Excluding Expert Evidence: a tale of ordinary folk and common experience

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Summary: This article contains a critical examination of the rule in R. v. Turner concerning the admissibility of expert evidence in the light of recent cases and psychological considerations.

The decision of the Court of Appeal in Turner has been extremely influential in bringing about the exclusion of expert psychiatric testimony in cases involving defendants who were not suffering from any abnormal mental condition at the time of the alleged offence. In this leading case, Lawton L.J. argued that an expert's opinion, even if it is clearly relevant, is inadmissible unless it furnishes the court with information that is likely to lie outside the common knowledge and experience of the jury. He inferred from this that:

"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."

Legal considerations

The Turner rule has recently been defended on the following essentially socio-logical ground:

"A judge deciding whether expert opinion should be accepted as an arbiter of a certain matter has to consider the state of public opinion on the point. If the community has come to defer to professional standards on the matters in question, the courts will normally follow suit. Medical evidence is admissible on matters of health because we accept the authority of the medical profession in this regard. Psychiatry has not yet obtained a like

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2 Ibid., at p.841.
acceptance. Psychiatric evidence is admissible on the issue of insanity but not . . . on the mental state of a normal person. It is arguable that the distinction is irrational; for to understand abnormality psychiatry has first to master the normal mental processes. However, as long as the community does not defer to psychiatry on matters such as intention and credibility, the scope for expert evidence on such matters must remain limited . . . . Only when public opinion is clear one way or another can we demand consistency from the courts.\textsuperscript{3}

The above remarks are equally applicable to the discipline of psychology. Indeed, psychological testimony is even more apt to fall foul of the Turner rule, not only because psychologists lack medical training but also by reason of the fact that psychology is a science devoted in the main to the study of normal behaviour.

The purpose of this article is, first, to provide a critical examination of recent judicial inconsistency in the application of the Turner rule and, second, to suggest that the public may have been misled by the courts into believing (a) that there is a clear dividing line between normality and abnormality and (b) that expert psychological and psychiatric testimony cannot help ordinary lay people when it is their task as jurors to consider the criminal responsibility of supposedly “normal” defendants.

**Some recent cases**

Expert psychiatric testimony is clearly admissible to assist the jury in its assessment of pleas of insanity, diminished responsibility, and automatism (whether of the sane or insane variety). Indeed, as far as diminished responsibility is concerned, it seems that psychiatric evidence is legally necessary,\textsuperscript{4} but at present this is not strictly true of either insanity\textsuperscript{5} or automatism.\textsuperscript{6}

As regards diminished responsibility, there is no doubt that, with the exception of complications arising from the voluntary consumption of alcohol or dangerous drugs,\textsuperscript{7} the courts have often been generous in their attitude towards psychiatric testimony. This has prompted Griew to remark:

"It is well known that psychiatrists, lawyers and judges have, between them, benignly contrived to bring within section 2 [of the 1957 Homicide Act] some kinds of cases that it might find difficulty in accommodating if diagnosis and statutory interpretation were both rigorously conducted. They are cases which might move a layman, innocent of section 2, to speak of the killer’s having been ‘out of his mind’ with jealousy or grief, or of his having finally ‘snapped’ after a long period of persecution or domestic conflict. Faced with such a pathetic reaction to grief or stress the lawyers involved may be sympathetic to any medical pronouncement that can plausibly serve as a certificate of the existence of a qualifying ‘abnormality of


\textsuperscript{7} See Tandy [1989] I All E.R. 267.
mind.' The psychiatrist may offer the necessary bait in the form of a 'diagnosis' of 'reactive depression' or 'dissociation.' "8

But the courts have adopted a much less benign approach when the plea has been one of provocation because, according to Lawton L.J. in *Turner*, "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."9

The reasoning behind this approach seems obvious. One of the crucial questions that the jury has to answer is whether the provocation was enough to make a reasonable person behave as the accused behaved. The loss of self-control that is essential to a successful provocation defence would seem therefore to be something that is likely to lie within the common knowledge and experience of the jury. However, since the decision in *D. P. P. v. Camplin*,10 it must be highly doubtful that such a narrow and simple interpretation is valid, because the law now requires a jury to endow the hypothetical "reasonable person" with "such of the accused's characteristics as they think would affect the gravity of the provocation to him."11 Even after being thus endowed, an ordinary, reasonable person is bound to retain some measure of self-control, and so expert psychiatric and psychological testimony appear to remain inadmissible on the final issue of whether or not this ordinary person would have experienced a loss of self-control.

