MENTALITY AND THE CRIMINAL LAW

O. C. M. DAVIS
AND
E. A. WILSHIRE

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BY

O. C. M. DAVIS, M.D., D.Sc.,

Head of Department of Forensic Medicine in The University of Bristol; and of the Middle Temple, Barrister-at-Law

AND

F. A. WILSHIRE,

Of the Middle Temple, Barrister-at-Law

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INTRODUCTION

THE object of this small book is to present in as concise a manner as possible the salient points connected with the law of England regarding the commission of criminal offences by mentally disordered persons. A very extensive literature on this subject already exists, and it is extremely difficult for anyone to gain a serviceable knowledge of this important branch of law without the expenditure of a considerable amount of time. We have endeavoured to summarize the opinions of some of the leading authorities on the subject, and to give references to these, in the hope that our effort may enable students and practitioners of law to obtain useful information without unduly encroaching upon their time.

We have thought it well to include sections dealing with some of the more common views regarding the nature and attributes of mind, the symptoms and diagnosis of insanity, and the psychology of intent,

A careful consideration of the present position of mentally disordered persons who bring themselves into conflict with the criminal law compels one to admit that much has been done during the last century to modify any precedents which militate against their interests, and that these unfortunate individuals have little to complain of in the way they are dealt with by the legislature and by His Majesty's judges.

We would point out that although the "legal definition of insanity"* is more or less laid down by the "McNaghten† Rule" (*see* p. 83), yet nevertheless both by statute and common law the defences available for persons suffering from mental disease are considerably wider in character than those apparently embraced by this rule. And furthermore, although since 1843 in the majority of criminal cases involving the defence of insanity the judges have laid down the law in accordance with the McNaghten Rule as stated by H. Oppenheimer,[1] it is a striking fact that most of the condemned persons who have been subsequently reprieved on the grounds of insanity, have been insane from the medical, rather than from the legal, point of view.

Our task of reviewing the opinions of various authorities has been rendered much less difficult

* This phrase was used by Darling, J., in the case of James Macdonald, 1 Cr. App. R., 1908, p. 266.

† Or McNaughten.

than it would otherwise have been but for similar attempts by other writers, and of these we think it just to place first the name of Dr. Stroud, whose classic work, *Mens Rea*,[2] has been of great assistance to us, and from which we have quoted freely.

We have not hesitated to quote from other authorities on different branches of our subject, as their opinions may have more weight than our own, and be of more value to readers.

We shall see later that the McNaghten Rule refers to " disease of the mind ", and in criminal trials involving the defence of insanity mental states are frequently referred to by judges, counsel, and medical witnesses, disease of the brain being less commonly mentioned ; it was referred to by Erle, C. J., in R. *v.* Law (*see* p. 110) who used the words " morbid action of brain ". A consideration of the relationships which may exist between mind and brain is of such great importance in medico-legal cases that it seems desirable to discuss this problem in some detail before proceeding to a general discussion on insanity and an analysis of the " rule " already referred to.

CHAPTER I

MIND

As already indicated, the present work chiefly concerns those persons who have come into conflict with the criminal law, and are seeking exemption from punishment on the plea of some form of insanity.

We shall notice later that insanity is closely related to the mind, and this apparently simple word is freely used by physicians and lawyers alike.

Even in the McNaghten Rule (*see* p. 83) no reference is made to body or brain, and the gravest issue centres round the two words " disease " and " mind." Under these circumstances it behoves all advocates who may be engaged in criminal proceedings involving the plea of insanity to inquire what is the precise meaning of these two words, apparently so simple.

There is no difficulty in the case of the word " disease ". Speaking scientifically, this word signifies a disturbance in the equilibrium existing between the many and various processes in the body which produce a condition commonly referred to as " health " ; in the present connection it may be considered as synonymous with the simpler word " disorder ",

The meaning of the other word, " mind ", cannot be so readily put into simple language ; no clear and precise definition of its meaning can be given, as no human being can ever hope to understand exactly what constitutes mind. The most that one can do is to examine the different views as to the nature or structure of mind, and having done so we may be able to gain some information, however meagre, regarding its attributes.

The following quotation is from Tredgold[3] : " As to the nature of mind itself there are two chief opposing views :—

" (1) On the one hand, it is contended that mind is a spiritual something transcending matter altogether, albeit making use of matter—the central nervous system—for its manifestations.

" (2) On the other hand it is alleged that mind is no ' thing ' at all, but merely a process, that it is, in fact, simply the sum total of the ganglionic activity of the brain."

The theory of mind being a spiritual something is very old, and can with certainty be traced back to the times of Plato and Aristotle. Aristotle's famous work* *The Soul*[4] is considered to be the first text-book written on psychology, from which the following passage is taken : " We have now given an answer to the question, What is the soul ? an answer which applies to it in its full extent. It is substance in the sense which corresponds to the

* Mind is referred to in the Oxford Dictionary as the soul, as distinguished from body.

definitive formula of a thing's essence. That means that it is ' the essential whatness ' of a body of the character just assigned " (namely, organized or possessed potentially of life).

