there are possible implications for the principle of criminal responsibility from emerging biological based explanations. Thus the possible connotations of the current neuroscientific understanding of the mind, discussed in chapter two, for the operation of the law will be more specifically addressed in this chapter.

Psychopathy

Psychopathy presents problems for both the legal and medico-psychological professions in terms of responsibility and detention.²²¹

²²⁰ Which cited *Criminal Cases Review Commission Ex.p. Pearson* [1999]

²²¹ For a historical overview of its development as a clinical condition and term see Walker & McCabe (1973) and Lewis (1998). For a gender comparison see Cale & Lilienfeld (2002).

Responsibility

Personality disorders,²²² which include psychopathy, have successfully been invoked in relation to the diminished responsibility defence (*Byrne; Muscroft* [2001]). Differences between the legal and medico-psychological professions concern understanding of the condition and definitions. For example, the law equates anti-social personality disorder (ASPD) with psychopathy, whereas mental health professionals do not (Scottish Law Commission (SLC) 2003; Hare 1993).²²³ ASPD concentrates on behavioural traits that appear to be solely concerned with legally prohibited behaviour, which are subject to frequent reconsideration, which overlooks the personality features identified with psychopathy (Murphy & Vess 2003: 13). The law is concerned with criminal behaviour, and in particular behaviour that represents a risk to social order and could result in harm. Therefore, whilst criminologists consider antisocial behaviour is behaviour that breaks the law (Nuffield report 2002: 89-90), psychologists take a broader view, and in line with the perspective detailed in chapter two medico-psychologists see it as a matter of anti-social traits because they consider it also encompasses attitudes, beliefs, interests and preferences for taking advantage of, or harming others, or a willingness to break the law, focusing particularly on aggression.²²⁴ Psychopathy, like other personality disorders, is concerned with domination by a particular personality trait that pervades a person's inter-relational style, with no specific connection to criminal behaviour. Psychopaths are not all criminals, the condition is not just about anti-social traits per se, and there are scales of the severity of the traits labelled psychopathic. However, as discussed previously, the law does not consider it has to adopt the medico-psychological meaning of mental health terms, particularly when this would thwart consideration of issues inherent in the legal objectives concerned with social order and public protection.

What is the focus within legal cases? *Fathi* [2001] was concerned with dual diagnosis, psychopathy with depression, and with and without psychosis, which has implications for detention decisions, as discussed below. In *Muscroft*

²²² Manning (2000) explores how the diagnosis of personality disorder emerged and how it has been used despite the less than solid basis for the diagnosis, which is controversial in the psychiatric profession.

²²³ Medico-psychological interviewees discuss this in chapter 7.

²²⁴ See Lilienfeld (1998) for an overview of testing and Skeem et al (2003) review the spectrum dimension to psychopathy.

[2001] the court focused on whether a personality disorder that amounts to a persistent disorder, or disability of the mind, resulting in abnormally aggressive or seriously irresponsible conduct, constitutes psychopathic disorder within the meaning of s1 of the MHA 1983.²²⁵ Thus the legal issue was whether the label psychopath could be used to explain violent and anti-social behaviour; the law tries to ascertain a diagnostic category that will explain behaviour. It is also significant because of the link being made between MHA categories and the ill-defined Homicide Act categories. In contrast, disagreements between the experts focused on the severity of personality disorders necessary to qualify as *substantial* because this is the crucial aspect of the expert's role.²²⁶ Thomas-Peter and Warren suggest that disagreements amongst medico-psychological professionals give the impression that experts are claiming the defendant's mental responsibility is substantially diminished in order to moderate punishment (1998: 87), which would appear to fit in with preceding assertions about the operation of the diminished responsibility defence.²²⁷ Significantly, the final arbiter in contested cases is the jury.

But criminal responsibility is concerned with the cognitive capacity of the individual, and with diminished responsibility the capacity to choose otherwise. In terms of cognition, psychopaths understand the nature of their acts, and whether the law prohibits them; it is their lack of empathy for others that distinguish them (Ciocchetti 2003; Benn 2003; Herpertz & Sass 2000). Explanations of decision-making referred to in chapter two maintain that empathy is an important factor.²²⁸ For example, Damasio's *somatic marker hypothesis* suggests that without emotional competence a vital part of the decision-making process is missing, although O'Carroll and Papps (2003) have challenged the veracity of this theory. Furthermore, Hare, a leading expert on psychopathy, has examined the fact that psychopaths do not possess the normal range of primary and secondary emotions, which are important factors in conforming to social norms (1993: 44-52).²²⁹ If psychopaths do not have all the levels of awareness with which to contextualize their decisions then can they choose otherwise and therefore should they to be judged responsible in the

²²⁵ As noted earlier, violent behaviour is a central concern for the law.

²²⁶ See the discussions of medico-psychological respondents on this issue in chapter seven.

²²⁷ This would not appear to be the case in the data in chapter 7.

²²⁸ Violence and faulty emotional regulation is discussed by Putnam & Larson (2000)

²²⁹ Also see chapter 2; Lerner & Keltner (2000); Benn (1999); Raine et al (1998)

same way that everyone else is? In essence they lack moral awareness so fundamental to responsibility for choices and actions, but cognitively they can appreciate that the action is legally wrong (Haji 1998).

As preceding discussions show, the operation of the law does not necessarily adhere to the literal application of legal rules, with moral arguments and procedural practices supporting a flexible approach. The condition does not come within the remit of the insanity defence because however insane a heinous act may appear there was still the understanding by the perpetrator that the act was wrong and there is no volitional element to argue that they could not resist the impulse. Mason et al, in the context of a discussion on the insanity defence in Canada, make the point that if the emotional aspect of decision-making is taken into consideration then emotional as well as an intellectual appreciation of an act is necessary and this could mean that anyone without remorse could be considered not guilty (1999:531). Whereas the diminished responsibility defence incorporates a volitional aspect, which enables a broader conception of the inability to choose to act in a morally appropriate way, and in addition the defence is a guilty plea, with the abnormality of mind a mitigating factor at the sentencing stage. There is also the fact that other personality disorders are accepted under the diminished responsibility defence, and as the SLC discussion debates, this begs the question whether it is justifiable to treat psychopathy differently.

The Scottish Position

The discussion to date indicates psychopaths engender an ambivalent reaction and the recent SLC (2003) report illustrates that the law has policy concerns about including psychopaths within the diminished responsibility defence. The current Scottish position was established in *Galbraith* [2001] and psychopathic personality disorder was explicitly excluded on *policy* grounds, even though it would technically fall within the wider definition developed in the case (p.17). It was held that the boundaries of legal doctrine were being established and it did not matter that a psychiatrist would recognize the disorder. The SLC challenge the basis to the decision, which was founded on the 1946 decision of

Carraher,²³⁰ because the defendant was also intoxicated, making the circumstances particular to the case (p.39). Moreover, no policy reasons were actually given in *Galbraith*, whilst there were two given in *Carraher*. The first was that the remit of diminished responsibility should be narrow, the opposite to the reasoning in *Galbraith*, and secondly concerns were expressed about ‘trial by psychiatry’. However, the SLC point out that expert evidence is needed on matters of mental abnormality, and question why it should be assumed that the evidence on psychopathy will be any different to that for any other disorder. It was acknowledged that there is a lack of agreement about the condition within medico-psychology, but it was said that this is no different to other contested cases. Furthermore, the case of *Williamson* (1994) had arrived at the same position as *Galbraith* by following the case of *Savage* (1923). Finally, the SLC said that including psychopathy has not affected the operation of the English defence.²³¹ The SLC claims:

“A key feature of psychopathic personality disorder is that the person concerned lacks the normal moral and social constraints on his capacity to control his actions. As this condition is not based on a clear form of mental disorder, it does not serve as a ground for relieving the person from criminal responsibility. However although a person’s personality will not excuse his conduct, it is proper to make allowance for his personality in assessing the full extent to which he is to blame for his conduct. Making allowance for conditions which do not provide full excuses is the very rationale of the plea of diminished responsibility” (p.41).

Thus the SLC maintains there is no support for excluding psychopathic personality disorder from the scope of the diminished responsibility defence. On the other hand Reznek does argue against the inclusion of psychopaths in the defence (1997: 309). Reznek maintains that there is no natural division between those with character defects and personality disorders, and yet the latter are excused. Therefore, because of the political consequences of this discrepancy and the potential impact on the concept of responsibility, psychopaths should be considered evil, not ill. The efficacy of this argument is affected by how one perceives the remit of personality disorders *vis-à-vis* character, and what is understood by psychopathy. Certainly if the legal understanding of psychopathy is solely that it is an explanation for anti-social behaviour then it is hard to know when someone qualifies for the application of a diagnostic label, and how difficult it must be for experts having to fit their

²³⁰ Which followed the *Kennedy* (1944) case

²³¹ See also *DPP v Terry* [1961]

appraisal of the defendant into legal rather than medico-psychological terms in light of the very different perceptions of psychopathy.

Detention

The diminished responsibility defence allows the judge to decide between prison and hospital, although hospital detention requires expert evidence to satisfy the requirement that the condition is treatable (MHA 1983 s1(2) and s3(2)(b)). The law is responsible for supporting social order and public protection and there are doubts about psychopaths' ability to experience remorse and respond to treatment.²³² Psychopaths present problems to both prisons and hospitals. For example, prison is supposed to act as a deterrent, but the legal assumptions underpinning deterrence do not apply to psychopaths because they lack fear, which is integral to our avoidance of punishment and pain (Hare: 54). Hare's discussions reflect those in chapter two because his explanations about the development of the capacity for inner control in line with social norms refer to childhood, the impact of nature and nurture, and the importance of socialization for choices (pp.165-69). In addition Hare claims that psychopaths do not accept responsibility for their actions, attributing fault to the other person (p.75). With regard to hospital it is usually assumed that psychopaths are not treatable, although there have been suggestions about the possibilities of working with their dominant personality traits, such as narcissism or borderline (Murphy & Vess: 24). However, Hare argues that as psychopaths do not see their traits as problematic and detrimentally affecting their judgment they are untreatable.²³³ There is a growing interest in biological explanations through brain scans,²³⁴ but it would seem that currently the prevailing view is that they are untreatable.²³⁵ The consequence of this is that hospital detention is not an option under the MHA and because of the potential danger the defendant presents, as a result of the current climate and recent legal changes, the defendant can be given a longer than normal sentence, as discussed in chapters one and four.²³⁶

²³² See Reid & Gacono (2000), & Stalenheim (2004) for evaluations of the issue of treatability.

²³³ Ciochetti (2003) discusses this in the context of their failing to see their actions as part of relationships.

²³⁴ Kiehl et al (2004), although Adshead (1999) expresses reservations and discusses other explanations.

²³⁵ Canli & Amin (2002) discuss the increasing recourse to neuroimaging to uncover the neural basis to emotion and personality and the limitations of scans in the investigation of predicting psychopathology.

²³⁶ See also Bartlett & Sandland (2003: Ch.6).

A judge's detention decisions are informed by expert opinion. Thomas-Peter and Warren argue that the decision is a matter of luck "determined by which psychiatrists are invited to submit reports to the courts" (p.90).²³⁷ They suggest that this is exacerbated by the fact that reports are undertaken by psychiatrists who have not developed standardized objective methods of describing personality disorders, in contrast to psychologists. However, in addition to the uncertainty prevailing in the medico-psychological fields, it could also be argued that the legal issues the mental health specialist has to address give rise to problems as well (Cunningham & Reidy 1998; Hodgins 1998). Mason et al debate viewing the condition as one of character rather than illness and then question whether a person should be punished for what their character dictates (1999: 540-1). However, despite this philosophical point, after addressing the treatment issues they conclude that on the grounds of public safety prison is the most suitable option. Owing to the fact that hospital detention is not subject to the same determinacy through judicial tariffs, Grounds (1998) suggests that psychopaths be sent to prison and any treatment initiatives that may be thought appropriate could lead to a hospital order, but they will be subject to a determinate sentence. But the backdrop is one of concern about dangerousness, as the introduction of the DSPD demonstrates.²³⁸ Chapter one also highlighted the concerns that have emerged about releasing such individuals back into the community and the measures that have been introduced, or that are proposed, to bolster provisions for continuing detention. Thus discussions and decisions about psychopaths take place within the context of these legal concerns so, as previously argued, an actual understanding of the condition is not relevant, with the moral overtones regarding responsibility impacted by concerns about public protection and therefore the issue of detention and release. The legal procedures described facilitate the necessary legal flexibility.

Intoxication

"Alcohol is a drug which is capable of altering mood, perception or consciousness, of loosening inhibitions and self-control, and of impairing movements, reactions, judgment and ability to foresee consequences" (Card 2001: 619). Whilst intoxication clearly affects cognitive capacity, the matter is

²³⁷ See the discussions in chapters 6 and 7.

²³⁸ For a discussion about the debates on options for change in Scotland see Crichton et al (2001)

addressed by the court through evaluating whether or not the drinking of the alcohol was a *voluntary* action, because we are responsible for our choices and actions, and it is assumed that the effect it would have is known.²³⁹ It is a common law principle, explicated in *Cooper* (1980) for example, “that in a *legal sense* ‘disease of the mind’ ... [excludes] self-induced states caused by alcohol or drugs,...” (p.61), which reflects s1(3) of the MHA. Even involuntary intoxication with the absence of moral fault cannot provide a defence if the court maintains that the accused had the necessary intent (*Kingston* [1995]). What has been debated is the fact “habitual drinking or drug-taking can sometimes lead to permanent changes in the brain tissues as to be accounted insanity, such as delirium tremens or alcoholic dementia” (Card: 631; *Davis* (1881)).²⁴⁰ The current leading authority for the consideration of intoxication in applying s2 is *Dietschmann* [2003], which is based on authorities developed since *Di Duca* (1959). With regard to the aetiological categories, in the latter case it was held that it was unlikely that the transient effect of alcohol, as a result of voluntary intoxication, however it affected the brain, could constitute *injury* within the meaning of s2. Similarly in *Fenton* (1975), confirmed in *Gittens* (1984), it was held that in the normal course of events drink is not seen as giving rise to an abnormality of the mind under *inherent cause*.²⁴¹ In *Tandy* [1989] it was affirmed that alcoholism could amount to abnormality of the mind, and *disease*, if it causes brain damage or results in irresistible cravings so that consumption is no longer voluntary. The latter requires the expert and jury to decide at what point it can be said that someone cannot resist an urge to drink or take drugs.

As the contested opinion of experts in *Dietschmann* show, there is debate within the medico-psychological profession as to whether alcoholism is a disease and should be conceived in this way.²⁴² Valverde states that, “drunkenness, even if psychiatrically classified as rooted in a prior condition (dependence), is rarely thought to excuse crimes, although it may serve to mitigate the sentence” (1998: 2). She locates this view of intoxication in a

²³⁹ However see the case of *Kingston* [1995]. For a review of the U.S. position see Marlowe et al (1999). The Irish Law Commission reviewed the matter in 1995.

²⁴⁰ It was affirmed in *DPP v Beard* [1920] & *A-G for Northern Ireland v Gallagher* [1963]

²⁴¹ Mackay criticized the test in *Fenton* because the inability to resist the urge to drink was linked to the first drink of the day (1995: 197).

²⁴² See also chapter 7

social context that values personal freedom, and free will, which is evidenced by the self-help ethos of addiction groups (p.3). Morse's examination of the legal and scientific images of addictive behaviour concludes that the disease model cannot fully explain addiction because it "inevitably involves human action and is therefore subject to moral evaluation" (2000: 49). This type of condition does not incur the same moral benevolence as other types of disease, as the exclusion of drug and alcohol problems from the MHA provisions would suggest (Bartlett & Sandland; 241). It would appear that the legal desire to limit the opportunities to those who are under the influence of drink or drugs has led to some contentious decisions. For example, Mackay takes issue with the judicial reasoning with regard to the aetiological category *injury* in the case of *O'Connell* [1997]. The case involved an adverse reaction to a prescribed drug but the court dealt with the matter by comparing it to voluntary intoxication (1999: 123-4). Yet the issue for the court is the malfunctioning of the brain and the common law principal is only that the voluntary consumption of alcohol should not afford an excuse to committing a criminal offence.

However, what if alcohol is only one factor that the defendant relies on for the purposes of s2(1)? In *Fenton*, and approved in *Gittens*, the court held that the jury have to disregard voluntary intoxication, which is not normally covered by *inherent causes*, and consider whether the other elements establish the defence. Subsequently the court of appeal in *Atkinson* [1985] and *Egan* [1992] held that the defendant could only succeed if the jury were satisfied that the killings would have occurred even if the defendant had not been intoxicated. The House of Lords in *Dietschmann* [2003] expressed disapproval of these authorities. Lord Hutton stated that, "the subsection does not require the abnormality of mind to be the sole cause of the defendant's acts in doing the killing" (pp.1216-1217). He maintained that "a brain-damaged person who is intoxicated and who commits a killing is not in the same position as a person who is intoxicated, but not brain-damaged, and who commits a killing" (p.1227). This is a more benevolent approach. But the public policy aspect of the decision is clear, "[i]f a person voluntarily takes a drink, knowing or believing that it will result in an uncontrollable craving for more alcohol, the defence of diminished responsibility will not be available" (LC 2003: 151).

Responsibility: Biological Explanations

In light of the focus of the thesis, this final section reflects on potential issues, as a result of emerging biological based explanations, for the legal principles of responsibility and punishment, which make no sense without free will.²⁴³ Technically, proof of a lack of moral agency, whatever the cause is what constitutes an excuse, but plainly policy considerations do affect the operation of the law, hence the tendency to pragmatism rather than evidence-based decisions.

The State of Scientific Evidence

In recognition of the potential importance of the trend towards biological explanations for behaviour the Nuffield Council for Bioethics (2002) reviewed the current state of scientific knowledge in the field of behavioural genetics.²⁴⁴ They examined three areas of criminal justice: *exculpation*, whether genetic information about a behavioural trait should affect the attribution of responsibility; *sentencing*, whether this is the stage at which such information should be taken into account; and finally *prediction*, whether the information should be used to identify future possibilities of anti-social behaviour. The three areas examined encompass the two aspects of medico-psychological involvement in the legal process; in the assessment of criminal responsibility and in respect of reports on the potential risk and danger the defendant represents when sentencing decisions are made. The last category represents an additional way in which medico-psychological research may be used, the implications of which are addressed in the subsequent discussions.

In the review it was stated that the main clinical categories to consider for legal purposes are the personality disorders; *conduct disorder*, which refers to the under 18s, *anti-social personality disorder* and *psychopathology*. As previous discussions show these are the clinical categories defined in relation to behaviour that is associated with criminal behaviour, but clearly other diagnostic categories affect cognitive capacity and therefore mental responsibility. It was stated that currently *personality traits* and *disorders* are

²⁴³ Genetics and criminality is a long standing debate, see Williams (1994: Chs. 6-7).

²⁴⁴ They examined conditions arising from environmental trauma: XYY males, battered spouse syndrome, battered child syndrome and PTSD; and the biological syndromes premenstrual syndrome, postnatal depression, Huntington's disease, dementia and monoamine oxidase A (MAOA) deficiency (pp.160-1).

descriptive categories rather than distinct biological categories (pp.81-89).²⁴⁵ Heritability estimates based on twin studies indicate that the genetic contribution is substantial and roughly equal across all aspects of personality.²⁴⁶ The report also assesses studies into the causes of violence, noting that violence is not usually a separate area of study in behavioural research, but linked to other forms of antisocial behaviour (pp. 93-96; Hamer & Copeland 1998). With regard to violence, it is claimed that the fact that genetic effects are found to be rare and inconsistent is attributable in part to the samples studied. For example, individuals labelled violent criminals are not the only perpetrators, they are just the ones that have been caught. Also some will be persistent offenders whilst others will have committed only a single offence. However, these problems will be true for most studies of violence.

Nonetheless reservations were expressed about the current state of scientific knowledge, reflecting challenges to adopting a myopic focus on genes referred to in chapter two. The report concludes that existing knowledge on the impact genes have on the operation of the brain is limited, so it is not possible to make definitive links between particular genes and personality traits. In addition, not all the genes that influence the brain have been identified yet.²⁴⁷ Furthermore, traits may be attributable to the functioning of neurotransmitters, in particular monoamine transmitters, dopamine, serotonin and noradrenaline (Moore et al 2002; Berman & Coccaro 1998). Finally, it is impossible to measure the contribution of environmental factors (Rutter & Silberg 2002). Therefore, because of the polymorphous nature of the genesis of behaviour it seems unlikely that a direct link between a particular gene and behaviour will be established (Alper 1998; Godfrey-Smith 1999). There appears to be no deterministic biological basis to any diagnostic categories, which may have an impact on the mental state required for criminal responsibility, yet concern centres on identifying possible links with categories that focus on anti-social behaviour. "Because 'crime' itself is not inherited, researchers are working to investigate which features of personality and cognitive function may be

²⁴⁵ There is a useful chart on traits on p.82.

²⁴⁶ Hamer & Copeland (1998) look at twin studies in the context of genetic roots to personality.

²⁴⁷ There is an outline of the studies that have been undertaken into identifying genetic influences on personality traits (pp. 84-5).

associated with antisocial behaviour” (Nuffield report: 96).²⁴⁸ The Nuffield report claims that there seems to be a ‘converging on the possibility’ that “genes act to augment the resistance of young people to environmental factors that would otherwise increase the likelihood of antisocial behaviour” (ibid: 96). As part of that research more attention is being paid to trying to assess the impact of environmental factors, which could prove important for prevention strategies.

Genetics and Individualizing Responsibility

Previous debates show that legal reactions to evidence need to be construed recognizing overriding legal objectives inherent in the rule of law. The interaction of law and science includes important political dimensions that are supported by a particular view of individual responsibility, which obscures the social context.²⁴⁹ Horton II makes the point that the law is concerned with what has been done and what the person has become, not what caused them to become that way.²⁵⁰ Yet chapter one introduced the dialectical perspective that suggests that crime is a socially constructed phenomenon. Criminological theories provide such explanations of criminal behaviour (McGuire 2000). Critically, there are a number of ways that embracing genetic-based evidence further undermines the dialectical perspective. For instance, Crossley (1999) argues that genetic defences internalize the source of criminality within the individual, thereby relieving society of responsibility.²⁵¹ In fact, Pickering Francis suggests that genetic information, as with other medical information, could be used to place more responsibility on the individual. Similarly, Novas and Rose (2000) assert that there is a trend amongst patients receiving genetic information to take responsibility for their life choices. They look at the potential impact of genetic research on our individual sense of agency, which is so integral to the operation of the principle of individual responsibility. This ties in with the point made in chapter two about the importance of social and normative concepts for the structure of self and agency. Certainly it would seem that there are pragmatic reasons for limiting exculpatory conditions because if genetic or environmental excuses were too broad then a large

²⁴⁸ For example Raine et al (2000); Pontius (1997)

²⁴⁹ For example Farrington (2000) examines childhood predictors for ASPD.

²⁵⁰ See Morse (1999a) on the basis of excuses being an issue of irrationality rather than causation.

²⁵¹ See also Kaplan (2000)

number of defendants would be able to claim that their behaviour was determined by past experiences and influences, removing the need to make any moral effort to comply with society's rules. Potentially, everything would be excusable by everybody. It is, as always, the legal approach to determining where the line should be drawn that is critical.

Evidence and Courts

What the debate shows is that there are social implications of medico-psychological research, and it has to be viewed in relation to the two dimensions of the cases, evidence informing the assessment of responsibility and detention decisions. A matter that pervades the use of medico-psychological evidence is the issue of the difficulty of classifying individuals into the appropriate category with legal cut-off points "more arbitrary than based on evidence" (Nuffield: 91). In contrast to the dichotomous approach of the law, medico-psychology measures matters on a continuum, as chapter two illustrated. For example, antisocial behaviour is "a trait that is normally distributed and therefore able to be measured as part of variation in the normal range" (ibid: 91). But, as the arguments of Cane discussed in chapter one state, the law has to make a decision. This thesis is highlighting that what is important is the manner in which the concepts and categories are used and applied by legal and medico-psychological professions to construct a framework for labelling and describing subjective mental states and behaviour.²⁵² As chapter two asserts the social use of information to construct categories is important and both law and medico-psychology do this, with the cases under scrutiny proving a forum where the two disciplines interact. The legal decision-making process has social ramifications in terms of the outcome of the case, and the use of medico-psychological evidence impacts on an individual's sense of self, which is constructed from our experiences and the concepts socially available. Genetic evidence is potentially unique if a direct cause and effect link can be established.

Summer examines U.S. cases where genetic defences based on scientific evidence such as scans have been raised, demonstrating that such evidence is

²⁵² Although McSherry (2003) does discuss a possible insanity defence that acknowledges the spectrum approach of the medico-psychological professions, discussed in chapter 8.

currently not sufficient to satisfy the courts (1999: 187-190). For example, scans have been produced to show that psychopaths process emotion-laden words differently.²⁵³ Crossley argues that 5 levels of evidence would need to be satisfied by a defendant for a genetic defence to succeed (1999: 174-9). The defendant would have to establish: (1) that he had the gene; (2) that possessing the gene creates a statistical predisposition to the particular behaviour in question, e.g. aggression, (which would be difficult on currently available evidence); (3) that the genotype had given rise to the phenotype in that individual; (4) that there was a causal link between the defective gene and the behaviour, that it was not attributable to any other cause. (Yet it has been shown that behaviour is considered to be the result of both nature and nurture, purely genetic conditions are very rare); (5) that as a result of (1) to (4) the defendant's culpability for their behaviour was removed and therefore they should be excused. So a genetic defence would need to definitively establish either the cognitive or volitional element, even though this level of authoritative inter-connected proof is not possible or required with other conditions. Furthermore the genetic prerequisite ignores the arguments about the links between neurochemicals such as serotonin, and, for example, aggressive behaviour.²⁵⁴ Prins (1998) examines the difficulties in establishing clear causal connections between mental abnormalities and crime.

With regard to responsibility, psychiatrists might be looking for causal explanations for an individual's behaviour, but the question remains, what proportion of our behaviour is determined, and by what factors (Kovnick 1999: 213; Looren de Jong 2000)? Moreover, as Horton II remarks, how could a gene interfere with the formation of criminal intent (pp.194-5)? Certainly, incorporating and linking genetic information to diagnostic categories of mental states makes a connection with the capacity to reason, which is the basis of the current legal approach. However, Pickering Francis sounds a note of caution about equating genetic information with medical information because medical information is generally evidence of a function-impairing condition whereas genetic information can relate to the genotype, phenotype, or a fully

²⁵³ Certainly Soderstrom et al claim that their brain scan study of violent psychopaths adds to the evidence "indicating that aberrant fronto-temporal activity may be a factor in violent behaviour" (2002: 82).

²⁵⁴ See Lesch & Merschdorf (2000)

expressed condition with symptoms (1999: 246). Moreover, of major concern to the law is ASPD and as Horton II claims, it does not involve features associated with major mental illnesses that entail a cognitive break with reality therefore identifying an antisocial gene may not help defendants (1999: 192).

Pickering Francis concludes that courts and policy makers should treat genetic information with extreme caution (p.248), whereas Summer argues that lawyers should use whatever defence they can to help their clients. What can perhaps be inferred from Summer's and Pickering Francis's position is the tension that exists between the defence and prosecution position on the use of the latest scientific evidence. The defence objective is to get the best deal they can for their client, while the prosecution represent the state and its inherent legal objectives of supporting the public interest in social order and public protection.²⁵⁵ This tension is a factor of the adversarial process although there is clearly collusion with regard to certain conditions, such as BWS.

Wells argues that it is unlikely that the genetic evidence is going to affect the social rhetoric on responsibility encapsulated in the law (1998: 738-9). She suggests it may lead to further categorization and measures of control within the criminal justice system. Similarly, Moldin claims that the link between genes and behaviour is not likely to be direct enough for the courts, at most there may be predispositions,²⁵⁶ although links between mental illness and genes may become important, if any are found, as mitigating circumstances (1999: 137-8). The development of diagnostic categories is ongoing, but it would also seem that referring directly to genetics, with its inherent overtones of determinism, is too overt a confrontation to the legal matters referred to in chapter one, but it might be introduced more surreptitiously through the diagnostic categories that remain largely unexplained. There is no direct exploration of diagnostic categories in the legal practice described earlier in the chapter. Furthermore, the judiciary controls the sentencing stage, although experts provide information at that stage too, but they retain legal control with regard to issues of public protection centred on concerns about risk and dangerousness.

²⁵⁵ The Code for Crown Prosecutors (2000) lists possible public interest factors for the purposes of deciding whether or not to prosecute.

²⁵⁶ For example see Dutton (2002) on the neurobiology of abandonment homicide.

The Jury

As earlier discussions show not only judicial responses to evidence need to be considered, but also those of the jury.²⁵⁷ Crossley maintains that public perceptions of science are important for evaluations and judgments about evidence, with psychiatry and psychology seen as soft science because they are subjective and imprecise, whereas genetics is perceived as hard science because it appears to offer objective proof. Thus, the development of biological explanations could affect the credence given to expert medico-psychological evidence. But Crossley suggests that the public need to be educated or political, or ideological forces may misappropriate the evidential process (p.179). The evidence in this chapter, which is reinforced by arguments in chapter four, suggests the legal control on the evidence heard and the interpretation placed on it is likely to affect jury perceptions. Additionally, Perlin (1999) considers that the impact of the new science is likely to be limited because of prevailing attitudes towards the mentally ill.

Genetics and Sentencing

It would appear that there is ample support for the Nuffield report conclusion that the current state of behavioural genetics does not warrant a substantial revision of prevailing concepts of human action and moral responsibility (p.159). But the report does consider genetic information has potential significance for the sentencing stage.²⁵⁸ Dresser (1999) argues that if a genetic defence is accepted the consequences would not necessarily be good because alternative forms of social control might result in response to that group if they are considered unable to control their behaviour. This could occur because traditional justifications for punishment rely on the assumption that individuals have choice and control in relation to their behaviour. Coombs makes similar arguments and states that, whatever objectives science may have, it is how the findings are interpreted in relation to social problems that is so important (1999: 232). Thus Coombs considers that genetic information might play a part in the defence of diminished responsibility because it could mitigate culpability, and more importantly because it could inform detention decisions.

²⁵⁷ This is also an important issue in the data chapters.

²⁵⁸ This reflects discussions in chapter four about scientific evidence being more acceptable at this stage of the legal process.

However, would it lead to further interventionist and preventative initiatives, such as the DSPD scheme?

If information emerges about conditions affecting anti-social behaviour would tests become compulsory in order to enable avoiding action to be taken? This would contrast with conditions that involve no potential social harm where the information is only of personal benefit or addresses cosmetic issues. Rose (2000) suggests that such tests could form part of the risk assessment processes that exist, providing new forms of control. He argues that the “traditional dichotomies of sociological thought – free-will vs. determinism, society vs. biology – are not very helpful in understanding the relations of power, knowledge, ethics and subjectification that are taking shape within these new practices of control” (p.20). Yet the Nuffield report maintains that crime is a complex phenomenon and interpreting crime through focusing on one aetiological factor will be misleading. It might present quick-fix responses and in the process obscure other factors that are more difficult and expensive to address. The report concludes that the concepts of crime and antisocial behaviour are too complex for scientific investigation.

Discussion

There are two limbs to the debate on legal views of medico-psychological evidence. The first concerns the determining of criminal responsibility. Chapters one and two show that the legal view of the mind is not based in current neuroscientific thinking. This chapter has shown that the judicial interpretation of the mental concepts within the defences specifically states that the terms do not, and do not need to, reflect the medico-psychological perspective, as they are legal matters. Nor are lawyers trained to understand medico-psychology, and so interpretation has to come from a legal point of view. The nature of the legal questions is also important because if the issue is only the effect that the condition has, then the expert will give an opinion on this and there is no need for lawyers to understand the disorder itself, which inherently contradicts the legal standpoint. This begs the question whether there is a stringent limit to the nature of the conditions that can qualify if they appear in the diagnostic manual and experts are willing to say that there is a link. So it is unlikely that the law will be concerned with state-of-the-art

knowledge unless it directly confronts some aspect of current reasoning and is challenged in court. Yet the legal practice relies on the collusion of forensic experts and therefore the practice is unlikely to be challenged. However, it would appear from Mitchell's (1997) research that an important factor in the expert's role is their moral judgment and therefore this may form the basis to identifying contestable evidence in court.²⁵⁹

The fact that the law uses expert witnesses gives the impression that the matter of the defendant's mental state and health has been rigorously and professionally reviewed. But this chapter has shown that there are controls on the admission of evidence and the questions addressed in court. The penal system makes value judgments based on the standards enshrined in the law and the overriding social policy concerns such as public protection, and the evidence in this chapter highlights how this is put into practice through judicial interpretation of legislation and common law rules, evidenced by reported case law. Decisions are made about the categorisation of those with mental health problems depending on legal normative standards (Mustill 1998: 80). The medico-psychological categories are incorporated into the law but interpreted and applied from a legal perspective, to meet legal objectives (Eastman 1998: 115). Both the normal and abnormal mental constructs forming the basis of deliberations in a case are legal, not based on medico-psychological understanding (pp.95-101). This enables the court to limit the admission of expert evidence and the focus of it, which is crucial for jury decision-making.

The other limb of medico-psychological involvement concerns the sentencing stage. The debate then becomes one of establishing links between mental disorders and criminal conduct rather than cognitive capacity. Examples involve psychopathy, ASPD and DSPD and the quest in the behavioural sciences for direct biological explanations. The medico-psychological assessments of dangerousness and risk form foundations for interventionist measures. Interestingly it would seem that the two strands of the forensic medico-psychological roles can become confused because Raine et al's (1997) study of behaviour involved brain scans of 41 murderers pleading insanity in

²⁵⁹ See also additional arguments as a result of the data discussed in chapter eight.

the search for universal abnormalities. This contrasts with the perception of insanity being a defence concerned with clinical disorders affecting cognition.

The legal use of medico-psychological evidence supports Foucault's theory that medicine is important for generating truths about normality and abnormality (1978:53; 1980). But the expert's knowledge is adapted to address legal categories and issues of responsibility and detention, even though diagnostic categories are descriptions of mental states whereas the law is about normative judgments about the mind and the nature of choice and responsibility. However, by incorporating the medico-psychological language and experts the nature of legal discourse is linked to the 'neutral' diagnostic categories, which precludes overt force to meet social policy requirements to ensure social order and public protection (Foucault 1978: 41; 1977: 187). Significantly, it would appear that the operation of law does not support Foucault's assertion that law defers to medicine (1978: 41). There is more support for Hacking's claim that there is a matrix of interactive processes that develop around categories (1999: 29-30). However, from the discussions in this chapter arguably Teubner's claim that law is an autopoietic, self-referential system is most clearly evident (Eastman 2000: 94-5; King & Piper 1995). It modifies rather than adheres to the medico-psychological evidence, such "that it rapidly drifts away from its original scientific meaning and its parentage become unrecognisable" (Eastman: 95). Furthermore the evidence is applied to very distinct legal conceptions and categories constituted in the defences of insanity and diminished responsibility, which are then used to assess individuals with particular mental states. Individuals are semantic artifacts produced by legal discourse (King & Piper: 27). This illustrates that language is not neutral, but is used to construct particular legal categories that distinguish individuals who enter the legal system. Language is performative not just descriptive within both disciplines, although more actively in the legal context it seems (Taylor & White 2000: 25-40). Take the words *abnormal* and *disorder* for instance (Hollin 1989: 99): 'abnormal' can mean wrong in a statistical sense, or wrong in a moral, judgmental sense, although it can be said generally to convey negative connotations; whereas 'disorder' could imply something is in disarray that can be put right - it does not evoke the same interpretations of good or bad. Therefore, the label 'mentally disordered

defendant' does not evoke the same negative response as 'mentally abnormal offender'.

Conclusion

It can be seen from this chapter that the judiciary are significant and limit the scope of the mental elements within the two defences by developing legal interpretations which do not represent current medico-psychological understanding of the mind. Through the vague construal of the terms and imposing a legal meaning onto medico-psychological based concepts, a flexible approach can be taken and legal control is retained over the operation of the defences. This has to be viewed in conjunction with the legal justifications that have developed for filtering the admission of evidence, discussed further in chapter four. The particular problems that emerge with psychopathy and intoxication serve to highlight the tensions that arise between the current legal perspective on criminal responsibility and requirements for securing social order and public protection. There are arguments that could allow the law to operate in any number of ways and the choices that are made provide interesting social and moral commentary. However, procedurally most cases of diminished responsibility do not go to court if in the experts' opinion the defendant's mental responsibility is substantially diminished. Thus moral decisions are being made that may not be in line with the strict letter of the law, and which are not as readily open to scrutiny. This shows that the pre-court process is important and this is explored through the interview data in chapters six and seven. Finally, the chapter examined the potential implications for the emerging trend towards biological explanations for the operation of criminal responsibility. It would appear that owing to the current state of scientific knowledge this does not constitute an imminent problem and acknowledging such matters could actually result in more extensive powers of control. As Alper suggests, "genes and environment influences should be treated equivalently" (p.1609). The use of diagnostic categories, however loosely, keeps the focus on the defendant's mental state, and the content of those disorders is not necessarily made explicit, yet they will be based on the range of factors described in chapter two which are rejected in the legal stance. This chapter has provided evidence of a symbiotic relationship between law and

medico-psychology, the nature of which is very different at the verdict and sentencing stage, which is examined further in chapter four.

CHAPTER FOUR

THE INTERACTION OF LAW AND SCIENCE: COURTS, EXPERTS AND EVIDENCE

Introduction

Previous chapters have outlined the theoretical and substantive legal issues, showing that the law does not simply adopt the medico-psychological perspective of the mind. However, although the investigation into this area began with the philosophy and framing of the issues, it became apparent how important procedures are. This is the second facet of the second dimension of the analysis of the interaction of law and medico-psychology, which again focuses on the significance of the judiciary. Chapter three outlined the judiciary's importance in the development of a particular legal interpretation of the medico-psychological criteria and the terms used in the defences of insanity and diminished responsibility. Chapter four addresses the procedural controls on the admission of expert evidence, which further affects the content and presentation of expert evidence heard by the jury. Initially an overview is provided of the historical development and foundations of legal recourse to expert scientific evidence, and the evolution of the forensic medico-psychological expert, as this gives a context to the legal rulings. Following this there will be an examination of the rules on the use of expert witnesses and the admissibility of their evidence.

The Efficacy of Using Science in Law

Law is presented as an objective and neutral institution in pursuit of the facts and science has become an integral part of the legal process, presented as an objective source of evidence helping the law to achieve justice. The objectivity of both can be challenged. Law is a social institution; the criminal court is charged with ensuring justice in individual cases but there is also an inherent symbolic role because decisions have wider social implications than the fate of the individual. Thus the court has to ensure authoritative verdicts are achieved in line with overarching objectives, such as social order and public protection (Smith 1989: 56-9). Legal decision-making is a contingent process that is presented as a neutral procedure (Smith & Wynne 1989: 5-8). For example,

chapter three shows how criminal *responsibility* is a matter of social negotiation with a lack of boundaries between fact and value, and the following discussion further highlights how the values inherent within law subtly affect what is held to constitute valid knowledge. Significantly, the law's pursuit of objective facts is via the application of legal rules that incorporate particular legal classifications. Critically, the law determines the questions to be addressed within specific areas of law in individual cases, as chapters one and three reveal. Wynne maintains that it can be difficult to determine the key questions because of the different forms of normative reasoning available, enabling judges to exercise discretion as to which one is pivotal and concordant with the preferred final judgement (1989: 48-9). This is powerfully illustrated by the provocation case of *Smith* [2001] discussed in chapter one.

Similarly, scientific investigation is assumed to be objective because knowledge is revealed through careful observation and analysis, but it too is founded on judgments within the field about such matters as the fit of experiments to theories, prefaced by judgments and interpretations of the theory, which in turn influence observations in the experiments testing the theory.²⁶⁰ Scientific sub-cultures have taken for granted assumptions that affect determinations about sameness and difference. Scientific claims that it considers facts and explains them logically to provide universal theories ignore the psychological, historical and social conditions that influence the theories through which science develops.²⁶¹ Thus culture, policy, history, and intellectual commitments and choices inform the social construction of professional classifications (Wynne: 53-4). Morrow and Brown argue dominant political and social interests shape the development of science and technology and that science mediates social relations (1994: 63-79). Yet the myth of scientific neutrality obscures this process and supports the legal myth that decisions are impartial and objective rather than a feature of the political-economic context.²⁶²

²⁶⁰ This is considered in chapter 5 in relation to this research project.

²⁶¹ Briggs & Peat (1985) also discuss this.

²⁶² Smith & Wynne refer to the Cleveland inquiry to illustrate the point (p.10). Smith discusses this through an examination of the IRA cases (pp.77-80).

Therefore, the factual questions to be addressed are not part of neutral frameworks and rules; it is not a deductive process, but one where the focus, analysis and responses are made in line with the practical considerations and social conventions inherent within the institutional regime. As part of the legal process expert knowledge, where necessary, is deconstructed, reconstructed and buttressed in line with legal requirements. In particular, forensic science has developed in response to legal needs for specific expertise, which “presupposes an agreement that legal and not scientific ends finally structure the production and application of knowledge” (Smith: 57). Yet medico-psychology is also concerned with the classification of individuals, which was discussed in chapter two, but the argument was made that medicalization is a social process, whereby matters subject to moral evaluation are also the object of medical practice (Smith 1981: 32). Therefore, notwithstanding that medico-psychology is an independent field of knowledge,

“[m]edical thought and practice always exist in relation to other forms of thought and practice...[for example] law and order...[providing] *lines of differentiation* which define certain persons, groups, sites, locales as appropriate for medicine and others as not” (Rose 1994: 57).

However, science tries to discover the universals amongst the particulars, whereas courts are concerned with the particulars amongst the universals (Faigman: 69). Yet law and the juridical field manipulate and control expert knowledge to their own ends (Smith 2000: 283). Pellizzoni (2001) suggests that there are two ways in which the law controls the impact of medico-psychological discourse: through ‘external’ power, which consists of the ability to acknowledge or disregard a speaker or discourse, and ‘internal’ power, the ability of an argument to eliminate other arguments by demonstrating its superiority. Chapters three and four provide support for this form of control and exclusion.

Despite the fundamental differences between the concerns of law and science when looking at the same issue, which chapter one and two have highlighted, the law’s need to apply rules that can be interpreted in a flexible manner according to a range of circumstances in line with legal requirements means that it is not concerned with medico-psychological understanding of the issues. Expert evidence is in many ways symbolic, as is shown by the lack of

adherence to medico-psychological understanding in the interpretation and operation of the insanity and diminished responsibility defences. It was argued in chapter three that the perspective and understanding detailed in chapter two enter through the back door through legal reference to the diagnostic condition without any overt acknowledgment of all that it incorporates, so the theoretical legitimacy of the law remains unchallenged because it is the legal question that is ostensibly addressed. Morawski (1999) attributes the lack of true facts in law to the socialization of the physical world, and the juridification of the social world.

Pragmatic use is made of experts by both sides as the adversarial process means that experts are selected not for their neutral standing but for their contribution to the case. Moreover, as the medico-psychological expert's knowledge does not accurately fit into the practical legal questions, the lawyers, through the adversarial process, can highlight the gaps, undermining the expert's credibility, and maintaining the myth that it is possible to distinguish between fact and value, or science and social interests. As a result, some scientific disciplines criticise the adversarial process, but forensic science itself developed from the legal context (Wynne: 35). Thus expertise has the indirect and symbolic role, as well as the more direct instrumental role.

The Rise of the Forensic Medico-Psychological Expert

Introduction

Having briefly discussed the legal efficacy of using science with reference to the discussion so far in the thesis, this section examines the development of the role of the medico-psychological expert in cases, which originated in relation to insanity.²⁶³ Significantly, during the 18th and 19th centuries social and political changes were taking place that led to transformations in penal thinking and the law (Smith 1981: 4). Also at this time the state of medico-psychological knowledge was developing, as in the late 18th century expert evidence was not dissimilar to that of lay witnesses, comprised of a mixture of fact and opinion (Ward 2001: 106-9; Eigen 1994), whereas by the early 19th century medical experts began to claim a special status as a result of observing

²⁶³ For a historical overview covering the developments in France see Harris (1989), and in Scotland see Houston (2003).

those detained in prisons, and the asylums that emerged mid-century (Smith 1981: 3). Asylums were an important factor in the development of psychiatry, which was further helped by emerging information on the physiology of the brain. Challenges to the prevailing understanding of mental illness surfaced, and professionals started providing specific evidence about the defendant to juries. Moreover, the expert's claim to a unique body of knowledge led to the view that juries needed help to *interpret* the expert's observations on the defendant's behaviour, which was the state of affairs at the time of the *M'Naghten* trial (1843) when the legal rules of insanity were delineated. Interestingly, at the time, the Scottish courts adopted a very different position and held there was no definitive legal definition of insanity,²⁶⁴ and that it is not a matter of law or science, but a matter for the jury, based on daily life (Johnstone 1998: 115-6).²⁶⁵

As identified previously, there are two dimensions to medico-psychological involvement in the legal system. The first is the role experts have in respect of assessments of a defendant's responsibility, and the second concerns involvement in detention decisions. What follows is a brief review of these two aspects.

Experts and Responsibility

The law only permits limited moral exceptions to the normal objective standard of responsibility, as highlighted by the debates in chapter one. Medicalisation became part of the process of making moral judgments by 1884-85 when prosecution procedures in murder cases required the Director of Public Prosecutions to ensure that medical evidence was submitted on the defendant's mental state (Ward: 113-4). Johnstone maintains that psychiatry has had little impact on the substantive law, although it challenged the law's right to be the only judge on matters of responsibility (pp. 84-5). There are a number of ways in which the law has restricted the impact of expert evidence on questions of responsibility. First, as chapter three established, the defences concerned with the state of the defendant's mind do not reflect current scientific thinking, which was the case even in the 1840s and 1850s where law held that

²⁶⁴ *HM Advocate v Miller* (1874)

²⁶⁵ *HM Advocate v Macklin* (1876)

defendants needed to be suffering from gross delusions or severe disturbances to qualify for the defence, whereas the view of medico-psychology included 'partial insanities', 'moral insanity' and 'homicidal mania without disorder of intellect' (Johnstone: 86; 109;²⁶⁶ Smith 1981: Ch. 3). These were conditions where the person had the power of comprehension but they could not feel for another person or control their behaviour by an act of will, so their moral appreciation of situations was impaired. These are what would now be termed psychopathic tendencies and defects in the capacity for volition, which were held as irrelevant by the law as those affected by them were sane and should be punished, despite the challenges of medico-psychologists. This is still the position with regard to insanity, although these attributes are taken into consideration under the diminished responsibility defence, as chapter three discusses.

In addition to the substantive framework limiting and redefining the medico-psychological perspective, early Victorian judges favoured the prosecution because the prevailing views on criminal liability were strict, which could manifest itself in hostility to medical witnesses in the judge's summing up (Ward: 113). Through judicial directions reference was often made to the speculative nature of the medical evidence because it was claimed that medics could not agree on diagnoses,²⁶⁷ and there were observations on the dangerous social consequences of accepting the medical view of responsibility.²⁶⁸ It was argued that the power to absolve from responsibility should not be in the hands of a profession that had no regard for the protection of society. Furthermore, it was claimed that juries should have an active role in deciding if particular scientific theories formed a safe basis for conviction or acquittal.²⁶⁹ These arguments are still in evidence today. However, Ward maintains that the scepticism of judges decreased throughout the Victorian era, partly because of the procedural changes requiring that medico-psychological evidence be provided in murder cases. Arguably, medical views on madness were also entering into common perceptions as the discipline developed. In terms of

²⁶⁶ Two key narratives were Isaac Rays *Medical Jurisprudence of Insanity*, and Wilson and Maudsleys *Responsibility in Mental Disease*.

²⁶⁷ A.S. Taylor (1866) *A Manual of Medical Jurisprudence*, 8th edn. London: Churchill.

²⁶⁸ *Prior* (1848) *Times* 11 Mar., 7; *Smith* (1849) *Times* 13 Mar., 7 and *Southey* (1865) 4 F. & F. 864 (Ward: 113).

²⁶⁹ J.F. Stephen (1863) 'On Trial by Jury, and the Evidence of Experts', in *Papers Read Before the Judicial Society*, Vol. 2. London: William Maxwell: 236-49

medico-psychological challenges to the restrictive legal approach, Smith maintains they diminished as it was appreciated that the rules operated flexibly enough to allow decisions which on the whole did not challenge the expert's own viewpoint (1981: 88-9).

It would appear that little has changed in terms of the substantive law or control of the admission of evidence since the middle of the 19th century where it was ensured that psychiatric knowledge does not interfere with the court's public role of censuring crime and criminals (Johnstone: 100-102). It would seem that psychiatry is *perceived* as too equivocal about moral responsibility and blaming people for their actions, although explaining behaviour in psychiatric terms is not necessarily excusing it. Law asserts that the legal principle of moral responsibility is vital for the functioning of modern society and is therefore reluctant to acknowledge the psychiatric viewpoint, whose explanations of the mind challenge the legal perspective. Hence the decisions of *Chard* and *Turner* which assert that medico-psychological evidence is not allowed into court regarding *mens rea* unless the defendant's mental state is an issue with regard to a defence (Mason et al 1999: 523-25). Notwithstanding this, the expert's role is important in diminished responsibility cases where their opinion on the ultimate issue can carry a lot of weight because, although discussions focus on the jury deciding the matter, many cases do not go to trial. Moreover, in light of the complexity of the evidence it has to be asked how competent is the jury to evaluate all the legal and medical evidence. Arguably, the legal position is less stringent in diminished responsibility cases because the defendant is admitting guilt and the evidence provides mitigating information for the sentencing stage. Eastman suggests, "the absence of a clear welfare function of criminal law, at least during the trial stage of a hearing directed towards verdict, will tend to maximise any 'Teubner effect'" (2000: 93-94).²⁷⁰ Even the cases dealing with such matters as BWS, which are derogations from strict legal theory, modify justice rather than introducing a welfare aspect because the condition is a legal one rather than one originating from the medico-psychological professions.

²⁷⁰ Teubner's theory is discussed in the introduction, chapter 3 and re-visited in chapter 8.

Experts: Detention, Punishment and Treatment

Conversely, medico-psychological involvement appears to be much less contentious on conviction, where psychiatry has become more influential since the 1860s and 70s, as medicalization became part of the management expertise in control and detention options (Smith 1981:33). As a result of the small number of insanity cases and increasing interest in the 'dangerous classes' psychiatric interest slowly moved from the insanity defence towards how to handle and process habitual criminals (Johnstone: 87-96).²⁷¹ This was in the context of a time of social change as industrialisation gave rise to new problems of social control and demanded new forms of social behaviour. Individuals held to be a problem were being constructed as mentally deficient because "it helped explain why habitual criminals were not deterred through ordinary penal measures" (ibid: 95). Thus individuals were punished for what they were, or were supposed to be, as well as for what they did (Foucault 1998: 447). There was a shift from attempts to obtain compassion for those deemed insane towards interest in ensuring that mentally abnormal offenders, which included all habitual offenders, were subject to effective means of control.

Thus from the 1860s medical-psychologists argued for habitual offenders to be held as individuals without rationality and the capacity for free will, on a par with dangerous lunatics. But the medico-psychological field criticised the law in respect of both groups, arguing that whilst proportionality was appropriate for punishing normal criminals, habitual offenders needed a medical assessment to determine the extent of their dangerousness and their capacity for reform, and furthermore that the law did not take into account the possibilities for treatment and cure of the insane. Thus in addition to the trials on insanity, what emerged were trials where issues of normality and moral defectiveness were reviewed at the sentencing stage, anticipating the current diminished responsibility defence. Consequently psychiatry became useful to the criminal justice system's efficient management and control of offenders because the medical justifications enabled interventions which could not be justified in purely legal terms.

²⁷¹ Foucault (1998) describes 19th century psychiatry's conceptualization of the dangerous individual.

With each dimension of the expert's role comes responsibility for making decisions about which particular medico-psychological or legal categories an individual qualifies for, with the consequences of that decision. The scope of the forensic role and issues arising from the production of the evidence will now be examined.

The Forensic Medico-Psychological Expert's Role

Introduction

Presently forensics incorporates both psychiatry and psychology, the latter of which emerged about 100 years ago (Thomas-Peter & Warren 1998: 79-80).²⁷² However, the criminal courts in the cases under scrutiny appear to favour psychiatry (Redding et al 2001), which relies on medical models, which Hollin attributes to a lack of understanding about the role of a psychologist and the contribution they can make (1989: 176-80).²⁷³ This preference may be explained by the fact that historically experts were initially involved with insanity cases where the focus is *disease of the mind* based on medical models. Also the law first sought biological rather than social explanations for criminal behaviour (Grob 1999).²⁷⁴ Additionally, there is a strong medical lobby within parliament, which has meant psychiatrists have become involved in administrative, political and moral issues (Thomas-Peter & Warren: 103).

Differences Between the Clinical and Forensic Assessments

Chapters one and two have illustrated the different perspectives on the mind and chapter three shows how this has led to legal interpretations of medico-psychological concepts within the defences. Thus mental health practitioners are likely to experience cognitive dissonance within the legal context because of the differing perceptions (Eastman 2000: 83). In terms of *roles*, clinically medico-psychological disciplines focus on the welfare of the patient and identifying where possible means of rectifying disorders, whereas in their forensic role they have a number of different responsibilities related to

²⁷² For an overview of law and psychology over the 20th century see Ogloff (2000). Atkinson (2001) claims cognitive neuropsychology can offer the possibility of advancing understanding of psychiatric disorders through psychometric tests to measure mental characteristics. Hayes provides an evaluation of such tests (1984: Ch.10).

²⁷³ This is supported by the interviews although it would not appear to be the case more generally (Hollin 1989: 175). Grob (1999) describes the influences of biological thinking on the development of psychiatry.

²⁷⁴ Although Larson (1999) highlights that there have been severe consequences from accepting biological explanations for criminal behaviour in the past, such as sterilization.

providing reports and giving testimony in court if required.²⁷⁵ Moreover, references to medico-psychological experts encompass two professions that undertake different analyses of the mind, and references to studies conducted elsewhere show that the role is not necessarily undertaken in the same way in every culture as there are diagnostic and policy variations (Niveau & Sozonets 2001).

With regard to training, there is a forensic component to psychiatric training²⁷⁶ and since 2000²⁷⁷ the British Psychological Society has provided a Diploma in Forensic Psychology.²⁷⁸ There are also the expert witness organizations, The Expert Witness Institute, The Academy of Experts and The Society of Expert Witnesses, all of which provide information and support. In addition Solon (2003) developed the Bond Solon organization specifically to offer expert witness training, in conjunction with Cardiff University.²⁷⁹ Interestingly, Dr. Jamieson, director of the Scottish Forensic Institute states that the Forensic Science Society is developing standards but “‘Forensic’ Psychology we regard as so far ‘out there’ that it is not even on our agenda” (2004).²⁸⁰ Notwithstanding these training options, experienced senior clinicians’ training is unlikely to have included a forensic component, particularly within psychology.

There are fundamental differences between the clinical and forensic roles. The clinical role is concerned with diagnosing mental disorders and providing appropriate treatment interventions. The forensic role incurs a number of additional consequences to these two facets of the clinical role. First, the legal system is concerned with how the clinical diagnosis relates to the intent/actions of the defendant at the time of the offence, which the expert may be assessing a considerable time after the event; secondly, thought has to be given to the link between the diagnosis and legal standards enshrined in the defences, such as whether the mental responsibility of the defendant was substantially

²⁷⁵ Jager (2001) explains the position in Australia and Sadoff (2001) in the U.S..

²⁷⁶ The Psychiatric Training Manual (2001). For an overview see Reiss and Meux (2000).

²⁷⁷ The British Psychological Society *Regulations and Syllabus for the Diploma in Forensic Psychology*

²⁷⁸ The Board of Examiners for Forensic Psychology was not established until 2000.

²⁷⁹ This was also an aspect of the role and organizations of one of the experts interviewed.

²⁸⁰ Email communication 21/4/2004. Golding (1998) and Stone (1998) reflect on training and being a forensic expert in the U.S. and the ethical difficulties because of the way that the law uses the testimony in relation to the defendant.

diminished; thirdly, there are ethical issues not associated with normal client interactions, for example, the assessment is at the request of another agency which determines the aims of the assessment and pays for it, so there are not the usual limits to confidentiality. Fourthly, any clinical opinions on treatment will inform any subsequent detention decisions.

Because the assessments have a different focus the range of evidence sought and used in making a clinical judgment is different. For instance, specific measures have been developed, such as Forensic Assessment Instruments (FAIs),²⁸¹ although Rogers and Sewell (1999) questioned the fact that insanity reports produced in the U.S. rarely made use of tests for evaluating responsibility. However, it would appear from the research that psychologists are more likely to use tests and psychiatrists are usually required to conduct the assessments in this context. Also important is the use of information from third parties,²⁸² “because of the incentives for examinees to distort their responses to interview questions or test items” (Nicholson & Norwood 2000: 12). Experts also receive a copy of the case files in order to evaluate and test the veracity of the defendant’s statements in light of that evidence, in contrast to a normal clinical setting where the patient’s narrative may be accepted more readily. Furthermore, although the legal system is interested in the defendant’s behaviour at the time of the offence, Scarano advocates the inclusion of a psychiatric evaluation of the individual’s past because it fits in with the ethics of the profession (2001: 563).²⁸³

However, it would seem from the discussions in previous chapters that the critical legal issue is the expert’s capacity to link their clinical diagnosis to legal criteria. The psychiatrists in Mitchell’s study claimed to recognize the distinction between the defences of insanity and diminished responsibility (1997: 627).²⁸⁴ It was said that the insanity defence is solely concerned with cognition whilst the diminished responsibility defence is less clearly defined and focused. The insanity defence was considered to be less important than s2,

²⁸¹ Nicholson & Norwood (2000: 11) provides a list of studies reviewing forms of assessment.

²⁸² Examples include medical, criminal justice, educational and employment records, interviews with or reviews of statements by witnesses, relatives and victims.

²⁸³ See chapter 7 regarding the nature of the CPS reports.

²⁸⁴ Warren et al (2004) conducted an extensive review of this issue in respect of insanity reports in the U.S.

which Mitchell attributed to the fact that psychiatrists are rarely required to consider the insanity defence.²⁸⁵ A small number of respondents said that they contemplate whether the *M'Naghten* rules are relevant when conducting s2 assessments. Mitchell's interviewees claimed that insanity is usually important in cases of psychosis, where it is necessary to consider if the killer knew the 'nature and quality' of what they were doing, and whether or not they knew it was wrong. In terms of their perceptions of responsibility, although the defendant is only partially responsible with diminished responsibility and with insanity the individual bears no legal responsibility, some psychiatrists in Mitchell's study asserted that they do not consider that a person's responsibility can ever be totally impaired, that an impulse can never be totally irresistible. However the study concluded that at the extremes the court holds that control is so negligible that it can be ignored. Coles analyses the difficulties in trying to answer legal questions, highlighting how they often have many dimensions to them and yet experts have to provide one-dimensional answers (2000:4).

This understanding has to be translated into reports. Nicholson and Norwood evaluated forensic practice using data from studies on forensic procedure, judging them against standards contained in guidelines, standards of practice, training programme and certification procedures.²⁸⁶ High quality forensic practice is held to be when the reports and testimony "document the examiner's adherence to the legal and ethical contours of the evaluation, focus on relevant legal questions and criteria, describe the factual and clinical material that led to the opinions expressed, and communicate findings in language that is comprehensible to persons not trained as mental health professionals" (p.10). This last admonition is important for the legal profession and the jury. However, as Foucault (1977)²⁸⁷ suggests, it is hard to step outside one's own discipline as training inculcates professional perspectives and language.²⁸⁸ Nicholson and Norwood discovered discrepancies between the statements made by professionals about their practices and the evidence in the reports. For example, in the surveys forensic psychologists claimed that explaining to the

²⁸⁵ This assertion is supported by my study.

²⁸⁶ There were two types of studies available, surveys of psychological experts and legal personnel, and those using sanitized copies of forensic reports, which had been coded.

²⁸⁷ See introduction

²⁸⁸ See chapters 6 and 7.

defendant the purpose of the assessment and the limits to confidentiality was important, yet content analysis of reports showed that this was rarely done (p.39). Experts are supposed to state clearly what facts they base their opinion on and it is unclear if when new facts emerge they are asked if their view would be different.

But critically “the professional aims, training and philosophies of the persons in these two groups have nothing in common, and are in some respects antithetical”, which results in confusion of purpose, mutual incomprehension and friction (Mustill 1998: 65). Yet it is the expert who relinquishes professional clarity to meet the demands of the legal system in the assessment and report, and on entering court the expert’s control of the evidence is further reduced, as discussed throughout the remainder of the chapter. In addition the evidence has to be simplified, perhaps oversimplified, for the sake of the jury, because the law does not want vast detail, the conclusions on the impact of condition on the defendant’s mental state being the crucial point. Medico-psychological evidence is also required at the sentencing stage and the diagnostic information that would normally inform treatment interventions has to be reconceived to take account of matters relating to risk and dangerousness. Therefore there are additional ethical issues for forensic psychiatry to consider than are presented by the normal clinical setting because of the moral claims of social groups and individuals affected by legal decisions (Sameer & Adshead 2002).

