

## PSYCHOLOGICAL EVIDENCE IN COURT Legal Developments in England and the United States

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Psychological testimony in England, except when it has dealt with clinical matters, has generally been ruled inadmissible on the grounds that it would usurp the function of the jury to decide matters of “common knowledge and experience”. The so-called *Turner* rule governing admissibility of psychological evidence has been interpreted according to a dubious assumption about the transparency of human behaviour, but this restrictive interpretation was rejected in a recent Court of Appeal decision, which should result in a more receptive attitude to psychological evidence. In the United States, the *Frye* test has been used to exclude psychological testimony unless it can be shown to have gained “general acceptance” in the field of psychology, but a recent United States Supreme Court decision has led to a more permissive approach to that jurisdiction also.

Key words: admissibility; expert evidence; expert testimony; fundamental attribution error; helping behaviour; obedience.

The potential usefulness of expert opinion on a variety of specialized matters has been recognized by the courts in England for several centuries. To begin with, experts were occasionally invited to serve on juries in cases involving technical issues; then, in the second half of the eighteenth century, they began to be called as witnesses (Cross and Tapper, 1990; Learned Hand, 1901). Throughout the nineteenth and twentieth centuries expert witnesses were called increasingly often to testify on a variety of matters, chiefly medical and scientific.

Psychological evidence, however, has generally been treated as a special case and has not won such easy acceptance. In England, the growth of psychology after the Second World War was accompanied by an increasingly sceptical and cautious attitude on the part of the judiciary towards the admissibility of psychological evidence. This came to a head with an extremely influential decision of the Court of Appeal in the case of *R v. Turner* (1975), which had the effect of rendering psychological testimony inadmissible except in cases in which the defendants were affected by mental disorder, mental handicap, or automatism (hypnosis or somnambulism, for example) at the time of the alleged offences. The decision was equally applicable to testimony from psychologists (non-medical experts on the nature, functions, and phenomena of behaviour and mental experience) and psychiatrists (medically trained experts on the classification, aetiology, diagnosis, treatment, and prevention of mental disorders).

### THE *TURNER* RULE

The expert evidence in *R. v. Turner* (1975) was excluded on the ground that it dealt with matters of “common knowledge and experience”, which the jury could understand without the

help of an expert. The defendant had killed his girlfriend with a hammer while they were sitting together in a motor car after she told him with a grin that she had slept with two other men and that the child she was carrying was not, as he had assumed, his. He claimed that he was overwhelmed with blind rage and hit her with the hammer 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, 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 that the expert witness intended to give, the trial judge ruled the evidence inadmissible. The defence took the case to the Court of Appeal, arguing that the trial judge had been wrong in refusing to admit the expert evidence, but the appeal was dismissed. Lord Justice Lawton justified the Court of Appeal decision 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 has impressive qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does. (*R. v. Turner*, 1975, p. 841)

A key premise of this argument, which was already well established in the common law by 1975, was 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. A few years before *Turner*, Lord Justice Roskill made this assumption lucidly explicit:

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 an accused man's mind—assumedly a normal mind—operated at the time of an alleged crime. (*R. v. Chard*, 1972, pp. 270–271)

The *Turner* rule applies only in criminal cases, but it has been used to exclude expert psychological and psychiatric evidence in innumerable such cases (Mackay and Colman, 1991). In cases involving pleas of diminished responsibility, except where defendants have voluntarily consumed alcohol or dangerous drugs, the courts have adopted a more tolerant attitude towards expert psychological or psychiatric testimony; but they have shown great reluctance to admit such testimony in cases involving pleas of provocation or in respect of issues of criminal responsibility or *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).

Mackay and Colman (1991) and Colman and Mackay (1993) have argued that the *Turner* rule has been applied inconsistently by the courts, in a manner that is excessively restrictive, and that the exclusion of evidence relating to non-clinical psychological phenomena is based on a false premise regarding the transparency of normal human behaviour and mental experience. There is, in reality, no obvious reason to believe that ordinary people's understanding of normal behaviour is any more reliable than their understanding of mental disorder. Con-

temporary psychology deals with countless aspects of normal behaviour that lie demonstrably outside the everyday understanding of even the most intelligent and well educated non-psychologists. Colman and Mackay (1993) discussed a number of examples, including the following.

