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## **WITNESS TESTIMONY: PSYCHOLOGICAL, INVESTIGATIVE AND EVIDENTIAL PERSPECTIVES**

**A guide for legal practitioners and other professionals**

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(Editors)**

**PART 3**

### **EVIDENTIAL ISSUES**

#### **CHAPTER 16**

#### **ADMISSIBILITY OF EXPERT PSYCHOLOGICAL AND PSYCHIATRIC TESTIMONY**

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#### **16.1 INTRODUCTION**

##### **16.1.1 Expert Testimony: Background**

The purpose of civil and criminal trials is to decide issues of fact and of law. In most jurisdictions, including England and Scotland, issues of fact are normally decided by juries and issues of law by judges. For several centuries, decisions about issues of fact, in certain cases, have been assisted by experts. As early as 1554, Saunders J. remarked in the case of *Buckley v Rice-Thomas* (quoted in Cross & Tapper, 1995, p. 555) that ‘If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation’.

In cases requiring abstruse or technical knowledge, experts were initially invited to serve on juries, then in the late Middle Ages they began to testify as witnesses. Testimony from experts in various fields became commonplace in England during the latter half of the eighteenth century, in parallel with the rapid development of numerous specialised branches of science and technology associated with the industrial revolution, which took place in England from about 1760 onwards. For example, in the landmark case of *Folkes v Chadd* (1782) 3 Doug KB 157, which we shall refer to again later, a leading engineer was called to give expert evidence about what had caused a harbour to silt up.

Expert testimony on psychological and psychiatric matters is of much more recent origin. Psychiatry, the branch of medicine concerned specifically with mental disorders, emerged only in the first half of the nineteenth century, and it was not until the 1880s that psychology began to be recognised as an independent discipline in its own right devoted to the scientific study of the nature, functions, and phenomena of behaviour and mental experience, both normal and abnormal. The first psychological expert to testify anywhere in the world was

probably Albert von Schrenck-Notzing, who was called as a witness in 1896 at the trial of a Munich man accused of murdering three women. His evidence focused on what has more recently come to be called the eyewitness misinformation effect – a form of memory distortion arising from confusion between what was seen or heard at the time of an event and information obtained after the event. In the United States at about the same time, Hugo Münsterberg served as a psychological consultant in two murder trials, and although his own evidence was not admitted in court he became a forceful advocate of forensic psychology in general and psychological testimony in particular.

### **16.1.2 Issues for Psychological and Psychiatric Testimony**

Most witnesses are permitted to testify only about facts, but expert witnesses are allowed to testify about their expert opinions as well. Typical issues on which expert psychological and psychiatric witnesses have testified include the following (adapted from Lloyd-Bostock, 1981). Did A suffer brain damage, and if so what are its likely long-term effects? Is B a fit person to have custody of her child? Is hypnosis likely to have improved witness C's memory? Is D's mental condition such as to require him to be detained under the Mental Health Act for the protection of others? Is E mentally fit to stand trial? What psychological evidence is available regarding the suggestibility of a child witness such as F when being interrogated by police officers? Is G's eyewitness identification of the accused likely to be trustworthy? Does H suffer from severe learning difficulties, and if so how is this likely to affect his future earning power? What are the likely effects of long-term alcohol abuse on J's memory? Is K's confession likely to be genuine?

The rapid growth of psychology and psychiatry since the Second World War has not been accompanied by a corresponding increase in the amount or the range of expert testimony from specialists in these fields. In England, the judiciary has maintained a sceptical and cautious attitude towards the admissibility of such evidence. This attitude crystallised in an influential decision of the Court of Appeal in the case of *R v Turner* [1975] QB 834 (CA), which established an important rule governing the admissibility of psychological and psychiatric evidence.

