

Psychiatric Testimony and the “Reasonable Person” Standard

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The aim of this article is to explore the boundaries of psychiatric testimony in criminal cases. In a series of vignettes, the author describes applications of psychiatric testimony in nontraditional areas. These are criminal cases in which the defendant—who was not mentally ill—acted in response to a situation that would tend to trigger violence in many persons: protection of self or others. In scenarios involving self-defense, duress, and passion/provocation, the dynamics involve interpersonal situations that give rise to behavior that may be entirely foreign to the defendant but that could not have been avoided. The law looks at these matters through a “reasonable person” standard: what the ordinary citizen would have done. In principle, there is often no need for expert testimony, because judges and jurors are presumed able to assess reasonableness, justification, or provocation. The trier of fact, however, could use a psychiatric explanation to assess culpability. The author discusses the cases in terms of application and admissibility.

The goal of this clinically based paper is threefold: to outline the ordinary boundaries of expert testimony admissibility in criminal cases; to give a series of examples illustrating the benefits and pitfalls of testimony in the borderland between objective and subjective standards; and to discuss application of such testimony in a number of nontraditional areas.

Expert testimony can be offered when elucidation of a legal issue requires knowledge or experience beyond the scope of the trier of fact.¹ In practice, psychiatric testimony is rarely excluded

from criminal proceedings when deemed helpful to a factual inquiry.² Mental health professionals are thus called on to provide opinion testimony on a variety of matters, such as psychiatric diagnosis, mental state at a relevant time, a specific residual capacity, or a prognostication about behavior. Expert witnesses, in principle, must not invade the province of the judge or jury³; and judges are careful to instruct juries that expert opinions are *only* opinions, that is, not probative. Whether a witness can offer an opinion on an “ultimate” legal issue—or even use legal terms such as *premeditation* or *provocation*—varies among settings,⁴ although the practice is denounced by the American Bar Association,¹ discouraged by the American Psychiatric Association,⁵ and contrary to Federal Rule of

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Evidence 704(b).^{*} In practice, there is an admissibility "gradient" whereby expert witnesses are always barred from giving testimony on guilt versus innocence, often barred from using the term *insane*, less often from using the term *(in)competent*, and variably permitted to opine on elements of culpability. Moreover, a given jurisdiction may not have adopted Federal Rules of Evidence.

There are traditionally accepted applications of psychiatric expert testimony in criminal law: competencies, criminal responsibility, and where possible, prediction of dangerousness.⁶ The best known of these is a proffered *excuse*, the insanity defense. In this affirmative defense, a "defect of reason" precludes *mens rea*. A "diminished capacity" argument (failure to prove *mens rea*) uses the presence of a mental disease or defect as a basis for asserting that the defendant could not have formed the requisite intent to commit, for example, first-degree murder.⁷ In these cases, the defendant represents that a mental disease or defect was present at the time in question.

There are other cases in which the defendant (not mentally ill) acted, in protection of self or others, in response to a situation (arguably) calling for violence. In these cases of self-defense, duress, and passion/provocation, the dynamics involve interpersonal situations giving rise to behavior that may be entirely foreign to

the defendant but that could not have been avoided. The law looks at these matters through a "reasonable person" standard—what the ordinary citizen would have done under similar circumstances (and using other criteria described below).

A successful self-defense (justification) or proof of duress (an excuse, although generally not to murder) will lead to acquittal, whereas a provoked homicide committed in the heat of passion leads to a ruling of reduced culpability (usually a reduction from murder to manslaughter). In certain instances, an "imperfect" self-defense, committed by someone not quite acting reasonably (due to a faulty analysis of circumstances), can give rise to reduced culpability as well (for example, 18 Pa. Cons. Stat. § 2503(b)). What is the role of psychiatric testimony here? In principle, there is often no need for expert testimony, because judges and jurors are presumed able to assess reasonableness, justification, provocation, and such. However, there are situations in which the trier of fact could use a dynamic explanation to assess reasonableness, especially in passion/provocation scenarios. These cases are often on the border between an excuse and a justification.

Self-defense is purely a matter of justification. The test for self-defense is largely an *objective* one, that is, independent of how a particular defendant viewed the situation. The test may have several elements, which determine whether the defendant acted reasonably and could not have done otherwise: these are *imminence*, *necessity*, and *proportionality*.⁸ In

^{*} Rule 704(b) states that "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

addition, the defendant has a duty to retreat, must act intentionally to thwart the attack, and must not be acting only in retaliation.⁸

The elements of self-defense were weighed in the much publicized trial of Bernhard Goetz, New York's "subway vigilante," who shot his assailants/victims because of a perception that he was about to be mugged.^{8,9} His self-defense against the attempted murder charges was successful, although he was found criminally responsible for possession of a weapon. He did not assert that his cognition or will was impaired.

