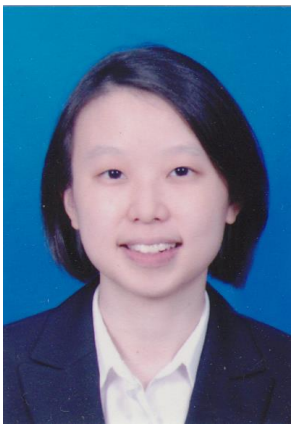
BREAKING AWAY FROM THE *TURNER* TENACITY



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The English judicial approach to expert evidence is somewhat intuitive, although professing to adhere to structure and rules. The courts are quite liberal in the admission of expert evidence in general,[1] and this approach extends to branches of novel science. This attitude, however, stops short of admitting psychiatric and psychological expert evidence in relation to matters that concern the supposedly 'normal' mental states of defendants in criminal cases. Why have the courts adopted such an approach? Is there really a clear demarcation between abnormality and normality? Are the current methods used to determine the admissibility of such evidence satisfactory? These are the main issues that will be discussed in this article.

Playing by the Rules: The *Turner* Tenacity

If it could ever be said that there was a consistently applied rule in the admissibility of expert evidence, the rule in *R v Turner*[2] would fit the bill. The courts have held up the *Turner* rule like a riot shield to ward off psychiatric and psychological evidence in numerous cases. The gist of the

[1] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 483.
[2] *R v Turner* [1975] QB 834 (CA).

judgment is that expert evidence is inadmissible unless the matter falls outside the experience of judge or jury.[3] This means that expert evidence concerning human behaviour within the limits of normality[4] or concerning the personality of a witness[5] are not admissible. 'Normal' persons are those not suffering from any mental illness.[6] There have been certain deviations from the rule when admitting expert evidence concerning the admissibility of confessions,[7] but this is due to the fact that the decision to exclude a confession is made by the judge, and regulated by statute.[8] The courts have held that where the defendant is suffering from a condition so severe as to be akin to mental disorder, psychological or psychiatric evidence is admissible in relation to the reliability of confessions.[9] This is far from a radical concession however, for there must be a substantial deviation from normality and a history of abnormality predating the confession.[10] Furthermore, the test is whether the disorder can render the confession unreliable.[11]

The issue of *mens rea* is an area into which psychological and psychiatric evidence cannot enter, unless mental illness is in the picture.[12] The courts' unhelpful references to degrees of abnormality[13] seem to place them in the role of amateur psychiatrists, arbitrarily determining an indefinable point where abnormality is sufficient. In one case, even where

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[3] ibid 841 .
[4] ibid .
[5] ibid .
[6] ibid .
[7] *R v Raghip and Others* [1991] *The Times*, 9 December.
[8] Police and Criminal Evidence Act 1984, s 76(2)(b) .
[9] *R v Ward* [1993] 96 Crim App R 1 (CA) 66.
[10] *R v O'Brien (Michael Alan)* [2000] Crim LR 676.
[11] ibid.
[12] *R v Coles* [1995] 1 Cr App R 157 (CA).
[13] *R v Reynolds* [1989] Crim LR 220 (CA); *R v Weightman* [1991] 92 Cr App R 291 (CA) 297.

the court acknowledged that the defendant did have some abnormality, the fact that they assumed it fell within the experience of lay people rendered the evidence inadmissible[14] - and the *Turner* rule strikes again. It has also been held (most absurdly) that a defendant was only without the limits of normality if his Intelligence Quotient (IQ) was 69 and below – and not where it was assessed at 72.[15]

Regarding witness credibility, psychiatric or psychological evidence can only be admitted where the witness has a mental illness which substantially affects his capacity to give accurate evidence.[16] Thus the case of *Lowery v The Queen*[17] was distinguished in *Turner* on its special facts, in that evidence was admitted on the issue of credibility of a witness because the defendant had put his own character in issue by saying that he was not the type to have committed the crime.[18] This approach to credibility of a witness has been maintained in recent cases,[19] although it seems that the court in the subsequent reference of *MacKenney* to the Court of Appeal took a more liberal approach to the admissibility of the psychiatrist's evidence of the psychopathic condition of the main witness than the court below.[20] Could this be because it was not until the late 20th century that psychopathy became an accepted clinical syndrome?[21] Perhaps so.