## **16.2 THE TURNER RULE**

### **16.2.1 Background to *Turner***

The decision in *R v Turner* [1975] QB 834 (CA) resulted in psychological testimony being ruled inadmissible in numerous cases except ones in which defendants were affected at the time of the alleged offences by recognised mental disorders, by mental handicap, or by automatism, all of which may be thought of as abnormal mental states. In cases involving unfitness to plead or insanity, psychiatric evidence is not merely tolerated but legally required in terms of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, though this does not cover automatism. The ground on which the expert evidence in *Turner* was excluded was that, because no mental abnormality was involved, the proposed expert testimony dealt with matters of 'common knowledge and experience' that could be understood by a jury without the help of an expert. This criterion for the admissibility of expert psychological and psychiatric evidence has come to be called the *Turner* rule.

The defendant in *Turner* had killed his girlfriend with a hammer after she told him with a grin that she had been sleeping with two other men and that the child that she was carrying was

not his. He pleaded provocation, claiming that he had been overwhelmed with blind rage and had hit her with the hammer without realizing what he was doing. Although he showed no signs of any mental disorder, the defence wished to introduce psychiatric evidence to show that he had enjoyed a deep emotional relationship with the deceased, that he was likely to have experienced 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. But after examining a psychiatric report outlining the evidence that the expert witness intended to give, the trial judge ruled the evidence inadmissible on the ground that it dealt with matters of ‘common knowledge and experience’ within the experience of the jury.

### 16.2.2 The *Turner* Appeal Court Decision

The defence took the case to the Court of Appeal, arguing that the trial judge had erred in refusing to admit the expert evidence, but the appeal was dismissed. Lawton LJ justified the Court of Appeal decision as follows in *R v Turner* [1975] QB 834 (CA):

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. (p. 841)

The *Turner* rule has been used to exclude expert psychological and psychiatric evidence in innumerable criminal cases since 1975 (Mackay & Colman, 1991, 1996). Following this leading case, the courts have been comparatively indulgent in their readiness to admit expert psychological and psychiatric testimony in cases involving pleas of diminished responsibility, though not where defendants have voluntarily consumed alcohol or dangerous drugs, but they have been reluctant, for a time at least, to admit such testimony in cases in which defendants pleaded provocation and those involving other issues of criminal responsibility or *mens rea*.

## 16.3 TRANSPARENCY OF NORMAL BEHAVIOUR

### 16.3.1 Assumption Behind the *Turner* Rule

The *Turner* rule did not fall from the sky without warning or premonition. It arose from a principle that can be traced back at least as far as the late eighteenth century, when Mansfield J ruled in *Folkes v Chadd* (1782) 3 Doug KB 157 that an expert’s opinion is admissible only if it furnishes the court with information that is likely to lie outside the common knowledge and experience of the jury or, more generally, the trier of fact, and this principle became firmly established in the English common law. The interpretation of this principle in relation to psychological and psychiatric evidence, which became the *Turner* rule, was the assumption that human behaviour, except when it stems from some form of mental abnormality, is within the common knowledge and experience of a jury. A few years before *Turner*, in *R v Chard* (1972) 56 Cr App R 268, Roskill LJ had expressed this assumption as follows:

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. (pp. 270-1)

Roskill LJ was implying by these words that normal, non-disordered behaviour is fully transparent and therefore not in need of explanation or clarification by experts. We may call this the *transparency assumption* about normal behaviour. A few years later Lawton LJ expressed this assumption more explicitly and bluntly in his *Turner* judgment, when he commented on the proposed expert testimony in relation to provocation 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). But is the transparency assumption about normal behaviour justified?

### 16.3.2 Evidence Against the Transparency Assumption

It has been argued that the application of the *Turner* rule by the courts has been inconsistent and excessively restrictive, and in particular that the underlying transparency assumption is false. There is abundant research evidence to suggest that ordinary people find many forms of normal behaviour as difficult to understand as mentally disordered behaviour (Colman & Mackay, 1993).

For example, experimental evidence has shown that, in explaining other people's behaviour, observers tend to underestimate the importance of external, situational factors, such as social pressures, and to overestimate the importance of internal, dispositional factors, such as personality traits. This powerful distortion of perception, which is sometimes called the *fundamental attribution error* or the *overattribution bias*, has been confirmed by numerous independent researchers (Webster, 1993). Since external, situational factors often play a significant role in criminal acts, it follows that jurors may not always be able to understand the causes of such conduct purely on the basis of their common knowledge and experience of human behaviour, in spite of the fact that no abnormality is involved.

