

# Equivocal Rulings on Expert Psychological and Psychiatric Evidence: Turning a Muddle into a Nonsense

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**Summary:** *This article expands on a previous critical examination of the rule established in R. v. Turner and discusses more recent decisions on the admissibility of expert psychiatric and psychological evidence.*

Although expert opinion, especially on medical and scientific matters, has been admitted as evidence in court increasingly often since the nineteenth century, psychological or psychiatric evidence has always been treated as a special case and has not been welcomed so readily by the courts. For more than 20 years, the extremely influential Court of Appeal decision in *R. v. Turner*<sup>1</sup> had the effect of excluding psychological and psychiatric evidence from numerous cases. The effect of the *Turner* rule has been to exclude evidence that does not deal with mental disorders, mental handicap, or automatism on the assumption that other psychological functions and phenomena are matters of "common knowledge and experience" that a jury can understand without the help of experts, although the underlying assumption about the transparency of non-clinical psychological processes is certainly open to challenge.<sup>2</sup> The *Turner* rule has been used to exclude psychological and psychiatric evidence on issues of, *inter alia*, duress, provocation, and *mens rea*, but the courts have generally adopted a more indulgent attitude towards evidence regarding diminished responsibility,<sup>3</sup> except in cases involving the voluntary consumption of alcohol or other drugs.

The purpose of this article is to summarise and comment on recent developments in this area. The decision in *R. v. Sally Lorraine Emery*<sup>4</sup> appeared at first to have

<sup>1</sup> *R. v. Turner* [1975] Q.B. 834, C.A. For a recent application of the *Turner* rule see *R. v. Coles* [1994] Crim.L.R. 820.

<sup>2</sup> R. D. Mackay and A. M. Colman, "Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience" [1991] Crim.L.R. 800. See also A. M. Colman and R. D. Mackay, "Legal Issues Surrounding the Admissibility of Expert Psychological and Psychiatric Testimony" in *Children, Evidence and Procedure* (N. K. Clark and G. M. Stephenson, eds.) (Issues in Criminological and Legal Psychology, No. 20) (1993, The British Psychological Society), pp.46-50.

<sup>3</sup> See R. D. Mackay and A. M. Colman, "Excluding Expert Evidence" [1991] Crim.L.R. 800, at p.801.

<sup>4</sup> *Emery* (1993) 14 Cr.App.R.(S.) 394.

taken a significant step towards rationalising and liberalising the law on the admissibility of expert psychological and psychiatric testimony. But more recent developments have muddied the waters considerably and may have left the law in an even more confused state than it was before.

### *Emery*

Sally Emery was the 19-year-old unmarried mother of a child who died before she was a year old of injuries resulting from prolonged physical abuse. In January 1992, a jury in the Peterborough Crown Court acquitted Emery of occasioning actual bodily harm but convicted her of failing to protect her child from its father. She claimed in her defence that she had been under duress, that the father had routinely abused both the child and herself, and that fear had prevented her from protecting the child. Her counsel applied to call two expert witnesses—a psychologist with many years' experience working with abused women and a psychiatrist with specialist knowledge of responses to serious trauma—to testify that exposure to continued abuse had reduced her to a condition of dependent helplessness, which explained her failure to protect her child. The prosecution contested the application on the ground that the proposed evidence dealt not with any recognised mental disorder but with matters within the common knowledge and experience of the jury. The trial judge ruled the evidence admissible, and the experts duly testified in Emery's defence. The jury nonetheless found her guilty of failing to protect her child, and she was sentenced to four years' detention in a young offender institution, but she appealed against this sentence and it was reduced to 30 months by the Court of Appeal in November 1992.