The Admission of Expert Evidence

Introduction

The discussion so far supports the proposition that the interaction of law and science is not a neutral process as law uses science strategically and requires a very particular role of the forensic medico-psychological expert. The next section discusses the procedural and judicial controls on the admission of expert evidence into court in support of the defences, which is influenced by factors discussed earlier, namely the belief in the value of the limited legal assessment of responsibility and the desire to ensure that trials are conducted in line with legal objectives and not those of medico-psychology. Thus there are

boundaries imposed on expert authority defined by the courts view of the problem rather than by relation to professional hierarchies of skill or knowledge (Wynne: 39-46). While it has been stated that many cases do not go to trial, nevertheless the rulings form a backdrop to decisions and practitioner's work because the presumption is that the case will be tried, and therefore the evidence has to be robust enough to survive the adversarial process if it does. In order to adequately address the court process it is necessary to provide a brief outline of the nature of expert evidence, which encompasses fact and opinion, and the impact of the adversarial process.

Evidence: Fact or Opinion

Expert evidence can take two forms, fact or opinion, each seen as presenting problems within the legal system. With regard to the former, expert knowledge is often presented in terms of probabilities, in line with the spectrum perspective summarised in chapter two, which contrasts with the dichotomous legal approach. It is suggested that juries can find it difficult to understand the reasoning behind probability compared with quantitative statements (Smith 1989: 64-6). Experts may also be permitted to offer an opinion. In the wardship case *R (A Minor)* [1991] it was held that experts should only express opinions that they genuinely hold, which are not biased in favour of one party. In the context of the current discussion expert opinion could involve linking clinical assessments with facts and legal criteria, or an opinion on the ultimate question being determined by the court, as with diminished responsibility. The latter is the most problematic because it involves moral and justice questions that are beyond the remit of the mental health expert's domain. Mitchell found that experts were sanguine, deriving little help from case law (1997: 627). It was said that some conditions, such as psychosis, were easier to comment on than personality disorder and depression, where the differences between normality and abnormality were less pronounced.

The fact/opinion distinction has not gone unchallenged. The philosophy of science disputes the possibility of distinguishing unproblematically between fact and opinion (Smith 1989: 66-9). For instance, answers that are not a simple yes or no may be treated as opinion because even though the answers are premised on probability, the possibility of a theoretical alternative can be

interpreted as uncertainty, which is an option the court can readily utilise. In verifying this with forensic pathologists, scientists and psychiatrists, Smith found that the first two groups considered that there was no problem distinguishing between fact and opinion, whereas psychiatrists thought there could be. Arguably this could be explained by the different nature of the disciplines.²⁸⁹ Smith asserts that the admission of expert opinion is itself tacit acceptance that facts do not speak for themselves, although he acknowledges that some facts might be difficult to comprehend. He also suggests that it illustrates that the court's comprehension is interpretative because, for example, both defence and prosecution counsel adopt an interpretative approach to the content of factual statements. Yet the myth of the fact/opinion distinction is perpetuated, which in line with arguments already made in this thesis provides a measure of flexibility in the legal response to the evidence and the credence that is accorded to it.

The Adversarial Process

The adversarial system polarizes rather than reconciles differences, which affects the approach to experts and their evidence.

Professional Identity

Lawyers know little about scientific disciplines and it seems only need to know a little, and are more concerned with winning, so it is more important for them that their expert appears credible rather than necessarily being clinically able. Courts usually favour the expert perceived to be the most prestigious witness, for example, when neurologists and psychologists disagree about the degree of impairment resulting from a head injury in a civil case, the neurologist's views will prevail. The polarization inherent in the adversarial process can overlook the fact the experts come from different fields and use different methods (Smith 1989: 80-7). Earlier discussions noted the preference for psychiatrists over psychologists in criminal courts, which ignores the new trend to collaborative working.²⁹⁰

²⁸⁹ Certainly the Director of the Scottish Forensic Institute distinguished what he saw as the vague science of psychiatry and psychology from the other sciences.

²⁹⁰ For example see the work of Solms & Turnbull 2002

Evidence

In terms of the approach to evidence, in contrast to medico-psychology the law adopts a dichotomous perspective, viewing matters in black and white terms because of the necessity for a verdict of guilty or not guilty (Thomas-Peter & Warren: 93). Whilst facts are always open to question the adversarial process favours the defendant because in criminal cases the standard of proof is 'beyond all reasonable doubt', although owing to the admission of guilt the diminished responsibility defence only has to be proved by the defendant on the 'balance of probabilities'. The former standard however, is often an impossible requirement in science or medicine because of the spectrum approach. Moreover, with medico-psychology, even if there is a clear mental illness diagnosis, there is the possibility of dual diagnosis with a less serious condition, which can undermine the validity attributed to the former (Eastman 1998: 120). Redding et al's (2001) study of lawyers' and judges' views on mental health experts' testimony found they did not like the fact that supporting evidence was often presented in terms of probabilities. Supporters of the adversarial process argue that scientists are too imprecise and influenced by hidden bias, but that cross-examination can reveal the true facts. For instance, it was held on appeal in the case of *Williams* (2000), where the issue was one of new evidence supporting a diminished responsibility plea, that discrepancies in the medical evidence could not be reconciled by written reports, and they needed to be resolved by oral testimony and cross-examination. On the other hand the psychiatric respondents in Mitchell's study asserted that differences in opinion should be discussed in order to facilitate the clarification of scientific divergence, and the comparison of data and information, because the purpose is not to try to reach agreement, as disagreements are inevitable with, for example, personality disorders and 'substantial impairment' (1997: 630).

Thus the adversarial process results in an artificial polarisation of scientific discourse, implying that it is false, which publicly demeans science and encourages unbecoming conflict. Furthermore, the social context surrounding the controversy limits the extent or clarity of the deconstruction. Thus the adversarial system is not well suited to comparing and assessing the merit of

distinct kinds of evidence because the court takes an either/or approach to factual evidence, showing that it does not appreciate the different ways of formulating reality.

Importantly, the expert is supposed to be an independent witness before the court but a number of factors potentially undermine this principle owing to the polarising nature of the legal process. Potentially problems could arise if experts regularly work for one side because this may foster a particular mindset. Furthermore, there is a rehearsal with counsel before the presentation of evidence and experts also help counsel identify the potential flaws in the expert evidence for the other side. Barristers are also trained in tactics for discrediting witnesses and their evidence (Hollin: 174). Thus experts experience a lack of control over their evidence once in the legal system, particularly in court. The value system and identity of their scientific culture can be stripped away, converting their expert knowledge into practical decisions (Wynne: 29-30; 37).

However, there are limits to the process of deconstruction because scientists in conflict are still from the same professional milieu, and trust and co-operation play an important part in scientific interaction (Wynne: 37; Faigman 1999: 56). Furthermore, scientists differentiate between their rational approach and the adversarial system, which is recognised as having little to do with the truth and more to do with winning the case (Smith: 70-3). Thus there is an emphasis by scientists on personal integrity within the adversarial process as they mediate between the scientific and legal norms. Experts handle working within the adversarial system by,

“intellectual identification with the scientific discipline; group solidarity among experts which overrides being pitched in opposition by the courts; ...; conceiving of expert evidence as a service to the court...; and writing reports in a firm style that indicates to legal people the limitations of evidence and retains control over the possible meaning of expert knowledge” (Smith: 72).

In addition Carson makes the point that being seen as an expert and surviving a battle of words and wits is prestigious (2000: 26).

The Judiciary

Introduction

Within the discussion on the efficacy for law of using science it has been stated that there are usually a number of legal options available for categorising the information presented in a case. Reported case law such as the provocation case of *Smith* [2001] shows this. It is an example of the strategic nature of the relationship between law and medico-psychology because, despite the lack of any direct reference to mental states, the judiciary has introduced the requirement that the defendant's mental state is considered. The greater recognition of mental characteristics of the defendant with the provocation defence is an illustration of the law extending the use of expert evidence strategically. As with diminished responsibility the defence depends on the expert being willing to give an opinion on whether they consider there is a link between the alleged abnormal mental state of the defendant and the legal criteria. The case has introduced a subjective element into what was intended as an objective defence. It is another example, like the diminished responsibility defence, which actually operates in a fairly benevolent manner, where strategic use is being made of expert evidence, despite the rhetoric about ensuring expert evidence does not overwhelm the law. Clearly this has not met with universal agreement, as the dissenting judgments and subsequent commentaries show. Critically, the practice of pleading both diminished responsibility and provocation together has muddied the waters between the two defences, illustrating the incoherence that can develop as a result of taking legally-driven strategic options in cases. Only time will tell how the judiciary might develop the defence as a result, and what legislative reforms might be introduced.

The judicial gate-keeping role in applying the law includes the oversight of court processes, which includes such matters as the admission of expert evidence. There are questions over what informs judicial attitudes to mental health issues over and above the influence of the legal perspective with its inherent values and concerns (Woolf 2001; Griffiths 1997).²⁹¹ Critically the exercise of discretion has led to rules relating to the credibility of the expert

²⁹¹ See chapters 6 & 7

and the content of their evidence. With regard to evaluating the content of the expert's evidence, chapter three has already shown that judicial understanding is not in line with current scientific understanding. Judicial training does not include the evaluation of science or an understanding of medico-psychology. With regard to legal considerations, earlier discussions indicate a tendency to limit the impact of expert evidence on the matter of responsibility in line with the points raised in chapters one and three. The courts have addressed the expert's duties and responsibilities, the credibility of the expert and their theories, which will now be examined.

The Expert's Duties and Responsibilities

The judiciary define the duties and responsibilities of expert witnesses in the cases of *Ikarian Reefer I* (1993)²⁹² and the appeal case *Ikarian Reefer II* (1995),²⁹³ *Clough* [1998]²⁹⁴ and *Carroll* (1985).²⁹⁵ They are concerned with the expert being independent and having integrity about acknowledging where their expertise stops. Although the duties appear to be straightforward, it would seem they are not so readily applied in litigation (Edmond 2000: 222-4). For example, an identifiable tension exists between the duty of the expert to the court²⁹⁶ rather than the particular side they are acting for, and the adversarial process that underpins the operation of criminal cases. The court believes that experts have a duty to point out the strengths and weaknesses of their evidence. For example in *R (A Minor)* [1991] it was held that experts should be objective and not omit factors which do not support their opinion, and their opinions should be straightforward and not misleading; but this is not necessarily what their barristers will want. The barrister's role is to win the case and an important part of that is ensuring that their own expert appears credible while discrediting the evidence of the expert acting for the other side. Therefore, although "[t]he court is more likely to expect the expert than the barrister to describe 'the whole truth'", the questions asked affect the remit of the answers, which in turn can restrict the evaluation of the scientific evidence (Smith 1989: 75).²⁹⁷

²⁹² Especially pp. 81-2, Cresswell J's judgement.

²⁹³ p.496 for Stuart-Smith LJ

²⁹⁴ p.1484-5

²⁹⁵ p.417

²⁹⁶ *Stockwell* (1993)

²⁹⁷ The interviewees discuss these matters in chapters 6 & 7.

Divisions in legal opinion have also arisen regarding the admonition that experts only give evidence in their area of expertise. In *Ikarian Reefer I* Cresswell J stated that experts should make it clear when a question falls outside their area of expertise. However, the Court of Appeal held that this may not always be possible, and it is necessary for experts to consider the probabilities on hearing information from other experts. Another instance of differences in the two judgements relates to interpretations to be placed on an expert changing their stance. Formerly it was held that it made the expert appear unreliable whereas subsequently it was held that it demonstrated they were not biased or unwilling to make concessions. Edmond claims that this shows how norms can be used to either strengthen or weaken knowledge or authority, allowing identical knowledge and expertise to be understood differently.

Expert Credibility

Earlier discussions suggest that the law theoretically assumes that science is reliable, but it does not necessarily presuppose that individual scientists are (Wynne: 54). In *Stockwell* (1993) it was clarified what qualifications and experience are required to present expert evidence. Interestingly, an expert's credibility is only called into question if they are a witness, not if they are simply providing questions to counsel about the evidence presented by the expert acting for the other side. It has already been said that the law favours what are perceived to be the more prestigious witnesses, and may prefer particular disciplines in an area of law. Debates on expert credibility have also focused on approaches towards 'repeat players'. There have been differences in attitude between the U.S. and U.K., with the U.S. courts inclined to criticise those acting regularly as experts, unless they are state experts, whilst in England these attributes are viewed favourably (Edmond: 234-5). In fact, inexperience has been a basis for English judges excluding evidence because of problems with communication, translation and simplification (*Ikarian Reefer I*). The adversarial system requires robust expert witnesses and legal personnel consider a good expert is one with good communication skills (Smith: 69-70). Certainly it would seem that the entry into the legal domain can lead to a change in meaning of expert evidence, or a loss of control by the expert, which

each legal side will want to minimise. In order to deal with the complexity of what is required, tacit skills resulting from the culture of practice prevailing within each professional field, which acts as the dominant guiding force, will be important, so many experts will be repeat players (Palmer 2000: 667). There appears to be little legal and forensic support for court-appointed experts, even with the option of each profession nominating its most professional experts, because of the possibility of error and bias.²⁹⁸

Evidence Credibility

The other area the judiciary challenge is the credibility of the evidence, on the basis of scientific method and whether or not it comes from an established scientific community within the field.

Scientific Method

At the outset of the chapter it was stated that scientific *method* can provide a powerful legitimisation device, but it has also been a ground for challenging the reliability of evidence. The U.S. Supreme Court case of *Daubert* (1993) held that it is important to ascertain that the methods used are valid and reliable and then the court will not have to concern itself with ascertaining the reliability of the conclusions.²⁹⁹ This reasoning was adopted in *Bonds* (1993) but subsequently held to be too simplistic in *Hall v Baxter Healthcare Corp* (1996) because it meant that disagreements between experts on conclusions force the judge to think that there is some mistake in the investigative or reasoning process. The revised position acknowledged that “[t]here is no universal scientific method determining every aspect of scientific practice” (Edmond: 220). But the judiciary have no training in evaluating such matters and so much depends on the medico-psychological discipline anyway. The courts use idealised norms about scientific procedures to distinguish ‘proper’ and ‘improper’ scientific knowledge and practice. A study of judges’ views on their gate-keeping role following the *Daubert* case found that whilst they thought the guidelines were useful they had trouble applying the criteria because they could not understand many of the scientific methods (Gatowski et al 2001: 454).

²⁹⁸ See chapters 6, 7 & 8 for further discussions.

²⁹⁹ pp. 2795-97.

The U.S. courts have also used the fact that publications are peer-reviewed as evidence that the data in question is reliable, even though experiments are not necessarily replicated or results recalculated (Edmond: 230-33). English judges are more generous towards unpublished results, perhaps because of the absence of mass tort litigation and civil juries. Faigman asserts that there is no reason why the judiciary cannot master the scientific basics as they are intelligent and much of the scientific evidence they review is specifically for the courts (1999: 64).

Established Scientific Community

Another factor courts have used to distinguish between evidence is whether there is an established field or community pertinent to the line of enquiry, although there seems to be little consensus amongst the judiciary about what the term ‘scientific community’ means (Edmond: 227-8).³⁰⁰ There is an issue around how the verification is undertaken as those presenting the evidence are likely to have a vested interest in confirming that there is an established community in respect of their evidence (Faigman: 62-3). There have been variations in judicial application of this rule, with England (*Parkes* [1987]; *Bolitho* [1998]) and Australia accepting evidence that represents a minority position more readily than the U.S.. In fact it would appear that the use of judicial statements as a line of reasoning to suit legal purposes is having ramifications for the scientific field.³⁰¹ For example, the appeal court in *Carroll* held there was a division in the field of odontology because of the disparity in the evidence provided by the three experts, and as a result the evidence was excluded and the conviction quashed. In contrast, in the case of *Robb* (1991) the expert presented phonetic evidence using techniques that were not accepted by the majority in the field, at least without additional verification,³⁰² yet the court held that as the witness had not been proved wrong the evidence stood. On the matter of whether or not to include or exclude novel evidence,

³⁰⁰ *Bonds* (1993) case & *Jarrett* (1994): 176; 189

³⁰¹ As an example in the civil case of *Parkes* (1987) it was conceded it was not an easy matter for a judge to decide between two experts. It was conceded that the longer experience of one lent value to their evidence but their seniority was also used to argue that they were less likely to be receptive to modern thinking. The judge opted for the more modern theory of the inexperienced expert, based on the facts of the case. Harpwood (2001) discusses this in relation to *Bolitho* [1998]: 238-9; 241-2. See also *Gilmore* [1977]: 939-41; *Carroll*.

³⁰² This was an issue in the case of *O’Doherty* [2002] as well.

“inclusion is usually explained in terms of the permissive and liberal aspects of evidence law. Where evidence is excluded, reference shifts to stress the importance of reliability, scientific recognition and dangers” (Edmond: 239).³⁰³ This illustrates that judges manipulate evidentiary standards and categories to legitimate decision-making, which can result in ill-informed judgments concerned with developing reasons to control the admission of expert evidence in order to ensure legal objectives. Thus, in light of discussions in chapter three, the law does not need to recognise the current state of medico-psychological knowledge and therefore it is unlikely to worry about state-of-the-art thinking, unless it represents a useful device to meet legal objectives.

What is also evident is an ambivalent attitude to science in that there is scepticism about the reliability of scientific evidence specifically for litigation purposes, the presumption being that there is rarely an alignment between science and society because the ‘truth’ science tries to uncover is “only occasionally and serendipitously coincidental with social and political uses” (Edmond: 224). This is tied into the assumptions discussed earlier that knowledge exists independently of context and/or purpose and is therefore neutral, objective and unbiased.³⁰⁴ It is the myth of the objective nature of science that buttresses the legitimacy of legal decisions. Yet the idea that science is abstract is also challenged by the fact the forensic science services have been spawned by the legal system.³⁰⁵ Whilst forensic facilities may be associated with such matters as pathology and DNA testing, although medico-psychological professions have a distinct clinical role this chapter shows that there is also a distinct forensic function. Chapter three makes the point that experts are aligning their clinical opinion to categories that have legal rather than medico-psychological meanings. For instance the BWS was a legal concept that became a medico-psychological one, and ASPD and DSPD are related to the legal context and discourses. Furthermore, there is the medico-psychological involvement in the detention role of the legal system.

³⁰³ A recent example is *U.S. v Scheffer* (1998)

³⁰⁴ See the English case of *Whitehouse* [1981]: 256-7 and the US case of *Daubert*: 1317 as examples.

³⁰⁵ *Daubert*: 1317.

The Judge and Jury

The jury are a key player in the court process because they make the final decision on the verdict. The analysis of the interaction between law and medico-psychology in court needs to take account of the fact the jury can potentially undermine legal control and the adversarial presentation of the evidence takes place before this critical audience. Judicial controls on the admission of expert evidence and of the court process will affect the jury's perceptions of the issues. Chapter three considered the importance of expert opinion but the final review of judicial controls on the admission of evidence requires a brief review of the judicial arguments centred round the jury role, to restrict the admission of expert evidence. In addition, there is the fact that judges sum up the evidence and explain the legal rules as part of their directions before the jury retire to make a decision.

Admission of Evidence and the Jury

Another basis on which judges assess the admissibility of expert evidence is to consider whether it is appropriate and necessary in terms of the jury's role (Edmond: 235-6). Admissibility in this context is covered by the *Turner* rule ([1975]; Thomas-Peter & Warren: 93). First, the judge has to consider if the evidence is overwhelming or confusing, because it is feared that if the jury are overwhelmed by the science they may attach more weight to it than it can bear. Secondly, expert witnesses can only testify when the matter in question is beyond the knowledge and experience of the judge and jury, such as with BWS, because the jury should be able to form an opinion on 'normal' human behaviour.³⁰⁶ Thirdly, evidence can be excluded if it is thought the jury do not require assistance, the evidence is redundant, or it usurps the jury's role. Mackay and Colman, whilst conceding that the admission of expert evidence should be restricted, maintain that *Turner* is too dichotomous in its division between normality and abnormality, and argue that it would be better if evidence were permissible on abnormal and unusual states of mind that fall short of mental disorders, which may not be readily understood by the jury (1996: 95). Certainly the *Turner* rules give judges wide-ranging discretion to

³⁰⁶ Edmond discusses this with reference to the Canadian case of *Lavellee* (1990) (pp.237-8).

include or exclude evidence that the jury hear in line with the legal objectives they want to prevail in the case.

Judges' Directions and the Jury

Judges give directions at the end of the trial on the relevant legal rules and issues, and summarise the facts and expert evidence.³⁰⁷ However, the jurors have no legal background and previous chapters have demonstrated the complex normative and moral nature of the cases under scrutiny. The Judicial Studies Board provides specimen judicial directions, including those for the law under discussion, which are available online.³⁰⁸ Although it is not feasible to detail the directions in full, observations from the diminished responsibility section that are salient to the debates are briefly reviewed. It is said that abnormality of mind includes matters of perception, understanding, judgment and will, which appears to be wider than the quote from *Byrne* on cognition and volition. Within the notes section there is an admonition that medical evidence be carefully scrutinised to consider how much depends on hearsay or statements made to the doctor by the defendant himself. There appears to be scepticism about the nature of the evidence and in particular the likelihood that the experts might be duped by the defendant (*Smith* [2002]). It was held that it was harder to lie about diagnostic matters than ordinary matters, and it is the former which are considered by the court. In addition, reference is made to ensuring that the jury are clear that alcohol and drugs are not covered by *inherent cause*.

Observations on the matter of judicial directions have also been made in cases. For example, it was held in *Lowe* (2003) that judges can improvise in their explanations of the legal rules, the essential matter being that they are conveyed in clear and simple language. With regard to the summing-up of expert evidence the judicial review case of *R (on the application of Farnell)* [2003] and *Norton* [2002] state that it should be fair and balanced and that it should be borne in mind that it is unhelpful to saturate juries. However, it would seem that with selective summaries there is always the issue of bias on the part of the judge. Account also needs to be taken of the judge's symbolic

³⁰⁷ Young (2003) has undertaken a comparative evaluation of the impact of judge's directions based on jury research.

³⁰⁸ <http://www.jsboard.co.uk/criminal>

status in terms of the weight that will be attached to what they say and the fact they are pulling the legal and evidential matters together at the end of the case.

There are clearly problems. For example, the *Taylor* [2003] appeal concerned the adequacy of the judge's directions in a case where the defences of diminished responsibility and provocation were pleaded together. Similarly, in *R (on the application of Farnell)* [2003] there were problems with adequately addressing the new basis for provocation introduced by *Smith* [2001]. In addition, chapter one highlighted that jurors struggle with the concept of *mens rea* and the legal definition of intention. Chapter three has shown that medico-psychological terms also have legal meanings, which may be very different from the medico-psychological profession's perspective and to the folk psychology of the public. The jury have a number of grounds on which they can decide not to take into account the expert evidence, which were outlined in chapter three, but it seems an onerous task for the jury to distinguish these in light of the emotion in a case, complex directions and complex evidence. Young concludes that simplicity of language is important and suggests that the jury could receive directions at the start of a case as to the central issues in order to provide a focus (2003: 15-16).

The Jury and Expert Evidence

Whilst the law controls the remit of the defences and therefore the questions addressed and the admission of evidence, insanity and diminished responsibility verdicts are influenced by the application of science by the expert to the legal criteria. Although many cases do not go to trial as a result of expert evidence there is the impact of the interface between the expert evidence and lay consensus if the case reaches trial, with the final decision resting with the jury. The judicial controls on the admission of expert evidence with regard to its impact on the jury have just been noted. The interplay between science and the jury historically began with the expert acting as an adviser to the jury on the matter of insanity at the end of the 19th century (Ward: 105). But then experts did not examine the defendant as they do now, they commented on the case in light of their professional experience, which arguably usurped the role

of witnesses generally.³⁰⁹ The role of the jury was only preserved through judges insisting that whilst expert opinion should be taken into account, it should not be accepted uncritically. However, Ward argues that the expert's role has gone from one of adviser to authority in diminished responsibility cases (p.117). There is support for this in light of the judicial comments on the credence to be given to expert evidence once it enters into court, and the grounds on which the jury should ignore it, discussed in chapter three. In essence, if the experts agree, having taken all the facts into consideration, the jury is not expected to reach an alternative conclusion.

Thus it seems that once the judges have decided the evidence is admissible in line with legal aims then it is to be relied on, as they want the jury to make decisions in line with legal objectives. Perhaps this is particularly the case with diminished responsibility because the defendant pleads guilty so the evidence is mitigating information for the sentencing stage. Significantly, in diminished responsibility cases the jury are still presented as having responsibility for deciding if there was a substantial reduction in mental responsibility,³¹⁰ although, as stated in previous chapters, since the case of *Cox* [1968] juries are rarely required to decide this. This means that the medical evidence in cases reaching trial will be contested and therefore the jury have to decide between competing viewpoints. Critically, the jury have a symbolic role for the professionals involved in the legal system because if there is an outcry about a verdict it can be said that the jury are responsible for the final decision. Similarly, the expert as an authority, both in court and through the operation of the *Cox* rule, may provide the law with an alternative device for displacing responsibility using the 'science card', should it be needed for the purposes of appearing neutral, even though chapters three and four show the level of legal control. McSherry argues that the role of deciding the ultimate issue should be given back to the jury as it involves social and moral considerations and experts should simply comment on whether the defendant was mentally impaired at the time of the offence (2001: 20). The evidence in chapter three does show that experts are aware that giving an opinion does require them to make social and moral judgments.

³⁰⁹ *Frances* (1849)

³¹⁰ *Byrne* (1960) & *Egan* [1992]

Research has been conducted into jury decision-making, which will be briefly reviewed because while only a few cases go to trial it is an important aspect of both the legal and medico-psychological role in court to convince the jury that their perspective on the incident is the right one.

Jury Decision-Making

Professionals fulfil their role within the constraints outlined and then responsibility for the verdict is devolved onto the jury. But most of what happens in court is far removed from ordinary conversation, yet it is heard and has to be understood by a lay audience (Lynch 1997: 126). The legal controls discussed in this chapter and chapter three affect the nature and scope of the evidence the jury hear, but the jury cannot be controlled beyond that, which is the concern that founds some of the suggestions in the Auld report, which proposes reform of the jury system.³¹¹ Clearly there is no way of knowing the basis to a jury's decision, but research has been conducted, often using mock juries.³¹²

The jury's assessment of the credibility of witnesses, including those giving eyewitness and expert evidence, takes place in an environment that is unfamiliar and stressful. Body language and speech styles have been identified as important considerations which can potentially influence decisions, as have the attractiveness of the defendant, their socio-economic status, gender, race, age and demeanour in court.³¹³ With regard to the latter, anxiety traits have been found to reflect those for dishonesty whereas confidence gives the impression of honesty (McEwan 2000: 114; Hollin 1989: 165-6). The more coherent a narrative appears the more likely it is to be believed, especially if it is tied to reality by means of factual evidence. This may mean that the fact such expert evidence is not anchored in legal requirements is overlooked. "The anchoring construction consists of evidence that connects the narrative to general beliefs" (McEwan: 116). Psychologists have also found that there is an innate tendency to create a story from what we hear, which is likely to be influenced by personally held perceptions of crime stories (Weiner et al 2002).

³¹¹ See Dennis (2002) for a discussion on this.

³¹² Darbyshire (2001) reviews evidence on juries and lists the conclusions to be drawn.

³¹³ Abshire & Bornstein (2003) look at the impact of race.

The quality of the 'case' story is affected by poor comprehension and memory (McEwan: 115). Cooper and Hall (2000) found that the expert was judged in terms of views on the parties they were representing. There is also the effect of the judge's instructions on evaluations of the expert evidence. Wheatman and Shaffer's (2001) study found that information on the detention options in insanity trials affected jury reactions. Schuller and Rzepa (2002) found that jury reactions to expert evidence on BWS were mediated by their views of the defendant and when judicial instructions indicated that they were not tied to the strict letter of the law.

Next to be considered is jury comprehension and views of the legal rules. Collett and Bull Kovera (2003) compare the effect of British and American trial procedures on jury decisions and conclude that the British system is less distracting because there are fewer extra factors to interfere with the processing of the evidence, although it was suggested that the judge's non-verbal cues within the case had more impact. However, the research indicated that overall this did not improve the juries' capacity to determine the strength of evidence. Whilst the rules are complex, it has also been found that the judge's directions can be confusing because they refer back to matters that jurors are struggling to remember, having no experience of legal matters (McEwan: 112-4). Spackman et al (2002) suggest that instructions are construed by jurors to fit with their evaluations; for example, the murder/manslaughter distinction is affected by perceptions of the defendant's past behaviour and emotions.

Mitchell found the public concept of *mens rea* was wider than the cognitive focus of the law because it took into account wider social policy issues, such as disregard for human life (2000: 826). Malle and Nelson's (2003) contrast of the legal and folk concepts of the mind, which included *mens rea*, illustrated how the two can clash and cause confusion for the jury, resulting in distortions of justice (p.578). This highlights the tension that exists with juries having to apply both legal concepts and common sense understandings. Malle and Nelson suggest the judge should specifically recognise and distinguish the two forms when instructing the jury. Research contrasting legal conceptions and common sense assessments of *foreseeability* suggest that foreseeability is more likely to be implied if it is easy to imagine or recall a personal instance, and if

an alternative outcome can be readily envisaged it is more likely to be thought that the resulting outcome could have been avoided (McEwan: 117-25). Psychologists have also shown that hindsight produces inflated perceptions of foreseeability. The concept of the *reasonable man* also presents problems if he has to have similar characteristics to the defendant when medico-psychological problems are involved because without experience it is difficult to understand or conceptualise.

Central to the cases under scrutiny are issues around mental illness and dangerousness, and the jury represent public attitudes, which will affect their reactions to the expert's evidence and the legal rules. Furthermore, murder cases are inherently emotional. Examples of research on these points include Angermeyer and Schulze's (2001) investigation into the potential impact of news reporting of violent incidents by the mentally ill on public attitudes. They concluded that although the information is not processed uncritically, the media do generate stereotypical images.³¹⁴ Also, in chapter three the point was made that public perceptions of psychopathy are significant, and Guy and Eden's (2003) study on risk perceptions of violence examined the effect of pre-conceived ideas on perceptions of expert evidence. Attempts have also been made to assess and measure the difference between moral judgements of violent behaviour based on justice and vengeance (Ho et al 2002; Wolf 2001). Mitchell's (2000) surveys of public opinion on homicide found evidence that there is an attempt to respond in a discriminating and balanced way to the loss of life and the killer's culpability. There was also consideration of wider social implications, especially the matter of dangerousness, so although the mentally ill often commit brutal murders and are liable to repeat the behaviour, there was concern that individual responsibility was adequately assessed, as well as public protection being ensured (p.826).

It would seem that individual perceptions about the correct verdict do not readily change, although the impact of group dynamics needs to be considered (McEwan: 112). The make-up of the group in terms of such things as attitudes and intelligence, which affect the capacity to deal with the information in the trial and the deliberations on the verdict are important (Hollin: 169-71). These

³¹⁴ See Williams (1994: Ch. 4) on the media and perceptions of crime.

are likely to influence the evaluation of the facts and expert evidence (Mason et al 1999: 526). The issue of *responsibility* and *blame* has been investigated and it has been suggested that there is more responsibility attributed when the consequences are serious, although this is not an uncontested argument. There is also evidence that assessments are made of the victim's culpability. In addition, arguments have been made that evaluations of circumstances are made in terms of the belief that the world is *just* and that something can be done to avoid catastrophic incidents. It would appear that the discrepancies between legal and jury decisions lie most often in the realm of acquittals.

Discussion

The law upholds the rule that individuals are responsible and purports to ensure that any evidence indicating they are not is reliable (Gerard 1999). This chapter has already discussed the fact the law has deliberately aimed to limit the influence of medico-psychological evidence in respect of responsibility. In addition, the political thoughts and policies relating to the mentally ill are an important backdrop, as Stone (1984) illustrates through a comparison of an American and Russian case. It can be seen from chapter one that the shift and emerging emphasis on matters of dangerousness are important indicators, although it is clear from this chapter that this is a long-standing concern. Furthermore, the expert's evidence is tightly regulated in part because of concern that expert evidence could overwhelm the law, and the jury, as ultimate arbiters, will be deciding between experts and not the legal presentations of the facts (Coles & Veiel 2001: 616).

Both this chapter and chapter three show the level and nature of legal intervention in relation to medico-psychological evidence but neither judges, nor lawyers in general, receive training in science or mental health issues, although Faigman maintains that they should (1999: 64).³¹⁵ Arguably, judges gain some familiarity with evidence through experience, but evaluation appears to be informed by a combination of prejudices towards those that have mental illnesses, scepticism about experts and scientific method, and legal preoccupations with dangerousness. Significantly the law has led to the establishment of forensic experts and requires that specific legal questions be

³¹⁵ See chapter 6

answered, yet experts are required to provide independent evidence. Furthermore, the spectrum aspect of medico-psychological evidence is overcome by requiring an opinion on the matter, underpinned by the adversarial process. This shows the range of ways in which the law excludes and controls medico-psychological discourses to achieve the social and moral outcome preferred, it is not a neutral process. Therefore despite the amount of time that experts have been involved in the legal process, and the considerable developments in the understanding of the mind that have occurred within medico-psychology, the relationship has not fundamentally changed, as the reality of the knowledge of the mind is not required for the operation of the law. Procedural factors controlling the range of evidence is the critical factor.

Mitchell expresses concern at the role required of psychiatry in areas where the law is under pressure to produce a particular result (1997: 623). Mitchell's study demonstrated that whilst psychiatrists do make use of the elasticity of s2 to allow their personal views to be expressed, there was concern that the law uses them to mitigate potential injustices. Coles and Veiel assert that clinicians need to stay with the science and not use it to support a more personal position on the issues in the case (2001: 616). Lymburner and Roesch (1999) claim there is a shift in focus in Canada from the legal restraints on the operation of the insanity defence toward assessing the quality of forensic assessments and measures. It would appear from this study that they vary enormously. Mitchell's respondents want to see the law take more accurate account of psychiatric and psychological research. Mitchell argues that if the law is going to benefit from expert opinion in this way then "it needs either to do more than simply call for common sense or to ensure that the experts are not put in the invidious position of stepping beyond their expertise and probably significantly influencing the outcome" (p.632). But as chapter three showed, plainly the diminished responsibility defence is being operated in a benevolent manner by both professions.

Moreover, if judges are ill-equipped to deal with expert evidence then juries, who are the ultimate arbiters, are in an even worse position. However, the story they hear is subject to gate-keeping by the judiciary through the restriction to legal categories and the admissibility of evidence, which is further exacerbated

by the adversarial process and counsel's form of questioning. There is currently considerable debate about the involvement and role of juries (Auld 2001; Carruthers 2001). The Auld report (2001) considered revisions to the jury process, which have been incorporated in the Criminal Justice Bill (2002). Essentially this includes provision for defendants to apply for the trial to be conducted without a jury (s36). Judges have criteria to help them decide, with public interest a major factor. The prosecution may also apply on the basis of the complexity of the case, but this seems to be restricted to financial matters because it has arisen as a result of concerns about fraud trials (s37).³¹⁶

Sentencing

The intersection of law and medico-psychology also encompasses the sentencing stage of the criminal process. Earlier in this chapter the inception of the expert's role at the sentencing stage was reviewed, which has generated a different response from the legal system. Experts' court reports frequently provide evidence about risk and dangerousness but they are also called upon to undertake a specific report to help the judge decide on the most appropriate sentence. The primary legal focus with regard to risk is concern over violent behaviour because of the potential for harm to others. The debate extends beyond the individual to the social implications of being labelled a risk and dangerous. The foundations to the current approach were detailed in chapter one.

The judiciary are again figural, determining the place of detention, prison or hospital, and the length of the sentence. There are more consistent norms with regard to verdicts than punishment, because of additional difficulties with the latter involving decision-making about whether treatment or punishment is most appropriate (Hawkins 1998); the debates and labels relating to deviance are not static. Solomka examined the role of reports in the passing of longer than normal sentences under s2(2)(b) of the Criminal Justice Act 1991,³¹⁷ which requires a report if the defendant appears to be, or is, mentally disordered and poses a future risk of serious harm, unless the court considers it

³¹⁶ For commentary on the proposed changes see Elliott (2002); Robertshaw (2002). Honess (1998) evaluates the problems said to exist in complex fraud trials.

³¹⁷ Wood (1998) contests the use of such sentences, arguing that civil detention is more appropriate than a longer prison sentence for those held to be dangerous.

already has enough information to make a decision (1998: 408-11). The reports analysed included information on diagnosis, treatability, and risk of re-offending. Detention in hospital requires the condition to be treatable under the MHA, an issue in civil and criminal detentions.³¹⁸ What is considered treatment is important, feeding could arguably qualify, but it constitutes another flexible tool for the decision-making process. Forrester claims the treatability requirement has been interpreted liberally and pragmatically to achieve hospital detention (2002: 341). Scott discusses how important emotional literacy and the capacity to learn is considered to be (1998: 462). This reflects the perspective outlined in chapter two about the importance of emotion to decision-making and is significant for the assessment of psychopaths. Verdun-Jones's discussions on the involvement of medico-psychological experts in assessing dangerousness notes that because hospitals do not want psychopaths as they are considered untreatable they try to ensure that they do not have recourse to the MHA provisions (1998: 304; 310-11; 314-5). Mason (2000) expresses concern about the psychiatrist's role because the law is unlikely to disagree with an expert who recommends the continued detention of a psychopath on the basis of risk. Mason asserts that there appears to be an increasing trend towards "using special hospitals as places of detention", which is supported politically and publicly by concerns about those with personality disorders and public safety.

However, the reliability of risk assessments has been called into question (Solomka: 414; Scott 1998; Menzies et al 1998). There are doubts about the accuracy of the research that underpins assessments because of the inconsistent results, such as the arguments made in the Nuffield report discussed in chapter three (Thomas-Peter & Warren: 96-7; Mason 2000).³¹⁹ For example, violence has social, psychological and biological antecedents, and in addition the samples are open to challenge. Menzies et al claim that

"danger, violence, risk, psychopathy, conduct disorder, and related constructs are not discrete or insulated entities amenable to narrow scientific calibration – rather, they are complex, multidimensional, and discursively charged phenomena, with deeply engrained and

³¹⁸ Dallaire et al (2000) review the use of dangerousness in civil detentions.

³¹⁹ The authors cite the views of J. Monahan & H.J. Steadman, (1994) 'Toward a Rejuvenation of Risk Assessment Research', in Monahan, J. & Steadman, H.J. (eds.) *Violence and Mental Disorder: Development in Risk Assessment*. Chicago: The University of Chicago Press to explain why this has been the case (pp.96-7).

contradictory connections to human thought and action and to wider social structures and cultural forces” (1998: 514).

Yet Hare et al (2000) argue for the validity of the Hare Psychopathy Checklist – Revised (PCL-R: 1991) for predicting crime and violence. Similarly Soderstrom et al (2002) assert that there are advantages provided by brain scans.³²⁰ Thomas-Peter and Warren maintain that owing to the ethical considerations inherent in risk assessments these methodological issues need to be addressed. Notwithstanding this, Monahan (1998) argues that it is disingenuous and in the long run counter-productive to deny an association between mental disorder and violence. He maintains that by acknowledging this a considered view on the policy responses and provisions can be undertaken to ensure a balance of the individual’s rights and society’s protection from harm.

The medico-psychological role is complex because of the linking of mental health with public order and protection. Mullen argues that the public expects those in mental health services to be helping to deal with those who kill and represent a danger, and he argues that this is part of the profession’s social significance, that homicide is a health issue (2000: 578). This leads to the search for explanations, be they organic or functional, for criminal behaviour, with aggression and violence the issue for social order and public protection.³²¹ Scarano points out that dangerousness is a legal word whereas risk of violent behaviour is concerned with clinical matters (2001: 562). Poletiek reflects on the differences in perspective between law and medico-psychology of the term dangerousness in civil hospital commitments, and, although each profession is using the same legal criteria, professional perspectives lead to different biases in the assessment of dangerousness (2002: 28). Dangerous is an evocative word and affects the evaluative nature of responses to behaviour so labelled. To illustrate the difficulties, the development of the ‘diagnostic’ category DSPD for the purposes of detention is problematic because it has no legal or medical status (Forrester 2002: 338-341). The Royal College of Psychiatrists suggests that the provisions are more about public order than mental health and that

³²⁰ Hawkins & Trobst (2000) look at the conceptual issues and research findings with regard to frontal lobe dysfunction and aggression.

³²¹ Walters (2000) discusses the search for the violence prone personality. A list of literature on aggressive behaviour can be found in the journal *Aggressive Behaviour* (2002) Vol. 28.

psychiatrists should not be agents of social control. However, Forrester points out that the current MHA already supports such definitions and detentions, through the psychopathic disorder. He argues that that emerged in much the same way and has survived despite its lack of meaning, precision and reliability. As noted earlier, Foucault claimed that social responses developed in reaction to what someone is as well as to what they have done, which in this instance is through the concept of dangerousness. Forrester states that previous provisions have fallen into disuse and that this is likely to occur with the current proposals. Manning's (2002) observations of the group dynamics and development of knowledge within this area leads him to be more speculative about the future.

Conclusion

The law has adopted a very pragmatic approach to the use of scientific knowledge. There are two dimensions to the interaction of law and medico-psychology. First, there is the expert's evidence on a particular mental state affecting the defendant's cognitive capacity to be responsible for their actions, which reduces moral culpability. Law has priority over science, historically and politically, which can make the position of the expert a difficult one at times:

"Our criminal law, founded as it is on the principle of individual responsibility, is not a mere means toward reducing antisocial activity; the institution is itself an essential end for society. There is no more reason to accept the decisions of experts than any other group" (Smith 1981: 175).

Therefore, while science provides legitimacy for legal decisions the knowledge is presented in a particular format with the possibility of procedural purification to ensure it supports legal purposes. The use of expert evidence is symbolic. Experts are expected to apply their scientific knowledge to legal concepts and rules. Mitchell found that experts know what the process allows and wants, and adapt and work within it. Evidence that the law is operating in a benevolent manner in the context of diminished responsibility is in large part possible because of the adaptation of the expert to the legal requirements. The arguments about scientific objectivity appear to be a smoke-screen for securing moral outcomes, at least in the context of diminished responsibility.

Crucial to the manner in which law and medico-psychology interact are the judiciary, both in terms of developing the law, but as this chapter shows procedurally, and as a practitioner in the legal process. Lynch maintains that the judge is a backdrop to tactical decisions, an audience and participant in court, and a social fact (1997: 100-4). This also informs the initial case process as it is anticipated that cases will go to trial, although it seems this is not the position with diminished responsibility. The jury are also important, although the shift in the use of expert evidence has arguably undermined the jury's role, but legal rhetoric maintains the symbolic prominence of the jury. Changes may occur in the role as a result of the Auld report, whereby professional judges might make decisions at the expense of lay participation, and juries will have to be more accountable for their decisions (Jackson 2002).

Secondly, there is the medico-psychological involvement at the sentencing stage. The focus on dangerousness and risk has led to an association of mental disorders with criminal conduct, for example, psychopathy, ASPD and DSPD. This dimension of the expert's role is more about providing foundations for interventions in relation to categories of people rather than individuals.

What is perhaps of concern is that if the assertions of Petrila (2004) are true, that forensic mental health is so important to mental health debates generally, then mental illness is equated with criminal conduct.

CHAPTER FIVE

METHODS

Introduction

This chapter explains the different data sources and methods used during the research, noting the reasoning behind the choices made, and detailing the problems encountered.

A multi-level analysis has been adopted in the theoretical and practical examination of the intersection of law and medico-psychology in cases of insanity and diminished responsibility. A qualitative theoretical stance has been assumed because it appreciates the subjectivity within the research process and the matter under investigation, recognizing the barriers to achieving objectivity (Filmer et al 1998: 25; Ch. 3; Lazar 1998: 8-21; Punch 1998: Ch. 8).³²² In fact the matter of subjectivity and objectivity is a theme that runs through the thesis, as the focal point is the meeting of the social institution of law and the scientific field of neuroscience and medico-psychology. The ideographic, or qualitative approach, tries to understand the social world, in part achieved through obtaining first hand subjective knowledge, whilst remaining aware that meanings are negotiable in relation to the context (Hornsby-Smith 1993: 54-57). Accordingly, the production of knowledge is not seen to be a neutral process, researchers are part of the world that they are seeking to understand, and those studied actively interpret their own behaviour (Brunskell 1998: 39-41). However, there is no agreed doctrine underpinning all qualitative social research (Silverman 2000: 8-9). The thesis highlights this in relation to the social construction of the legal categories and the process of allocation to them.

Documentary Research

Introduction

In order to examine the nature of any interaction between law and medico-psychology in insanity and diminished responsibility cases the respective legal and medico-psychological theories of the mind, the technical legal framework,

³²² Hughes (1990) provides a lucid outline of the historical complexities involved in the study of social life and action. See Creswell (1998), Silverman (2000), and Henwood & Pidgeon (1993) on the nature of qualitative research.

common law position and role of experts have to be explored. The information for these dimensions of the study was found in statutes, reported cases, Law Commission reports, Home Office statistics, and legal and medico-psychological academic texts. This constitutes a diverse range of documents from very different sources that approach the topic from different perspectives. Documents are socially produced, containing information developed on the basis of certain ideas and theories (Macdonald & Tipton 1993: 188-198). In addition, the use and meaning of language varies between different professional groups because of divergent standpoints, as is evident, for example, with the two disciplines under scrutiny in relation to the terms and concepts relating to the mind. However, the fact that the project makes use of a wide variety of different sources in order to evaluate the nature of the interaction of law and medico-psychology ensures that no one perspective prevails; the matrix of viewpoints is examined to enable a consideration of the construction of the interface and the issues. The effect that the researcher's perceptions and views have on the interpretation and construction of subsequent observations is discussed directly in the section on data analysis dilemmas, although it is a theme throughout the chapter as the nature of the construction of the different data sources is reviewed.

Official Statistics

Whilst statistics are associated with a quantitative approach, official statistics have been used in chapter one to illustrate the number of insanity and diminished responsibility cases in recent years because an integral part of the review is the impact that the structure of the defences and their incumbent sentencing options has on recourse to the defences. The statistics included in the thesis were obtained from the Home Office Homicide Index, which has categorized cases from the mid-1970s. In addition to using publicly available information, by gaining Home Office clearance access was secured to recent statistics that included a more comprehensive range of data about the cases.³²³ Confidentiality requirements were imposed by the Home Office, which included a requirement to ensure that individuals are not identifiable. They also reserved the right to refuse information. The data that have been supplied as part of the research project have to be deleted or destroyed on completion of

³²³ This additional data informed the construction of the vignette.

the project, with a written and signed declaration sent to the Home Office to confirm this. In addition to agreeing to these Home Office conditions it was necessary to register annually under the Data Protection Act 1998. Requests are processed by a gatekeeper who has released statistics covering the period 2000/2002, although the most recent request has not resulted in another set of statistics to include in the final presentation of the thesis. It has been possible to obtain additional incomplete data for 2003 from a publicly available report on Homicide and Gun Crime (2004). Significantly, the figures for 2000/2002 that are included in the official publication differ from those the Home Office supplied directly for this research.

The statistics show how many defendants have officially been categorized as successfully pleading insanity and diminished responsibility, but there are a number of qualifications that need to be made regarding the production and use of official statistics. For instance, errors can be introduced in the statistical process itself between the occurrence of the event and the recording and production of data (Kitsuse & Cicourel 1963: 133). There can be differences between initial recording schedules and the published statistics (Hindess 1973: 47). This may explain the discrepancies between the Home Office statistics supplied and those cited in the recent report. Another issue concerns the fact that statistics are a particular representation of the culmination of a complex decision-making process as the difference between official statistics and the British Crime Survey show (Williams 1994: Ch.4). The analysis of the intersection of law and medico-psychology in the thesis is effective in illustrating the negotiated nature of the final case judgments contained in the statistics. The project highlights in detail procedural practices and critical junctures that provide the opportunity for alternative outcomes, and the concepts, norms and objectives from which the possible choices are made.

Despite the scepticism about statistics some argue that they can be useful (Bulmer 1999; Levitas & Guy 1996), whereas others (Kitsuse & Cicourel) hold that official statistics are problematical because they do not fit social science classifications and are a map of organisational policies, politics and priorities. Therefore, statistical data are the result of categories of factors that have been socially constructed (Silverman: 7-8). There is support for this position in this

project, which examines the legal reconstruction of definitions of mental illness, which in itself has generated a plethora of research on the importance of social and cultural influences (Szasz 1972; Doyle 1981). Bulmer acknowledges these shortcomings but he asserts that official statistics at least show the “magnitude, nature and locality of a problem” (p.133). Similarly Silverman claims that official statistics are social facts, providing opportunities to conduct longitudinal studies, historical research, area-based studies, international comparisons and insights into the procedures of organisations (1998: 98; 133). In respect of the current research the decline in the use of insanity and diminished responsibility highlighted in the statistics forms an important reference point in legal discussions on the operation of this area of the law. Therefore, as this thesis shows, the social production of statistics can be investigated notwithstanding that the statistical data does not elucidate the process and the impact that decisions have on those categorised through the defences, that there is no sense of the discretionary power that doctors or judges are applying, or the ambiguity that accompanies a mental health diagnosis in clinical or legal terms, there is no appreciation of the normative judgements inherent in assessing these cases in order to take account of concerns about dangerousness and public protection, that they produce no sense of the social meanings for the actors, and that there is no uniformity of application (Silverman: 106). Research such as the current project examines the conceptual process that leads to categorization encapsulated in the statistics (Hindess: 12), with the caveats that accompany the production of information by researchers, which are discussed in this chapter.

Crown Prosecution Service Case Files

As the thesis explores the interaction of law and medico-psychology through investigating the practitioner’s roles and practices in addition to the theoretical issues, one important way to examine the practical interaction appeared to be obtaining access to case files, which the Crown Prosecution Service (CPS) are responsible for. At the outset of the project it was anticipated that 20 case files would enable a suitable review, particularly of expert reports, which contain the expert’s opinion on which so much importance is placed as chapters one and three discuss. However, a number of access problems were encountered and as a result only two case files were studied.

Obtaining security clearance for access to the CPS was not difficult.³²⁴ The key requirements imposed on conducting research were the guarantee of anonymity for the individuals whose files were examined; agreeing to no mechanical copying of the files only note taking; no quoting, or dissemination of the material to individuals outside the Service without prior approval of CPS Headquarters, with the CPS retaining the right to edit or otherwise restrict publication of any such information, which included a thesis. The expert report synopsis contained in chapter seven has been approved. It transpired that security clearance was not an automatic guarantee of access (Hornsby-Smith 1993: 59), there were problems securing the co-operation of the CPS offices that were contacted because the area Head could exercise personal discretion. The three offices selected were located in the same areas as the interviewees but they are not identified in order to maintain the confidentiality of individuals in the cases and interviewees. Two were central offices, whilst the other came within the catchment area of one of the central offices, although this was not self-evident when the request was made. One central CPS office agreed access. The second centre presented reasons to deny access each time contact was made and after several follow-up calls it was stated they would make contact when it was more convenient but they did not. The local office lost the initial request and subsequently refused access.

The head of the department within the CPS who dealt with access to the case files exercised stringent gate-keeping and a number of problems were identified. First it was stated there could be no access to active case files. Secondly, there was no system to enable identification of files by the type of plea because reference is by name and number. In addition, owing to limited CPS resources, whilst they were happy to help they could not allocate any personnel time to detect any relevant cases. Finally, it also transpired that as soon as a case is over, so point one no longer applied, the CPS case files were rapidly sent on to the archives in London. Case files can take up to two days to read³²⁵ and therefore it was not possible to spend the necessary time in London to view 20 cases because of the prohibitive fieldwork costs, illustrating how

³²⁴ Agreement was secured through a NIS form, Character Inquiry form, Research Undertaking form and Declaration requiring acceptance of pertinent aspects of the Official Secrets Act 1989.

³²⁵ A supervisor who has undertaken this task supplied this information.

institutional procedures and financial constraints can affect the avenues of research within a project.

Following several telephone discussions it was established that if relevant case names could be supplied to the CPS it might be possible to view those files after the case was over and before it was dispatched to London. As a result the Crown Court were contacted to ascertain if the court lists would identify relevant cases. A letter was required to explain the request for senior managers to consider it, which resulted in a website address where the lists are displayed, but the same identification problems applied. The Home Office statistics were not recent enough to be of assistance. A supervisor suggested a barrister who deals with murder cases as potentially providing a way of identifying case names. The problem was explained to the barrister who agreed to help and as a result of meeting them a number of names were supplied from the Chambers' case list. The names were given to the CPS office and as a result access to two case files was permitted, neither of which established a plea of insanity or diminished responsibility, and they had to be viewed in one day. This made it difficult with no experience of case files, and the fact that there were several boxes of materials for each case, which were not in any order. One case contained a psychiatric report and the other a defence and prosecution report, where both experts concluded that there were no grounds for a diminished responsibility defence. Therefore, although it was helpful to see the content of case files and expert reports the intended reviews and comparisons were not possible. That said, viewing the case files and in particular the expert reports was important for understanding the nature of reports, in particular the conclusions and opinions on which so much emphasis is placed. The three expert reports are outlined in chapter seven and inform the discussions in chapter eight.

Researching Practitioners

Introduction

In addition to the different forms of documentary analysis of the interaction of law and medico-psychology the project examines the practitioner's perspective and role. The documentary evidence shows the incongruity between the

perspectives of the two disciplines and the importance of the complex legal procedural processes for the interaction in the application of the law. In order to comprehensively review the level and nature of the interaction between the two professions an investigation of how practitioners applied and worked within the theoretical and substantive legal framework discussed in chapters one to four was necessary. Two options seemed possible, viewing a case in court and conducting interviews.

Court Cases

An option that appeared to provide an opportunity to gain practical insights and contextualize the interaction between the professional disciplines, observing key actors within the adversarial process and the use of expert evidence, which was the focus of chapters three and four, was viewing a court case. Unfortunately, the problem with identifying cases by defence type created difficulties for discovering when a suitable court case was to be heard. As discussed in chapter one, there are very few cases and not all of those go to court. Despite inquiries to the court service, CPS, legal and medico-psychological respondents, and checking local newspapers it was not possible to attend court to view a case. Some respondents indicated that they were anticipating cases in the near future, but they were settled before the hearing. The Judge, in addition to trying to find a suitable case said in the interview that he would find out if it was possible to provide access to judicial case summaries for the research project but it would appear that this was not permitted as, despite a follow-up letter, nothing further was heard on the matter. The problems in viewing a court case illustrate an important point made in the thesis regarding the lack of public scrutiny of insanity and diminished responsibility cases because the decision-making process has shifted to the CPS, which reinforces the importance of considering the pre-court processes and the approaches of the practitioners who are making the decisions. The review of case files in London would make an important avenue of research to ascertain the nature of the evidence supporting the decisions, which could be linked to points made within this thesis.

Interviews

Conducting interviews with the professionals involved in homicide cases appeared to offer the most effective opportunity to review the practical interaction of those applying the law in these cases. The second level of analysis that focuses on the judiciary and the construction of the role of the expert already shows how important practitioners are to the development and application of the law discussed in chapter one.

The Interview Sample and Access

Interviewing is a complex matter and there are particular issues inherent in interviewing professionals (Hornsby-Smith). Researchers need to consider the institutional setting and be aware of the protocols that exist. Studying the issues through documents did provide essential insights but it was during the interviews that the limitations in understanding the practitioner perspective became clear through the distinct bifurcation between the theory debates in the earlier chapters and the pragmatic procedural focus in the interview data. This supports a fundamental assertion in this thesis that it is necessary to examine the intersection of law and medico-psychology in the application of law from the three dimensions covered by this project.

The first stage was to identify possible interviewees. It was anticipated that obtaining a representative sample would be difficult because of concerns about persuading professionals to give up their time, so an opportunistic approach was adopted. A geographical area was identified and the key selection criterion was simply to contact those who had been practising since the 1970s or early 1980s because it was anticipated that the sample would be small and their extensive experience would provide the most helpful insights in relation to what was a complex moral and legislative matter. Originally it was expected that the names of pertinent professionals would be found from the CPS case files. As this proved not to be a viable option the alternative was to use professional registration directories, which were available online. Using the search term *criminal law* to locate solicitors, and *criminal responsibility* for experts, searches of the Law Society Directory for lawyers, and for expert witnesses, the UK Expert Witness Directory and the British Psychological

Society Directory were conducted. The results provided more details about the practitioners listed and it became apparent that the number of people undertaking this sort of casework is not large. This was supported subsequently in the interviews where it became clear that only a small pool of people within an area deal with homicide cases. The significance of this is discussed in chapter eight. As it happened, after the interviews had commenced snowballing occurred and other respondents were identified as a result of respondents mentioning their names during the interviews. One consequence of requiring experienced practitioners, at least with regard to the lawyers, was a lack of possible female respondents. The one female lawyer contacted referred the request on to a male within her firm. Of the two female respondents, one was a psychologist and the other a psychiatrist.

The barrister could not be selected from directories as none could be located, but the individual within the CPS dealing with access mentioned his name, it was in one of the CPS case files, and an interviewee recommended him. There were no organisational gate-keeping issues with the barrister, defence lawyers, psychiatrists and psychologists but there were with the CPS, police and, potentially, the Judge. The CPS office only permitted contact with their most senior lawyer. Similarly, as a result of writing to the Chief Constable about interviewing a senior investigating police officer (SIO) a pre-selected interviewee telephoned to arrange an interview. The Judge was approached directly. Potentially the Lord Chancellor's department (LCD) can act as a gatekeeper but Judges' names are listed on the LCD website. Initially contact was made with a circuit judge who stated that he did not have the appropriate certificate to try the cases being studied but he recommended the High Court Judge who was eventually interviewed. There were gate-keeping protocols to negotiate in order to interview the judge as a result of their official status.

The difficulties in gaining access to busy professionals for research purposes were exacerbated by the small number of suitable candidates. The request letter contained details of the project, the funding source, the researcher's professional and educational background, and the project supervisors and their

specialization.³²⁶ The British Sociological Association's remarks on informed consent state that the researcher should explain to the participants as comprehensively and clearly as possible what the research is about, who is undertaking it, who is financing it, why the research is being done and how the information will be disseminated (Hornsby-Smith: 63; Warren 2002: 88-90). If the researchers and researched share similar backgrounds then trust is more likely because it indicates an understanding of the technical, ethical and moral issues that they are faced with (Seale 1998: 11). The interviews showed that professional acceptance was an important factor in the operation of the law.

In terms of unsuccessful requests, three defence lawyers, three psychiatrists and three psychologists declined to become involved in the project. The reasons given were that they considered they did not have the relevant expertise or that they did not have the time. In two instances the request was simply ignored, even after following up the initial inquiry. The final sample consisted of one High Court Judge, one CPS lawyer, one SIO, one barrister who is also a Recorder (a part-time judge),³²⁷ three defence lawyers, three psychiatrists and three psychologists.³²⁸ Whilst there are the concerns about the limitations of using small samples in qualitative research, attempts have been made in the research process to ensure that issues were explored comprehensively. The research represents a novel exploration of the issues that can be developed further through subsequent studies, as discussed in chapter eight.

Interview Method

As the project is concerned with exploring professional reasoning and pragmatic professional considerations when the two professions negotiate their roles in cases, semi-structured interviews appeared to offer the best method of obtaining this information. Semi-structured interviews are useful where the subject matter is sensitive or complicated (Fielding 1993a: 138-139). For example, Smith and Wynne used this approach to conduct research on some

³²⁶ See appendices

³²⁷ Although only one was formally interviewed, another barrister joined a discussion after the formal interview. In addition there were two meetings with another barrister about case names and for a review of the validity of the vignette.

³²⁸ The vignette was piloted with an experienced expert witness and provided views on procedural issues too.

matters covered in this project, which are discussed in chapter four, although they used a question schedule to ensure particular questions were raised for comparative purposes (1989: 11). The research in this project required a reflexive approach so themes rather than questions were used as a guide because it was unclear what the practitioner's perspective might include. Warren states that the "purpose of most qualitative interviewing is to derive interpretations..." (2002: 83). Semi-structured interviews allow the respondent to give a considered response and minimise the introduction of bias through extensive interaction. The respondents in the study are required to deal with what appeared to be a complex set of issues in terms of their professional roles and the operational categories with which they work. What was sought was to maximise the opportunity for their rationale, attitudes, beliefs and the descriptions of their actions to become explicit, so it seemed appropriate to keep the interviews as open ended as possible. Adopting this approach proved to be very informative and significantly exposed the contrast between the practitioners' perspective and focus with that of earlier theoretical debates, which is discussed in chapter eight.

The themes were developed from the documentary research, providing general guidance but it seemed important to see what the professionals themselves identified as the main issues, thus revealing contrasts both between inter-professional practitioner perspectives and with those in the legal and medico-psychological discourses in academic debates. Essentially, the themes concerned the respondents' views on the substantive law, suggestions for reform, procedural matters and their roles, and inter-professional understanding. Notwithstanding that the aim was to ensure the interviews were as unstructured as possible in order to elicit the professional viewpoint, a case scenario represented in a vignette was used.