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[14] *R v Weightman* [1991] 92 Cr App R 291 (CA).
[15] *R v Masih* [1986] Crim LR 395 (CA).
[16] *R v MacKenney and Pinfold* [1981] 76 Cr App R 271.
[17] *Lowery v The Queen* [1974] AC 85 (PC).
[18] *R v Turner* [1975] QB 834 (CA) 842C-D.
[19] *Pinfold and MacKenney v R* [2003] EWCA Crim 3643, [2004] 2 Cr App R 32 [16]; *R v Henry* [2005] EWCA Crim 1681, [2006] 1 Cr App R 118 [15].
[20] *Pinfold and MacKenney v R* [2003] EWCA Crim 3643, [2004] 2 Cr App R 32 [55].
[21] Hugues Herve, 'Psychopathy Across the Ages: A History of the Hare Psychopath' in Hugues Herve and John C. Yuille (eds), *The Psychopath: Theory, Research and Practice* (Lawrence Erlbaum Associates Inc. 2007) 31.

The courts' narrow interpretation and tenacious grip of the *Turner* rule, although irrational in some cases is understandable. This is due in part to the inherent differences between law and science. At a very basic level, they have different methods, different aims in the gathering of data. The reliance of the judicial system on zealous advocacy stands opposed to the scientist's model of organized skepticism based on the bounce-back opinions in critical peer review.[22] Also, finality and certainty of the outcomes of court decisions do not occupy such high pedestals in the realm of science. Due perhaps to the idea that 'justice delayed is justice denied',[23] the courts sometimes require a premature dichotomization of outcomes even where there is a lack of absolute certainty in the evidence, whereas uncertainty and probability is embraced by the scientific community.[24] The hostility of the courts is even more apparent regarding matters of 'soft science', and according to a study, this is also the case in the United States of America (USA).[25] This is enhanced by the fact that true experiments are often impossible in social science due to it being either not viable to control all variables other than the one under study or due to the unethical action of introducing human beings (the independent variable) under controlled

[22] Harvard Law Review, 'Admitting Doubt: A New Standard for Scientific Evidence' [2010] Harvard Law Review 2021, 2032.
[23] William Gladstone (1809-1898).
[24] A Leah Vickers, '*Daubert,* Critique and Interpretation: What Empirical Studies Tell Us About the Application of *Daubert'* (2005) 40 University of San Francisco of Law Review 109,124; Andrew E Taslitz, 'Myself Alone: Individualizing Justice Through Psychological Character Evidence' (1993) 52 Maryland Law Review 1, 99.
[25] Margeret Bull Kovera and Bradley D McAuliff, 'The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?' (2000) 85 Journal of Applied Psychology 574, 584.

circumstances.[26] Furthermore, proof 'beyond a reasonable doubt' – the required standards in criminal law – does not always sit well with the normative and therefore probabilistic nature of psychological research data.[27]

Another argument for the exclusion of psychiatric and psychological expert evidence in relation to 'normal' behaviour (or behaviour that is not 'abnormal' enough) is that it would usurp the fact-finding function of the jury.[28] There is always a risk that the jury will give too much weight to psychiatric and psychological evidence, viewing it as proven fact and free from limitations or qualification. If this is the case, the culpability of defendants may be determined according to 'biological determinism',[29] changing the very concept of responsibility in criminal law to that determined solely by scientific explanations of the workings of the mind. This, however, is the extreme position. Even where expert evidence is admitted in favour of the defendant concerning his personality, it does not mean that the jury will acquit him, as was the case in *Lowery v The Queen*.[30] It is submitted that the current strong position of epistemic paternalism regarding the admissibility of psychological and psychiatric evidence could in fact make the *judges* the vehicle for the very usurpation they are so keen to guard against.