Judge Michael Astill, the trial judge, allowed the expert evidence in for the following reason:

“There is potential expert evidence to the effect that if she is right, her will could have been crushed. That would afford her a good defence . . . Therefore, without further explanation or understanding, the jury's lack of understanding might lead to a guilty verdict, whereas if they were to consider the expert evidence which seeks to explain her conduct, they [might] find her not guilty. It follows from that that in my judgment the effects of abuse of the scale and persistence she describes might well not be within the capacity of a jury to understand unassisted by expert evidence.”<sup>5</sup>

In the Court of Appeal judgment, Lord Taylor C.J. endorsed this decision and its justification, commenting that the condition of dependent helplessness to which the evidence related “is complex and it is not known by the public at large. Accordingly we are quite satisfied that it was appropriate for the learned judge to decide that this evidence should be allowed”.<sup>6</sup> Lord Taylor C.J. commented further that “the question for the doctors was whether a woman of reasonable firmness with the characteristics of [the defendant], if abused in the manner which she said, would have had her will crushed so that she could not have protected her child”.<sup>7</sup>

<sup>5</sup> Quoted in *Emery* (1993) 14 Cr.App.R.(S.) 394, at p.397.

<sup>6</sup> *ibid.* at p.397.

<sup>7</sup> *ibid.* at p.398.

It is an established empirical fact that people without any specialist training in psychology, including prospective psychology students, generally have a very poor knowledge and understanding of psychological functions and phenomena.<sup>8</sup> Research has shown that even psychology undergraduates at the start of their courses have very little knowledge and understanding of the subject.<sup>9</sup> This arises from the fact that most branches of psychology are both "complex and not known by the public at large", as Lord Taylor C.J. put it in regard to dependent helplessness. The belief that non-clinical aspects of psychology are known and understood without specialist training is hopelessly out of date and demonstrably false. It follows that the comments of Lord Taylor in *Emery* should have opened the door to expert evidence on numerous non-clinical psychological functions and phenomena apart from dependent helplessness.

The Court of Appeal's decision in *Emery* did not eliminate the essence of the rule in *Turner*, that the expert evidence dealing with matters within the "common knowledge and experience" of the jurors remains inadmissible, but the application of the rule appeared to have been relaxed so as to permit expert testimony relating to a condition which, although not a mental disorder, "is complex and . . . is not known by the public at large".<sup>10</sup> Indeed, in his earlier decision in *R. v. Ahluwalia*<sup>11</sup> Lord Taylor adopted a similar attitude when dealing with "battered woman syndrome" in relation to a plea of provocation: it seems clear that, had expert evidence of "battered woman syndrome" been put before the court, it would have been permitted despite the decision of the Court of Appeal in *R. v. Turner*.<sup>12</sup> The reasoning behind Lord Taylor's approach is that although the loss of self-control that is essential to a successful plea of provocation is something regarded by the law as falling "within the realm of the ordinary jurymen's experience",<sup>13</sup> the defendant in *Ahluwalia* was not only later found to have been suffering from a "major depressive disorder"<sup>14</sup> which led to a successful diminished responsibility plea, but also might have used evidence of "battered woman syndrome" to bolster her provocation plea. It seems clear, therefore, that expert evidence concerning this latter condition would have been admissible to explain the accused's loss of self-control. However, it is unclear whether such testimony would be admissible to assist the jury in its consideration of the question of whether the "ordinary person" would have been provoked. This certainly seems to have been the opinion of Lord Simon in *DPP v. Camplin* when he remarked:

<sup>8</sup> A. Furnham, "Social Psychology as Common Sense" (1983) 36 *Bulletin of the British Psychological Society* 105; A. Furnham, "Prospective Psychology Students' Knowledge of Psychology" (1992) 70 *Psychological Reports* 375; W. McKeachie, "Changes in Scores on the Northwestern Misconceptions Test in Six Elementary Psychology Courses" (1960) 51 *Journal of Educational Psychology* 240; P. Smith, E. Ashton, J. Elliott, C. Freeland, W. Jones, A. McKinnon, S. Simpson and R. Strong, "Sixth-formers and Psychology: Survey" (1969) 22 *Bulletin of the British Psychological Society* 205; P. Smith and D. Casbolt, "Sixth-formers and Psychology: Fifteen Years On" (1984) 37 *Bulletin of the British Psychological Society* 334.

