Advances in psychiatric treatment (2012), vol. 18, 193–197 doi: 10.1192/apt.bp.111.009175

Expert evidence on trial

ARTICLE

COMMENTARY ON… PSYCHIATRIC ASPECTS OF FRAUD OFFENDING†

Keith J. B. Rix

SUMMARY

The complex nature and consequences of fraud are illustrated by the case of 'Dr' Barian Baluchi, who held himself out to be a consultant neuropsychiatrist before being convicted of deception, actual bodily harm and procuring registration by making false declarations. Under the proposed UK Criminal Evidence (Experts) Bill, psychiatric experts in fraud cases are likely to find the admissibility of their evidence tested against statutory criteria. Where they rely on test results, they will need to know the validity of the methods and show that they have taken proper account of the degree of precision or margin of uncertainty affecting the accuracy or reliability of their results. Proposals to reform the law on unfitness also have implications for psychiatric assessment in fraud cases. It will now be even more important for psychiatric opinion evidence to be demonstrably sound and of such evident strength that there is no issue as to its admissibility and the judge can presume evidentiary reliability.

DECLARATION OF INTEREST

None.

Wallang & Taylor (2012, this issue) correctly identify that fraud is a massive problem that takes many forms and has far-reaching consequences. Consider the UK case of the Iranian-born asylum seeker who started life in Britain as a waiter and minicab driver and for 5 years held himself out to be a consultant neuropsychiatrist and honorary professor (Pygott 2011). From the Kimia Institute, which was said to be a National Health Service (NHS) provider and of which he was co-founder and medical director, he prepared expert psychiatric reports that helped hundreds of asylum seekers to remain in Britain and for which he received £1.5 million. When his real identity was revealed, the NHS had to write to more than 2000 patients, warning them that a bogus doctor may have examined them. 'Dr' Barian Baluchi claimed to have been trained at Harvard and Columbia universities in the USA and Newcastle and Sussex universities in the UK, and claimed that he had attended Leeds Medical School, also UK. In fact, he had 'bought' a PhD in the USA and obtained General Medical Council registration by assuming the identity of a former trainee doctor whose registration had lapsed. In 2005, at the Crown Court at Middlesex, he was convicted of a string of offences, including obtaining money by deception, assault occasioning actual bodily harm and procuring registration by making false declarations. He was sentenced to 10 years' imprisonment.

Two potential developments in the criminal law of England and Wales are likely to have important implications for psychiatrists preparing expert reports in cases of fraud and alleged fraud. These are the proposals to reform the law relating to expert evidence in criminal proceedings (Law Commission 2011) and the law relating to fitness to plead and stand trial (Law Commission 2010). The Scottish Law Commission (2004) has proposed a change from Scotland's present 'insanity in bar of trial' (*HM Advocate v Wilson* 1942) to a focus on the functionality of the accused person. Jersey has deliberately not adopted the Pritchard test and in *Attorney General v O'Driscoll* [2003] the Court set out an approach based on the general principle of 'effective' participation or what amounts to an 'adjudicative competence' test (Rix 2011: p. 196).

Expert evidence in criminal proceedings in England and Wales

Demonstrating reliability

The Law Commission (2011) proposes that for expert evidence to be admitted in criminal proceedings, the party seeking to rely on the evidence should bear the responsibility of demonstrating its reliability in accordance with a reliability test. This test would make statute law the current common law requirements relating to assistance, expertise and impartiality. The statutory basis would be a Criminal Evidence (Experts) Act (set out in draft form at Appendix A of the Law Commission's report) that would permit the trial judge to presume evidentiary reliability in most cases when expert evidence is tendered for admission and set out factors relevant to the

Keith J. B. Rix is a consultant forensic psychiatrist at Cygnet Hospital Wyke and at The Grange, Cleckheaton, and a part-time lecturer in the Department of Law at De Montfort University, Leicester. His book *Expert Psychiatric Evidence* was published by RCPsych Publications in 2011.
Correspondence Dr Keith J. B. Rix, The Grange, 92 Whitcliffe Road, Cleckheaton, West Yorkshire BD19 3DR, UK. Email: drrix@drkeithrix.co.uk

†See pp. 183–192, this issue.

https://doi.org/10.1192/apt.bp.111.009175 Published online by Cambridge University Press

determination of evidentiary reliability alongside the admissibility test. There would also be provision, in exceptional cases, for the judge to call a further expert witness, who has been screened for expertise and impartiality, to provide the judge with additional expert evidence when applying the reliability test.