A closely related example of normal, non-disordered behaviour that is far from transparent and is demonstrably outside the everyday understanding of even intelligent and well educated people is provided by Stanley Milgram's well known experiments on obedience to authority (Milgram, 1974). These experiments showed that approximately two-thirds of ordinary people who volunteer to take part in experiments are fully obedient to firm and insistent instructions from the experimenter to deliver apparently painful and possibly lethal electric shocks to an innocent victim who screams with pain and then appears to lose consciousness or die. The findings, which have been replicated by a number of independent researchers (Blass, 1991), are clearly beyond the common knowledge and experience of ordinary people, because people grossly underestimate the level of obedience likely to occur in the experiment, and 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 United States medical school, and they predicted that only about one person in a thousand would be fully obedient (Milgram, 1974, p. 30).

The research literature is replete with further examples of normal forms of human behaviour that are demonstrably opaque to common-sense understanding or intuition. In fact, empirical studies have shown that ordinary people generally have a very poor knowledge and understanding of psychological functions and phenomena (Furnham, 1992). The supposition that only mentally disordered behaviour transcends the common knowledge and experience of ordinary people is not supported by the evidence. This implies that the transparency assumption about normal behaviour, according to which the *Turner* rule has been used to exclude psychological and psychiatric evidence of non-clinical psychological phenomena on the ground that they necessarily fall within the common knowledge and experience of ordinary jurors, seems groundless. Largely for this reason, the restrictive interpretation of the *Turner* rule was not followed by the Court of Appeal in the case of *R v Sally Lorraine Emery (and Another)* (1993) 14 Cr App R (S) 394.

## 16.4 DURESS, PROVOCATION, CONFESSIONS, AND *MENS REA*

### 16.4.1 *Emery* and Duress

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 a prolonged period of severe physical abuse. In January 1992, the jury in the Peterborough Crown Court acquitted Sally Emery of occasioning actual bodily harm to her child, but found her guilty of failing to protect the child from the father, and she was sentenced to four years' detention in a young offender institution. She appealed against this sentence and it was reduced to 30 months by the Court of Appeal in November 1992.

Sally Emery pleaded that she had been acting under duress. She testified at her trial that the father, Brian Hedman, had often severely abused both her and Chanel, and that her failure to protect Chanel was due to fear. Her counsel, Helena Kennedy QC, wished 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 support the defence of duress. The experts were ready to testify that Sally Emery had been suffering from *battered woman syndrome*, a syndrome resulting from prolonged violence and abuse of a woman by her partner that can induce a form of learned helplessness characterised by an inability to stand up to the abuser, a feeling of dependence on the abuser, and an inability to withdraw from the situation. The prosecution objected, citing the *Turner* rule, on the ground that the proposed evidence did not focus on a recognised mental disorder but on a form of normal behaviour, which was assumedly within the common knowledge and experience of a jury. The trial judge ruled the evidence admissible, his justification being that without expert help the jury might find the defendant guilty, whereas with the understanding gained from the expert evidence they might acquit her.

The case went to the Court of Appeal as *R v Sally Lorraine Emery (and Another)* (1993) 14 Cr App R (S) 394, where a judgment read by Taylor LCJ fully endorsed the trial judge's decision and its justification. Taylor LCJ commented that the condition of learned helplessness that was the subject of the proposed expert testimony, though not a mental disorder, '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).

The *Emery* decision did not abandon the *Turner* rule altogether: expert evidence dealing with matters within the ‘common knowledge and experience’ of a jury remained inadmissible, but the interpretation of the rule in relation to expert psychological and psychiatric evidence was relaxed. In particular, it was no longer assumed that all forms of human behaviour apart from mental disorder, mental handicap, or automatism are fully transparent, and that expert testimony regarding them was therefore invariably part of ‘common knowledge and experience’ and hence inadmissible. The *Emery* decision thus appeared to open the door to psychological and psychiatric evidence across a far wider range of behaviour than had been the case before 1993. In particular, the notion put forward in *R v Turner* (1975) QB 834 (CA) 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) seemed well and truly buried.

