Forensic psychiatric research based on forensic psychiatric statements must be prioritised, and professionals must have access to these statements

Forensic psychiatry after 22 July 2011

Forensic psychiatry received a battering in relation to the case against Anders Behring Breivik. Some were of the opinion that it was too easy to be acquitted by reason of insanity, and that this was an outcome of the use of the so-called medical principle in Norway. Some thought that forensic psychiatrists wielded too much power in the courtrooms, others that forensic psychiatry in Norway has no scientific basis.

Those who believe it is too easy to be found acquitted by reason of insanity often claim that the psychological principle would entail fewer acquittals and that this would be desirable. The medical principle demands that a perpetrator be acquitted of an otherwise punishable act if it was committed *when* the perpetrator was suffering from serious mental illness. The psychological principle requires that the act was committed *because* the perpetrator was severely ill. Intuitively, the psychological principle is the «correct» one, but nonetheless I believe that the medical principle is to be recommended. It is possible with some level of certainty to assess how ill a person was at the time of the act, but extremely difficult to assess what his motivation was. Defining how mentally ill a person must be in order to be acquitted by reason of insanity presents a problem, both legally and clinically. No clinical diagnosis is equivalent to the legal rule on acquittal by reason of insanity. The severity of symptoms in psychotic illness is the determining factor.

The preparatory work for the current rule on acquittal by reason of insanity extended from the 1980s until the law was enacted in 2002 (1). A green paper has now been presented, which further clarifies the concept of acquittal by reason of insanity (2), and which recommends that the medical principle should be maintained. The report discusses the degree of illness necessary for a person to be acquitted; however, in my opinion the report is coloured too much by legal argumentation and too little by clinical understanding of serious mental illness. Forensic psychiatric research should be able to provide considerably more clinical information about the symptoms that characterise those acquitted by reason of insanity in Norway. This would enable a debate on whether these are too many or too few.

I note that there are some who believe that expert witnesses wield too much power in criminal cases. If this is indeed true, it is because the court abrogates responsibility. We observed in the Breivik case that the court did not abrogate responsibility – it undertook its assessment according to its mandate, having considered all the evidence in the case, including the opinions of expert witnesses.

Forensic psychiatry requires sound diagnostics, and in some cases also risk assessments. These are built upon international, scientifically based knowledge. This aspect of forensic psychiatric work is presumably of variable quality, as is clinical work in general.

What is specific to forensic psychiatric work is that clinical psychiatric assessments are applied within the confines of a courtroom. Expert witnesses should be capable of making a sound clinical assessment, and they should be able to write and present their statements in a manner that is understandable to the court. In criminal cases there will be a majority of lay judges who must understand the information they are given in order as far as possible to reach a correct judgment.

Following the Breivik case, there has been a greater interest in research that can provide more information about the specific challenges of forensic psychiatry. Unfortunately, few analyses of Norwegian forensic psychiatric practice have been conducted. It is my opinion that there is a significant need for more knowledge about the group that are acquitted on the grounds of psychosis and the group that are found guilty even though they have serious diagnoses. We need to know in what way the expert witnesses have assessed the felons and what points have weighed particularly heavily with the courts.

In this issue of the Journal of the Norwegian Medical Association, Skeie & Rasmussen make a contribution to this knowledge (3). The article is a psychological analysis of sentences in cases in which the accused has been acquitted by reason of insanity according to the medical principle, on the grounds of psychosis. The authors have considered whether it is evident from the sentence that there is an association between the illness and the criminal acts. They have seen that this is the case in serious acts of violence such as murder, but less so in crimes against property and drugs cases. Their findings may therefore underpin a perception that there would be more convictions if the psychological principle were used in criminal law.

The authors have considered a question that is not relevant in Norwegian law – the connection between the illness and the criminal offence. They present data on this, but it is difficult to know how accurately they have been able to answer their own question. If they had also considered the forensic psychiatric assessments, this would have provided more information, and if the expert witnesses had had a mandate to make the connection clear, this would have cast even more light on the issue. However, what actually went on in the mind of the perpetrator will never be possible for us to know with any precision.

The increased interest in forensic psychiatry that we have seen since the Breivik case should be maintained. Several interesting research projects have been initiated (4). A major obstacle in this context is that the ethical research committees consider that forensic psychiatric assessments fall within the Health Research Act when studied by health personnel, and therefore require the consent of those assessed. Experience indicates that the subjects of forensic psychiatric assessments do not give consent to the use of their reports in research This makes it difficult to access a representative sample of forensic psychiatric statements for the purposes of psychiatric research.

We have a legislative system which grants entitlement to acquittal by reason of insanity, compulsory treatment orders and protective custody orders for those who are considered to present a particular danger. The sentences are partly based on information from forensic psychiatric assessments. It is therefore deplorable that we know so little about the population and the premises for these judgments.

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