

The role of lay understanding of mental illness in mental incapacity defences

Archie Loughnan discusses the importance of non-specialist understanding of mental illness in determining criminal responsibility.

Mental incapacity defences relate to the mental state of the defendant at the time of the commission of a crime or at the time of a criminal trial. In England and Wales, this category of defence includes automatism, diminished responsibility, infanticide, insanity, intoxication and unfitness to plead. Pleading these defences involves admitting the criminal act, but claiming that, on the basis of his or her mental capacity, the defendant should be granted a partial excuse, or not held criminally liable at all.

The development, construction and operation of mental incapacity defences in criminal law is traditionally understood as the product of a conflict between law and medicine for control over the notion of 'deviance'. This conflict is framed as one between the voluntarist base of law and the determinist base of medicine. In this conflict, psychiatry and psychology are aligned with medicine as 'scientific', as opposed to 'legal', forms of knowledge. Law, with its emphasis on universalism, reasonableness, free will and punishment, comes up against medicine with its emphasis on particularity, physical or mental disease and treatment. Mental incapacity defences, both 'on the books' and in practice, are generally regarded as the unwieldy outcome of this competition.

This traditional understanding of mental incapacity defences posits them as the product of two elite, technical forms of knowledge. However, mental incapacity defences involve a third form of knowledge: lay knowledge about, or understandings of, mental illness. This form of knowledge is relevant to any attempt to understand mental incapacity defences. By 'lay understandings of mental illness' I refer to the attitudes and beliefs about mental illness held by judges, jurors and lawyers. Though legally trained, judges and lawyers are 'lay' in this respect because they do not have medical knowledge. Thus, it is in part lay understandings of mental illness that inform tactical decisions by prosecution and defence about mental incapacity defences. Lay understandings of mental illness also inform the decision-making of the jury in a criminal trial.

Some criminal law theorists writing about mental incapacity defences hint at the importance of lay understandings of mental illness. Alan Norrie pleads

for a "social understanding of madness" (2001). Michael Moore requests an analysis of the "popular moral notion of mental illness" which he argues is the key to understanding why juries have "for centuries excused the otherwise wrongful acts of mentally ill persons" (1984). Moore posits that the unofficial version of the insanity defence may restrict legal insanity to those popularly considered 'crazy' or 'mad' (1984). These comments suggest that lay understandings of mental illness are just as important as medical and legal constructions in understanding mental incapacity defences.

Substantive role

What then is the role of lay understandings of mental illness in mental incapacity defences? I suggest that lay understandings of mental illness have two related roles, which can be termed substantive and symbolic roles. Firstly, lay understandings of mental illness play a substantive role in the criminal law. They inform the task of determining whether a particular defendant will be allowed to rely on a mental incapacity defence. This is the evaluative aspect of the trial, and it is the province of the jury. As fact-finders, the jury deals with questions of moral evaluation. The jury determines whether a defendant meets the criteria of a particular mental incapacity defence, and therefore should be granted an excuse. In this task, lay understandings of mental illness are crucial. Alongside expert medical evidence and judicial instructions on the law, lay understandings of illness inform the jury's decision-making, and are the measure against which laypersons evaluate the defendant's culpability and reach a conclusion of criminal responsibility or reduced or non-responsibility. As Tony Ward has argued in relation to the history of the insanity defence, whatever the precise form of the legal test for insanity, "the sane are divided from the insane according to juries' and judges' ideas about moral responsibility and 'folk psychology': it is 'lay truth' rather than 'law's truth' or 'medical truth' that ultimately prevails" (1998).

Symbolic role

Secondly, lay understandings of mental illness have a symbolic role in the criminal law. The symbolic aspect of lay understandings arises in references to

the lay or 'common sense' of the jury. This 'common sense' frames and justifies the jury's task of evaluating defendants' claims that he or she should be granted a mental incapacity defence. As Ward has argued in relation to the development of the insanity defence, judicial wariness about expert evidence reflected in part a desire to maintain the 'cognitive sovereignty' of the jury over the definition of criminal responsibility (2002). Appeals to 'common sense' in the contemporary criminal law perform a similar function. Rhetorical appeal to the fact-finder's 'common sense' is important because it affirms the distinctiveness of the jury inquiry into the defendant's criminal responsibility. Determining whether a defendant should have a mental incapacity defence is not reducible to the question of whether the defendant has a mental illness, even though this may be important. Recognising the rhetorical aspect of lay understandings of mental illness shows that these understandings continue to be important even though, as Mackay and Kearns have shown, the role of the jury has been limited in relation to some mental incapacity defences (1999 and 2000).

Illustration

A useful illustration of these two uses of lay understandings of mental illness is provided by the Court of Appeal decision of *R. v Byrne*. In that case, the accused killed a woman and mutilated her body. He was convicted of murder. Medical evidence suggested that Byrne had particular sexual urges that he found very difficult to resist. The Court of Appeal quashed Byrne's conviction for murder and substituted a conviction of manslaughter by reason of diminished responsibility, on the basis of the accused's inability to control his impulses. The Court of Appeal stated that the factual question of whether Byrne suffered from a 'substantial' impairment of 'mental responsibility', as required by defence of diminished responsibility (*Homicide Act 1957* (Section 2), was one on which "juries may quite legitimately differ from doctors" (at 403). This comment invokes and upholds a substantive, lay evaluation of the meaning to be given to the defendant's mental illness. In *Byrne*, the Court of Appeal also acknowledged that there was no scientific measurement capable of distinguishing between a state of being unable to resist an impulse (which warrants an excuse) and mere failure to resist that impulse (which does not warrant an excuse) (at 404). According to the Court, the jury should seek to resolve the question into which category a particular defendant falls using a "broad common-sense" approach (at 406). In this comment, the Court is appealing to the jurors' lay understandings of mental illness.

Together, the substantive and symbolic roles of lay understandings of mental illness show that they are central to the development, construction and operation of mental incapacity defences. This is not

to say that mental incapacity defences always accord with 'common sense', nor that expert medical evidence or particular legal tests, such as that for diminished responsibility, are unimportant. Rather, I argue that accounts of the construction and operation of the defences as the unwieldy outcome of competition between law and medicine are partial and may be misleading. Lay understandings of mental illness must be recognized as knowledge alongside legal and medical knowledge about mental illness. Recognizing the role of lay understandings of mental illness is important because it reminds us that the 'battle' about the way criminal law deals with mentally incapacitated defendants is fought on three fronts. ■

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