In the recent provocation case of *Roberts*,12 the Court of Appeal refused leave to call psychiatric evidence to the effect that the past physical abuse of the profoundly deaf accused by his father, together with communication difficulties and some alcohol consumption, could have contributed to his loss of self-control, and that irrational violence was to be expected from some immature, prelingually deaf people when emotionally disturbed. Explaining this decision, Watkins L.J. said:

"Following a careful examination of all the medical reports, [and] the evidence of the jury's view of the obvious about [the appellant] and the judge's directions as to his characteristics, the possibility of the jury finding provocation upon medical evidence, if heard, is so remote as to be safely disregarded . . . . No amount of medical evidence could, in our view, have served to further enlighten them as to that."13

It is difficult to understand how such reasoning can be correct. At the very least, the medical evidence must have been relevant to the issue of whether the accused lost his self-control. Furthermore, had the psychiatrist been able to bring the accused's condition within the realm of diminished responsibility, there would then have been nothing to prevent defence counsel from running both provocation and diminished responsibility defences together. As has been

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9 *Turner*, *ibid.*, at p. 841.
13 Lexis Transcript.
argued previously, there seems much to be gained from such a strategy inasmuch as it circumvents the Turner rule as well as enabling the parties involved to adopt the benign approach referred to by Griew.

The refusal to admit expert psychiatric and psychological evidence is not, of course, confined to the issue of provocation; it extends to the broader issue of mens rea, as was confirmed by the Court of Appeal in Chard. Once again it seems that if an otherwise normal defendant wishes to argue that a temporarily abnormal mental state, which in itself does not amount to insanity, diminished responsibility, or automatism, led to a loss of mens rea, then such evidence is inadmissible. In cases of “Caldwell” recklessness such evidence would actually help the prosecution to explain “how it came about that [the defendant] was in fact in one of the states of mind necessary to constitute the offence.”

The inadmissibility of expert psychiatric or psychological evidence on mens rea was recently confirmed in Reynolds. In this case the Court of Appeal, upholding a refusal to admit psychiatric evidence which would have suggested that the 17 year old defendant was emotionally disturbed and living in a fantasy world, stated: “We think that there was no degree of abnormality disclosed by the evidence of the psychiatrists which would justify departing from the normal rule that juries may decide such cases without medical evidence of this kind.”

What is most significant about this remark is the Court’s reference to “degree of abnormality.” This suggests that, although some abnormality may have been disclosed in the psychiatric reports, it was insufficient in degree to circumvent the Turner rule.

This point about degree of abnormality has been reiterated by the Court of Appeal in the recent case of Weightman, in which the point at issue was the veracity of a confession. A psychiatrist testified that the accused had a histrionic personality disorder known as “la belle indifférence” characterised by emotional superficiality, impulsive behaviour when under stress, and an impaired capacity to develop enduring relationships with other people. There was no suggestion, however, of mental illness or impairment, which is probably why the defence was not one of diminished responsibility. Upholding the trial judge’s refusal to admit the psychiatric evidence, the Court of Appeal stated:

“The point taken here is that the appellant has an abnormal personality . . . . What does the abnormal personality amount to however? It seems to us that it is not something which is beyond the experience of non-medical people . . . . In our judgment [the jury] would not have been helped by having a psychiatrist talking about ‘emotional superficiality’ and

18 [1989] Crim.L.R. 220. But cf. Toner [1991] Crim. L. R. 627 where the Court of Appeal held that the possible effect of a mild hypoglycaemic attack on negativing the accused’s specific intent for attempted murder and wounding with intent was outside the ordinary knowledge and experience of jurors who should have been permitted to consider expert evidence.
19 Lexis Transcript.
'impaired capacity to develop and sustain deep and enduring relationships'.
In fact as Lawton L.J. pointed out in the Turner case, . . . 'dressed up in scientific jargon it may make judgment more difficult.' 

This line of reasoning is decidedly opaque, especially as the court clearly accepted that the appellant was psychologically ‘abnormal.’ The implication must be either that the defendant was not abnormal enough to warrant the admission of psychiatric testimony or that only certain unspecified types of abnormality permit psychiatric evidence to be heard. On either interpretation, this argument obviously begs the question of how abnormal a defendant must be or what type of abnormality a defendant must suffer from before the Turner restriction can be circumvented.