Clause 4(1) of the draft Bill sets out the meaning of reliability:

> '(1) Expert opinion evidence is sufficiently reliable to be admitted if –
>
> (a) the opinion is soundly based, and
>
> (b) the strength of the opinion is warranted having regard to the grounds on which it is based.'

Establishing unreliability

Clause 4(2) sets out five key or 'higher order' examples of reasons why an expert's opinion is not sufficiently reliable to be admitted (Box 1). In the Schedule to the Act will be set out more specific 'lower order' or generic factors that may be relevant. One of these is: 'Whether the expert's methods followed established practice in the field; and, if they did not, whether the reason for the divergence has been properly explained'. Professor Nigel Eastman, a member of the project's working group, suggested that this factor, in tandem with the need for the expert to provide an opinion as to why their opinion is sound, summarises 'particularly well what should be the approach to medical evidence which is psychiatric in nature'.

Validating tests

Where the psychiatrist relies on any tests for malingering, such as the Miller-Forensic Assessment of Symptoms Test (M-FAST; Jackson 2005) or the Test of Memory Malingering (TOMM; Tombaugh 1997), as suggested by Wallang & Taylor, heed will need to be taken of the requirement to consider 'the validity of the methods by which [data] were obtained' and to take 'proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results' (Schedule 1, paragraph 1 of the draft Bill). As Wallang & Taylor have noted, if the US *Daubert* (1993) criteria are applied to the admissibility of evidence derived from such tests, this can create significant problems with tests that have not been fully validated. The effect of the Law Commission's proposals will be to create similar problems when reliance is made on psychological tests, including the M-FAST and TOMM.

Regarding tests of malingering, care must be taken in any event not to fall foul of the rule that it is for the court, and not experts, to decide whether or not the defendant, or indeed any witness, is credible. In *Re S (Care: Parenting Skills: Personality Tests)* [2004] and *Re L (Children)* [2006] the Court of Appeal made it clear that psychometric testing has no place where the credibility of an adult witness is an issue. However, a psychiatrist may be asked to give an opinion as to whether or not a witness 'is or was suffering from some recognised mental illness, disability or abnormality … that undermines his credibility' (*Toohey v Metropolitan Police Commissioner* [1965]) and expert evidence from a psychiatrist may be critical in deciding whether or not a witness or defendant is feigning mental illness, disorder or abnormality.

The 'validity' requirement is also a matter that will have to be addressed by any psychiatric expert who includes in their report the results of the administration of the rating scales that are commonly used in clinical practice. Already such experts should be able to answer the question: 'Has this rating scale/questionnaire been validated for use in the population to which this claimant/defendant belongs?', that is, individuals in personal injury litigation or people charged with offences of violence.

The overall approach of the judge is described thus:

> 'It will always be the particular opinion evidence proffered for admission which has to be scrutinised for reliability. The judge must therefore look at the general foundation material, the extent to which relevant case-specific matters were taken into consideration by the expert, the legitimacy and logic of the expert's reasoning process in coming to his or her opinion and whether the sort of opinion the expert wishes to give, including its strength, can be objectively justified, bearing in mind the uncertainties inherent in the foundation material.' (Law Commission 2011, paragraph 5.13).