*Vignette*³²⁹

A vignette was used because the aim of the interviews was to explore the interaction of the legal and medico-psychological professions and the negotiation of the different discourse perspectives, and providing a case scenario to all the respondents introduced a familiar format that would provide

³²⁹ See appendices

a common focus across both sets of interviews. Vignettes are “short stories about hypothetical characters in specified circumstances, to whose situation the interviewee is invited to respond” (Finch 1987: 105-110). Vignettes are essentially non-directive in that although they do provide a structure through the factors that are included, they allow respondents to attribute their own meaning to the situation. Meanings are social and this research explored the constructions of meanings in a specific context. Because of the difficulties in making the implicit explicit (Johnson & Weller 2002), it was anticipated that the familiar focus was more likely to result in the implicit professional norms becoming explicit because with a vignette the respondent is making normative statements about a set of social circumstances rather than expressing beliefs and values in a vacuum.

However, it was not assumed that language is simply an accurate reflection of thoughts and actions (Fielding: 148). Nonetheless, institutional ethnography “takes for its entry point the experiences of specific individuals whose everyday activities are in some way hooked into, shaped by, and constituent of the institutional relations under exploration” (DeVault & McCoy 2002: 753). Thus the viewpoint within the institutional context where the moral and political issues in the theoretical discussions are dealt with was sought, to identify the discursive and organisational processes that shape the professional activities and application of the legal rules. Both professions have distinct professional perspectives and cultural norms but they coalesce in the case process, so an exploration of the different considerations each profession has in a case seemed the most effective way to illustrate these distinctions.

There were a number of factors that influenced the formation of the vignette. Of particular assistance in the documentary research were the leading cases where judicial reasoning indicated their principle concerns and the range of conditions that have qualified for the two defences, examples of which are listed in chapter three. Furthermore, each case presented a résumé of the key circumstances related to the defendant and the incident, which provided instances of the personal and social characteristics that might exist in cases of this type. In addition there were details of significant factors provided as part of

the Home Office statistics. A summary of the range of key information and the most common examples is provided in Table 1.

Table 1: The key features in homicide case reports

<i>Basic Factor</i>	<i>Example</i>
Relationship	Suspect and Victim
Method of Murder	Sharp Instrument/Gun/Strangulation
Circumstances	In/consistency of the accused’s behaviour before and after the incident Is there any indication of pre-meditation and attempts by the accused to conceal their actions? What was the trigger for the violent act? What, if anything, does the accused say at the time and immediately after the act in question? Is alcohol a feature?
Mental state of the accused	Is there any history of, or indication that at the time of the act the accused was suffering from a mental illness?

The defendant in the vignette is called Malcolm. The scenario is divided into sections. It outlines the nature and quality of the relationship between the suspect and victim as it is usually someone known to the victim, and often related, that commits the murder. In addition, the vignette describes the defendant’s experience of familial relationships, existing personal relationships, and the circumstances surrounding the homicide. A potential trigger to the incident is noted, and the nature of the defendant’s behaviour after the stabbing. Plainly, in light of the focus in this research it was necessary to include facts that implied there was some reason to question Malcolm’s mental state.

Having identified from the case reports conditions that the courts have acknowledged, research was undertaken into the definitions within the diagnostic manuals, which also list disorders that could present similar symptoms in order to appreciate the cluster of factors that would be relevant. Additionally a search of ‘SOSIG’, the social science search engine was conducted using the term ‘psychological disorders’. This resulted in a list of U.S. and U.K. websites, with those dealing with dissociative disorders of

particular interest,³³⁰ owing to the requirements of the law for establishing these defences and because the neuroscientific research referred to in chapter two reveals the importance of these types of disorder.³³¹ Finally, a review of personality disorders was undertaken, which concentrated on borderline, avoidant, paranoid and adjustment disorders. The vignette alluded to a number of these factors in reaction to the trigger that led to the incident and Malcolm's behaviour afterwards. It was intended that the scenario would be ambiguous so that the interview process would lead to the interviewees deliberating and discussing the basis of their choices because it was likely that there would be a range of possible options, which indeed occurred.

Finch asserts that vignettes are difficult to construct effectively so that they are comprehensive, comprehensible and plausible (p.110). In addition, interpreting the responses may be difficult because it is not necessarily evident what factors are generating responses. Thus, following the formation of the vignette, and supervision feedback the vignette was piloted with a senior psychologist and barrister. A number of important points arose from the psychological review. Initially there was a misunderstanding about the purpose of the vignette. It was assumed that the vignette was meant to represent a psychological report and therefore the inferences and statements made throughout, which had no supporting evidence, resulted in the response that this would be impossible for an expert to defend in court. It was considered that the role of the expert had been usurped because it was their role to collect this information and interpret it. This indicated how important it was to ensure that matters were effectively explained to potential interviewees. Two additional points concerned the instructions experts receive from solicitors, and what sort of investigations the vignette might generate. These observations have been included in chapter seven as they add to the procedural discussions. However, the points gave an initial intimation of the nature and automatic reaction of an expert's professional concern. The barrister who provided the names supplied to the CPS reviewed the vignette. The feedback was not as in-depth as the expert's, however following a number of conversations it was concluded that the

³³⁰ For example, (31/10/02)

³³¹ For example Damasio (1994, 2000), Edelman & Tononi (2000) & Carter (2002)

vignette would provide a non-directive discussion on the issues that may arise in such cases.

What was interesting about the reviews of the vignette was how responses were primarily tied into professional considerations in a case context, which was the objective with regard to the interviews, so they were a positive indication that the vignette would facilitate this. In fact the overwhelming focus on procedure became a major outcome from the research, which is discussed in chapter eight. Nevertheless, there is always the possibility of differences between what people think they ought to do and what they would actually do in a situation (Finch: 112-113). Finch warns against assuming vignettes produce an accurate prediction of action in terms of the attitudes, reflecting Fielding's point about presupposing that language is an accurate reflection of thoughts and actions. However, the use of open questions provides the possibility to verify the respondent's position, supported by a reflexive approach following on from each interview.

The initial inquiry letter stated that a vignette would be used, which would be forwarded in advance of the interview to enable time to develop a considered response. It was a possibility that professionals might consider a vignette-focused interview more time consuming than one requiring no prior preparation on their part, although alternatively it could be seen as providing a familiar range of information through which to discuss matters. The interviewees were very generous with their time, with most interviews lasting at least an hour.³³² The vignette did provide a useful focus with all the interviewees engaging fully with it and there was considerable positive feedback.

Informed consent was obtained again at the time of the interview, in particular as permission had to be sought to tape the interviews, and there were no objections.³³³ There are a number of advantages to taping interviews. It makes it possible to revisit the information and interaction (Fielding: 145-147). As noted previously, a reflexive interview approach was being taken and it is not

³³² One interview lasted several hours.

³³³ One respondent wanted to discuss a case and make a point, but would only do so if the tape recorder was turned off.

always obvious at the time what information will be important, or to appreciate all the possible lines of inquiry and analysis. In addition with an unstructured interview format interviewer contributions can lead to difficulties remembering or writing everything down. Therefore, not recording the interviews potentially undermines the validity of the data because of the inherent unreliability of memory and notes.

A potential problem with interviews, particularly unstructured interviews, is interviewer bias (Fielding: 147-50). There is a research agenda in terms of interest in the area, the interpretation placed on the data informing the focus in the interview and the theoretical perspective inherent in the methodological approach, as methodological awareness contains a political sensitivity (Seale: 10). The methods chosen were designed to reduce the intrusion of the researcher, although the vignette clearly provides a particular focus. Also, the interview transcripts made it possible to monitor and reflect on the interactions. Furthermore, with qualitative research the relationship between researcher and researched is of crucial importance because inherent in the methodological stance is a recognition of the two-way nature of the process as interactions are co-created (Reason 1996). Gender can be an important dimension to interviews, and only two respondents were women (Warren: 94-96). Additionally, the demeanour of the interviewer and the mode of questioning can cause respondents to monitor their answers. With regard to this, while no specific incident stands out, two identifiable aspects were that there was often a lot of laughter that was based on assumptions of a shared understanding of the issues, which implied an inclusion in their professional culture, and the inter-professional relationships between the professions were evidently significant from the data. In addition, some interviewees asked a lot of questions, and the nature of the professional roles of both sets of practitioners is to elicit information in order to categorise. Finally, although the respondents did not review the transcripts of the interviews, at the end of the interview four respondents requested a copy of the thesis on completion.

Data Analysis

The research project makes use of different sources of information on the issues under investigation to ensure methodological triangulation (Seale: 52-5;

Macdonald & Tipton: 199). The documentary component is comprised of a range of material from very divergent sources with different inherent perspectives influencing the interpretation of issues. The incongruities between the legal and medico-psychological perspectives throughout the thesis are testimony to this. Inevitably, however, there will be an impact on the analysis and presentation of the data resulting from the agenda and perspective of the researcher, just as there are influences on the choices made in the construction of cases. Descriptions of social matters are not a literal view of the world, illustrated by the fact that the adversarial process results in two very distinct presentations of the facts of the case. Nor is it alleged that the presentation of the information, in particular the descriptions by the practitioners, which is represented in the data chapters, is not the culmination of the processes of categorisation into the classes available within the parameters of the normative and legislative legal framework. Miles and Irvine succinctly state, “individual experience is constituted within social structures - structures that themselves make possible and delimit individual and organizational practices” (1981: 117).

The researcher’s inherent assumptions are formed through personal history, culture, and theoretical perspective. One solution is for the researcher to disclose their attitudes and values (Henwood & Pidgeon 1993: 25),³³⁴ yet bias can only be explained to the extent that the researcher can appreciate it. The social world is constructed through language, which is imbued with cultural, gender and institutional values (Filmer et al: 25; Potter 1996). Meaning differs according to the social relations and institutional settings “within which they are produced, reproduced and sometimes reshaped” (Jupp & Norris 1993: 47). The difficulties that face the researcher in distinguishing all the influential factors that influence their interpretation of the issues is also a fundamental challenge in relation to eliciting professional attitudes and actions. Challenging discourses can be difficult, because as part of the society being challenged the researcher and research participants have been inculcated in current language constructions (Lago & Thompson 1996).³³⁵ This is central to Foucault’s premise (1980) and an important theme in the thesis. The constraints of professional discourses and the difficulties these present for appreciating the

³³⁴ Fortier (1998) highlights the gender and ethnicity issues encountered in her fieldwork.

³³⁵ Lago & Thompson (1996) consider the role of norms in inhibiting recognition of cultural differences.

perspective of another profession were evident in the data and throughout the research.

The interviews were transcribed by the researcher because of the benefits that offered in developing familiarity with the data. The hesitations and pauses are included because it appeared more valid to reproduce the quotes as accurately as possible thereby reducing the likelihood of researcher interpretation being imposed on what was said.³³⁶ However, it is not purporting to be conversational analysis;³³⁷ it is undertaking to detail the procedural and professional concerns informing the understanding of practitioner's concerns throughout a case in relation to the legal framework outlined in the theoretical debates. In order to do this, following the transcription of the interviews the NVIVO qualitative analysis package was used to arrange the data from each interview into the broad themes that formed the interview guide, with some data incorporated into more than one theme because of the interlinked nature of the matters under discussion.³³⁸ Inevitably an order will be imposed on the data that did not exist in the interviews (Czarniawski 2002; Gudmundsdottir 1996). It seemed appropriate to divide the data into substantive law and reform discussions, procedural matters, roles and key players, in order to highlight any relationship with earlier theoretical themes and to detail the information that was distinctive to the role and concerns of practitioners because the study is aiming to identify where law and medico-psychology intersect in the three dimensions identified. The presentation of the data highlights the fact that the main focus in the interviews was on practical and tactical matters, providing a stark contrast to the theoretical debates in chapters one, two and three. The procedural orientation meant that conceptual issues were rarely addressed explicitly. An important factor to emerge from the interviews was the orientation towards diminished responsibility because none of the respondents had been involved in an insanity plea, despite their extensive experience.

Coffey and Atkinson state that coding does not constitute analysis, the “important analytic work lies in establishing and thinking about such

³³⁶ A full stop and space were added for each second in a pause. For an explanation of detailed recording codes see Coffey & Atkinson (1996: Ch. 2); Heath & Luff (1993).

³³⁷ For more detailed alternatives see Hutchby & Wooffitt (1988) and Schiffrin (1994).

³³⁸ See Seale (2002) on using computer packages and Fielding (1993b) on coding

linkages...” (1996: 27). However, there is interference from the researcher in categorizing the data for subsequent detailed scrutiny, although the data was organized into a format that reflects themes identified earlier in the research into the intersection of law and medico-psychology, again to minimize researcher influence. To illustrate the distinctiveness of the two professional narratives, which is a recurrent theme in each facet of the investigation, the data chapters outline the legal and medico-psychological responses respectively. The stark contrast to previous theoretical debates pointed out the lack of symbiosis between theoretical debates and practitioners concerns, and gave rise to different considerations for the analysis of the intersection of law and medico-psychology. This further challenged developing coherence within the thesis, as it became more manifestly one of two separate halves. The analysis in chapter eight is a limited synthesis of all three dimensions of the research into the intersection of law and medico-psychology in the operation of the defences of insanity and diminished responsibility, owing to the restrictions on length. The examination represents an interpretation by the researcher as part of the heuristic research process (Moustakas 1990; Bulmer 1999: Ch. 1). This has been seen as giving rise to concerns about reliability, one of the criticisms levelled on occasion at qualitative research (Silverman: 9-11). However, the procedure and reasoning adopted is documented as fully as possible. The issue of interpretation is inherent in all forms of research.

Finally, the confidential CPS and interview data, in hard copy and on the computer, has been stored securely and will be retained for seven years.³³⁹

Conclusion

The project explores the intersection of law and medico-psychology using a number of methods. The chapter has described the issues relating to each methodological choice, reflecting on the correlations between researcher considerations in relation to methods with those within the thesis topic itself. Another researcher may have adopted a different approach, but as Seale argues, the middle ground between all the perspectives is seeing social research as craft skills that are driven by practical concerns (pp.26-33). Social researchers need

³³⁹ As stated earlier, the original Home Office data has to be destroyed and notification sent to the Home Office.

to take a pragmatic approach to exploring the issues, which is reminiscent of the approach of the legal system to cases. Seale maintains that the important thing is methodological awareness rather than strict adherence to a particular methodology as poor studies arise when researchers are blind to the methodological consequences of research decisions (p.49). This mirrors conclusions in chapter eight that assert that legal deliberations on the law require a broad awareness of the issues incorporating all three dimensions explored in this research project.

CHAPTER SIX

LEGAL INTERVIEWS

Introduction

This chapter is the first of two data chapters, and portrays the interview responses of the legal fraternity. The practitioner's perspective provides the third level of analysis of the intersection of law and medico-psychology in respect of the issues under consideration. The data covers issues dealt with in chapters one, two, three and four. Initially this chapter will describe the comments made on the substantive law, followed by the observations on dealing with cases, covering pre-trial, trial and sentencing stages. The interviewees described the technical considerations, legal objectives, perceptions, tactics and perceived impact of expert evidence, often from a prosecution or defence perspective.

Glossary of Interviewees

The Judge

JM – Barrister/Recorder³⁴⁰

AC – Chief Prosecution Lawyer

DW – Defence Lawyer

KR – Defence Lawyer

SB – Defence Lawyer

GF – Senior Investigating Officer (SIO)

The Law

The first part of the chapter addresses the remarks and reform suggestions made in respect of the legal rule of *mens rea* and the substantive law of the defences.

Mens Rea – Guilty Intent

Chapter one examined the extensive debates that have occurred with respect to the principle and meaning of *mens rea*. However, the same scope was not represented in practitioners' concerns. The discussions of the subject by the barrister JM, and the Judge focused on the technical legal requirements for explaining the rule to the jury. So JM referred to s8 of the Criminal Justice Act

³⁴⁰ A recorder is a part-time judge.

1967, used in giving directions to the jury.³⁴¹ He said most judges use that formula, or at least some paraphrase of it. In terms of the convoluted incorporation of foreseeability contained in the *Woollin* [1999] definition, which was outlined in chapter one, the Judge said

“[I]literally, I think, I think for, from a, practical politics point of view, you can ignore it, it doesn’t arise. I, think in practice, . there is no, great difficulty, with directing juries, on *mens rea*, in most cases. Erm, it’s simply an intention, in murder, to kill or do really serious injury. I, myself, have never ever, directed a jury, or indeed been in a case, I think, in which the jury’s been directed, to start looking at it in terms of foreseeability for specific intent cases”.

JM reflected on how difficult it is to prove someone's intention. The Judge discussed how hard it is for juries to comprehend the legal rule as *intention* has a legal meaning. DW, a defence solicitor, supported this perception, with an example. DW trains solicitors on *mens rea* and stated they find it a difficult concept to grasp, with each training scenario resulting in very subjective interpretations. He said "it's quite surprising, . the different attitude you get from solicitors as to, what is, . you know, the appropriate *mens rea* and what’s not". SB further illustrates the different approaches that professionals have when categorising offences in relation to intent, referring to murder/manslaughter decisions. SB called it “one punch manslaughter” because the defendant did not *intend* the punch to kill or cause really serious harm.

"It wasn't the kick, that the other bloke delivered, but he's charged with murder. It was the, the way he fell to the ground, and banged his head. It was the blow on the head from the ground that caused it. Now is that murder"?

He said even though the incident was caught on CCTV the prosecution would not accept a manslaughter plea, which he claimed was a distortion of the law. SB said manslaughter still results in a lengthy period in custody.

The scope for individual interpretations of legal rules is evident, which can be seen in the different responses to the vignette, which is further affected by whether the lawyer acts for the defence or prosecution. The observations on the difficulties with understanding intent illustrate the potential problems for juries who are less familiar with the law, and perhaps a negative consequence of having a legal definition so far removed from the usual understanding of intention.

³⁴¹ *Ives* [1970] outlines how the jury might be required to look at this section.

Reform Suggestions

The reform debate in chapter one centred on the development of a statutory definition of intent, a move not supported by SB. He argued for the law to stay as it is because the current scope of *mens rea* and *actus reus* are wide enough to enable a review of any issue that might arise. He is concerned that codification may introduce restrictions on the range of evidence that might be considered. This would support earlier arguments that the law is able to adopt a flexible approach through developing reasonably loose definitions. In contrast DW argued for the re-examination of all homicide law, expressing scepticism that a legislative definition would emerge. First, because the Law Commission (LC) has promised it for a long time and it has not happened. Secondly, as a result of the recent abolition of *doli incapax* the law now imputes the same legal understanding to children as adults. He views the modification as a backward move, attributable to political reasons rather than a legal rationale. Alternatively, the Judge and JM challenged the fact that murder includes "really serious bodily injury or really serious bodily harm" because it is very difficult to explain to the jury, and unlikely they actually understand (JM). Additionally JM believes it has resulted in people serving life imprisonment for murder, even though the jury were satisfied they did not intend to kill, because their decision had to be in accordance with the judge's directions.³⁴² JM conceded not everyone agrees with his point of view,³⁴³ although he said a number of eminent people have suggested it to the government over the last 30 years.

The discussions do not reflect the theoretical focus of those in chapter one, the issues raised are plainly concerned with changes that would affect achieving 'just' results. The matters raised as a result of their experience as practitioners are referred to in terms of whether the changes would either lead to unjust results, or are necessary for the law to operate more fairly.

³⁴² He further illustrated his view that the law is incoherent through the crime of attempted murder where you have to prove intent to kill because you have to prove intent to commit the full offence.

³⁴³ The QC who joined a discussion after the interview did not concur with JM's viewpoint.

The Defences of Insanity, Diminished Responsibility and Provocation

In line with the moral position inherent in the development of the defences, JM said that the law should not treat defendants as if they are in full control of their mental faculties if this is not the case, despite how difficult this may be for the victim's relatives. What follows are the discussions of the defences by the interviewees.

Insanity

Despite the philosophical and symbolic importance of the insanity defence, it has been shown in preceding chapters that it is rarely used, except occasionally in the context of fitness to plead.³⁴⁴ The Judge confirmed this, saying that "in my experience that is becoming more common", a view supported by other respondents. As a result, despite the considerable experience of the lawyers interviewed they had no experience of insanity cases. For example, KR a defence lawyer said that neither he nor his partner had undertaken a case of insanity at trial, although his partner had handled one in relation to fitness to plead. He claimed there are probably three or four cases of fitness to plead a year in his area. In earlier chapters it was suggested that the reason the defence is not invoked is the sentence, which was affirmed by interviewees. For instance SB stated that

"whilst it appears attractive to get an acquittal, an acquittal on the grounds of insanity isn't really too helpful to a de, detained person. Because you, you never know what the position is. You don't know what your rights are going to be. You don't know how much you're gonna be hospitalised".

The Judge also ascribed the shift to the spectre of detention for life with no tariff. In addition, as AC said, diminished responsibility effectively takes insanity out of the equation. There were no remarks on whether the law should be changed to ensure the insane were able to obtain an acquittal, or whether it should be a *status* or *excuse* defence.

Diminished Responsibility

The central focus of the interviews was the diminished responsibility defence. Chapters one and three have established the technical considerations with

³⁴⁴ See Mackay & Kearns (2000)

regard to the critical issue of whether the abnormality of the mind substantially impairs the defendant's mental responsibility. The observations of the respondents were more pragmatic and did not contain the analysis of the effects of recent developments on the overall legal position, as the more academic debates do. However, the Judge said "that, people, argue diminished responsibility, erm, . where the intention, may be slightly, less clear than is needed, for diminished responsibility". This provides confirmation that the defence provides a tactical device. In the interviews only DW paid attention to the conditions that can come within the remit of the defence, and there was no wide-ranging debate on the interpretation of the terms used in the defence. DW remarked, "it is a bit of a case of anything goes". He said that by way of illustration it took the criminal law years to catch up with BWS, and Othello's syndrome, an irrational fear or belief that your partner is having an affair. It is DW's conviction that the law is becoming more open, and not bracketing matters in the way it used to. "If there really is something there which does, impair somebody's, reasoning, ... so that, you know, they're properly described as being under diminished responsibility, then, . to make sure that justice is done the court should be told about that, and er, the jury should be able to assess that". Therefore it is DW's opinion that if the defendant is suffering from diminished responsibility, the court should be made aware of it, even if the state does not fit into a convenient legal box that has been used for a few hundred years. "Maybe it's those concepts that are out of date. And I think, . you know, the law is, moving forward on that". These remarks support previous observations within the thesis that the law is operating benevolently and that it is not concerned with technical matters but securing what is perceived to be justice in the case.

Another significant factor in preceding discussions, which was addressed by interviewees, is that of requiring experts to state their opinion on the ultimate issue. The Judge maintained it is important "for the psychiatrist, to make plain the factual basis", of their decision, and if the facts are disproved the expert should be consulted to ascertain if their opinion has changed in light of the new factual scenario. Nonetheless, in terms of arriving at an opinion, the Judge said, "it's a very difficult, line, how much choice," someone has in a situation. Furthermore, AC remarked on how important the word *substantial* is, and how

difficult it is to evaluate, because what is substantial to some might not be to others. But “everyone involved in the court process needs to know that that doctor has addressed his mind to substantially ... we may as well know what he thinks and what his assessment is”. As an expert he is entitled to give an opinion, although AC admitted it is an onerous task.³⁴⁵ In terms of the process by which the expert reaches an opinion, to facilitate the assessment the expert is given a copy of the case file, which AC conceded is not designed to go to a doctor. In addition the expert interviews the defendant. Significantly AC distinguished his own role from that of the expert, saying that as a lawyer he reviews the evidence from a different perspective to a doctor, who also deals with a live body, not just a bundle of paperwork. AC also claimed it was unfair to expect a doctor to determine if the defendant is ‘blagging’ simply as a result of having access to the case papers. Thus the importance of the expert’s opinion is acknowledged as well as the difficulties in arriving at such a judgment. In addition the roles are distinguished through a sceptical reference to the perspicacity of the expert to test the veracity of the defendant’s story.

As noted previously, changing the role of the expert whereby they now give an opinion has affected the role of the jury. First the case may not go to trial if the experts on both sides agree, and the CPS decides to accept the plea. Secondly, if the case does go to trial the jury now hear *expert* opinion, which will inform their thinking and potentially could have a significant impact. No mention was made of the former, and in relation to the latter JM argued it is absurd to expect the jury to address the issue without expert opinion. The Judge said he viewed the topic as “a medical thing”, which earlier discussions have shown it is not. But JM held that problems do arise when the doctors disagree and the jury then have to decide between the two experts, although the Judge said he was confident juries can assess the evidence. In fact the Judge alleged that “the reality is that in most cases, one, person is saying well, you know, responsibility was diminished, but in my view not substantially”. Critically, both AC and the Judge emphasized it still is a matter for the jury.³⁴⁶

³⁴⁵ There were mixed reaction on this from the medico-psychological respondents in chapter 7.

³⁴⁶ This point is made by a medico-psychological respondent in chapter 7.

Provocation and Diminished Responsibility

Chapter one explained the marked shift in the operation of the provocation defence since the case of *Smith* [2001] but the respondents did not address this. Furthermore, there was limited discussion of the concerns that have arisen with regard to pleading the provocation defence alongside diminished responsibility. The Judge said that in his experience “the defence, is running, both, diminished responsibility, and provocation”. This was supported by KR’s assertion that as far as his responsibilities are concerned any mental health information enters court in one of two ways, either through provocation, or through having a diagnosed mental illness.³⁴⁷ The Judge expressed disquiet about the difficulties it presents for the jury because of the different evidential burdens,³⁴⁸ whereas JM alluded to the difficulties in cases concerned with relationships that have broken down and one of the parties suddenly snaps and kills the other one. The interviews indicated an acceptance of this shift in practice, and the problems identified were raised in chapter one, but again a more in-depth appreciation of the theoretical issues was absent.

Psychopathy and Intoxication

Throughout the thesis two *states* have been identified as creating particular problems, psychopathy and intoxication, but JM was the only legal interviewee to address them. JM observed that with regard to “mental disorder and mental illness, the psychopath of course is a major problem”. He suggested it is probably not known yet if such an individual is fully mentally responsible. He also thought matters are complicated further if they have other mental disorders or illnesses because these will be treatable, whereas psychopathy is not. Therefore once the other mental illnesses are treated in hospital the defendant will be suitable for release in relation to them, but still be dangerous owing to the psychopathic tendencies. This reflects the major legal concern about the potential dangerousness of the psychopath and the problems arising from the fact they are currently considered untreatable.

³⁴⁷ However the case of *MF* [2003] shows that there can be difficulties because the decision in large part depends on the information that the defendant supplies.

³⁴⁸ Provocation has to be disproved by the prosecution beyond all reasonable doubt whereas the defence have to prove diminished responsibility on the balance of probability.

As identified previously, in terms of intent the law is reluctant to recognise intoxication as an excuse and although psychiatrists are introducing the possibility that alcoholism constitutes a *disease of the mind*, it is currently a contested matter.³⁴⁹ JM's view is that it is difficult to assess the degree of alcoholism that might lead to brain damage and psychiatrists do not have the pathologist's advantage of actually looking into the brain.³⁵⁰ However, JM conceded that if alcoholism has caused brain damage then the condition might qualify as diminishing responsibility. In line with the current legal position, he suggested the question is: was taking the first drink of the day a conscious decision, or an unconscious one programmed by the disease. JM argued if the drink could be resisted it considerably reduces the strength of the defence argument, which occurred in a case he was involved in.

Reform Suggestions

The reform discussions provided suggestions and concerns about options for change. In terms of revising the language used, a matter highlighted in chapter one, KR took issue with the Victorian foundations, and in particular turns of phrase, in the common law and statutes. KR argues that the law on fatal offences needs to be codified, or at least put into clearer modern language. His suggestions in part resulted from experience of practising law in Australia where the statutes were more modern and much clearer. KR believes that when you are talking about

"significant impairment of the mind, disease of the mind, er, ... abnormality of the mind ... that those are just such arcane and archaic concepts that they do need to be put into, into modern language, I think. So that juries have a better peg to hang the evidence on ...".

In addition, JM suspected problems will get more acute because psychiatry as an art is not static but constantly developing, whereas words in Acts of Parliament are static. He suggests that unless the statutes are reviewed every 20 or 30 years, every decade or so the psychiatric words will be out of sync with the law again.³⁵¹ This overlooks what has been shown earlier, that there is no correlation between legal and medico-psychological meanings and concepts, and no evident desire for there to be any. The earlier deliberations intimated that the significance of language is in terms of the social connotations attached

³⁴⁹ See also chapter 7.

³⁵⁰ Will neuroscience change this as it develops new ways in which to scan and analyse the brain?

³⁵¹ See the debate on psychopathy in chapter 7.

to particular words or phrases. Furthermore, JM questioned the codification proposals that will result in a reliance on symptomatology because behavioural manifestations are easy to engineer with a little bit of research. He knew defendants who had read psychiatry books and pretended to be “bonkers”.³⁵² This shows the legal scepticism towards defendants.

There were also concerns about reform proposals affecting the current legal flexibility. For example SB states

"over a period of history, . we've got to a position now where the law, . and the laws that exist, have been sufficiently scrutinised, to say well actually, we're not in a bad, .. we're not in a bad position, because, . what we intended to achieve at first, . has now been, honed, to what we are actually wanting to achieve".

He also argued it allows for changes in public opinion that have taken place in society over the last few decades to be reflected in the law. It is perhaps ten years behind, but this is not a bad thing because public opinion can change from year to year. He maintains judges provide sufficient flexibility and adaptability for the various scenarios presented in cases. This supports the perceptions gained through the research in chapters three and four.

SB expressed concerns that increased codification would restrict the introduction of mitigating information, which is a major part of the defence solicitor's role. He argues this information enables the court to appreciate the bigger picture, and the impact the defendant's history has had on the behaviour in question. He maintains this broader view of the defendant allows the law to take account of social factors, in an acceptable way, at the sentencing stage, rather than with the verdict. SB expressed the opinion that it is difficult to know whether simplifying the rules of evidence would enhance the law, and the spirit of the law. What is required is that the law properly protects the rights of the defendant and the victim. As an example he cites the difficulties in achieving a balance in the questioning process in rape cases. In his view restricting the admission of evidence can have a detrimental effect on the rights of the defendant. He acknowledges that you have to bear in mind the public interest point of view but argues that to undermine the rights of the defendant to support his case, simply to protect the feelings of an individual, is not the

³⁵² These issues will be discussed further in chapter eight.

right balance. This does not mean that he does not actually understand why they have introduced these restrictions. This encompasses the defence perspective very aptly, and also how he is concerned with a wider sense of justice than the theoretical debates, but which is reflected in the practices outlined in chapter three.

Similarly, AC said “legal draftmanship is [not] what it was. We have some very odd things in new legislation these days which give us, practical problems”. AC argues that practitioners, when giving effect to it, realise why it was the way it was before. AC believes that “in some areas, the prosecution’s almost driving . . . changes of attitude or changes of approach, or looking at things afresh”. It would seem there is support for his belief with the changes in the operation of the diminished responsibility defence. In the area of law under scrutiny AC is concerned that a statutory framework could influence the process too much and reports will become conclusive. “You’re gonna have lawyers struggling with that because we’ve had reports with conclusions which we’ve tested, . . . and we’ve come to a different conclusion”. Thus the issue is one of legal control as currently the CPS decide, if both reports claim that the defendant’s mental responsibility is substantially diminished, whether the case goes to trial. The final decision remains a legal one, namely whether there are any public interest issues, as defined by law, to be addressed in the case. The individual defendant is perceived and dealt with in light of social considerations, the broader issues are a lens to view the individual and their case, but this lens is a legal one, as a social institution charged with ensuring particular social norms and values are upheld. However, public interest, as defined by the law, means justice has to be served for both victim and defendant, and there is an evident scepticism towards defendants on the part of the prosecution.

Thus the focus for reform is on the practical problems that would affect the undertaking of the lawyers’ role and the securing of justice, as they perceive it, which appears more liberal than the strict letter of the law. So the issue is one of retaining flexibility to introduce matters into cases rather than any broader conceptual debate.

Procedural Considerations in a Case

The legal responses to the vignette provided an informative insight into the procedural considerations in a case where the defendant is thought to have mental health problems. The description of the responses covers the various stages of the case process in order to highlight the critical junctures and base of professional deliberations identified by the interviewees. What the interviews provide is an insight into practical case decision-making within the legal conceptual framework outlined in preceding chapters.

The Police Station

The police are important because they investigate the incident, produce the case file, and control detention and questioning at the police station.³⁵³ A number of observations were made about options available at this stage if there are concerns about the defendant's mental state. The police have the first opportunity to make an assessment about possible mental health issues. GF, a senior investigating officer, explained the defence solicitor or interviewing officer might identify that the defendant is potentially vulnerable and consider an appropriate adult should be present. "[I]f you *felt* that this person's got some mental difficulties and, . first of all you would think, is he fit for interview"? GF stated there is no training to help with the recognition of mental health issues. He said the defence solicitor is seen as a security net, although he suspected they were no better informed. Consequently the welfare of the defendant is contingent on police officers and solicitors being able to spot mental health problems on the basis of *tacit* knowledge, developed through experience. Clearly the behaviour of the defendant may be very extreme, or witnesses, family or friends may furnish pertinent information. GF said the taking of medication, such as anti-depressants, would be a consideration, but if medically the depression were not thought to be serious then no special measures would be adopted. He remarked "we are conscious, we're not, we don't, we're not er, . . erm, if you like, ride roughshod over, people's needs, if we can identify them". GF claimed the police are more sensitive to the defendant's needs than they used to be.

³⁵³ Sanders (1994) examines police practices in the police station.

Notwithstanding this aim, GF pointed out how difficult it is to identify serious mental health problems for mental health professionals, let alone the police. GF provided a case example, which appeared to be a significant experience. The man in question was on anti-depressants for mild depression, although he had taken a small number of pills in a suicide attempt the year before. He was in a relationship with a woman who had two children aged 6 and 11, each by a different father. Both natural fathers were involved with the children, which the man in question, who was inclined to be jealous, found hard because he wanted an exclusive family unit. One night the man interfered with the 6 year old, hanged her, tried to harm the mother, then ran off and hanged himself. He had given no sign of wanting to harm anyone else, so even though he had stopped taking his medication, as a result of the diagnosis of mild depression the medical profession were not concerned. Thus, GF concluded, experience was essential to assessing what to do in a case, but mistakes are inevitable.

SB's insight, as a defence solicitor, was that the police station is the most difficult part of the process because the courts have a certain procedural organisation, whereas at the police station "there are so many more issues that you've got to cope with before doing your work". In particular, he maintained, murder cases are very pressurised incidents with the emotions and sensitivities that surround them. Significantly, SB argued that much of what solicitors do is dependent on acquired experience.

"I mean that there are, the *experience* helps, because, in the pressured situation of the police station, where you have to make decisions, really within minutes, and without reference to any material, without reference to any reports, and without seeing the evidence that the police have against them, you need the confidence to stand by your decision. And that comes with experience".

This illustrates the importance of tacit knowledge gained through professional inculcation and experience.

As noted previously, GF said the police rely in part on the defence solicitor to ensure the defendant's interests are protected, yet the police perspective initially informs a defence lawyer's tactical decisions. For example, KR said solicitors receive "disclosure as it is called from the police officers, ... before you speak to the client in any detail". Moreover, SB said the defence solicitor's decisions about the defendant's mental state are *unqualified assessments*; there

is no training except in signposting about which avenue of investigation to pursue. KR also stated that most solicitors have had no in-depth training in mental health issues because there is none, only circulars produced by the Home Office on mentally disordered offenders. KR stated you can practise for 15 or 20 years without any instruction on psychiatric issues, which he conceded is probably wrong. He suggested there might be some half-day continuing education courses with psychiatrists, but it is not part of the formal training in crime. Also criminal lawyers specialising in mental health law may have a better working knowledge, but "most of us rely on, er, you know, *inherent feeling* for clients". Nonetheless KR asserted it is dangerous to rely on your own perceptions of someone's mental capacities.

So you have a position whereby the police and the defence lawyers are making decisions about the defendant based on tacit judgments about their mental health based on experience, as they have no suitable training. If there are concerns about the defendant's mental health police surgeons provide medical support at the police station. When making a decision about whether to call one, GF claimed the government's new contractual arrangement in some areas, whereby there is no longer a local police surgeon, could affect matters. As a result of the changes surgeons may have to travel large distances and "the clock is still ticking" on the time allowed to question a defendant. This is another illustration of how changes in one part of the Criminal Justice System can potentially affect the operation of another. As AC said, the consequences of a lot of the legislative change make you realise why it was the way it was before.

Notwithstanding the fact the police do not like wasting time on the clock, SB stated the police are under pressure to make sure defendants are detained properly and do not do anything "silly". Moreover, despite GF's remark regarding reliance on defence solicitors, SB said only the police can request the police surgeon because the solicitor has no authority to say they ought to bring in X, Y or Z. SB cited a case example where the defendant confessed to the murder.

"And I mean, it, it became very difficult for me then to say to, the police, erm, this man is mad, and I don't think he ought to be detained. And I don't think he ought to be interviewed. Because his admissions were so, open, honest, rounded, constructed well ...".

The prosecution argued that as the defendant's explanations were so lucid, and the details so accurate, it was murder. This point of view persisted even when the defence obtained medico-psychological reports demonstrating there were problems and that the defendant had a psychiatric history. This shows the contrasting defence and prosecution objectives in a case. Nevertheless, SB argued that usually, in serious cases where there is clearly a mental health issue, the police are not critical if you raise the issue. In addition he said that as his firm is well known and has a good reputation, the police usually listen. This is an indication of the importance of reputation and established relationships for the operation of the legal system.

A police surgeon is called to verify whether or not the defendant is fit to be detained and fit for interview, although SB pointed out these are ongoing assessments. GF suggested it is quite difficult for the police surgeon, especially as the defendant's mental state is frequently affected by drink and drugs. In addition, KR made the point that police surgeons are not consultant psychiatrists or psychologists. SB said they are simply GPs with a little bit of training. Furthermore, he argued the difficulties are exacerbated by the fact everyone is under stress in a police station. SB asserted, "basically, if they've got their limbs attached to their bodies, they're capable of being detained. And that's all the police are bothered about". Similarly KR said doctors take a robust attitude about fitness for interview. "You've got to have a pretty significant impairment for them to determine at the police station that you're not fit to be interviewed". If found unfit for interview the defendant might be certified by two psychiatrists under s3 of the MHA and taken to hospital. If mental health difficulties are identified but the defendant is fit for interview, they are deemed to be a vulnerable adult and require an appropriate adult as well as a solicitor to be present. SB stated that an appropriate adult would always ensure a legal representative is present to advise on the law. However KR's

"experience tends to show that people who have let's call it some mental impairment at the moment without defining exactly what it is, generally appreciate, generally, the significance of the situation they are in such that when they're asked that question they do say yes I do want a solicitor".

Tactically, if KR thinks he might run diminished responsibility, he may advise the defendant to say nothing.

What this discussion shows is the importance of experience in assessing mental health matters. There is no training and clearly no understanding of mental health matters. But critically it demonstrates that the legal system is not underpinning the moral concerns identified in the theoretical debates with stringent systems because lawyers and non-specialist medical personnel are making judgments about the defendant's mental health. The important issue remains the legal evaluation of the situation and obtaining evidence to make the initial case decisions. There appears to be no intersection of law and medico-psychology at this point in the legal process.

Vignette

To demonstrate that a case can generate a variety of reactions this section describes the responses to the vignette. They illustrate how attitude, perceptions and legal objectives affect decision-making.

In evaluating the case SB remarked it was unlikely a solicitor would not think the vignette scenario strange. He claimed, as a result of *experience*, he had a sense of 'normal' behaviour by murderers. SB remarked on the fact the vignette incident involved alcohol, but for him the most alarming thing was that Malcolm does not recognise the significance of what he has done in stabbing JD. Furthermore, Malcolm does not leave the premises in a panic with a view to avoiding detection. SB concluded this is not a normal reaction to killing someone. KR referred to the significance Malcolm's behaviour towards the police, and his contiguous comments, would have in putting the arresting officers on alert that there is something strange. He said the officers could subsequently alert the custody sergeant that there are possible mental health issues. Alternatively, KR suggested the custody sergeant may think Malcolm is not functioning at 100 percent, and subsequently act on the basis that he was a vulnerable suspect. KR suggests

"even disregarding any issue about his mental capacity, on a murder case the custody sergeant would probably, *invariably* call the doctor out to see Malcolm, but he'd be doubly reinforced in doing that if he thought there was some issue".³⁵⁴

DW said that at the police station he would determine if Malcolm was fit to be dealt with, in particular if he was sober enough to give coherent instructions. DW regarded Malcolm's amnesia as an indication of some sort of psychiatric or psychological problem and would have him assessed as quickly as possible, although he claimed it is difficult to get professionals down to the police station.³⁵⁵ However, he said you could get the police surgeon down to assess whether he needs diverting under the MHA. KR thought an appropriate adult would be necessary and he would have a doctor certify Malcolm was fit for interview. He would not let Malcolm say anything until a doctor had seen him and an appropriate adult had been called. In addition, if he suspected a psychiatric history he would get onto the GP or psychiatrist who treated him. SB said, "I think that the police surgeon is, from what, is said here, he's gonna say he's fit to be detained but not fit to be interviewed perhaps".

An alternative suggested by DW was recommending he say nothing and that the mental health professionals can be involved when he is remanded in prison. Also KR said if he considered Malcolm might say things that are negative to his interests, he would write a pre-prepared statement with Malcolm, which can be submitted at the point at which the police are going to charge him. Legally he has said something, and if the police have charged him it is difficult for them to then go back into an interview situation. "So, look you've charged him so you think you've got enough evidence, he's said everything he wants to, there's what he wants to say, put it on file".

KR's *hunch*, based on the information in the vignette, and the presumption there is no history of mental illness, was that Malcolm does not have a mental illness under the MHA, but perhaps has a personality disorder. "That's what I'd be thinking here, aggressive personality disorder, but not necessarily mental illness". This suggests *experienced* solicitors feel they can distinguish between mental illness and personality disorder. Nevertheless, KR said if Malcolm

³⁵⁴ This was not said by any other respondent.

³⁵⁵ Some medico-psychological respondents indicated they would like to be involved this early in the proceedings, see chapter 7.

continued to say he did not remember the incident alarm bells would ring higher. "But, being realistic you'd be wondering as a solicitor, is he saying that, because he's fearful of the position he's in or is that potentially a, a genuine, err, symptom". This sceptical attitude is evident in other interviews.

Interestingly it is the defence lawyers that responded to the vignette directly. Despite the ambiguities within the scenario the lawyers all suspected mental health problems and discussed having the defendant assessed, whilst attending to their strategic responsibilities regarding how much the defendant should talk in the police interviews.

The Charge

In light of the early stage at which a charge has to be made the police normally choose murder, unless the CPS advise manslaughter. AC stated that the police consult the CPS when "they are arresting and charging, and to be fair often they will consult us before arrest for advice on the case evidentially as, as it sits". GF attributed increasing CPS involvement to changes following the Auld report (2001). But GF still said "I would say 99.9% of the time, it would be a, a murder charge. The manslaughter might come later".

Once the defendant is charged the possibility of trial becomes the central focus. KR said cases are dealt with much quicker than they used to be, within a week of going into the magistrate's court it will be up in the Crown Court, whereas they used to rumble on for perhaps three months before going up. The Crown Court judge sets the case timetable; when the prosecution have to serve papers and when the hearings will take place. KR said there are a number of options at this stage for involving a medico-psychological expert. The court may initiate contact with a community psychiatric nurse or individuals from the local psychiatric hospital, to request an assessment and help decide where the defendant should be incarcerated.³⁵⁶ Another option, discussed by AC, is that at the plea and directions hearing the defence could say they want medical reports. He said the defendant in the vignette "is fairly easily flagged up as one where we're going to get into the realms of diminished responsibility".

³⁵⁶ S4(1) of the Criminal Justice Act 1991 requires a trial judge to ensure that a psychiatric report is provided to the court on anyone who is or appears mentally unstable.

Furthermore, if the defendant is charged with murder and their mental state has not been assessed, an assessment will be undertaken once they are remanded in prison. The judge at the remand hearing may order an assessment is done during the next month. Alternatively the defendant may be remanded to a secure hospital because of concerns about his mental state.

Preparing the Case for Trial

Initial Defence and Prosecution Considerations

As indicated earlier, legal considerations are different from a defence and prosecution perspective, although it appears to be important to both prosecution and defence to secure the preferred barrister. AC emphasised establishing a prosecution case team by the second remand hearing, significantly deciding which QC and junior counsel are appropriate and getting them on board as early as possible, as you may lose your first choice to the defence. DW said homicide cases require a very senior barrister and there is only a small pool of people, as with experts, so it is important to phone them or contact them immediately. AC discussed making decisions as a team, which consists of the police, CPS and leading counsel, working from *basic principles* and *experience*.³⁵⁷ AC said he values having the three perspectives at the table, as each of these parties is independent of the other. An example he gave of the advantage of this independence is that the police can get too close to a case and the family, which without the counter checks provided by the CPS and counsel may mean that public interest issues are overlooked. But AC said the primary considerations for the prosecution are the evidential hurdles and likelihood of a conviction, and then public interest matters are considered. You may be “almost immediately put on notice, diminished responsibility, is this the way that’s going, is that the argument that’s going to be raised”? From a prosecution barrister’s perspective, JM states that if the defendant is saying he cannot remember having done the act “there is bound to be some mental health problems somewhere”. This does not reflect the legal scepticism towards the defendant that is normally evident and it represents a very simplistic connection that contrasts starkly with observations in chapter seven.

³⁵⁷ There is a CPS Code for prosecutors and a booklet containing instructions for prosecuting advocates, which has to be adhered to.

SB discussed his *attitude* and *perception* of his *role*, and *tactical responsibilities*, as a defence lawyer. SB believes the defence are “knights in shining armour” because they challenge everything, including authority, as they stand up for the “little man”. SB argued you build a rapport with clients and begin to see them as a sort of mate, someone you see through a particular difficulty, much the same as say social services. However he pointed out you do not see them socially. SB suggested you form these relationships because most clients come back, although one suspects not for murder, but he did discuss representing two brothers for different murders. The defence solicitor’s job is to try and convey their persona in court, which for SB is what makes the job interesting, although under-funding is putting the role at risk. Additionally, SB argued he has an obligation to represent his client, so all the evidence has to be explored, leading him to dispute claims that the defence often cause delays, maintaining that the crown prosecution and courts are more often responsible. For example, the defence cannot advise a client what to plead before they know whether or not there is sufficient evidence against him. “Even if the client has admitted the offence to us, . English law requires us, to establish the prosecution have enough evidence to prove it”. SB said it is very difficult to fulfil this duty if the CPS and police do not disclose evidence.

In terms of initial *legal tactics* SB said he considers if the police interviewed the defendant without an appropriate adult where it seems one should have been appointed. If this is the case he said he would be rubbing his hands with glee because that puts real pressure on the CPS to do a deal.

"If they know that they're gonna have egg on their face, through the police not acting properly. So, you know, from our, strategic and tactical point of view, that's something that I'd be looking at". However, "I don't think the detective inspector, would run the risk, of having a murder case kicked out because they didn't deal with someone properly at the police station stage".

The distinction between the concerns of the two legal perspectives is portrayed very clearly in these representations. There is also a very clear sense of the importance on fulfilling the role required, rather than the technical details discussed in chapter one. In addition, there is the first sense of the importance of inter-professional relationships.

Choosing a Medico-Psychological Expert

Having decided it would be propitious to obtain an expert's opinion, there is the issue of choosing an expert. It became apparent that lawyers develop preferences premised on experience of the expert's performance in legal terms, not necessarily indicating clinical competence. In addition there was evidence of procedural constraints restricting defence choices. However, an important fundamental point, raised only by KR, is that "there's a lot of confusion, even in legal circles, between the differences between psychiatrists and psychologists".

In terms of judging experts based on performance, AC said they are evaluated on two things, the calibre of reports and performance in the witness box. Notably both are crucial components to success within the *adversarial* legal process. With regard to reports, KR said the psychiatrists and psychologists he prefers provide comprehensive discursive reports rather than relying on prescribed headings, which he believes is an indication the expert knows the client. In respect of court appearances, the Judge held, "obviously the lawyers pick them and those who are, doughty fighters". Significantly, AC has found the quality of the expert's report and their performance in the witness box can be incongruent. "Doctors and other experts are not unknown to resile entirely from what they've put on paper once the right questions are asked".³⁵⁸ The QC that AC regularly works with only likes two particular people, which he endeavours to get because "if you've got, someone of that calibre and experience giving you advice of that nature ...". AC has already emphasised the importance of securing the barrister he prefers and the importance of team-work, and securing the 'right' expert appears to be a part of the co-operative working process.

However, attention was paid to factors affecting the securing of preferred experts. DW has three or four psychiatrists or psychologists he likes to use, and said as he is part of a big firm he does not usually have any difficulty getting them.³⁵⁹ In addition, as an experienced homicide lawyer he alleged he 'pulls strings', although getting the reports quickly is more of a challenge. However,

³⁵⁸ Experience of being in court is discussed in chapter 7.

³⁵⁹ DW is also part of an e-group for criminal lawyers, which provides recommendations on request.

DW referred to a current high profile murder case he is involved in where all the experts required said yes immediately, which, he suggested, was a result of the case featuring heavily on TV.³⁶⁰ DW argued it is particularly important in homicide cases to get people you have used before, or that have come recommended, because clients are looking at the possibility of life imprisonment. "You don't want to take the risk of somebody unknown". Therefore he maintained that to get the 'heavyweights' you often have to wait because lots of other people use them as well.

AC joked about the reasons why defence solicitors might have their favourites, but SB contextualized his discussion by reference to the fact his preferences are in large part dictated by the franchising requirements to justify the expert chosen. The defence has to apply to the Legal Services Commission (LSC) for funding. SB and KR both said funds are normally granted, with perhaps a quibble about whether you should have gone to psychiatrist one or two. Decisions can take as little as ten minutes or up to three or four days. As soon as legal aid is granted it can be used, so the expert can become involved at the early stages, providing they are available. SB said the biggest problem is the lack of availability of preferred experts, and when they have to use someone new it has to be explained under the franchising requirements. This rule also applies to the appointment of barristers.³⁶¹ This administrative process generates pressure to stick with the small pool of established experts to ensure the funding from the LSC, even though this is likely to result in delays.

The discussions indicate there are tactical and procedural reasons for experts becoming part of a favoured small pool of professionals. The legal system reinforces the use of those that work well within the legal context, which will be judged on legal terms because there is no basis for an assessment of clinical competence, and as chapters three and four show, no legal need for it because the defences are concerned with legal interpretations.

³⁶⁰ DW also discovered that his 16 year old client falls between the psychological specialisms dealing with children and adults.

³⁶¹ SB's firm have a Directory indicating whether someone did a good job or not, to help the inexperienced solicitor.

Instructing the Expert

Having acquired an expert the solicitor despite the lack of any mental health training has to provide the necessary instructions which supply the framework for the assessment process. Therefore, legal considerations will prevail. Importantly, AC stated if the defence decide to run the diminished responsibility defence the prosecution usually seek a report after viewing the defence information. KR said current practice is for the defence to get two psychiatrists to say that the person is suffering from a mental illness, and was doing so at the time of the index offence, in order to convince the prosecution. As indicated previously, the preference is to involve an expert as quickly as possible. KR said that this is so with murder cases in particular, because, based on his *experience*, it is difficult for psychiatrists to project back, especially if they see the defendant months after the event. KR argued practices are changing and he normally comes away from the bail application and goes straight to a psychiatrist, and the LSC. Significantly KR is in charge of the Crown Court department in his area and said he gets very upset if there are delays in cases that come before him. This illustrates the importance of the attitudes and practices of those influencing legal practice and processes.

There were differences in approach to signposting the avenues the expert should investigate. Concerns centred on giving the expert adequate information, not influencing them, and not helping the other side in the case. DW said he produces a detailed letter setting out exactly what they are looking for and what the case is about. In addition he said he asks that if anything else of interest emerges to let him know, implying the expert knows what is of legal interest. In contrast SB asserted he does not "want to say too much to the psychiatrists about, the thought I had about it". SB explained this tactically, saying the information in the report is not privileged unless it is part of a letter to the solicitor.³⁶² "And I've got to be very careful about that because the, psychiatrists report, may deal with issues that I want dealing with, that the prosecution may not even think of". The example he gave was, why had the defendant with a constant mental disorder not stabbed someone before. SB wants the answer, but not in the report where it will be revealed to the CPS, as

³⁶² See Davies [2002]; Clough [1998]

it might assist them. This shows the report is a tactical device, particularly in light of subsequent discussions on comprehending the reports.

A number of points were made about the issue of expert independence and being a team player. KR discussed how he tries to avoid 'colouring' the expert's judgment, which he argued is helped by the fact that in addition to seeing the client and a discussion with him, the expert is in receipt of all the case papers produced by the police and CPS. "[T]hey'll certainly see, what is important for them to see. ... anything we think may help them reach an important decision". GF asserted that the case file is likely to contain significant statements for the expert, as it includes a profile of the defendant from witness statements, the forensic science and the defendant's statement. However, it would seem that the earlier an expert is involved the less developed the case file is going to be. This was a matter noted by DW, who pointed out that sometimes not all the information is available. As a consequence occasionally it is necessary to phone the expert and ascertain whether, had they known the information, it would have made a difference. An interesting development is the evolving practice of the police videoing defendant's interviews, which might in due course provide tactical evidence for the defence to have an expert assert that the defendant's behaviour exhibited identifiable symptoms of mental difficulties and thereby challenge the veracity of the evidence obtained.³⁶³

Notwithstanding these remarks, AC claimed it is inevitable that the legal side instructing the expert affects their approach. AC asserted he is not denigrating the expert's professionalism, he is simply saying "the starting point carries a disproportionate weight". Consequently, experts rely on what the defence lawyers and defendant tells them, although the police files will have an impact. Despite this viewpoint, AC then said, "it is not a doctors job to review evidence in the same independent way that I do it, ... It's his job to give a diagnosis of the individual in front of him".

Likewise the Judge said "although, . each report now finishes, with the words to the effect, that they know they must be dispassionate, and, are giving, an opinion for the benefit of the court. ... it's human nature isn't it, that erm, ... you fight for one side, . the reality is that you're paid ... it can be very lucrative work".

³⁶³ Perhaps they would make good training material for police and solicitors.

Plainly from previous chapters the legal system engenders a partisan approach through the adversarial process. This is also likely to be bolstered by the development of inter-professional relationships. The remarks also reveal a legal scepticism to expert evidence that pervades the other two dimensions of the analysis of the interaction of law and medico-psychology and supports the legal position that it should control the admission of expert evidence.

Subsequent instructions might also be produced. SB said they are "under a duty, to check firstly that the report matches the instructions". DW said "if something is not addressed in the report I'll happily send it back and say, you've missed, this that or the other. But then you wait, weeks more...". Barristers can also play an important part because they can request the expert address further specific questions. AC said this could be necessary if the expert is inexperienced in writing reports for criminal cases and perhaps as a result adopted too academic an approach. Cases may even be adjourned if the report requires an addendum. But does the possibility of delay affect legal decision-making? It would seem this possibility adds to the pressure to secure the experts familiar with the system. As a barrister, JM said it is important to ensure that he has the relevant information, whilst being careful not to influence the expert. Therefore "the formulation of the conclusion, may be an area that you want to talk to him, so as to satisfy yourself, particularly as I said earlier, if, if it's a, a psychiatrist you haven't dealt with before. To make sure in your own mind that he has actually addressed, all the statutory criteria". Once satisfied on this he said the expert is independent, which shows the important legal focus, the conclusion, with little attention paid to other matters, as it is hard to envisage what is meant by independence if the report concludes that there is evidence of a defence.

As earlier discussions indicate, an important matter is the delay in experts producing their report. DW attributed this to the fact that most firms use the same people so they are very busy.

"The difficulty is, the numbers of people, actually doing criminal work and, . you know, they take on the work, and if they say no then we badger them until they do say yes, because they're, . we want, people that we've used before, we want people who are recommended".

As a result he claimed you often have to wait 14 to 16 weeks for somebody to be seen and get a report.

Another issue, which SB and DW discussed, is the cost of reports. SB said it costs between £800 and £1000 for six hours worth of work. He pointed out the LSC grant the authority to incur the cost of the psychiatrist, and if it is refused the defence lawyer has to foot the bill, hence the propensity to stay with those experts the LSC readily sanctions. DW said "[p]sychologists will only talk to us when they can send us massive bills". Reports can cost thousands of pounds, with experts charging over £100 per hour for attending court to give their opinion.³⁶⁴ Whereas defence lawyers work on fixed legal aid fees of £46.50 an hour for criminal work, although everyone assumes that they are getting £150 to £200 an hour.³⁶⁵ DW admitted he has a very poor view of the medical profession because of this.

The Report

A number of remarks were made about the content and format of reports. For instance, JM discussed the fact that experts are required to include a paragraph in the report stating that they are aware that their duty is to the court. He said in the past they were effectively 'hired guns', something AC also mentioned. JM said that that is thoroughly unsatisfactory and does not help the judge. As noted earlier, KR prefers a more discursive report, "like anything there's some excellent psychiatrists, there's some not quite so good, ... some can be very mechanical in their reports almost with headings, ... the psychiatrist I generally instruct are far more discursive". Their reports are sometimes twice as long and not just template headed, but he finds them "far more useful as they really get into it, and get into the client if you like ...". KR said whilst the expert normally sees the defendant once, perhaps twice, for between one and four hours, in a current case the defendant had unusually been seen four times.

³⁶⁴ This seems to be a prevalent legal view, which contrasts with that made by RH in chapter 7.

³⁶⁵ DW said, owing to the poor financial rewards, he has to justify undertaking criminal work to the partners in the firm. Many big firms have stopped because to make any money a high volume of cases is necessary. Also the poor rate of pay means few solicitors do defence work as the prosecution can offer more money. DW says the government's new public defenders service costs on average 50% more per case than in private practice.

JM said he is concerned that the report comes from a reliable expert who has asked the right questions. So with regard to the diminished responsibility defence it should have been assessed whether the defendant suffers from a mental illness, which arose from a condition of arrested or retarded development, and as a result of this his responsibility was diminished. If it was, was the diminution substantial? JM believes that "any expert worth his salt will do the automatic sort of, conversion, into our language. ... Although he may say, in his report, the medical language so that his colleagues understand". Similarly JM maintained any reputable expert can translate it for the benefit of the jury, but he said

"it is more difficult for psychiatrists actually than it is for lawyers because, I mean psychiatrists can explain to you in psychiatric terms, and then you sit down with him and, and you, you discuss, how best you can word it, within the legal constraints".

These concerns are understandable in light of the role of the barrister within the adversarial process. They also clearly indicate the expert is required to meet legal needs in making clear conclusions, in legal terms that the jury can understand.

The Judge alleged, "some psychiatrists are more willing than others, to say that it's diminished responsibility". Is this an important factor in the development of preferences by prosecution and defence? He acknowledged psychiatrists hold different views, but he was concerned "they may not always, see the victim". He attributed this to the doctor-patient relationship, which is premised on the assumption that the "patient is telling them the truth". But he argued it might not be the complete picture, in legal terms anyway, as it is not simply focused on diagnosis and treatment. Assessments for legal purposes require a "dispassionate approach which not every, psychiatrist has". But nor did the judge think the expert should say what the court wants because "their integrity is at the heart of expert evidence". The Judge said if a defendant confesses to the expert, as the case is about getting as "close to the truth, ... as possible ... it, may be better ..." that it comes out. This reflects the ambivalence inherent in the role of the clinical forensic expert as clinician and actor within the legal process, and the possible legal perceptions and interpretations of the expert and their opinion.

In terms of including scientific evidence, KR stated that in his experience, psychiatric reports seem to be based on talking to the client, whereas psychological reports are more scientific, based on particular tests, such as IQ tests. He said they seem to rely on both old and new tests. With regard to citing research to support an argument, KR had seen references to reports, but not technologies such as brain scans. However, he did know of a case where a neurosurgeon as well as psychiatrist and psychologist had been involved, although he admitted he had never thought to instruct one. KR stated "your stock solicitor's first port of call with vulnerable clients with query mental impairment [is a] psychiatrist". The psychiatrist guides the solicitor, and if technological research were suggested money to conduct the tests would be applied for.

JM said once the reports have been produced it is common for the experts to respond to one another's reports. He alleged they might go into a room together, consider areas of agreement and disagreement, and think whether a joint report is possible. The prosecution are likely to accept a joint report supporting a defence and the case will not proceed to a full court hearing. Thus even potentially contested cases are avoided wherever possible.

SB said with regard to Malcolm it is difficult to see what kind of assessment will be made, "it's one of those ones where they may say that he had, . he was too insane, in, in the legal terminology".