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[26] Andrew E Taslitz, 'Myself Alone: Individualizing Justice Through Psychological Character Evidence' (1993) 52 Maryland Law Review 1,75.
[27] David H Sheldon and Malcolm MacLeod, 'From Normative to Positive Data: Expert Psychological Evidence Re-examined' (1991) Crim LR 811, 814.
[28] Eg. *R v Turner* [1975] QB 834 (CA) 836.
[29] Alan A Stone and Duncan C MacCourt, 'Ethics in Forensic Psychiatry: Re-imagining the Wasteland After 25 Years' (2008) 36 Journal of Psychiatry and Law 617, 635.
[30] *Lowery v The Queen* [1974] AC 85 (PC).

The Myth of Normality: Defining the Indefinable

We now come to the second issue: is there really a clear demarcation between what is 'normal' and what is 'abnormal'? Even within the province of psychiatry itself, it is not entirely clear which conditions come within the realm of mental illnesses and which do not. The Court of Appeal has recently warned against the temptation to 'medicalise normality'.[31] But is not normality itself a mental condition? One has to consider mental conditions on a sliding scale, with 'normal' at one end, and 'abnormal' at the other. Towards the middle of the scale, normality can be merely a shade away from abnormality. Where does one draw the line? If terms that can effectively differentiate normality from pathology are lacking in psychiatry itself,[32] how can the courts be so clear in their perceptions of normality and abnormality? The courts perhaps cannot be blamed for trying to draw a line in the interests of practicality; however this has resulted in undue limitations on the potentially helpful evidence that can be presented to the jury, and the rationale for excluding evidence in some cases and not others is sometimes arbitrary. For example, the attitude of the courts towards expert psychiatric evidence in relation to cases where children are involved is relatively liberal.[33] However this is not the case for adolescents of low mental capacity[34] or an adult with an IQ of 72[35] – although this may render him child-*like*.

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[31] *R v Deighton (Richard)* [2005] EWCA Crim 3131 [14].
[32] Tejas Patil and James Giordano, 'On the Ontological Assumptions of the Medical Model of Psychiatry: Philosophical Considerations and Pragmatic Tasks' Philosophy, Ethics and Humanities in Medicine 2010 5:3 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2825495/pdf/1747-5341-5-3.pdf> accessed 17 March 2011.
[33] *DPP v A & BC Chewing Gum Ltd* [1968] QB 159 (QB).
[34] *R v Coles* [1995] 1 Cr App R 157 (CA).
[35] *R v Masih* [1986] Crim LR 395 (CA).

The courts have proceeded in their decisions on admissibility upon the misconception that normality is not within the scope of study of psychiatrists and psychologists,[36] and that what is normal can be judged by the common sense of the jury. Two prime examples of criminal defences in which the common sense judgment of the jury has always been advocated are those of provocation (now replaced by 'loss of self control'[37]) and duress. The objective limb of provocation requires the jury to consider whether a reasonable man would have lost his self-control as the defendant did,[38] whereas that of duress requires the jury to consider whether a person of reasonable firmness would have responded in the same way.[39] In relation to these defences, normal behavioural conditions such as stress, anxiety, and anger are considered to be well within the knowledge and experience of juries. In reality, however, the courts fail to take into account that these normal conditions occur within abnormal circumstances, most of which would not be within the common everyday experience of a person. Jurors commonly commit what is known as the 'fundamental attribution error',[40] failing to take in situational factors. Research has shown that expert testimony aids in juries' focus on the importance of these contextual factors.[41]

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[36] Rosemary Pattenden, 'Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia' [1986] Crim LR 92, 100.
[37] Coroners and Justice Act 2009, s 54.
[38] *DPP v Camplin* [1978] AC 705 (HL) 727.
[39] *R v Graham* [1982] 74 Cr App R 235 (CA) 241 .
[40] R D Mackay and Andrew M Colman, 'Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience' [1991] Crim LR 800, 807.
[41] Neil J Vidmar & Regina A Schuller, 'Juries and Expert Evidence: Social Framework Testimony' (1989) 52 Law & Contemporary Problems 133, 154,160.