An exception to the elements of self-defense is the battered spouse defense,⁷ in which violence may be excused or justified when there is *objectively* no way out of an abusive situation. Often, the battered spouse will have to demonstrate that there was a *modus operandi* of the batterer that was identifiable, although the violence was not imminent and retreat was *physically*, if not *psychologically*, possible.³

The passion/provocation scenario is a more ambiguous area than the purely objective ones. This defense, which could result in a murder defendant's conviction for voluntary manslaughter (for example, in 18 Pa. Cons. Stat. § 2503(a)), consists of four elements: that there was a *reasonable* provocation; that the provocation *directly* led to the death of the person responsible for the provocation; that there was *insufficient* "cooling time" for the accused to have used his reasoning faculties and capacity to reflect; and that the accused *actually* acted in the heat of passion.¹⁰ The first three elements are objec-

tive and the fourth subjective. However, practitioners are advised to consult local standards with respect to which actions are considered provocative or how long a person can ruminate about the provocation before being objectively cooled off.

In *McCusker*,¹⁰ a leading Pennsylvania Supreme Court ruling from 1972, the trial court was reversed for refusing to admit psychiatric evidence relevant to *whether* the defendant acted in the heat of passion. However, it was left to the trier of fact to determine provocation, defined as whether a reasonable person, given the same set of facts, would become impassioned to the extent that the person's mind would be incapable of cool reflection.

Illustrative Cases

The following cases illustrate *potential* applications of psychiatric testimony in reasonable person cases. There is an admissibility issue, because, by rules of evidence, expert testimony may be barred if the interpretation of the behavior in question is within lay determination. The cases described are from the author's practice in Pennsylvania and New Jersey.

Case 1: Self-Defense and Loss of Control A 35-year-old man was living by himself in a crime-ridden neighborhood of a New Jersey city. He lived there out of necessity; the house was paid for and he did not have the resources to move. The local drug dealers and users would target a home and commandeer it, turning it into a drug house and forcing the occupants either to acquiesce or to leave. This *modus operandi* was well known, and when

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it happens, one knows the stage may be set for mortal combat.

The scenario unfolded insidiously. The defendant took in a young man he had known in the neighborhood, believing that the youth had fallen on hard times. Over a period of days, especially while the defendant was at work, the home was overtaken by drug dealers. This occurrence was, in the defendant's mind, connected to the man who had come to stay. Being a large man, not fearful by nature, the defendant asserted himself and drove out several of these intruders, thinking he had solved the problem. On the way out, one of the men threatened to come back to "finish the job," which the defendant took as a death threat. This perceived threat put him on edge but did not cause a formal psychiatric disturbance. Not a gun owner, he kept a baseball bat at the bedside. A few days later he heard an intruder during the night. In the dimly lit house he thought he saw a gun; he had his bat in hand. When the intruder moved quickly, the defendant struck out, in his mind to protect his life. However, when the other man was on the floor, the defendant realized that it was the young man he had taken in, not the one who made the death threat. Feeling betrayed and enraged, he delivered several more blows, which were fatal. The psychiatric examination revealed that, during the incident, he felt that the victim had made a fool of him. The victim personified those qualities the defendant had tried so hard to transcend, the criminal elements prevalent in his environment. In effect, he was exorcising this symbol of evil but violating a boundary of self-defense.

The defense attorney asked for an assessment, including a report based on the defendant's statements, regarding the psychodynamic issues leading to violence. The defense would not be *pure* justification, because there were features atypical to self-defense: the defendant did not see a gun (there wasn't one), he failed to retreat, and he maintained the assault after the immediate threat was gone. The expert's report explained how this reasonable person had been terrorized, sensitized to violence, and then violated by an intruder who, by *modus operandi*, would be expected to be armed. The event served as a *provocation*, inflaming the defendant's emotions, leading to loss of control (not a defense *per se*). The report was used for tactical purposes; the prosecutor reduced the charge from murder to manslaughter. A plea bargain was struck, with a sentence of incarceration greatly reduced from that of murder.

Comment This case, a flawed self-defense against an intruder, explores the subjectivity of the defendant in the context of an objective test. Admissibility was not reached because the defendant pled guilty. The report, however, served as a stimulus for both sides to look at the defendant as an otherwise reasonable person whose behavior went farther than appropriate. The negotiated plea acknowledged both his responsibility and his diminished culpability.