Legal Perceptions of Medico-Psychological Comprehension of the Law

When SB was asked whether psychiatrists have a problem understanding legal definitions, such as abnormality of the mind and disease of the mind, or fitting in with court requirements, he answered none at all. KR claimed most reports state the person has not got a mental illness but a personality disorder, and he is unsure how bad a personality disorder has to be to make it a mental illness. Likewise DW stated he has found no problem in homicide cases, pointing out that they only use very experienced experts in such serious cases. He said new people coming into the field do need some guiding through concepts, but he is always happy to sit and chat through things with them, but they are not necessarily happy with the legal concepts. On this last point, JM said

psychiatrists do not like the formulation of diminished responsibility and would like to get rid of it. It is his belief that when "they're giving evidence in court proceedings, they've really got to, you know, er, it goes against the grain I think for, for a lot of them", because they have to convert their opinions into language which is consistent with the Homicide Act. In fact JM believes that there is a major problem with doctors talking to lawyers.³⁶⁶ This reflects the picture in chapters two and three about how far removed the definitions within the defence of diminished responsibility is from the medico-psychological understanding that experts have to work with. That said, experienced experts are those that know how to work within the legal meanings.

Legal Comprehension of Medico-Psychology

What of legal competence in comprehending expert reports? SB believes both the court and solicitors have difficulties understanding psychiatric reports and terminology. He said it helps that reports are written in a fairly standardised fashion. "It's just that the, the information contained within psychiatric reports, is often very voluminous. And, and also, erm, techi, very technically phrased". This was not evident in the reports that formed part of the CPS case files, which are reviewed in chapter seven. Therefore, SB argues, it can be difficult to work out what they mean, even with the help of medico-legal dictionaries.³⁶⁷ "I'll be, I'd be lying if I said sometimes I wasn't confused completely". SB has found that psychiatric reports of four pages will require probably three times as much reading as a witness statement of the same length. As a result SB reads reports with the philosophy that nothing in it is going to be straightforward and then it is possible to cope. He conceded experience has its benefits. Whereas DW said he has found he generally understands reports in cases such as homicide, because he deals with the reports personally and goes through them in a very detailed way. He attaches comments to reports he sends to barristers, and argued that barristers should be able to critique the reports. As a barrister, JM finds the major problem is the definition of mental illness or mental disorder. He believes now that most people are aware of ICD 10, which most psychiatrists use, although there was no reference to it in the CPS reports.³⁶⁸

³⁶⁶ See chapter 7 for the medico-psychological viewpoint.

³⁶⁷ This reflects the psychiatrist DT's view of the helpfulness of law books.

³⁶⁸ JM pointed out he is conscious there are some differences in the diagnostic definitions of ICD 10 and DSM IV.

It would seem lawyers experience difficulties understanding reports yet technically they are crucial to decision-making and form part of the information the solicitor and client need to evaluate to make tactical choices. However, training is not held to be necessary. Furthermore, this discussion provides some indication of the difficulties juries face trying to understand *unfamiliar* technical evidence in order to make a considered judgment and arrive at a verdict.

Expert Reports and Case Decisions

The expert's report potentially has a number of repercussions for legal options and tactics, which are different for the defence and prosecution.

Defence Perspective

The expert's judgment about which defence can or cannot be supported is potentially very important. SB stated he is in the hands of those assessing the defendant as to which way the case will be fought. Likewise KR said, you only decide which defence to run once you have received the report. The report is an evidential tool. It can be seen how important it is that the expert is trusted and can link their clinical judgments to the legal issues.

KR claimed that many reports assert the individual has no mental illness, but even if the report supports a defence the matter has to be discussed with the client before offering a plea.³⁶⁹ DW remarked on how important it is to ensure clients are fully aware because it is very easy "for, solicitors on, on both sides of the case to forget about the people involved". He believes that one of the biggest criticisms, fairly levelled at the criminal justice system, is that it forgets the personal element that it is about real people and real lives. Though he conceded that with some homicide cases it is better to forget it is real life. That said, DW has found it varies how much clients want to be involved, although in homicide cases they usually want to be included, with some wanting a copy of every piece of paper.

³⁶⁹ The case of *Weekes* [1999] is a good example of the issues that can arise from the defendant refusing to use reports that support a diminished responsibility plea because of their mental illness.

However, the report might say that the defendant was not capable of formulating instructions. SB said,

"of course if the assessment suggested that he wasn't able, to formulate, proper thoughts. ... Wasn't able to formulate *mens rea*. Wasn't able to formulate proper thoughts, I would have to assume that he wasn't able to formulate proper instructions".³⁷⁰

If the defendant is fit to instruct, do they want what fits in with the legal viewpoint? DW cited an example involving a defendant accused of rape who objected to the psychiatrist's remarks that he constituted a danger to all women and was therefore unsafe to be released back into the community. Therefore, even though this constituted significant information the report was not used. Notwithstanding this the defendant received 5 life sentences. DW said that if he believes the report should be used he offers very strong advice to that effect, as part of his professional role, but at the end of the day it is the client's case. He admitted most clients cede to his advice.³⁷¹ Significantly there is no duty on the defence to disclose unfavourable reports because it is a confidential document.³⁷² This demonstrates further that reports are devices in the legal process and not strictly about the defendant's mental state. However, the Judge argued "you do effectively know if you're prosecuting, . that's happened to be fair, if they're switched on anyway". He maintained that if someone is in custody there is a record of who has visited and if no report appears it is obvious why. Furthermore, it may be a second report that is disclosed, but reports usually cite which documents have been seen in reaching the conclusions, so it is a matter of being astute about it.

As a defence barrister JM's first concern is whether the defendant is fit to plead, whether there is any point running the insanity defence. If there is insufficient evidence for this the next option is whether there is evidence of diminished responsibility. "I would hope that by the time I came into it er, the defence solicitor would have got a defence psychiatric report and if he hadn't erm, then, told to quick, told to go get one as soon as possible". This remark is interesting because of previous assertions about how important it is to get a

³⁷⁰ Viljoen, Roesch & Zapf (2002) have undertaken a study on the effect of different mental states on the capacity to instruct.

³⁷¹ It was held in *Hobson* [1998] *per curiam* that the task of counsel is to exercise judgment and discretion as to the way in which a client's case can best be presented, and not simply act as a mouthpiece for the client.

³⁷² *Davies* [2002] deals with reports being privileged.

barrister on board early, more than likely before a report is ready in view of claims about delays. Furthermore solicitors are aware that barristers can be particular about which experts they will work with so they have to wait to see which barrister they will be using.

Prosecution Perspective

AC held that prosecution decisions are made on the merits of the particular case. The team go back to first principles, but essentially leading counsel make the final decision when there are medical reports. Consideration is given to the internal consistency of the defendant's behaviour, their antecedents, the information from prison assessments, and the two reports that are likely to have come from the defence. AC said

"[n]ow you have to remember we're lawyers therefore we're arsey and, cynical and difficult people. (Laughter) And all too ready not to believe, . what's written in front of us. (Laughter) So there's, there is, there is no, sense in which, we accept the material given to us on face value".

He argued attitudes are informed by practice, and he believes there are experts for hire, "[w]ho'll come up with the right answers".³⁷³ AC argued it is the prosecution's role to decide if "we buy that. It's, guilty plea to manslaughter we all go home. Or to say .. not a criticism of the doctor, but we're not satisfied with that". In which case a report is obtained, and the doctor's view is tested under cross-examination. He said it depends if the prosecution team were already thinking that it was diminished too. AC said sometimes they receive a defence report supporting diminished when there has been nothing in the case to make them think the defence will be raised. AC's *attitude* and *interpretation* of this is that "people in the frame for very serious crimes who are going to be away for a very long time, do tend to cast around and explore every possible avenue to see if there is a way out of it". When the defence tries a number of defence options these are known as 'Billy Bunter' defences. "I've not seen a cake, and if I had seen a cake I didn't eat it, and if I did eat some cake I didn't eat it all". Consequently AC finds obtaining expert opinion from someone they are *familiar with* can be helpful before deciding how to proceed.

³⁷³ There is evidence of this sceptical attitude in *Fathi* [2001]

It seems the 'familiarity factor' is an important one that can result in either discrediting the expert or perceiving them as a valuable team player. Again the issue is one of legal control dictating the perspective.

Trial or no Trial: The Issue of Public Interest

If the prosecution and defence psychiatrists agree that the grounds for diminished responsibility are established then the CPS consider whether to accept the plea (*Cox*). AC said he hoped the combination of the defence and prosecution process means "the accumulative whole works". He stated that expert "reports carry enormous weight and importance". Certainly this procedural practice means that the case can be effectively decided on the basis of the expert evidence, without any public reflection on it via a jury. The Judge made the point that the expert's conclusions have to be tied to the facts so that if new evidence emerges, which changes the facts, the expert can be apprised in order to establish if the expert wants to change their opinion. Cases are evaluated in terms of the legal view of public interest. A number of comments were made.

Importantly DW claimed that in his experience even when both sets of experts agree it is rare that the case would not go to trial. He maintained "there's very little incentive on the prosecution, . to agree things in advance", and there is considerable political pressure on them to be seen to be tough on crime. Therefore, he asserted, it is a brave prosecutor who would put his head above the parapet and say it is not worth taking it to trial. They would rather let the courts decide and if anything goes wrong the court can be blamed. DW discussed a case where it took the CPS six months before they eventually dropped the case, and then it was on evidential grounds. He said the police had put pressure on the CPS to keep the case running, showing the importance of the inter-relationship of the various components of the legal process on decisions made in each case. In that particular case DW said it was about the victim's family having their day in court.

JM also discussed circumstances where the prosecution do not simply accept the defence psychiatric report, even though it would save a lot of public money. He claimed the police are very hesitant about any mental illness

diagnosis, as they consider the defendant is pulling the wool over the solicitor's, barrister's and psychiatrist's eyes. JM acknowledged that on occasion there might be some truth in this, as there is an obvious benefit to being convicted of manslaughter on the basis of diminished responsibility. Furthermore, he remarked on how difficult these types of defences are for the victim's family because the concepts are beyond them and therefore it does not represent the necessary redress. However, JM also asserted that the law has to give effect to the basic proposition that if somebody is not in full control of their mental faculties the courts should not treat them as if they were. An earlier quote from JM said they do try to urge experts to agree.

AC provided an example of CPS decision-making in the public interest. He discussed a case where it was anticipated the judge would prefer manslaughter to murder. The case concerned domestic violence allegations against a man in his 70s,

“so a judge on a practical basis may say, is this worth a murder trial, perhaps he's going to serve no longer than he's going to serve, does this really matter, can't we do manslaughter and all go home. Without all this fuss and bother”.

However, *his perception*, based on *experience*, was that he did not “buy” the defence report because it made the perpetrator of the domestic violence sound like a victim, even though he had killed his wife. AC attributed the tenor of the report to the fact that doctors “tend to rely to a very large degree on what they're told”. AC admitted that some of the defendant's statements to the doctor would have convinced him too, but the man was obviously cunning and devious and in light of all the statements from people who knew the defendant, he could not accept the picture presented in the report. He said that in fact they were so confident it was a poor quality report that they did not obtain a prosecution report. They believed once they had the doctor in the witness box they would be able to prove their viewpoint. When they got to trial the judge wanted the case entered as manslaughter but they said “no, we've already thought about that in great detail m'lord and we're proceeding”. The defendant was convicted of murder. AC's justification was the difference the label made to the man's daughters, and the community, which the legal system needs to remember. “I think it is right and proper that certain things are litigated, that is what the court process is there for”. This illustrates earlier discussions

regarding the importance of the CPS lawyers in the determination of how cases proceed.

Court

This section provides the practitioner's perspective on the issues raised in previous discussions on the intersection of law and science within the court context. Earlier chapters have outlined the judicial interpretation of the legal provisions, and the rules on the control of expert evidence. This section provides the practitioner's concerns in a case framed by those technical requirements. The dialogue addresses the presentation of the case with regard to the two key decision-making proponents in the court, the judge and jury, as with previous discussions.

Judges

Judicial Attitudes

Significantly, as chapter three in particular addresses, judges develop common law interpretations of legal rules, which represent the legal reflection of cultural, social and theoretical shifts. As well as the judicial role being concerned with the delineation of legal meaning of terms that refer to the mind, the judiciary have also developed rules that control the admission of medico-psychological evidence. The importance of the background and persona of the judge is recognised as affecting the legal process.³⁷⁴ In addition consideration has to be given to the impact of legal training and the duty to secure legal objectives. However, the judge admitted there is no medico-psychological training unless the Judicial Studies Board has a "psychiatrist addressing us". Even then it is not training in a technical science, because there is the assumption that "a competent expert, should be able to explain it". Some legal practitioners commented on the law reflecting current social and scientific outlooks. Therefore, while KR asserted that responsibility for contemporary scientific research reaching court lies with experts,³⁷⁵ there is also the effect of judicial responses to take into account. SB said the law is currently "perhaps 10 years behind, public opinion", whereas DW claimed "we're dragging it into the 20th century, . as the rest of us have moved on into the 21st,...". Thus despite

³⁷⁴ Griffiths 1997; Woolf 2001

³⁷⁵ Only two psychiatric respondent mentioned neuroscience and genetics.

the significant role of the judge in delineating the operation of this area of law and the nature of expert evidence there is no medico-psychological training. This has to be viewed in light of the fact the judiciary are important gatekeepers for securing legal objectives such as the protection of the public. Yet they are also part of the practitioner team in court cases.

As GF stated, judges are now involved in the management of cases much earlier on. “[A] judge is sort of, allocated to it. ... [They] manage that case and start looking, at the timeliness, of its progress”. It was indicated above that it is from the initial stages that representations about mental health issues can be made. SB said,

“the courts don’t interfere with the way we present a case, or prepare our case. ... I know that I’m, the kind of person who's gonna argue with the judge, rather than let him, stamp on me. ... you stand up for yourself, and your client expects you to”.

SB considered it can become personal in the Crown Court, because the judge can actually have a go at you, which is not the case in the Magistrates Court. SB held the court may commission its own psychiatric report if it believes it is necessary in the interests of justice, but he viewed this option as problematic because “the court then ask, the questions, and not us”. This removes vital tactical control and undermines the dichotomous adversarial presentation of the arguments. A more partisan approach could potentially materialize if the judge has strong views as the judiciary have a strong influence by nature of their position in the legal hierarchy.

Experts in Court

Experts do not always attend court. DW stated "I've never done the figures I would have thought probably about two-thirds of the reports that we get ... we would actually call them to give evidence". He prefers to call the witness, even if the prosecution will not really challenge them, rather than just have the report read out to the jury because he thinks it does not come across as well. As chapter four discussed, if an expert goes into court the judge can question the expert’s competence and evidence. There is also the impact of the barrister’s questions on the evidence to consider.

Expert Qualifications

As discussed in chapter four, judges assess the credibility of the expert's qualifications and experience.³⁷⁶ On this point the Judge stated that he had not done a case at the bar, or as a judge "in which the qualifications, of the expert, have been brought into question". He did state that plainly some are more qualified than others. The issue that may arise is when "an expert, ... stray[s] into an area, . in which their expertise is less, clear". He claimed it is more difficult with the qualifications of psychologists because "the issue involving, psychologists, don't, that often arise, in my experience of criminal cases" therefore he experiences more difficulties in determining whether or not they are speaking from within their area of expertise.

Admission of Expert Evidence

The Judge said evidence is admitted where it is something the jury "in their ordinary lives, will not know about". As noted previously, DW believes the law has become more generous in the admission of evidence in diminished responsibility cases, for instance, 'battered woman syndrome'.³⁷⁷ AC also discussed syndromes, saying that they explain a defendant's conduct through illustrating how other individuals in similar circumstances would behave in this way because these conditions give rise to particular behavioural manifestations. Alternatively, as chapter four notes, the judge has the power to exclude evidence on the basis that it usurps the jury's role, as they are meant to be adopting a common sense approach. Having both alternatives regarding expert testimony allows a wide-ranging exercise of judicial discretion on the admissibility of evidence.

Chapter four indicated that courts favour the most 'prestigious' witness. KR mentioned that there are differences in judicial attitude to psychological and psychiatric reports. "[J]udges will invariably prefer a psychiatric report, ... the judges can sometimes feel, in my experience that psychological reports, that, that they're telling me nothing I don't know".³⁷⁸ He subsequently said that this is not a universal outlook. KR also said appreciating the difference between the

³⁷⁶ *Ikarian Reefer 1* (1993); *Stockwell* (1993)

³⁷⁷ Edmond discussed this in some detail on pp. 237-8, with specific reference to the Canadian case of *Lavellee* [1990]

³⁷⁸ This is discussed by Hollin (1989: 176-180).

disciplines comes with experience. For instance a psychological report is essential to establish a defendant's IQ. Clearly, prejudice against psychology ignores the way that the two central medico-psychological disciplines provide different information on the mind and that increasingly collaborative working partnerships are developing with the acknowledgment that no one discipline provides all the answers.³⁷⁹

Judicial Directions and Expert Evidence

Judges give directions to the jury at the end of the trial, which incorporate a summary of the expert evidence and explanations of the legal rules to be applied. In terms of legal rules, JM said judges are constrained by Acts of Parliament, if the Act expresses something in a particular form of words the judge cannot tell the jury to ignore that. In terms of expert evidence, SB stated that "I don't think that, if there was a finding, . of a mental health issue by a psychiatrist, I don't think a judge would dare to ignore it". However, summarising the expert evidence is not circumscribed in the same way as with the legal rules and therefore there is more scope for personal attitudes to influence the presentation. For instance there is the difference in views on psychology and psychiatry that have just been noted. SB stated "[u]sually on, issues of, law like that, the judge would try and give the jury some direction as to what they *ought* to be finding". The Judge said, "it shouldn't be too difficult. You can simplify it, and you can put it in writing, in parts, not completely but, in chart form ...". He claimed that mostly the issues are clearly defined between prosecution and defence, if both sides do their job properly. Yet the directions come from an influential member of the court and could affect the perceptions of the jury as they undertake their independent role.

Juries

The jury's role as final arbiter is an important factor in the adversarial legal process. Therefore, lawyers' perceptions of what influences the jury and their understanding of the issues are likely to affect the undertaking of their legal role. Bearing in mind that the cases that reach trial are going to be contested and part of an adversarial process, JM's point that the jury decide disputes

³⁷⁹ This is not to say that there was not any rivalry between the disciplines evident in the interviews in chapter 7.

between experts is an important one. Although SB argued that whether they get the decision right or wrong is not problematic, it is “the balancing of the evidence one way or the other .. that’s healthy”. In terms of cases that go to court, although the debate to date has focused on the meaning of legal concepts and the admission of expert evidence, it can be seen that the jury represent the ‘wild card’ in a case. Legal control is maximised but decisions cannot be guaranteed to meet legal preferences. AC referred to this as public interest. He discussed a case where he thought, “no reasonable person could do this ...”, but the individual was convicted of murder. AC explained this state of affairs by reference to the ‘Yorkshire Ripper’ case, although he said the point of view expressed was personal rather than professional. He said while there was clearly something wrong with the mind of the Yorkshire Ripper it was imperative he was convicted of murder, whatever the expert reports said, because there are cases where issues outside legal concerns can affect people’s views. In these instances, he argued, the jury’s perception of the public interest will override legal considerations. This also provides an example of the strategic use of expert evidence to achieve moral outcomes, and the way that both experts and juries are valuable legal tools as responsibility for decisions can be attributed to them.

Understanding Expert Evidence

In light of the previous discussion on the problems lawyers experience in comprehending expert evidence, can a juror, as a layperson, understand it? JM believes that as psychiatry develops the evidence “must get more and more complicated for a jury”. Legal skills and expert credibility in the witness box are considered to be important factors affecting jury comprehension. SB said “I would imagine they find it difficult. .. I suppose it depends on the way in which it is presented to them, the skill, . of the barrister, will dictate how much of the, . point, the jury realise and take in”. However, as KR says, you have defence and prosecution counsel presenting two very different perspectives of the facts and the medical position. Therefore,

“although [the jury] are going to be urged to carry out a, a cold and clinical analysis of the medical evidence that they’ve heard they are bound to be persuaded as any human being would be ... from the advocacy of the advocates”.

In terms of the barrister's questioning of expert reports, JM said that he talks with his psychiatrist about the differences between the reports. Also, he said if each expert attends court, while one is giving evidence the other one can suggest what their barrister should pick up on. "Erm, and they will very often say well, the symptoms are not under, sufficient in my view, er, for him to be able to express so confident a conclusion". Certainly the Judge alleged that the fact the expert acts for a particular side can lead to "some astonishing, views expressed", and "of course, the danger is that you're a jolly good witness and terribly convincing and the jury believe everything you say". However, he observed that while experts might be very convincing in court, this is not a guarantee that they are good practitioners. This illustrates how the case process is dependent on co-operative team-work between lawyers and expert witnesses.

SB proposed that ultimately it is only necessary for the jury to understand the expert's conclusion on whether the defendant is mad or not, and whether or not he will recover. KR also maintained that the conclusion is very important and declared that the jury on hearing it should be able to look at the facts to determine whether they fit in with the medico-psychological statements.³⁸⁰

Alternatively, JM claimed

"some judges will do it if counsel don't, er, well Doctor I've got to erm, direct the jury about this and I'm going to have to explain to the jury, ... what diminished responsibility is, and what they need to be satisfied about...is he suffering, er, from a mental, illness ...".

The Judge thinks diminished responsibility must be difficult because it is a matter for the jury whether the diminution of responsibility is substantial, and quite a lot of cases are emotional, but the jury need "to be dispassionate in making that assessment". Essentially he thinks they are reasonably sensible on medical issues but if it is a horrific murder "there may be the temptation, ... to call it murder". The Judge suggested it would help if a written summary of the expert's reports, or the conflicting issues were provided. "[T]hese are not easy topics for them to grasp, ... They're not easy topics quite often for the judge to grasp ...". It is more difficult now with the practice of running diminished responsibility and provocation together. This indicates the difficulties in understanding the evidence and the potential for other factors to take precedence in light of that.

³⁸⁰ There is a summary of a couple of reports from CPS case files in chapter 7.

Nevertheless, despite this recognition of the difficulties the jury face, KR maintained,

"you know you've got QCs of 30 years experience and the judge of 40 years experience. They all know, they can all speak in code, when you're looking at say diminished responsibility, you don't go into, normally, into, an in-depth assessment of what the evidence is of *mens rea* and what the psychiatric reports say in countering it. Because there is invariably a gut feeling about the reports, ... you had hard evidence that he has hallucinations ... and the prosecution psychiatrist went to see them and backed that up, you'd have a pretty body of evidence to run diminished responsibility with".

This indicates, as did previous debates, how *tacit* knowledge is fundamental to legal interaction, and in this situation it appears to impact on the nature and scope of the information presented to the jury throughout the trial process. So, in addition to the effect on the presentation of the two views as a result of the adversarial process, there might not be a full legal argument because the 'correct' evaluation of the matter is plain to the professionals. KR believes that where you can get more legal argument with the lawyers cross-examining the doctors is on fitness to plead.

Understanding the Legal Rules

The jury also need to comprehend the pertinent legal rules, for which the judge's directions are crucial. However, DW held the view that

"there's a lot of time, . er, on, on all sorts of different legal concepts, that I think, . the directions that are given, . to the jury by the judges, work on the assumption that we have 12 law students who've just finished their degrees in there".

DW suggested that there are likely to be 2 or 3 on a jury that are not that bright and may have literacy problems and therefore the judge needs to break "it down into almost noddy language ... but unfortunately the majority of judges don't seem to deal with it, . on that basis".

It was outlined in chapter one that the *mens rea* concept is complicated because it includes two facets, intention to do the act and oblique intention, foreseeability about the consequences of one's act.³⁸¹ KR actually stated that the fact *mens rea* includes both dimensions makes it difficult for juries to comprehend the concept. Significantly the Judge claimed he tends not to use the second facet in his explanations. With regard to diminished responsibility

³⁸¹ A concern supported by the fact in the cases of *Maloney* [1985], *Hancock* [1986] and *Nedrick* [1986], the jury returned to ask for further clarification on the meaning of intention, even though the definition is said to reflect 'common usage'.

AC said, “I think juries struggle with anything .. as complex as, . diminished responsibility”. Furthermore, when AC discussed the complexity of legal categories he said that it “is, you know, why we’ve got the judicial system whose boards, flap about the word for word directions to try and help the jury”. Consideration is being given to whether or not the legal system is doing the best that it can

“[s]eeing as they’re making the most important decision in the whole case isn’t it, quite important that we reassure ourselves, that they are given the best advice and assistance they, they can receive to reach their conclusions”.

However, he also acknowledged how difficult it is to make a decision as a practising lawyer let alone as a juror who knows nothing, “at least we’re building on, previous experience”.

Perceptions of Non-Legal Influences on Jury Decisions

The interviewees acknowledged that juries struggle to understand the legal rules and expert evidence, and offered speculations on other influential factors. They can only be tentative perceptions because direct research on jury decision-making is not permitted, as chapter four discussed, but they provide some indication of legal insights and perceptions, based on considerable experience, which arguably affects how the interviewees carry out their role.

Respondents referred to the everyday process of evaluating someone’s credibility, which in the court context incorporates experts, lawyers and the defendant. On the matter of judging between *experts*, JM raised the possibility, jokingly, about gentlemen on the jury deciding between two female psychiatrists based on which one they fancy the most. Similarly DW suggested it is important who presents best in the witness box, whereby “if one expert turns up nicely dressed and is well spoken and, . somebody else is your nutty professor, . erm, then, the nutty professor is likely to come second, just because the, the other one presents better”.

In terms of evaluating *lawyers*, DW cited an old legal joke “that the jury is 12 people selected at random to decide who’s got the best lawyers”. An example he provided from his time as a prosecution rather than defence lawyer, concerned a case where the evidence was overwhelming but the jury acquitted.

He thought that they considered that the nice young man defending would never have defended someone he knew was guilty. He also acknowledged it is hard to know what a jury's decision is based on when you have contradictory and complex expert opinion. Finally there is likely to be an assessment of the credibility of the *defendant*. Another example from DW stated that at every party a criminal lawyer attends there is always someone who talks about their time on a jury. He said they say things like "they've convicted the guy because they didn't like the way he walked to the witness box, or they acquitted because, she was such a nice lady".

In addition to making assessments of individuals, reference was made to the tendency to make moral value judgments of situations. Homicide cases can be very emotional, which the Judge claimed can be a big issue, especially if the jury see horrific pictures of the crime scene. Certainly the pictures in the CPS case files were very disturbing. One option to de-sensitise the jury is through repeated exposure to the pictures. Also JM wondered

"whether the jury still with diminished responsibility look at what the defendant did and, . I suppose apply the test 'is the defendant morally responsible', if they come to the conclusion yes he is, they may well convict of murder".

Likewise DW wondered "how much attention the jury pays... to what's said, as opposed to what they think is the justice of the situation and er, . just decide a verdict accordingly". He considered that by and large juries look at the case and consider what they think is fair in the circumstances, "almost, irrespective of what the judge has said to them". JM concluded that all that can be asked of the jury is that they take a common sense view, which is what the law presumes.

The lawyers plainly recognise there are any number of factors that can influence jury decisions, many of which reflect the themes in the research on the matter in chapter four. It seems there may be cause to argue that this is a potential factor in the current practice of diminished responsibility cases not going to trial where there is evidence to support this option, if the professionals are all agreed that that is the most just outcome in the case.

The Future of Jury Trials

A number of legal respondents expressed concern about the jury role in light of increasing case complexity. For example, the Judge's personal view was that he is unsure, because of the difficulty of the issues, if the jury is the most ideal way of dealing with the cases under scrutiny. Yet he also thought it is valuable to participate in something of great importance to society. Similarly KR wondered if the legal system has become too multifaceted with regard to fraud and complex medical evidence.

"[J]uries were designed for deciding facts on, routine criminal cases and that they, they were not designed to assess either serious fraud issues in a fraud case or, medical evidence in, in connection with, with murder...".

SB also referred to fraud cases when arguing that some cases have become too complex for juries. Likewise AC said, some areas of law are difficult for practitioners, let alone a jury. SB suggested that a consequence of focusing on so much detail is that the bigger picture is lost; the technical matters obscure the obvious facts. However, DW stated, "I'm a fan of the jury system because I don't think there's a better one. But that doesn't necessarily mean I think that it's very good. It's just the best of a bad, bad lot".

In terms of solutions, SB indicated there is a move to take serious fraud cases "out of the hands of, lay juries, and they're looking to put them to specialist juries...". Alternatively, KC discussed the possibility of a judge sitting alone, but said, "it is difficult to speculate what would happen if judges were assessing that evidence on their own". He suggested that "the likelihood would be that less people would be successful, . in, . succeeding on diminished responsibility ... because [judges would] be inherently cautious", furthermore, that it is hard to imagine that judges are going to make the 'moral' decisions that juries are seen to make. Significantly the Judge held "I, certainly wouldn't want it to move, to being a judge, deciding, guilt or innocence".

There is an appreciation of the difficulties that such cases represent for the jury, and this may be another reason that few cases go to trial. The interesting thing is that the fact so few cases go to trial is not raised.

Sentencing: Detention - Hospital v. Prison

As noted in preceding discussions, the operation of the defences and proposals for reform are integrally linked to sentencing options. The respondents identified a number of issues.

Sentencing

First, KR discussed the importance that a finding of manslaughter rather than murder has for the length of the sentence. He said the mandatory life sentence incurs a minimum Home Office tariff recommendation of 12 years, whereas manslaughter usually results in a sentence of between five and seven years.

In the cases under discussion a major issue concerns the matter of deciding where the defendant serves their sentence, prison or hospital. Chapter one outlined the pertinent provisions and in chapter four the importance of expert reports to this aspect of the decision-making process was discussed. Court reports usually make recommendations on the matter, but it may be that an additional report is requested at the sentencing stage. However, such information may not emerge to inform decisions, as an example provided by JM highlighted. He discussed a case that concerned a man who had been released after serving eight years for motiveless assaults on women, and who, whilst out cycling stabbed a woman to death. As the defendant pleaded not guilty on the basis that it was not him there was no scope for exploring his mental state and he was convicted of murder. JM stated that

"my view is there was manifestly something wrong with him because people don't generally go round and, they may go round raping, they may go round attacking women to rob them, ... but a motiveless attack erm, . is odd".

JM argued that evidence that he had attacked a number of times before needs to be viewed as an indication that he is likely to do it again "and I would want to be jolly careful myself before I let him out".

Additionally, a number of possible problems were identified with reports obtained at the sentencing stage. KR said, for example, that occasionally when a psychiatrist wants to assess the defendant in a hospital psychiatric unit rather than prison, under s38 of the MHA, there is no bed available. JM discussed a

case from when he was sitting as a Recorder, where the perpetrator was 16 or 18, and had been convicted of bugging a six-year-old he was babysitting. JM was unsure whether the defendant had acted as a result of teenage sexual experimentation, or if he constituted a serious danger to children.³⁸² A senior judge suggested getting a report from a psychologist rather than a psychiatrist.³⁸³ However, the psychologist concluded it was not possible to express a view because the defendant still denied the offences. JM interpreted this as showing that the defendant was very dangerous and gave a youth custody sentence. Sometimes the prosecution and defence psychiatrists can disagree on whether the defendant should be sent to a hospital under the MHA. If this is the situation JM suggested it might then be necessary to say to the solicitors that the doctors should discuss the matter further to see if they can produce a joint report, amend their report, or develop it. He argued this is not about forcing doctors to make decisions, but the judge might not be able to make an order, certainly with a restriction order attached, in a case where there is a dangerous defendant with a mental health problem. This indicates that the legal rules, such as requirements that two doctors have to sanction MHA detentions, may hamper judicial discretion on perceptions of the danger presented by the defendant.

The issue of judicial discretion at the sentencing stage is important. SB asserted that

“judges ... their decisions are self made. They decide what’s going to happen, and if they want a person locking up, er, in prison, they will find a reason for accepting the psychiatrists advice, but locking them up in prison”.

Yet a subsequent remark was that “where there’s, psychiatrist is saying, don’t lock him up in prison I think the judge would find it very, very difficult, not to follow that line”. He suggested the loophole for the judge would be if the prosecution had a psychiatrist claiming that the defendant should be in prison. The way that the judge frames the matter will be critical to the legitimacy of the decision made. This reflects the ambivalent nature of the thinking and views that pervade this area, which has been highlighted previously.

³⁸² It would seem this behaviour was questionable from any perspective.

³⁸³ An example of the benefits of appreciating the difference in their expertise.

Notably, if the defendant goes to prison first and is then referred to hospital, if the hospital eventually decides that the defendant is well, they are sent back to the prison for the remainder of the sentence. The parole board would then decide when they should be released. If the defendant is initially sent to hospital there is not the same minimum tariff recommendation and responsibility falls on the Mental Health Review Tribunal (MHRT).³⁸⁴ The difficulty in making the decision and the consequences were highlighted by a case example supplied by JM. The jury had been confused about whether it was murder or manslaughter and ultimately a decision was made based on the reports produced by the prosecution doctors that the defendant should go to a special hospital because

"under pressure from various sources including pressure from the judge we eventually, rather than having a retrial agreed to accept a plea of, guilty to manslaughter on the grounds of diminished responsibility".

Some four years later the MHRT decided that the defendant did not have a mental health problem and therefore that they had no authority to detain him, even though he had killed his girlfriend. JM believes that at the time of sentence everyone was misled so the defendant was sent to hospital and now there is no mechanism whereby he can be brought back to court even though he has only been detained for four years. He argued that the doctors who claimed he was "as nutty as a fruitcake" should provide some answers. It would appear that these possibilities reinforce the legal scepticism towards defendant's allegations of mental health problems and the capacity for medico-psychological professions to provide accurate diagnoses. However, it would seem that there was pressure to make an argument about diminished responsibility because of the wish to avoid a re-trial and therefore there is a question if the defendant has been treated or whether the defendant was perhaps not seriously mentally disordered, although conditions permitted under the diminished responsibility defence are not necessarily serious mental disorders. If the latter is the case then it begs the question as to what the special hospital has done with the defendant for four years. The fact that the defendant is able to go free after such a short period of detention does undermine legal control and ideas of punishment.

³⁸⁴ For a review of the different considerations of the MHRT and parole board see Harding & Hoffman (1988), Walker (1985: Ch. 14) on parole boards.

JM speculated on whether the courts are the appropriate body to determine if the defendant needs a secure special hospital or a high security prison. In addition he argued such trials are painful for relatives of the deceased because the trials seem to be primarily concerned with whether the judge will send the defendant to prison or to hospital. Thus JM believes that on occasions the doctor is under some pressure to say that there is nothing wrong with the defendant so that he is sent to prison. He also suggested that matters have been exacerbated by government closure of many mental hospitals.

Release

The issues around dangerousness and release have been examined in earlier chapters, and similar concerns were echoed in the interviews, through case examples of defendants who went on to kill again. Significantly, the Judge claimed expert evidence is probably more important in terms of release and the matter of dangerousness than in respect of sentencing, reflecting arguments made in chapter four. However, the Judge and JM also held that diagnosis is a human activity, which like all other human activity by definition is fallible. JM argued that a balance has to be drawn between psychiatric opinions on an individual's mental health and the matter of their dangerousness, in particular where the decision that the defendant is no longer dangerous is contingent on their taking medication. JM said in his experience a lot of individuals feel that they know more than the psychiatrist and actually stop taking their medication. In support of his beliefs he referred to a particular hospital, also cited by other respondents regarding the same issues, where a number of patients had failed to take their medication and went on to kill. JM also acknowledged how difficult it is to devise foolproof systems to overcome these problems. The discussions indicate the problems that exist with the interaction of law and medico-psychology in dealing with those held to be a risk to society, in large part because of the different considerations that underpin the respective professions' review of the defendant's mental state.

Reform Suggestions

There were a number of reform suggestions, which recognise the tensions and difficulties with these decisions. For instance DW argued that the mandatory

life sentence for murder causes the problems, a recurrent theme in the Law Commission debates. He contextualised his discussion saying the mandatory requirement takes away judicial discretion and it should be about the punishment fitting the crime. He maintained that although judges are thought to be 'out of touch' most politicians are even more so. He supported his point about ill-informed political decisions by referring to the introduction of the 'three strikes and you are out' policy for various offences. This has given rise to a situation where with burglary a judge will be required to impose a life sentence, although his recommended tariff would be two years, making the life sentence a nonsense. Therefore, DW stated "if they actually concentrated on, stopping crime rather than just, . mucking about with the system, er, criminal justice, then, they'll probably be far more effective". He maintained an important concept is that judges and the courts are independent, whereas politicians are concerned with ulterior policy issues, and when politicians tell judges what to do their independence is undermined. Whilst this recognises the tension that exists between legislation and common law nevertheless, the earlier chapters have highlighted the significance of the judiciary in securing particular policy objectives.

In terms of judicial discretion, JM's suggestion involved more interaction between law and medico-psychology, whereby the judge decides the tariff but psychiatrists, probation officers and other appropriate professionals determine where the defendant spends their custodial time, which would need to be compatible with the convention on human rights. JM thought that it was a sufficient safeguard that there is judicial involvement in subsequent release decisions. In terms of the problems JM identified with releasing those with continuing mental health problems on medication, he speculated on the possibility of judges, when passing sentence, imposing something similar to a probation order where various conditions are attached. He suggested it could include attending the GP practice at particular times to ensure that medication is taken, and if the person fails to turn up they will be in breach of the order. Another proposal was that the MHRT could make an order for conditional release, which may require that individuals have to reside in a particular place,

where it would be ensured that they took their medication.³⁸⁵ But JM said if it was decided that there needs to be some sort of halfway house problems will arise over who should run it, the Home Office or the Department of Health. JM believes matters have become worse because many of the big mental hospitals have been closed, placing people into the care of the community, creating problems both for the community and those with mental health difficulties.³⁸⁶ Chapter one shows that there are collaborative developments emerging focused on those considered to be very dangerous.

Discussion

Two overriding observations that emerged from the data will be briefly addressed: first, the difference between the practitioner's perspective and previous theoretical discussions, and secondly, the importance of professional relationships.

What distinguished the interviews from the earlier two dimensions of the analysis of the interaction of law and medico-psychology was the lack of reflection on the moral issues and legislative aspects dealt with in the previous chapters. What emerged was a sense that despite the significance in theoretical debates regarding the moral nature of the defences, and the seriousness of homicide cases, these cases were to a large extent routine. The concern was the application of particular tactical procedures, which is dependent on whether the case is being viewed from a defence or prosecution perspective. Dingwall et al's (2000) investigation of the litigation strategies of defence lawyers in personal injury cases found expertise within professions leads to strategies based on experience. The mechanical processing of cases challenges the complex idea of the rule of law (Silbey 1981: 22-4). This form of processing cases is the way that decisions are made regarding the application of the remedy universally, the symbolic goal, and individually, the instrumental goal (Eisenstein & Jacob 1977: 24-28).

The other matter is the significance of inter-professional relationships, which is reinforced through the data in chapter seven. The "formal aspects operate

³⁸⁵ *R (on the application of H)* [2002] deals with the condition setting powers and responsibilities of MHRTs, especially when their stipulations cannot be met immediately.

³⁸⁶ Discussions in chapter 7 reinforce this argument.

through a comprehensive system of informal relationships, norms and practices of court practitioners” (Church 1982: 398). The fact that there are a small number of professionals involved in such cases within an area provides support for the proposition of a local legal culture (p.401). As a result “each person who acts on his [the defendant’s] case is reacting to or anticipating the actions of others” (Eisenstein & Jacob: 10). Despite the particular tasks of the lawyers there are shared instrumental goals as part of the adversarial process, and familiarity enhances the likelihood of successful negotiations (pp.30-34; 61). The operation of the diminished responsibility defence is based on plea-bargaining, and although justice is linked with the due process model, in reality the plea bargain model prevails (Feeley 1979: 26-8). This makes the CPS rather than the judge important, but also it seems that this process depends on the culmination of the inter-professional relationships. However, the reliance on expert evidence as a tactical evidential tool is still underpinned by scepticism about such evidence, which appears to offer the opportunity to assemble arguments to reject the evidence when it suits legal objectives to do so. What was interesting was the position of the judge who helps develop the law and is a practitioner within the legal process. The perception gained from chapters one, three and four of the judicial role as part of the legal process was challenged through the picture painted in this chapter. Interestingly the judge and jury were the crucial audiences, referred to by practitioners.

Conclusion

The discussion has outlined what the various legal practitioners had to say about the law, procedural considerations and tactics throughout the case process, and experts and expert evidence. The debates indicate that the relationships that develop and underpin interaction of legal and medico-psychological professionals are very important, but as AC remarked, they each have very distinct roles. There are identified legal considerations within a case, which frame the information demanded from the expert and reactions to the information provided, which in turn are affected by whether the perspective is that of defence or prosecution. In addition, there are distinct ramifications as a result of expert evidence both during the case and in terms of sentencing, although none of the legal personnel have any training in medico-psychological matters, and appear to have little understanding. This chapter illustrates how

the difficult philosophical and legal framework is not really addressed by practitioners and the way that the law is formulated leaves the way open for practitioners to manage the uncertainty and pragmatism inherent in case decisions, in what is perceived by lawyers to be a just manner. The interview data shows how decisions are the result of interplay between tacit knowledge accumulated through professional training and experience, substantive law, and the scope for legal tactics within the role in question. It would seem from the subjectivity evident in the process that the juxtaposition of the personal and professional is a crucial dimension to the decision-making process within a case. Each case is negotiated through a range of possible options and the interviews have demonstrated some of the factors that are taken into consideration, reflecting the manner the difficult legal and moral issues are addressed. In terms of the interaction of law and medico-psychology, this takes place at a procedural level, as the legal personnel do not appear to comprehend the medico-psychological evidence. The point was made in chapter three that judges develop the law without any understanding of the medico-psychological understanding of the mind, and it would seem that the law can operate throughout without an adequate comprehension, as the expert's conclusions as to whether or not there is a link between the defendant's mental state and the defence is all that is required as an evidential tool.

CHAPTER SEVEN

MEDICO-PSYCHOLOGICAL INTERVIEWS

Introduction

This chapter examines the medico-psychological observations made about the law and legal process. It provides a mental health practitioner's perspective on the two levels of analysis addressed in chapters one to four, the legal theory, interpretation and procedures. Initially the chapter addresses the medico-psychological understanding and views of the substantive law. Thereafter attention will be paid to the forensic role, which includes initial involvement in a case, undertaking assessments and writing reports, giving evidence in court, and finally detention and release decisions. In addition to the interview data the chapter includes observations made by the psychologist that reviewed the vignette to check its validity, and details of the reports in the CPS case files.

Glossary of Interviewees

DT – Psychiatrist
JR – Psychiatrist
SP – Psychiatrist
LC – Psychologist
RH – Psychologist
TB - Psychologist

The Law

Introduction

Earlier chapters have shown that this is a complex area of law, yet the expert is required to assess the defendant's mental state in light of the defences and to make recommendations regarding any potential link between the mental state and defence criteria. This implies a thorough understanding of the law, and the ability to translate a clinical diagnosis into the mental health options incorporated in the defences (discussed in chapter three) in order to give an opinion. There is an issue of adequate legal training for experts. Although current courses contain a forensic component, the experts currently involved with these serious cases have been practising for a long time, and will not have undertaken this training. Although suitable continuing professional training might be possible, none was mentioned by the interviewees.

As regards those currently acting as experts, the psychiatrists DT and JR both said understanding comes with *experience*. DT said "it's assumed that if you're in forensic psychiatry you will understand the law, and that's not, you know, you don't get particular training in that".³⁸⁷ DT initially relied on forensic psychiatry textbooks, whereas now if she is unclear about a particular legal rule she can contact the legal team, which she prefers because legal textbooks are difficult to understand.³⁸⁸ In addition some barristers voluntarily send her information, which she admitted is not always comprehensible, but she likes the fact they involve her in the debates.

"It's good, I mean, you, you know, it's a good atmosphere and, oh, I mean all, although in the end, you know, you're doing something really serious and, ... it's not a laughing matter when you get into court but, there's lots of sort of, humour and, and er, and banter goes on, in the background".

DT argued the exchange of information benefits both professions because she also explains mental health matters to lawyers. She maintained it is a continual learning process because each case gives rise to debates on the central issues. Similarly JR said, "I think there's a lot more we can learn from each other". This demonstrates, as did chapter six, the importance of the relationships that develop between the small pools of people involved in homicide cases for comprehending professional discourses. The established relationships help overcome the problem of a lack of training, which is more significant for the medico-psychological profession because they are being required to adapt to the legal rules and definitions.

Mens Rea – Guilty Intent

The psychologist RH was the only respondent to discuss *mens rea*. In line with the medico-psychological perspective described in chapter two, he expressed concern that the legal concept takes so few factors into consideration. One example RH discussed referred to Gudjonsson's suggestibility scale,³⁸⁹ which provides "the psychological context of the decisions that were made" in terms of whether the decision-maker could choose to say no.³⁹⁰ In addition, as

³⁸⁷ This supports the opinion of JM in chapter 6.

³⁸⁸ SB made the same point about medico-psychological books.

³⁸⁹ Gudjonsson (2003)

³⁹⁰ Rassin & Merckelbach (1999) consider the use of this in the legal setting because of differences between clinical and judicial decision-making.

chapter one illustrated, a contentious aspect of *mens rea* is *oblique intention*.³⁹¹ RH argued that from a psychological perspective it is necessary to "distinguish between the act and the consequences of the act. ... They're two quite different things". RH says that many people, when asked whether they intended to do something, "because they've done it, they accept that something has happened, they then sort of go back and, and retrospectively rationalise, . But, well, I must be guilty ...". Whereas RH maintained that when balancing the likely consequences of an act, "if you're making probability judgments of risk, . and erm, had sex and just had an orgasm, then, you're likely, to assume less risk. No different to actually having, having a bit to drink". Alternatively, if you are depressed, have suffered from stress for a long time, or had a fright then you are likely to perceive more risk. In addition alcohol, drugs, menstrual cycle, time-of-day, tiredness and shift-work could all impair someone's judgment. Furthermore, he suggested you have to ascertain if the judgment is based on what someone else has said, or on feelings, which in turn is affected by paranoid or obsessive traits. Likewise could they understand what was said, or remember it long enough to make a decision? This presents a much more subjective picture than the abstract legal position described in chapter one.

The Defences

As stated, experts are fitting clinical diagnoses into the terms of the defences, as defined by the judiciary. In terms of understanding the legal concepts of *abnormality of the mind* and *disease of the mind* the psychiatrist DT said, "no I haven't had any difficulties at all". DT said that whilst the law is difficult, if you stick to the manslaughter act it is pretty clear and definite.³⁹² "The only thing, it, it is always the same, when there's any argument about mental illness, mental intent, or, personality disorder, it always comes down to the one word, the substantial". However, DT claimed she had no trouble deciding where to draw the line because it is "a sort of *gut instinct* that's just sort of, that's *what I feel comfortable saying in court*". Whereas the psychiatrist JR's response to whether or not he understands the legal definitions said, yes and no. He argued customary practice has developed around what is intended, which has made it easier to apply medical understanding and conditions. As examples he said, the

³⁹¹ In chapter 6 KR identified this as an issue, although the Judge maintains that in practice it is not.

³⁹² This would seem to be a reference to the Homicide Act 1957

term *inherent causes* refers to personality disorder, *disease* means mental illnesses, and *injury* equates to head injury. He pointed out psychological injury is overlooked. It would appear in practice the law uses *inherent cause* to cover many conditions, although in chapter three it was explained that in *Sanderson* PTSD was classified under *disease* and *injury*.

With regard to psychological responses, in terms of *disease of the mind*, RH simply said minds are not diseased. TB said he had had problems understanding *abnormality of the mind* until the defence was successful using *adjustment disorder*, “which is the mildest diagnosis one can find and if that comes under the heading of abnormality of mind, then everything does”.³⁹³ He argued it may not diminish responsibility, but at least it can be put before the jury, although this means that over 400 possible diagnoses have to be considered when doing a report. TB does not mind using the legal language if he can give it some coherence by assessing whether the diagnosis relates to the offence. TB, perhaps because he is a psychologist, said he had not been asked to comment on the issue of *substantial impairment*, although in a recent case where he had assessed a defendant's intelligence he believes the legal team were getting at that issue. In TB's view psychotic behaviour, schizophrenic conditions and sub-normality of the mind substantially impair someone's mental responsibility. As previous discussions as well as TB's example show, less serious mental states do qualify for the defence, which arguably supports the impression that the diminished responsibility defence operates to achieve moral outcomes.

Again it seems experience rather than training informs understanding. Furthermore, like the lawyers, the experts' professional roles are informed by *tacit* knowledge. In this instance it illustrates the subjective nature of opinions on the ultimate issue, although there is clearly a recognition of what the law requires that appears to differ from their professional opinion. But in addition to the personal practices of individuals, the ethos of the small pool of professionals within an area is also potentially significant.

³⁹³ This condition was cited in *Dietschmann* [2001: 2003]

Criminal Responsibility

Although there was not an extensive discussion of the actual law, the experts did express views on the issue of criminal responsibility, paying particular attention to psychopathy and intoxication. Significantly, despite the contrasting professional perspectives on the mind, it was not argued that the law should be more lenient, but there were concerns about the lack of veracity in the legal approach, which gives rise to inconsistencies. For example, RH said,

"[t]here are a lot of people with cognitive impairment get off things they shouldn't. . You know, it would be in the public interest, what, what's the reason, the person is. because you're cognitively impaired doesn't mean to say you're not, you're not responsible, because you can be".

RH argued that these legal decisions should not be made until the person has been assessed. Furthermore, he challenged the legal assumption that we simply choose our actions in an objective manner, and should therefore automatically take responsibility for them. RH argued that if a man batters his wife, but the wife knows how to defuse and escalate the situation, and chooses the latter, it is questionable whether the man should take all the blame, especially if he has had a drink, as his reactions will be automatic. Similarly if you tried to stop a paranoid obsessive carrying out their rituals it would be likely to generate a violent reaction. RH believes "the person wasn't, ... responsible for their behaviour". This demonstrates the difference between a psychological and legal approach to evaluating decision-making. RH is advocating medico-psychological input whether or not a defence is raised, which is not permitted owing to the *Chard* and *Turner* decisions.

The psychiatrist SP also had this view. He argued that it is important to be able to acknowledge the individual's characteristics in court, using information from mental health professionals, although he conceded there are problems with the lack of professional accuracy. However, SP suggested that the law's dichotomous approach creates problems because often comparisons are not like with like, for instance when you compare someone who has had few adverse life experiences with someone who has suffered a significant number. Furthermore, some people cope better with life than others, and whilst you might do your best at the end of the day "*if it is in your biological make up to behave in a certain way, can you hold such a person responsible*"? This is one

of the few references to biological foundations to behaviour, but it did not result in a denial of responsibility. SP said it is difficult to say someone is not responsible for their actions, even though it is possible to identify factors that make their behaviour problematic. Chapter three addressed the differing debates on the consequences of raising biological arguments.

Psychopathy

Currently psychopathy does come within the remit of diminished responsibility, although TB alleged that psychopaths will not qualify for the diminished responsibility defence, or it would be very difficult, because the law cannot take account of sophisticated psychological concepts. Plainly it does qualify but not on the basis of sophisticated psychological concepts as chapter three established that the legal understanding is not the same. TB argued that the law should codify the distinction between ASPD and psychopathy, but claimed that the law does not seem to appreciate the distinction in order to do so. DT also took issue with the legal definition, arguing it shows a limited understanding of personality disorder and is very descriptive.³⁹⁴ She too identified that ASPD equates to psychopathy in law, and that lawyers simply read out the definition for ASPD.³⁹⁵ "In psychiatric terms, psychopathy applies to any type of personality disorder". For DT this is the biggest discrepancy between the law and psychiatry, and for her is a major source of irritation, as ASPD simply refers to behaviour that qualifies as criminal, whereas DT views personality disorders from the more complex professional position identified in chapter two. But it illustrates again that the law does not incorporate the actual discourse of the medico-psychological profession, and develops legal clinical categories containing elements that support the securing of legal objectives.

The discussion of the unique problems presented by psychopaths showed how professional opinion varies, and mirrored previous legal debates. DT cited a case where she disagreed with the consultant psychiatrist acting for the other side, even though they both worked in personality disorder services. The

³⁹⁴ DT says that the main time that the issue is debated is at Mental Health Review Tribunals (MHRT) in relation to detention decisions about someone held dangerous because they have a severe personality disorder which is a mixture of personality traits.

³⁹⁵ This view is supported by the fact the SLC makes this mistake in its recent report (2003: 26).

defendant in question was considered to be extremely psychopathic, having held someone hostage and tortured them for months. She said the other psychiatrist had argued that because the man had a severe personality disorder his *mental responsibility was substantially impaired*. DT argued "[a]ll along he was making choices. All, although his choices, may have been based on a severe personality disorder, he still had that choice, choice". Thus DT believes, based on years of working with people with personality disorder, that whatever *physical* evidence is found a personality disorder does not remove the capacity to choose, and so mental responsibility is not substantially impaired, although she conceded it is a philosophical debate. She also said there is evidence that psychopaths can learn to do otherwise, therefore if they do not respond to treatment focused on distinguishing right from wrong they should be punished if they commit another crime. This view contrasts with the views cited in chapter three on the matter of treatment and another statement by DT included in the sentencing discussion of this chapter. However, her case example demonstrates that not everyone in the field holds the same point of view, therefore in a contested case, as chapter six suggested, it is down to how persuasive the expert is when giving their evidence, and the barrister's questions, which is also discussed later. Also there is the matter of public opinion with regard to psychopaths, which the jury represent.

JR also viewed the issue as a philosophical one, saying psychopathy provides an explanation but not necessarily an excuse. He argued it is necessary to address whether, "as a result of the personality disorder was the person, unable or unwilling, to exert, the necessary restraint, or self-control". So the issue is, does the personality disorder affect choice, and if so when can it be said to have done so, which is a less rigid view than that of DT.

SP initially discussed psychopathy in terms of the difficulties that arise from the differences in perception between a layperson and psychiatrist, which is an important matter in terms of the jury's perception and interpretation of expert evidence. TB asserted that the moment ASPD or psychopathy is raised judges and juries are prejudiced against the defendant. SP argued, "I don't think we've got our act together strong enough, . to say look there are clinical evidence for a, a person we would call a psychopath". He believes about one in two hundred

people fall into this category in Britain today. "And the difference between them and the rest of the population is that, erm, if we scan them on MRI scanning you would find the parts of their brain don't light up when it comes to empathy". Thus psychopaths cannot empathise with people, they have no remorse or guilt, and project blame on to others. For example, SP says that Malcolm's desire to watch TV and his not perceiving the fact he has just stabbed JD as a problem is a classic textbook example. It indicates no feeling for the person killed; they are merely an object. This reflects the assertions made in chapter two about the importance of empathy and phenomenal concepts to normal functioning.

Consequently SP questioned whether psychopaths could make the same choices and therefore be subject to the same standards of responsibility. SP suggested it is not "a mental illness as much as a state of mind that's fixed from birth. And therefore the person, in a sense is not responsible". He argued that psychopaths do not have the capacity to understand the world the way that everyone else does, although they know other people perceive death as wrong. It is this last point that is crucial to DT's stance. SP suggested you could say to the court that someone in this state is responsible, but does not understand the emotional impact that they have had. However, the law does not readily acknowledge the importance of emotion to decision-making. It would seem that SP is less dismissive of the physiological evidence than DT, who supports the cognitive approach of the law.

However, the physiological evidence currently available is not sufficient to establish a definitive cognitive impairment that reduces responsibility in the eyes of medico-psychological professionals, let alone the law, although the English law does allow this condition to qualify. The issue is does the condition substantially diminish the defendant's mental responsibility, which is not the same standard of impairment to cognitive capacity required for the insanity defence. It would seem that much depends on the beliefs of the expert the defendant has acting for him. The psychiatrists in Mitchell's (1997) study claimed that despite the lack of an agreed professional definition about psychopathic symptoms they did not experience problems making a diagnosis. The unanimous view of the respondents was that such a killer might come

within s 2 but it was not automatic. They held that each case must be dealt with on its merits with regard to abnormality and the capacity for self-control, and the matter of treatability was irrelevant. The majority noted that it is often difficult to feel any sympathy for psychopaths and that there is little public sympathy along with the fear of repetition. However it was thought to be a matter for the court to decide whether a defendant should be shown any sympathy. It would seem the issue for the law is the risk the psychopath presents. This debate showed the ambivalent attitudes that prevail within medico-psychological professions and the position adopted by an expert depends on their subjective position in the philosophical debate.

Intoxication

The other contentious area is intoxication. The intoxicated person is usually held not to have an *abnormality of the mind* in law. JR said "most er, perpetrators of extreme violence, including homicide, are under the influence of alcohol, and/or drugs at the time they do it", as are a substantial proportion of the victims. In terms of responsibility LC believes that people know the effect alcohol will have on them and therefore cannot allege surprise at the nature of their behaviour under its influence. Nevertheless, JR suggested severe intoxication is a traumatic injury to the brain, which leaves demonstrable injurious effects, usually temporarily. For JR the issue is whether or not you equate alcoholism with *disease*. "I think the psychiatric establishment, I think the world, is split about this". JR said there is emerging *genetic evidence* in respect of alcoholism, but there is little support for claiming it is a disease, in contrast with other conditions where "there is no evidence, to support, the erm, the disease, notion of, schizophrenia, manic depressive, psychosis, ... there is no actual evidence", but they are accepted as diseases. He argued that currently the problem is that the evidence is indirect, unlike with physical illnesses. LC made similar points, arguing services that deal with those who have alcohol problems maintain "drinking is not, erm, is not an act from a mental disorder". Even if the individual is dependent on alcohol, they are scathing about the idea alcohol constitutes a dependency syndrome, as it is not an illness.

JR suggested political views influence the presentation of the legal psychiatric issues. In his experience if the expert evidence goes against the legal

viewpoint, which was identified in chapter three, it can lead to stern looks and words from the judge. He provided a case example involving a section 18 wounding, where the accused was drunk and had a “mental state abnormality”. When he addressed the matter of intoxication in court, claiming he was neither excusing nor condoning but simply offering a psychiatric defence, he found that the judge hardly listened to him. JR held that the judge dismissively said, “it might be interesting but it's not really relevant because er, of the self-induced intoxication”. This reflects points discussed in chapter four on the importance of the judge for the admission of expert evidence, that is essentially determined by legal concerns. JR was concerned about his responsibility to make sure the jury were aware of the peculiar mental state because it was complicated. But as discussed in chapter three, it is the initial choice to have a drink that is legally important, not the fact intoxication alters mental cogency. It would seem that currently there is no medical evidence or opinion to support an alternative approach.

The law requires that in cases where the accused is intoxicated, that there is a separation of the actions affected by the abnormality from those resulting from the effects of alcohol. The respondents in Mitchell’s study claimed that they did not consider this a problem, but also said that it is necessary to consider if the two are linked because this may be a way that the individual responds to the abnormality.

Reform Suggestions

Whilst interviewees in this study did not provide reform suggestions, the forensic psychiatrists in Mitchell’s study expressed various views that it seems pertinent to briefly summarise (1997: 630). Some said that s2 was imperfect but it was not necessary to reform it. Others suggested that if the mandatory life sentence were made discretionary there would not be the same pressure to bring cases within s2, although there would still be the stigma that accompanies the murder label. There were some that claimed psychiatrists should not be pressed to express an opinion on whether the defendant’s responsibility was diminished as this took them beyond their area of expertise. Others suggested that there ought to be more clarification about what is meant by ‘substantial impairment’. One respondent considered diminished

responsibility could be extended to cases other than murder and even that it and the insanity defence could be replaced by a system that operated on gradations of abnormality. Finally there were suggestions to modernize the language of s2 and replace the term 'mental responsibility' with something that refers to moral culpability and responsibility. Mitchell asserts that if the study reflects the national picture on the workability of s2 then it provides a good argument for extending the defence beyond homicide (p.632).

The Forensic Expert

In line with chapter six, the points raised by the interviewees deal with the initial professional contact, pre-court processes, trials and the sentencing aspects of a case. The debate covers issues raised in previous chapters, especially chapter four.

Expert Reputations and Titles

In chapter six it became apparent that there is a small pool of experts operating within an area, with legal choice primarily based on judgments about competence in report writing and performance in court. However, SP suggested that the limited choice might have arisen because, as in his area, there are a limited number of clinicians. For example, he said there are only four psychiatrists available to prepare this type of report in his region, whereas in more populated districts there might be as many as fourteen psychiatrists. He also acknowledged that perhaps only one or two would specialise and do the majority of the work. Certainly DT discussed how she was initially involved in less serious cases, such as personal injury, but progressed to specialising in serious cases. She said she now finds that she can be selective about which cases she takes on, and does about fifteen reports a year, as difficult cases can take a couple of months. Nowadays DT secures work simply through her reputation, and illustrated this by saying, "I'm in the Expert Witness thing, erm, I've been in that, for, for a few years, and this year, when they rang me to update it, I said look, take me out of the next one, I really, I don't need it". TB also referred to the importance of reputation for repeat referrals, which he linked to the efficacy of his reports. Similarly LC referred to reputation, but added that the relationships that develop are important too. RH supported the latter argument, claiming judges now wait until he, or another member of his

organisation, are free to provide the appropriate assessments and reports. Interestingly, based on the nature of the discussions in chapter six, this will be reputation for competence in meeting legal needs rather than clinical competence.

