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The role of expert witnesses in psychological blow automatism cases.

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Automatism is a defence in criminal violence that raises some critical issues about the role of the expert witness in the determination of guilt and innocence. The recent Australian case of R v Leonboyer illustrates some of these issues including psychologists and psychiatrists going beyond their area of expertise, establishing reasonable doubt on the basis of possibilities rather than probabilities and failing to differentiate between automatic behaviour and its causes. Though there may be a necessity to utilise the experience of psychologists and psychiatrists to explain the complex issues arising from the defence of automatism, there are particular problems in using such expert witnesses in this under-researched and complex area.

Automatism is a defence in criminal violence that raises important issues about the role of expert witnesses in evaluating human behaviour. The Victorian Supreme Court case and subsequent appeal of R v Leonboyer illustrates these issues clearly (R v Leonboyer [1999], VSC 422; R v Leonboyer [2001], VSCA 149). In particular, R v Leonboyer demonstrates that "experts" in human behaviour may be enticed to act as advocates rather than as impartial purveyors of the truth. One of the major criticisms of the role of expert witnesses in the criminal justice system, especially when the human behaviour under investigation-in this case automatism – is that it lacks a definitive scientific body of knowledge.

The major purpose of this paper is to analyse the role experts can play in determining the psychological aspects of evidence in relation to automatism. In addition, R v Leonboyer highlights the complexities associated with psychological blow automatism cases and the possibility of feigning this defence. A factual background to R v Leonboyer is provided with reference to verbal and physical activity relating to the crime. In addition, the relationship of the victim and offender is examined pertaining to the proposition that jealousy, physical abuse and threats of violence were contributing factors to the offender's behaviour. An explanation of automatism is offered--specifically psychological blow automatism. Finally, an analysis of the experts' roles in R v Leonboyer is presented.

Factual Background

The accused, Michael Leonboyer, was 24 years old at the time he killed his girlfriend, Sandra Morales. He was born in Chile, but moved to Australia at a young age with his family. Michael’s parents divorced in 1980; however, he continued to have intermittent
contact with his father. Michael's mother remarried in 1994 but separated from her husband soon after. Michael graduated from university in 1995 with a business degree and in 1996 with a law degree. At the time of Sandra's death, Michael was completing his Master's degree in Taxation and Competition Law (Brief of Evidence: re death of Sandra Morales; R v Leonboyer [2001], VSCA 149).

The victim, Sandra Morales, was 19 years old and completing year 11 studies at the time she was murdered. Born in Columbia, Sandra and her three sisters moved to Australia in 1993 to live with their mother in Melbourne. Sandra met Michael at a Spanish nightclub soon after her arrival in Australia. The two began a serious relationship and lived with Michael's mother, announcing their engagement in January 1997. This relationship soon dissolved and Sandra returned to live with her mother and sisters. Sandra was a popular member of her extended family and enjoyed dancing with her sisters, mother and cousins. Her English improved considerably during her time with Michael because he encouraged and preferred her to speak in English, as opposed to Spanish (Brief of Evidence: re death of Sandra Morales).

There is some contention regarding the nature of Sandra and Michael's relationship at the time Sandra was murdered. Michael stated that Sandra was his fiancee whereas Sandra's family believed the couple were "re-establishing" their relationship after a period of fighting (Statement of Michael Leonboyer, May 6, 1997, p. 8; Statement of Esneider Gaviria, May 9, 1997, p. 5; Statement of Hermelinda Gaviria, May 9, 1997, p. 10). Regardless, there is little disputing that Sandra and Michael's relationship was tumultuous and "volatile" at times (R v Leonboyer (2001), VSCA 149). Later we examine Sandra and Michael's relationship in greater detail, with specific reference to allegations of jealousy and physical abuse.

**May 5, 1997: Sandra's Murder**

On May 5, 1997, Sandra received a telephone call from Michael's mother inviting her to dinner. Sandra packed her clothes and schoolbooks, intending to stay the night as Michael resided there. Prior to the family dinner, Sandra and Michael met at the local library and spent the day shopping together. They also signed a lease for a flat and visited the local doctor's surgery to check if Sandra was pregnant (she was not) (Statement of Michael Leonboyer, May 6, 1997, p. 10). Sandra and Michael arrived at his mother's house for the family dinner late in the evening. A number of extended family members were present as they were celebrating, according to Chilean custom, the seventh month of Michael's sister's pregnancy (Brief of Evidence: re death of Sandra Morales).