BOX 1 Key or higher order examples of reasons why an expert's opinion is not sufficiently reliable to be admitted

a The opinion is based on a hypothesis that has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny

b The opinion is based on an unjustifiable assumption

c The opinion is based on flawed data

d The opinion relies on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case

e The opinion relies on an inference or conclusion which has not been properly reached

(Draft Bill, Clause 4(2); Law Commission 2011)

Advances in psychiatric treatment (2012), vol. 18, 193–197 doi: 10.1192/apt.bp.111.009175

Issues in the vignettes

What Wallang & Taylor do not make sufficiently clear are the particular issues for which psychiatric evidence may be admissible in each of their example fraud cases. The issue in Vignette 1 of the chief executive officer who fled to Australia was clearly the trial issue of M'Naghten insanity (*M'Naghten's Case* 1843) based on a diagnosis of narcissistic personality disorder. It is implicit that the 'drug dealer' in Vignette 2 was convicted of the offence and his intellectual disability and vulnerability to exploitation were raised as mitigating factors on the basis of which he avoided a custodial sentence and was made subject to a mandatory drug treatment programme.

In the case of the depressed administrator in Vignette 3, the issue was one of disposal, having regard to her mental condition at the time of sentencing in that, satisfying the criteria for a s. 37 hospital order under the Mental Health Act 1983, she was diverted to hospital instead of sentenced to imprisonment. The hedge fund manager in Vignette 4 was presumably either seeking to avoid trial by 'acting mad', being unable to remember and being unable to concentrate (i.e. the issue was fitness to plead and stand trial) or perhaps he was seeking to lay a defence on the basis that he was 'ill' at the material time. However, what actual defence was, or would have been raised, is not clear.

The nature of the issue and the stage of the proceedings are likely to determine the approach to the admissibility of expert psychiatric evidence.

In the case of the hedge fund manager, psychiatric evidence was not relevant because the defendant's symptoms 'miraculously' disappeared but, had they not, it is likely that the defence would have sought to prove that they made him unfit to plead and stand trial and the prosecution would have sought to prove that he was malingering. The judge would probably have decided the issue on the basis of the difference between the defendant's presentation to prison staff and the visiting psychiatrist, and what was a sort of 'covert surveillance': he would probably not have wanted expert assistance on this matter. However, there would have been a potential issue as to the admissibility of evidence regarding the likelihood of someone with a depressive or psychotic illness complaining of low mood, appearing sullen, complaining of spectacular visual hallucinations, lack of memory and concentration and experiencing a paralysis. The case for the prosecution would be put based on the improbability of such a presentation but what would be the evidence? If it had become part of the defence case to submit that, on the basis of the M-Fast or TOMM, he was not malingering or the prosecution sought to rely on such evidence to prove that he was malingering, this is a case in which the judge would probably rule that the issue was one that could be decided without expert assistance by relying on the evidence of the prison staff as to the defendant's behaviour in custody.

In Vignette 1, where the issue was insanity, there is already a statutory criterion for the admissibility of expert evidence in England and Wales: it must be given by two registered medical practitioners and one must be approved under s. 12 of the Mental Health Act 1983. Beyond this, it is difficult to see what question there could have been about the relevance of, or assistance provided by, psychiatric evidence in applying the M'Naghten rules. Thus, the issues under the rules would have been: (a) whether or not narcissistic personality disorder was a disease of the mind; (b) whether or not it resulted in a defect of reasoning; and (c) whether or not such a defect of reasoning could have resulted in (i) the executive not knowing the nature and quality of his actions or (ii) if he did, not knowing that what he was doing was wrong. Possibly, there might have been an argument that the diagnosis of narcissistic personality disorder was not soundly based but a judge would be more likely to leave this to decide when considering the issue of disease of the mind than exclude evidence as to the diagnosis at a pretrial admissibility hearing.

Where psychiatric evidence is admitted in mitigation of sentence, as in the case of the young man with intellectual disability who was addicted to heroin, it is unlikely, in practice, that there will be issues as to the admissibility of psychiatric evidence. This is because it is uncommon for the prosecution to take issue with, or judges to question, the psychiatric evidence that is tendered, usually only in report form, in mitigation of sentence and in support of a 'therapeutic disposal'. In theory, it could have been questioned to what extent the court could rely on a 19-year-old's school IQ results or what were probably the results of suggestibility testing without having regard to the validity of the methods by which the suggestibility data were obtained and without taking proper account of matters such as the degree of precision or margin of uncertainty affecting the accuracy or reliability of suggestibility test results.