In addition to the importance of reputation experts alluded to the significance of professional titles. SP asserted titles affect perceptions of your credibility, so there are psychologists and psychiatrists who would do a really good job, but they are deemed not to have the appropriate paperwork or title. But professional clinical qualifications do not guarantee expertise in court work.³⁹⁶ RH expressed concern about the qualifications held by many psychological expert witnesses. "An awful lot of people in the business haven't got a clue what they're doing". Moreover, because solicitors do not know whom to instruct, the reports can be useless. He cited a case example where the court took one look at the report, which had cost £5,000 and tore it up. The solicitors had used someone recommended, who was not a chartered British Psychological Society (BPS) psychologist. RH thinks that the BPS as an organisation fails to offer guidance on expert witness testimony, and the profession needs to be properly policed so an appropriate standard is established. It would appear the lack of legal understanding about the medico-psychological profession can lead to problems. The consequences of mistakes also reinforce the use of known experts.

Pre-Trial Responsibilities

Initial Instructions

As stated in chapter six, solicitors make the initial contact, and instruct the expert. LC believes that the legal profession broadly understands the difference between psychologists and psychiatrists now, although firms who do not deal regularly with particular kinds of work may not appreciate the distinction. This perhaps seems a little optimistic in light of previous evidence in this thesis. LC stated psychologists do not normally do murder and manslaughter assessments, a consultant psychiatrist does.

³⁹⁶ Whereas the Judge said being a convincing witness does not mean they are clinically competent.

It became apparent that solicitors have different approaches to instructions. This set of interviews indicated just how important this initial contact is. DT said,

"defence or CPS doesn't make a difference whatsoever. As far as I'm concerned, and I think that's why, erm, I do carry on and get, and get the work from, one or two solicitors, who know that, that I'm going to give them, the most honest account possible".

However, DT's choice of which cases to accept can be influenced by the solicitors involved. She said she will not work with certain firms because

"they are hopeless and they mess things up and they don't get the information to you on time, erm, er, and they, you know, and they don't give their client a fair deal really because, they've got their own, agenda,".

For example she said that once she received a letter asking her to see a client, but it did not say who the client was or what they had done. Likewise TB discussed how variable instructions are, "[f]rom nothing, er, you know please assess this person, to very precise". TB prefers detailed instructions, "[b]ut very often, you know, just assess this person, it is up to you to make up the instructions if you like". LC said instructions vary depending on the nature of the law, "in criminal cases there are often, they don't give you very clear instructions at all". They sort of say what the problem is and then leave you to it, whereas in child protection work you get very clear guidelines and usually produce joint reports. In addition she said problems arise when a committee designs the questions, as you can have three questions basically asking the same thing. RH argued they do not know what questions to ask, suggesting good practice would be fifteen narrow questions. However he had recently received a letter regarding a man who had disintegrated in court which said, "the judge wants him assessing he thinks he's a bit nuts". Alternatively, LC held that sometimes instructions provide a sort of psychological profile, which of course does not mean anything. Interestingly the psychologist who reviewed the vignette said that they had reservations about some solicitor's statements about defendants, although they conceded the information might prove helpful in planning the assessment. The fact that the instructions are of variable quality and leave it up to the expert could be explained by the lack of legal training in medico-psychological matters.

The legal interviewees discussed the likelihood of bias on the part of the expert because they are arguably part of the team, whereas medico-psychological respondents expressed concern about being asked to take a particular direction. SP said he has found, "you get some solicitors who give you more than an inkling of what they want". For instance they may say what they are intending to do and *suggest* that they would like a particular angle. However, SP held that he has not been bullied, or definitively asked to write a particular report. In contrast DT considers it a positive that the lawyers she works with tell her how they are thinking and whether they think there is anything in it. "In their letter, they'll say look, you know, we got this evidence, er, well I mean tapes, erm, and they are actually pretty clear, they really are". This, alongside previous examples of how close working relationships help with the exchange of information, demonstrates how the established relationships could have an impact on the production of expert evidence through the general professional inclusion that develops. For example, with firms DT regularly works with, if they have not had their plea and directions hearing, they will tend to consult her about her availability before sorting out the trial date. Whereas TB even found himself in a situation, acting for the defence, where the prosecution were arguing they did not have time to get an expert, so he found one at an expert witness conference.

The assertions of respondents in this study are supported by a survey undertaken by the UK Register of Expert Witnesses (1995).³⁹⁷ It was claimed in the study that frequently solicitors fail to specify what is wanted, the norm being simply to request a 'psychological report'. Suggestions were that requests might ask if there are any mental health problems or disorders; if there are any mitigating psycho-social factors; about the likelihood of re-offending and the implications for any custodial sentence. Any relevant factual details should also be included, for example, witness statements, and a history of previous convictions. Interestingly it was claimed that it would be helpful to know what the defendant's defence is to be, along with other information that would allow an expert to estimate how much time they would need to prepare the case, and therefore how much it would cost. This last point contradicts the prevailing view held by both sets of respondents in this research. Likewise the

³⁹⁷ Issue 1, September, 1995

Law Society has produced guidelines on instructing experts, which it would seem are not being followed.³⁹⁸ Significantly the guidelines are intended to assist solicitors to make “effective use of experts” so they meet solicitors’ and the court’s needs as this better serves their clients and the interests of justice (2002: C4.1).

In addition to the instructions the interviewees discussed how important it was to receive a copy of the case files (depositions), for preparing for the assessment. DT said there is no point spending three hours with a defendant going through their account of the offence if you have not had the benefit of looking through the depositions and witness statements so that you can challenge what is said. This contrasts with the legal respondent’s perceptions of the ‘gullibility’ of the medico-psychologist with regard to the defendant’s story. In fact DT argued the capacity to get the depositions together quickly is another important way to assess a solicitor’s competence. DT claimed that once she has the depositions she will try and get things wrapped up within a couple of weeks “because it doesn’t help to have things, sort of, hanging on. And they start to blur together”, despite earlier remarks that cases can take a couple of months.³⁹⁹

In addition she argued that counsel’s advice, and knowing who the barrister is, helps you to know what they are thinking. This shows the importance of working relationships for judgments about what is required, and ultimately for the operation of the law in such cases. It also implies a partisan rather than independent approach to the assessment process. When acting for the prosecution the expert will usually receive the defence expert’s report. The vignette reviewer and DT also mentioned seeing GP records for identifying matters such as substance abuse, or mental health problems. All these types of records were in the CPS case files offering a wealth of information and insight into the victims’ and the perpetrators’ lives. In particular the pictures of the murder scene are graphic, and made it easy to understand the Judge’s point about the emotional impact they can have on a jury.

³⁹⁸ The Law Society Guidelines on Expert Evidence can be found on the Law Society website.

³⁹⁹ This contrasts with the legal claims about delays.

The Assessment

Procedural Issues

As chapter four discussed, the assessment process incurs additional responsibilities for the clinician compared with those of the usual doctor/patient relationship. For example, doctors normally arrive at a diagnosis and treatment plan on the basis of the information supplied by the patient. Yet it was identified in chapter six that lawyers consider that this face value acceptance of the patient/defendant's story undermines the validity of reports. However, the experts claimed that in this context they do test out the defendant's story, which is why the case files are so important. JR said the information in the depositions makes it possible to test the veracity of claims, such as not remembering or understanding what happened. The client "might not want to say anything but, you have to form an opinion about, that, because that's all about automatism and intent, you see". RH talked at length about the mode of questioning necessary to elicit as much descriptive information as possible, which means avoiding confronting someone about their behaviour, thoughts and values. The psychologist who reviewed the vignette stressed the need to interview other parties too, which in the scenario would include the father, Sharon, any close relative and the employer. As a result of the amount and complexity of the information DT said she completes a case before getting involved in another. She referred to a double murder case where the depositions "were about a foot thick, and, really erm, and that was a very detailed report". So the interviewees presented a very different picture to that drawn from the assertions of the legal respondents.

Experts identified a number of procedural problems that they find affect the efficacy of the process. For example, SP says it can be difficult relating the mental health information to the time of the incident if the assessment takes place months after the event, "it would be much nicer if we were there the day they were arrested. Which doesn't, can happen. The police arrest and we go straight in".⁴⁰⁰ He said currently psychiatrists only see the individual at the police station if the police surgeon decides a MHA assessment is needed. However JR said an individual might need to go to hospital to be assessed, but

⁴⁰⁰ The legal respondents also made this point.

there are no beds available, so they have to go to prison. TB also discussed the delays, saying a person may have been in jail anything from seven months to a year, yet once the solicitor makes contact there is pressure to produce a report quickly. TB said he endeavours to interview the defendant within a few days of getting the first phone call, but not before he has received a letter of instruction.

LC identified another factor that can affect the assessment process, where individuals have already been through one legal process, and/or perhaps received therapeutic support. "So it's thinking who else has been in that process before you actually see them, to prepare a report for court, ...". It would seem that there could be ramifications from police interviews as well.⁴⁰¹ LC also raised the matter of confidentiality, saying it is the responsibility of the expert to ensure the person is advised about the limits of confidentiality because the report is for the court. LC cited a time when a defendant who had denied guilt to the police, made an admission to her. This information can reach court through the report, and LC was unsure whether the solicitor subsequently used the report. So there are numerous ways in which the defendant's narrative can be influenced. LC's last remark shows that the report is an evidential tool.

As regards how long an assessment takes, JR says that when the case is a straightforward one, like Malcolm, he would spend about two hours face-to-face with them, but up to six to eight hours reading and preparing the report. TB discussed the time taken in terms of the nature of the tests, saying he usually sees defendants for one or two hours for a standard assessment, where he uses the Personality Assessment Inventory (PAI).⁴⁰² "Erm, which, with most people I can do it in about an hour". TB was particularly concerned with risk assessments of sex offenders and held the PAI is helpful because it generates information in a systematic format. He said he might be required to undertake additional tests, for instance related to suggestibility or intelligence.⁴⁰³ TB said he does not assess someone's intelligence unless he anticipates arguments about the appointment of an appropriate adult at the police interview.

⁴⁰¹ See McKenzie (2002)

⁴⁰² See Edens et al (2001) for an evaluation of the PAI for forensic assessments.

⁴⁰³ An aspect of the case of *Fell* [2001] was the suggestibility of the defendant in relation to police interviews.

Interestingly TB referred to an occasion where he prepared a report without conducting an interview, because the defendant refused to attend one. "And he was a, he wasn't say, he wasn't a rapist, but he was on the way to being, he, he was an exhibitionist." On the basis of perceptions and information provided by other parties TB came to the conclusion the defendant was on his way to serious criminality, and recommended that they lock him up and treat him.

RH also discussed the cost of reports, admitting he is expensive. A report costs, "I mean we charge, I don't know, £2000 for a full report on, on one person. On a, on a mother and, father, £3800 I think". Assessment of a child costs £300. VAT is charged on top of this. In justifying the costs RH discussed how long it takes to do an assessment, referring to the reading time beforehand, the assessment, dictating the report, typing it up, usually by a secretary. In addition there may be travel and hotel costs. RH equated this with a solicitor charging £120 an hour. However, in chapter six it was established defence solicitors do not receive this level of remuneration. LC pointed out that the psychological service she is attached to do not charge for the reports, whereas the psychiatrists do undertake court reports as private work.

Diagnostic Issues

The respondents discussed a number of clinical issues. SP said he focuses on the "man himself" on the night in question, and "was he mentally ill, if not was he physically ill, if not, is this, is there something seriously psychological that you think should be considered". SP maintained it is only from the age of 18 that it is possible to classify a personality disorder, as in children the most you can say is that there are traits, which could be developmental. This overlooks conduct disorder that covers the under 18s, which is discussed in chapter three. SP argued having something psychologically wrong is the weakest ground because many people believe we all have problems. RH also said "one of the things the court has a problem with, if the person hasn't got a mental illness, but is psychologically disturbed", but it still means their reasoning is impaired. But in chapter three it was shown that the courts claim they accept functional disorders. This could be an important issue for cases where the CPS accept a plea, or let the case go before a jury. There are clearly functional disorders that are readily accepted because they are related to particular case types where the

law wants to achieve a moral outcome, such as with battered women, because there are no issues of future risk.

SP alleged problems arise when there is an elusive medical condition that requires more time to investigate, for example, temporal lobe epilepsy, a rare organic disorder.⁴⁰⁴ SP has encountered this in a couple of cases where it had been missed. It usually occurs in young men who have unprovoked aggressive outbursts, which they cannot remember. "[T]hey've got temporal focus, which can cause rage and aggression", which can cause many of the symptoms of paranoid schizophrenia. However, he argued, even if someone has temporal lobe epilepsy it does not mean that on the night in question they actually had a temporal fit. This indicates a concern to be a competent clinician in diagnosing conditions. Whilst insanity is used less and less, DT said it is something you are expected to look at if you see somebody who is "actually barking mad", but generally they are not.

The psychologists RH and TB both challenged the psychiatric process of arriving at a diagnosis without using proper diagnostic processes. RH said he takes exception to simply referring to a diagnostic category in either DSM IV or ICD 10, because anyone could use them, as it is a diagnostic manual.⁴⁰⁵ Moreover in the UK there is an assumption that only doctors can diagnose, yet the preface to the diagnostic manual indicates that it is for use by anyone with experience in mental health issues, such as nurses, occupational therapists, psychologists and doctors. TB made contentious remarks about psychiatrists, claiming it is becoming more common, where one party employs a psychiatrist, for the other side to get a psychologist to counter their argument through the use of tests. "And I'm pleased with that because, I've never come across a psychiatrist who knows anything about, psychometrics". RH also said "[t]raditionally it's been a psychiatrist, but if you look at things now like certificates of incapacity, more and more and more psychologists are doing them". TB said he hopes as more psychologists are providing evidence judges

⁴⁰⁴ The effect this condition has on volition and the sense of self is discussed by Pontius (2003).

⁴⁰⁵ RH discussed the fact the UK uses ICD 10 not DSM IV and all the diagnostic codes used in NHS statistics are based on ICD 10. Yet he said, reference to PTSD and ADHD is actually based on DSM IV because it is not included in ICD 10. "There's no, there's no standing, in terms of the DSM IV criteria, but it's used routinely, in the UK". TB refers to DSM IV categories, even though in the UK ICD 10 is used. Arguably this could affect the acceptability of TB's report.

will begin to appreciate the difference between the psychiatric and psychological diagnostic process. He held that it is not that psychiatrists are incompetent individuals but that their profession has not kept up with modern knowledge. Therefore, despite the assertions in chapter four about scientists as a profession being united it would appear there are inter-professional rivalries within the medico-psychological field.

Assessments of Malcolm

With reference to Malcolm's claims not to remember the incident, DT said in her experience once reality starts to set in defendants usually remember. She suggested his reaction could be a *hysterical response*, a *dissociative reaction* or an indication of an *epileptic fit* or *fugue state*. However, DT claimed any dissociation is likely to be a response to the offence, not a cause. DT also speculated that "[h]e might have a personality disorder, . A few changes of jobs and things, but it's all down to his *paranoid personality traits*". Furthermore, it is not unusual for people with paranoid personality disorders to say that they do not remember an event. What is unusual, she stated, is the complete gap and the fact he does not accept that he has done anything wrong. "I'm sure the solicitors would be looking for a, a cause in terms of abnor, abnormality of mind, but I suspect that this one wouldn't have it". In her view nothing appears to constitute a substantial impairment, he does not fit the bill for ASPD, so Malcolm's case would not go to trial by means of the diminished responsibility defence.

Similarly, JR's view of Malcolm was "there isn't, isn't any, definite information here that there is a mental health problem". However, he said this was not a definitive opinion because there were indications of a possible serious mental health problem linked to *paranoia* or *psychosis*. JR held Malcolm is more likely to have *paranoid personality traits* as he is an insecure individual. JR's 'gut feeling' is that Malcolm would not come into the mental health system based on the available information, however he believed the defence would try a psychiatric angle, but he did not think it would work, particularly because of the political issues surrounding alcohol and violence.

In contrast, SP claimed he would be looking for evidence of ongoing mental illness that has been missed, such as *dissocial personality disorder* or *psychopathic disorder*. One possibility SP suggested was *paranoid schizophrenia*, even without the obvious auditory hallucinations and delusional symptoms, as some cases are not so straightforward. SP considered *temporal lobe epilepsy* was not applicable because of Malcolm's age and he did not exhibit the confusion and perplexity that often follows such an incident of memory loss.

The psychological responses were less detailed, which fits in with previous assertions that psychologists are less likely to be called upon to make such assessments. TB wondered whether Malcolm was being truthful when he said he could not remember. He suggested there might be a possibility of *dissociation*, which he conceded would not be discovered through the standard assessment he uses. LC also mentioned *dissociation*, stating that such an assessment would require a lot of questions regarding memories of the incident. She said she would not be readily convinced because he is aware of other ongoing matters. Another possibility she suggested was *process dissociation*, but said it is highly unusual. LC also mentioned *personality syndrome*, perhaps bordering on a kind of mental illness, but her overall view was that he is likely to be *paranoid* with some *obsessional personality dimensions*. When the vignette was reviewed it was said there might be indications of Asperger's Disorder.

This illustrates the focus within the diagnostic process, although plainly this is from a limited vignette scenario rather than a detailed interview. Clearly certain characteristics invoke particular diagnostic categories, as there are overlaps within the range of responses, particularly with dissociation and paranoia. It would seem, however, that the interviewees, whilst wanting to verify a number of possibilities, suspect on the information supplied that they would not recommend the diminished responsibility defence. From the discussions so far in the thesis the more subjective aspect of the process would be in the evaluation of the effect of the condition on the defendant's mental responsibility.

The Report

Legal respondents identified the quality of the report as an important criterion for selecting an expert. In particular the conclusion was cited as significant because it contains the recommendations and opinions about the mental state of the defendant in terms of the incident, and possible applicable defences. It is this link that earlier chapters showed the law is interested in because the focus is on the effect of the condition on the defendant's mental responsibility. The medico-psychological interviewees made a number of points. DT claimed you only look foolish if there is no basis to running a defence. For example in the double murder case referred to earlier, she went through every possible defence and wrote out her reasons why they were not applicable. DT also said that it is necessary to consider what the eventual sentence is likely to be and include a section referring to such matters as remorse, regret, and the determination of the defendant to move away from the factors that contributed to the offence, for instance drug use. She cited an example where the defendant was attending substance misuse groups in prison and intended to go to the domestic violence groups. DT argued it is important to include these factors because they subsequently inform the parole board, an insight she had gained from sitting on these. This reflects the fact that the information is mitigation at the sentencing stage of the diminished responsibility defence, as the defendant pleads guilty to manslaughter.

DT also discussed the fact that reports supporting a diminished responsibility defence have to contain an opinion on substantial impairment. In her experience "the majority of er, erm, . requests for, a report by, erm, a murder, erm, in, a murder charge, are asking for that". SP's comments on the matter were that you might say that the person was under immense pressure and acted out of character, and therefore it's diminished responsibility, because of mitigating circumstances linked to a mental illness. In such circumstances he said the defendant might know that what they did was wrong, but the court holds their illness as a mitigating factor because murder is often emotionally driven.⁴⁰⁶ Significantly SP commented on the lack of accuracy within psychiatry, saying "you *certainly* won't get" agreement. He acknowledged that

⁴⁰⁶ But SP believes we are far more cautious than the U.S. in taking these factors into account.

this undermines perceptions of the profession, but declares you get good and bad in every occupation and advocated improving accuracy and the general standard of court reports through training. His remarks are interesting, first because of the acknowledgment of the importance of recognising the impact of emotion with the diminished responsibility defence. Secondly because he is attributing the lack of uniformity in the medico-psychological approach to problems within his own profession when earlier discussions indicate the assessment can only be an evaluative process because clinical judgements are being related to socially constructed categories about mental states and responsibility that have been developed by lawyers.

RH said he has seen reports that do not conform to the law's standards because they contain no statement of truth, they do not identify the expert's qualifications, they do not include references that indicate how up-to-date the expert is, and they do not distinguish between evidence and opinion. LC remarked that her reports have not changed over the years, except that they might be a bit longer than they used to be and are perhaps more fully referenced, although LC is unsure how helpful the latter is because she surmises that most judges will not follow them up. "[E]ssentially what they want is the best evidence that you have from your own discipline, . . . Written, er, er, and described in language which, can be understood by the intelligent layman". On the matter of science entering into cases, LC said she does not believe this has essentially changed and generally science and law work well together. "I mean, I, I think, I think the key thing is that, you've got to be sure about your own science, . . .", therefore the report should establish what you have actually found, what opinions you have gained and the basis on which you link the two, and the court then decides whether to act on it.

Briefly, as further information, Mitchell's interviews with forensic psychiatrists regarding their role in diminished responsibility cases found that they perceived there were three critical issues (1997: 624). First, does a *mental abnormality* exist?⁴⁰⁷ The second concerned *mental responsibility* and finally

⁴⁰⁷ Mitchell stated that Dell's (1982) research found that of the 13% who disagreed whether the defendant qualified for s2 about half were about whether an abnormality of mind actually existed (p.624).

determining whether the defendant's mental responsibility was *substantially impaired*. Mitchell claims that

“[t]he general view is that the role of forensic psychiatry is to offer evidence as to whether the accused's behaviour was autonomous – how far the defendant was able to exercise free will and to criticize and adjust his or her beliefs and intentions – so that he or she can properly be held responsible” (p.621).

The respondents in his study claimed reports focused on the individual's power of reasoning, rational judgment and ability to exercise willpower, including control over thoughts as well as deeds. The defendant's thoughts, perspective and actions were compared with those of the ordinary citizen. It was said that if there is no clear evidence of mental illness then a comprehensive examination of the individual's life should be undertaken. The experts did not restrict themselves to the time of the killing in looking to link the killing and mental abnormality. One respondent actually said that in his experience the court had not always required a link. The respondents claimed that they invariably considered treatability and treatment issues too. It was acknowledged that this was not important for questions of responsibility, but most said they tended to bear in mind the likely sentence. Some admitted that they might be swayed by what they thought that the court would accept and was in the public interest. This implies a familiarity and focus on legal rather than medico-psychological concerns. But Mitchell remarks that essentially, rather than develop their own rules of thumb to judge matters psychiatrists fall back on their expertise and focus on mental illnesses and personality disorders. Afterwards they consider wider issues, such as how the court and the public will view the case and how they will justify their opinion. Accordingly 'mental responsibility' is construed in psychiatric terms. However with certain types of cases, such as BWS and mercy killings then there is evidence to support concerns that the opinions of psychiatrists are influenced by personal judgements about culpability and what is socially desirable.

On the other hand Mackay and Kearns examination of insanity reports in 44 cases, which resulted in 91 psychiatric reports, found little evidence of connections between clinical judgment and the limbs of the defence (1999: 722-3). For example five reports did not address the issue of insanity at all, whilst another 14 reports indicated that the defendant was insane at the time of

the offence, but either offered no explanation of how this related to the *M’Naghten* rules or were ambiguous. It is alleged that the ‘wrongness’ limb would appear to be interpreted by psychiatrists in a liberal manner beyond that of it being a legal wrong as stated in chapter three. Mackay and Kearns conclude that this is the preferred option and it appears that psychiatrists “are adopting a common sense or folk psychology approach and that the courts by accepting this interpretation are, in reality, expanding the scope of the *M’Naghten* rules” (p.723).

CPS Case File Reports

What follows is a brief description of the format and content of the psychiatric reports found in the two CPS case files.⁴⁰⁸

Case One

Briefly the case involved a male juvenile, who knew the victim. There was alcohol and drug use at the time of the incident, with extensive scientific reports produced on the mental effects that would result from their use despite the fact these matters are not usually acknowledged by the law for the purposes of assessing responsibility. Death occurred as a result of a single stab wound to the heart.⁴⁰⁹ There was a clear trigger event, and the subsequent behaviour of the defendant was unusual and inconsistent. He denied he had the necessary intent, claiming he had simply bumped into the victim whilst in the room, and did not know what had happened until later in the day.

There was only one expert report by a specialist in child and adolescent forensic psychiatrist, who listed their qualifications. The report was based on an interview with the defendant conducted six weeks after the killing. The report outlined the defendant’s family history, school history, including his attendance at special institutions as a result of previous serious convictions, which were listed. Earlier mental health problems were outlined, and his drug and alcohol use. Using a scale of 0-10 it was said the defendant’s level of depression at the time of the interview was (2), compared with (8) at the time

⁴⁰⁸ Care was taken to ensure anonymity and the CPS have read and approved the account.

⁴⁰⁹ Killing with a sharp instrument, according to Home Office statistics received as part of this project, is the most common method of murder.

of the incident. The report also stated that the defendant claimed he had been hearing voices since just after the event. Apparently the voice, which said he should kill himself, sounded similar to that of the victim. The defendant said part of him did want to die, but he was also scared of dying. He had tried to hang himself whilst on remand.

In the psychiatrist's *opinion* the defendant had a serious mental disorder within the terms of the MHA as his symptoms were consistent with a major depressive disorder, complicated by flashbacks of the stabbing. The report stated that the defendant's current place of detention could not manage his mental health needs and recommended that under s36 MHA he should be transferred to hospital for treatment. After treatment he could be returned to prison to face trial. Crucially the depression and flashbacks were seen as a consequence rather than cause of the stabbing. Additionally, in light of the defendant's history of violent crime and behavioural difficulties, a diagnosis of emerging *Sulipathic Personality Disorder* was made. (As this is not a diagnostic category it may be a typing error and mean sociopathic personality disorder.) The CPS accepted a plea of guilty to manslaughter because the witnesses were deemed unreliable. The defendant was sentenced to five years in a young offender's institution.

Case Two

The second case involved a more brutal murder, which generated considerably more documentation.⁴¹⁰ The accused was male, knew the victim, and death resulted from 18 stab wounds using two blades. There were also head injuries caused by a blunt instrument, and bruising. The accused denied involvement until the evidence was overwhelming. The defence and prosecution both obtained expert reports.

The Defence Report

The defence report was by a consultant forensic psychiatrist based on one interview about seven months after the incident. The report stated that before the interview the expert had read the defendant's statement to the police, health records, a consultant psychologist's report from a road traffic accident (RTA)

⁴¹⁰ There was a 112 page document listing all the material produced in support of the case.

in 2001, and a CPS report by a senior forensic psychiatric registrar.⁴¹¹ There was no list of the expert's qualifications. Briefly, the details on the defendant were as follows.

The report summarised the defendant's family history, paying attention to his relationships with immediate family. Then there was a description of the defendant's personal history, which included details of head injuries, employment and school history, including academic results, and reference to the fact he was bullied. The report then dealt with personal relationships, embracing discussions on the defendant's sexual orientation because homosexuality was an important issue in the case. Then there was information on drinking, smoking and drug (prescribed and illicit) habits. The report noted that the accused was on anti-depressants and wanted counselling, but the prison lacked the necessary expertise to deal with the PTSD resulting from the RTA, which had already led to two overdoses.

The expert then addressed the defendant's forensic history, which was minimal and did not include violence. Following this the circumstances of the offence were described, including the nature of the relationship between the defendant and victim. The defendant alleged the victim had propositioned him three years earlier, and again at the time of the offence. The defendant claimed the victim had also threatened him with a knife and it was in the ensuing fight that the victim was stabbed. The defendant left the scene not knowing whether the victim was alive or dead. The psychiatric report then described 'other relevant information', covering mental rather than physical injuries resulting from the RTA, which led to PTSD with depression. It was stated that as a consequence of this the defendant's life had fallen apart; he lost his job, his relationship ended, and he started sleeping rough.

The *psychiatrist's opinion and recommendations* initially dealt with the defendant's denial of the incident and explanation of his actions as resulting from threats of homosexual acts by the victim. Reference was made to the defendant's limited intelligence, although an earlier learning disability

⁴¹¹ It has been stated by the respondents that it is usually the defence who obtain a report first. Furthermore the case files seemed to indicate that the second interview by the prosecution expert was after the interview date given by the defence expert.

diagnosis had been rescinded. In terms of his mental state, reference was made to the RTA and resulting PTSD. In addition it was stated that during the interview the defendant showed signs of moderate depression, but this was not linked to the offence. It was suggested that the defendant was a vulnerable man who might have felt threatened by the victim. Significantly the psychiatrist stated it was not possible to say whether the defendant's account was accurate. Reference was made to the defendant being on anti-depressants, which can lead to suicidal ideation and, on withdrawal, violent behaviour. However, it was concluded that while reactions like this are well documented, the type of anti-depressant being taken by the defendant was unlikely to reduce his control of his behaviour, and he had been on them for some time without exhibiting violence. But it was suggested that the court should take into account his low intelligence, poor mental state following the RTA, and the breakdown of his relationship because these factors would make him vulnerable to being upset.

The psychiatrist's conclusions regarding the legal options stated that the defendant was *fit to stand trial* because he could understand the nature of the charges and instruct counsel. *Diminished responsibility* was deemed unsuitable in this case, but there was clear evidence that the defendant was depressed and in a poor state of mind at the time of the offence. It was suggested that this would support an argument for *provocation* or *self-defence*. Reference was made to the fact it was the victim's knife and there was no evidence of premeditation or a desire to injure the victim. The report concluded that the court should take into account the defendant's vulnerability when making decisions about self-defence and/or provocation.

The Prosecution Report

The defendant was interviewed twice, some two months apart, for a total of 3 hours. The expert stated that they had read the case files prior to interview and there was no list of their qualifications. The report incorporated the same range of background information, although more details of the defendant's mental health problems from medical files were included. However, the assessment of the defendant's mental state at the time of the two examinations was explained by reference to different factors. The report described the volume and pace of the defendant's conversation, which was said to be normal. He was coherent in

his explanations of his history. His body language was said to support his declaration of low mood, although the defendant denied suicidal thoughts. It was stated there were no features to suggest psychotic mental illness. Terms such as psychotic were explained; “by psychotic I mean a severe mental illness which impairs the patient’s grasp of reality; by delusion I mean a false, fixed often bizarre idea held against reason; and by hallucination, I mean a perception in the absence of the appropriate external stimulus”. Therefore the defendant was held to be cognitively oriented in time, place and person. Tests of the defendant’s memory, capacity for maths and spelling, and for the presence of organic brain disease revealed no evidence of major problems.⁴¹² It was noted that the defendant claimed he was suffering from PTSD, believed he was mentally ill, and wanted to receive medication and help. In addition it was reported the defendant denied murder, insisting it was self-defence. A review of the defendant’s progress since remand held that he appeared to be well behaved, and that his mental health had improved considerably since he had been given anti-depressants. The prison staff had no concerns about his physical or mental health.

The *opinion and recommendations* regarding legal options held that the defendant was *fit to plead* by the usual legal criteria. There was no learning disability, his I.Q. being in the dull to normal range. He was not mentally impaired under the MHA, and any psychological disturbance due to the PTSD did not *substantially diminish his responsibility* for his actions. The expert indicated a willingness to attend court to give the opinion that the diminution was trivial rather than substantial. In addition it was said there was no evidence to suggest that the defendant could not form a specific intent to kill, and *insanity* and *automatism* were ruled out. The psychiatrist concluded there was no psychiatric recommendation to make. The defendant was sentenced to life.

In contrast to what is said to be expected practice, there were factors missing from the reports that were examined. For example declarations by the experts that they understand that their duty is to the court, or a list of their qualifications, or research references. Nor were any assertions about possible legal options dealt with in depth by reference to criteria within the statutes,

⁴¹² The report noted the tests undertaken and provided some examples of the results.

such as with the provocation defence. The bulk of the report was not directly related to legal matters and the discussions within the recommendations and opinion section were brief. No mention was necessarily made of risk or possible detention and treatment options.

Reform Suggestions

Only one respondent discussed reform. In terms of assessment JR advocated adopting the TVS system in Holland, where the defendant is assessed for about six weeks rather than the average of two hours with our approach. Furthermore, a lawyer works in the assessment institution and it is their job to write the reports, which JR believes allows a much better interface between the two disciplines, although that is not supported by the data in chapter six. The other notable feature of the system is the attempt to assess the proportion of accountability affected by the mental illness.

"So they will say, well this person, actually they estimate them, this person seems to be about 30 percent accountable, but, 70 percent of him wasn't accountable for what he did because of the, mental disorder, thing. And so, he'll get a proportionate prison sentence, they have to do both. Prison and therapy".

JR argued that this is a more transparent system than ours, but the difficulty lies in assessing the percentage. To illustrate his point JR referred to a case where a young man became psychotic and believed he was in the film *The Matrix* and his mother was an agent. In a matter of hours of this happening he stabbed and killed her. JR was unsure how much was attributable to the illness, and how much to the fraught relationship between mother and son. But his view is essentially that if you could accommodate both aspects like the Dutch system "then that's more, I mean it's fairer, . juster outcome" because the person would go both to prison and hospital.

Expert Reports and Case Decisions

There were a number of comments made on decision-making in terms of the report. With regard to the exchange of information and making decisions, LC and TB said how important case conferences are. SP pointed out how subjective what happens is, so much depends on the individuals involved in the case. It is all about "what the police say. And what the solicitors say and what I feel, and the social worker. We have to make a decision, joint". For example,

SP discussed when he had debated with a solicitor whether the defendant was fit to plead. SP believed the defendant was responsible for their actions and advocated that they go through the court system as they could then be sent to hospital afterwards "[b]ecause if I bring them in before sentencing they can get out of it. It's a loophole really". He also argued how important attitudes to mental illness are, which he suggested are informed by whether the person has any personal experiences, and whether whatever knowledge they possess is prejudiced or preconceived. SP argued that trying to move people's perceptions is very hard, even within the medical profession. Therefore the intricacies of cases can be underestimated, and many believe madness is not an illness that can be treated, which can result in no attempt to understand. He remarked that if the medical profession can hold views like this then what could be expected of the legal profession or jury?

To illustrate his point SP discussed a case where he expected the solicitor to instruct a medical expert because the man, in his 30s, had acted very out of character when he initiated an armed attack. He was a family man who had obtained a number of supportive character references, and who had also been receiving treatment for illness and anxiety. In addition the person he attacked was stealing from his business, which was foundering. The man ultimately approached SP privately, but the solicitor refused the report. SP explained that the judge was likely to stop the case for a psychiatric report, but the solicitor still refused the report, which surprised SP. In addition to illustrating SP's point about the importance of attitudes to mental health, the example is interesting because the solicitor ignored the client's wishes, which contrasts with the assertions of the legal respondents on this matter.⁴¹³ In contrast LC discussed how hard some solicitors try to understand her reports and explain them to clients. One problem that TB highlights is the lack of feedback about the case. For instance, he saw the outcome of one case in the local paper and had no idea whether or not his report was used. This demonstrates the importance of legal objectives informing the use of expert evidence.

⁴¹³ Whilst this case example may have occurred before the recent provocation case of *Smith* [2001], if the diminished responsibility defence was not appropriate it would seem like an instance to consider provocation.

Court

The legal rules and academic observations pertinent to experts giving evidence in court were outlined in detail in chapter four. This section reveals the medico-psychological experiences and perceptions of attending court and dealing with the adversarial process with specific reference to the key players, judges, juries and barristers.

Judges

Judicial Attitudes and Responsibilities

The remarks of experts indicated that they consider individual judicial attitudes are significant. For example SP said “it depends on the judge as well ‘cause, you know even the solicitors say, ohh, it’s so and so and he’s not gonna listen”. However, interviewees distinguished between personal mind-sets on mental health matters, and those resulting from a legal perspective. Thus on the issue of personal viewpoints SP argued that whether or not judges are amenable to taking mental health factors into consideration depends on whether they are psychologically minded, which he attributed to personal experience of mental health problems. However, he questioned if it can be said that judicial attitudes remain static because repeated exposure to expert evidence is likely to have an impact on their knowledge and point of view. For instance JR argued that the education of judges is of vital importance and TB suggested judges are becoming more familiar with, for example, personality disorders, as they read more reports. In terms of educating judges and maximising the likelihood they will understand what is being said, RH advocated that experts note how often a judge writes things down, and then give their evidence taking pauses timed to the frequency with which the judge needs to make notes. He stated that emphasising a point will ensure that it is written down as a single point. RH claimed that barristers recognise the importance of this process. This last point shows the importance of experienced experts in the process for the delivery of information. More generally there is an assumption that repeated exposure to medico-psychological evidence has an impact, but this is not necessarily well supported by the data in chapter six.

In addition the judge is inculcated into the legal perspective. JR discussed the impact this can have by reference to a case concerned with whether the defendant was fit to plead. JR had been treating the defendant for paranoid delusions for some months, but eventually JR also became incorporated into the defendant's delusions and so the defendant stopped taking his medication. Therefore, in JR's professional opinion the defendant was not fit to stand trial. The judge's response to JR's evidence was,

"he's responsible, erm, he'd seen, thousands of er, accused people, and they have, will all say, that they're innocent. ... How do you know this guy isn't, pulling the wool over your eyes"? JR admitted in the interview, "I think that's a fair question. ... I couldn't answer him. And, and, and actually, I, I hadn't, thought, of that question. Because I would say, locked into, my psychiatric field, .. I hadn't thought, well maybe he is a con man".

This contrasts with earlier statements in the chapter that the defendant's perspective is not automatically accepted and supports the legal concerns expressed in chapter six. It also shows how important professional perspectives are for the framing of evaluation of matters.

However there were also positive examples. SP talked about judges stopping trials to order reports to ensure there were no outstanding mental health issues. In addition, RH had been called upon to help a judge assess expert reports in a child custody case. RH had also been in a case where the judge had called him into chambers to confer on the issues. This also affirms the lack of medico-psychological understanding within the judiciary and their reliance on expert advice, which potentially is important in terms of the expert's interpretation of their clinical diagnosis in respect of the legal rules and issues. However, RH distinguishes what he perceives to be an increasingly open attitude within the child and family courts with the autocratic attitude of judges in the criminal system where the legal issues are very different. But critically what these examples highlight is the subjectivity introduced into the process through the influences on judicial discretion.

Expert Qualifications

As chapter four explained, the judge is required to evaluate the expert's professional capacity to provide the evidence. In line with assertions in chapter six, titles are recognised as an important determinant. LC discussed the fact that many psychologists are not doctors since this trend is a recent

phenomenon. She maintained it undermines credibility because it is then necessary to explain one's professional standing. LC supported her assertion with a case example where a professor's arguments, which had not been researched, were given more credence than her own extensively researched findings. She said the professor likened the situation of a boy in care who was being abused by a female member of staff as putting "a young dog in with a, an experienced bitch", at which the judge smiled and nodded. These attitudes will permeate trials, both with and without a jury.

RH claimed that the judge's familiarity with the expert could influence judicial assessments of credibility, although he said this might not always be advantageous. RH could recall being protected by a judge who made it clear that what he, RH said, was to be taken seriously otherwise it would be wasting the court's time. Alternatively "if they don't like you it's just, bad, you know, they'll shut you up. ... I think you've spent enough time explaining this. ... can you finish ... in 10 minutes?" Then all that can be achieved in such circumstances is a brief summary of the key points, such as "13 points in 20 minutes".

Admission of Expert Evidence

The operation of the legal rules on the admission of expert evidence, described in chapter four, was said to shape disciplines and sub-disciplines by affecting the level of commitment to particular perspectives. Remarks by RH support this proposition. He argued, "the influence judges have on psychological evidence is enormous" but "it always staggers me how learned and, wise... they are ... and the ability to think ... logically, and I think they do think scientifically". LC's view concurs with this last point as she said, "generally most judges are fair and intelligent and weigh up the evidence and then, and critically review it ...". Yet RH also discussed the impact "the particular prejudices of the judge" can have by referring to a judge who does not accept psychology theories about children. "[I]t affects, how testimony is given, it affects, what's *listened* to, what's *recorded*, and her *judgments*". There is also JR's experience in respect of evidence on intoxication discussed earlier. Significantly, judges give directions to the jury and TB referred to their importance for the jury's comprehension of expert evidence and the legal rules.

Therefore the same facts before a different judge could result in a different outcome. This affirms arguments in chapters three and four about the importance of the judge for the operation of this area of law in terms of the inclusion of expert evidence.

In addition to the subjectivity introduced by the judge, SP argued it is necessary to acknowledge the impact of the individuality of each expert. RH also made this observation, noting its importance for the theories that enter into court. He expressed concern about the possibility of miscarriages of justice based on extreme theories, saying he has never been asked if the majority of his colleagues hold similar views.⁴¹⁴ However, RH said that in particular geographical areas judges and experts are in frequent contact and therefore judges become familiar with good practice and the issues to be addressed.⁴¹⁵ But the data in this project highlights that the small number of experts are likely to be selected for their efficacy in legal rather than medico-psychological terms, although their perspective and theories will dominate. It also supports arguments in chapter six about the importance of inter-professional working groups for the operation of the law. RH places responsibility with the expert to distinguish between prevailing and state-of-the-art theories, so that the benefits of the latter are appreciated. This was the stance of the legal respondents, which will be the case when one considers that the lawyers have no mental health training and have trouble understanding the reports that they do read. However, RH did acknowledge that there might be problems with judges understanding state-of-the-art evidence, and without training it is hard to imagine that that evidence is effectively evaluated. Yet crucially the court can rule if an expert is deemed to be speaking from within their discipline, or from outside it. As stated in chapter four, English judges have been more generous with regard to unpublished results than is the case in the USA, for instance.

RH also discussed how the legal framework affects judicial attitudes to scientific theories. He contrasted the dichotomous legal perspective with the scientific propensity to use percentages. Yet RH believes the jury are capable

⁴¹⁴ It was noted in chapter 6 that the Judge thought the expert acting for the other side would ensure that the credibility of the theory would come to the attention of the court. However, whilst this may be the case where there are at least two experts, civil cases are usually conducted with a jointly instructed expert.

⁴¹⁵ Currently there is a lot of debate about the standard of evidence that has been submitted in relation to cot deaths, for example see, Burrell & Murray (2003).

of making decisions on evidence such as, in a “sample of a 100 people, 90% do this”. Similarly, in line with chapter two SP argued for a spectrum approach to assessing issues and finds legal evidence poses a dilemma because of the law’s concern with either/or thinking. SP said, “if you start saying to the court, I’m not certain but these are the theories, it, it won’t hold water will it because the court is very much black and white”. On the other hand this matter was addressed by Cane, and discussed in chapter one, in terms of the necessity of law to arrive at a verdict. Thus there is a fundamental tension in the two approaches that affects the interaction. The law avoids some of the uncertainties by requiring that the expert give an opinion in diminished responsibility cases as to whether the abnormality of mind does substantially diminish the defendant’s mental responsibility.

With regard to the last mentioned practice of seeking the expert’s *opinion* on the ultimate issue in diminished responsibility cases, JR stated that you can hardly avoid saying something about the matter of substantial impairment, and had done so, but that he had “had an unpleasant discussion with the judge about that”. JR had said to the judge that whilst he can know certain things and explain them, it is not his decision as to whether the defendant’s mental responsibility is substantially impaired, that is a decision for the jury to be made on the judge’s instructions. JR said it was apparent that the judge did not know this, brushed it aside and asked for an opinion. JR’s view is that an expert “can show there is a link between one and the other, but, it is the jury’s decision. Because, if, essentially it’s about, whether they are guilty or not-guilty of murder. ... It’s not my decision to say that”. But JR also observed that if the fact the opinion comes from an expert is likely to be an important consideration to the jury, it could be seen as automatically deciding the matter and therefore why bother with the jury. Furthermore if the expert is plausible then there is a sense in which psychiatrists are being drawn into convicting people and “that’s something which psychiatry, needs to be very careful about”. His remarks echo concerns raised earlier in the thesis. RH also argued that definitive answers have to come from the judge and jury because an expert’s role is simply to give the best advice they can. He said sometimes those in court listen, perhaps too much, and sometimes they do not. But experts

need to appear as a science practitioner, and be “very clear about what is, . fact, if there is such a thing”, distinguishing clearly between fact and opinion.

What can be seen are particular factors that stand out about the judicial approach, some of which mirror previous discussions, but very little is viewed in terms of the legal constraints that have been identified before.

Juries

Whilst experts appreciate it is important that the judge understands the evidence, they also stress their responsibility to facilitate the jury’s comprehension as the ultimate arbiters. For example, DT said when she is compiling her report she considers the jury’s potential reaction to it. If she thinks that she is stretching a point, and if she “were sitting there, in the jury and, and, you know, was going to raise [her] eyebrows at that, ... [she] wouldn’t say it”. This statement is interesting in two ways. First because it presupposes a professional has the capacity to judge a layperson’s perception of expert opinion even after years of being inculcated within their disciplinary perspective: it would seem the lawyers identified this as a problem even with experience. Secondly there is the fact that a professional would evaluate their considered opinion in terms of the reaction and judgement of a lay audience.

A critical factor that was identified by interviewees as facilitating comprehension was the language used. DT stated that you have to “[k]eep it simple stupid”, using layperson’s language as much as possible. She claimed it is a mistake to assume using lots of jargon will give the impression that you know your stuff. She said some people also launch into lectures but it does not impress the jury. JR also said understanding is best achieved by trying “to keep it as simple as possible”, but conceded it makes it difficult to explain diagnostic categories. However, he remarked that as the law is a blunt instrument “[his] evidence [he] present[s] as a blunt instrument as well. ... I’m not going to attempt to, . you know, give them the details. It’s futile, I don’t have the time”. JR distinguished between the UK and US, saying there is a more academic focus in US cases, as experts use flip charts and give lectures on the subject. LC also held that the objective is to pitch the report for the layman, avoiding jargon wherever possible because it is unnecessary. This said, SP claimed he

reads reports full of jargon, admitting how easy it is to fall into the trap. He argued that professionals overlook the fact that it is not other psychiatrists reading the report, so for example “[t]hey’ll put things like erm, ‘there was no evidence of formal thought disorder’. It doesn’t mean anything. It does to me.” Again from the data in chapter six it would appear the language used is a barrier and simplicity is not necessarily achieved, although there may be some distinction between the presentation of evidence in reports and in court.

RH related his views on language use to the level of intelligence among jury members. He claimed lots of the public are Sun readers, which means they have a basic reading age of 10, so there is an onus to use as little technical language as possible, although, he added there is a danger that if the evidence is not complex people think there is not a lot behind it. RH suggested the best approach is to be middle of the road, adopting a common sense approach because “good psychology, the, the, general public should, should understand. It should make sense to them”. In order to make it comprehensible RH draws on everyday life to illustrate technical points.⁴¹⁶

TB’s perceptions differ somewhat from those held by RH, although TB said, “[o]h I think it’s vital, it’s no use hiding behind, words and, pretending that you (sic) clever because you can use words that other people, that other people can’t understand”. However he argued that “you can’t just treat the jury as a bunch of, uneducated clods, ‘cause if they are then you’ve got a helluva lot more work to do ...”. TB initially claimed “if I can explain it successfully to the legal fraternity then, the jury ought to be able to understand it”, but subsequently conceded that perhaps the legal fraternity have an advantage because they read more reports. Yet the legal respondents admitted that they have problems understanding expert evidence even with the advantage of familiarity and a high level of education, recognising therefore that it must be *very* difficult for the jury.

SP emphasised that he attempts to make his conclusions very clear, for example,

⁴¹⁶ He did this throughout the interview and he was very effective at making his point.

“he is responsible for his action, he knew what he was doing, before and after, there’s been no evidence during this period or now, that he’s not fully aware of the consequences of his actions. . And it should be punished”.

This would clearly afford the jury the opportunity to understand and take the information into account, however this is a medical opinion on what the law is trying to establish. Furthermore, SP said he sees the legal position as “[i]f he’s aware, but doesn’t fully understand, that this is punishable, he’s innocent”. This is a limited representation, which is significant in light of the role of the expert in linking the clinical diagnosis to legal standards. There appears to be the possibility that the desire to communicate clearly will lead to distortions in meaning, which is then exacerbated by the loss of control by the expert once the evidence enters the legal domain.

Expert Evidence, Barristers and the Adversarial Process

Whilst experts can control the content and format of information within the report, once in court there is the impact of the adversarial process, especially barrister’s questions, to contend with. The medico-psychological interviewees’ responses correspond with those of legal interviewees on the importance of barristers to the exposition of expert evidence. However, in LC’s experience as a psychologist, “in relation to criminal cases it’s rare, that you actually, ... erm, get invited to the court”, which she interpreted as an indication that the report covered all the necessary points so no further clarification was required. TB also made this point, but in addition he said the report will still be explained in court, and the barristers will “each ... translate it to his own advantage, so they’ll get two versions”. Nevertheless most reports are by psychiatrists and therefore this may not be a representative experience. It was said in chapter six that it was considered to be a tactical advantage to have the expert give evidence in court.

Chapter four explained that in acknowledgement of the problems generated by the adversarial system the expert’s duty is to the court because the expert is more likely than the barrister to describe ‘the whole truth’.⁴¹⁷ As part of this duty the expert is expected to indicate the strengths and weaknesses of their evidence, which does not fit in with the tactical concerns inherent in the

⁴¹⁷ Stockwell (1993) and Ikarian Reefer 1 (1993).

adversarial process. Critically, as JR stated, the dichotomous legal perspective means the focus is on “getting you to admit that it is or it isn’t,” which “is er, specious, way of doing things...”. He said there is a difference between being cross-examined to elicit a clear opinion one way or another, and the aim being to discredit you.

However, there is always the matter of the impact of experience. For example DT claimed that going into court taught her the sort of things that barristers ask, alongside attending case conferences. DT remarked that “you could be brilliant at giving evidence and, and persuading the jury but you need to have a barrister erm, who asks appropriate questions”. RH also argued that “you get a balanced view if you’ve got decent counsel .. [but] if you’ve got bad counsel they’ll never get a balanced view”. On this last point DT admitted that sometimes her argument can be quite weak, and would have been stronger had she been acting for the other side, but because the barrister did not ask the right, (or wrong) questions, this was not evident. DT attributed this to inexperience impinging on the barrister’s ability to make effective use of discrepancies, because “barristers should be homing in on that” as establishing doubt about one aspect of a report can cast doubt on the rest of it.⁴¹⁸ Her remark also shows that experts do take a partisan stance.

DT’s explanation overlooks observations by other interviewees concerning the help experts give barristers in identifying the weaknesses in the evidence of the other side. For example, JR remarked that sometimes there is a rehearsal beforehand on how to present the disagreements. TB also discussed how an aspect of his role is explaining to barristers what he thought were the ‘terrible blunders’ by the other expert. Similarly LC said, "barristers are there to, to present the case to the court, so that it, it helps them actually, erm, prepare their case. You, you don't get a much bigger role really". Furthermore, by explaining the psychological issues to them they know how to ask you direct questions in court. This interaction was discussed in chapter six and suggests it involves the expert in being part of the legal team. However, LC also said about the need to be independent, "I think the best way to help people, is to do the best you can

⁴¹⁸ The Judge had great difficulty with this assertion, arguing how important the expert is on one’s own side for helping to identify problems in the report produced by the expert on the other side.

to be er, an impartial, ... expert anyway". Furthermore the evidence is easily challenged if it is biased. In contrast to DT RH attributed poor performances by barristers to inadequate preparation, holding it is possible to identify those who received the brief 10 minutes before the hearing because they do not know what they are talking about and tend to follow a set pattern of questioning. He said this is much more likely to happen in the criminal courts, because some barristers will do anything for money.⁴¹⁹ Notwithstanding this he suggested that long running cases received more detailed attention. Clearly murders fall into this last category.

Lawyers said they prefer experts who stand up well to cross-examination. It would appear that experienced experts are very aware of barristers' tactics, which enables them to withstand the process more adeptly. For example, RH discussed undermining the adversarial process, citing a time when he had challenged the barrister's technique of questioning because it was not eliciting the relevant information. He conceded "I'm thought to be appalling in the witness box, . if someone starts getting difficult". Whereas DT discussed the importance of not being too garrulous as the other side can come back on the points, and there is no opportunity to find supporting research, it has to be off the cuff. DT feels that "often ... it comes down to theatre in the end".⁴²⁰ This illustrates that experienced expert witnesses appreciate the tactics inherent in the adversarial process, and learn measures to endeavour to communicate their key points to the court.

Reform Suggestions: Education and Communication

Introduction

In terms of reform, medico-psychological respondents stressed professional and inter-professional training and understanding. Although the lawyers frequently referred to their lack of training in mental health issues, and the difficulties they have with medico-psychological evidence it was overlooked as

⁴¹⁹ An allegation made against expert witnesses in chapter 6.

⁴²⁰ Certainly the impression gained during the interviews was that a number of the respondents enjoyed the challenge of the legal process. See Carson (2000: 26)

a reform issue.⁴²¹ This would seem to be explained by arguments in chapters three and four that show that the lack of understanding does not impinge on the legal process and the law is not actively seeking to incorporate medico-psychological knowledge. In turn this would explain why experts considered there is a need for greater inter-professional understanding.

Training Experts

SP believes "[t]hat psychiatrists [should] be specially trained to do court reports. So in other words you apply as a specialist area, and you go on the training courses and you're rigorously tested".⁴²² Notably however he expressed concern about the lack of coherence in current clinical psychiatric training and "think[s] the same would happen if you did a court case thing". SP claimed that presently forensic psychiatrists are often very capable but "their opinions vary terrifically". Significantly he alleged that general clinicians often do a lot of reports, although usually not murders. SP went on to suggest there should be a panel of experts used for such cases, so "there's specialists who know exactly what the courts want". It would appear that this effectively occurs in this particular area of law anyway. Furthermore, his argument implied being a proficient medico-psychological expert needs inculcation into legal perspectives to ensure conformity with the requirements of the system, which would perhaps further affect clinical independence. However, the core of SP's argument was that the whole subject needs revisiting, especially issues of communication between key players, to assess what is required to most effectively serve justice rather than the current pragmatic approach. It would appear that with a core of professionals involved in such cases practices develop, but as a result of the explorations of the interaction between law and medico-psychology in chapters three and four the law fosters the pragmatic approach so that it can achieve justice in an ad hoc way based on legal evaluations of the merits and issues of the case.

Similarly JR advocated that law and forensic psychiatry learn more from *each other* because working in forensic psychiatry is "a different reality to the, the

⁴²¹ The Scottish Forensic Institute has introduced forensic science training modules for the Law Society, although the Director in an email communication indicated that the medico-psychological professions were not really considered to be proper science.

⁴²² This has been suggested within the legal profession (Robins 2000). Although there are different expert witness organisations, which is discussed by Pamplin (1997).

lawyers of the courts, working in that setting all the time". He believes there is only a little space in the middle where they meet, usually at the last minute, in the pre-trial conference. JR argued more time in court would make it more real. JR's perceptions reflect earlier discussions within this thesis regarding the nature of the interaction between law and medico-psychology.

Educating Legal Personnel

TB argued education of the legal profession is important, particularly barristers, citing reports as a useful tool for providing insights. He believes it is a slow process of accumulating psychiatric and psychological knowledge, but matters are improving. He argued that in particular increased understanding of psychological knowledge, concerned with suggestibility in interviewing for example, not just that which is applicable at the sentencing stage, would improve the operation of the law. SP suggested that everyone involved in the case should be fully educated, "[e]ven if it's just, a couple of hours in the morning to go through the stuff".

Disquiet was expressed at the lack of judicial understanding of mental health issues, yet they rule evidence in or out, and direct the jury.⁴²³ SP believes judges should be up to scratch on diagnoses, especially those applicable to the particular case. SP said he would ensure training, and insist on compulsory attendance because he is concerned that judges have no real concept of what the medico-psychological expert is actually doing.

"Basically what happens, I think, a judge says we better have a psych opinion because it is the expected thing. Then he or she, makes their minds up when we write in saying this person is, er, unbalanced by their circumstances and they subjectively decide whether they believe that or not".

SP expressed the opinion that judges need to understand the concepts more than solicitors who are just a cog in the wheel. But this overlooks the importance of solicitors in terms of involving experts, instructions and tactical decisions, especially as so few cases get to trial, which is down to the CPS. Educating solicitors may help fulfil the stated desire of experts to be involved in cases much earlier.⁴²⁴

⁴²³ Note the Judge said the Judicial Studies Board provide some education, but conceded not much.

⁴²⁴ This was a point also made by the lawyers.

It has been discussed that questioning by barristers results in expert evidence being presented in a particular light, usually emphasising a particular direction. RH argued "for there to be some controls on that, judges need to know a lot about it. Because judges, ... need to know where to draw the line".⁴²⁵ To demonstrate his point he said that in over 1000 assessments he has never been asked to locate his viewpoint within the psychological field as a whole. However, as chapter six showed, the Judge said they rely on the fact there are experts on both sides as a safety check. However, as RH argued since the Woolf reforms in civil proceedings it is unlikely there will be more than one expert, unless the case goes to appeal and a judge authorises an additional report.⁴²⁶ RH is questioning the level of trust that can and should be placed on experts, especially if, as he believes, law reform will result in greater reliance by the courts on expert opinion.

There is an acknowledgment of the lack of legal understanding of medico-psychology, which is particularly perturbing with regard to judges in light of their significant role in the legal process.

The Jury

In terms of the difficulties juries experience in understanding expert evidence, SP made a number of suggestions. For example, that they could have a mini-tutorial on the morning of the case to help them understand concepts more clearly, "[o]therwise how can they make a decision". He argued that by educating the jury through actual case examples, such as the meaning of shoplifting in depression, could show that these are diagnoses rather than excuses. However, it has to be asked if such a short introduction could be a significant help when you consider how legal professionals struggle with years of exposure. Yet it would be information that is not simply presented through barrister's questions. SP also believes it would help to train psychiatrists to explain medical diagnoses simply.⁴²⁷

⁴²⁵ The education of judges and who undertook it was a big issue for RH, who is part of an organisation that provides legal training in psychological issues to lawyers, because he has not been able to access training provision for judges.

⁴²⁶ See Sowersby (2001)

⁴²⁷ The Judge suggested the jury would benefit from having a summary of the expert's report.

SP argued the consequences of not educating the jury is that they will fall back on attitudes and prejudices about mental illnesses. "It's very subjective. So if you said to the jury this young man has been diagnosed with paranoid schizophrenia, . they've already, they've made their mind up now". He maintains that they will either decide that the person is not responsible, or that they want to get rid of those sorts of people from the community.⁴²⁸ He claimed it is unlikely decisions will be based on any actual knowledge of the manifestations of the particular mental illness. For example, schizophrenia is seen as split personality by many lay-people. Certainly the lawyers discussed factors that may influence the jury as a result of finding the law and the expert evidence too complex. SP said it is very hard to educate the public. SP said his concerns about improving education arise because cases are so subjectively decided, hanging on the views of a range of people, and their reactions to the expert evidence presented. SP admitted to being unsure how hard this idea would be to implement. This demonstrates SP's concern that prejudice and ignorance on the part of the jury could lead to discriminatory decisions.

Sentencing: Detention – Hospital v. Prison

Introduction

It was established in chapter four how important experts are to decisions at the sentencing stage and for the management of those with mental health problems. As indicated, reports usually provide recommendations as to sentence as well as identifying possible defences. However, as always, there is the issue of the expert needing to be cognisant with the legal options. For example, JR, an experienced forensic psychiatrist, who admittedly has not been involved in an insanity case, thought that in homicide cases the individual would not necessarily be sent to hospital. But on being told this was the case he pointed out that for those confined in hospital eligibility for the initial tribunal hearing occurs at six months, with two tribunals possible in the first year.⁴²⁹ However, the political and legal backdrop outlined in chapter one means those with serious mental health problems are unlikely to be released for some time.

⁴²⁸ This view is supported by Mitchell's studies cited in earlier chapters.

⁴²⁹ Legal concerns about early release were discussed in chapter six.

Detention

TB said you can see when solicitors want to do best for their clients, and as an expert you want to help, but this has to be done in an independent way, by being honest about whether probation or prison is best, and outlining any treatment issues. Again there is the possibility of a tension between the clinical role and judgment versus being part of the legal team and meeting legal concerns. For example, TB said one time he was able to recommend probation because of the level of support available from public services and the family, which would enable the defendant to change behaviour patterns. TB stated that, "sometimes one's, opinions are important. Sometimes, they're peripheral". For instance in one case TB found his recommendation of prison because of the defendant's dangerousness were ignored and the judge gave a community order. This example contrasts with what one would expect, although it also illustrates earlier arguments about the ability of the legal system to ignore medico-psychological evidence to secure legal objectives.

Chapter one highlighted that, notwithstanding this experience, there is increasing concern with provisions to deal with 'dangerousness'. But an evident issue throughout the thesis is the lack of legal clarity in decision-making around whether detention should be in prison or hospital. Experts perceive it is a capricious process. For example SP stated it appears arbitrary in many instances, because it is often hard to distinguish between those in special hospitals and prison. He remarked "it seems to be very subjective on the courts", very dependent on the judge who may use reports, but ultimately he is unsure how the final decision is made. In his explanations of the different types of hospital, SP said special hospitals house "long-term and dangerous people who are *untreatable* and, and a *risk* to the public", such as a paranoid schizophrenic who acts out their delusions. JR pointed out "it's not, inevitable that homicide cases go to er, . high secure", the vast majority of those detained are in less secure accommodation. However, SP suggested that for detention in such a hospital stays are typically 8 to 10 years, incorporating a long programme of assessment and treatment. JR claimed about 10 percent of individuals in high security hospitals get stuck in the system.