*The fundamental attribution error* (Ross, 1977). There is abundant experimental evidence to show that, in explaining other people's behaviour, observers tend to underestimate the importance of external, situational factors and to overestimate the importance of internal, dispositional factors. This powerful distortion of perception, which is sometimes called the *overattribution bias* (e.g., Webster, 1993), has been confirmed by numerous independent researchers (Miller, Ashton, and Mishal, 1990). External, situational factors play a significant role in many criminal acts, 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.

*Obedience to authority* (Milgram, 1974). A series of experiments has established that approximately two-thirds of people are fully obedient if they are instructed firmly and insistently by an authority figure to deliver what they believe to be extremely painful and possibly lethal electric shocks to an innocent victim, even if the victim appears to scream with pain and eventually to lose consciousness or die. These findings have been replicated by a number of researchers (Blass, 1991), and there is no doubt that they constitute a highly counter-intuitive phenomenon, because only about one in a hundred people believe that they themselves would be fully obedient in such a situation. Furthermore, before the experiment had been published, it was described in detail to a group of 40 senior psychiatrists at a leading medical school in the United States, and most of them predicted that only about one person in a thousand would be fully obedient (Milgram, 1974, p. 30).

*Group inhibition of helping behaviour* (Latané and Darley, 1970; Latané and Naida, 1981). Numerous naturalistic field experiments have confirmed that, contrary to what most people assume, in an emergency in which a person is apparently in distress or a crime is apparently being committed, a bystander is much less likely to help if there are other people present than if the bystander is alone. This is a robust phenomenon of social psychology, and one that has obvious relevance to the circumstances of many alleged crimes, but it is also obviously counter-intuitive.

There are numerous examples of such counter-intuitive psychological processes in the areas of psychology devoted to non-disordered behaviour, and it therefore seems absurd to exclude psychological evidence on non-clinical psychological phenomena on the ground that they necessarily fall within the common knowledge and experience of ordinary jurors. The argument is now academic, however, because the restrictive interpretation of the *Turner* rule was finally abandoned in a Court of Appeal decision in November 1992.

## THE EMERY DECISION

The facts of the case of *R. v. Sally Lorraine Emery (and Another)* (1993) were briefly as follows. Sally Emery was a 19-year-old unmarried mother of a child called Chanel, who died at the age of 11 months with many injuries, including fractured ribs and a ruptured bowel, resulting from several weeks of severe physical abuse. In the Peterborough Crown Court in

January 1992, the jury acquitted Sally Emery of occasioning actual bodily harm, but found her guilty of failing to protect the child from the father. 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.

Sally Emery's defence was that she had been acting under duress. She testified at her trial that the father, Brian Hedman, had routinely and severely abused both Chanel and herself, and that fear had prevented her from protecting Chanel. Her counsel, Helena Kennedy QC, made an application to call two expert witnesses to explain the mental condition on which her defence of duress rested: a psychologist with many years' experience working with abused women and a psychiatrist with specialist knowledge of responses to serious trauma. The application was opposed by the prosecution on the basis of the *Turner* rule, on the grounds that the proposed evidence dealt with matters within the common knowledge and experience of the jury. After considering this argument, the trial judge, Michael Astill, ruled the evidence admissible and granted leave to the defence to call the two experts, who testified that Sally Emery had been suffering from post traumatic stress disorder (PTSD) and that her symptoms included "learned helplessness" and the "battered woman syndrome". They said that prolonged violence and abuse of a woman by her partner can induce a flat hopelessness, an inability to stand up to the abuser, a feeling of dependence on the abuser, and an inability to withdraw from the situation. The jury found that Sally Emery had not herself administered violence to the child but found her guilty of failing to protect her child, which implies that the jury rejected her defence of duress and was therefore not fully convinced by the expert evidence.