<sup>9</sup> J. Best, "Misconceptions About Psychology Among Students Who Perform Highly" (1982) 51 *Psychological Reports* 239; L. E. McCutcheon, "A New Test of Misconceptions About Psychology" (1991) 68 *Psychological Reports* 647; E. Vaughn, "Misconceptions About Psychology Among Introductory Psychology Students" (1977) 4 *Teaching of Psychology* 138.

<sup>10</sup> *Emery* (1993) 14 Cr.App.R.(S.) 394, at p.397.

<sup>11</sup> *Ahluwalia* [1992] 4 All E.R. 889.

<sup>12</sup> [1975] Q.B. 834, C.A.

<sup>13</sup> *Smith (Stanley)* [1979] 3 All E.R. 605, at p.611

<sup>14</sup> [1992] 4 All E.R. 889 at p.900.

“Whether the defendant exercised reasonable self-control in the totality of the circumstances. . . would be entirely a matter for the jury without further evidence. The jury would, as ever, use their collective common sense to determine whether the provocation was sufficient to make a person of reasonable self-control in the totality of the circumstances (including personal characteristics) act as the defendant did.”<sup>15</sup>

In this respect English law seemed to part company with the law of New Zealand, where in cases such as *R. v. Taaka*<sup>16</sup> and *R. v. Leihua*<sup>17</sup> medical evidence has been accepted as admissible that related loss of self-control to a mental condition that the accused had been suffering from at the time of the offence, and has also permitted this evidence, through the doctrine of “characteristics”, to assist the jury in deciding whether the provocation was sufficient “to make a person of reasonable self-control. . . act as the defendant did”. However, the Court of Appeal may have taken a significant step towards such an approach in the recent case of *R. v. Humphries*<sup>18</sup> where the trial judge was held to have wrongly excluded expert psychiatric evidence from the jury’s consideration in relation to the concept of the reasonable man. In allowing the appeal, Hirst L.J. stated:

“It is common ground that the judge was . . . explicitly directing the jury, as a matter of law, not to attribute to the reasonable young woman, in her situation, any of the seriously abnormal characteristics described by Dr Tarsh, including her attention-seeking trait through her tendency to wrist cutting.”<sup>19</sup>

In ruling that the trial judge was mistaken, his Lordship concluded that this trait as described by the psychiatrist, together with that of immaturity, were indeed matters that the jury “were entitled to take into account as eligible for attribution to the reasonable woman, it being of course for the jury to decide what weight if any to give to them”.<sup>20</sup> In addition, it is clear from the House of Lords’ recent decision in *R. v. Morhall*<sup>21</sup> that characteristics are not to be excluded from the reasonable man test merely because they are somehow discreditable. Further, in the course of his judgment Lord Goff cast doubt on the emphasis on characteristics placed by the Court of Appeal in *R. v. Newell*,<sup>22</sup> agreeing with the reservations expressed in the New Zealand Court of Appeal by Cook P. in *R. v. McCarthy*,<sup>23</sup> which concerned the “needless complexity” and “difficulty”<sup>24</sup> caused by the role of characteristics within the provocation plea.

There is no doubt that the decisions in *Humphries* and *Morhall* signify an important liberalisation of the law relating to provocation. However, despite these developments, the admissibility of expert testimony to inform juries about the

<sup>15</sup> [1978] 2 All E.R. 182.

<sup>16</sup> [1982] 2 N.Z.L.R. 198.

<sup>17</sup> [1986] N.Z. Recent Law 188.

<sup>18</sup> [1995] 4 All E.R. 1008, discussed by L.H. Leigh in “Provocation and the Reasonable Person” (1995) 145 New L.J. 1308. See further *R. v. Dryden* [1995] 4 All E.R. 987 and *R. v. Thornton (No. 2)* [1995] N.L.J. Law Reports 1888.

<sup>19</sup> [1995] 4 All E.R. 1008 at p.1014.

<sup>20</sup> *ibid* at pp.1014–1015.

<sup>21</sup> [1995] 3 All E.R. 659.