## 16.5 EVOLVING CASE LAW

### 16.5.1 The Objective Test in Provocation

In a similar way the courts seemed to be adopting a more relaxed approach to the objective test in cases involving pleas of provocation. This test requires the jury to consider ‘whether the provocation was sufficient to make a person of reasonable self-control in the totality of circumstances (including personal characteristics) act as the defendant did’, as Lord Simon expressed it in *DPP v Camplin* [1978] 2 All ER 168.

It is worth noting that Taylor LCJ approached the issue of ‘battered woman syndrome’ in an analogous way in *R v Ahluwalia* [1992] 4 All ER 889 when he made it clear that, had evidence of this condition been before the trial judge, ‘different considerations may have applied’ (p. 898) as to whether the condition could amount to a ‘characteristic’. That such mental conditions may constitute characteristics for the purposes of the objective test in provocation has since been more clearly endorsed by the Court of Appeal in a series of decisions, including *R v Humphreys* [1995] 4 All ER 1008, *R v Dryden* [1995] 4 All ER 987, especially *R v Thornton* (No. 2) [1996] 2 All ER 1023, in which Taylor LCJ, in holding that battered woman syndrome could be a relevant characteristic, said that ‘mental as well as physical characteristic should be taken into account’ (p. 1031). In arriving at this decision his Lordship followed the decision of the House of Lords in *R v Morhall* [1995] 3 All ER 659 but failed to mention the fact that in that case Lord Goff had expressed concern about the emphasis on characteristics placed by the Court of Appeal in *R v Newell* (1980) 71 Cr App R 331, concurring with the reservations about the ‘needless complexity’ of the role of characteristics within the provocation plea expressed by Cooke P. in the New Zealand Court of Appeal in *R v McArthy* [1992] 2 NZLR 550.

Shortly after *R v Thornton* (No. 2) [1996] 2 All ER 1023, Lord Goff added to this criticism in his judgment in *Luc Thiet Thuan v R* [1996] 2 All ER 1033, when he remarked that the liberal approach in New Zealand towards ‘characteristics’ was likely to have been influenced by the absence of any defence of diminished responsibility in that country. Accordingly, he considered that mental infirmity impairing the defendant’s power of self-control could not be attributed to the reasonable person for the purposes of the objective test, because this would have the effect of incorporating the concept of diminished responsibility ‘indirectly into the law of provocation’ (p. 1046). The only exception should be where the ‘mental infirmity of the defendant [was] itself the subject of taunts’ (p. 1046). It seems clear from Lord Goff’s

majority judgment that, in re-emphasising the importance of the objective test in provocation, he was at the same time endorsing the *Turner* rule in the sense that it must follow that expert medical evidence should remain inadmissible on the central issue of whether a reasonable person would have lost self-control in similar circumstances. That this is the effect of the ruling in *Luc Thiet Thuan* is made abundantly clear in the dissenting opinion of Lord Steyn when he said that to admit such evidence ‘on the subjective issue whether the woman had in fact lost her self-control’ while at the same time requiring the jury to ignore such evidence ‘when they consider the objective issue’ would leave a jury ‘puzzled by such artificially compartmentalised directions’ (p. 1049) and would inevitably lead to injustice.

Since the ruling in *Luc Thiet Thuan v R* [1996] 2 All ER 1033, in which Lord Goff was openly critical of the decisions of the Court of Appeal in *R v Ahluwalia* [1992] 4 All ER 889, *R v Humphreys* [1995] 4 All ER 1008, and *R v Dryden* [1995] 4 All ER 987 as being inconsistent with the objective approach to provocation as interpreted by the House of Lords in *DPP v Camplin* [1978] 2 All ER 168, the Court of Appeal had to decide which line of authority to follow. In *R v Campbell* [1997] 1 Cr App R 199, Bingham LCJ decided that it was not open to the Court of Appeal to choose between the two competing views, because the Court was bound by its own previous decisions. It follows that mental characteristics that may have influenced a defendant’s loss of self-control continue to be relevant for the objective test in provocation, as had already been made clear in *R v Thornton No. 2*, [1996] 2 All ER 1023 at p. 1031. There seems little doubt that this trend towards liberalisation of the law relating to provocation will lead to a radical if gradual shift in reducing the impact of the *Turner* rule by permitting expert psychological and psychiatric evidence to assist a jury in deciding whether a reasonable person with similar mental characteristics would have lost his or her self-control. That this is the case was further demonstrated by the Court of Appeal’s decisions in *R v Hobson* [1997] Crim LR 759 and *R v Parker* [1977] Crim LR 790, both of which followed *R v Campbell*.