Let us here pause to emphasize the fact that whether we adopt the first or second of the above views they both postulate a connection between mind and brain, a most important relationship from a medico-legal point of view.

If we delve into the writings of later philosophers, we shall find that their views regarding mind are eminently theoretical and their speculations most interesting, but they do not help us very much to get hold of a working definition of this mysterious " something " or " nothing ". Thus Lord Haldane[5] states that " Mind is ultimate reality ", and later, " now mind is not a thing. It is not a thing that is somewhere in the brain and is worked by the nerves or works on the nerves." We shall venture later to disagree with the last part of this statement.

William McDougall[6] writes : " We may define the mind of an organism as the sum of the enduring conditions of its purposive activities."

Lloyd Morgan,[7] in an illuminating monograph, is, we think, rather more helpful in his simple method of arriving at a working definition of " mind ". He starts an inquiry into the nature of mind by considering the processes involved in seeing a candle. Here a physical object—the candle—is in physical relationship with certain mechanisms in the retina of the eye called " receptors " ; these

physical receptors are in physical and physiological relatedness via nervous conducting paths with the visual centre in the brain situated in the occipital lobe. We have thus :—

1. The retinal receptors in physical relation to the physical object—the candle.

2. The visual centre in physical and physiological relation to these receptors, and through them to the object—the candle.

If the matter ended here, there is no reason to believe that the candle would be seen by the person whose retina and visual centre are taking part in the phenomena described above. There is, however,

3. " Something " in psychical relation in some way to the visual centre, and through it to the receptors and ultimately and essentially to the candle. This " something " is what we call mind, which is concerned in taking psychical note of the candle—in plain language, seeing it.

It may be interesting to notice that it is quite easy to set up simple apparatus, e.g., a magic lantern, which will produce the image of an object upon a screen, and furthermore, by special telegraphic methods to transmit such an image over great distances ; but there appears to be no satisfactory evidence that any of the mechanical devices concerned take any such psychic note of the object as can a living organism such as man. The screen on which the image is projected appears to be quite devoid of any " awareness " of the object.

Let us compare this view with a statement from

Aristotle's work.[4] "Suppose that the eye were an animal—sight would have been its soul, for sight is the substance or essence of the eye which corresponds to the formula (i.e., which states what it is to be an eye), the eye being merely the matter of seeing; when seeing is removed the eye is no longer an eye, except in name—it is no more a real eye than the eye of a statue or of a painted figure."

We will now briefly consider some of the views regarding the origin of mind.

One of the older materialistic views was that of Cabanis, who considered that the brain secreted thought, just as the liver secretes bile.

One school considers mind to be an epiphenomenon, arising from, and thus causally related to, cerebral activity. To use the words of Watts Cunningham,[8] "According to epiphenomenalism there is a causal relation between mind and body, but it holds only in one direction; mind is an offshoot of brain activity, and so in a sense may be said to be caused by it, but mental processes cannot function as cause in relation to brain processes. Mind is an epi-phenomenon—a phenomenon, that is, which is of secondary importance only. It is produced by the brain, a halo dancing above the brain cells, as Bergson poetically puts it."

Referring to the doctrine of epiphenomenalism, William McDougall[9] writes: "Huxley and others have illustrated this doctrine by likening this stream of epiphenomenal elements to the shadows cast by the moving parts of a machine, or to the

noise fortuitously produced by them—the creaking of wheels. Perhaps a better simile would be the electrical disturbances that always are incidental to the strains and frictions of the working of a machine."

Another view regarding the origin of mind is that during the process of evolution, at one particular stage mind emerges.

The theory of emergence is well treated by Lloyd Morgan.[10] He describes an emergent as something new and unpredictable which makes its appearance in the evolutionary process. He mentions as a chemical illustration the events which occur when carbon and sulphur unite to form carbon disulphide. We could predict the molecular weight of the new compound, and this may be called a resultant; but the special properties of carbon disulphide could not be predicted, and are emergents.

According to the emergent theory mind will be something added to the brain states in the course of Nature.

Many people believe that mind comes from some external source at the moment of conception, and that it is not dependent for its origin on the activities of cerebral tissue. It can quite reasonably be surmised that cerebral activity may produce something in the nature of epiphenomena which are, as it were, held together by a mysterious something *ab extra*, a " pervading principle " (Lotze) or " medium of composition of effects ", and that consciousness may thus have a two-fold origin. A somewhat similar view appears to be put forward

by McDougall :[11] "We are compelled to postulate as a necessary condition of the development of the magnetic field a medium or substance which we call the ether. Just so we are compelled to postulate an existent, an immaterial being, in which the separate neural processes produce the elementary affections which we have called psychical elements, and this we call the soul." The same author further writes : "Does the soul come into existence at the moment of conception or of birth, or does it exist before the union of those two tiny specks of protoplasm from which each mortal body and marvellous brain arise ? Does it come, as so many have believed, trailing clouds of glory or of shame ? "

It would be impossible to discuss in detail the question of the relationships which exist between brain and mind during the life history of an organism. There are two main theories :—

1. The first of these postulates that the physical processes of the brain run parallel with the psychical processes of the mind, being merely associated together in time, without reacting on each other. This is known as "psycho-physical-parallelism", and it is the view held by many eminent psychologists.

