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# Legal issues surrounding the admissibility of expert psychological and psychiatric testimony

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## Introduction

English courts have recognized the usefulness of experts for centuries. At first, experts used to be invited to serve on juries; later, in the second half of the eighteenth century, they began to testify as witnesses (Hand, 1901; Cross and Tapper, 1990). During the centuries that have elapsed since then, there has been a steady increase in the frequency with which expert witnesses have testified on medical, scientific, literary and a variety of other matters.

The decision of the Court of Appeal in the leading case *R. v Turner* (1975) has resulted in potentially helpful expert psychological and psychiatric testimony being ruled inadmissible in numerous cases, especially those involving defendants who were not suffering from any mental disorder at the time of the alleged offences. One of us (A.M.C.) has had his expert testimony about crowd behaviour and memory processes ruled inadmissible according to the so-called Turner rule in several recent cases in Northern Ireland. In this paper, we examine the structure and underlying assumptions of the Turner rule.

## R. v. Turner

The defendant in *R. v. Turner* (1975) had been convicted of murder and sentenced to life imprisonment; he appealed against the conviction on the ground that the trial judge had wrongly refused to admit psychiatric evidence which would have helped to establish his defence of provocation.

The facts of the case were briefly as follows. The defendant killed his girlfriend with a hammer while they were sitting together in a motor car. Almost immediately after killing her, he went to a nearby farmhouse and told the occupants what he had done. When the police arrived he admitted the killing but added: "I didn't mean to do it. I didn't mean to do it, honestly". One of his defences was provocation. He claimed to have been deeply in love with the woman and to have believed that she was pregnant by him. While they were sitting together on the night in question she told him with a grin that she had slept with two other men and that the child that she was carrying was not his. He claimed that he was overwhelmed with blind rage, that his hand came across a hammer tucked beside the seat, and that he hit her with it without realizing what he was doing.

The defence wanted to call a psychiatrist to prove that, although the defendant showed no sign of mental disorder and did not require a psychiatric assessment, he had enjoyed a deep emotional relationship with the deceased which was likely to have caused an explosive outburst of blind rage after her confession to him, and that after the crime his behaviour showed profound grief for what he had done, which was consistent with his defence of provocation. After examining a long psychiatric report, which outlined the evidence the expert witness intended to give, the trial judge ruled the evidence inadmissible. The defence argued that the trial judge was wrong in refusing to admit the expert evidence, but the appeal was dismissed.

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## “Common Knowledge and Experience”

The expert evidence in *R. v. Turner* (1975) and many other cases was excluded on the ground that it dealt with matters of “common knowledge and experience”. The foundation of this common-law principle was laid as long ago as 1782 in the case of *Folkes v. Chadd*, when Lord Mansfield ruled that an expert’s opinion is admissible only if it furnishes the court with information that it is likely to lie outside the common knowledge and experience of the jury. Two centuries later, in *R. v. Turner* (1975), Lord Justice Lawton reinforced this interpretation. Lord Justice Lawton justified the *Turner* rule as follows:

If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness had impressive qualifications does not by that fact alone make his opinion on matters of human nature any more helpful than the jurors themselves; but there is a danger that they may think it does. (*R. v. Turner*, 1975, p.841).

A key promise of the *Turner* rule is that all psychological processes except those involving some form of mental abnormality are part and parcel of the common knowledge and experience of a jury. Lord Justice Roskill made this assumption lucidly explicit in *R. v. Chard* (1972):

Where the matters in issue go outside [the jury’s] experience and they are invited to deal with someone supposedly abnormal, for example, supposedly suffering from insanity or diminished responsibility, then plainly in such a case they are entitled to the benefit of expert evidence. But where, as in the present case, they are dealing with someone who by concession was on the medical evidence entirely normal, it seems to this Court abundantly plain, on first principles of the admissibility of expert evidence, that it is not permissible to call a witness, whatever his personal experience, merely to tell the jury how he thinks the accused man’s mind - assumedly a normal mind — operated at the time of the alleged crime. (pp. 270-271)

The *Turner* rule has been used to exclude expert psychological and psychiatric evidence in numerous cases (Mackay and Colman, 1991). The courts have adopted a generally indulgent attitude towards expert psychiatric testimony in relation to diminished responsibility, except in cases involving the voluntary consumption of alcohol or dangerous drugs. But they have shown great reluctance to admit such testimony in cases involving pleas of provocation and broader issues of *mens rea*. Lord Justice Lawton epitomized the judiciary’s attitude towards expert testimony in relation to provocation when he said in *R. v. Turner* (1975) that “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” (p.841).