How can a juror truly put themselves in the shoes of the accused when he has never been subjected to, for instance, long term physical abuse?[42] Psychologists have conducted studies concerning how stressful events affect the mind, giving rise to 'learned helplessness'[43] which may well aid the jury in determining the culpability of an accused. The overestimation of lay people to predict from a single observation what would happen on a different occasion, and the tendency to over-generalise behaviour[44] and base judgments upon stereotypical preconceptions would seriously compromise justice for an accused. An example of a misconception concerns the 'common knowledge' behavioural conditions of conformity and obedience to authority. It has been shown that people grossly underestimate the power of group social pressure and authoritarian pressure, [45] evidence of which was excluded in one case.[46]

Why should expert evidence about 'normal' notions of intention and credibility not be admitted if relevant to the case at hand? Indeed, the danger of jury deference is a real issue and their role as fact finder will in fact be usurped if they take expert evidence wholesale, without fully considering its limitations. On the other hand, can it be said that the jury has fulfilled their fact-finding role when they have not considered all the facts and alternatives? Are they really well-equipped to pass judgment on the veracity

[42] *R v Emery* [1993] 14 Cr App R 394.
[43] Tracey J Shors, 'Learning During Stressful Times', (2004) 11 Learning and Memory 137, 137 <http://www.rci.rutgers.edu/~shors/pdf/Shors%20review%20on%20Learning%20during%20Stressful%20Times%20in%20Learning%20and%20Memory.pdf> accessed 16th March 2011.
[44] Andrew E Taslitz, 'Myself Alone: Individualizing Justice Through Psychological Character Evidence' (1993) 52 Maryland Law Review 1, 110-111.
[45] R D Mackay and Andrew M Colman, 'Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience' [1991] Crim LR 800, 806-807.
[46] *Neeson and Others* (Crown Court, 1990).

of a witness who is suffering from a mental incapacity not amounting to a mental illness? An analysis carried out on the accuracy of deception, judgments have shown that the average person discerns lies from truth little better than if he merely flipped a coin to decide.[47] It is submitted that where the witness has a mental incapacity not defined as a mental illness, expert evidence should not be automatically excluded.

The admissibility of psychiatric and psychological evidence concerning the *mens rea* of a defendant is probably the most shunned, as it concerns decisions on the very culpability of a defendant for his crime. States of 'abnormality' amounting to insanity, automatism or diminished responsibility are not a barrier due to the fact that these require states of mind amounting to mental illnesses. What is the position of the accused who is suffering from a mental condition unfortunately not 'abnormal' enough to warrant the admission of psychiatric or psychological evidence? If the current state of affairs is any indicator to go by, he will have to wait until his disorder is included in the Diagnostic and Statistical Manual of Mental Disorders or the International Statistical Classification of Diseases and Related Health Problems 10th Revision, and then wait further for the amateur scientists in the legal community - the judges - to accept it as an established disorder. The 'slow-burn' characteristic of Battered Woman Syndrome (BWS), without expert evidence, would not have been taken into account by the jury who may have thought as the trial judge in *R v Thornton* did: could she not have taken another alternative to the provocation, for example by going upstairs or walking out?[48] It was only after BWS was

[47] C F Bond Jr and B M Depaulo, 'Accuracy of Deception Judgments' (2006) 10 Personality and Social Psychology Review 214, 230.
[48] *R v Thornton* [1992] 1 All ER 306 (CA) 312.

recognised as a 'pathological condition'[49] that expert evidence could be admitted.

Other Jurisdictions: Broader Views Abroad?

What are the attitudes towards the admissibility of psychiatric and psychological evidence of courts abroad? The starkest difference is that there is no ridiculous demarcation between mental illnesses and normal mental conditions in the admissibility criteria, which brings us to another point: that other jurisdictions actually *have* set proper guides to admissibility.

Take *Daubert v Merrell Dow Pharmaceuticals*[50] in the USA, which held that the judge should take into consideration four criteria: whether the scientific theory has been tested and withstood falsifiability; whether it has been subjected to peer-review and publication in journals; its error rate; and whether the theory is supported by the relevant scientific community. The thinking behind the *Daubert* test is that scientific evidence obviously would require a test of scientific validity. This is unfortunate, however, for the fact is simply that judges are not scientists. Empirical research suggests that most judges are unable to properly apply the *Daubert* guidance, showing that only 6% of the judges surveyed understood falsifiability and 4% understood error rate.[51] The test also tends to be bias towards 'hard' sciences such as DNA profiling as the theories in social sciences would find the falsifiability and error rate requirements more arduous due to the relative impossibility to

[49] *R v Ahluwalia* [1992] 4 Alll ER 889 (CA) 898.
[50] *Daubert v Merrell Dow Pharmaceuticals* (1993) 509 US 579.
[51] Sophia I Gatowski and others, 'Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert* World' (2001) 25 Law and Human Behavior 433, 444, 447.

conduct true experiments, as mentioned above.[52] Thus, although the general position in the USA regarding evidence about witness credibility has been that the jury should be informed of all matters concerning credibility,[53] it is submitted that under the *Daubert* test, the admissibility criteria are inordinately tightened and psychiatric and psychological evidence is harder to introduce.