Following the meal, the family gathered in the lounge room to watch television. Sandra began to fall asleep on the couch and then went into Michael's bedroom to sleep. Approximately 30-40 minutes later, Michael went into his room, as he too was falling asleep on the couch. Some 5-10 minutes later (shortly after 11.30 p.m.), family members who were still watching television heard Sandra "screaming like you don't normally hear people screaming" from Michael's bedroom (Statement of Frances Leonboyer, May 6, 1997, p. 5). Family members ran to Michael's room and discovered Michael and Sandra
lying on the double bed. According to several witnesses, both individuals looked "shocked" (Statement of Albert Leonboyer, May 6, 1997, p. 2). Michael's eyes were flickering and moving rapidly and appeared to be staring at the ceiling. Michael later recalled that he felt weak at the knees and his legs felt watery (R v Leonboyer (2001), VSCA 149). Sandra was holding on to her stomach, rolled off the bed, took a few steps and then collapsed into Michael's mother's arms. She was then dragged into the hallway where pressure was applied to some of her stab wounds using bathroom towels.

The murder weapon (an open pocket knife) was located in the bedroom and had Sandra's blood and hair on it. Grace Leonboyer removed the knife from the bedroom and placed it in a plastic bag on the kitchen sink (Statement of Grace Leonboyer, May 6, 1007, p. 1). Michael remained on the bed the entire time that Sandra was in the hallway – "he wasn't going anywhere, wasn't doing anything or saying anything. It appeared he was in a state of shock" (Statement of Albert Leonboyer, May 6, 1997, p. 1). The ambulance was called and Sandra was admitted to hospital. She died several hours later.

The cause of Sandra's death was given as acute blood loss, secondary to 28 injuries located on the back, chest, head, shoulder, arm and genital area (R v Leonboyer [2001] VSCA 149; Victorian Institute of Forensic Pathology – Autopsy Report). Seven stab wounds were located on Sandra's head area and 11 wounds were on her back. Of the wounds on Sandra's back, seven were inter-thoracic penetrating wounds with four puncture wounds to the right lung and three puncture wounds to the left lung. Additional injuries include an abrasion on Sandra's right knee, a superficial incised injury in the genital area and a possible stab wound to the left breast which could not be identified with certainty as it had been incorporated in a surgical wound (Victorian Institute of Forensic Pathology – Autopsy Report). According to Forensic Pathologist, Malcolm John Todd, there was no evidence of defensive-type injuries to Sandra. The pocketknife found at the crime scene is consistent with the nature of her injuries.

Verbal Evidence from the Leonboyer Case

Michael and Sandra's verbal interaction during and immediately after the murder is of particular importance. In Michael's bedroom and in the hallway, witnesses heard Sandra call out "Grace, Grace, help me" and "why did I tell him, Grace?" Michael was alleged to have said "she don't love me any more she don't love any more" and "I can't live without her. I want to die" (Statement of Grace Leonboyer, May 6, 1997, p. 1, 2). Michael was also admitted to hospital with a cut on his hand from the pocketknife. While at the hospital, Michael allegedly spoke to a police officer, "Is she alright? If anything happens I don't want to live anymore" (Statement of Sean Michael Kennedy, June, 2, 1997, p. 2). Detective Senior Constable Casey asked Michael at the hospital if he could "remember anything at all" to which Michael replied, "I just remember fainting. My legs felt like water" (R v Leonboyer [2001], VSCA 149).

Michael stated that Sandra had made specific comments to him in the bedroom relating to Sandra's alleged infidelity. Michael raised some concerns over a family member's failed relationship by stating "you're not concerned about that happening to us, we're different,
aren't we?" to which Sandra replied, "I'm not sure we are". Michael replied "What do you mean?" and Sandra responded in a similar vein saying that she did "not love you anymore ... being seeing someone else". Michael apparently stated, "What are you trying to say? Are you having sex with him?" to which Sandra insinuated that she had and that "he did it better than you". This last phrase was spoken in Spanish, which Michael was able to understand (R v Leonboyer [2001], VSCA 149).

Additional Evidence from the Leonboyer Case

There is evidence to suggest Michael suffered from night terrors and bad dreams during his childhood. He would often wet the bed and was scared of the dark. Although Michael endeavoured to remain in contact with his father, their relationship was strained. According to Michael, his father was "gonna hit me with a hammer" shortly before Sandra's murder (Statement of Michael Leonboyer, May 6, 1997, p. 20). The father was described as a "tyrant" by Michael's brother, who would "control us with fear" and make the children feel "inferior and useless" (Statement of Albert Leonboyer, May 7, 1997, p. 1).