The trial judge allowed the expert evidence in, although it did not deal with mental disorder, mental handicap, or automatism, 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 described might well not be within the capacity of a jury to understand unassisted by expert evidence. (Quoted in *R. v. Sally Lorraine Emery (and Another)*, 1993, p. 397)

The Court of Appeal judgment, delivered by the Lord Chief Justice, Lord Taylor, fully endorsed this decision and its justification. Lord Taylor commented that the condition of dependent helplessness that was the subject of the proposed expert testimony "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" (p. 397).

Every major branch of psychology contains vast quantities of information that are both "complex and not known by the public at large". Without serious and sustained study of psychology, no member of the public at large could come anywhere near passing a psychology examination at first-year university level. The effect of the *Emery* judgment therefore appears to open the door to psychological evidence in a far wider range of areas than has hitherto been the case. The *Turner* rule was not abandoned in *Emery*; expert evidence dealing with matters within the "common knowledge and experience" of a jury remain inadmissible, but the interpretation of the rule was relaxed inasmuch as it was no longer to be assumed 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” (*R. v. Turner*, 1975, p. 841).

## THE *FRYE* TEST AND FEDERAL RULES OF EVIDENCE

In the United States, the admissibility of expert evidence was governed for seven decades by a Court of Appeals decision in the leading case *Frye v. United States* (1923), but considerable confusion was caused by the legislative enactment by the United States Congress of the *Federal Rules of Evidence for United States Courts and Magistrates* (1975), which provided a much less stringent standard for the admissibility of expert testimony.

The decision of the Court of Appeals for the District of Columbia in *Frye v. United States* (1923) was that expert testimony based on a scientific technique is inadmissible unless the technique is “generally accepted” as reliable in the relevant scientific community, and that expert opinion based on a methodology that diverges “significantly from the procedures accepted by recognized authorities in the field . . . cannot be shown to be ‘generally acceptable as a reliable technique’” (pp. 1129–1130).

The expert evidence in *Frye* related to a systolic blood pressure deception test, a crude precursor of the polygraph lie detector test which, even in its modern, sophisticated form, is highly controversial (Kircher and Raskin, 1992). In a brief but influential judgment the court argued as follows:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. (*Frye v. United States*, 1923, p. 1014)

Because the deception test had “not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made” (p. 1014), evidence of its results was ruled inadmissible.

The *Frye* “general acceptance” test generated a vast amount of controversy (see, e.g., Becker and Orenstein, 1992; Black, 1988; Gianelli, 1980; Green, 1992; Imwinkelried, 1990, 1992; Kircher and Raskin, 1992). In practice, the admissibility of expert evidence was decided on a case-by-case basis, and it was difficult to predict in advance whether testimony would be admitted in any particular case, because the *Frye* test left plenty of scope for interpretation.

Since the legislative enactment of the Federal Rules of Evidence in 1975, there has also been confusion in United States courts over whether these rules supersede or coexist with the *Frye* test (Imwinkelried, 1990). The rules that are most relevant to the present discussion are the following:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible . . . If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in 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. (*Federal Rules of Evidence for United States Courts and Magistrates*, 1975, Rules 402, 702)

The rules define “relevant evidence” as evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” (Rule 401). The question of the relative force of the Federal Rules of Evidence and the *Frye* test was finally resolved in 1993.

### THE *DAUBERT* DECISION

The Federal Rules of Evidence are obviously much more permissive than the *Frye* test, because they allow any relevant evidence to be admitted, and they have nothing corresponding to the much more demanding “general acceptance” standard required by the *Frye* test. In the landmark case of *Daubert v. Merrell Dow Pharmaceuticals* (1993), the United States Supreme Court decided that the Federal Rules of Evidence supersede the *Frye* test. From June 1993, when the Court of Appeals decided this case, the *Frye* test ceased to govern decisions about the admissibility of expert evidence in United States Federal courts.