## Logic of the *Turner* rule

The *Turner* rule appears to be based on an interpretation of the relation between psychology and common sense that is sufficiently wrong-headed to be called a fallacy. The underlying structure of the argument can be clarified in terms of the following chain of propositions. (a) Expert psychological or psychiatric evidence, unless it deals with mental disorder, mental handicap, or automatism, is inadmissible even if it is relevant. This is so because (b) psychology and psychiatry are no substitute for the common sense of jurors when it comes to matters that lie within their common knowledge and experience. This is so because (c) a psychologist’s or a psychiatrist’s opinions about normal human behaviour are in reality of no greater value than those of an ordinary jury, but if they come from an expert witness with impressive qualifications, and if they are dressed up in scientific jargon, jurors might attach too much weight on them, believing wrongly that they have greater value than their own opinions. This is so because (d) ordinary, reasonable men and women can understand normal human behaviour on the basis of their common knowledge and experience, and psychology and psychiatry can offer nothing that might correct or enlarge that understanding. This is so because (e) The behaviour of normal human beings is essentially transparent.

These propositions form a logical chain: each depends for its validity on the one that follows it, so that if any one of them turns out to be invalid, the justification for the one preceding it collapses, and therefore so does the justification for every proposition preceding it. In other words, the justification

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for excluding expert psychological or psychiatric evidence (a in the list) dangles on the end of a chain of assumptions (b, c, d, and e).

Let us, therefore, focus on the last assumption (e) about the transparency of human behaviour. We shall test it against five examples of normal human behaviour that are demonstratively counter-intuitive in the sense that "ordinary, reasonable men and women" generally misunderstand them. The examples will expose the fallacy that psychology consists of nothing but common sense "dressed up in scientific jargon" (as Lord Justice Lawton put it) and that a psychologist's opinions on normal behaviour are therefore unhelpful to a jury.

## Psychology and common sense

Our first example relates to the fundamental attribution error (Ross, 1977). Since the mid 1970s, social psychologists have been accumulating evidence which shows that people tend to attribute their own actions to external situational causes, whereas outside observers tend to attribute the same action to causes internal to the actors. Since in these circumstances actors and observers disagree about causes, the question naturally arises as to who is right and who is wrong. The experimental evidence shows that the error usually lies in the observers' tendency to underestimate the importance of internal, dispositional factors, and this pervasive and powerful illusion is now well established on a secure empirical foundation (Miller et al., 1990). Research into the fundamental attribution error shows clearly that "ordinary, reasonable men and women" have a systematically biased understanding of normal human behaviour when external, situational factors play a significant part. Allegedly criminal acts often fall into this category, which suggests that jurors may not always be able to understand issues concerning *mens rea* purely on the basis of their common knowledge and experience of human behaviour.

Our second example relates to obedience to authority. A series of classic experiments (Milgram, 1974) established that most ordinary people will deliver what they believe to be extremely painful and possibly lethal electric shocks to an innocent victim if they are merely instructed firmly and insistently to do so by a self-appointed authority figure, even if the victim screams with pain, begs to be released, and eventually appears to lose consciousness or die. Roughly two thirds of those who have taken part in the many replications of the experiment have been wholly unable to resist the pressure (Blass, 1991). There is no doubt that this is a highly counter-intuitive phenomenon, for many authorities (e.g. Aronson, 1988, p.41; Colman, 1987, pp.88, 108; Milgram, 1974, chap. 3) have reported that when people are asked to guess how they would have behaved if they were the experimental subjects, about only one in a hundred believe that they would comply with the instructions to the end, although in reality a large majority of experimental subjects generally do so. The conformity pressure in this type of situation is so counter-intuitively strong that even experienced psychologists were surprised by the findings. When the experiment was first described to a group of 40 senior psychiatrists at a leading medical school in the United States, most of them predicted that only about one person in a thousand would be fully compliant (Milgram, 1974, p.30).