Case 2: Revelation of Infidelity and Passion/Provocation A 40-year-old man had been living alone for several years after a divorce. He had no criminal record and no psychiatric history. A friend introduced him to a younger woman, also di-

forced, who was a medical resident at a major city hospital. They fell in love and began to live together at his apartment. All seemed well until about a year and a half into the relationship. She began to tell him she did not need a ride home from work, and she would make excuses for not coming home for dinner. Then things took an ominous turn: she would receive telephone messages from a man; when he came home the place "smelled of sex"; he saw semen running down her thigh. He repeatedly confronted her about her obvious infidelity, and she repeatedly denied it. On the night in question they went to his favorite nightclub, where she was treated with a familiarity that could not be explained by his visits there with her. On the way home, he was enraged; she was similarly indignant over his treading on her autonomy. The heated argument continued at home, during which she admitted to her infidelity in a taunting manner. Unable to contain his emotions, he picked up a knife and stabbed her in the chest. As she tried to run, he stabbed her in the back. Seeing what he had done, he stabbed himself in the abdomen and then jumped off the roof, but did not seriously injure himself. He then walked to a police station and confessed. The victim's injuries were fatal.

The expert's report focused on the defendant's emotional and behavioral reactions to a potent stressor, which the attorney would argue constituted reasonable provocation. It was pointed out that the defendant's behavior contained strong elements of his cognitive faculties having been overcome by emotion and loss of

control. The District Attorney attempted to bar psychiatric testimony entirely, arguing that it invaded the province of the trier of fact. The judge permitted the testimony as to the defendant's state of mind at the time of the homicide, barring ultimate issue testimony on provocation. That is, the question of provocation remained objective, whereas the defendant's state of mind was left open to interpretation. The defendant, against legal advice, elected to waive a jury trial. The judge heard the defense testimony and from a psychiatrist hired by the District Attorney. Although the defense was barred from proffering an opinion as to *whether* the victim's actions constituted a provocation, the defense expert described the interaction in detail. The defendant's passion/provocation argument failed, and he was convicted of non-capital first-degree murder. The judge rejected the idea that words alone or the revelation of infidelity, at this stage of the relationship, could constitute *reasonable* provocation for homicide. Therefore, the subjective area was never reached. Although some testimony had been admitted, it was given no importance.

Comment This case shows that there may be little place for testimony on what constitutes *provocation*, in keeping with the objective nature of the test. Thus, psychiatric testimony may be limited to the subjectivity of the *passion* element. However, the judge read the report and heard the testimony, showing dynamically how the defendant's passions had been inflamed. From an overall defense perspective, the use of expert testimony served as a vehicle for introducing a

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broader view of the crime. Short of a reduction of the offense to manslaughter, the defendant was hoping for a conviction for third-degree murder but was unsuccessful.

Case 3: A Homosexual Assault and Provoked Homicide A 32-year-old male professional boxer split up with his wife and moved into a house with another man. The boxer knew the other man was homosexual and believed they had an understanding that there was to be no sexual interaction between them, that their relationship was one of business and convenience. The boxer, meanwhile, had a severe crack cocaine addiction, which worsened in response to his recent breakup. This addiction caused him to be irritable, although there was no evidence that he was intoxicated during the incident to follow.

During the days and weeks before the criminal incident, the roommate breached their agreement by making sexually explicit and provocative remarks, specifically about performing oral sex on the boxer. The boxer found this talk irritating but never took it seriously. On the day in question, the boxer was asleep on his back. He woke up to find his penis out of his shorts, semen on his chest, and the roommate at the bedside. He instantly became enraged. The roommate, a larger man, tried to hold him down. They fought; the boxer grabbed a heavy candlestick and beat the other man in the head. While the roommate was down, the boxer, still enraged and fearing for his life, dropped a portable air conditioner on the other man and killed him.

The defense expert report explained the

dynamics of the assault on the defendant as the cause of his actions. Among other things, it pointed out that the homosexual assault was a potent stressor, which any person might consider provocative. Beyond that, the defendant sincerely believed his life was in danger. The prosecutor objected to the admissibility of any psychiatric testimony, arguing that it was a lay determination whether the defendant acted in self-defense or in the heat of passion from a legal provocation. The judge agreed, although the defense attorney argued that expert testimony should be admitted on the *subjective* elements of the test: that the accused was acting in the heat of passion and that he did not cool off. The case was tried before a jury, without the benefit of psychiatric testimony. A subjective account was provided by the defendant himself. The jury convicted him of aggravated manslaughter rather than murder.