<sup>22</sup> (1980) 71 Cr.App.R. 331.

<sup>23</sup> [1992] 2 N.Z.L.R. 550.

<sup>24</sup> *ibid.*, at p.558.

reactions and states of mind of "ordinary folk" continues to be a major sticking point.<sup>25</sup> For, while the decision in *Emery* appeared to accept that the proper "question for the doctors was whether a woman of reasonable firmness with the characteristics of [the defendant] . . . would have had her will crushed",<sup>26</sup> more recent decisions on duress have made it clear that this is not the proper approach.

### Decisions since *Emery*

In cases involving pleas of duress or provocation, the classic test, which comprises two separate components, was confirmed more than a decade ago in *R. v. Graham*.<sup>27</sup> In relation to duress, the first (*subjective*) component of the *Graham* test is: were the defendant's actions a consequence of having been threatened with violence, or might they have been a consequence of such threats? The second (*objective*) component is: would a person of reasonable firmness, sharing the defendant's characteristics and circumstances, have responded in the same way? This dual-component test was approved by the House of Lords in *R. v. Howe*.<sup>28</sup> In relation to alleged provocation (rather than duress), the objective component refers to reasonable *self-control* rather than reasonable firmness.

In *R. v. Hegarty*,<sup>29</sup> which involved a plea of duress, the trial judge had refused to admit evidence regarding the defendant's emotional instability, which might have strengthened his defence by showing him to be especially vulnerable to threats. On appeal it was argued that as a result of Lord Taylor's remarks in *Emery* "medical evidence could extend to the reaction of a person of reasonable firmness to the threats in question".<sup>30</sup> However, the Court of Appeal expressed the view that Lord Taylor C.J. had not intended to cast any doubt on the general rule governing the admissibility of expert evidence in relation to provocation and duress, namely that the objective component of the *Graham* test is a matter for the jury and that expert evidence in relation to it is inadmissible.<sup>31</sup> Neill L.J. stated the view of the court as follows:

"We are quite satisfied that the medical evidence is not admissible as the law stands at present on the objective test in a case of duress. Furthermore, as the objective test predicates a 'sober person of reasonable firmness', we see no scope for attributing to that hypothetical person as one of the characteristics of the defendant a pre-existing mental condition of being 'emotionally unstable' or in a 'grossly elevated neurotic state'."<sup>32</sup>

In *R. v. Horne*,<sup>33</sup> the Court of Appeal similarly rejected a claim that the trial judge had wrongly excluded psychiatric evidence regarding the defendant's psychological characteristics. That evidence would have shown that the defendant was unusually pliable and vulnerable to pressure, which in turn might have strengthened his

<sup>25</sup> cf. *Coles* [1994] Crim.L.R. 820.

<sup>26</sup> *Emery* (1993) 14 Cr.App.R.(S.) 394, at p.398.

<sup>27</sup> *Graham* (1982) 74 Cr.App.R. 235.

<sup>28</sup> *Howe* [1987] A.C. 417.

<sup>29</sup> *Hegarty* [1994] Crim.L.R. 353.

<sup>30</sup> Lexis transcript.

<sup>31</sup> See Lord Simon's comments in *Camplin* [1978] 2 All E.R. 182.

<sup>32</sup> Lexis transcript.

<sup>33</sup> *Horne* [1994] Crim.L.R. 584.

defence of duress. The trial judge had ruled that if the word “characteristics” in the objective component of the *Graham* test were to be interpreted in its ordinary broad sense, it would naturally include psychological characteristics, but if psychological characteristics such as inherent weakness, vulnerability, and susceptibility to threats were included, then the objective component of the *Graham* test would be undermined completely and would, in fact, become subjective. “Characteristics” must therefore be interpreted more narrowly to exclude such mental characteristics but to include such things as age, sex, and physical disability. An expert’s opinion as to whether a defendant is by nature pliant and vulnerable cannot concern a jury, because that would circumvent the objective part of the *Graham* test.