### 16.5.2 The Objective Test in Duress

While a step forward in this respect has taken place in relation to provocation, more recent cases involving pleas of duress seemed to be casting doubt on the more liberal approach adopted in *R v Sally Lorraine Emery (and Another)* (1993) 14 Cr App R (S) 394, where the Court of Appeal had accepted that the proper question for the doctors to decide was ‘whether a woman of reasonable firmness with the characteristics of [the defendant] would have had her will crushed’ (p. 398). It seemed clear from this that the objective test in duress, which requires the jury to decide whether a person of reasonable firmness, sharing the defendant’s characteristics and circumstances, would have been unable to withstand the threats in question, was being interpreted in much the same way as the analogous test in provocation.

However, it was not long before the Court of Appeal began to question this approach. First, in *R v Hegarty* [1994] Crim LR 353 the court made it clear that it did not consider that the Lord Chief Justice ‘intended to throw any doubt on the general rule . . . that the application of the objective test is a matter for the jury and that the evidence of witnesses is inadmissible’. This approach was followed in *R v Horne* [1994] Crim LR 584 where it was made clear that for the purposes of the reasonable firmness standard, ‘evidence of personal vulnerability or pliancy falling short of psychiatric illness is not relevant’. Similarly, in *R v Hurst* [1995] 1 Cr App R 82 the court upheld a refusal to admit evidence about the possible effects on the defendant of sexual abuse as a child on the following ground: ‘So long as there is this

objective element in the standard by which a person's reaction to duress is to be judged, we find it hard to see how the person of reasonable firmness can be invested with the characteristic of a personality which lacks reasonable firmness, and although we appreciate the difficulty involved in trying to separate personal characteristics one from another, we are bound by the formulation in the case of *Graham* [1982] All ER 801, 806.'

Finally, in *R v Bowen* [1996] 4 All ER 837, the Court of Appeal was called upon to consider whether low intelligence should be regarded as a 'characteristic' for the purposes of the objective test in duress. In arriving at his decision Stuart-Smith LJ considered that a number of principles could be derived from the above authorities including, inter alia:

The mere fact that the accused is more pliable, vulnerable, timid or susceptible to threats than a normal person are not characteristics with which it is legitimate to invest the reasonable/ordinary person for the purpose of considering the objective test.

The defendant may be in a category of persons who the jury think less able to resist pressure than people not within that category. Obvious examples are age, where a young person may well not be so robust as a mature one; possibly sex, though many women would doubtless consider that they had as much moral courage to resist pressure as men; pregnancy, where there is added fear for the unborn child; serious physical disability, which may inhibit self protection; recognised mental illness or psychiatric condition, such as post-traumatic stress disorder leading to learned helplessness.

Psychiatric evidence may be admissible to show that the accused is suffering from some mental illness, mental impairment or a recognised psychiatric condition, provided persons generally suffering from such a condition may be more susceptible to pressure and threats, and thus to assist the jury in deciding whether a reasonable person suffering from such a condition might have been impelled to act as the defendant did. It is not admissible simply to show that in the doctor's opinion an accused, who is not suffering from such illness or condition, is especially timid, suggestible or vulnerable to pressure and threats.

In most cases it is probably only the age and sex of the accused that is capable of being relevant (pp. 844-845).

In applying these principles, his Lordship could not see 'how low IQ, short of mental impairment or mental defectiveness, can be said to be a characteristic that makes those who have it less able to withstand threats and pressure' (p. 845).