Someone initially sent to prison may be subsequently transferred to hospital. JR said this occurs if the prison cannot manage the mentally ill or disturbed. JR remarked that the medical establishment does not condone, forgive or punish, but it is not necessarily lucky to be sent there because an order can result in 30 years on a mental ward. He claimed that he is unsure which is worse, prison or hospital, as some people can be quite damaged by the experience of long-term special hospitals because it is "a territorial institution, every aspect of your life is controlled, or monitored, or er, . virtual loss of, of individuality ...". He acknowledged the same sort of considerations applied to the prison system but hospital is tougher "because people are trained to be looking into your mind all the time". There is no escape because everything said and done is scrutinised, whereas the prison system tends to leave you alone. JR suggested perhaps the outcome is basically the same whichever institution the defendant is sent to, because they are locked away and it is a matter of luck whether anything happens while they are locked away, and the way it affects them. Thus in contrast to common perceptions that hospitals are the easy option this is not the view of an expert working in the field.

Psychopaths

Again the psychopath presented a conundrum both in terms of legal definitions, as discussed previously, and as an essential dimension to decisions about prison or hospital based on whether or not the condition is considered to be treatable. Psychopathy is generally considered untreatable, although TB said it is a vitally important to distinguish between ASPD, which is treatable, and psychopathy which is not. TB said he is not against trying to treat psychopaths, but argued the older the individual the tougher the job, and with the shortage of resources it is essential he include this sort of practical advice in the report. His view is that "all you finish up doing is making them better psychopaths". SP discussed the arguments propounded by Professor Hare about psychopaths being untreatable.

"He reports that there is no treatment, there is no real change, the wiring is all wrong. finish. Once you've got them detain them, they're gonna keep doing it. It's just the levels because again you can be psychopathic and not, dangerous, in the sense of physical harm".

JR expressed concern that those with severe personality disorder are frequently not offered treatment because of this assumption, whereas untreatable

schizophrenics and other mental illnesses receive the benefits of the mental health system. In light of earlier debates within this thesis this could be attributable to the different moral judgments made of psychopaths and those suffering from mental illnesses.

SP claimed there is research arguing it is possible to work with the other personality disorder traits of a psychopath, teaching social awareness in a minority of cases. Similarly DT maintained that the other conditions with dual diagnosis are treatable, but not the psychopathy, although another remark she made cited in the earlier examination of psychopathy in this chapter revealed a different stance. But in chapter one it was noted that there are two new special hospital units that will research DSPD. SP argued that establishing the units was a politically motivated decision, but acknowledged that it offers an opportunity to address the issue of treatment. He speculated, "whether we end up concluding there that, you know, biologically speaking these people, you can't change the blueprint. Or whether we'll end up saying well, you can do something". In contrast RH discussed how the proposed new MHA is evidence of a move away from treatability to containment. RH speculated that approaches to the vignette scenario would be different under the new MHA. He argued the trend has to be viewed in conjunction with the DSPD initiatives, which illustrate the political and policy trend towards emphasising social order and public protection with regard to individuals with mental health problems.

Release

DT said that expert court reports should also include information that will be useful for release decisions, which will be in addition to a report covering the detention period, and a risk assessment. The respondents focused on problems on release from hospitals, much as the lawyers did. An example provided by JR illustrates very aptly the tensions of dealing with mental health issues and retribution. This is a case where the defendant, who established the diminished responsibility defence and has been detained in hospital for a depressive illness, is likely to be released after only three years. He argued this is difficult

to accept in relation to murder.⁴³⁰ Yet JR held that the defendant is 100 percent normal and questions why the tribunal has not discharged him, whilst acknowledging that with this sort of case "they would do their best to look for something, that could keep him detained". This reflects examples provided in chapter six.

JR also raised concerns about the lack of support services within the community following release, an issue also mentioned in chapter six.⁴³¹ JR discussed the case of an individual who has served 14 years for major assaults, both before and during his detention. JR considered him to be one of the worst examples he has known of an unstable and dangerous individual, but Broadmoor and the local regional secure units refuse to take him. As a result he will be released back into his local village where the community mental health team (CMHT) will have to deal with him. JR said the CMHT are aware that they will not be able to provide adequate support, and there are concerns that he will kill someone to either demonstrate how he feels, or because he is out of control. All the agencies, police, health, social services, and probation, are very anxious because whilst they will try to share information, there is nothing much they can do besides monitor the situation. JR claimed, "the person will not cope, in a hostel, with lots of, of criminal, people around them, unstable people, around them. They'll do something". JR said the individual in question recognises that they cannot cope and are afraid that they will hurt someone. This reinforces JR's view that the law is a blunt instrument, as the government simply expels a person at the end of their sentence. Furthermore, even if the individual expresses concerns to their psychiatrist they cannot necessarily be locked up if there are not suitable grounds to do so.⁴³² He said that he hopes that the government's new provisions will result in additional support for such cases. JR is involved in a local initiative developing services for those coming out of the high security system, who can be neglected and receive inappropriate treatment.

⁴³⁰ In *Walton* [2003] it was held that the court should not avoid using the MHA provisions if there is a suitable bed if the condition is treatable by imposing a life sentence, in order to thwart the release of the prisoner by the MHRT.

⁴³¹ *Clunis* [1998] involved a claim of negligence against the Health Authority for inadequate after-care by a defendant with mental health problems who killed on release from hospital.

⁴³² Does this imply the MHA is not adequate to the task?

Discussion

The analysis of the interaction of legal and medico-psychological practitioners from the data in this chapter can be dealt with by way of two themes. First there is the matter of understanding the substantive aspects between both professions, and secondly the nature of the working relationships. The data reinforces the arguments made at the end of chapter six on the importance of practices and relationships of practitioners for the application of the law, despite the lack of a genuine epistemological interaction between the disciplines.

One would not necessarily have expected as in-depth a review of the rules of law and its social role from the medico-psychological experts as from the lawyers, although in fact there is little to distinguish them. If anything, the experts reflected more on the issue of responsibility, which can be attributed to the fact that they are required to make a link between the clinical condition and the legal criteria on responsibility. When observations were made about the current law the evaluation was in terms of the factors the law fails to take into account in its examination of decision-making and mental states, from the perspective detailed in chapter two. In fact there was a persistent theme on educating lawyers that would seem justified in light of the lack of understanding identified in chapter six, and the lack of fit between the two perspectives. However, the arguments in chapters three and four show that the law uses medico-psychological terms and evidence in a very strategic and symbolic manner, which was supported by statements in chapter six. The law plainly operates flexibly with little understanding of medico-psychology and from the remarks in this chapter would have to be more stringent if the assessment of the defendant's mental state addressed the matters as outlined in chapter one, and the expert actually gave a professional opinion on effects of the diagnostic condition on responsibility and the capacity to make moral choices, as respondents noted that they considered the law was operating very generously. However, despite the reservations the interviewees accept working within the system and in fact there was a distinct sense that they gained satisfaction from being considered a good expert witness.

There was, as with the respondents in chapter six, an overwhelming focus on procedural matters and the importance of inter-professional relationships. What became apparent from the interviews is that there is a small pool of experts that enter into the legal role required of them and they enjoy the professional acceptance and legal approbation, although familiarity can also mean that on occasion they challenge legal tactics through confidence born of experience. However, when this is analysed in the context of the adversarial process it means that they serve the interests of the side for which they act by being able to present their evidence more adeptly in the witness box. As in chapter six, there were repeated references to reliance on tacit knowledge and how to be effective tactically, which reflect legal concerns identified in chapter six. The latter was particularly evident in relation to key players, especially the judge and jury. Thus the experts appear to embrace the legal culture (Grau 1981: 96). This reinforces the assertion in chapter six that the formal aspects of the law operate through the informal relationships, norms and practices of the court and practitioners. Also in previous chapters the point has been made that the law could not operate as it does without the co-operation of medico-psychological experts. The adversarial process is self-regulating as the court process brings together different actors with different roles and aims, although pre-court processes are vital to the operation of the diminished responsibility defence for the achievement of substantive justice (Feeley 1979: 18-9; 279). Specialised functions by each of the different respondents are part of a broader framework that acts as a restraint through common goals (Eisenstein & Jacob 1977: 10). Thus the nature of the relationships enables the legal system to strive to achieve what it considers to be just results, which are arguably locally developed value judgments as well as wider evaluation linked to legal norms and objectives, and experts do not appear to question the use made of their evidence.

Conclusion

The discussion by the medico-psychological interviewees primarily concentrated on their concerns about their role and particular stages of the legal process, rather than the substantive law. Disquiet with the legal process focused on their role in relation to key legal personnel and tactical issues rather than theoretical matters, as it did with the lawyers. A number of themes

emerged, such as the amount of subjectivity introduced into cases through personal and professional attitudes and practices by both professions. For instance SP said "[i]t's really quite strange, it all hangs on people. And subjective views". It would appear the personal characteristics of principal actors are important because of previous experience and ingrained bias (Eisenstein & Jacob: 10). What appears to be important is the flexibility of the legal system to determine the preferred outcome and the procedural tactics and devices that can be invoked at different stages of the process. The impact of the adversarial process on the presentation of expert evidence was discussed, with special attention paid to the impact of barrister's questioning techniques. Finally, the major suggestions for change centred on the need for more education and understanding between the respective professions, in particular that lawyers become more cognisant with medico-psychology, rather than specific legal changes, except with regard to the legal definition of psychopathy. It was also suggested that juries need to receive more education on the mental health issues in a case. Yet earlier debates within this thesis show that the law does not attempt to adopt the medico-psychological meaning and that it operates flexibly without any understanding, as the aim is to secure legal objectives and the expert's evidence appears to be a device within the legal process.

CHAPTER EIGHT

THE INTERACTION OF LAW AND MEDICO- PSYCHOLOGY: CONCLUSIONS

Introduction

This thesis has examined the interaction between law and medico-psychology, with their contrasting discourses on the mind, in the context of assessing criminal responsibility, as part of the homicide defences of insanity and diminished responsibility. The voyage resulted in an unanticipated journey and destination. The desire to analyse how effectively the law incorporated medico-psychological understandings of the mind, especially with the neuroscientific revolution, now seems naïve. The initial investigation started with ascertaining the pertinent theoretical and philosophical parameters of both disciplines, however, subsequent examination of reported cases and the interview evidence showed a lack of integration and negotiation between the two discourses. Chapters three and four revealed a symbolic use of medico-psychological discourse and meanings by the law, whilst the interviews were rarely concerned with any of the theoretical concepts grappled with in chapters one and two, rather they were pragmatic procedural discussions. Thus the chapter focuses on the two themes identified in the introduction.

The first is the nature and social significance of the interaction between the institutions of law and medico-psychology. As identified at the outset of the thesis, Foucault's (1980) argument that knowledge constitutes power⁴³³ is an important point with respect to both disciplines as they each hold dominant social positions. The institutions of law and medicine have what Freundlieb calls 'primary' relations and their discourses in turn create relationships between individuals and particular social contexts, which are held to be 'secondary' relations (1994: 165). Inherent in the debate is the need to recognise the significance of the content of legal and medico-psychological discourses for the prevailing organization and contiguity of perceptions within society, as institutional and cultural practices create a sense of identity with discourses empowering or dis-empowering individuals and groups (Sawicki

⁴³³ See in the context of the arguments raised by Rose et al (1990)

1991: 22; 25-6).⁴³⁴ For example, it can be seen through the discussions in this thesis that categorizing someone as mad or bad can be employed strategically through medical and legal practices.⁴³⁵ In this context the discourses are a politically and ideologically important aspect of social relations, which are the result of particular historical antecedents, as chapter four described (Jupp & Norris 1993: 48-9). Chapters one, three and four highlight shifts in medico-psychological and legal relations as a result of social changes. Thus definitions of individual agency, responsibility and culpability are negotiated within a particular framework in each individual case. This project has explored the normative value judgments contained within the particular frameworks of knowledge and the incumbent discourses and practices. However, not all the propositions contained within Foucault's theory outlined in the introduction are supported by the research undertaken as part of this thesis.

Thus the analysis of the interaction of law and medico-psychology focuses on law using expert evidence symbolically through a number of controls, which supports particular normative, social and policy considerations. This chapter reviews those controls through revisiting the three levels of analysis undertaken to distil the main conclusions that can be drawn for the application and practice of law and the format of reform debates. In addition, the debate is further broken down into processes pertinent to the verdict and sentencing stage, as these raise distinct issues.

The second aspect that is considered concerns the nature and implications of the practices that have developed in relation to practitioners. This discussion explores how the distinct professions negotiate the differences in discourse and perspective within the context of these legal cases. Fundamental to this is the routine procedural focus of practitioners in the management of cases.

The Interaction of Law and Medico-Psychology

General

This thesis has explored the interests and values embedded in the operation of the law through the dialectic perspective. It was argued in chapter one that the

⁴³⁴ Shilling (1993) illustrates this point with her discussion on power, discourse and the body.

⁴³⁵ Szasz (1972) eloquently questions the way that psychological theories construct what is termed mental health and ill health, based on behaviour patterns and social actions rather than physiological factors.

legal recognition of the moral derogations from the objective standard of criminal responsibility was problematic because of the contradictory language and role that this generates as legal language is cognitive and factual (Norrie 2000: 157; 180). The research has examined these issues and the compromises that have developed as a result of the oblique language and legal concerns when assessing responsibility given the need to consider public protection and social order, particularly because of the potential dangerousness of mentally disordered offenders.

The legal rules representing the moral exceptions to the criminal standard of responsibility have to be balanced with the view of the mind implicit in the concept of criminal responsibility and legal objectives such as social order and public protection, and therefore the rules inherently have a limited legal focus and remit, reviewed in chapter one. Consequently, the philosophical and normative constraints underpinning the defences dealing with mental states, although they include medico-psychological concepts and terms, and require expert evidence, preclude a full consideration of matters from any other perspective. It transpires from this research that the acknowledgement of medico-psychology represents a strategic device, enabling flexibility in the operation of the law, with derogations from the theoretical rhetoric obscured. Thus whilst on the surface there may appear to be support for Foucault's assertions that the disciplinary society is concerned with control through the body, the manner in which this is undertaken is not at the expense of legal sovereignty. The evidence in the thesis supports Teubner's claim that law is a self-referential system.

As stated previously, the debate needs to distinguish between the legal attitude towards medico-psychological evidence at the verdict and sentencing stage. The more expansive medico-psychological perspective, such as the complex neuroscientific explanations of decision-making are not evaluated in the same way when forming part of discussions about risk and punishment, as opposed to criminal responsibility. The contradiction exists because acknowledging the medico-psychological position at the verdict stage would affect the whole basis of criminal responsibility, whereas when the focus is on risk and dangerousness the concern is with criminal behaviour and the objectives of social order and

public protection. The relationship between the two disciplines reveals the importance of the social context to the interpretation and application of this form of science, particularly in relation to sentencing and detention decisions.

A fundamental aspect of the analysis has been consideration of the power of the social institutions of law and medico-psychology to assert their particular perspective. Significantly, whilst law seems to use medico-psychological evidence symbolically, it is not autonomous because it is a social institution, but it has a constitutive aspect and appropriates extralegal knowledge (Valverde 2003: 6-7; Smart 1996). This research challenges Foucault's claims that medical discourse is gaining ascendancy over legal discourse (1980: 106-7). While the law appears to use medico-psychological categories to resolve matters a deeper analysis shows that law utilises medico-psychological terms and professionals symbolically, and as a disciplinary power it does not cede power to other discourses.⁴³⁶ Teubner's assertion that law is a self-referential system seems more apposite because the *truth* of medical discourse is not needed, as the legal interpretation of medico-psychological terms and the lack of understanding on the part of legal professionals indicate. Expert evidence has to be related to legal criteria concerned with the mind, focusing on the effect so the implicit challenge to the legal view of the mind contained in the diagnosis and medico-psychological perspective can remain imperceptible. The research began by distinguishing the differences in perspectives on the mind and throughout the discourses remained parallel rather than intersecting.

The law's use of knowledge from other disciplines is self-referential, but as Valverde states, it is site-specific knowledge (2003: 23). Therefore, claims that the law is self-referential are not saying that the law is homogenous; an analysis of a different area of law would produce a different picture of the constructs, categories, norms and practices. As Smart maintains "the nature of the law/medicine debate [varies], in some instances we may see a coalition, in others a conflict and we cannot assume a pattern or clear signposts which will point us to an inevitable future" (p.430). This thesis presents a snapshot of the issues currently prevailing in this particular area of law and the debates reveal an association that has developed between mental illness and dangerousness.

⁴³⁶ See Smith (2000)

The fluid nature of law enables it to create from other disciplines and to shape the world that it claims it only adjudicates. Valverde states that “[l]egal actors and institutions, however, care little about epistemological purity and derive great benefit from being epistemologically creative” (p.26).

The significance of legal and medical discourses for establishing norms and categorising individuals and groups in society has been noted. The two diverse disciplines are involved in cases that categorise individuals as mad or bad, but the legal process has developed a role for medico-psychological discourse, adapting it in a manner that is not immediately evident. The linking of law and the medico-psychological disciplines normalises and dichotomises (Foucault 1977), but the medical evidence obscures the social and normative choices that underpin legal decisions. Law uses medico-psychological concepts in the defences, and evidence of a diagnostic label, to support and legitimise decisions to allocate defendants to particular legal categories. The evidence shows that language is not neutrally constructed or applied, highlighting the social construction of individual legal categories of defendant. What the following discussion of the judicial role, inter-professional relationships and legal processes does is summarise the key ways in which law both remains self-referential and secures legal objectives. The general overview is undertaken by reference to the three levels of analysis, providing an insight into the formulation of the Homicide Index statistics, and the evidence to support the assertion that Foucault’s claim that medicine was in ascendance over law is erroneous in this context at least.

Judges as Legislative Interpreters

General

Initial evidence that law uses medico-psychological evidence symbolically was provided through the analysis of the judicial interpretation placed on legislation and the scope of the common law rules. This followed on from the outline in chapter one of the legal interpretation of *mens rea* (*intent*) upholding the legal perspective and chapter two illustrating how limited this is in terms of understanding the mind and decision-making from a medico-psychological perspective. The latter was reinforced in chapter six by RH, a psychologist, the only medico-psychological interviewee to refer to *mens rea*, who challenged

the law's restrictive view of factors affecting decision-making, providing a number of examples of states of mind that can affect choices.

Chapter three spelt out the judicial interpretations placed on the medico-psychological terms and concepts within the two defences by means of in-depth scrutiny of reported case law. Judicial construal of the law takes place in the shadow of the legal view of the mind and the overarching objectives and norms that pervade the criminal law. A critical factor to emerge was that judges receive no training in mental health issues or the mind, yet they have immense power to define terms and dictate how the evidence will be included. The matter of how up-to-date or out-of-date the law is was alluded to in the interviews, with SB suggesting that the law is 10 years behind scientific knowledge and public opinion, whereas DW claimed it is a century behind the times. Consequently a legal perspective is placed on the medico-psychological concepts and terms within the defences, which is not in line with the medico-psychological viewpoint, with additional constraints imposed on the admission of evidence to secure justice in line with pertinent legal objectives concerned with social control and public protection. The judiciary acknowledged that their interpretations impose a limited legal view of medico-psychological concepts. Thus the test to assess the defendant's mental state has a limited focus, particularly in insanity, which has a very restricted cognitive focus with no volitional element.

The nature of the interpretations and rules developed to determine if the defence tests have been satisfied have important social consequences. Chapters three and four identified problems and anomalies that have arisen from attempts to ensure a legal perspective pervades the defences. The incongruities are not allowed to undermine the operation of the law. The law is able to use expert evidence strategically as a result of the legal focus remaining on the *effect* of the condition, so the dissention between the two disciplines on the issue of *cause* is not overtly addressed. The legal concern with evaluating the effect of the disorder on cognition, keeps the 'mind' abstract, even though the conditions cited implicitly incorporate the medico-psychological perception of the mind. This is possible because the diagnostic conditions are being applied

to legal tests, for instance the *mental responsibility* of the defendant in diminished responsibility.

Interestingly, the analysis revealed that the flexible operation of the law can result in more benevolent decisions than many medico-psychological practitioners would sanction from a professional view of the condition undermining the defendant's capacity to choose their actions. RH said that he knows of defendants who have escaped liability on the basis of cognitive impairments who should not, in his opinion, have done so. SP attributed this in part to the dichotomous approach of the law that results in comparisons that do not involve like with like. The prevailing view amongst the experts was that it takes a serious condition for the defendant not to be responsible for their actions because most diagnostic conditions do not have an impact on the choice of whether or not to kill. On the other hand DW views it as a positive move that the law has become less rigid on the conditions it accepts, citing BWS and Othello's syndrome as examples. He argued that if the concepts are out of date and are restricting the range of conditions that can be considered, then they need to be modified to ensure justice is served, because the issue of whether the defendant's responsibility is substantially diminished has to be addressed. This highlights very aptly the different perspective of the two professions.

Yet BWS and Othello syndrome are also examples that the current legal approach masks the tensions between the two perspectives because they are effectively socially and emotionally based conditions not in line with the legal view of the mind as they reflect the perspective outlined in chapter two, although they seemingly emerged from the law, demonstrating the gap it has been possible to develop between rhetoric and practice. Again this is achievable because experts are required to make a judgment about the *effect* the condition had on the defendant's mental responsibility; they are addressing legal questions and equating their understanding of the mind to legal concepts of the mind and responsibility. Moreover, the work of neuroscientists such as Damasio, which may improve medico-psychological understanding of the mind and decision-making, is likely to pervade clinical practice and diagnostic categories, increasing the epistemological gap between the two disciplines. But the enhanced understanding could enter court without overtly needing to be

acknowledged owing to current practice simply looking at the *effect* of the condition cited.

Critically, because the law also retains flexible control on the admission of evidence through ambivalent rules, determines the questions addressed, and the manner in which this is undertaken, there is no clear indication as to what will succeed. Significantly, the law needs experts who are willing to enter into this process. Possibly the fact that neuroscience appears more like *hard* science than perhaps current medico-psychological approaches do, which the Director of the Scottish Forensic Institute referred to as ‘so far out there’ and ‘art forms’, will affect how the findings and opinion of the expert are *perceived* by lawyers, and arguably the jury, if not necessarily making it more easily understood.

Psychopathy and Intoxication

Further evidence that decisions held to affect a defendant’s mental state are not decided in a political vacuum are provided by preceding discussions on psychopathy and intoxication. Criminal responsibility and moral exceptions are not purely philosophical and theoretical matters because of the public policy dimensions of the rule of law, in this context public protection and social order. Practitioners appreciated this with the discussions in chapter three mirrored in chapter six and particularly chapter seven. For example, medico-psychological interviewees referred to the inaccurate legislative definitions and legal understanding of psychopathy, and the disagreements within their profession on the impact psychopathy has on the capacity for choice. In particular, exception was taken by medico-psychologists to the legal propensity to equate ASPD with psychopathy, which is tied into the association of psychopathy with dangerous criminal conduct, with the labels evoking prejudice in judges and juries. Crucially as most cases do not go to trial then they are subject CPS rather than judicial or jury scrutiny. What seems to be important in legal terms, because the issue is one of potential risk, is summed up by the Judge’s remark that a psychopath may qualify for the defence, but they can still be given a life sentence.

Similarly with intoxication, JR said that in his experience judges generally reject evidence on intoxication for political reasons, reflecting the discussions in chapter three. Again, medico-psychological opinion is divided over whether alcoholism should be classified as a mental disorder, with allusions to the possibility of genetic foundations. Comparable arguments regarding compulsion arise with drug addiction, which does not refer to a homogenous group as the term 'drugs' encompasses opiates to nicotine (Johns 2002; Husak 1999). These issues highlight the tension between the differing perceptions and understanding of the mind most clearly; however, as the law uses medico-psychological knowledge in a symbolic manner, and social policy factors affect the use and interpretation to be applied to medico-psychological discourse to secure legal objectives, the position on these conditions is unlikely to change. Judges have a crucial role in ensuring this.

Judges as Trial Arbiters

The position of the judiciary is distinctive because in addition to their involvement with the development of substantive law they are also practitioners through their presence and role in court and the trial. Chapter three detailed the substantive legal framework that High Court judges have developed and chapter four examined the reasoning, processes and rules affecting the admission of expert evidence, which are adaptable and wide-ranging. Such ambiguous rules can exist because the legal criteria promote evidential flexibility to support the defences to ensure that expert evidence does not undermine or overwhelm the operation of the law. There is legal scepticism about the validity of evidence that comes into court. It is the combination of the two dimensions to the judicial role that facilitates the legal resolution of the tensions between the different perspectives inherent in the legal and medico-psychological standpoint.

To illustrate the significance of this aspect of the judicial role one can consider the changes to the operation of the provocation defence introduced in the case of *Smith* [2001], outlined in chapter one, which are the result of judicial reasoning. The inclusion of the mental characteristics of the defendant for consideration with the provocation defence is an illustration of the law extending the use of expert evidence, despite the rhetoric about ensuring that

expert evidence does not overwhelm the law. Critically there are no mental state aspects to the provocation defence so it is a strategic innovation, and, as with diminished responsibility, it depends on the willingness of the expert to give an opinion on whether they consider there is a link between the alleged abnormal mental state of the defendant and particular legal criteria. It has introduced a subjective element into what was intended as an objective defence. Clearly this has not met with universal agreement, as the dissenting judgments, subsequent commentaries and the recent Law Commission (2003; 2004) reports show. Furthermore, the practice of pleading both diminished responsibility and provocation has muddled the waters between the two defences, illustrating the incoherence that can develop as a result of taking legally driven strategic options in cases. Provocation has not had much time to develop since *Smith*. The discussions in chapter one and four show that *Smith* is being applied, but only appeal cases are reported. The Law Commission (2004) discussions on the topic suggest how they would like the issues to be addressed.

Thus judges have a special place in the debates because of their hybrid role, developing and applying the law. They are a significant part of the backdrop to the formulation of cases for trial and the trial process itself.

Inter-Professional Relationships: How the Incongruities are Managed

Introduction

The second major aspect of the analysis concerned the role of practitioners in applying the discourses and institutional objectives they represent. Chapters six and seven show the nature of the involvement of practitioners within the framework of interaction already discussed, demonstrating the character of the implementation of the legal rules. As stated at the outset of the thesis, a central theme throughout Foucault's theories is that the professions are sites for the production of knowledge, a major resource of power. Social institutions produce webs of meaning and types of knowledge, which result in particular practices. The deliberations throughout the research show that there is no

seamless synthesis between or within the two heterogeneous professional groups under consideration.⁴³⁷

Interestingly, the complex debates in the early chapters were not evident in the interview discussions. The theoretical discussions were concerned with ensuring a moral outcome for those who because of their mental state at the time of the incident should not be held fully responsible (insanity), or only partially responsible (diminished responsibility) in line with the philosophical underpinnings of the law. In contrast, the lawyer's discussions of the substantive law were approached in terms of legal tactics and pragmatic considerations, which varied between prosecution and defence. The clinicians did critique the limited remit of the law but were also primarily concerned with their role in the context of legal procedures.

The following overview first reflects on inter-professional understanding and relationships in light of the differences between the professions. There are a number of important observations about the nature of the professional relationships and the lack of inter-professional understanding that further illustrate the law is an autopoietic system. Secondly, the summary considers how the tensions are negotiated at the critical decision-making stages of the legal process. A major factor that is also addressed, which emerged from the investigation, was the routine nature of such cases, with the mechanical procedures fundamental to overcoming the lack of philosophical and theoretical interaction between the disciplines.

Inter-Professional Understanding

Perhaps inevitably because the disciplines have very different perceptions of the mind and professional concerns, and effectively the medico-psychological perspective is excluded from the law, with experts adapting their clinical viewpoint to legal criteria on mental states, the interview data revealed problems of understanding between the disciplines. Furthermore, again as one might expect, lawyers have more problems understanding the medico-psychological material than vice versa. The legal interviewees said that they

⁴³⁷ For debates on aspects of the criminal justice system see Reiner (1994), Sanders & Young (1994) and Hester & Eglin (1992) for example.

did not really understand the experts' discourse, although continued exposure helped. Plainly experts are entering into the legal system and it is expected they will be *forensic* experts, although reference was also made to the importance of having access to supportive legal personnel with problems comprehending technical legal matters. SB and KR said that they found psychiatrists do not have problems, although JM asserted that they do not like the form of diminished responsibility and would like it to be reformed.

This supports the points made in chapters three and four that the law does not need to understand the medico-psychological perspective to operate because it is using legal definitions of medico-psychological terms, whereas experts need some understanding of the law in order to identify which defence they think might be feasible in light of their clinical assessment, and to give an opinion on the link between their clinical diagnosis and the legal criteria. Having examined the importance of the expert's opinion, which is contained in the report's conclusions, this explains, in conjunction with the lack of legal understanding, the legal respondents' claims that the conclusion is the main part of the report. In fact it would seem from the CPS reports that the conclusion was the only part that would actually be of use to the courts at the trial stage because the preceding parts deal with a vast range of information that would not fit into legal considerations at the verdict stage, but would perhaps be taken into consideration at the point of sentencing.

A key theme in both sets of interviews was the capacity to comprehend the *language* of the other discipline.⁴³⁸ Books by the other professions were said to be unhelpful because specialist knowledge results in technical jargon affecting its accessibility to anyone outside the field.⁴³⁹ However, as preceding discussions show, the onus is on the expert to adapt, which was captured by the comment of JM, that "any expert worth his salt will do the automatic sort of, conversion, into our language...". Even the language that the expert might expect to understand has a legal interpretation, which was usefully illustrated by DT's discussion of psychopathy. Again, established inter-professional relationships seemed to offer an opportunity to seek help, and case conferences

⁴³⁸ The problems of professional jargon affecting communication between the disciplines were very evident at the Psychology and Law Edinburgh conference (2003).

⁴³⁹ This was also considered to be a major issue in relation to the jury.

were seen as helpful by both sets of respondents in providing an opportunity for each profession to learn from the other, although JR believes that there is a lot more they can learn from one another.

The lack of legal understanding may be explained by the fact that lawyers undertake no mental health training and, as shown in previous discussions, there is no necessity to understand anything other than the legal meaning of medico-psychological terms and the conclusions of reports where the focus is on opinions as to the *effect* of the diagnostic condition. Therefore, even though the case process involves a number of legal personnel making critical decisions regarding the direction of the case centred on expert involvement and evidence this is not viewed as a problem. The lawyers did not appear concerned about a need to understand more of the medico-psychological discourse, although the experts did challenge this state of affairs.

Mental health professionals need to understand the substantive legal rules to which they tie their clinical opinion, although the first health professional that is likely to be involved is the police surgeon, and they are not qualified mental health professionals. As chapter four explained, both medico-psychological professions now include forensic modules in their basic training and there are a number of expert witness organisations that provide additional training. However, most experts in this area have been practising for some time, and unless they have chosen to undertake specific training they will not necessarily have had any. For example DT, a consultant psychiatrist, admitted that she has had no training and has learnt as she has gone along, claiming it had not caused any problems. SP advocated more training to improve accuracy and the general standard of court reports because the fact that agreement between experts is difficult to achieve undermines how reliable they are seen to be. This is important in terms of the significance attributed to the perceptions on professional standing. There are two aspects to SP's claim: the training would be concerned with improving compliance with legal needs; and the lack of agreement is seen as reflecting badly on the medico-psychological profession when it concerns the requirement that an evaluative judgment is made about the fit of a mental disorder to legal criteria on responsibility. Both are

concerned with medico-psychological professionals complying more effectively with legal needs to enhance views of forensic professionals.

Inter-Professional Relationships

Another facet of the evidence generated through the research shows how practice reinforces the domination of the legal perspective. This is possible it seems from the interviews because a small pool of solicitors, barristers, and experts are involved in homicide cases within an area. Additionally, the pool of judges is restricted because they have to have a special certificate to be able to hear murder cases and they also work on particular circuits. The inter-relationship of the small pool of professionals appeared key to the operation of the law. It seems that experience and professional relationships facilitate the undertaking of roles despite the divergence in perspective and discourses.

In light of the problems with comprehending the other disciplinary discourse, despite the years of experience, trust was central to the working relationship, which appeared to be premised on an evaluation by each discipline of the competence of the other in helping them fulfil their role within the legal context. For example, lawyers evaluate experts on how tactically advantageous their reports usually are and their ability to withstand cross-examination. Critically, competence at writing good legal reports and withstanding cross-examination does not mean that they are competent practitioners. Experts assess lawyers on their ability to provide clear instructions and support in understanding legal points. Once there is a mutual acceptance then the division between the disciplines seems to disappear at a practical level, if not at a theoretical one, as the focus becomes one of fulfilling roles and deciding on tactics. This focus on procedural routines might help to explain how the delicate moral issues are not actively addressed and the professionals avoid the problems that could emerge from such distinct perspectives.

Chapters three and four showed the significance of the co-operation of the expert in the role that they fulfil. However, whilst experts used on a regular basis are at least likely to be familiar with the legal system and its requirements, this can be seen to have its advantages and disadvantages. For

example, in terms of clinical judgments and opinion on where the line should be drawn on mental states excusing from responsibility, in all likelihood using the same set of experts leads to particular views and approaches prevailing, which may be those that suit legal ends, but it could be problematic if the expert uses radical or outmoded theories.⁴⁴⁰ Similarly, the admission of new forms of evidence, such as that generated by the field of neuroscience is dependent on the practitioners operating in the area. But the lack of legal understanding of clinical matters means that the expert's claims cannot be cogently evaluated. The Judge stated that, as a result of having experts on both sides, if a theory is extreme the expert on the other side would highlight this. This will not be the case where there is a joint expert, as in civil cases, and therefore this may be a reason not to adopt this practice in the criminal law context, particularly as so few cases are publicly scrutinised in the case of diminished responsibility. But it has already been suggested that there is little investigation into the basis of the medico-psychological theory underpinning their opinions. The scope for subjectivity in applying clinical judgments to the legal criteria, as a result of experience, is likely to be informed by what is legally acceptable. This may explain why experts, such as DT, claim they are comfortable forming an opinion on the substantial impairment of the defendant's mental responsibility in line with legal objectives. The interviews show that expert opinion does vary and therefore the selection of experts could also be informed by the ability to appreciate and support the social and normative perspective inherent in the legal frame of reference.

There is also the matter of the impact of experience on the expert's procedural competence, which will be valued by the legal side that they act for. The expert's duty is to the court, not the side they are acting for, but they are familiar with the lawyers, and value being recognised as a competent forensic expert, so they are going to give their best for their side. The Judge remarked that the fact it is lucrative work means experts do the best they can for their side. Involvement in case conferences might also foster the feeling of being a team player. Value is placed on the expert's ability to perform in the witness box, and chapter four reviewed issues arising from the adversarial mode of

⁴⁴⁰ The recent controversy over Professor Meadows' evidence on cot deaths is evidence of the problems that can arise (Burrell & Murray 2003; James 2003; Mahendra 2002; Robins 2000).

questioning, which can be ameliorated by experienced experts. For instance DT considers that appearing in court is a form of gamesmanship, and both she and RH provide examples of ways in which they know how to handle the court process, furthering the cause of the side they are acting for by providing less opportunity for the other side to discredit their version. Thus experienced experts are affecting the sceptical testing of the veracity of their evidence, although it could also be argued that they are perhaps conveying more coherent or comprehensive information to the jury.

Correspondingly there are competing interests and different ethical considerations between the professions inherent in their roles within the adversarial process. So, for example, the barrister is considered good if they control the evidence entering into court for both their own side and in respect of the expert on the other side. On the other hand experts discussed the importance of appearing credible and comprehensible to the jury, with SP specifically stating how important it was that the jury really understand the impact of the condition so that they make an informed decision.

Experts in the interviews gave the impression that they like being involved in legal cases, citing it as interesting and important. A central aspect of job satisfaction was being accepted by the legal profession and taking part in a serious aspect of the legal process. For example, DT highlighted how she had progressed to doing homicide cases and during the transition had become irritated by being required to deal with less serious cases. Experts also judged their importance by being in a position where they only have to work with their preference in lawyers. Interestingly, there is little reference to their role in relation to defendants, the ethics of such cases or the ethical issues regarding the use of their evidence; rather they focused on how they and their professional evidence are treated within the legal context. Perhaps this is exacerbated by the adversarial emphasis on winning. An interesting matter might be to consider if using a new expert locally affects the dynamics of local practice, or whether their continued involvement is affected by their ability to provide what the legal system requires.

The Legal Process

Introduction

An interesting factor to emerge from the data chapters was an overwhelming focus on procedural routines and tactics by both sets of professionals. The responses to the vignette show that within this there is the opportunity for subjectivity through the interpretation of events, with the possibility of discretion in decision-making at a number of junctures, but it would seem that this is informed by tacit knowledge gained through experience as part of a small group of practitioners undertaking such work, in large part based on what legal category the case invokes and the processes that this sets in motion.

With regard to the legal role importance is placed on tactical considerations informed by whether they act for the prosecution or defence. The defence discussed issues in terms of the impact the law, or possible changes, might have in tactical terms for the defendant. The prosecution's view, as representatives of the state, is suffused with scepticism towards the defendant, centred on the belief that someone in such a serious position will cast around for excuses and they need to resist any undermining of overarching legal, public interest, objectives. Alternatively, the medico-psychological respondents were focused on clinical matters, although there was considerable discussion of the role required in relation to the substantive legal rules and the adversarial process. The data relate to arguments raised in chapters three and four regarding legal control, both in terms of the difference in meanings attributed to medico-psychological matters covered by the defences, and the legal devices for controlling the admission of expert evidence.

The next section briefly evaluates the practical features of the legal process where the two professions interact and how the tensions resulting from the inconsistency between the two professional perspectives are accommodated. It identifies the different junctures at which legal ascendancy is secured. In light of the small number of insanity cases, the key aspects of which have been discussed in chapters one and three, so the focus will be primarily on the operation of the diminished responsibility defence, particularly as this was the only defence the interviewees had dealt with and many of the procedural issues are applicable to both defences.

Pre-Court Issues

The Police Station

The first time that the mental state of the defendant will be considered is at the police station. Policemen are the first point of contact for defendants yet, as GF said, they have no mental health training and rely on the defence solicitor, although only the police can request the police surgeon. Crucially, the police surgeon is not a mental health specialist. The criminal lawyers, such as KR, said they have no training in identifying mental health issues. He thought that practising mental health law may help, although in light of the arguments in this thesis this is debatable. Reference was made to the importance of experience and tacit knowledge when decisions were made about whether the defendant required the involvement of a mental health professional. SB said that making decisions at the police station was the most stressful aspect of a case because of the *lack of the structure* that accompanies the rest of the case process.

There is a clear lack of procedures to ensure that the defendant is adequately assessed, with the emphasis on the police interview. Bartlett and Sandland note that there are some local initiatives to improve the detection of mental illness at the initial stages but they are not government-led and are affected by limited resources (2003: 238-9). Leading counsel in the Privy Council case of *Smalling* (2001) made the argument for routine examinations when defendants are awaiting trial on grave capital charges and the judicial response was that it may be desirable but they could not tell the sovereign state how to deploy its human and material resources. Following this stage solicitors, and subsequently possibly counsel, instruct the experts in what to address in the assessment and reports, which preceding arguments show is centred on legal concerns rather than mental health matters.

Assessment

Again the emphasis is on the expert meeting legal requirements, although the interview discussions on assessment showed that the distinct perceptions within the two professions about the role and perspective of the other profession within the process, reflect tensions in the attitudes held about the

approach and viewpoint of the other profession. For example, experts expressed concern about the fact that there is often a considerable delay between the index offence and their being contacted to assess the state of an individual's mind at the time of the incident. KR conceded that it is difficult for experts to project back in time. Whilst lawyers consider the expert takes an uncritical stance to the defendant's information.

Crucially, the assessment is based on instructions from solicitors and the interviews showed that solicitors think in defence or prosecution terms when they formulate them. Furthermore, it could only be legally oriented because lawyers have no mental health training, the defence is about legally conceived mental health issues, and it is the expert's conclusions in respect of legal criteria that is the vital element. Experts, such as SP, said that often solicitors give more than an inkling of what they want. DT also said that counsel's advice and knowing who the barrister is helps to show what the lawyers want. Therefore, whilst the expert will appraise the defendant's story in terms of their clinical training, from the outset their involvement is also directed towards legal issues, which will inevitably be affected by which side they are acting for and perhaps by their inter-professional relationship with the lawyers involved.

The Judge claimed that some psychiatrists are more willing than others to say that there is diminished responsibility, which is supported by evidence in previous chapters that has shown the scope and importance of individual subjectivity. Does this become an important factor in which a particular legal side favours specific experts? There is also evidence that implies that experts become team players, but the experts themselves intimated that, while they are aware of the lawyers wanting to achieve a particular outcome, they also want to keep their professional integrity. DT said it was essential that she could stand by her claims and an important aspect of this was how she considered the jury would react to what she is saying. It seems there is a distinction between the more objective clinical diagnosis and the subjective judgment of the fit between that and the legal criteria, which could be influenced by any number of factors.

Chapter four appraised the differences between the clinical and forensic medico-psychological role, noting the different ethical considerations that accompany diagnosis and treatment opinions. However, only the psychologist LC discussed idiosyncratic aspects of the forensic assessment. For instance, she remarked on the lack of confidentiality regarding the information, where for example a defendant has denied guilt to the police but admits guilt to the clinician, which enters into court through the report unless the solicitor chooses not to use it. Yet the defendant's view of their relationship with the medical and legal profession is likely to differ, based on experience of the different roles, but the clinician is part of the legal process on this occasion. LC believes it is important for clinicians to remember this and to ensure that the individual being assessed is advised in advance about the limits of confidentiality.

The other interesting point LC made concerned the possible influence of professionals on the defendant's story. She asserted that it could have been affected by repeated exposure to legal personnel such as the police and solicitors, and their framing of the questions and event. Indeed, the story will be placed into a legal framework because the incident has to be categorised, just as the expert's discourse has to be framed in particular legal concepts and deal with specific legal criteria. Likewise, if the defendant is a recidivist they may be well versed in what to say to optimise the system: it may not just be lawyers who use tactics, as the prosecution suspects. LC also suggested that previous therapeutic interventions could result in the defendant's story becoming laced with jargon and theories. Even the initial expert assessment could have an impact on subsequent defence and prosecution reports. So each profession has a way of categorising individuals, which will influence the questions asked because tacit experience will guide initial judgments and this will frame subsequent interventions. Chapter two discussed the potential importance of concepts for an individual's perception of self.

Legal scepticism towards expert evidence has been noted throughout the thesis. So, although reports are tactically important for lawyers their judgment of them is underpinned by a sceptical view of the assessment process, particularly on the part of the prosecution whose viewpoint inherently suspects the defendant is duping everyone. The legal interviews indicated an assumption that experts

take what the defendant says at face value because this is the nature of the doctor-patient relationship, and therefore they overlook matters such as the fact that there is a victim and the defendant has an agenda. This is even mentioned in the Law Commission (LC) report on partial defences (2003: 135). The Judge claimed that a dispassionate approach is required, which not every psychiatrist has. An example given by JR, a very senior psychiatrist actually confirmed this lack of cynicism towards the defendant. Additionally, it was suggested that experts are likely to be more involved because they are dealing with a person rather than paperwork, although this was not the impression the interviews gave. However, DW noted the claims that lawyers are perhaps too detached, but asserted that some cases are so heinous it is necessary. What this scepticism seems to provide is another potential legal tool to invalidate expert evidence that is not in line with particular legal objectives. For example, the defence do not have to disclose reports that are not favourable to the defendant and as AC revealed the prosecution can reject expert reports on the basis of public interest.

But apart from the one comment by JR all the medico-psychological responses, including others by JR, suggested that they adopt a rigorous approach to assessing the defendant, which did not support the legal perspective. There was frequent reference to checking what the defendant says against the information in the depositions, which are read prior to seeing the defendant. However, there is an issue about how much the experts understand the content of the depositions because as AC, a prosecutor stated, they are not meant for experts and he does not expect them to review the files in the way that he himself does. Based on limited experience gained in this research, homicide case files are extensive.

An issue that was not addressed and which seems important in the context of the central theme in the thesis is the possibility that the case files influence the expert's perceptions making them less independent, at least in terms of moral evaluations of the defendant and victim. Reviewing the abstract theoretical debates generated a detachment that was punctured on seeing the CPS case files. Therefore one might suspect that such matters could influence the expert's assessment of the applicability of possible defences to the defendant.

As it was, however, both sets of interviewees demonstrated an objective, pragmatic approach to the issues, with little sense of the moral and ethical issues involved in such cases.

Critically, experts are adapting their clinical expertise to legal instructions, rules and roles, which calls into question their independence from the legal system. Diagnosis has to be linked to the defendant's mental state at the time of the index offence, which may have taken place a considerable time before the assessment takes place. Also the clinician is required to consider if it is possible to link their assessment to the legal rules for the defence, primarily, of diminished responsibility. Likewise, their decisions about appropriate treatment options inform judicial decisions on detention. There is an acceptance of this role by experienced experts and satisfaction in being a valued part of the legal team, without any reflection on the manner in which their evidence is used. Similarly, while legal scepticism is evident and provides a basis for challenge, it would seem that when professional relationships have been forged this is less likely to happen because the expert is a valued member of the team tactically.

Reports

The reports are clearly an important evidential tool. LC maintained that reports have changed little over the years except that they are now more likely to include referencing. RH believes the references are a way of assessing the competence of an expert, although based on the findings in this study this is only likely to be possible between experts, which can be conveyed to the legal practitioners. Providing substantiation on the format of reports as part of this research was hampered by the fact there was no obvious way to identify pertinent case files. It has been noted that lawyers are concerned with the effects a condition has, not the causes encompassed by the condition, and the expert's opinion on whether the defendant's mental responsibility was substantially diminished. Legal interviewees admitted that they struggled to understand reports but it would seem that it is unnecessary to understand how the expert arrived at their conclusions. It is unclear if lawyers go through the report and verify if there are any discrepancies between the content and the depositions, but this seems unlikely in view of the following remarks. Prisons

also provide a report while the defendant is on remand but none were evident in the two CPS case files.

Lawyers, such as the Judge and AC, remarked on how difficult it must be to decide the issue of choice and whether something constitutes a substantial impairment. Medico-psychological interviewees' responses indicated that it is necessary to follow the statute. Also, experience helps the expert to know what conditions the court will accept, evident in TB's comment that he was unsure where to draw the line until he discovered that *adjustment disorder*, the most general personality disorder, had qualified for the defence. But deciding if a condition has had a substantial impact seems to be a matter of *gut instinct* based on personal and professional judgment, both of which are affected by working within the legal system. In terms of linking the condition to legal criteria, Dell found that conditions were classified with reference to different aetiologies, which is possibly attributable to their not being based on medico-psychological categories (1984: 39). In addition, some reports did not necessarily identify which aetiology substantiates the claim that there is an abnormality of the mind. Chapter three shows that the courts have subsequently provided more definition on interpreting the aetiologies (Mackay 1999: 120) but this is still a legal perspective. The forensic psychiatrists in Mitchell's study asserted that they were not concerned with the defendant's moral or legal responsibility, but focused on the mental illness and personality disorder (1997: 631). This can be seen to avoid the moral choices and ethical implications that follow on from their evidence, although this must be difficult when required to give an opinion.

Peay found in her study of the application of mental health law by practitioners that they relied on conceptual perceptions of what law "did or ought to permit them to do" rather than being concerned with the detail of legislation (2003: 164). Certainly, the CPS reports viewed for this study did not contain rigorously substantiated recommendations, although none of them supported a plea of diminished responsibility to enable further comments. Mitchell's (1997) study found that the basis to the claims that the diminished responsibility defence was applicable were limited. This may be because clinicians are being asked to link defined clinical categories to legal criteria about mental states that

are nothing more than legal terminology, not specific states of mind. The term *mental responsibility* and *substantially diminished* are oblique terms referring to the mental state of the defendant, and addressing the matter of choice, allowing flexibility. SP suggested more training in writing reports, and the Law Society and expert witness associations also provide recommendations. If, as seems to be the case, the law permits reports that do not insist on the strict legal requirements then experts are unlikely to change, which permits flexibility and subjectivity on both sides. The legal framework, practices and the inter-professional relationships that develop mediate this.

The responses to the vignette effectively illustrate the difference in the legal and medico-psychological perspectives. The experts, as one might expect from previous statements, took a much more stringent view of the defendant's mental state impacting on his responsibility for his actions than the lawyers. The differing perspectives point up the diverse concerns of the two professions and the fact that the law is undertaking a symbolic evaluation of the defendant's mind whereas the medico-psychologists are viewing it from a technical professional standpoint. This can result in the law being more benevolent than medico-psychologists would be, based on the interviews, and case reports. Chapter two shows that the medico-psychological view of the mind does not deny free will and the discussions on psychopathy in chapter three indicate that the capacity for choice is not considered to be impaired easily. However, for a condition to be accepted, it must have been proposed by at least one expert. It would seem that adopting a more accurate appraisal of the defendant based on medico-psychological understanding would remove legal control and that is the issue rather than the fundamental challenge to legal philosophy.

Tactically there are a number of issues that arise with regard to the report, which appear unaffected by the lack of legal comprehension of the content. For example, on the basis of the recommendations of the report the defence need to advise their client and the defendant needs to instruct their solicitor. But it would seem from the discussions that the report is a tool. For instance, the defence have to decide whether or not to divulge the report, depending on whether it is favourable to their client. Barristers ensure that the report

addresses all the legal questions in a comprehensible manner because it forms part of the tactical evidence. This is potentially problematic if they cannot understand the report but essentially the conclusion is the basis for decision-making, even though it seems this is not always comprehensive. Barristers also need to formulate questions to highlight the weaknesses in the report produced by the other side, which requires help from their own expert. Furthermore, the expert's report is fundamental to decisions about accepting a diminished responsibility plea by the CPS to avoid a trial. Knowing the experts and trusting them, and therefore their conclusions, is likely to be an important aspect of this process, although the nebulous nature of the assertions provides considerable flexibility to ensure that legal objectives prevail.

Trial or Accept the Plea

The CPS decides if they are going to accept a plea of diminished responsibility or go to trial, making them gate-keepers of the operation of the defence. This decision is significant in a number of ways. The CPS decide that the case will not go to trial *if the experts on both sides agree* and they see *no public interest* in taking the case to trial. The decision-makers are therefore different depending on whether or not the case goes to trial, and if the option not to proceed to trial is exercised then the assessment of the expert evidence takes a discreet form (Feeley 1979: 27-33). The interview data from AC and JM shows that the decision-making process is founded on the tacit knowledge and experience underpinning the prosecution perspective. What this means is that the conditions qualifying for the diminished responsibility defence rarely enter the public domain, and are therefore not subject to the judicial and public examination discussed in chapters three and four. This illustrates the importance of legal practitioners and experts, rather than judges and the jury, although case law forms the backdrop to decisions, which again highlights the importance of inter-professional relationships. Critically, those making the decisions are legal personnel representing state interests, and they have no mental health training. Significantly, this process enhances the opportunity for the legal system to operate to secure moral outcomes in individual cases, as judged ultimately by the local CPS, because it ensures legal control and removes the jury, who are an unknown element, from the process. It also reduces the role of judges in most cases, and may give rise to results they do

not favour, as discussed in chapter three. This alternative also fulfils the legal need for efficiency as trials are time consuming and costly. Thus while justice is associated with due process in fact much is dependent on plea-bargaining (Feeley: 33).

The recurring argument that the securing of particular policies is obscured through legal practice is supported by the recent LC report on partial defences that states that the diminished responsibility subsection has

“provided a practically convenient method for the prosecution, defence and the court, by agreement, to dispose of cases where nobody would wish to see the imposition of a mandatory life sentence. This has been achieved by a sometimes strained and sympathetic approach to the medical evidence and the language of the statute” (p.13).

The Butler report also made an analogous point (para. 19.5). Similarly, in support of the assertion that resolving matters without going to trial is the preferred option, JM noted that if the experts do not agree then they are encouraged by the legal teams to have a meeting and see if they can produce a joint report. Thus, although the reports are not rigorously placing recommendations and opinion within a framework that links the diagnosis and legal criteria, and medico-psychological interviewees claim that the law should be more stringent about the conditions that qualify as affecting the defendant’s responsibility, experts must be producing reports that lawyers can use flexibly to accept the plea of diminished responsibility. This may be attributable in large part to the inter-professional relationships that develop as a result of a small pool of people undertaking such work, experts being essentially team players as has been implied in previous deliberations.

Court Issues

Judges

It has been noted how important the judiciary are to the development of the law and the impact of expert evidence. The medico-psychological interviewees’ observations about judges were in terms of their significance to their evidence. For example, experts such as SP, JR and RH cited instances illustrating how the judge’s personal and professional attitudes affect their view of theories and evidence, how testimony is listened to, and recorded, which informs

subsequent judgements. SP attributed prejudices to lack of education. RH stated that experts see their role as one of giving advice, and sometimes the court listens too little, or too much. However, there appeared to be a lot of respect for many judges and it was felt that repeated exposure to the experts' evidence has an impact unless the judge's viewpoint is entrenched. Nonetheless, the lawyers SB and KR, and medico-psychological respondents LC, TB and JR supported claims in chapters three and four referring to the fact that judges can avoid following expert evidence if they want to secure legal objectives. Correspondingly, the Judge remarked that judicial views differ on experts giving an opinion on the ultimate issue.

In terms of testing the veracity of the expert the Judge said that he had never known an expert's qualifications to be questioned, but the matter of whether they have strayed from their area of expertise might arise. Also he did say that there can be problems ensuring that psychologists are appropriately qualified, and that he did not really understand psychology. This affirmed earlier concerns about judges understanding medico-psychology, and their preference for psychiatrists. The problem with relying on titles, which is a social indicator of seniority within a profession, is that it does not necessarily indicate competence, as was aptly illustrated by LC's example about a professor. The Judge admitted that there is a lack of judicial training in these matters but this was not considered to be a problem because the onus is on the competent expert to explain matters, and the jury make the final decision. There are a number of points that can be made about this assumption. First, the court is reliant on whom each side has instructed. Secondly, it cannot be overlooked that there are opportunities to control the admission of expert evidence. Thirdly, there is no need to understand the expert evidence for the fulfilment of the judicial role or for the law to operate. Finally, there is reference to the fact that ultimately responsibility lies with the jury, which appears to be a way in which all the professionals at some point relinquished responsibility.

Barristers

The importance of barristers and the questions they ask to the presentation of expert evidence was acknowledged by both sets of interviewees. For example, DT and RH discuss the fact that when a barrister does not understand enough

about the content of reports to effectively identify discrepancies he will not be able to discredit the report produced by the other side. It has already been established that frequently there is no understanding and JM and the Judge stated that barristers rely on their own expert in pre-court discussions and during the case to identify potential weaknesses. Therefore, professional relationships are important for this aspect of the adversarial process, as legal personnel are not conversant enough with medico-psychological theory to adequately attack its veracity. In a sense it is expert against expert, with lawyers controlling the process in which it occurs. There was also the assertion that experienced experts learn to deal with barristers' styles of questioning, which confirms the importance of the expert's capacity in this respect for the side that they act for. However, the law adopts a dichotomous approach and JR remarks on the way in which there is a focus on trying to obtain admissions as to whether something is or it is not, whereas medico-psychologists work on a spectrum or continuum basis using probabilities. These points give an indication as to why clinical competence is not that important, but being able to address the legal criteria and work within legal tactical constraints is.

In chapter four it was stated that although the adversarial process is divisive there is essentially a professional identity that unites experts. However, what was evident in a number of the interviews was that psychiatry and psychology were critical of one another. This centred on occasions where their evidence had been seen as more credible than that of the expert acting for the other side who was from the alternative medico-psychological profession. So there is a division engendered amongst experts by the adversarial process, but their personal professional standing, as noted earlier, was clearly the most important matter at stake.

The Jury

Endeavouring to make sure the jury could understand the evidence was important to both professions. AC claimed it was necessary to ensure that juries understand that they have an important role, although there were concerns about the capacity of the jury to undertake the task. There appear to be two issues, jury comprehension and the impact of legal practices on the

jury's role. Again the manner in which legal discourses and control prevails is a central theme.

Jury Comprehension

With regard to understanding the law it was evident from the interviews that the legal concepts and normative standards were not automatically addressed, remaining implicit, with concern focusing on procedural processes pertinent to a case. The process itself is seen as ensuring that the issues are dealt with. This impression was supported by remarks by KR. Determining the *mens rea* of the defendant is in theory the critical issue in court, yet KR states that judges and barristers tend to speak in a code about *mens rea* and act on a *gut feeling* about whether the evidence constitutes diminished responsibility. He claims that the matter is not overtly discussed because *tacit knowledge* and *gut instinct* are critical aspects of the legal process. So, despite the concerns of JM and the Judge with technical requirements for directing the jury, there is support for the idea that professionals find it hard to appreciate what needs explaining, let alone how they do it, to professionals from other disciplines, or the layperson in the jury. Therefore, judicial directions will be given but the issues they are referring to may not have been obvious within the case. In addition, KR and AC note how difficult legal language is, with DW saying that judges tend to forget they have not got twelve law students before them, and therefore they should use 'noddy' language. The Judge and barrister both claimed the practice of pleading diminished responsibility and provocation together makes it even more difficult for the jury because each defence has a different onus and burden of proof, and addresses different matters.⁴⁴¹ An additional burden is the requirement that the jury evaluate the defendant's behaviour against the *reasonable man* who has the same abnormal mental disorder when they have in all probability no experience of such a mental state.

In terms of the expert's evidence, the legal perception of SB and KR was that it is important the jury understand the expert's conclusions. However, the Judge expressed concern that good witnesses will have the jury believing everything they say, as barristers select those that are "doughty fighters", although this is what barristers will want from their respective experts. Furthermore, the legal

⁴⁴¹ See the recent LC report on partial defences (2003).

respondents asserted that unless experts provide an *opinion* on the ultimate issue it is a difficult link to make between the diagnostic condition and the legal standard on responsibility by the judge in their directions, and ultimately by the jury. So there is an acknowledgment that no one really understands the expert's evidence and having the expert's opinion ameliorates that. Moreover, there is a tension set up by the adversarial process and within the roles in the legal process whereby the focus is frequently on the experts' evidence, which is exacerbated by the use of expert opinion, despite frequent reference to ensuring it does not overwhelm the law.

Medico-psychologists placed great emphasis on the importance of simplifying their evidence for the layperson in the jury, but they are not trained to do so. They claimed to keep the language simple and not use jargon, particularly as it was considered that many of the jury would not be very bright. However, the fact that educated professionals of long standing cannot understand technical factors from another discipline after repeated exposure does imply that intelligence is not necessarily a determining factor. There is also the question of whether it is possible for them to know how a layperson would react to their evidence so they can ensure their arguments are likely to be considered feasible. It would seem this level of professional objectivity might be hard to attain, although experience of such cases perhaps informs judgments. RH raised concerns about distinguishing between fact and opinion. It was also noted how important the judge is with regard to the jury, both for explaining matters through judges' directions, and if the opportunity to explain evidence is truncated through judicial intervention. The Judge stated that it helps if you simplify the evidence and put some of it in writing, and perhaps provide charts. He also suggests a summary of the expert's report. This is arguably helpful, but it could also be seen as another layer of legal control and interpretation.

In light of the discussion so far there is always the matter of how much of the evidence that the jury hear is actually understood by them because they are having to juxtapose scientific truths, legal rules, and expectations around what constitutes the reasonable man. The jury have not had the benefit of professional training or previous exposure, which professionals involved in the cases have, and even they, with the benefit of experience, admit to struggling

with the other profession's discourses. Also references were made to the limited intelligence of many jurors. As a result there is speculation about what other factors juries might take into account if they cannot comprehend the technical aspects of the case, as chapter six shows, and the possible impact prejudices against mental illness may have, discussed in chapter seven. Examples reflected some of the factors outlined in chapter four. Moreover, the Judge expressed concern that the cases are often emotional. Therefore, the legal respondents' recognition that the jury really struggle with the complexity of the legal and expert evidence, which is exacerbated by the linking of diminished responsibility and provocation, may be another factor that encourages the trend not to go to trial. However, control appears to remain with the legal system, whichever option is selected, with the validity of decisions being ostensibly supported by expert opinion either way.

Jury Role

It was frequently iterated that the jury are the ultimate arbiters, in what appeared to be a disclaimer in relation to practices by both professions for responsibility for the outcome of the case. The jury are given the role of conscience for the legal system and society, yet preceding chapters have shown that in practice they only fulfil this role in a small number of cases. Moreover, even those cases that do go before a jury are conducted in a manner that potentially undermines the jury's role. Technically the jury are required to decide the ultimate issue, as to whether the defendant's mental responsibility is substantially diminished. However they now hear the expert's opinion on the matter and are expected to decide in line with that opinion except in a limited number of circumstances described in chapter three.

Yet an expert's opinion is a value judgment not a clinical one. For example, DT stated that her opinion is based on *gut instinct*, and SP noted that accuracy is not always forthcoming in professional judgments. It has already been discussed that the expert is focusing on legal definitions of terms and legal criteria. Furthermore, as the 1975 Butler Report noted, *mental responsibility* is not a term that is found in any other statute and it may be a moral or legal concept but it is not a clinical fact (1975: para. 19.5), although the Judge saw it as a medical matter. The Butler report expressed concern that this implies the

ability to conform to the law can be measured, and went on to state that it cannot be measured scientifically, it is a matter for the jury. The extension of the expert's role to the provocation defence includes the expert giving an opinion so it is likely that the observations already made will apply to that defence as well. Respondents in this study accepted that they are expected to give their opinion, but were not necessarily happy about doing so. For example JR stated that he had argued with a judge on being asked to give his opinion, indicating that this was not his role as it was a matter for the jury, but the judge overruled the argument and required his opinion. JR expressed concern about the practice, stating that his role is not one of convicting the defendant. He recognizes, as did the Judge, that if an expert is plausible then the jury are likely to take what is said seriously, and thus experts are effectively being drawn into convicting people, which he suggested experts need to be cautious about.