Dismissing the appeal, Smith J. said:

“In the view of this court, if the standard for comparison is a person of reasonable firmness, it must be irrelevant for the jury to consider any characteristic of the defendant which shows that he is not a person of reasonable firmness, but is, for example, pliant or vulnerable to pressure. It would be a contradiction in terms to ask the jury this question, and then to ask them to take into account, as one of the defendant’s characteristics, the fact that he is pliant or vulnerable.

We take the view that it is not appropriate in the context of this case for this Court to seek to lay down any general rules as to what may or may not be taken into account as a characteristic for the purposes of the second limb of this test. . . . For the purposes of this appeal we say only that evidence of personal vulnerability or pliancy falling short of psychiatric illness is not relevant.”<sup>34</sup>

## Comment

A jury obviously cannot take *all* of a defendant’s characteristics into account when deciding whether a person of reasonable firmness or self-restraint, sharing the defendant’s characteristics and circumstances, would have responded in the same way; a person who shared *all* of the defendant’s characteristics and circumstances would lack firmness and self-restraint if the defendant lacked it and would in any case *necessarily* have responded identically to the defendant. That is the problem that has remained in the wake of the *Emery* decision.

Although the Court of Appeal did accept in *Hegarty* that “for the purpose of the subjective test medical evidence is admissible if the mental condition or abnormality of the defendant is relevant and the condition or abnormality and its effects lie outside the knowledge and experience of laymen”,<sup>35</sup> it was nevertheless considered that the emotional instability and neurotic state did not go this far. It seems clear, therefore, that the legal position regarding “characteristics” is broadly the same for both provocation and duress. In particular, the thrust of *R. v. Hegarty* and *R. v. Horne* is that it would be absurd to expect a jury to decide whether a person of reasonable firmness or self-restraint *but with the defendant’s firmness or self-restraint* would have acted as the defendant acted, and that if the objective standard is a person of reasonable firmness or self-restraint, then the defendant’s personal qualities of firmness or self-restraint cannot be taken into account. According to the *Graham* test, the jury are explicitly enjoined to take the defendant’s characteristics

<sup>34</sup> Lexis transcript.

<sup>35</sup> Lexis transcript.

and circumstances into account when applying the test. In an attempt to avoid this muddle, the Court of Appeal has ruled that the jury should consider all of the defendant's characteristics *apart from firmness or self-restraint*, as the case may be. We believe that this has merely increased the confusion.

Psychological research<sup>36</sup> has established beyond doubt that human personality consists of a complex web of intercorrelated characteristics sometimes called a *nomological net*. To mention just one example, a person with low self-esteem may be less likely to be firm in response to threats than someone with high self-esteem, so if the jury are forbidden to consider firmness, then they should also be forbidden to consider self-esteem. A jury may expect a young, physically disabled female to be more likely to have low self-esteem, and therefore to lack firmness in the face of threats, than an older, able-bodied male defendant. But if a jury is able to take account of age and sex in such a case when considering the objective test in duress, then how is it possible for jurors to disentangle these "characteristics" from that of low self-esteem? Further, if the defendant's mental state is abnormal enough to be allowed in under the *Turner* rule in relation to the subjective test in duress, then when the jury is called upon to consider the objective test, what must it decide? Professor Smith raised the following question: "If a man directs his helplessly dependent partner to commit a specific crime, like robbery, or be beaten, do we ask whether the threat would have overborne the will of a woman of reasonable firmness or the helplessly dependent woman?"<sup>37</sup> It seems clear according to *Hegarty* and *Horne* that the relevant comparison is with a person of reasonable firmness, in which case if, as in *Emery*, the woman is suffering from "battered woman syndrome" which makes her unduly compliant, then there is a real danger that this type of condition will not qualify as a characteristic owing to the fact that a number of its features—compliance, learned helplessness, dependence, and so on—all conflict with the objective notion of "reasonable firmness".