Comment Here there was an admissibility issue, although such testimony had been permitted in other jurisdictions. The judge, in the pretrial hearings, was averse to the notion of introducing expert testimony on a subject accessible to the average citizen. In the author's experience, barring testimony on the question of the defendant's state of mind is not consistent with state-of-the-art jurisprudence.

Case 4: Killing a Psychotic Son in Self-Defense A retired physician, a quiet and always law-abiding member of the community, had a psychotic son. The young man, age 30 at the time of his death, had lived away from home for many years but had returned home in a deteriorated mental state a few years ear-

lier. He was a constant source of concern for his parents; he was socially inappropriate, foul-mouthed, verbally and physically assaultive to both parents, and non-compliant with psychiatric treatment. Of great concern to the father was his threats to kill his mother. This situation amounted to slow torture, from the parents' point of view. Even worse, the young man threatened to kill them if they tried to commit him to a hospital.

The physician had run out of patience and had decided to leave home alone for a few days. There was a hand gun in the house, although he denied that he bought it in relation to his son's threats. He had taken out the gun, he said, so that his wife could have it in case an acute problem arose with their son. On examination, he admitted that such a plan was not rationally considered. While he was packing, he overheard his son in another room saying "kill the bitch" and other statements suggesting that an attack on his mother was imminent. Hearing this, the physician took out the gun, saw that his son was about to attack him, and shot, emptying the gun into his son's chest with fatal consequences.

The discussion within the defense team was whether the defendant's actions were reasonable and justified as a self-defense scenario. The defense attorneys considered using psychiatric testimony to educate the court about the effect of a psychotic and threatening family member on his parents. The defendant took an opportunity to plead guilty to third-degree murder without a recommendation for sentencing. The defense put on testimony at the sentencing hearing, as did the District

Attorney. The thrust of defense testimony was that the defendant's situation was *virtually* one of self-defense. The judge agreed, sentencing him to a year of house arrest and several years' probation.

Comment This case is an application of psychiatric testimony to self-defense issues, but in a sentencing hearing. The importance of the case is twofold. First, it shows the legitimacy of psychiatric testimony in a situation about which the average person would have little knowledge or experience, namely, the behavior of a psychotic individual. Thus, the *reasonableness* of the defendant's actions could be viewed in psychiatric terms. The court did not examine the idea that the whole notion of leaving the gun for the wife was ill-conceived. The *imminence* and *proportionality* elements of a self-defense would not have been aided by psychiatric testimony, the reason for the plea bargain. Second, the case underscores the importance of psychiatric testimony in sentencing. It is an opportunity to describe flawed defense scenarios in detail, with an advantage: the defendant has already accepted responsibility, and the testimony serves to humanize him before sentence is passed.

Case 5: A Schizophrenic Bank Robber Under Duress A 25-year-old man with a well documented history of psychiatric hospitalization for schizophrenia had formed a delusion about a friend, who was a professional criminal. The delusion was aggrandizing; the friend was wise, godlike, and omnipotent. The schizophrenic knew of the friend's criminal activity; he felt that he knew too much, which made him vulnerable. In fact, he

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had been told by the friend to keep quiet—or else!

On the day of the incident, the friend visited the schizophrenic, conscripting him into an activity to be revealed on the way. There were weapons in the car. The schizophrenic was told, "Take one and watch my back." They were going to rob an armored car at a bank in a shopping mall. Upon this revelation, the schizophrenic became distraught; he had hallucinations telling him alternately that he should not do this and that he must or be killed. He feared for his life if he refused to cooperate. In the robbery, the friend was killed and bystanders were killed but not by a bullet from the schizophrenic's gun. Despite the ambiguity over whether this man killed anyone, he was indicted for felony-murder, as required by federal law.

The government sought the death penalty. Among other arguments, including lack of *mens rea*, the defense cited duress as a mitigating factor. Although duress is essentially based on a reasonable person standard, federal law (for example, in a bank robbery case) permits evidence of reduced mental capacity in the analysis. The Attorney General's office certified the case as capital. Both sides offered psychiatric and psychological analyses, focusing on the impact of the psychotic symptoms on criminal intent. The defendant was committed to a federal facility for an extended evaluation. The psychologist opined that the defendant, among other things, was malingering. Ultimately, the government offered the defendant a life sentence, which he reluctantly accepted.