The Australian courts have declined to apply *Daubert*[54] and have maintained the criteria set out in *R v Bonython*[55]: whether the subject matter is such that a person without experience or instruction in the area of knowledge or human experience would be able to form a sound judgment on the matter without assistance of expert witnesses and; whether that subject matter is part of a body of knowledge sufficiently organised or accepted as a reliable body, a special acquaintance with which by the witness would render his opinion of assistance to the court.[56] Notably, the distinction between normal mental states and mental illness was disapproved of in *Murphy v The Queen.*[57] However, BWS is relied on by lawyers in that jurisdiction to introduce evidence about the effects of domestic violence[58], perhaps suggesting that in practical terms the establishment of an 'abnormal' condition is still the easiest way to pass the admissibility criteria. Also, the Australian courts reliance on the *Frye v United States*[59] test of general acceptance by the scientific community,[60] which is rejected in the USA,

[52] (n 26).
[53] *United States v Partin* 493 F2d 750 (5th Cir. 1974) [72].
[54] *HG v R* [1999] HCA 2 [40].
[55] *R v Bonython* (1984) 38 SASR 45.
[56] *R v Turner* [1975] QB 834 (CA) 841 D.
[57] *Murphy v The Queen* (1989) 167 CLR 94 (HC) [45].
[58] See *Osland v The Queen* [1998] HCA 75.
[59] *Frye v United States* (1923) 293 F 1013 at 1014.
[60] *Runjancic & Kontinnen v R* (1992) 56 SASR 114 [19].

seems to be extremely conservative in relation to novel science which is bad news for psychiatry and psychology as these bodies are not as established as the 'hard' sciences in the eyes of the court.

The highpoint of admissibility of expert psychiatric and psychological evidence in Canada came in the case of *R v Lavallee*,[61] where it was held that such evidence is admissible to combat commonly held myths or stereotypes, to assess the state of mind of the accused, and such evidence may prompt a change in the common law. This liberal approach was however curtailed in *R v Mohan* which states the general test in Canada today: that the evidence must be relevant, necessary, be from a qualified expert and its admission must not contradict any exclusionary rule.[62] The most debated criterion is that of necessity, which is higher than the previous 'helpfulness' standard. This was elaborated upon to mean that the opinion should provide information likely to be outside the knowledge and experience of judge or jury.[63] Later decisions however show that Canada is heading towards a more restrictive approach. The Supreme Court of Canada has held psychological evidence regarding the delay of a child's complaint of sexual assault inadmissible as it did not satisfy the necessity requirement,[64] in contrast to the English attitude which embraces expert evidence concerning children.[65] It is submitted that the necessity requirement has been too narrowly interpreted, without taking full account of the opinions in *Mohan*.[66]

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[61] *R v Lavallee* [1990] 1 SCR 852.
[62] *R v Mohan* [1994] 2 SCR 9 [17].
[63] ibid [22] (Sopinka J).
[64] *R v D (D)* [2000] 2 SCR 275.
[65] *DPP v A & BC Chewing Gum Ltd* [1968] QB 159.
[66] *R v Mohan* [1994] 2 SCR 9 [22] (Sopinka J).

Further, the *Daubert*[67] criteria have been endorsed in *R v J (J-L)*[68] despite the earlier disinclination towards a test of scientific validity in *Mohan.*[69] In fact the Supreme Court in *R v J (J-L)*[70] could have excluded the (not very well presented) [71] evidence under ordinary criteria of relevance and admissibility,[72] but instead has been influenced by the 'judge as amateur scientist' view in the USA.

Reform: How to Man the Gate?