A partial answer to this question in respect of mental impairment may have been given by the Court of Appeal in Masih, in which it was decided that if the defendant’s I.Q. had been 69 or below then, in so far as that mental defectiveness was relevant to the case, expert evidence about it could have been admitted. Since the accused in question had an I.Q. of 72, however, he fell within the lower end of the range of “normality” which meant that expert evidence was not necessary and was properly excluded by the trial judge. As pointed out by Beaumont, the decision in Masih has not been interpreted as a complete bar on the admissibility of psychiatric evidence in all cases in which the mentally impaired defendant had an I.Q. above 70, for as Hodgson J. stated in Silcott and Others: “To draw a strict line at 69/70 does seem somewhat artificial.” A point that is often overlooked in this context is that no such line seems to exist in respect of unfitness to plead: on that issue the admissibility of psychiatric evidence has been unquestioned provided that it is relevant to the primary issue of whether the defendant is able to comprehend the proceedings in court. In a recently researched sample, 48 mentally impaired defendants were found unfit to plead and no attempts were made to exclude expert psychiatric evidence in a number of instances in which the defendants’ I.Q.s were 70 or above. Why not? The question of unfitness to plead is ultimately for the jury to decide, so it seems inconsistent not to apply the argument about common knowledge and experience equally in such cases.

Psychological considerations

If it is accepted that to draw a strict line between I.Q. scores of 69 and 70 is “somewhat artificial,” then surely the same can be said about the line that is currently drawn by the courts between other forms of normality and the abnormality. To demonstrate that the assumption of a clear dividing line between

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21 Lexis Transcript.
24 Ibid., at p. 293.
normality and abnormality is misconceived, and to expose the fallacy that expert psychological and psychiatric testimony cannot help jurors to assess the criminal responsibility of defendants who are not mentally disordered in any medical sense, some examples will now be given which show that ordinary, reasonable people can easily misunderstand some forms of behaviour that fall within their common knowledge and experience.

The examples are taken from a psychologist's report that one of the authors (A. M. C.) prepared as a basis for expert testimony in Neeson and Others, one of a series of cases arising out of the notorious "corporals' murder." The incident took place on March 19, 1988 in the Andersonstown Road, Belfast, during the funeral of Kevin Brady, who had been killed by an assassin at an I.R.A. funeral a few days earlier. An unmarked car containing two British Army corporals wearing civilian clothes drove towards the funeral procession at speed. The car was rapidly surrounded by a mob of mourners, and its occupants were dragged from the car, assaulted, and eventually killed. The defendants in Neeson and Others were not alleged to have taken part in the killings, but they were part of the mob that attacked the car, and they were charged with various offences such as grievous bodily harm, false imprisonment, criminal damage, and making an affray. On the basis of an examination of video footage of the incident taken by four separate news companies and an army surveillance helicopter (heli-tele), a report was prepared suggesting that several psychological processes which might have a bearing on mens rea ought to be taken into account in assessing the mental states of the accused at the time of the alleged offences. The report suggested that the unexpected appearance of the corporal's car led to a hysterical mob panic of a type that can generate irrational, almost sheeplike behaviour lacking the deliberation, reflection, and self-monitoring associated with normal behaviour. Among the psychological processes mentioned were conformity, obedience, and the fundamental attribution error. In the event, after studying the report, McCollum J. ruled the psychological evidence inadmissible according to the Turner rule:

"An application [has been made] for the admission of evidence by Doctor Andrew M. Colman, a psychologist. This evidence might be summarised as evidence going to explain the behaviour that might be engaged in by, or reactions that might occur in, persons in unusual situations. Doctor Colman describes the processes that might make people act in certain ways and discusses the results of studies or surveys of human behaviour. I must say that I do not find anything unacceptable or inappropriate in the contents of Doctor Colman's report . . . . However I hold that evidence is not admissible for the following reasons: The first is the general rule that 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. 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 effect, the studies themselves do little more than put labels on and supply statistics

about matters which are part of the sum of human experience and knowledge and are readily recognisable by ordinary people.\(^{27}\)

It is none the less worth describing these psychological processes and commenting on whether it is reasonable to assume that expert psychological testimony could not, in general, help a judge or jury to understand them.