The impact of this decision could be viewed as reaffirming the importance of the objective test in duress as well as making it clear that the *Turner* rule continues to hold sway in this connection. However, some progress has been made in that the decision in *Emery* was approved in *Bowen*, when it was made clear that 'post-traumatic stress disorder leading to learned helplessness' can constitute a characteristic for the purposes of duress. As Smith and Hogan (1996) have pointed out, 'the acceptance of such an illness as a relevant characteristic suggests that the objective test has broken down' (p. 247). If this is so for duress, then the same seems true for provocation. However, although this breakdown of the objective test will have the beneficial effect of permitting more expert testimony to be admitted, by themselves these developments do nothing to rid the law of the *Turner* rule. That this is so can be well illustrated by focusing on the issue of *mens rea*.

### 16.5.3 Confessions

A particular area in which the courts have shown a willingness to depart from the *Turner* rule

has been in relation to the admissibility of confessions. In one of the Broadwater farm cases, *Raghip* 90/5920S1; *The Times*, December 9, 1991 (a limited report), the Court of Appeal allowed fresh evidence on appeal (evidence that would have been admissible at trial had it then been available) of the psychological and psychosocial state of the appellant, even though there was no suggestion of mental illness. The court pointed to the ‘artificiality’ of drawing a strict line between IQ scores of 69 and 70, as had occurred in *Masih* [1986] Crim LR 395. The evidence was admitted to provide assistance on the issue of the admissibility of the confession under section 76(2)(b) of the Police and Criminal Evidence Act of 1984. One of the circumstances to be considered was the mental condition of the defendant. At trial that was a decision to be taken on medical evidence and not, as in this case, by the judge’s own assessment of the defendant in interview or in evidence. The Court of Appeal found that the appellant’s abnormal susceptibility to suggestion and his level of functioning – equivalent to that of a child aged nine – was highly relevant information that could not have been divined from his performance in the witness box.

Similarly, in applying *Raghip*, the Court of Appeal in Northern Ireland in *Kane*, December 19, 1997, admitted evidence of a psychologist on appeal to cast doubt on the reliability of a confession. In *Kane*, one of the Casement Park murder cases, the trial judge, sitting without a jury, had formed the opinion without expert help that the defendant was ‘deliberately trying at times to give an appearance of being more unintelligent than he is’. In fact, unknown to the judge, but accepted on appeal, the defendant had a modest IQ of 78 and suffered severe anxiety problems coupled with a high level of compliance.

*Raghip* was also followed in *Judith Ward* [1993] 2 All ER 577. The Court of Appeal concluded ‘on the authorities as they now stand’ (including *Turner* and *Raghip*) that expert evidence of a psychiatrist or a psychologist that a defendant, while not suffering from a mental illness, was suffering from a personality disorder so serious as to be properly described as a mental disorder, might be admissible to demonstrate the unreliability of confessions made by that defendant, although such evidence would be admitted only on rare occasions. The conviction was quashed on this and other grounds.

In *Strudwick and Merry* (1995) 99 Cr App R 326, Farquharson LJ reflected on the mood of change:

It is not suggested here that the appellant is suffering from a mental illness, but that is not in itself conclusive against the admission of his evidence. The law is in a state of development in this area. There may well be other mental conditions [including psychological damage] about which a jury might require expert assistance in order to understand and evaluate their effect on the issues in a case (p. 332).

Ironically, this modern approach was presaged twenty years earlier by Lawton LJ in *Turner*:

In coming to the conclusion we have in this case we must not be taken to be discouraging the calling of psychiatric evidence in cases where such evidence can be helpful within the present rules of evidence. These rules may be too restrictive of the admissibility of opinion evidence.

Lawton LJ went on to refer to the recommendations of the Criminal Law Revision Committee (Cmnd. 4991), of which he was a member, that an expert should be allowed to give an opinion ‘on any relevant matter on which he is qualified to give expert evidence’ –

even on intent. However, as the following paragraphs show, the law is still a long way from having adopted such a position.