The facts of the *Daubert* case were briefly as follows. After taking Merrell Dow’s morning sickness drug Bendectin, which was sold in Britain under the trade name of Debendox, Joyce Daubert bore a child, Jason, with serious birth defects (without a bone in his lower right arm and with only two fingers on his right hand), and she (together with others) sued Merrell Dow for damages. Her counsel wished to introduce the evidence of eight suitably qualified experts on teratogens (substances capable of causing malformations in foetuses) who would testify, partly on the basis of a statistical reanalysis of published data, that maternal ingestion of Bendectin was a risk factor for human birth defects. The court ruled this evidence inadmissible on the grounds that it failed to meet the “general acceptance” standard of the *Frye* test, because the reanalysis of published data on which it was based had not itself been published or subjected to peer review. The case finally went to the United States Supreme Court, which held unanimously that the Federal Rules of Evidence had displaced the *Frye* test in decisions about the admissibility of expert evidence. The *Daubert* case was therefore remanded for further proceedings in the light of this decision.

Although the *Frye* test was displaced by the far more liberal Federal Rules of Evidence, Justice Harry Blackmun said in a part of his judgment that was accepted by a 7–2 majority of the bench that “under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable” (*Daubert v. Merrell Dow Pharmaceuticals*, 1993, p. 18). According to Rule 702, quoted above, the expert testimony must relate to scientific knowledge, and according to the court the adjective “scientific” implies “a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation. In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability” (p. 20). In the United States it is now up to the courts to decide not only whether proposed expert testimony is relevant, which has always been necessary, but also whether it is reliable in the scientific sense.

### CONCLUSIONS

Barriers against expert psychological evidence were lifted by recent legal decisions in England and the United States. In England, the *Turner* rule still excludes testimony dealing with

matters that are deemed by the judge to lie within the “common knowledge and experience” of a jury, but in the light of the decision in *R. v. Sally Lorraine Emery (and Another)* (1993) the rule is no longer interpreted to exclude all psychological and psychiatric evidence relating to non-clinical psychological phenomena. The assumption that human behaviour and mental experience outside of mental disorder, mental handicap, or automatism are necessarily within the common knowledge and experience of a jury and are therefore matters on which expert evidence must be excluded, was demonstrably absurd and anachronistic (Mackay and Colman, 1991; Colman and Mackay, 1993). The change is welcome, and should herald in a more rational era in which expert evidence on aspects of normal psychology will be admitted provided that it does not usurp the function of the jury to decide matters within their own unassisted competence.

In the United States, the confusion that has existed for many years over the *Frye* test and the Federal Rules of Evidence was dispelled in 1993. The Supreme Court decided in *Daubert v. Merrell Dow Pharmaceuticals* (1993) that the *Frye* test was superseded by the Federal Rules of evidence. The *Frye* test is effectively dead, and expert testimony will no longer be ruled inadmissible on the grounds that it has not “gained general acceptance in the particular field in which it belongs”. Expert evidence is now admissible provided that it is based on “scientific knowledge”, which is assumed to guarantee a standard of evidential reliability or trustworthiness, and that it is also relevant, which according to the Federal Rules of Evidence means that it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” (*Federal Rules of Evidence for United States Courts and Magistrates*, 1975, Rule 702). It has always been up to the courts to decide whether or not proposed expert evidence was relevant; courts in the United States must now decide also whether or not the evidence is based on “scientific knowledge” and is therefore reliable.

In both England and the United States, after decades of arbitrary restriction, the courts are now more accommodating towards expert psychological testimony. If this leads to more enlightened decisions being made in the light of well established psychological research findings, the legal changes will have had a salutary effect. There is anxiety in traditionalist legal circles that the new rules will lead to a free-for-all in which cranks and charlatans will be paraded across witness stands to befuddle juries with irrational and pseudo-scientific evidence. Such pessimistic predictions may derive from an underestimation of the intellectual capabilities of juries and the power of the adversarial system, through cross-examination, the presentation of contrary evidence, and careful judicial instruction to juries on the required burden and standard of proof, to undermine or expose dubious though admissible evidence. The legal checks in both countries against the promiscuous use of expert evidence make it unlikely that there will be cause to regret the liberalization of the law.

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