Comment This case describes how a mentally ill person was subject to influence by a more powerful criminal mind. Because, under federal rules of evidence, a person's subjective state can be incorporated into a duress argument, testimony can be used both in the defense case and in mitigation against the death penalty. In the latter instance, the written report was used first as part of a brief; live testimony before a jury could have been used if needed.

Discussion

These cases illustrate potential applicability and admissibility of psychiatric testimony in non-insanity cases. Although there may be little apparent overlap between reasonable and mentally disturbed behavior, the borderlands explored above suggest opportunities for educating judges and juries on the complex issues.

There has been a tightening of restrictions on expert admissibility since John Hinckley's trial.¹¹ Adding complexity is the interplay of objective and subjective standards governing excusable or justifiable conduct and mitigation. In cases of mental disease or defect, there is generally no problem of admitting psychiatric testimony, although there are issues of approaching the ultimate question, burden of proof, threshold tests, and applicable defenses. On the other hand, the judge or jury would need to assess a defendant's state of mind during an act that either was provoked or necessitated by mortal fear. Here, testimony could be helpful, not prejudicial.¹⁰

There appears to be flexibility in the adjudication of passion/provocation ele-

ments. Acceptable heat-of-passion emotions include anger, rage, sudden resentment, and terror.¹² Mere slapping or breaking of an object would not qualify as provocation.¹³ As **Case 2** above illustrates, evidence of infidelity, short of *in flagrante delicto*, does not qualify as provocation. Introducing psychiatric evidence that the defendant acted in the heat of passion may not intrude on the jury's function,¹⁴ and failing to introduce it may be prejudicial.¹⁵ For example, a recent New Jersey appeals court ruled that a homicide defendant with a history of sexual abuse was deprived of an opportunity to present expert testimony on posttraumatic stress disorder in support of either a self-defense or passion/provocation defense.¹⁶ A variation of this trend was seen in a Maine federal court ruling that a battered woman could use evidence of her mental state in the service of a duress defense to a drug charge.¹⁷ A different result occurred in Colorado,¹⁸ where a trial court affirmed barring psychiatric testimony about heat of passion, saying these matters were within the common knowledge of jurors. Instead, the judge instructed the jury on the elements of heat-of-passion manslaughter after the defendant himself testified.

In the imperfect self-defense scenario, there is a perception of a need for self-defense based on a faulty analysis of circumstances; this includes a state of mind arising from a pattern of interaction or a history of abuse leading to a reaction based on fear of one's safety.¹⁹ Thus, the *modus operandi* of the victim is a valid element in the defense calculus. In **Cases 1** and **4**, evidence of mental state was

used in plea bargaining and sentencing, respectively. If the imperfect self-defense is not recognized in a jurisdiction, perhaps the expert testimony can be reserved for sentencing.

Because the illustrative cases are from the defense perspective, a few words from the prosecution side are in order. After working with the prosecuting attorney to determine how psychiatric testimony has been treated by statute and case law, the psychiatric consultant can scrutinize the defense expert's report, looking for areas in which the opinions exceed the legal standards, when they invade the province of the trier of fact or become frankly prejudicial or argumentative. Whenever possible, the prosecution strategy should be to argue that the court bar defense testimony on one or another of these grounds. If not barred, testimony should be limited to clinical information suggesting, but not determining, *mens rea*. When there is no ruling, or when the defense testimony falls squarely within established parameters, the prosecution expert must follow ordinary clinical forensic psychiatric principles, rebutting, where possible, the defense expert's conclusions.

In summary, although it would appear that psychiatric testimony could be used whenever *mens rea* is at issue, finding the proper format is not automatic. Irrespective of the actual results in the illustrative cases, the following applications of psychiatric input to reasonable-person cases are worthy of consideration: (1) dynamic explanations and clinical assessment of state of mind in passion/provocation cases, if not for defining provocation (ob-

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jective test), then for the question of whether the defendant acted in the heat of passion (possibly subjective); (2) dynamic explanations of the role of mental disease or defect in duress (if there is a subjective component); (3) dynamic explanations of the subjective states of individuals during self-defense scenarios, whenever the jurisdiction permits such an analysis; (4) the tactical use of an expert report as a means of bringing about a plea bargain, especially in a flawed, but intuitively appealing, self-defense or passion/provocation case; and (5) the use of testimony at sentencing, where otherwise limited data and opinions can be expressed.

Acknowledgments

The author thanks Marcia Steinbock, Esq. for her critical reading and helpful suggestions.

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