In light of the evidence to date it can be argued that experts are already viewing matters in line with legal requirements, so there is a measure of influence over the formulation of their opinions that is unlikely to be achieved in respect of the jury, which is why the development of the practice of experts giving an opinion is legally expedient. It can be seen that the jury's role has in many ways been usurped and they seem to serve a notional role, with references to their symbolic role masking the reality of the decision-making process.

Inter-Professional Relationships, Local Values and The Routine Nature of Cases

A major observation that emerged from analysing the interaction of the two professions through the interview data was the confirmation of earlier depictions that the law emasculates the medico-psychological view of the mind, and as a result expert evidence plays a symbolic role, helping to secure legal objectives. Thus the particular operation of the law obtained through formal legal control of the interpretation of the defences and the formulation of rules on the admission of evidence, is further supported by the inter-professional relationships that develop.

However, it also has to be said that the theoretical and practitioners' discussions seem a long way apart, although the judiciary provide a link between the two debates. What was evident after conducting the three levels of analysis was the routine nature of the processing of cases, which is in stark contrast to the complex underpinnings to the rule of law (Silbey 1981: 22-4). It would appear that procedural routines mean that delicate moral issues do not need to be actively addressed, so professionals can avoid the inherent incongruities. The appraisal shows how little the tensions matter to practitioners overall, as the interviewees identified numerous contradictions between the two perspectives with little evident consternation. For example, there was no real concern on the part of lawyers about potential problems in ensuring justice arising from their lack of understanding of the experts' evidence. Similarly the experts did not express concern about the use that was made of their evidence, except for JR's reservations on the impact of giving an opinion on the ultimate issue. It would appear that the fact that only a small pool of people are involved in such cases results in particular responses becoming the norm in an area (Eisentein & Jacob 1977).

It is asserted that it is difficult for professionals to step outside the matrices of their professional discourses (Foucault 1978: 95-7; Hollis 1994; Freundlieb 1994: 162; 168; 174-7; Hunt & Wickham 1994: 28). The discussions in chapters six and seven show, along with the review contained in this chapter, show that the formal aspects of the law where these two distinct professions have to work together operate effectively through a system of informal relationships, norms and customs amongst practitioners (Church 1982: 398). The fact that a small pool of legal and medico-psychological professionals are involved in this type of work appears to develop a cohesion in the normative understanding of the application of the law, facilitating the current practices described in this thesis where expert testimony is an evidential tool (Church: 401). Therefore, while the experts reveal that they do have a different perspective on matters their adherence to the requirements of the law, and concern with procedures and acceptance by the legal profession all enable the process to exist as it does (Grau 1981). For example, as diminished responsibility is primarily dealt with through accepting the plea it is possible that a common perception of the justice of the case based on evaluations of the

defendant develop within the professional work group (Hester & Eglin 1992: 220-22).

The focus was on professional performance rather than the ethical issues arising from the use of the evidence in relation to assessing a defendant's criminal responsibility. In fact there was little reference in any of the interviews to the difficult issues pertaining to this area of law; instead considerable attention was paid to what is required to fulfil their respective roles within the routine procedures, because gaining professional approbation was deemed important. Inter-professional acceptance is also important, which appears to be based on evaluations of the competence of the individual from a professional perspective. The specialist subjectivity on the issues remains, which was apparent in the ambivalence about the veracity of the other discipline's perspective in the interviews.

There is also the importance of the tacit practices of individuals, and how they make active choices and present a version of events that removes the ambiguity and contradictory elements, and the importance of the way that the story is constructed (Taylor & White 2000: 11; Dingwall et al 2000). This reflects Luhmann's psychic autopoiesis (King & Piper 1995: 25-28). Consequently, subjectivity is introduced by the actions of individual practitioners. From a legal perspective this is negotiated within the framework of legal discourses, objectives and the adaptable legal procedures that have developed in relation to the defences, supported by lawyers' processes of selecting experts. In medico-psychological terms subjectivity is possible because of the spectrum nature of diagnostic categories being applied to obliquely defined legal mental states. Teubner maintained that the law is impervious to common sense and practical reasoning.

However, there is the impact of the jury to consider, and whilst the ways in which jury decisions are restricted have been examined in this thesis the possible ways in which the jury can undermine legal control have also been identified, the *Sutcliffe* (1981) case being cited by a number of legal respondents as an example of the latter.

Although the sample of practitioners was not vast it provided the opportunity to examine how the theoretical and philosophical matters discussed in chapters one and two were managed. It has shown that it is important to assess procedural practices because of their significance in giving effect to the law, and because changes that can have important ramifications can occur without any overt declaration, or changes that are introduced can be undermined by practitioners' normative culture. Plainly there is the possibility for discretion as judgments are made about the merits of the case by both professions, but a consistency is clearly provided by the focus on procedural issues, which overlooks the philosophical and moral difficulties such cases present. Moreover, there is support for the assertion that law is a self-referential system, discussed further below, as it provides a structured framework that uses discourses from medico-psychology but translates it into legal meanings, which influences discretion and subjectivity.

Sentencing

The other aspect of cases where the interaction of institutional discourses has significant social and policy issues underpinning the categorization of individuals, and subsequent interventions is the sentencing stage. As chapter one shows, sentencing options often have profound ramifications for the operation of the defences, with debates on the mandatory sentence for murder and insanity being obvious examples. The insanity defence is rarely used in homicide cases because of the sentence, particularly as the diminished responsibility defence is available. However, people that may qualify for an acquittal on grounds of insanity are instead choosing to use what is only a partial defence, as they plead guilty to manslaughter, but at least with this there is discretionary sentencing, although severe sentences can be, and are imposed.

It is perhaps in this respect that Foucault's theories on the significance of categorisation have the most pertinence. Chapters one and four explored the increasing range of provisions to secure the detention of those held to be dangerous and the medico-psychological involvement in this process. As with the assessment of responsibility, it is legal concerns that structure the debates, and legal control is maintained, with the judiciary once more central to the development of the operation of the law. In fact inter-professional relationships

are not as overtly significant, although it is the same small pool of experts providing the reports. Particular to the sentencing decisions, analysed in preceding chapters, are issues concerning judicial judgments as to whether to detain the defendant in prison or hospital. Mustill asserts that there is a discretionary use of the utilitarian principles of punishment, with judges developing personal tacit hierarchies, which are tested by the mentally disordered offender because of the added features of the judges' desire to be humane balanced with concerns about dangerousness (1998: 72). Experts are an integral part of the sentencing decision and it was noted in chapter four that the expert's role is seen as less problematic at the sentencing stage because it is concerned with matters of risk, dangerousness and public protection, whereas the verdict stage is about assessments of criminal culpability.

Both sets of professionals had strong views on this aspect of the legal process and remarked on how arbitrary and subjective the courts are. For example, SP said that he has trouble distinguishing between those in prison and special hospitals, with so much depending on the judge, who may or may not make use of expert reports.⁴⁴² SB asserted that if the judge wants to secure an alternative to the one suggested by the expert then they will try and find a way. It would seem that both sets of interviewees feel that poor choices are made, although JR speculated on whether there is a lot difference either way because special hospitals are not necessarily the most benign institutions.

However, as noted elsewhere, psychopaths present a particular challenge and the interview data indicates that neither hospitals nor prisons welcome them because they are difficult to manage. The interviewees' responses reflected their respective professional perspectives, with the legal focus on the provisions developed to enable law to evaluate matters in light of social issues, while the medico-psychologists adopted a technical view of the condition. For example, JM reflected legal concerns raised in chapter three about treatability and having to take into account public attitudes towards the condition. Alternatively, medico-psychological respondents referred to the law not really understanding the condition sufficiently to enable it to make informed decisions, although JR did acknowledge the political aspects to incarceration

⁴⁴² See also Slovenko (1999)

decisions. He stated that the overarching responsibilities of the law to maintain its legitimacy and support social order and public protection objectives are important influences on the exercise of judicial discretion.

Integral to the detention discussions were the potential consequences when individuals are released. Focus centred on the potential risk of those whose behaviour is controlled by taking regular medication. The topic evoked remarks about the problems of making accurate predictions of risk and having suitable provisions for those that are released, because of the need to achieve a balance between public protection and the individual's right to freedom. The Judge said that he finds reports most useful when making release decisions because of the issue of dangerousness. The DSPD provisions discussed in chapter one have introduced additional options but both sets of respondents expressed concerns about inadequate services in the community. Medico-psychological professions are plainly integral to debates on risk and dangerousness, and research into explanations and treatment options, as discussed in chapter four. As such their role straddles civil and criminal interventions, with mental health law permitting intervention in the interests of others. It will be interesting to see how the DSPD options operate.

The issue that stands out from the debates on this topic, which both sets of interviewees found difficult, is the association that exists between mental disorder, dangerousness and risk. As chapter three showed, research into these issues is resulting in an association between traits and criminal behaviour. ASPD describes behaviour that is proscribed by law, and this is usually the legal understanding of psychopathy. Therefore there are different ethical consequences to medico-psychological involvement in this aspect of the legal process to those associated with assessments of criminal responsibility. Whilst evaluating an individual's criminal responsibility is important, the significance at this stage is the possibility for interventionist measures to be introduced in respect of wider groups within society, because research on mental states is being linked to issues of risk and dangerousness, such as with the measures regarding DSPD. As chapters three and four discussed language is not neutral and there are significant implications for individuals in being labelled a risk and dangerous.

Yet as chapter two and three revealed, this is an area where the nature of behaviour can perhaps be revealed through the collaborative endeavours of the different forms of medico-psychologists coalescing around the neuroscientific endeavours (Adolphs 2003). There is increasing collaboration between disciplines under the neuroscientific banner as centres emerge within universities such as Cambridge and Nottingham, for example, making it increasingly difficult to ignore. However, this thesis highlights the importance of the social construction placed on this information within the context of legal debates on social order.

Reform

Introduction

Chapter one exposed the nature of legal reform debates, many of which have been regularly revisited without changes subsequently being introduced.⁴⁴³ A meticulous examination of the reform proposals outlined in chapter one in light of the observations made throughout the thesis is not possible because of the limitations imposed on the length of this work, but a few general observations can be made. It appears that there are two matters that need to be addressed with regard to reform, reflecting the two principle strands to emerge from the thesis. The first relates to the dominance of the legal perspective resulting in the symbolic use of medico-psychological evidence, and the second to the necessity of reform debates to take into account the application of law by practitioners.

Interaction between Law and Medico-Psychology

The investigation into the interaction between the discourses in the cases under scrutiny resulted in evidence of the manner in which the law uses medico-psychological testimony in a symbolic way. Therefore reform discussions about a more accurate use of medico-psychological terminology are specious if the current approach continues. In addition, it is important to distinguish between the use of experts and their explanations of the mind at the stage where the defendant's criminal responsibility is assessed, from their involvement in providing explanations to help with assessing risk and

⁴⁴³ The law of murder is to be revisited in 2005

dangerousness at the sentencing stage. As chapter four discussed, involvement of experts in the former is more contentious whereas the latter is seen as more beneficial because of legal and social concerns about what to do with those who represent a danger to the public and social order. The latest proposals around dangerousness and detention support long-standing beliefs that law and psychiatry should be working together to deal with violence (Stone 1984: 152).

The law is dichotomous so the defendant has to be allocated to a category, mad or bad. The issues which law examines centre on whether the action was voluntary and intended, which is a hard standard to apply, hence the diminished responsibility defence as recognition of the need for a moral derogation from the objective standard of responsibility in some circumstances. However, if the legal question in reform discussions remains focused on the *effect* of the clinical condition then law will retain all the flexible practices that have developed and it will remain a social rather than scientific question. Therefore, suggestions to change words or develop more accurate definitions, for instance with psychopathy, will not alter matters if legal meanings continue to be attributed to medico-psychological concepts and terms, and procedures stay the same. Although this is not to say that language is not important, as discussed in chapter three, the words ‘abnormality’ and ‘disorder’ have different connotations, which could perhaps change perceptions and approaches to the individuals and issues (Peay 2003: 166). So the question is whether the law should be reconceived, as the current pragmatic approach leads to anomalies, although it is debatable whether there can possibly be a system that is universally just when dealing with moral situations.

Carson suggests that there should be increased co-operation, with each profession being critically reflexive and considering what should happen in practice rather than aiming for perfect tests about distinctions (2000: 37). It seems that the latter currently occurs, without the overarching critical reflection. This research suggests it is necessary to take account of the norms that develop at a local level through the small pool of practitioners that work on these cases within each area. In a sense the thesis does present a bleak picture, as it is hard to see an intersection of law and medico-psychology developing.

Essentially the law wants to avoid expert evidence overwhelming the law and to ensure that legal considerations prevail. As it is, as the Law Commission acknowledge, the law actually operates more benignly than would be anticipated by its strict interpretation, but the flexibility is permitted through legal criteria and procedures that enable discretion to be applied in pursuance of legal objectives and evaluations of morality. Certainly the medico-psychological interviewees in this study and Mitchell's would not excuse as many as the law currently does, because, as chapter two established, there is a belief in free will and from a full appreciation of how the mind works it is clear that it takes a lot to interfere with that. Clearly there are experts who are fulfilling the role required and providing opinions to suit the law, although contested cases show that there is no universal agreement within the medico-psychological profession, which was acknowledged by respondents. In part this can be explained by the fact that diagnosis is based on a spectrum approach, and it is being applied to legal criteria on the mind, so it is not surprising that there are differences of opinion. Arguably these issues are affected by the inter-professional relationships. There is therefore, as a result of current practices, a lack of fidelity to 'the law', which would result in harsher judgments in diminished responsibility (Feeley 1979; 292). The flexibility is dependent on practices that develop within procedural constraints however. Whilst in chapter three it was stated that there are attempts to operate insanity generously, the operation of the defence is affected by the lack of plasticity in the sentence in homicide cases.

It would seem from the deliberations in this thesis that without a comprehensive appreciation of the issues the suggestions by Carson (2000), Faigman (1999: 56), Stone (1984: 152) and the medico-psychologists in this study for greater co-operation between law and medico-psychology can be called into question. It seems necessary to consider the ways in which the medico-psychological discourse is used symbolically and why training for lawyers has been deemed unnecessary to date, even though mental health matters are currently being defined and dealt with by those selfsame individuals. Perhaps it is feared that training would cloud legal thinking.

Theory v. Practitioners

The differences in perspective between legal and medico-psychological understanding of the mind depicted in chapters one and two show the theoretical, normative and moral conundrums that accompany decisions on how and where to draw the line on criminal responsibility if there are questions about the defendant's mental state. However, the application of the resulting legal provisions through judicial common law interpretations, and the procedural practices of the judiciary, barristers, solicitors and experts working within the legislative and common law framework are equally important. While the discourse of the professionals in part reflects the tensions identified in earlier debates the most outstanding factor is the routine nature of the roles as the focus is primarily on procedural and tactical concerns. Thus, as a result of the examination of the nature of the interaction of law and medico-psychology within this thesis it would seem that reform debates need to evaluate theoretical and legislative issues, common law interpretation, procedural factors, *and* inter-professional practices.

In support of the argument for such a comprehensive analysis to reform debates, it can be seen that theoretical debates focus on such factors as whether or not to acknowledge connections between character and action (Lacey 1988: 74), or whether insanity should be a status or excuse defence (Mason et al 1999: 534), while practitioners focus on procedures that can result in practices that undermine the legal principles informing the law.⁴⁴⁴ For example, practitioners made little of the legal meaning attributed to mental health terms, or that diminished responsibility is concerned with *mental responsibility*. While examining professional practice it is possible to lose sight of the moral debates the thesis started with, yet this is the way that the theoretical and moral issues are managed. Chapters three, four, six and seven identified how particular conceptual frameworks and practices sustain the legal perspective intact despite the involvement of the field of medico-psychology.

It seems that there is strong support for the argument that current practice ensures legal control by providing flexibility through illusions, which perhaps

⁴⁴⁴ This would fit with the neuroscientific arguments raised in chapter two, which take a more comprehensive approach to cognitive functions.

explains why the extensive reform proposals are not implemented. It would seem that modifications to *procedures*, such as sentencing options are more likely to have a profound impact. For example, because of the detention consequences with the insanity defence in homicide cases defendants who could perhaps receive an acquittal plead guilty to manslaughter by reason of diminished responsibility. Nonetheless, King and Piper have argued that reforms have little impact on the manner in which courts and lawyers conduct their business (1995: 10), which is an argument for reform debates including an appreciation of practices. Similarly, if tensions exist between the substantive and procedural considerations, the informal norms, expectations and procedures will affect the implementation of reforms because the formal aspects operate through them (Church 1982: 395-8; Silbey 1981: 22). Whilst judges are not neutral in the construction of the form of law and medico-psychological involvement, the current operation of the diminished responsibility defence, and the compromise of medico-psychological discourse, could not occur without the local legal culture, and its acceptance by experts. The inter-professional relationship that exists between the small pool of professionals appears to result in shared norms and attitudinal similarities for the law to work so effectively (ibid.: 401-3; Grau 1981: 96). However, the local practices take place within the broader legal framework and despite the fact it can be seen that the law is operating in a benevolent manner in some respects, there plainly are fewer cases of diminished responsibility as well as insanity over the last ten years. This trend can be viewed in conjunction with increasing concern with dangerousness and risk, with the DSPD provisions providing an example of a shift towards criminalisation rather than medicalisation (Bartlett & Sandland 2003: 237).

Perhaps what this thesis offers is a possibility to re-conceptualise the reform debate by showing the necessity to consider this area of law, and arguably others, from the three dimensions covered. Courts regulate force and provide authoritative compulsory remedies, and what has been described is the style, the form of adjudication that has developed in respect of this aspect of the rule of law, which is concerned with social order and public protection (Silbey: 22). In addition, the organised network of relationships working within the broader legal framework is also a critical consideration, with the personal

characteristics of the principal actors forming a normative set of practices to deal with the issues (Eisenstein & Jacob 1977: 10; 30-7; 287). The judge occupies a unique position as developer of the law and as a practitioner. However, as a practitioner it would appear that the judge does not have complete influence, as there is a mutual dependence with the stability of practices, which emerged from the interviews, although the judge did ultimately have the potential to exercise extensive power. The fact that practices are not necessarily considered would account for AC's remark about legislation resulting in changes that are incomprehensible to practitioners and difficult to apply (ibid.: 307-8; Feeley: 279-80; 292). Therefore, if account is not taken of the attitudes and practices of those applying the law then reforms may be absorbed with little change in procedure because of the flexibility built into current practices.

Dialectics Revisited

The dialectic perspective is concerned with the explication of the interests and values embedded in the operation of the law. In particular it was argued in chapter one that the legal recognition of the moral derogations from the objective standard of criminal responsibility was problematic because of the contradictory language and role that this generates as legal language is cognitive and factual (Norrie 2000: 157; 180). This thesis has examined these issues and the compromises that have developed as a result of the oblique language and legal concerns when assessing responsibility, given the need to consider public protection and social order, particularly because of the potential dangerousness of mentally disordered offenders. The pragmatic operation of the law has been described, showing the symbolic use of the law and the practical approach of practitioners to resolving the difficulties in applying the law.

The fact that the legal system is a social institution supporting particular normative standards and objectives is obscured, but the analysis throughout this thesis has tried to examine political and moral influences on the interpretation and implementation of the substantive law in this area. The particular legal cognitive focus on individual responsibility ignores the political and policy aspects underpinning the law. As a result the defendant's social

context, which forms a backdrop to an individual's development and their decision-making processes, can be overlooked. This is possible because attention is on the effect of the mental disorder rather than the causes it incorporates, ensuring the biopsychosocial perspective of medico-psychology is overlooked. As a result, conditions that are premised on social factors, such as BWS, have been accepted but the lack of overt discussion of clinical conditions avoids the contradictions becoming explicit, allowing the law to achieve in an ad hoc manner moral outcomes that are not in line with the stated legal position. Similarly, it is argued in this thesis, this practice is also likely to mean that the increasing infusion within clinical diagnostic categories of state-of-the-art knowledge on the mind that will further contradict the legal position will remain unexamined.

Chapter two highlighted that the construction of identity is a complex matter that requires consideration of a wide range of factors that are biological and social, and also asserted that the *concepts* available for developing a narrative to explain experience are important. The linking of mental disorders with criminal behaviour represents a significant association for those being categorised, although Hacking (1999) claims that individuals are not simply passive and a process of bio-looping occurs as people respond to the label attached. But the use of language, diagnostic conditions and the defences are important modes of classification. Different ethical considerations arise for experts depending on whether they are acting as part of the process of identifying conditions that affect determinations of criminal responsibility, or developing theories of risk and dangerousness that engender an association between mental disorders and criminal behaviour.

Furthermore, the individual orientation on the defendant within cases obscures the associations between mental health, risk and dangerousness that pervade the evaluation of the defendant and their moral status, as the sentencing stage is integrally linked to the views on the appropriate verdict. Lawyers and experts referred to this in the interviews and, in fact, it is implicit in the structure of the defence of diminished responsibility. The provisions to deal with those held to be dangerous are expanding whereas the number of insanity and diminished responsibility cases has declined over the last decade. It would appear that the

defences are legal devices that do not need to reflect medico-psychological understanding of the mind, but this has resulted in an ad hoc application of the law that is the subject of regular law commission reviews because of reservations about current practice.

There is greater involvement between law and medico-psychology over issues of detention centred on matters of risk and dangerousness. However, because the debates on risk and dangerousness focus on behaviour that is legally prohibited, there is an increasing involvement of the medico-psychological profession in explanations of criminal behaviour. The focus has extended to breaches of norms rather than simply the law, as the linking of risk and dangerousness pervades both civil and criminal debates. This buttresses Foucault's argument that medical discourse, the 'truths' developed on normality and abnormality, obscure the social norms being supported by practices as the power is exercised invisibly (1977: 94-101; 187; 273-7; 298). Thus the subject is constituted through the relations of power (ibid: 1980: 133; 198-9), and the manner in which this is achieved within this context has been examined at length through this research project. What this thesis demonstrates is the lack of support for Foucault's claim for the ascendancy of medicine over law in the disciplinary society, or the more inter-relational propositions of Hunt and Wickham, or Hacking, as the evidence supports the assertion that the law operates in an autopoietic manner, appropriating the medico-psychological evidence to secure particular legal objectives.

Conclusion

This chapter has reviewed the main issues arising from the three dimensions to the interaction of law and medico-psychology in respect of the defences of insanity and diminished responsibility. The two main findings of this thesis are, first, that the law appears to operate without having to actually incorporate the medico-psychological perspective; the interaction stays symbolic in support of achieving legal objectives in cases. The legal interpretation of medico-psychological terms and concepts means the expert has to apply clinical judgments to legal criteria, and procedures have developed to provide a flexibility that enables the inclusion or exclusion of expert evidence on a wide variety of 'legal' grounds. This challenges Foucault's assertion that as part of

the disciplinary society medical discourse would prevail over legal discourse. However, there is support for his idea that the medical rhetoric on normality and abnormality helps obscure the social norms being supported. Secondly, the analysis of the interaction through the three dimensions showed that the conceptual and procedural considerations are difficult to reconcile and yet there is arguably a need to appreciate their interaction more fully if the law is to be more cohesive and less pragmatic. Whilst the practitioners did not discuss many of the theoretical issues raised in academic debates, clearly practice is having an effect on how particular values are being upheld. Furthermore, the application and operation of the law falls to a small pool of people within an area who are involved in these cases. SP says "[i]t's really quite strange, it all hangs on people. And subjective views".

Crucially, practitioners, through focusing on procedural factors, were able to overlook the patent differences between the two disciplines and the conceptual and moral dimensions of these cases. Although both personal and professional perspectives inform the decision-making of professionals the evidence is that the procedural legal framework governs to a large extent the exercise of subjectivity as the adversarial process creates a tactical focus. Therefore, each profession undertakes their role adhering to their own objectives, although experts plainly have to be aware of the requirements of the legal system. Fundamental differences in perspective were acknowledged at times, for example the dissimilar understanding of psychopathy, but primarily the focus for professionals was on procedures and tactics, and professional acceptance, the wider implications inherent in cases remaining essentially unexplored. Fundamentally the law remains self-referential.

Although there are only a limited number of respondents in this study the findings indicate that an exploration of the application of the law is a necessary part of the theoretical academic discussions if a full appreciation of the legal position is to be obtained. Whether the self-referential nature of law can be addressed is unclear, but being aware of the processes provides a starting point for reflection. Possible future research directions following up on matters raised in this thesis include detailed reviews of reform proposals using this three dimensional level of analysis in order to develop a comprehensive

consideration of whether matters would alter if the current practices remain unchanged; evaluating possibilities for a less symbolic role for expert evidence; conducting interviews with both professions in additional areas to verify the idea that the small pool of people working on homicide cases in an area has a significant impact; and evaluations of more expert reports to examine the manner in which links are, or are not made.⁴⁴⁵ In light of the importance of the subject-matter such research would appear to be both necessary and worthwhile.

⁴⁴⁵ It would seem a system for identifying cases needs to develop to further research opportunities. Mackay (2004) has obtained access as part of the Law Commission report of August 2004.

BIBLIOGRAPHY

Cases

- Attorney-General v Prior* (Unreported, February 9, 2001) (Royal Ct (Jer))
- Attorney-General for Northern Ireland v Gallagher* [1963] A.C. 349
- Attorney-General's Reference (No.3 of 1998)* [2000] Q.B. 401
- Bolitho v City & Hackney Health Authority* [1998] A.C. 232
- Bratty v Attorney-General for Northern Ireland* [1963] A.C. 386
- Carraher v H.M. Advocate* (1946) J.C. 108
- Clough v Tameside & Glossop Health Authority* [1998] 1 W.L.R 1478
- Clunis v Camden and Islington Health Authority* [1998] Q.B. 978
- Cooper v The Queen* (1980) 110 D.L.R. (3d) 46
- Daubert v Merrell Dow Pharmaceuticals, Inc.* 43 F. 3d 1311 (9th Cir. 1993)
- DPP v Beard* [1920] A.C. 479
- DPP v Lynch* [1975] A.C. 653
- DPP v Terry* [1961] 2 QB 314
- Galbraith v Her Majesty's Advocate* [2001] ScotHC 45; [2002] JC 1
- Hall v Baxter Healthcare Corp* F Supp. 1387, 1399, 1411 (D Or 1996)
- H.M. Advocate v Blake* (1996) S.L.T. 661
- H.M. Advocate v Cunningham* (1963) J.C. 80
- H.M. Advocate v Macklin* (1876) 3 Couper 257
- H.M. Advocate v Miller* (1874) 3 Couper 16
- H.M. Advocate v Savage* (1923) J.C. 49
- Kansas v Hendricks* (1997) 138 L Ed 2d 501
- Kennedy v H.M. Advocate* (1944) J.C. 171
- Lavellee v The Queen* (1990) 55 C.C.C. (3d) 97
- Lindsay v HM Advocate* (1997) S.L.T. 67

Luc Thiet Thuan [1997] AC 131

Magalhaes Pereira v Portugal (2003) 36 E.H.R.R. 49

Maidstone Crown Court, ex p. Harrow LBC [1999] All E.R. 542

M’Naghten (1843) 10 Cl & F 200

Moore v The State (2001) W.L. 15031 (Privy Council)

National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd. (Ikarian Reefer I) (1993) 2 Lloyd’s Rep. 68

National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd. (Ikarian Reefer II) (1995) 1 Lloyd’s Rep. 455

Parkes v Port of London Authority [1987] QBD Lexis Nexis

R v Ahluwalia [1992] 4 All E.R. 889

R v Antoine [2000] 2 Cr. App. R. 94

R v Atkinson [1985] Crim L.R. 314

R v Burgess [1991] 2 Q.B. 92

R v Burr [1969] NZLR 736

R v Byrne [1960] 2 Q.B. 396

R v Campbell (1986) 84 Cr. App. R. 255

R v Camplin [1978] A.C. 705

R v Carroll (1985) 19 A. Crim. R. 410

R v Chard (1972) 56 Cr. App. R. 268

R v Clark [1972] 1 All E.R. 219

R v Codere (1916) 12 Cr. App. R. 21

R v Cox (1968) 52 Cr. App. R. 130

R v Criminal Cases Review Commission Ex p Pearson [1999] 3 All E.R. 498

R v Davies [2002] EWCA Crim 85

R v Davies (1881) 14 Cox CC 563

R v Di Duca (1959) 43 Cr App R 167

R v Dietschmann [2001] EWCA Crim 2052; [2003] 1 A.C. 1209

R v Din [1962] 2 All E.R. 123

R v Dix (1981) 74 Cr. App. R. 306

R v Dunbar [1958] 1 Q.B. 36

R v Egan [1992] 4 All E.R. 470

R v Fathi [2001] EWCA Crim. 1028

R v Fell [2001] EWCA Crim 696

R v Fenton (1975) 61 Cr. App. R. 261

R v Frances (1849) 4 Cox CC 57

R v Gilmore [1977] 2 NSWLR 935

R v Gittens (1984) 79 Cr. App. R. 272

R v Hancock & Shankland [1986] A.C. 455

R v Heeson (1878) 14 Cox CC 40

R v Hennessy [1989] 2 All E.R. 9 (CA)

R v Hobson [1998] 1 Cr.App.R.31

R v Hutchinson [1997] 2 Cr. App. R. (S) 60

R v Hyam [1975] A.C. 55

R v Ives [1970] 1 Q.B. 208

R v Jarrett (1994) 73 A. Crim. R. 160

R v Kemp [1957] 1 Q.B. 399

R v Kingston [1995] 2 A.C. 355

R v Kiszko (1978) 66 Cr. App. R. 62

R v Khan (2000) WL 11511441 (CA (Crim Div))

R v Lloyd [1967] 1 QB 175

R v Lowe [2003] EWCA Crim 677

R v Maloney [1985] A.C. 905

R v Matheson [1958] 1 W.L.R. 474
R v Matthews & Alleyne [2003] EWCA Crim 192
R v MF [2003] EWCA Crim 1173
R v Muscroft [2001] EWCA Crim. 604
R v Nedrick [1986] 1 W.L.R. 1025
R v Norton [2002] EWCA Crim 2953
R v O'Connell [1997] Crim. L.R. 683
R v O'Doherty [2002] NICA 20
R v Quick [1973] Q.B. 910 (CA)
R v Reynolds (1989) WL 651409
R v Roach [2001] EWCA 2698
R v Robb (1991) 93 Cr. App. R. 161
R v Roberts [2002] EWCA Crim 1069
R v Sanderson (1994) 98 Cr. App. R. 335
R v Smith [2002] EWCA Crim 2671
R v Smith [2001] 1 A.C. 146
R v Stockwell (1993) 97 Cr. App. R. 260
R v Sullivan [1984] A.C. 156
R v Sutcliffe The Times 30th April 1981
R v Tandy [1989] 1 W.L.R. 350
R v Taylor [2003] EWCA Crim 2447
R v Thornton [1992] 1 All E.R. 306; No. 2 [1996] 1 W.L.R. 1174
R v Turner (1975) 60 Cr. App. R. 80
R v Vinagre (1979) 69 Cr App R 104
R v Walton [2003] EWCA Crim 2254
R v Walton (1977) 66 App R 25, PC

R v Weekes [1999] Crim. L.R. 907 (CA (Crim Div))

R v Weller [2003] EWCA Crim 815

R v Windle [1952] 2 Q.B. 826

R v Woollin [1999] 1 A.C. 82

R (A Minor) (Expert Evidence) [1991] 1 F.L.R. 291

R (on the application of Martin) v Secretary of State for the Home Department [2003] EWHC 1512

R (on the application of H) v Secretary of State for the Home Department [2002] EWCA Civ 646

R (on the application of N) v Ashworth Mental Health Review Tribunal [2001] EWHC Admin 1133

Rabey v The Queen (1980) 2 S.C.R. 513

Rongonui [2000] NZLR 385

Smalling v The Queen (2001) WL 415550 (Privy Council)

The Queen (on application by Nicholas Farnell) v The Criminal Cases Review Commission [2003] EWHC 835

The Queen on application of P v Mental Health Review Tribunal for the East Midlands and North East Regions [2002] EWCA Civ 697

The Queen on the application of Ashworth Mental Health Review Tribunal v Mr A [2001] EWHC Admin 1133

US v Bonds 12 F 3d 540 (6th Cir. 1993)

US v Scheffer 140 L Ed 2d 423 (1998)

Whitehouse v Jordan [1981] 1 W.L.R. 246

Williams (Cardinal) v Queen (PC (st V)) (2000) WL 1084491

Williamson v H.M. Advocate 1994 J.C. 149

Statutes

Criminal Justice Act 1967

Criminal Justice Act 1991

Criminal Procedure (Insanity and Unfitness to Plead) Act 1991

Data Protection Act 1998

European Convention on Human Rights 1998

Homicide Act 1957

Mental Health Act 1959

Mental Health Act 1983

Official Secrets Act 1989

Powers of Criminal Courts (Sentencing) Act 2000

Official Reports

Auld, R. Sir, *Review of the Criminal Courts of England and Wales* (2001)
HMSO: London

Butler Report (1975): Home Office, Department of Health and Social Security.
Report on the Committee on Mentally Abnormal Offenders (1975) (Cmnd. 6244) HMSO: London

Consultation Paper on Homicide: The Mental Element in Murder. The Law Reform Commission, Ireland (LRC CP17-2001) [2001] IELR 2 (Dublin)

Crime in England and Wales 2002/2003: Supplementary Vol.1: Homicide and Gun Crime: 01/04 Povey, D. (ed.) National Statistics: London

Criminal Justice Bill 2002 HMSO: London

Criminal Law Revision Committee, 14th Report, *Offences Against the Person* (1980) (Cmnd. 7844) HMSO: London

Development of a Programme for Violent Psychopathic Offenders
<http://www.dspdprogramme.gov.uk/> 14/10/03

Discussion Paper on Insanity and Diminished Responsibility (2003: No. 122)
Scottish Law Commission, The Stationary Office: Edinburgh

Draft Mental Health Bill (2002) Cm 5538-1; Explanatory Notes Cm 5538-II:
Mental Health Bill: Consultation Document Department of Health 2002, Cm 5538-III HMSO: London

DSPD Programme <http://www.dspdprogramme.gov.uk/> 14/10/03

Home Office Mental Health Unit <http://www.dspdprogramme.gov.uk/>
14/10/03

House of Lords Report of the Select Committee on Medical Ethics (H.L. Paper 21-1 of Session 1993-4) HMSO: London

Intoxication as a Defence to a Criminal Offence Irish Law Commission (1995)
(CP 9-19) (Dublin)

Justice for All (2002) (Cm 5563) HMSO: London

Law Commission: *Partial Defences to Murder: Final Report* (2004)
<http://www.lawcom.gov.uk> 10/9/04

Law Commission: *A Criminal Code for England and Wales* (no.177) (1989)
HMSO: London

Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development (1999) (Home Office and Department of Health Consultation Paper) HMSO: London

Non-Fatal Offences: Draft Criminal Code 1989 (L.C. No. 218) (1993) HMSO: London

Partial Defences to Murder (2003) The Law Commission Consultation Paper (No. 173) HMSO: London

Personality Disorder: No Longer a Diagnosis of Exclusion (2003) National Institute for Mental Health in England, Department of Health HMSO: London

Reform of the Mental Health Act 1983, (1999) Proposals for Consultation (Cm 4480), Department of Health HMSO: London

Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital, Peter Fallon [Chairman], (1999), (Cm 4194-I; Cm 4194-II; Cm 4195), Department of Health HMSO: London

Report of the House of Lords on Murder and Life Imprisonment (H.L. Paper 78-1 of Session 1988-9) HMSO: London

Report of the Royal Commission on Capital Punishment 1949 – 1953 (Cmnd. 8932) (1953) HMSO: London

Richardson, G. (1999) *Review of the Mental Health Act 1983*, Report of the Expert Committee HMSO: London

Reforming the Mental Health Act, Part 1: The New Legal Framework, Cm 5016-1; *Part II: High Risk Patients*, Cm 501-II, (2000) Department of Health and Home Office HMSO: London

The Code for Crown Prosecutors (2000) The Crown Prosecution Service: London

- Fortier, A-M. 1998 'Gender, Ethnicity and Fieldwork: a Case Study' in *Researching Society and Culture*, Seale, C. (ed.), Sage: London.
- Foucault, M. 1998 'About the Concept of the "Dangerous Individual" in 19th Century Legal Psychiatry' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Foucault, M. 1980 *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* Colin Gordon (ed.) Harvester Press: Brighton
- Foucault, M. 1978 *The History of Sexuality: An Introduction* Penguin: London
- Foucault, M. 1977 *Discipline and Punish: The Birth of the Prison* Penguin: London
- Foucault, M. 1973 *The Birth of a Clinic: An Archeology of Medical Perception* Tavistock Publications: London
- Franck, T.M. 1999 *The Empowered Self: Law and Society in the Age of Individualism* Oxford University Press: Oxford
- Frankel, M.S. & Teich, A.H. (eds.) 1994 *The Genetic Frontier: Ethics, Law, and Policy* American Association for the Advancement of Science: Washington DC
- Franks, D.D. & Smith, T. S. (eds.) 1999 *Mind, Brain and Society: Toward a Neurosociology of Emotion* JAI Press Inc.: Stamford
- Freeman, W. J. 'Consciousness, Intentionality and Causality' *Journal of Consciousness Studies* Vol.6, No.11-12, 1999, pp.143-172
- Freundlieb, D. 1994 'Foucault's Theory of Discourse and Human Agency' in *Reassessing Foucault: Power, Medicine and the Body*, Jones, C. & Porter, R. (eds.) Routledge: London
- Frost, S.E. 1942 *The Basic Teachings of the Great Philosophers* The New York Library: New York
- Gallagher, I.I. 'Philosophical Conceptions of the Self: Implications for Cognitive Science' *Trends in Cognitive Science* 2000, 4(1):14-21
- Gallese, V. 'Agency and the Self Model' *Consciousness and Cognition* 8:387-389 (1999)
- Gardner, J. & Macklem, T. 'No Provocation Without Responsibility: A Reply to Mackay and Mitchell' *Criminal Law Review* 2004, Mar, 213-218
- Gardner, J. & Macklem, T. 'Compassion Without Respect? Fallacies in *R v Smith*' *Criminal Law Review* 2001, Aug, 623-635
- Gatowski, S.I., Dobbin, S.A., Richardson, J.T., Ginsberg, G.P., Merlino, M.L. & Dahir, V. 'Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World' *Law and Human Behaviour* Vol.25, No.5, 2001, pp.433-458

- Gerard, J.B. 'The Medical Model of Mental Illness: Its Application to the Insanity Defense' *International Journal of Law and Psychiatry* Vol.22, No.1, pp.65-78, 1999
- Gerrans, P. 'Authorship and Ownership of Thoughts' *Philosophy, Psychiatry and Psychology* 8.2/3 (2001) 231-237
- Gilbert, M. 'Social Rules: Some Problems for Hart's Account, and an Alternative Proposal' *Law and Philosophy* 18: 141-171, 1999
- Ginet, C. 1995 'Reasons Explanation of Action: An Incompatibilist Account' in *Agents, Causes and Events: Essays on Indeterminism and Free Will* O'Connor, T. (ed.) Oxford University Press: New York
- Glannon, W. 'Responsibility and Control: Fischer's and Ravizza's Theory of Moral Responsibility' *Law and Philosophy* 18: 187-213, 1999
- Godfrey-Smith, P. 1999 'Genes and Codes: Lessons from the Philosophy of Mind?' in *Where Biology Meets Psychology* Hardcastle, V.G. (ed.) MIT Press: Massachusetts
- Goff, Lord 'The Mental Element in the Crime of Murder' *The Law Quarterly Review* Vol.104, 1988, pp.30-59
- Goldie, P. 'Emotions, Feelings and Intentionality' *Phenomenology and the Cognitive Sciences* 1: 235-254, 2002
- Golding, S.L. 1998 'Mental Health Professionals and the Courts: The Ethics of Expertise' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Gottfried, G.M. & Jow, E.E. "'I Just Talk with my Heart': The Mind-Body Problem, Linguistic Input, and the acquisition of Folk Psychological Beliefs' *Cognitive Development* Vol.18, No.1, 2003, pp.79-90
- Graham, G. & Neisser, J. 'Probing for Relevance: What Metacognition Tells Us About the Power of Consciousness' *Consciousness and Cognition* 9:172-177 (2000)
- Grau, C.W. 'The Limits of Planned Change in Courts' *The Justice System Journal* Vol.6/1, 1981, pp.84-99
- Greenfield, S. 2000 *Brain Story* BBC Worldwide Ltd.: London.
- Griew, E. 'The Future of Diminished Responsibility' *Criminal Law Review* 1988 p.75
- Griffiths, J.A.G. 1997 *The Politics of the Judiciary* (5th Ed.) Fontana Press: London
- Griffiths, P.E. 'Beyond the Baldwin Effect: James Mark Baldwin's 'Social Heredity', Epigenetic Inheritance and Niche-Construction' (2002a) 2/5/02

- Griffiths, P.E. 'Basic Emotions, Complex Emotions, Machiavellian Emotions' (2002b) 2/5/02
- Griffiths, P.E. 'The Fearless Vampire Conservator: Philip Kitcher, Genetic Determinism and the Informational Gene' (2002c) 7/11/02
- Griffiths, P.E. 'What is Innateness?' (2002d) 2/5/02
- Grob, G.N. 1999 'On the Threshold: Illusion and Reality in American Psychiatric Thought' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Gross, R. 1995 *Themes, Issues and Debates in Psychology* Hodder & Stoughton: London
- Grounds, A.T. 1998 'Detention of 'Psychopathic Disorder' Patients in Special Hospitals: Critical Issues' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Gudjonsson, G.H. 2003 'The Psychology of Interrogations and Confessions: A Handbook' Wiley: Chichester
- Gudmundsdottir, S. 'The Teller, The Tale, and the One Being Told: The Narrative Nature of the Research Interview' *Curriculum Inquiry* Vol.26, No.3, 1996, pp.293-306
- Gunther, Y.H. 'The Phenomenology and Intentionality of Emotion' *Philosophical Studies* 117: 43-55, 2004
- Guy, L.S. & Edens, J.F. 'Juror Decision-Making in a Mock Sexually Violent Predator Trial: Gender Differences in the Impact of Divergent Types of Expert Testimony' *Behavioural Sciences and the Law* 21: 215-237 (2003)
- Hacking, I. 1999 *The Social Construction of What?* Harvard University Press: Massachsetts
- Haji, I. 'On Psychopaths and Culpability' *Law and Philosophy* 17: 117-140, 1998
- Hamer, D. & Copeland, P. 1998 *Living with our Genes: Why they Matter more than You Think* MacMillan: London
- Hardcastle, V.G. 'On Being Importantly Necessary for Consciousness' *Consciousness and Cognition* 8:152-154 (1999)
- Harding, C. & Koffman, L. 1988 *Sentencing and the Penal System* Sweet & Maxwell: London
- Hare, R.D., Clark, D., Grann, M. & Thornton, D. 'Psychopathy and the Predictive Validity of the PCL-R: An International Perspective' *Behavioural Sciences and the Law* 18: 623-645 (2000)

- Eldergill, A. 'Reforming the Mental Health Act' *The Journal of Forensic Psychiatry* Vol.12, No.2, 2001: 379-397
- Elliott, C. 'Justice for All: Erosion of the Jury System?' *Solicitors Journal* Vol.146, No.38 pp.902-903, 2002
- Elman, J.L., Bates, E.A., Johnson, M.H., Karmiloff-Smith, A., Parisi, D. & Plunkett, K. 1998 *Rethinking Innateness: A Connectionist Perspective on Development* A Bradford Book; MIT Press: Massachusetts
- Evans, D. 'The Search Hypothesis of Emotion' *British Journal of Philosophy of Science* 53 (2002) 497-509
- Eysenck, M. W. & Keane, M. T. 1998 *Cognitive Psychology* (3rd Ed.) Psychology Press Ltd.: Hove
- Faigman, D.L. 1999 *Legal Alchemy: The Use and Misuse of Science in Law* W.H. Freeman & Co.: New York
- Farrer, C. & Frith, C.D. 'Experiencing Oneself vs. Another Person as being the Cause of an Action: The Neural Correlates of an Experience of Agency' *Neuroimage* 2002, 15(3): 596-603
- Feeley, M.M. 1979 *The Process is the Punishment: Handling Cases in a Lower Criminal Court* Russell Sage Foundation: New York
- Farrington, D.P. 'Psychosocial Predictors of Adult Antisocial Personality and Adult Convictions' *Behavioural Sciences and the Law* 18: 605-622 (2000)
- Fielding, N. 1993a 'Qualitative Interviewing' in *Researching Social Life* Gilbert, N. (ed.) Sage: London
- Fielding, J. 1993b 'Coding and Managing Data' in *Researching Social Life* Gilbert, N. (ed.) Sage: London
- Filmer, P., Jenks, C., Seale, C. & Walsh, D. 1998 'Developments in Social Theory' in *Researching Society and Culture* Seale, C. (ed.) Sage: London
- Finch, J. 'Research Note: The Vignette Technique in Survey Research' *Sociology*, 1987, Vol.21, No.1, pp.105-114
- Fischer, J.M. 'Responsibility and Manipulation' *The Journal of Ethics* 8:145-177, 2004
- Fitch, W.L. & Ortega, R.J. 'Law and the Confinement of Psychopaths' *Behavioural Sciences and the Law* 18: 663-678 (2000)
- Flew, A. 1973 *Crime or Disease?* MacMillan: London
- Foot, P. 1966 'Free Will as Involving Determinism' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York
- Forrester, A. 'Preventive Detention, Public Protection and Mental Health' *The Journal of Forensic Psychiatry* Vol.13, No.2, 2002. pp.329-344

- Duff, R. 1990 *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* Basil Blackwell Ltd: Oxford
- Dutton, D.G. 'The Neurobiology of Abandonment Homicide' *Aggression and Violent Behaviour* Vol.7, No.4, 2002, pp.407-421
- Dyzenhaus, D. 'The Genealogy of Legal Positivism' *Oxford Journal of Legal Studies* Vol.24, No.1, (2004) pp.39-67
- Dyzenhaus, D. 'Hobbes and the Legitimacy of Law' *Law and Philosophy* 20: 461-498, 2001
- Eastman, N. 2000 'Psycho-Legal Studies as an Interface Discipline' in *Behaviour, Crime, and Legal Processes: A Guide for Forensic Practitioners* McGuire, J., Mason, T. & O'Kane, A. (eds.) John Wiley & Sons Ltd: Chichester
- Eastman, N. 1998 'Psychiatric, Psychological, and Legal Models of Man' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Eastman, N. & Peay, J. 1999 *Law Without Enforcement: Integrating Mental Health and Justice* Hart Publishing: Oxford
- Edelman, G. M. & Tononi, G. 2000 *Consciousness: How Matter Becomes Imagination* Allen Lane The Penguin Press: London
- Edens, J.F., Cruise, K.R. & Buffington-Vollum, J.K. 'Forensic and Correctional Applications of the Personality Assessment Inventory' *Behavioural Sciences and the Law* 19: 519-543 (2001)
- Editor 'Partial Defences to Murder' *Criminal Law Review* 2004, Jan, 1
- Editor 'A Guide to the Literature on Aggressive Behaviour' *Aggressive Behaviour* Vol.28, pp.bmi-bmx (2002)
- Edmond, G. 'Judicial Representations of Scientific Evidence' *The Modern Law Review* Vol.63, No.2, 2000, pp.216-251
- Edwards, S.S.M. 'Abolishing Provocation and Reframing Self-Defence – The Law Commission's Options for Reform' *Criminal Law Review* 2004, Mar. 181-197
- Eigan, J.P. 1994 'I answer as a Physician: Opinion as Fact in Pre-McNaughten Insanity Trials' in *Legal Medicine in History* Clark, M. & Crawford, C. (eds.) Cambridge University Press: Cambridge
- Eisenberg, N. 'Emotion, Regulation, and Moral Development' *Annual Reviews Psychology* 2000 51:665-679
- Eisenstein, J. & Jacob, H. 1977 *Felony Justice: An Organizational Analysis of Criminal Courts* Little, Brown & Co.: Boston

- Dell, S. 1984 *Murder into Manslaughter: The Diminished Responsibility Defence in Practice* Oxford University Press: Oxford
- Dennett, D.C. 2003 *Freedom Evolves* Allen Lane Penguin Press: London
- Dennett, D.C. 'Are we Explaining Consciousness Yet? *Cognition* 2001, Vol.79 (1-2) pp.221-237
- Dennett, D.C. 'Facing Backwards on the Problem of Consciousness' *Journal of Consciousness Studies* 3(1) 1996, pp.4-6
- Dennett, D.C. 1991 *Consciousness Explained* Little, Brown & Co.: Boston
- Dennis, I. 'The Auld Review: Part 2' *Criminal Law Review* 2002, Jan, 1-2
- Denno, D.W. 'A Mind to Blame: New Views on Involuntary Acts' *Behavioural Sciences and the Law* 21: 601-618 (2003)
- DeVault, M.C. & McCoy, L. 2002 'Institutional Ethnography: Using Interviews to Investigate Ruling Relations' in *Handbook of Interview Research: Context and Method* Gubrium, J.F. & Holstein, J.A. (eds.) Sage: Thousand Oaks
- Diagnostic and Statistical Manual of Mental Disorders*, (4th Ed.), Text Revision (2000) American Psychiatric Association: Washington, DC
- Dilman, I. 1999 *Free Will: An Historical and Philosophical Introduction* Routledge: London
- Dine, J. & Gobert, J. 1993 *Cases and Materials on Criminal Law* Blackstone Press Ltd.: London
- Dingwall, R., Durkin, T., Pleasence, P., Felstiner, W.L.F. & Bowles, R. 'Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases' *Legal Studies* Vol.20, No.1, 2000, pp.1-18
- Doney, W. (ed.) 1968 *Descartes* MacMillan: London
- Doyle, L.A. 1981 'A Matter of Life and Death: Medicine, Health and Statistics' in *Demystifying Social Statistics* Irvine, J., Miles, I. & Evans, J. (eds.) Pluto Press: London
- Dresser, R. 1999 'Criminal Responsibility and the Genetics defense' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Duff, A. & Garland, D. (eds.) 1994 *A Reader on Punishment* Oxford University Press: Oxford
- Duff, R. 'Choice, Character and Criminal Liability' *Law and Philosophy* Vol.12, 1993, p.345

- Creswell, J. W. 1998 *Qualitative Inquiry and Research design: Choosing Among Five Traditions* Sage: London
- Crichton, J.H.M., Darjee, R., McCall-Smith, A. & Chiswick, D. 'Mental Health (Public Safety and Appeals) (Scotland) Act 1999: Detention of Untreatable Patients with Psychopathic Disorder' *The Journal of Forensic Psychiatry* Vol.12, No.3, 2001, pp.647-661
- Crick, F. 1994 *The Astonishing Hypothesis: The Scientific Search for the Soul* Touchstone Books: London
- Crossley, M. 1999 'The Genetics Defense: Hurdles and Pressures' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Cubitt, R.P. & Sugden, R. 'Dynamic Decision-Making Under Uncertainty: An Experimental Investigation of Choices Between Accumulator Gambles' *The Journal of Risk and Uncertainty* 22:2, 103-128, 2001
- Cunningham, M.D. & Reidy, T.J. 'Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behaviour in Sentencing Evaluations' *Behavioural Sciences and the Law* 16, 333-351 (1998)
- Czarniawska, B. 2002 'Narrative, Interviews, and Organisations' in *Handbook of Interview Research: Context and Method* Gubrium, J.F. & Holstein, J.A. (eds.) Sage: Thousand Oaks
- Dallaire, B., McCubbin, M., Morin, P. & Cohen, D. 'Civil Commitment due to Mental Illness and Dangerousness: The Union of Law and Psychiatry Within a Treatment-Control System' *Sociology of Health & Illness* Vol.22, No.5, 2000, pp.679-699
- Damasio, A. 2003 *Looking for Spinoza: Joy, Sorrow and the Feeling Brain* William Heinemann: London
- Damasio, A. 2000 *The Feeling of What Happens* Vintage: London
- Damasio, A. 1994 *Descartes' Error* Papermac: London
- Darbyshire, P. 'What can we Learn from Published Jury Research? Findings for the Criminal Courts Review 2001' *Criminal Law Review* 2001, Dec, 970-979
- Davidson, R.J., Putnam, K.M. & Larson, C.L. 'Dysfunction in the Neural Circuitry of Emotion Regulation – A Possible Prelude to Violence' *Science* Vol.289, No.5479, 2000, pp.591-594
- Davidson, D. 1966 'Actions, Reasons, and Causes' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York
- Deikman, A.J. 'I = Awareness' *Journal of Consciousness Studies* 3(4) 1996, pp.350-356

Books and Articles

- Abrams Faude, J., Jones, C. W. & Robins, M. 1996 'The Affective Life of Infants: Empirical and Theoretical Foundations' in *Knowing Feeling: Affect, Script, and Psychotherapy* Nathanson, D. L. (ed.) W.W. Norton Company: New York
- Abshire, J. & Bornstein, B.H. 'Juror Sensitivity to the Cross-Race Effect' *Law and Human Behaviour* Vol.27, No.5, 2003, pp.471-480
- Albuquerque, J., Deschauer, D. & Grof, P. 'Descartes' Passions of the Soul - Seeds of Psychiatry?' *Journal of Affective Disorders* 2002, pp. 1-9
- Adolphs, R. 'Cognitive Neuroscience of Human Social Behaviour' *Nature Reviews Science* 4, 165-178 (2003)
- Adshead, G. 'Measuring Moral Identities: Psychopaths and Responsibility' *Philosophy, Psychiatry & Psychology* Vol. 10, No.2, 2003, pp.185-187
- Adshead, G. 'Capacities and Dispositions: Reflections on Good and Evil from a Forensic Psychiatrist' . 19/09/02
- Adshead, G. 'Psychopaths and Other-Regarding Beliefs' *Philosophy, Psychiatry & Psychology* 6.1 (1999) 41-44
- Alper, J. S. 'Genes, Free Will, and Criminal Responsibility' *Social Science and Medicine* Vol. 46, No.12, 1998, pp.1599-1611
- Angermeyer, M.C. & Schulze, B. 'Reinforcing Stereotypes: How the Focus on Forensic Cases in News Reporting may Influence Public Attitudes Towards the Mentally Ill' *International Journal of Law and Psychiatry* Vol.24, No.4-5, 2001, pp.469-486
- Anscombe, E. & Geach, P.T. 1976 *Descartes Philosophical Writings* Nelson's University Paperbacks: Open University Press: Maidenhead
- Arboleda-Flórez, J. 'On Automatism' *Current Opinion in Psychiatry* Vol.15(6) 2002, pp.569-576
- Ashworth, A. & Mitchell, B. 2000 'Introduction' in *Rethinking English Homicide Law* Ashworth, A. & Mitchell, B. (eds.) Oxford University Press: Oxford
- Atkinson, A.P. 'Pathological Beliefs, Damaged Brains' *Philosophy, Psychiatry and Psychology* 8.2/3 (2001) 225-229
- Bar-On, R., Tranel, D., Denburg, N.L. & Bechara, A. 'Exploring the Neurological Substrate of Emotional and Social Intelligence' *Brain* Vol.126, No.8, pp.1790-1800, 2003
- Baron-Cohen, S., Ring, H.A., Wheelwright, S., Bullmore, E.T., Brammer, M.J., Simmons, A. & Williams, S.C.R. 'Social Intelligence in the Normal and Autistic Brain: An fMRI Study' *European Journal of Neuroscience* Vol.11, pp.1891-1898, 1999

- Barnard, S. 'Construction and Corporeality: Theoretical Psychology and Biomedical Technologies of the Self' *Theory & Psychology* 2000 vol.10(5): 669-688
- Barratt, E.S. & Felthous, A.R. 'Impulsive versus Premeditated Aggression: Implications for Mens Rea Decisions' *Behavioural Sciences and the Law* 21: 619-630 (2003)
- Barsalou, L.W., Simmons, W.K., Barbey, A.K. & Wilson, C.D. 'Grounding Conceptual Knowledge in Modality-Specific Systems' *Trends in Cognitive Sciences* Vol.7, No.2, February 2003, pp.84-91
- Barsby, C. & Ashworth, A.J. 'Homicide: Homicide Act 1957 s.3 – Defence of Provocation' *Criminal Law Review* 2003, Oct, 724-727
- Bartlett, P. & Sandland, R. 2003 *Mental Health Law: Policy and Practice* (2nd ed.) Oxford University Press: Oxford
- Bartlett, P. & McHale, J. 'Mental Incapacity and Mental Health: The Development of Legal Reform and the Need for Joined-up Thinking' *Journal of Social Welfare and Family Law* 25(4) 2003: 313-324
- Benn, P. 'The Responsibility of The Psychopathic Offender: *Commentary of Ciocchetti*' *Philosophy, Psychiatry & Psychology* Vol. 10, No.2, 2003, pp.198-192
- Bentham, J. 1748-1832: 1970 *An Introduction to the Principles of Morals and Legislation* Burns, J.H. & Hart, H.L.A. (eds.) Methuen: London
- Berman, M.E. & Coccaro, E.F. 'Neurobiologic Correlates of Violence: Relevance to Criminal Responsibility' *Behavioural Sciences and the Law* 16, 303-318 (1998)
- Bieberich, E. 'Recurrent Fractal Neural Networks: A Strategy for the Exchange of Local and Global Information Processing in the Brain' *Biosystems* Vol.66, No.3, 2002, pp.145-164
- Briggs, J.P. & Peat, F.D. 1985 *Looking Glass Universe* Fontana: London
- Broad, C. D. 1966 'Determinism, Indeterminism and Libertarianism' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York
- Brock, D.W. & Buchanan, A.E. 1999 'The Genetics of Behaviour and Concepts of Free Will' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Brunskell, H. 1998 'Feminist Methodology' in *Researching Society and Culture* Seale, C. (ed.) Sage: London
- Bulmer, M. (ed.) 1999 *Sociological Research Methods* (2nd ed) MacMillan Press Ltd & Transaction Books: New Brunswick USA

- Burrell, G. & Murray, A. 'Cot Death – Fact or Fiction?' *Archibald News* 2003, 3, 8
- Cale, E.M. & Lilienfeld, S.O. 'Sex Differences in Psychopathy and Antisocial Personality Disorder' *Clinical Psychology Review* Vol.22, No.8, 2002, pp.1179-1207
- Campbell, C. 'Action as Will-Power' *The Sociological Review* 1999, pp.48-61
- Campbell, C. A. 1966a 'The Psychology of Effort of Will' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York
- Campbell, C. A. 1966b 'Is "Freewill" a Pseudo-Problem?' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York.
- Campbell, J. 'Rationality, Meaning, and the Analysis of Delusion' *Philosophy, Psychiatry and Psychology* 8.2/3 (2001) 89-100
- Campbell, J.K. 'A Compatibilist Theory of Alternative Possibilities' *Philosophical Studies* 88:319-330, 1997
- Campbell, P. G. 'Diagnosing Agency' *Philosophy, Psychiatry, & Psychology* 7.2 (2000) 107-119
- Cane, P. 2002 *Responsibility in Law and Morality* Hart Publishing: Oxford
- Canli, T. & Amin, Z. 'Neuroimaging of Emotion and Personality: Scientific Evidence and Ethical Considerations' *Brain and Cognition* Vol. 50, No.3, 2002, pp.414-431
- Card, R. 2001 *Card, Cross and Jones: Criminal Law* (15th Ed) Butterworths: London
- Carruthers, J. 'Are Juries Safe' *Scots Law Times* 2001, 25, 217-221
- Carson, D. 2000 'The Legal Context: Obstacle or Opportunity?' in *Behaviour, Crime, and Legal Processes: A Guide for Forensic Practitioners* McGuire, J., Mason, T. & O'Kane, A. (eds.) John Wiley & Sons Ltd: Chichester
- Carter, R. 2002 *Consciousness* Weidenfeld & Nicolson: London
- Casebeer, W.D. & Churchland, P.S. 'The Neural Mechanisms of Moral Cognition: A Multiple-Aspect Approach to Moral Judgement and Decision-making' *Biology and Philosophy* 18:169-194, 2003
- Casey, J. 'Legal Defences and Expert Testimony on the Battered Woman Syndrome: A Focus on Self-Defence' *Scots Law Times* 2003, 31, 247-252
- Casey, J. 'Diminished Responsibility and Battered Women Who Kill' *Scots Law Times* 2001, 38, 311-317
- Chalmers, D.J. (ed.) 2002 *Philosophy of Mind: Classical and Contemporary Readings* Oxford University Press: New York