How then should a judge carry out his gate-keeping function? It has been suggested that admissibility should be decided solely upon relevance, and to instruct juries on various factors regarding reliability before the introduction of the evidence.[73] This is a bit short-sighted as the courts would be flooded with all types of ostensibly 'expert' evidence, moreover it seems to echo the approach of the English courts towards evidence other than psychiatric and psychological evidence. Nor should the courts take the *Daubert*[74] approach as recommended by the Law Commission[75] as this would tend to exclude potentially helpful behavioural science evidence. The Law Commission has

[67] *Daubert v Merrell Dow Pharmaceuticals* (1993) 509 US 579.
[68] *R v J(J-L)* [2000] 2 SCR 600.
[69] *R v Mohan* [1994] 2 SCR 9.
[70] *R v J(J-L)* [2000] 2 SCR 600.
[71] Graham D Glancy and John M W Bradford, 'The Admissibility of Expert Evidence in Canada' (2007) 35 Journal of American Academy of Psychiatry and the Law 350, 354-355.
[72] Emma Cunliffe, 'Without Fear or Favour? Trends and Possibilities in the Canadian Approach to Expert Human Behaviour Evidence' (2006) 10(4) E & P 280, 303.
[73] Harvard Law Review, 'Admitting Doubt: A New Standard for Scientific Evidence' [2010] Harvard Law Review 2021, 2033.
[74] *Daubert v Merrell Dow Pharmaceuticals* (1993) 509 US 579.
[75] Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales* (Law Com No 190, 2009) para 5.2.

also suggested that a *Daubert*-style test be supplemented with training for judges,[76] which ignores the fact that most expert evidence in contention would be that of *novel* science, and there may be new methodologies and techniques which no set of standard guidelines could ever address fully.

It is submitted that judges should take an active gate-keeping role, thought not in relation to a test of scientific validity, but with a contextual approach to expert evidence. In particular, the demarcation between psychological and psychiatric evidence about 'abnormal' and 'normal' mental conditions should be abandoned. The basic consideration of admissibility – that the probative value must be higher that the prejudicial effect – should be paramount in admissibility decisions. The crucial question is not only whether or not the expert evidence could make a significant contribution to the jury's understanding of an accused's state of mind,[77] but also what the potential effects upon the jurors' minds of *excluding* that evidence are. For example, excluding evidence about the reasons for delay in reporting a rape or sexual abuse may leave the jury's prejudiced idea that the charge must have been fabricated intact. Evidence that is admitted must then be accompanied by judicial warning about its flaws and limitations as to reliability.

Other factors must also be addressed here to ensure the viability of the above proposal. The problem of the usurpation of the jury's fact-finding role by the expert can be combated by educating experts on how to present their opinions. A psychologist, instead of saying that a person's initial failure to mention certain details about an alleged rape is consistent with her

[76] ibid .
[77] R.D. Mackay and Andrew M. Colman, 'Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience' [1991] Crim LR 800, 809.

suffering Post Traumatic Stress Disorder and is not unusual, could say instead that persons who have experienced traumatic events, including rape, often do not remember details of the incident,[78] thereby avoiding any indirect pronouncement on whether she was raped or not. Also, experts should not base their opinions solely on what a defendant says. Further steps need to be taken, for example using objective validity tests,[79] making use wherever possible of actuarial formulae, and letting the jury know about actual observations, not merely about their conclusions. Cross-examination with the help of expert advice would help to elicit expert bias, and make sure that the expert has been thorough in his investigation, and that his findings are also grounded as much as possible on empirical research.

Conclusion

It is clear that the current state of the law regarding the admissibility of psychiatric and psychological evidence is unsatisfactory. Evidence of this sort is accorded a particularly suspicious view due to its apparent conflict with the intuitive notions of 'folk psychology'.[80] But it is to dispel these sometimes wrongly held myths and stereotypes that expert evidence regarding even the characteristics of 'normal' persons should be admitted, subject to its reliability in context as determined by the judge.

[78] Tony Ward, 'Usurping the Role of the Jury? Expert Evidence and Witness Credibility in English Criminal Trials' (2009) 13(2) E & P 83, 98.
[79] Taslitz (n 24) 37-39.
[80] (n 78) 93.