During the trial, evidence was raised concerning Michael's rigid, possessive, controlling and dominating character towards all facets of his life-his family, his girlfriend, friends and study. Individuals testified that Michael was violent towards Sandra on previous occasions--hitting her because she spoke in Spanish, because he did not like the food she had cooked and because she disagreed with his possessive character (R v Leonboyer (2001), VSCA 149). Michael had a history of previous violence, including threatening female university students, punching brick walls, tearing up clothing and punching his university friend. Of particular interest is a previous occasion in which Michael was strangling Sandra in bed while he was allegedly sleeping. Family members (who heard Sandra screaming) had to break his hold as he was screaming to her, "I know you are cheating". Afterwards, Michael stated that he had dreamt about evil spirits and dark shadowy figures that were on top of him.

There is some evidence to suggest Michael had previously threatened Sandra's life and was jealous of her behaviour with other men. Michael had made comments in the past that if Sandra ever tried to leave him that he would kill her. During a trip to Philip Island, Michael allegedly threatened to kill Sandra by driving the vehicle erratically. At a local nightclub, Sandra was asked to dance by a young man to which Michael replied, "Sandra knew what to do" (i.e., to refuse the dance). Various family members and friends provided statements suggesting Michael had physically assaulted her in the past (i.e., Statement of Katherine Day, May 19, 1997, p. 3; Statement of Gloria Leonboyer, May 10, 1997, p. 1). Sandra once had a bruise on her thigh, wore a bandage on her arm to Michael's graduation ceremony to cover a large bruise and was kicked by Michael while she was lying on the bedroom floor.

Psychological Blow Automatism
Automatism can be broadly defined as a state in which an individual's mind does not accompany his or her physical bodily actions (Coles & Armstrong, 1998; Beran, 2002; O'Regan, 1978; Williams, 2000). There are various definitions of the term automatism; however, it is considered to be a denial of actus reus (the criminal act itself) (Freckelton & Selby, 1999). Unconscious or involuntary behaviour may result in a "spasm, reflex action or a convulsion" (Coles, 2000, p. 34). In Australia, a defence of automatism (depending on the subtype) results in a complete acquittal – the offender walks free (see discussion in R v Falconer (1990) 171 CLR 30; Fairall, 1993; McSherry, 1992; Yeo, 1991).

The causes of automatism are still the subject of considerable debate. However, there are two main subtypes – insane automatism and non-insane (sane) automatism (Febbo, Hardy & Finlay-Jones, 1993/4; Freckelton & Selby, 1999). These subtypes are also referred to as mental disorder automatism and non-mental disorder automatism (McSherry, 2000). Insane automatism may be caused by cerebral arteriosclerosis, brain turnout or hyperglycaemia (high blood sugar). Australian courts suggest that these conditions are internal and likely to recur. Non-insane automatism can be caused by head injury, psychological blow or hypoglycaemia (low blood sugar) and these conditions are described as transient, external and unlikely to recur (Freckelton & Selby, 2003). In an Australian context, a verdict of insane automatism results in a qualified acquittal (meaning a verdict of not guilty by reason of insanity) (Williams, 2000). Some jurisdictions require the individual to be periodically reviewed by mental health professionals, institutionalised or held in secure care at a hospital. Alternatively, a verdict of non-insane automatism leads to an absolute acquittal (Febbo, Hardy & Finlay-Jones, 1993/4; Williams, 2000).

Although psychological blow automatism is cited as a type of non-insane (sane) automatism, there is still some controversy surrounding its classification. Psychological blow automatism is "something, which so completely overwhelms your capacity to cope psychologically and emotionally that you disintegrate mentally" (R v Leonboyer [2001] VSCA 149). Essentially, the "psychological blow" amounts to something so catastrophic or devastating to the individual that they cannot control their physical actions.