- Chalmers, D.J. 'Facing Up to the Problem of Consciousness' *Journal of Consciousness Studies* 2(3) 1995, pp.200-219
- Chalmers, J. 'Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism' *Criminal Law Review* 2004, Mar, 198-212
- Christman, J. 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' *Philosophical Studies* 117: 143-164, 2004
- Church, T.W. Jr. 'The 'Old and the New' Conventional Wisdom of Court Delay' *The Justice System Journal* Vol.7, No.3 (1982) 395-412
- Cicchetti, D. 'The Impact of Social Experience on Neurobiological Systems: Illustration from a Constructivist View of Child Maltreatment' *Cognitive Development* Vol.17, Nos.3-4, 2002, pp.1407-1428
- Ciocchetti, C. 'The Responsibility of the Psychopathic Offender' *Philosophy, Psychiatry & Psychology* Vol.10, No.2, 2003, pp.175-183; 195-198
- Coffey, A. & Atkinson, P. 1996 *Making Sense of Qualitative Data* Sage: Thousand Oaks
- Cole, J. 'Empathy Needs a Face' *Journal of Consciousness Studies* Vol.8, No.5-7, 2001, pp.51-68
- Coles, E.M. & Veiel, H.O.F. 'Expert Testimony and Pseudoscience: How Mental Health Professionals are Taking Over the Courtroom' *International Journal of Law and Psychiatry* Vol.24, No.6, 2001, pp.607-625
- Coles, E.M. 'The Emperor in the Courtroom: Psychology and Pseudo-Science' *The Journal of Forensic Psychiatry* Vol.11, No.1, 2000, 1-6
- Collett, M.E. & Kovera, M.B. 'The Effects of British and American Trial Procedures on the Quality of Juror Decision-Making' *Law and Human Behaviour* Vol.27, No.4, 2003, pp.403-421
- Coombs, M. 1999 'A Brave New Crime Free World?' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Cooper, B. 'Nature, Nurture and Mental Disorder: Old Concepts in the new Millenium' *British Journal of Psychiatry* (2001) 178 (suppl.48) s91-s102
- Cooper, J. & Hall, J. 'Reaction of Mock Jurors to testimony of a Court Appointed Expert' *Behavioural Sciences and the Law* 18:719-729 (2000)
- Cotterrell, R. 1984 *The Sociology of Law* Butterworths: London
- Cotton, J. 2004 'Homicide' in *Crime in England and Wales 2002/2003: Supplementary Vol.1: Homicide and Gun Crime*, Povey, D. (ed.) National Statistics: London

- Hare, R.D. 1993 *Without Conscience: The Disturbing World of the Psychopaths Amongst Us* The Guildford Press: New York
- Hare, R.M. 1963 *Freedom and Reason* Oxford University Press: London
- Harpwood, V. 'Bolitho, Expert Evidence and the Role of Judges' *Health Law* 2001, 6(10), 1-3
- Harris, R. 1989 *Murderers and Madness: Medicine, Law, and Society in the Fin de Siècle* Clarendon Press: Oxford
- Hart, H. L. A. 1968 *Punishment and Responsibility* Clarendon Press: Oxford
- Hastie, R. 'Problems for Judgment and Decision Making' *Annual reviews Psychology* 2001, 52:653-683
- Hawkins, K. & Trobst, K.K. 'Frontal Lobe Dysfunction and Aggression: Conceptual Issues and Research Findings' *Aggression and Violent Behaviour* Vol.5, No.2, 2000, pp.147-157
- Hawkins, K. 1998 'Assessing Evil: Decision Behaviour and Parole Board Justice' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Hayes, N. 1984, *Psychology* Thomas Nelson & Sons Ltd.: Walton-on-Thames
- Heath, C. & Luff, P. 1993 'Explicating Face-to-Face Interaction' in *Researching Social Life* Gilbert, N. (ed.) Sage: London
- Heinimaa, M. 'Ambiguities in the Psychiatric Use of the Concepts of the Person: An Analysis' *Philosophy, Psychiatry & Psychology* 7,2 (2000) 125-136
- Henwood, K. L. & Pidgeon, N.F. 1993 'Qualitative Research and Psychological Theorizing' in *Social Research* Hammersley, R. (ed.) Sage: London
- Herculano-Houzel, S. 'Psychiatric Disorders: The Chicken or the Egg?' *Nature Reviews Neuroscience* 4, 1(2003)
- Herpertz, S.C. & Sass, H. 'Emotional Deficiency and Psychopathy' *Behavioural Sciences and the Law* 18:567-580 (2000)
- Hester, S. & Eglin, P. 1992 *A Sociology of Crime* Routledge: London
- Hobart, R. E. 1966 'Free Will as Involving Determinism and Inconceivable Without it' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York
- Hindess, B. 1973 *The Use of Official Statistics in Sociology* MacMillan Press Ltd: London
- Ho, R., ForsterLee, L., ForsterLee, R. & Crofts, N. 'Justice Versus Vengeance: Motives Underlying Punitive Judgments' *Personality and Individual Differences* Vol.33, No.3, 2002, pp.365-377

- Hodgins, S. 'The Major Mental Disorders and Crime: Stop Debating and Start Treating and Preventing' *International Journal of Law and Psychiatry* 24 (2001) 427-446
- Hodgins, S. 1998 'Assessing Mental Disorder in the Criminal Justice System: Feasibility Versus Clinical Accuracy' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Hollin, C.R. 1989 *Psychology and Crime: An Introduction to Criminological Psychology* Routledge: London
- Hollis, M. 1994 *The Philosophy of Social Science* Cambridge University Press: Cambridge
- Honderich, T. (ed.) 1999 *The Philosophers: Introducing Great Western Thinkers* Oxford University Press: Oxford
- Honderich, T. 1988 *The Consequences of Determinism: A Theory of Determinism* (Volume 2) Clarendon Press: Oxford
- Honderich, T. (ed.) 1973 *Essays on Freedom of Action* Routledge & Kegan Paul: London
- Honess, T.M. 'Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial' *Criminal Law Review* 1998, Nov, 763-773
- Horder, J. 'Between Provocation and Diminished Responsibility' *King's College Law Journal* [1999] 143-166
- Hornsby-Smith, M. 1993 'Gaining Access' in *Researching Social Life* Gilbert, N. (ed.) Sage: London
- Horton II, C.C. 1999 'The Defective Gene defense in Criminal Cases' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court*, Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Horwitz, A.V. 2003 *Creating Mental Illness* University of Chicago Press: Chicago
- Hospers, J. 1966 'What Means this Freedom?' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York
- Houston, R.A. 'Courts, Doctors, and Insanity Defences in 18th and Early 19th Century Scotland' *International Journal of Law and Psychiatry* Vol.26, No.4, 2003, pp.339-354
- Howson, A. & Inglis, D. 'The Body in Sociology: Tensions inside and Outside Sociological Thought' *The Sociological Review* 2001, pp.297-317
- Hudson, B. 1987 *Justice Through Punishment: A Critique of the 'Justice' Model of Corrections* MacMillan Education Ltd: Hampshire

- Hughes, J. 1990 'The Interpretive Alternative' in *The Philosophy Of Social Research* Hughes, J. (ed.) Longman: London.
- Hunt, A. & Wickham, G. 1994 *Foucault and Law: Towards a Sociology of Law as Governance* Pluto Press: London
- Husak, D.N. 'Addiction and Criminal Liability' *Law and Philosophy* 18: 655-684, 1999
- Hutchby, I. & Wooffitt, R. 1988 *Conversation Analysis: Principles, Practices and Applications* Polity Press: Cambridge
- International Statistical Classification of Diseases and Related Health Problems*, Vol.1, Tabular list, 10th revision, Geneva: World Health Organization, 1992
- International Statistical Classification Of Diseases And Related Health Problems*, Vol.2, Instruction manual, 10th revision, Geneva: World Health Organization, 1993
- International Statistical Classification Of Diseases And Related Health Problems*, Vol.3, Alphabetical index, 10th revision, Geneva: World Health Organization, 1994
- Jackson, J. 'Modes of Trial: Shifting the Balance Towards the Professional Judge' *Criminal Law Review* 2002, Apr, 249-271
- Jager, A.D. 'Forensic Psychiatry Services in Australia' *International Journal of Law and Psychiatry* Vol.24, No.4-5, 2001, pp.387-398
- James, A. 'Murder: Medical Evidence' *Journal of Criminal Law* 2003, 67(4) 297-300
- Jasanoff, S., Markle, G.E., Petersen, J.C. & Pinch, T. (eds.) 1995 *Handbook of Science and Technology Studies* Sage: California
- Jenkins, A.H. 'Individuality in Cultural Context: The Case for Psychological Agency' *Theory and Psychology* 2001 Vol.11(3): 347-362
- John, E.R. 'A Field Theory of Consciousness' *Consciousness and Cognition* 10:184-213 (2001)
- Johns, A. 'From Dead Drunk to Dead Drunks – Medico-legal Aspects of Substance Misuse, Violence and Mental Illness' *Medico-Legal Journal* (2002) No. 3, pp.108-125
- Johnson, J.C. & Weller, S.C. 2002 'Elucidation Techniques for Interviewing in *Handbook of Interview Research: Context and Method* Gubrium, J.F. & Holstein, J.A. (eds.) Sage: Thousand Oaks
- Johnstone, G. 1997 'From Experts in Responsibility to Advisers on Punishment: The Role of Psychiatrists in Penal Matters' in *Criminal Legal Doctrine* Rush, P., McVeigh, S. & Young, A. (eds.) Ashgate: Dartmouth

- Jones, S. 'Towards a Physics of Subjectivity' (2002)
- Jupp, V. & Norris, C. 1993 'Traditions in Documentary Analysis' in *Social research: Philosophy, Politics and Practice* Hammersley, M. (ed.) Sage: London
- Kaplan, J.M. 2000 *The Limits and Lies of Human Genetic Research: Dangers for Social Policy* Routledge: New York
- Katz, L. 1987 *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* The University of Chicago Press: Chicago
- Kendall, T. & Speedwell, P. 1999 'On the Existence of the Unconscious' in *Controversies in Psychotherapy and Counselling* Feltham, C. (ed.) Sage: London
- Kenny, A. 1968 *Descartes: A Study of his Philosophy* Random House: New York
- Kiehl, K.A., Smith, A.M., Mendrek, A., Forster, B.B., Hare, R.D. & Liddle, P.F. 'Temporal Lobe Abnormalities in Semantic Processing by Criminal Psychopaths as revealed by Functional Magnetic Resonance Imaging' *Psychiatry Research: Neuroimaging* Vol.130, No.3, 2004, pp.97-312
- King, M. & Piper, C. 1995 *How the Law Thinks About Children* (2nd Ed.) Arena Publishing: Aldershot
- Kitazawa, S. 'Where Conscious Sensation Takes Place' *Consciousness and Cognition* 11 (2002) 475-477
- Kitsuse, J.I. & Cicourel, A.V. 'A Note on the Uses of Official Statistics' *Social Problems* Vol.11, No.2, 1963, pp.131-139
- Klein, S.A. 'Libet's Temporal Anomalies: A Reassessment of the Data' *Consciousness and Cognition* 11:198-214 (2002)
- Koriat, A. 'The Feeling of Knowing: Some Metatheoretical Implications for Consciousness and Control' *Consciousness and Cognition* 9:149-171 (2000)
- Kovnick, J.A. 1999 'Juvenile Culpability and Genetics' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Kramer, M.H. 'On the Moral Status of the Rule of Law' *Cambridge Law Journal* 63(1) March, 2004, pp.65-97
- Kriegel, U. 'Is Intentionality Dependent Upon Consciousness?' *Philosophical Studies* pp.271-307, 2003
- Kupfer, D.J., First, M.B. & Regier, D.A. 2002 *A Research Agenda for DSM-IV* American Psychiatric Association: Washington D.C.

Kurthen, M. 'Conscious Behaviour Explained' *Consciousness and Cognition* 8:155-158 (1999)

Lacey, N. 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' *The Modern Law Review* Vol.64, No.3, 2001, pp.350-371

Lacey, N. 1998 'Contingency, Coherence, and Conceptualism: Reflections on the Encounter between 'Critique' and 'the Philosophy of the Criminal Law'' in *Philosophy and the Criminal Law: Principle and Critique* Duff, A. (ed.) Cambridge University Press: Cambridge

Lacey, N. 1998 *State Punishment* Routledge: London

Lacey, N. 'A Clear Concept of Intention: Elusive or Illusory?' *The Modern Law Review* Vol. 56, No. 5, 1993, pp. 621-642

Lago, C. and Thompson, J. 1996 'Western Theories of Counselling and Psychotherapy' in *Race, Culture and Counselling*, Lago, C. & Thompson, J. (eds.) Open University Press: Buckingham

Larson, E.J. 1999 'Criminal Determinism in Twentieth-Century America' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC

Laver, N. 'Playing Mind Games' *Law Society's Gazette* 2002, Vol.99, No.1, pp.12-13

Lazar, D. 1998 'Selected Issues in the Philosophy of Social Science' in *Researching Society and Culture* Seale C. (ed.) Sage: London

Leppert, M. 1999 'Genetic Research and the Clinical Subtleties of Mental Illness' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC

Lerner, J.S. & Keltner, D. 'Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgement and Choice' *Cognition and Emotion* 2000, 14(4), 473-493

Lesch, K.P. & Merschedorf, U. 'Impulsivity, Aggression, and Serotonin: A Molecular Psychobiological Perspective' *Behavioural Sciences and the Law* 18: 581-604 (2000)

Levitas, R. & Guy, W. (eds.) 1996 *Interpreting Official Statistics* Routledge: London

Lewis, C.S. 1998 'The Humanitarian Theory of Punishment' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot

Libet, B. 'Timing of Conscious Experience: Reply to the 2002 Commentaries on Libet's Findings' *Consciousness and Cognition* Vol.12, No.3, 2003, pp.321-331

Lilienfeld, S.O. 'Methodological Advances and Developments in the Assessment of Psychopathy' *Behavioural Research and Therapy* 36 (1998) 99-125

Lloyd, D. 'Functional MRI and the Study of Human Consciousness' *Journal of Cognitive Neuroscience* Vol.14, No.6, 2002, pp.818-831

Lloyd, D. 1964 *The Idea of Law* Penguin: London

Loewenstein, G. 'Willpower: A Decision-Theorist's Perspective' *Law and Philosophy* 19: 51-76, 2000

Looren de Jong, H. 'Genetic Determinism: How not to Interpret Behavioural Genetics' *Theory & Psychology* 2000, Vol.10(5): 615-637

López, S.R. & Guarnaccia, P.J. 'Cultural Psychopathology: Uncovering the Social World of Mental Illness' *Annual Reviews Psychology* 2000 51:571-598

Lowe, E. J. 'Self, Agency and Mental Causation' *Journal of Consciousness Studies* Vol.6, No.8-9, 1999, pp.225-239

Lymburner, J.A. & Roesch, R. 'The Insanity Defense: Five Years of Research (1993-1997)' *International Journal of Law and Psychiatry* Vol.22, No.3-4, pp.213-240, 1999

Lynch, M. 1997 'Preliminary Notes on Judges' Work: The Judge as a Constituent of Courtroom 'Hearings'' in *Law in Action: Ethnomethodological and Conversation Analytic Approaches to Law* Travers, M. & Manzo, J.F. (eds.) Ashgate: Aldershot

Lyons, D. 'Open Texture and the Possibility of Legal Interpretation' *Law and Philosophy* 18: 297-309, 1999

Macdonald, K. & Tipton, C. 1993 'Using Documents' in *Researching Social Life* Gilbert, N. (ed.) Sage: London

Mackay, R.D. & Mitchell, B.J. 'Replacing Provocation: More on a Combined Plea' *Criminal Law Review* 2004, Mar, 219-223

Mackay, R.D. & Mitchell, B.J. 'Provoking Diminished Responsibility: Two Pleas Merging into One' *Criminal Law Review* 2003, Nov, 745-759

Mackay, R.D. 'On Being Insane in Jersey: Part 2: The Appeal in Jason Prior v Attorney-General' *Criminal Law Review* 2002, Sep, 728-734

Mackay, R.D. & Gearty, C.A. 'On being Insane in Jersey – The Case of Attorney General v Jason Prior' *Criminal Law Review* 2001, Jul, 560-563

- Mackay, R. D. 2000 'Diminished Responsibility and Mentally Disordered Killers' in *Rethinking English Homicide Law* Ashworth, A. & Mitchell, B. (eds.) Oxford University Press: Oxford
- Mackay, R.D. & Kearns, G. 'An Upturn in Unfitness to Plead? Disability in Relation to the Trial Under the 1991 Act' *Criminal Law Review* 2000, Jul, 532-546
- Mackay, R.D. 'The Abnormality of Mind Factor in Diminished Responsibility' *Criminal Law Review* 1999, Mar, 117
- Mackay, R.D. & Kearns, G. 'More Fact(s) About the Insanity Defence' *Criminal Law Review* 1999, Sep, 714-725
- Mackay, R.D. & Colman, A.M. 'Equivocal Rulings on Expert Psychological and Psychiatric Evidence: Turning a Muddle into a Nonsense' *Criminal Law Review* 1996, Feb, 88-95
- Mackay, R. D. 1995 *Mental Condition Defences in the Criminal Law* Clarendon Press: Oxford
- Mackay, R.D. 'Pleading Provocation and Diminished Responsibility Together' *Criminal Law Review* 1988, 411
- Mackie, J. L. 1977 *Ethics: Inventing Right and Wrong* Penguin: Harmondsworth
- Mahendra, B. 'Convicted by Flawed Science' *New Law Journal* 2002, 152(7044), 1225
- Malle, B.F. & Nelson, S.E. 'Judging Mens Rea: The Tension between Folk Concepts and Legal Concepts of Intentionality' *Behavioural Sciences and the Law* 21: 563-580 (2003)
- Manning, N. 'Actor Networks, Policy Networks and Personality Disorder' *Sociology of Health & Illness* Vol.24, No.5, 2002 pp.644-666
- Manning, N. 'Psychiatric Diagnosis under Conditions of Uncertainty: Personality Disorder, Science and Professional Legitimacy' *Sociology of Health and Illness* Vol.22, No.5, 2000, pp.621-639
- Marcoulatos, I. 'John Searle and Pierre Bourdieu: Divergent Perspectives on Intentionality and Social Ontology' *Human Studies* 26: 67-96, 2003
- Markman, A.B. 'Thinking' *Annual Reviews Psychology* 2001 52:223-247
- Marlowe, D.B., Lambert, J.B. & Thompson, R.G. 'Voluntary Intoxication and Criminal Responsibility' *Behavioural Sciences and the Law* 17: 195-217 (1999)
- Martin, E. 'Mind-Body Problems' *American Ethnologist* Vol.27, No.3, 2000, pp.569-590

Mason, J.K. 'The Legal Aspects and Implications of Risk Assessment' *Medical Law Review* 8, 2000, pp.69-84

Mason, J.K., McCall Smith, R.A. & Laurie, G.T. 1999 *Law and Medical Ethics* (5th Ed.) Butterworths: London

Mathews, E. 'Moral Vision and the Idea of Mental Illness' *Philosophy, Psychiatry & Psychology* 6.4 (1999) 299-310

May, T. 'On Raz and the Obligation to Obey the Law' *Law and Philosophy* 16: 19-36, 1997

McCrone, J. 'A Bifold Model of Freewill' *Journal of Consciousness Studies* Vol.6, No.8-9, 1999, pp.241-259

McEwan, J. 2000 'Decision-Making in Legal Settings' in *Behaviour, Crime, and Legal Processes: A Guide for Forensic Practitioners* McGuire, J., Mason, T. & O'Kane, A. (eds.) John Wiley & Sons Ltd: Chichester

McGaugh, J.L. & Roozendaal, B. 'Role of Adrenal Stress Hormones in Forming Lasting Memories in the Brain' *Current Opinion in Neurobiology* Vol.12, No.2, 2002, pp.205-210

McGuire, J. 2000 'Explanations of Offence Behaviour' in *Behaviour, Crime, and Legal Processes: A Guide for Forensic Practitioners* McGuire, J., Mason, T. & O'Kane, A. (eds.) John Wiley & Sons Ltd: Chichester

McKenzie, I.K. 2002 'Forensic Investigative Interviewing' in *Handbook of Interview Research: Context and Method* Gubrium, J.F. & Holstein, J.A. (eds.) Sage: Thousand Oaks

McSherry, B. 'Voluntariness, Intention, and the Defence of Mental Disorder: Toward a Rational Approach' *Behavioural Sciences and the Law* 21: 581-599 (2003)

McSherry, B. 'Expert Testimony and the Effects of Mental Impairment: Reviving the Ultimate Issue' *International Journal of Law and Psychiatry* 24 (2001) 13-21

McSherry, B. 'Getting Away with Murder? Dissociative States and Criminal responsibility' *International Journal of Law and Psychiatry* Vol.21, No.2. 1998, pp.163-176

McSherry, B. 'The Reformulated Defence of Insanity in the Australian Criminal Code Act 1995 (Cth)' *International Journal of Law and Psychiatry* Vol.20, No.2, 1997, pp.183-197

Menzies, R., Webster, C.D., McMain, S., Staley, S. & Scaglione, R. 1998 'The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot

- Merzhanova, G.KH. 'Local and Distributed Neural Networks and Individuality' *Neuroscience and Behavioural Physiology* Vol.33, No.2. 2003, pp.163-170
- Midgley, M. 2001/1984 *Wickedness* Routledge: London
- Miles, I. & Irvine, J. 1981 'The Critique of Official Statistics' in *Demystifying Social Statistics* Irvine, J., Miles, I. & Evans, J. (eds.), Pluto Press: London.
- Mill, J. S. 1966 'The Freedom of Will' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York
- Mills, S. 'Criminal Law (Insanity) Bill 2002: Putting Insanity Back into Sanity?' *Bar Review* 2003, 8(3), 101-106
- Mitchell, B. 'Further Evidence of the Relationship Between Legal Public Opinion on the Law of Homicide' *Criminal Law Review* 2000, Oct, 814-827
- Mitchell, B. 'Public Perceptions of Homicide and Criminal Justice' *The British Journal Of Criminology* 38: 453-472 (1998)
- Mitchell, B. 'Putting Diminished Responsibility Law into Practice: A Forensic Psychiatric Perspective' *Journal for Psychiatry* Vol.8, 1997, pp.620-634
- Moldin, S.O. 1999 'Genetic Research on Mental Disorders' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Monahan, J. 1998 'Mental Disorder and Violent Behaviour: Perceptions and Evidence' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Moore, M. 'Causation and the Excuses' *California Law Review* 1985, p.1091
- Moore, M. 1984 *Law and Psychiatry: Rethinking the Relationship* Cambridge University Press: Cambridge
- Moore, T.M., Scarpa, A. & Raine, A. 'A Meta-Analysis of Serotonin Metabolite 5-HIAA and Anti-Social Behaviour' *Aggressive Behaviour* Vol.28, pp.299-16 (2002)
- Morawski, L. 'Law, Fact and Legal Language' *Law and Philosophy* 18: 461-473, 1999
- Morris, N. 1999 'The Abolition of the Special Defence of Insanity' in *Foundations of Criminal Law* Katz, L., Moore, M.S. & Morse, S.J. (eds.) Oxford University Press: Oxford
- Morrow, R. A. & Brown, D. D. 1994 'Postempiricist Critiques of Positivism and Empiricism' in *Critical Theory and Methodology* Morrow, R. A. & Brown, D. D. (eds.) Sage: London

- Morse, S.J. 'Hooked on Hype: Addiction and Responsibility' *Law and Philosophy* 19: 3-49, 2000
- Morse, S.J. 'Craziness and Criminal Responsibility' *Behavioural Sciences and the Law* 17: 147-164 (1999a)
- Morse, S.J. 1999b 'Excusing the Crazy: The Insanity Defense Reconsidered' in *Foundations of Criminal Law* Katz, L., Moore, M.S. & Morse, S.J. (eds.) Oxford University Press: Oxford
- Morse, S. J. 'Excusing the Crazy: The Insanity Defense Reconsidered' *Southern California Law Review* 1985, p.777
- Moustakas, C. 1990 *Heuristic Research: Design, Methodology and Applications* Sage: London
- Mullen, P.E. 'Moral Principles Don't Signify' *Philosophy, Psychiatry, & Psychology* 9.1 (2003) pp.19-21
- Mullen, P.E. 'Homicide' *Current Opinion in Psychiatry* Vol.13(6) 2000, pp.575-579
- Murphy, C. & Vess, J. 'Subtypes of Psychopathy: Proposed Differences Between Narcissistic, Borderline, Sadistic, and Antisocial Psychopaths' *Psychiatric Quarterly* Vol.74, No.1, 2003
- Murphy, T.F. & Lappé, M.A. 1994 *Justice and the Human Genome Project* University of California Press: Berkeley
- Musacchio, J.M. 'Dissolving the Explanatory Gap: Neurobiological Differences between Phenomenal and Propositional Knowledge' *Brain and Mind* 3:331-365, 2002
- Mustill, Lord 1998 'The Mentally Disordered Offender: A Call for Thought' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Nagel, T. (ed.) 1995 *Other Minds: Critical Essays 1969-1994* Oxford University Press: Oxford
- Neff, K.D. & Helwig, C.C. 'A Constructivist Approach to Understanding the Development of Reasoning about Rights and Authority within Cultural Contexts' *Cognitive Development* Vol.17, No.3-4, 2002, pp.1429-1450
- Nicholson, R. A. & Norwood, S. 'The Quality of Forensic Psychological Assessments, Reports, and Testimony: Acknowledging the Gap Between Promise and Practice' *Law and Human Behaviour* Vol.24, No.1, 2000, pp.9-44
- Nielsen, L. 'The Simulation of Emotion Experience: On the Emotional Foundations of Theory of Mind' *Phenomenology and the Cognitive Sciences* 1: 255-286, 2002

- Niveau, G. & Sozonets, E. 'Criminal Responsibility Assessment in Switzerland: Changes and Continuity' *European Psychiatry* Vol.16, No.8. 2001, pp.483-490
- Norrie, A. 2000 *Punishment, Responsibility and Justice: A Relational Perspective* Oxford University Press: Oxford
- Norrie, A. 'After Woollin' *Criminal Law Review* 1999, Jul, 532-544
- Norrie, A. 1998 "'Simulacra of Morality'? Beyond the Ideal/Actual Antimonies of Criminal Justice' Law" in *Philosophy and the Criminal Law: Principle and Critique* Duff, A. (ed.) Cambridge University Press: Cambridge
- Norrie, A. 1997 'Legal and Moral Judgment in the 'General Part'' in *Criminal Legal Doctrine* Rush, P., McVeigh, S. & Young, A. (eds.) Ashgate: Aldershot
- Norrie, A. 'Oblique Intention and Legal Politics' *The Criminal Law Review* 1989, pp.793-807
- North, N.T. & O'Carroll, R.E. 'Decision making in Patients with Spinal Cord Damage: Afferent Feedback and the Somatic Marker Hypothesis' *Neuropsychologia* Vol.39, No.5, 2001, pp.521-524
- Novas, C. & Rose, N. 'Genetic Risk and the Birth of the Somatic Individual' *Economy and Society* Vol.29, No.4, 2000, pp.485-513
- Nowell-Smith, P. H. 1966 'Freedom and Responsibility' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York
- Nozick, R. 1995 'Choice and Indeterminism' in *Agents, Causes and Events: Essays on Indeterminism and Free Will* O'Connor, T. (ed.) Oxford University Press: New York
- Nuffield Council on Bioethics 2002 *Genetics and Human Behaviour: The Ethical Context* Latimer Trend & Co. Ltd: Plymouth
- O'Carroll, R.E. & Papps, B.P. 'Decision Making in Humans: The Effect of Manipulating the Central Noradrenergic System' *Journal of Neurology, Neurosurgery and Psychiatry* 2003; 74:376-378
- Ogloff, J.R.P. 'Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) in the 20th Century' *Law and Human Behaviour* Vol.24, No.4, 2000, pp.457-483
- Palmer, D. 'Identifying Delusional Discourse: Issues of Rationality, Reality and Power' *Sociology of Health Illness* Vol.22, No.5, 2000, pp.661-678
- Pamplin, C. 'Are Expert Witness Organisations 'Anti-Competitive'? ' *New Law Journal* 1997, 147(6802), 1104
- Panksepp, J. 'At the Interface of the Affective, Behavioural, and Cognitive Neurosciences: Decoding the Emotional Feelings of the Brain' *Brain and Cognition* Vol.52(1), 2003, pp.4-14

Panksepp, J. 'The Long-Term Psychobiological Consequences of Infant Emotions: Prescriptions for the Twenty-First Century' *Infant Mental Health Journal* Vol.22, No.1-2, 2001, pp.132-173

Pannick, D. 'When Curing Mental Illness Amounts to a Death Sentence' *Times*, February 25, 2003, Law 4

Papps, B.P., Calder, A.J., Young, A.W. & O'Carroll, R.E. 'Dissociation of Affective Modulation of Recollective and Perceptual Experience Following Amygdala Damage' *Journal Neurology, Neurosurgery, Psychiatry* 2003; 74:253-254

Parker, L.S. 1999 'Genetics, Social Responsibility, and Social Practices' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC

Parzen, M.D. 'Toward a Culture-Bound Syndrome-Based Insanity Defense?' *Culture, Medicine and Psychiatry* 27: 131-155, 2003

Peay, J. 2003 *Decisions and Dilemmas: Working with Mental Health Law* Hart Publishing: Oxford

Peay, J. (ed.) (1998) *Criminal Justice and the Mentally Disordered* Ashgate: Aldershot

Peay, J. 1989 *Tribunals on Trial: A Study of Decision-making under the Mental Health Act 1983* Clarendon Press: Oxford

Pellizzoni, L. 'The Myth of the Best Argument: Power, Deliberation and Reason', *British Journal of Sociology* Vol.52, No.1, 2001, pp.59-86

Penrose, R. 1994 *Shadows of the Mind: A Search for the Missing Science of Consciousness* Oxford University Press: Oxford

Perlin, M.L. 1999 'Big Ideas, Images and Distorted Facts: The Insanity Defense, Genetics, and the Political World' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court*, Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC

Petrila, J. 'Emerging Issues in Forensic Mental Health' *Psychiatric Quarterly* Vol.75, No.1, 2004, pp.3-19

Pickering Francis, L. 1999 'Criminal Law' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC

Pink, T. 2004 *Free Will* Oxford University Press: Oxford

Platek, S.M., Keenan, J.P., Gallup, G.G.Jr & Mohamed, F.B. 'Where am I? The Neurological Correlates of Self and Other' *Cognitive Brain Research* Vol.19, No.2, April 2004, pp.114-122

- Platt, M.L. 'Neural Correlates of Decisions' *Current Opinion in Neurobiology* Vol.12, No.2, 2002, pp.141-148
- Plomin, R. 'Individual Differences Research in a Post-Genomic Era' *Personality and Individual Differences* Vol.33, No.6, 2002, pp.909-920
- Pockett, S. 'On Subjective Back-Referral and How Long it Takes to Become Conscious of a Stimulus: A Reinterpretation of Libet's Data' *Consciousness and Cognition* 11:144-161 (2002)
- Poletiek, F.H. 'How Psychiatrists and Judges Assess the dangerousness of Persons with Mental Illness: An 'Expertise Bias'' *Behavioural Sciences and the Law* 20:19-29 (2002)
- Polger, T. & Flanagan, O. 1999 'Natural Answers to Natural Questions' in *Where Biology Meets Psychology* Hardcastle, V.G. (ed.) MIT Press: Massachusetts
- Pontius, A.A. 'From Volitional Action to Automatized Homicide: Changing Levels of Self and Consciousness During Partial Limbic Seizures' *Aggression and Violent Behaviour* Vol.8, No.5, 2003, pp.547-561
- Pontius, A.P. 'Homicide Linked to Moderate Repetitive Stresses Kindling Limbic Seizures in 14 Cases of Limbic Psychotic Trigger Reaction' *Aggression and Violent Behaviour* Vol.2, No.2, pp.125-141, 1997
- Potter, J. 1996 *Representing Reality: Discourse, Rhetoric and Social Construction* Sage: London
- Pribram, K.H. 'The Self as Me and I' *Consciousness and Cognition* 8:385-386 (1999)
- Prins, H. 1998 'Mental Abnormality and Criminality – An Uncertain Relationship' in Peay, J. (ed.) *Criminal Justice and the Mentally Disordered* Ashgate: Aldershot
- Proust, J. 'Self Model and Schizophrenia' *Consciousness and Cognition* 8:378-384 (1999)
- Punch, K.F. 1998 *Introduction to Social Research: Quantitative and Qualitative Approaches* Sage: London
- Rabinow, P. (ed.) 1991 *The Foucault Reader* Penguin Books: London
- Raine, A., Lencz, T., Bihrl, S., LaCasse, L. & Colletti, P. 'Reduced Prefrontal Gray Matter Volume and Reduced Autonomic Activity in Antisocial Personality Disorder' *Archives of General Psychiatry* Vol.57, No.2, 2000: 119
- Raine, A., Meloy, J.R., Bihrl, S., Stoddard, J., LaCasse, L. & Buchsbaum, M.S. 'Reduced Prefrontal and Increased Subcortical Brain Functioning Assessed Using Positron Emission Tomography in Predatory and Affective Murderers' *Behavioural Sciences and The Law* 16, 319-332 (1998)

- Raine, A., Buchsbaum, M. & LaCasse, L. 'Brain Abnormalities in Murderers Indicated by Positron Emission Tomography' *Biological Psychiatry* 1997; 42:495-508
- Rassin, E. & Merckelbach, H. 'The Potential Conflict Between Clinical and Judicial Decision-Making Heuristics' *Behavioural Sciences and the Law* 17: 237-248 (1999)
- Rawls, J. 1999 *A Theory of Justice* Oxford University Press: Oxford
- Reason, P. 'Reflections on the Purposes of Human Inquiry' *Qualitative Inquiry*, Vol.2, No.1, 1996, pp.15-28
- Redding, R.E., Floyd, M.Y. & Hawk, G.L. 'What Judges and Lawyers Think About the Testimony of Mental Health Experts: A Survey of the Courts and Bar' *Behavioural Sciences and the Law* 19: 583-594 (2001)
- Reddy, S. 'Temporarily Insane: Pathologising Cultural Difference in American Criminal Courts' *Sociology of Health & Illness* Vol.24, No.5, 2002, pp.667-687
- Reid, W.H. & Gacono, C. 'Treatment of Antisocial Personality, Psychopathy, and other Characterologic Antisocial Syndromes' *Behavioural Sciences and the Law* 18: 647-662 (2000)
- Reiner, R. 1994 'Policing and the Police' in *The Oxford Handbook of Criminology* Maguire, M., Morgan, R. & Reiner, R. (eds.) Oxford University Press: Oxford
- Reiss, D. & Meux, C. 'Education and Training in Forensic Psychiatry' *The Journal of Forensic Psychiatry* Vol.11, No.3, 2000, pp.501-505
- Revonsuo, A. 'Binding and the Phenomenal Unity of Consciousness' *Consciousness and Cognition* 8:173-185 (1999)
- Reznek, L. 1997 *Evil or Ill? Justifying the Insanity Defence* Routledge: London
- Ridley, M. 2003 *Nature via Nurture: Genes, Experience and What Makes Us Human* Fourth Estate: London
- Robertshaw, P. 'For Auld Lang Syne – Towards the Demise of the Jury?' *Journal of Criminal Law* 2002, 66(4), 338-358
- Robins, J. 'Question of Evidence' *Law Society's Gazette* 2000, 97(48) Supp, 4-5
- Rogers, R. & Sewell, K.W. 'The R-CRAS and Insanity Evaluations: A Re-Examination of Construct Validity' *Behavioural Sciences and the Law* 17: 181-194 (1999)
- Rose, N. 2004 'Becoming Neurochemical Selves' in *Biotechnology Commerce and Civil Society* Stehr, N. (ed.) Transaction Press: New Jersey

- Rose, N. 'The Biology of Culpability: Pathological Identities in a Biological Culture' *Theoretical Criminology*, 2000, 4(1):5-34
- Rose, N. 1998 *Inventing Our Selves: Psychology, Power, and Personhood* Cambridge University Press: Cambridge
- Rose, N. 1994 'Medicine, History and the Present' in *Reassessing Foucault: Power, Medicine and the Body* Jones C. & Porter, R. (eds.) Routledge: London.
- Rose, S. 'Précis of Lifelines: Biology, Freedom, Determinism' *Behavioural and Brain Sciences*, 1999, Vol.22, pp.871-921.
- Rose, S., Lewontin, R.C. & Kamin, L.J. 1990 *Biology, Ideology and Human Nature: Not in Our Genes* Penguin: London.
- Rosenberg, A. 1999 'The Explanation of Human Action' in *Foundations of Criminal Law*, Katz, L., Moore, M.S. & Morse, S.J. (eds.) Oxford University Press: Oxford
- Rosenthal, D.M. 'Consciousness, Content, and Metacognitive Judgments' *Consciousness and Cognition* 9:203-214 (2000)
- Rutter, M. & Silberg, J. 'Gene-Environment Interplay in Relation to Emotional and Behavioural Disturbance' *Annual Reviews Psychology* 2002, 53:463-490
- Ryle, G. 1949 *The Concept of Mind* Hutchinson: London
- Sadoff, R. 'Education and Training in Forensic Psychiatry in the United States' *The Journal of Forensic Psychiatry* Vol.12, No.2, 2001, pp.263-267
- Sameer, S.P. & Adshead, G. 'Ethics in Forensic Psychiatry' *Current Opinion in Psychiatry* Vol.15(5) 2002, pp.527-531
- Sanders, A. & Young, R. 1994 *Criminal Justice* Butterworths: London
- Sanders, A. 1994 'From Suspect to Trial' in *The Oxford Handbook of Criminology* Maguire, M., Morgan, R. & Reiner, R. (eds.) Oxford University Press: Oxford
- Sass, L.A. 'Pathogenesis, Common Sense, and the Cultural Framework' *Philosophy, Psychiatry & Psychology* 8.2/3 (2001) 219-224
- Sawicki, J. 1991 'Foucault and Feminism' in *Disciplining Foucault: Feminism, Power and Body* Sawicki, J. (ed.) Routledge: London
- Scarano, V.R. 'Psychiatric Defenses to Criminal Offenses' *Current Opinion in Psychiatry* Vol.14(6) 2001, pp.559-563
- Schaffer, J.A. 1968 *Philosophy of Mind* Prentice-Hall Inc.: Englewood Cliffs
- Schiffrin, D. 1994 *Approaches to Discourse* Blackwell Publishers: Massachusetts

- Schlick, M. 1966 'When is a man Responsible?' in *Free Will and Determinism* Berofsky, B. (ed.) Harper & Row: New York
- Schopp, R.F. & Patry, M.W. 'The Guilty Mind and Criminal Sentencing: Integrating Legal and Empirical Inquiry as Illustrated by Capital Sentencing' *Behavioural Sciences and Law* 21: 631-651 (2003)
- Schopp, R.F. 1999 'Natural-Born Defense Attorneys' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Schopp, R.F. 1998 *Justification Defenses and Just Convictions* Cambridge University Press: Cambridge
- Schopp, R. F. 1991 *Automatism, Insanity, and the Psychology of Criminal Responsibility* Cambridge University Press: Cambridge
- Schore, A. 'Effects of a Secure Attachment Relationship on Right Brain Development, Affect Regulation and Infant Mental Health' *Infant Mental Health Journal* Vol.22, No.1-2, 2001, pp.7-66
- Schuller, R.A. & Rzepa, S. 'Expert Testimony Pertaining to Battered Woman Syndrome: Its Impact on Jurors' Decisions' *Law and Human Behaviour* Vol.26, No.6, 2002, pp.655-673
- Schweizer, K. 'Does impulsivity Influence Performance in Reasoning?' *Personality and Individual Differences* Vol.33, No.7, 2002, pp.1031-1043
- Scott, S. 'Fragmented Selves in Late Modernity: Making Sociological Sense of Multiple Personalities' *The Sociological Review* 1999 pp.432-460
- Scott, P.D. 1998 'Assessing Dangerousness in Criminals' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Seale, C.F 2002 'Computer Assisted Analysis of Qualitative Interview Data' in *Handbook of Interview Research: Context and Method* Gubrium, J.F. & Holstein, J.A. (eds.) Sage: Thousand Oaks
- Seale, C. (ed.) 1998 *Researching Society and Culture* Sage: London
- Searle, J. R. 'Consciousness, Free Action and the Brain' *Journal of Consciousness Studies* Vol.7, No.10, 2000, pp.3-22
- Searle, J. R. 1997 *The Mystery of Consciousness* Granta Publications: London
- Shafir, E. & LeBoeuf, R.A. 'Rationality' *Annual Reviews Psychology* 2002. 53:491-517
- Shilling, C. 'Towards an Embodied Understanding of the Structure/Agency Relationship' *British Journal of Sociology* Vol.50, No.4, 1999, pp.543-562

Shuman, D.W. 'A Comment on Christopher Ciocchetti: *The Responsibility of the Psychopathic Offender*' *Philosophy, Psychiatry & Psychology* Vol. 10, No.2, 2003, pp.193-194

Silbey, S.S. 'Making Sense of the Lower Courts' *The Justice System Journal* Vol.6/1, 1981, pp.13-27

Silverman, D. 2000 *Doing Qualitative Research: A Practical Handbook* Sage: London

Silverman, D. 1998 'Analysing Conversation' in *Researching Society and Culture*, Seale, C. (ed.) Sage: London

Simester, A.P. & Sullivan, G.R. 2003 *Criminal Law Theory and Doctrine* Hart Publishing: Oxford

Simester, A.P. & Shute, S. '*R v Woollin* (Stephen Leslie) [1998] Crim. L.R. 890 (HL)' *Criminal Law Review* 2000, Mar, 204-205

Skeem, J.L., Poythress, N., Edens, J.F., Lilienfeld, S.O. & Cale, E.M. 'Psychopathic Personality or Personalities? Exploring Potential Variants of Psychopathy and their Implications for Risk Assessment' *Aggression and Violent Behaviour* Vol.8, No.5, 2003, pp.513-546

Slovenko, R. 'The Mental Disability Requirement in the Insanity Defense' *Behavioural Sciences and the Law* 17: 165-180 (1999)

Smart, C. 1996 'The Power of Law' in *Criminological Perspectives* Muncie, J., McLaughlin, E. & Langan, M. (eds.) Sage: London

Smilansky, S. 'Compatibilism: The Argument from Shallowness' *Philosophical Studies* 115:257-282, 2003

Smith, J.C. 1999:2002, *Criminal Law/Smith and Hogan* Butterworths: London

Smith, C. 'The Sovereign State v Foucault: Law and Disciplinary Power' *The Sociological Review* 2000, pp.283-306

Smith, J.C. 'Individual Incapacities and Criminal Liability' *Medical Law Review* 6, 1998, pp.138-160

Smith, J. C. 'A Note on 'Intention'' *The Criminal Law Review* 1990, pp. 85-91

Smith, R. 1989 'Forensic Pathology, Scientific Expertise, and the Criminal Law' in *Expert Evidence: Interpreting Science in the Law* Wynne, B. E. & Smith, R. (eds.) Routledge: London.

Smith, R. & Wynne, B. E. 1989 *Expert Evidence: Interpreting Science in the Law* Routledge: London

Smith, R. 1981 *Trial by Medicine: Insanity and Responsibility in Victorian Trials* Edinburgh University Press: Edinburgh

- Soderstrom, H., Hultin, L., Tullberg, M., Wikkelso, C., Ekholm, S. & Forsman, A. 'Reduced Frontotemporal Perfusion in Psychopathic Personality' *Psychiatry Research: Neuroimaging* Vol.114, No.2, 2002, pp.81-94
- Solms, M. & Turnbull, O. 2002 *The Brain and the Inner World* Karnac: London
- Solomka, B. 1998 'The Role of Psychiatric Evidence in Passing "Longer than Normal" Sentences' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Solon, M. 'Old Dogs, New Tricks' *Solicitors Journal* 2003, 147(25) Supp. 16-17
- Sowersby, R. 'New Developments' *Solicitors Journal* Vol.145, No.47, 2001
- Spackman, M.P., Belcher, J.C., Calapp, J.W. & Taylor, A. 'An Analysis of the Effects of Subjective and Objective Instruction Forms On Mock-Juries' Murder/Manslaughter Distinctions' *Law and Human Behaviour* Vol.26, No.6, 2002, pp.605-623
- Spence, S.A., Hunter, M.D. & Harpin, G. 'Neuroscience and the Will' *Current Opinion in Psychiatry* Vol.15(5), 2002, pp.519-526
- Spitz, D. 'How to Cut the Psychiatric Pie: *The Dilemma of Character*' *Philosophy, Psychiatry & Psychology* 6.4 (1999) 311-316
- Spring, R.L. 'The Return to *Mens Rea*: Salvaging a Reasonable Perspective on Mental Disorder in Criminal Trials' *International Journal of Law and Psychiatry* Vol.21, No.2, 1998, pp.187-196
- Stalenheim, E.G. 'Long-Term Validity of Biological Markers of Psychopathy and Criminal Recidivism: Follow-up 6-8 Years After Forensic Psychiatric Investigation' *Psychiatry Research* Vol.121, No.3, 2004, pp.281-291
- Stanghellini, G. 'Psychopathology of Common Sense' *Philosophy, Psychiatry and Psychology* 8.2/3 (2001) 201-218
- Stapp, H. P. 'Attention, Intention, and Will in Quantum Physics' *Journal of Consciousness Studies* Vol.6, No.8-9, 1999, pp.143-164
- Stone, A.A. 1998 'Revisiting the Parable: Truth Without Consequences' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Stone, A.A. 1984 *Law, Psychiatry, and Morality* American Psychiatric Press: Washington DC
- Strawson, G. 'The Self' *Journal of Consciousness Studies* 4(5/6) 1997, pp.405-428
- Stuss, D.T. & Levine, B. 'Adult Clinical Neuropsychology: Lessons from Studies of the Frontal Lobes' *Annual Reviews Psychology* 2002, 53:401-433

- Sullivan, G.R. 'Is Criminal Law Possible' *Oxford Journal of Legal Studies* Vol.22, No.4, (2002), pp.747-758
- Summer, D.A. 1999 'The Use of Human Genome Research in Criminal Defense and Mitigation of Punishment' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC
- Sverdlik, S. 'Unconscious Evil Principles' *Philosophy, Psychiatry, & Psychology* 9.1 (2003) pp.13-14
- Szasz, T. S. 1972 *The Myth of Mental Illness* Paladin Books: London
- Tamanaha, B.Z. 'Socio-Legal Positivism and a General Jurisprudence' *Oxford Journal of Legal Studies* Vol.21, No.1, (2001) pp.1-32
- Tattersall, I. 'Evolution, Genes, and Behaviour' *Zygon*, Vol.36, No.4, 2001, pp.657-666
- Taylor, J.G. 'Paying Attention to Consciousness' *Trends in Cognitive Sciences* Vol.6, No.5, May 2002, pp.206-210
- Taylor, C. & White, S. 2000 *Practicing the Reflexivity in Health and Welfare* Open University Press: Buckingham
- Thomas, D.A. 'Sentencing: Life Imprisonment – Discretionary Life Sentence' *Criminal Law Review* 2001, Apr, 326-328
- Thomas, S. 'Ethical Question for Behavioural Genetics Research' *The Journal of Forensic Psychiatry* Vol.12, No.3, 2001, 491-494
- Thomas-Peter, B. A. & Warren, S. 'Legal Responsibilities of Forensic Psychologists' *Expert Evidence* Vol.6, 1998, pp.79-106
- Thompson, E. 'Empathy and Consciousness' *Journal of Consciousness Studies* vol.8, no.5-7, 2001 pp.1-32
- Tomkins, S. S. 1962 *Affect, Imagery, Consciousness, Vol. 1: The Positive Affects* Springer: New York.
- Tomkins, S. S. 1963 *Affect, Imagery, Consciousness, Vol.2: The Negative Affects* Springer: New York
- Trevena, J.A. & Miller, J. 'Cortical Movement Preparation Before and After a Conscious Decision to Move' *Consciousness and Cognition* 11:162-190 (2002)
- Trusted, J. 1984 *Free Will and Responsibility* Oxford University Press: Oxford
- Turner, S. 'What is the Problem with Experts?' *Social Studies of Science* 31/1, 2001, pp.123-149
- Tye, M. 'Phenomenal Consciousness: The Explanatory Gap as a Cognitive Illusion' *Mind* Vol.108, 432, 1999, pp.705-725

- Uchii, S. 'Darwin on the Evolution of Morality' 1-9. 2-5-02
- Uğurbil, K., Toth, L. & Kim, D-S. 'How Accurate is Magnetic Resonance Imaging of Brain Function?' *Trends in Neurosciences* Vol.26, No.2. 2003. pp.108-114
- Valverde, M. 2003 *Law's Dream of a Common Knowledge* Princetown University Press: Princeton
- Valverde, M. 1998 *Diseases of the Will: Alcohol and the Dilemmas of Freedom* Cambridge University Press: Cambridge
- Van der Burg, W. 'The Expressive and Communicative Functions of Law. Especially with Regard to Moral Issues' *Law and Philosophy* 20: 31-59, 2001
- Van der Henst, J-B., Yang, Y. & Johnson-Laird, P.N. 'Strategies in Sentential Reasoning' *Cognitive Science* Vol.26, No.4, 2002, pp.425-468
- Varela, F.J., Thompson, E. & Rosch, E. 1995 *The Embodied Mind: Cognitive Science and Human Experience* The MIT Press: Massachusetts
- Verdun-Jones, S.N. 1998 'Sentencing the Partly Mad and the Partly Bad: The Case of the Hospital Order in England and Wales' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Viljoen, J.L., Roesch, R. & Zapf, P.A. 'An examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology' *Law and Human Behaviour* Vol.26, No.5, 2002, pp.481-506
- Villa, V. 'Legal Theory and Value Judgments' *Law and Philosophy* 16: 447-477, 1997
- Vogeley, K. & Fink, G.R. 'Neural Correlates of the First-Person Perspective' *Trends in Cognitive Sciences* Vol.7, No.1, 2003, pp.38-42
- Vogeley, K., Kurthen, M., Falkai, P. & Maier, W. 'Essential Functions of the Human Self Model are Implemented in the Prefrontal Cortex' *Consciousness and Cognition* Vol.8, No.3, 1999, pp.343-363
- von Wright, G. H. 1993 'Two Traditions' in *Social research: Philosophy, Politics and Practice* Hammersley, M. (ed.) Sage: London
- Wahlsten, D. 'Single-Gene Influences on Brain and Behaviour' *Annual Reviews Psychology* 1999, 50:599-624
- Walker, N. 1991 *Why Punish* Oxford University Press: Oxford
- Walker, N. 1985 *Sentencing: Theory, Law and Practice* Butterworths: London
- Walker, N. & McCabe, S. 1973 *Crime and Insanity in England: Volume 2*, Edinburgh University Press: Edinburgh

Walker, N. 1968 *Crime and Insanity in England*: Volume 1, Edinburgh University Press: Edinburgh.

Walters, G.D. 'Disposed to Aggress? In Search of the Violence-Prone Personality' *Aggression and Violent Behaviour* Vol.5, No.2, 2000, pp.177-190

Ward, D.E. 'Explaining Evil Behaviour: Using Kant and M. Scott Peck to Solve the Puzzle of Understanding the Moral Psychology of Evil People' *Philosophy, Psychiatry, & Psychology* 9.1 (2003) pp.1-12: 23-26

Ward, T. 'Observers, Advisers, or Authorities? Experts, Juries and Criminal Responsibility in Historical Perspective' *The Journal of Forensic Psychiatry* Vol.12, No.1, 2001, pp.105-122

Warren, C.A.B. 2002 'Qualitative Interviewing' in *Handbook of Interview Research: Context and Method* Gubrium, J.F. & Holstein, J.A. (eds.) Sage: Thousand Oaks

Warren, J.I., Murrie, D.C., Chauhan, P., Dietz, P.E. & Morris, J. 'Opinion Formation in Evaluating Sanity at the Time of the Offense: An Examination of 5175 Pre-Trial Evaluations' *Behavioural Sciences and the Law* 22: 171-186 (2004)

Wasserstrom, R.A. 1999 'H.L.A. Hart and the Doctrines of *Mens Rea* and Criminal Responsibility' in *Foundations of Criminal Law* Katz, L., Moore, M.S. & Morse, S.J. (eds.) Oxford University Press: Oxford

Weiner, R.L., Richmond, T.L., Seib, H.M., Rauch, S.M. & Hackney, A.A. 'The Psychology of Telling Murder Stories: Do We Think in Scripts, Exemplars, or Prototypes?' *Behavioural Sciences and the Law* 20:119-139 (2002)

Wells, C. "'I Blame the Parents": Fitting New Genes in Old Criminal Laws' *The Modern Law Review* 1998, pp.724-739

Wettstein, R.M. 1999 'Violence and Mental Illness: Additional Complexities' in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court*, Botkin, J.R., McMahon, W.M. & Pickering Francis, L. (eds.) American Psychological Association: Washington DC

Wheatman, S.R. & Shaffer, D.R. 'On Finding for Defendants Who Plead Insanity: The Crucial Impact of Dispositional Instructions and Opportunity to Deliberate' *Law and Human Behaviour* Vol.25, No.2, 2001, pp.167-183

Widiger, T.A. & Sankis, L.M. 'Adult Psychopathology: Issues and Controversies' *Annual Reviews Psychology* 2000, 51:377-404

Williams, K.S. 1994 *Textbook on Criminology* (2nd Ed.) Blackstone Press Ltd: London

Williams, G. 'The Mens Rea for Murder: Leave it Alone' *The Law Quarterly Review* Vol.105, 1989, pp.387-397

Williams, G. 'Oblique Intention' *Criminal Law Journal* Vol.46, 1987, p.417

- Wilson, W. 2000 'Murder and the Structure of Homicide' in *Rethinking English Homicide Law* Ashworth, A. & Mitchell, B. (eds.) Oxford University Press: Oxford
- Wilson, R.A. 1999 'The individual in Biology and Psychology' in *Where Biology Meets Psychology* Hardcastle, V.G. (ed.) MIT Press: Massachusetts
- Wilton, R. 2000 *Consciousness, Free Will, and the Explanation of Human Behaviour* The Edwin Mellen Press: New York
- Winter, J. 'The Truth will Out? The Role of Judicial Advocacy and Gender in Verdict Construction' *Social and Legal Studies* 2002, Vol.11(3) pp.343-367
- Wolf, Y. 'Modularity in Everyday Life Judgments of Aggression and Violent Behaviour' *Aggression and Violent Behaviour* Vol.6. No.1, 2001, pp.1-34
- Wood, D. 1998 'Dangerous Offenders, and the Morality of Protective Sentencing' in *Criminal Justice and the Mentally Disordered* Peay, J. (ed.) Ashgate: Aldershot
- Woof, Lord 'Are the Courts Excessively Deferential to the Medical Profession?' *Medical Law Review* 9, 2001, pp.1-16
- Worrall, A. 1990 *Offending Women: Female Lawbreakers and the Criminal Justice System* Routledge: London
- Wynne, B. 1989 'Establishing the Rules of Laws: Constructing Expert Authority' in *Expert Evidence: Interpreting Science in the Law* Wynne, B. E. & Smith, R. (eds.) Routledge: London
- Yeo, S. 'Clarifying Automatism' *International Journal of Law and Psychiatry* Vol.25, No.5, 2002, pp.445-458
- Yeo, S. 1998 *Unrestrained Killings and the Law* Oxford University Press: Hong Kong
- Young, W. 'Summing Up to Juries in Criminal Cases – What Jury Research says about Current Rules and Practice' *Criminal Law Review* 2003, Oct, 665-689
- Zachar, P. 'Psychiatric Disorders are not Natural Kinds' *Philosophy, Psychiatry & Psychology* 7,3 (2000) 167-182
- Zeman, A. 'Consciousness' *Brain* Vol.124, No.7, 1263-1289, 2001
- Zhu, J. 'Locating Volition' *Consciousness and Cognition* Vol.13, No.2, 2004, pp.302-322

APPENDICES

Appendix One

Vignette

Defendant

The accused Malcolm Dudley is aged 40 and described by those who know him as a socially withdrawn individual who when drinking is argumentative and violent, which is in contrast to his normal quiet taciturn manner. Malcolm does not appear to have any close friends, male or female, seeming only to have passed the time of day with his work colleagues.

Employment

Prior to his arrest he worked at a factory packing medical supplies, where recently temporary workers such as Malcolm had been put on a three-day week. This was known to have made Malcolm resentful and concerned about money. Malcolm has only been in his current employment for about 12 months having had a number of jobs prior to this. The reason provided for this tendency to change jobs is that Malcolm becomes convinced that he is being treated worse than the other workers are by his bosses. In addition he believes that it is because his fellow workers deliberately spread malicious rumours that affects how the bosses perceive him. He does not appear to trust anyone.

Living Circumstances

At the time of the incident Malcolm lived with Sharon and had done so for 9 months. Prior to that he had lived at home with his parents where his leisure time was taken up with his obsession with World War Two (WWII). His mother behaved as if she was an invalid although there was no specific diagnosis and would only leave the house if Malcolm or his father took her out for a country drive. She secretly drank with Malcolm colluding in this by supplying the alcohol. Malcolm's father, who is ex-army, is a strict and harsh disciplinarian who only related on a personal level with Malcolm through the WWII interest. The only time that Malcolm was not a placid and conforming son was when he drank alcohol with his mother and then he was very aggressive towards his father, although Malcolm did not always recollect that he had had an outburst. Malcolm's mum died 15 months ago and he continued to live with his father for a further six months until he moved in with Sharon.

Malcolm met Sharon through work because she is a cook in the factory canteen. Their relationship was a surprise and source of speculation from the outset because they seemed so different. Sharon is 35 years old with a 17-year-old daughter Lucy. Sharon's marriage had ended in divorce as a result of her ex-husbands violence some 10 years prior to her living with Malcolm. Sharon had not been put onto a 3-day week and Malcolm was unhappy that she was currently the primary earner in the household. Lucy, Sharon's daughter, had been seeing the deceased J.D., for about 3-4 months. Malcolm, who disliked Sharon being at all friendly towards other men, had, prior to the fatal incident,

begun to repeatedly accuse her of flirting and encouraging J.D.. These accusations were particularly virulent when Malcolm was drinking. Lucy thinks there may also have been physical violence towards her mother, in addition to the vitriolic verbal arguments, during the last month.

Incident

On the night in question Malcolm, Sharon, Lucy and J.D. had been at the pub having a meal to celebrate Sharon's birthday. They had all consumed alcohol and therefore Malcolm had become outgoing rather than withdrawn. After finishing the meal a number of the pub regulars had joined them at the table to sing Happy Birthday to Sharon. At the end of the singing J.D. gave Sharon a birthday kiss and on seeing this Malcolm grabbed his steak knife and stabbed J.D.. He then calmly seized Sharon by the wrist and apparently unaware of the ensuing mayhem he says, "let's go home or we will miss that program on WWII at 10 p.m.". He then left the pub still grasping Sharon's wrist tightly and started walking home oblivious to her protestations and distress. Just as they get home a police car pulls up and as the police officers confront him Malcolm seems to become aware of the state Sharon is in and looks confused. He reacts in a bewildered manner when officers push him against the police vehicle and handcuff him. The officers reported that he asked them why they were doing this to him and that he also asked Sharon why she was so upset after having had such a lovely birthday meal. When Malcolm was told that he had fatally stabbed J.D. he denied any knowledge of the event.



Appendix Two

Dear

I am currently undertaking a PhD project centred on the mental facet of legal responsibility. Consequently I am analysing the legal concept of *mens rea* in homicide cases, narrowing the focus by exploring the operation and scope of the defences of insanity and diminished responsibility. The project considers an area of law that the Law Commission concedes needs reforming and with the current proliferation of pertinent scientific research it is a critical juncture for evaluating this important legal and scientific area. Whilst it would be possible to investigate these matters through academic publications alone I think that the validity of the project would be enhanced by obtaining input from the practitioners involved in such cases. Thus I would like to interview defence and prosecution lawyers, forensic psychologists and psychiatrists. A vignette would be supplied in advance, which would form the focus of the interview, thereby facilitating discussion of significant principles and procedures. To this end I am inquiring if you would be prepared to make an important contribution to a review of these issues by agreeing to be interviewed. I appreciate that your time is valuable but I hope that you will feel that it is worth helping with this project.

I have an undergraduate and postgraduate degree in law from Warwick University, followed by a number of year's experience as a lecturer in law at Leicester University. In addition I have an MSc in psychotherapy, with some experience of practising as a therapist. I chose to undertake the PhD, based at Nottingham University, because I wanted to explore the different approaches and perspectives adopted towards the individual and their mental state evident in the legal and medico-psychological fields. In recognition of the significance of the issues dealt with in the project in 2001 I was awarded a three year Economic and Social Research Council (ESRC) Grant to support my research endeavours. The Institute for the Study of Genetics, Biorisks and Society supports such a multidisciplinary PhD because it brings together academics from a range of disciplines. My supervisors are Professor Robert Dingwall (Sociology), Dr Peter Bartlett (Law) and Dr Ellen Townsend (Psychology).

The significance of the project is that it intersects law and science. Investigating the issues by moving beyond adopting a documentary focus to talk to the practitioners involved may crucially inform the debate. I hope that you will be able to help me in this matter. I will telephone you next week to discuss the possibility of an appointment.

Yours sincerely

Hazel James
MSc, LLM, BA (Hons)