## Conclusion

So far as duress is concerned, a clear way forward is contained in clause 42(3)(b) of the Criminal Code Bill, which would rid the law of the objective test and would permit such expert testimony by requiring that "the threat is one which in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to resist".<sup>38</sup> In its commentary on the provisions, the Law Commission states: "A person's 'firmness', however, is one of his characteristics that may affect the gravity of the threat to him; and we are not convinced that personal characteristics can be separated in the way the *Graham* test appears to contemplate."<sup>39</sup> There is no doubt that such a departure from the objective limb of the *Graham* test would be a great improvement. However, this would still leave the

<sup>36</sup> See, e.g. L. R. Goldberg, "The Structure of Phenotypic Personality Traits" (1993) 48 *American Psychologist* 26; S. E. Hampson, "The Construction of Personality" in *Companion Encyclopedia of Psychology* (A. M. Colman, ed.), Vol. 1, pp.602-621 (1994, Routledge); *Handbook of Personality Theory and Research* (L. A. Pervin, ed.) (1990, Guilford, New York).

<sup>37</sup> [1994] Crim.L.R. 356.

<sup>38</sup> Law Com. No. 177, *A Criminal Code for England and Wales, Vol. 1: Report and Draft Criminal Code Bill* (1989).

<sup>39</sup> *ibid.*, para. 12.16 of Vol. 2.

*Turner* rule intact, which is clearly unsatisfactory. An obvious solution would be for the judiciary to reconsider the *Turner* rule.<sup>40</sup> It is interesting to note that this has already occurred in the High Court of Australia in *Murphy v. The Queen*,<sup>41</sup> where a majority of the court stated:

“The question then is whether the evidence. . . was admissible expert evidence. In *R. v. Turner* Lawton L.J. expressed the basis upon which expert evidence is received in terms about which there can be no quarrel: ‘An expert’s opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury.’ Later Lawton L.J. added some remarks which may not be so unquestionable: ‘Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.’ There are difficulties with such a statement. To begin with, it assumes that ‘ordinary’ or ‘normal’ has some clearly understood meaning and, as a corollary, that the distinction between normal and abnormal is well recognised. Further, it assumes that the common sense of jurors is an adequate guide to the conduct of people who are ‘normal’ even though they may suffer from some relevant disability. And it assumes that the expertise of psychiatrists (or, in the present case, psychologists) extends only to those who are ‘abnormal’. None of these assumptions will stand close scrutiny.”

We believe that this criticism is fully justified and that now is the time to rid English law of the *Turner* rule and to adopt the approach that we advocated in our earlier article,<sup>42</sup> namely that expert psychiatric and psychological evidence should be limited, but that the range of admissible evidence should be extended to include abnormal and unusual states of mind that fall short of mental disorders but are not well understood by ordinary people, and in relation to which expert testimony could contribute to a jury’s understanding of a defendant’s behaviour or state of mind at the material time.<sup>43</sup>

<sup>40</sup> In “A New Look at Eye Witness Testimony” (1995) 145 New L.J. 94, Peter Thornton Q.C. at p.98 makes the following suggestion: “Alternatively, each category of prospective expert evidence could be considered by Parliament and the new limits of admissibility codified in statute.” But such a development seems impractical and unrealistic, especially as the potential categories of expert evidence are virtually limitless.

<sup>41</sup> (1988–89) 167 C.L.R. 94, at p.110.

<sup>42</sup> R. D. Mackay and A. M. Colman, “Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience” [1991] Crim.L.R. 800, at p.809.

<sup>43</sup> *cf. Daubert v. Merrell Dow Pharmaceuticals* (1993) 113 S.Ct. 2786, where the Supreme Court of the United States abandoned the restrictive approach towards the admissibility of expert evidence contained in the *Frye* test (see *Frye v. United States*, 293 F.Supp. 1013, D.C. Cir. 1923) in favour of the more liberal approach of the Federal Rules of Evidence 1975, especially rule 702 which provides that “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise”. For a discussion see A. M. Colman and R. D. Mackay, “Psychological Evidence in Court: Legal Developments in England and the United States” (1993) 1 *Psychology, Crime & Law*: 261.