#### **16.5.4 The *Turner* Rule and *mens rea***

The courts have consistently ruled that inferences as to a normal person's state of mind can be drawn from that person's conduct and the surrounding circumstances without the aid of expert evidence. This means that where the issue concerns the knowledge or intention of a normal person, the *Turner* rule must prevail, as was made clear in *R v Chard* (1971) 56 Cr App R 268, a murder case decided before *Turner*. Similarly, in *R v Coles* [1994] Crim LR 820, the trial judge refused to admit expert psychological testimony in answer to a reckless arson charge on the ground that the 15-year-old defendant's mental capacity, though lower than average, did not disclose any evidence of abnormality. In upholding this decision, the Court of Appeal ruled that the evidence in question related solely to characteristics of the defendant that could be evaluated competently by a jury through reference to the facts without the assistance of expert evidence, because adolescents of varying stages of maturity and brightness were all within the common experience of jurors. This is a clear-cut application of the *Turner* rule, and it is interesting to note that while the boy's age would be a relevant characteristic for the purposes of both provocation and duress, this is not so when it comes to the fundamental issue of whether the defendant had *mens rea*. However, although age gets in as a 'characteristic' in cases of provocation and duress, it seems highly unlikely that any expert testimony would be permitted to assist a jury in its deliberations about how a reasonable 15-year-old would react to provocation or duress. In that sense the *Turner* rule is once again designed to ensure that the ruling in *Coles*, about adolescence and immaturity, will apply equally to other areas of the criminal law, as is well illustrated in *R v Davies and Others* (1995) 94/4098/52, a case dealing with the admissibility of expert evidence in relation to the reliability of testimony given by very young children, where the Court of Appeal had no hesitation in following the *Turner* rule, saying:

It is fundamental that experts must not usurp the function of the jury in a criminal trial. . . . Particular circumstances arise when there are characteristics of a medical nature in the makeup of a witness, such as mental illness, which would not be apparent to the jury or the effect of which would not be known to the jury without expert assistance. These circumstances do not arise in the case of ordinary children, who are not suffering from any abnormality.

### **16.6 SUMMARY**

The *Turner* rule continues to dominate the question of the admissibility of expert psychological and psychiatric testimony. Accordingly, if the mental processes of an accused are not claimed to be abnormal, then the jurors must use their own knowledge and experience to decide the issue in question. This is well illustrated within the broad area of *mens rea*, where it is only in exceptional cases that expert evidence is permitted to assist a jury. As an example of an exceptional case, in *R v Toner* [1991] Crim LR 627 it was decided that the possibility of a mild attack of hypoglycaemia lay outside the ordinary experience of jurors, in the sense that they would not be able to make a judgment about how such a medical condition might have effected the accused's mental state in relation to *mens rea* without the aid of expert evidence. However, it seems clear that such cases are exceptional.

With regard to provocation and duress, the Court of Appeal has begun to review the doctrine

of ‘characteristics’ in relation to the relevant objective tests. In cases involving pleas of provocation, courts are beginning to allow expert evidence on the question of how a reasonable person would have reacted, but in cases involving the defence of duress, the trend still favours the *Turner* rule.

The fundamental question is whether the *Turner* rule is fatally flawed. It assumes that ‘ordinary’ and ‘normal’ are well defined personal attributes and that the distinction between ‘normal’ and ‘abnormal’ can be clearly understood and recognised. It restricts the admissibility of psychological and psychiatric expertise to the supposedly ‘abnormal’, on the dubious transparency assumption according to which all ‘normal’ forms of behaviour are necessarily within the common knowledge and experience of a jury. The transparency assumption does not seem to accord with research evidence, and in any event, as psychology and psychiatry develop, the crude distinction between ‘normal’ and ‘abnormal’ is becoming increasingly difficult to maintain. It would be more reasonable to extend the range of expert testimony to include forms of behaviour and states of mind that fall short of mental disorders but are none the less poorly understood by ordinary people. In many ways this seems to be what is beginning to happen in relation to provocation, and more particularly in a number of important confession cases, and it may only be a matter of time before this trend begins to dilute the broader impact of the *Turner* rule.

### Key Terms

battered woman syndrome  
 common knowledge and experience  
 confession  
 duress  
 eyewitness misinformation effect  
 fundamental attribution error  
 learned helplessness  
*mens rea*  
 objective test in duress  
 objective test in provocation  
 overattribution bias  
 provocation  
 reasonable firmness  
 transparency assumption  
*Turner* rule

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