2. The second main theory is that interaction takes place between the two processes, the mental process affecting the physical process, and vice versa. This view is adopted by the interactionists, and it is probable that such a hypothesis as this is more likely to be accepted by practical scientists than by speculative philosophers.

We have already quoted Lord Haldane's opinion on this view, and our disagreement with it; we ourselves think it the most tenable of all views, and amply supported by experimental and clinical evidence.

From an advocate's point of view, the relationship between the activities of mind and brain is of fundamental importance. That there is frequently some demonstrable change in the structure of the brain in cases of mental disease will be borne out by pathologists who have examined the brains of deceased persons known to have exhibited mental symptoms during life.

Thus Bernard Hart[12] states: "Imbecility is generally correlated with an early demonstrable failure of brain development . . . acquired dementias are, like imbecility, generally correlated with marked changes in the brain."

One of the most recent text-books on mental deficiency[13] devotes one section to the subject of brain structure in relation to mind, and another section deals with the cellular changes in the brains of the mentally defective, illustrated by excellent microphotographs. An important investigation has been recently made on the chemistry of the brain in mental defectives.[14] From this research it is deduced that in the defective either the nerve-cells are immature in form or there is an excess of neuroglia present. The grey matter from the frontal lobe of 71 brains was examined, 62 being from mental defectives of various mental ages, and 9 from normal adults.

Let us refer here to the indivisibility of mind; it will be pointed out later that mind has been, as it were, divided into water-tight compartments by some clinicians; although for clinical purposes it may be convenient to make such a hypothetical division of mind into faculties, there is no evidence to show such a clear-cut separation, and the better view is that mind is continuous.

As stated by Lloyd Morgan,[7] according to the interactionists "mind is non-spatial, unextended, and indivisible, as contrasted with the spatial order of the world of things and physical objects." Oppenheimer[1] also writes: "mind is a living harmonious whole, each part of which receives support from every other, and is bound up with all others by ties of the most intimate solidarity. It cannot therefore be admitted that any one of the divers faculties can receive a hurt, without the equilibrium of the whole system being disturbed."

It may be helpful to conclude this discussion by laying stress on the fact that all theories regarding the nature and origin of mind must to a great extent be purely speculative. Nevertheless cerebral and mental processes are closely related to each other, and in all probability interact. Furthermore, mind is one homogeneous whole, and any defect in one function of the mind cannot exist without a possible influence on other functions.

The methods of diagnosing mental disorder are discussed in Chapter II.

CHAPTER II

INSANITY

It seems desirable to begin the discussion in this section with a consideration of some of the outstanding features of insanity, so that an advocate may possess some working knowledge of what constitutes this state or condition; otherwise it must of necessity be a matter of extreme difficulty to examine or cross-examine a medical witness.

As in law, so in medicine, there is no precise and exact definition of the meaning of the word "insanity", and although in many cases it is quite easy for an expert to pronounce a person insane, in many other cases it is by no means easy to do so. Furthermore, within wide limits insanity is no bar to a person's liberty, and the law only interferes under certain conditions to take away an individual's freedom to behave as he pleases.

There have been many discussions regarding the respective views held by lawyers and physicians as to what symptoms of insanity should exempt a person from criminal responsibility. As will be seen later, the McNaghten Rule defines those symptoms of insanity which of themselves, confer such exemption. In the case of James Macdonald (1 Cr. App. R., 1908) Mr. Justice Darling referred

to " the legal definition of insanity ". In the case of John William Smith (5 Cr. App. R., 1910) an appeal case involving the defence of insanity, Mr. Justice Darling said, " The law on this subject is perfectly well known ", and proceeded to quote the McNaghten Rule.

These and many other cases make it quite clear that a person may exhibit symptoms of insanity which do not conform with the legal requirements for exemption from criminal responsibility. It is probable that the great majority of the medical profession consider that any symptom of insanity should justify exemption from such responsibility.

It is generally agreed that insanity is a disease or disorder of the mind, but it is of the utmost importance to realize that all types of mental disorder are not insanity ; many authorities consider that when a person knows that he or she is suffering from a disordered mind, the fact of this knowledge precludes a diagnosis of insanity. That this is so appears to be recognized by a provision in the Mental Treatment Act 1930 (20 & 21, Geo. 5, c. 23). Sections 1–4 make it possible for persons suffering from mental disorder voluntarily to subject themselves to treatment in a mental institution.

Charles Mercier[15] divides mind into gradually ascending levels or faculties and considers that insanity exists only in those persons in whom there is disorder of the higher levels. In another work[16] he gives the following very simple illustration of sane disorder of mind : " Giddiness may be