The Expert Evidence

Two psychiatrists testified for the Crown in R v Leonboyer: Justin Barry-Walsh and Professor Paul Mullen. Both psychiatrists contended that there was no evidence of dissociation or automatic behaviour. Barry-Walsh was familiar with the legal concept of automatism and stated that he had never identified an individual acting in an automatic state as a result of a psychological blow (R v Leonboyer [2001] VSCA 149). Mullen supported the notion that cases of psychological blow automatism are extremely rare, usually only associated with catastrophic events such as an earthquake. Barry-Walsh testified that flickering eyes, the perception of watery legs or feeling weak at the knees are not necessarily indices of automatistic behaviour – in fact, these are indicators more akin to witnessing a distressing, exciting or dramatic event. Both psychiatrists gave evidence that highly organised, complex and goal-directed movements of an automatic
individual are rare, except if such actions are routine or familiar to the individual. Both described Michael's behaviour (reaching for the knife and stabbing Sandra) as purposeful and goal-directed, but not routine.

Contrary to the prosecution, the psychiatrist and psychologist commissioned by the defence argued that Michael was in a dissociative state during the commission of the crime. Professor Graham Burrows (psychiatrist) and Mr Robb Stanley (clinical psychologist) testified that Leonboyer was highly hypnotisable during their examination (the Crown's expert witnesses did not examine Michael as he refused them access). Burrows and Stanley maintained that individuals who are highly hypnotisable are more likely to dissociate and are therefore more likely to act in an automatic way. In contrast to the Crown's expert witnesses, Burrows maintained that dissociative behaviour had a purpose but the individual committing the act may not be aware of what that purpose is. Mullen (Crown's expert witness) stared that Burrows' opinion concerning dissociation was a minority view among psychiatrists. Stanley gave evidence suggesting Leonboyer dissociated before he stabbed Sandra, citing Leonboyer's lack of memory for the event as one of the crucial factors indicating automatism.

The Problems

The testimony presented by the four expert witnesses is complex and multifaceted; however, it raises some critical areas of concern relating to the defence of psychological blow automatism. First, R v Leonboyer highlights a major criticism of most Australian legal authorities – the opportunity for individuals to feign the defence of psychological blow automatism in order to receive a complete acquittal. Second, psychiatric and psychological evidence generally relies on truthfulness and honesty. This appears to be particularly so with cases involving automatism. Lastly, psychologists and psychiatrists often go beyond their real area of expertise and in cases of psychological automatism there are ample opportunities to do just that.

The majority of Western legal systems treat psychological blow automatism cases with scepticism and suspicion for one crucial reason – it can easily be feigned. This is best summarised by Bastrache J in the Canadian case of R v Stone (1999) 2 SCR 290:

Genuine cases of automatism will be extremely rare ... Automatism is easily feigned and all knowledge of its occurrence rests with the accused (as cited in McSherry, 2000, p. 280).

There is a greater probability of an individual feigning the defence of psychological blow automatism as compared to automatism caused by a brain tumour, cerebral arteriosclerosis or a head injury (McSherry, 2000). Febbo, Hardy, and Finlay-Jones (1993/1994, p. 42; Bronitt & McSherry, 2001) state that it is relatively easy to feign the occurrence of a dissociative state as opposed to one resulting from physical origins, "hence the wariness and scepticism with which it has been treated by the courts". In a similar vein, Blair (1977, p. 174) notes "endeavours to feign automatism ... may be made
by unscrupulous criminals in an effort to escape from the awesome penalty for any serious crime”.

It should be stated that in the Leonboyer case, the Court of Appeal did not state that Michael Leonboyer had feigned the defence of psychological blow automatism in an attempt to receive an acquittal, although it was the judge who raised the matter. However, relying on the truthfulness of the accused in psychological blow automatism cases is also an important factor to consider (McSherty, 2000). Certain aspects of Leonboyer's personality and behavioural characteristics raise questions about the authenticity of his evidence. Chief Justice Phillips stated that the Crown Prosecutor in R v Leonboyer "put it squarely to the jury that the opinions of the defence experts were based upon acceptance of the truthfulness of the applicant" (R v Leonboyer [2001] VSCA 149). The expert witnesses in R v Leonboyer had to rely on the truthfulness of the victim's family and friends, the offender's family and friends, police, medical practitioners and Michael Leonboyer himself. Reliance on the accuracy of evidence is problematic for all criminal cases; however, cases in which there are no witnesses to support or refute the offender's actual automatistic behaviour must be treated with caution.