Likewise, in the case of the depressed administrator, it is also likely that, in practice, there will not be issues as to the admissibility of psychiatric evidence beyond the statutory criteria in s. 37.

The Bill as interim guidance

The Criminal Evidence (Experts) Bill may not become law. It probably will, but in the meantime, if issues arise as to the admissibility of expert evidence in criminal proceedings, the consultation paper and draft Bill are likely to be relied upon to assist the court in deciding the issue. Nothing will be binding until the Act is passed but, whether or not this happens, when issues of admissibility of expert evidence arise in civil or other jurisdictions, again the court may look to the consultation paper and draft Bill for assistance. Having regard to the proposed statutory requirement, the lesson is a simple one that should not need to be restated. Experts should not just provide an opinion – they should 'show their workings' and provide sufficient reasoning for it to be clear that the opinion is soundly based and the strength of the opinion (whether on the balance of probabilities or beyond reasonable doubt) is clear, having regard to the grounds of the opinion.

Consultation on new rules to decide who is fit to stand trial

The Pritchard test

The current legal test for fitness to plead and stand trial is known as the Pritchard test, because it is has a common law basis in the case of *R v Pritchard* (1836). The Pritchard test is regarded as setting too high a threshold and limiting the number of people who are found unfit to plead and stand trial. It is essentially a cognitive test that does not allow for the impact of psychosis unless the psychosis affects cognitive functioning. There is also a concern that defendants are able to deceive their barristers by feigning mental illness (Rogers 2008).

New developments

In 2010, the Law Commission issued a consultation paper, *Unfitness to Plead*. The provisional proposal is that the current test should be replaced with a test of decision-making capacity that is consistent with the Mental Capacity Act 2005. It is also proposed that there should be a defined psychiatric test to assess whether or not an accused person has decision-making capacity.

This proposed reform is not as well developed as that relating to the admissibility of expert evidence in criminal proceedings and proposals for the tests are awaited. If, as is likely, this area of the law is reformed, it is probable that there will be requests to assess the decision-making capacity of accused persons more often than at present.

Considerations during assessment

Cases of alleged fraud are even more likely to be problematic. Those referred for psychiatric assessment often involve depressive disorders, as the vignettes of the hedge fund manager and the bereaved administrator illustrate. Such cases often involve hitherto, or still, law-abiding professional or business people who are understandably unhappy when charged with fraud and fear not just financial and professional ruin but years of imprisonment, to which almost all will be unaccustomed. It is necessary to remember that most defendants are unhappy about being prosecuted and are fearful of the outcome but do not have a disability or lack decision-making capacity. Memory and concentration impairments severe enough to interfere with understanding evidence, giving instructions or giving evidence are easy to assert and, for some, not difficult to represent.

Careful forensic assessment, which is well illustrated by the assessment of the hedge fund manager, is needed to judge the genuineness of the psychiatric presentation which, it may be asserted by the defence, is of a psychiatric disorder that renders the defendant unfit to plead and/or stand trial.

The recollection of a recent event can call into question alleged memory impairment. An admission to spending 6 hours a day going over statements and documentary exhibits with a solicitor can call into question impairment of concentration. Careful study of medical records and witness statements may reveal evidence inconsistent with the symptoms alleged. Some of the 'possible signs of malingered behaviour' in Box 3 of Wallang & Taylor's article can assist, but not all: but for the risk of being sent to hospital on a hospital admission order, almost always there will be significant secondary gain for a defendant who can convince the court that they are unfit to plead or stand trial and there is a medico-legal context in all of these cases.

Assessment of fitness to plead and stand trial is best approached, following a minimum of introduction, by asking the accused to explain their attendance. Their response may indicate that they understand the adversarial criminal proceedings and the nature of the offence(s) with which they are charged. Questions as to plea may reveal whether or not they understand the available pleas and their effects. If pleading not guilty, the accused can be asked to explain why they are pleading not guilty, although, if the assessment is at the request of the prosecution, they may have been advised not

Advances in psychiatric treatment (2012), vol. 18, 193–197 doi: 10.1192/apt.bp.111.009175

to discuss their defence. In these circumstances, it will be more difficult to decide whether or not they can give instructions.