Our third example is group polarization (Isenberg, 1986). Before the problem was scientifically investigated for the first time in the early 1960s, it was generally assumed that the collective decisions of committees, boards, cabinets and other decision-making groups tend to be more cautious and generally more moderate or less extreme than individual decisions. A large and quite unambiguous body of experimental evidence has now accumulated to show exactly the reverse - that group decisions involving risk tend to be riskier, and those not involving risk tend to be generally more extreme than individual decisions.

Fourth, we have cognitive dissonance, and in particular forced compliance (Festinger, 1957; Festinger and Carlsmith, 1959; Wicklund and Brehm, 1976). People who are persuaded by bribes or threats to say or do things that they do not inwardly agree with tend to shift their private opinions in the direction of their words or actions. That much is hardly surprising, and is probably part of the stock of common knowledge and experience of ordinary people. What is surprising and generally counter-intuitive, but is confirmed by scores of carefully controlled experiments, is that the greatest shifts in private opinion result from the smallest bribes or the mildest threats necessary to gain compliance. Once again, the phenomenon is demonstratively counter-intuitive: people who are invited to guess almost invariably expect the opposite result.

Last, let us consider bystander apathy (Latané and Darley, 1970; Latané and Naida, 1981). Contrary to popular belief, in an emergency involving a person visibly in distress or a crime obviously being committed, a bystander is much less likely to help when there are other people present than when he

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or she is alone. More than 50 experiments by dozens of independent researchers have confirmed this robust and remarkably consistent effect across a wide range of different emergency situations. In spite of its robustness, however, this phenomenon is profoundly counter-intuitive.

The implicit assumption on which the law is founded is that the behaviour of normal people is essentially transparent. On that premise a legal principle about the inadmissibility of expert psychological and psychiatric evidence has found its way into the common law in England, the United States and many other jurisdictions. The principle is that expert psychological or psychiatric evidence, unless it deals with mental disorder, mental defectiveness, or automatism, is inadmissible even if it is relevant. Our examples show that the underlying assumption - that normal behaviour is transparent - is clearly false, and this leaves the Turner rule without any discernable justification or persuasive force.

There is, in our view, no obvious reason to believe that ordinary people's understanding of normal human behaviour is any more accurate than their understanding of mental disorder. Contemporary psychology bristles with ideas and experimental findings that lie outside the everyday understanding of even the most intelligent and well educated non-psychologists. Thirty examples of this type from all branches of psychology are given in the form of a quiz in Colman (1988).

A legal breakthrough may have occurred in the Peterborough Crown Court in January 1992 in *R. v. Emery*, when Helena Kennedy QC managed to get expert psychological evidence admitted on the question of the long-term effects of physical abuse. Sally Emery claimed that her partner had battered both her and her 11-month-old child over a long period, and the child eventually died of its injuries. She was accused of failing to protect her child. Helena Kennedy, defending, attacked the Turner rule and managed to get evidence on the "battered woman syndrome" admitted. Sandra Horley of Chiswick Family Rescue testified. Judge Michael Astill said in his ruling:

On the face of her evidence it may be incomprehensible why she failed to protect her child in these circumstances. Therefore without further explanation or understanding this might lead to a guilty verdict, but if the jury were to hear expert evidence they might find her not guilty. It follows in my judgment that effects of abuse may well not be within the capacity of a jury to understand without expert witnesses ... it would be unjust to Sally Emery if this evidence were excluded. (*R. v. Emery*, 1992, court transcript).

The case is now going to appeal on the grounds that the expert evidence should not have been admitted. The Appeal Court's judgment will have far-reaching consequences for future expert witnesses. Our view is that expert psychological evidence should be admitted whenever it is both relevant and potentially helpful to the jury in explaining aspects of human behaviour that are not easily understood with common sense alone.

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