**Conformity and obedience**

A clear example of a counter-intuitive psychological phenomenon arises from the social pressures associated with the familiar phenomena of conformity and obedience to authority. Psychologists have accumulated a vast amount of normative data regarding the behaviour of ordinary people in situations designed to create these pressures. In one classic experiment,\(^ {28}\) small groups of people seated round a table were asked to judge in a number of successive instances which of three lines of unequal length printed on a card held up in front of them was the same length as a comparison line. The judgments had deliberately been made simple and unambiguous, so that in the absence of conformity pressure no one gave any wrong answers. However, when there was only one real experimental subject present, the rest of the group comprising several accomplices of the experimenter who on prearranged occasions called out unanimous wrong answers, in roughly three-quarters of cases the real subject yielded to the social pressure by conforming with the others on at least one occasion, in roughly one-quarter of cases the subject conformed on every occasion, and on average 35 per cent. of all the subjects' judgments conformed to those of the experimenter's accomplices. This experiment has been repeated with variations scores of times in many different countries, and the results have always been similar.

The social pressure caused by a group of people acting similarly is demonstrably much more powerful than most people realise. Even the psychologist who devised the experiment was surprised by the amount of conformity that it elicited. The counter-intuitive power of conformity pressures can be demonstrated by describing the experiment to people, or allowing them to watch a film of the experiment being run, and then asking them to guess how the experimental subject is likely to behave. The result is invariably that most people greatly underestimate the likelihood and extent of conformity,\(^ {29}\) which shows that human behaviour under this type of social pressure is not well understood by ordinary, reasonable people. Videotapes of the corporals' incident in Belfast contain indications that powerful conformity pressures were operating in the mob that surrounded the car. The mob behaved in some ways like a single organism, at one stage recoiling from the car in unison and then surging forward again a few seconds later, and numerous examples of blindly imitative and apparently irrational behaviour, such as kicking the sides of the car, are evident on the tapes.

A more dramatic and even clearer example is provided by research into

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obedience to authority. A series of classic experiments has 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 an authority figure, even if the victim screams with pain, begs to be released, and eventually appears to lose consciousness or die. Being subjected to this form of obedience pressure is a surprisingly distressing experience for most experimental subjects, and they usually display signs of considerable unease, but roughly two-thirds of those who have taken part in the many replications of the experiment have been wholly unable to resist the pressure. There is no doubt that this is a highly counter-intuitive phenomenon, for many different researchers have reported that when the experiment is described or shown on film to people and they are asked to guess how they would have behaved if they were the experimental subjects, only about one in a 100 believe that they would comply with the instructions to the end, although in reality a large majority of experimental subjects always do so. The social pressure in this type of situation is so counter-intuitively strong that even experienced psychiatrists were initially 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 1000 would be fully compliant. In the light of all these findings, it seems highly unlikely that a judge or jury, without expert help, would be likely to understand completely the state of mind of a defendant in circumstances involving obedience pressures.

The phenomenon and its unexpected power are not confined to artificial, laboratory situations. In a naturalistic field experiment, a man purporting to be a physician telephoned a hospital on 22 separate occasions and asked to speak to a different nurse each time. He instructed the nurse to administer medication to a certain patient; but the medicine was not on the ward stocklist and was therefore unauthorised, the prescribed dose was double the maximum clearly marked on the container, and the nurses all knew that they were expressly forbidden to accept prescriptions by telephone. When questioned about how they might behave if they were subjects in the experiment, a majority of nurses said they would certainly not comply with the doctor's instructions, but of the nurses who were actually telephoned rather than merely asked to imagine the situation, 21 out of 22 administered the medicine as instructed.

The fundamental attribution error

Since the mid 1970s psychologists have been accumulating evidence which shows that, in a wide range of circumstances, people tend to attribute their own actions to external situational causes, whereas outside observers tend to attri-

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30 See S. Milgram, Obedience to Authority: An Experimental View (1974); and, for a critical review, A. M. Colman, Facts, Fallacies and Frauds in Psychology (1987), chap. 4.
32 S. Milgram, op. cit., Fig. 5, at p. 30.
but the same actions 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 external, situational factors and to overestimate the importance of internal, dispositional factors, and this illusion is called the "fundamental attribution error." The tendency of ordinary people to underestimate vastly the social power associated with conformity and obedience pressures is an illustration of this error, and it suggests that expert psychological testimony in the corporals' murder case of Neeson and Others, and in countless similar cases, may indeed have assisted the Judge or jury.