Cummins J, the trial judge, described evidence that suggested the accused had lied about the nature of his conversation with Sandra in the bedroom. Leonboyer later admitted Sandra only said, "I've been having an affair" (R v Leonboyer [1999] VSC 480). Whether this was an attempt by Leonboyer to reduce his legal responsibility by way of provocation is unclear. Second, Leonboyer had completed a law degree, thus would probably have been more familiar with the defence of psychological blow automatism than the average layperson committing homicide. Third, Leonboyer's verbal activity subsequent and after the murder raises questions relating to whether he was indeed familiar with this defence. During the medical examination he made comments referring to demons, bad dreams, and feeling inhumane (Statement of Dr Lino Nido, September 1, 1997, p. 1) Throughout his initial police interview, Leonboyer made repeated requests to speak to a psychiatrist and stated he was willing to be hypnotised. R v Leonboyer exemplifies the concerns legal authorities have in relation to the complexities associated with the defence of psychological blow automatism.

Going beyond one's area of expertise is a common criticism in relation to expert testimony of psychologists and psychiatrists (Ellard, 1993/4; Coles & Veiel, 2001; Freckleton, 1997; Freckleton & Selby, 2003; Gutheil & Simon, 1999; Reid, 2001; Redding, Floyd & Hawk, 2001). However, this problem intensifies in psychological blow automatism cases, given that opinion among experts is diverse and based on relatively few empirical studies of human behaviour (Freckleton & Selby, 2003). This divergence in opinion is clear in R v Leonboyer, even though the experts who testified are regarded as eminent psychologists and psychiatrists in their field. Although an expert witness may testify within their area of expertise, this testimony may be inconsistent with established knowledge (Coles & Veiel, 2001; Cumes, 2000).

The likelihood of miscarriages of justice in psychological blow automatism cases is increased by the combination of two factors. First, leaving this specific case aside, we
know that expert witnesses receive substantial economic benefits for their work. Whether it be for this economic reward or for other reasons experts may begin to see themselves as members of a prosecution or defence “team” rather than as impartial witnesses answerable to the court (Gudjonsson, 1994; Gutheil, 2000; Gutheil & Hillard, 2001). Second, expert witnesses may use the courtroom instead of their own clinical/experimental settings to establish their knowledge and expertise that is required in such a complex area of law. “When courtroom procedures are reduced to a battle of experts, and the expert testimony is devoid of objective, scientific principles, justice, itself, is in jeopardy” (Coles and Veiel, 2001, p. 624).

Lastly, the failure to differentiate--and indeed to fully understand--automatic behaviour and its causes may result in establishing the existence of automatistic behaviour that is never factually established (Coles, 2000). A basic principle of psychology is "evidence of the determinants of behaviour must be something other than the behaviour that is being determined" (Coles, 2000, p. 444). If a psychiatrist or psychologist assumes the offence in question is the result of the offender's automatistic behaviour, the expert witness is more than likely to investigate features of the offender's past behaviour. After investigating an offender's past behaviour, the expert witness may discover features such as previous violence, previous dissociative states, sleepwalking, or bizarre sensations, and then interpret these features as evidence of the behaviour in question. In R v Leonboyer, particular attention was given to Michael's past history of violence, nightmares, his tumultuous relationship with Sandra and his alleged possessive/jealous personality. The distinction between automatistic behaviour and its causes becomes obscured and confusing. This problem is one of many that psychologists and psychiatrists must face when providing expert evidence in psychological blow automatism cases.

Conclusion

In summary, psychological blow automatism cases have been the source of much controversy in Western legal systems, particularly in Australia. Given that it is a distinct defence in Australia's legal system, it has been highly criticised by various authorities (Ellard, 1993/2; Febbo, Hardy, & Finlay-Jones, 1993/1994; Williams, 2000). The law itself creates an opportunity for individuals to feign automatism in order to receive a complete acquittal, thus creating opportunities for miscarriages of justice. However, it is the utility of expert witness in psychological blow automatism cases that is of most concern. Expert witnesses who exceed their area of expertise may inadvertently create further problems, especially if the field becomes distorted with divergent opinions. And, as with all forensic evidence given by experts, "hired guns" who either consciously or unconsciously see themselves as a member of a defence or prosecution team must be viewed warily.

If anything, R v Leonboyer highlights the complexities associated with the lack of definitive, scientific knowledge concerning psychological blow automatism. For this reason we strongly suggest that rather than using the courtroom as a setting to establish knowledge associated with this complex psychological state, psychologists and psychiatrists examine this issue more thoroughly in a clinical or experimental setting.
Generating a clearer understanding of psychological blow automatism is of paramount importance so as to limit an artificial battle between experts, and to obtain a more acceptable legal test of determining whether an individual was actually suffering from psychological blow automatism during the commission of a crime.

References