To test their ability to give instructions and their understanding of the evidence, it is necessary to put some of the evidence and ask the accused to comment or explain. It is important to realise that the accused has to understand the detail of the evidence. The issue is case-specific ('a case of this nature' – *R v Pritchard* (1836)). There is a world of difference between understanding the evidence in a complex fraud case and understanding the evidence in a shoplifting case. All of this questioning will also shed light on the ability of the accused to give evidence.

The case should not be considered in isolation: how the accused conducts the affairs of everyday life will shed light on the abilities needed to understand evidence, give instructions and give evidence. Witness statements, reports and medical records should be searched for evidence of the accused's ability, or otherwise, to function in everyday life.

Such an assessment depends not on tests (the validity or reliability of which may be questioned), but on skilled history-taking, examination and consideration of records and 'third-party information'. Such skilled forensic psychiatric assessment should lead to the formulation of opinions that are so demonstrably sound and that are held with such evident strength that there is no issue as to their admissibility. As a result, the judge can presume evidentiary reliability.

Conclusions

Wallang & Taylor have drawn attention to fraud, which is a massive societal problem and yet one that comes little to the attention of psychiatrists. When such cases are referred, the medico-legal issues are familiar: fitness to plead and stand trial, intent, insanity, mitigation and 'therapeutic disposals'.

Proposals for the statutory implementation of rules as to the admissibility of expert evidence in criminal proceedings are likely to be far-reaching and do not depend on enactment of the Criminal Evidence (Experts) Bill. The lesson is simple: experts should provide not just an opinion but also sufficient reasoning for it to be clear that the opinion is soundly based and strongly held.

Proposals to reform the law on fitness to plead and stand trial are less advanced and their impact less certain, except for the likelihood of the issue being raised more often if the test shifts from being a largely cognitive test to a functional test. In the meantime, experts should provide opinions that are so demonstrably sound and held with such evident strength that their reliability is not questioned.

References

Jackson R, Rogers R, Sewell K (2005) Forensic applications of the Miller Forensic Assessment of Symptoms Test (MFAST): Screening for feigned disorders in competency to stand trial evaluations. *Law and Human Behavior* **29**: 199–210.

Law Commission (2010) *Consultation Paper 197: Unfitness to Plead*. TSO (The Stationery Office).

Law Commission (2011) *Law Com No 325: Expert Evidence in Criminal Proceedings in England and Wales*. TSO (The Stationery Office).

Pygott E (2011) Presidential address: Asylum, human rights and medicine. *Medico-Legal Journal* **79**: 3–14.

Rix KJB (2011) *Expert Psychiatric Evidence*. RCPsych Publications.

Rogers TP, Blackwood NJ, Farnham F, et al (2008) Fitness to plead and competence to stand trial: a systematic review of the constructs and their application. *Journal of Forensic Psychiatry & Psychology* **19**: 576–96.

Scottish Law Commission (2004) *Insanity and Diminished Responsibility in the Criminal Law (Discussion Paper No. 122)*. Scottish Law Commission.

Tombaugh TN (1997) The Test of Memory Malingering (TOMM): Normative data from cognitively intact and cognitively impaired individuals. *Psychological Assessment* **9**: 260–8.

Wallang P, Taylor R (2012) Psychiatric aspects of fraud offending. *Advances in Psychiatric Treatment* **18**: 183–92.

Attorney General v O'Driscoll [2003] JLR 390.

Daubert v Merrill Dow Pharmaceuticals, Inc (1993) 509 US 579.

HM Advocate v Wilson (1942) JC 74.

M'Naghten's Case (1843) 10 Cl & F 200.

Re L (Children) [2006] EWCA Civ 1282.

Re S (Care: Parenting Skills: Personality Tests) [2004] EWCA Civ 1029.

R v Pritchard (1836) 7 C&P 303.

Toohey v Metropolitan Police Commissioner [1965] AC 595.