Numerous experiments have helped to establish the fundamental attribution error on a secure empirical foundation. For example, Edward Jones and his colleagues in the United States have shown many times, under strict experimental conditions, that people tend to take the words and deeds of others as evidence of their true beliefs even when they know that those others have been assigned roles to perform and have little or no choice, their words and actions being obviously constrained by external factors more or less beyond their control. In one typical experiment, a number of people assembled in a room first filled in questionnaires indicating their attitudes towards the Cuban leader Fidel Castro and towards the legalisation of cannabis. The experimenter then instructed half of them to write essays in favour of Castro and the rest to write essays in favour of legalising cannabis. The essays were then swapped so that each person who had written a pro-Castro essays was shown one of the pro-cannabis essays and vice versa, and after a few minutes each reader was asked to estimate the writer’s true attitude towards the issue discussed in the essay. The researchers then compared the writers’ true attitudes as indicated by their answers to the questionnaires with the attitudes attributed to them by the readers. The results provided a clear illustration of the fundamental attribution error: the readers persistently misjudged the writers’ attitudes in the direction of the views expressed in the essays, and this effect was not small but usually amounted to about one-quarter of the full range of the attitudes covered by the questionnaire. Although the readers were aware of the constraints under which the essays had been written, they failed to take these external, situational factors sufficiently into account.

Research into the fundamental attribution error shows clearly that "ordinary, reasonable men and women" have a systematically biased understanding of human behaviour in a wide range of circumstances in which external, situational factors play a significant part. Allegedly criminal acts often fall into this category—the corporals' incident in Belfast is a clear example inasmuch as powerful conformity and obedience pressures of the kind generally underestimated by outside observers seem to have been operating in the mob that surrounded the car—which suggests that in such cases jurors may not always have a

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full understanding of the state of mind of a defendant purely on the basis of their common knowledge and experience of human behaviour.

Conclusions

What might be a reasonable approach to the admissibility of expert psychological and psychiatric evidence? One recent commentator has suggested that, since no clear line can be drawn between the normal and the abnormal, "all expert evidence as to personality should be admitted subject to its relevance."\(^{36}\) We do not advocate such a radical solution, partly because it is the task of the jury to try the facts of a case and it is therefore right that expert testimony should be excluded on matters that are well understood by ordinary people, and partly because we recognise that such a solution would in any event be unacceptable to the judiciary. We advocate instead that expert psychological and psychiatric testimony should be limited, but that the range of admissible evidence should be extended beyond its present bounds.

It is clear that the Turner rule has already been breached by a number of exceptions, but in our view it is still being interpreted too narrowly. The fundamental purpose of the rule is to exclude expert evidence that, in the court's opinion, will not help the jury to understand the accused's state of mind; its reference to "human nature and behaviour within the limits of normality" is subservient to this purpose. In decisions regarding admissibility, the crucial question ought to be whether or not the expert evidence could make a significant contribution to the jury's understanding of the accused's state of mind. This must depend, of course, on the judge's assessment of the probative value of the evidence. If the expert evidence points to an abnormal state of mind or personality of any degree on the defendant's part at the time of the alleged offence, then we submit that the court ought to exercise its discretion in favour of admitting the evidence. There are many abnormal states of mind brought about by situational forces, for example the conformity and obedience pressures discussed earlier, which, although they do not involve mental disorders in any medical sense, none the less lie demonstrably beyond the understanding of ordinary people, and in relation to which expert evidence could therefore contribute significantly to a jury's understanding. In the spirit of the Turner rule, evidence on such matters ought in our view to be admitted, for to exclude it might deprive the jury of evidence that could help them to understand the defendant's state of mind at the material time.

We would argue that Woolf L.J. was correct in Reynolds\(^{37}\) to uphold the exclusion of psychiatric evidence since "nowhere in the psychiatrists' reports [was] it suggested that the appellant was fantasising about anything at the material time."\(^{38}\) but that His Lordship was wrong to add: "Even if the appellant had then been fantasising that was not a matter on which psychiatric evidence was required . . . . It was no more than a personal trait in the appellant, in respect of which the jury could well use their common sense without the evi-

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\(^{38}\) Lexis Transcript.
In this case there was clear psychiatric evidence to the effect that the appellant's ability to separate fantasy and reality was markedly flawed. Had this evidence further suggested that the appellant had been fantasising at the time of the killing, then it should have been admissible because it could certainly have helped the jury to understand the defendant's state of mind. To hold otherwise seems not only prejudicial to the accused but also unnecessarily bound by an artificial and counter-productive distinction between normality and abnormality. It follows that in a case like Weightman the jury should have been permitted to consider expert evidence relating to the defendant's personality disorder. The exclusion of such evidence represents a self-defeating application of the Turner rule, which was never intended to exclude expert evidence that might help a jury to understand an accused's abnormal state of mind. The narrow interpretation of the rule also encourages a futile attempt to divide mental abnormalities into forms that require elucidation through expert testimony and those that do not.  

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99 Ibid.