

Feigned Insanity in Nineteenth Century America Legal Cases

Neil S. Kaye M.D.

Forensic Psychiatrist Dr. Neil S. Kaye M.D. is a specialist and expert witness in Forensic Psychiatry, his testimony has had a major impact on high profile cases and studies.

His Curriculum Vitae, credentials and information can be found at www.courtpsychiatrist.com .

Introduction

Today, it is only out of necessity that lawyers bring physicians into the courtroom. Indeed, it is only the ability of an expert witness to give opinion testimony and to answer hypothetical questions that makes his attendance attractive to the bar at all. In reviewing the cases of feigned insanity during the 1800's it becomes clear that the same sentiments existed then as well. Indeed, little has changed during the intervening century.

Similarly, many of the same issues that psychiatry addresses today as ethical dilemmas are not new. Neither are the lawyers tricks and antics nor their confusion, whether deliberate or unintentional, of a number of important forensic psychiatric issues.

Through review of the leading cases of the time, I will endeavor to show how a forensic psychiatric expert at that time conducted his examination, the nature of his testimony, and how the lawyers operated. The court's view of the profession will also be seen through this approach and perhaps the public's, through the eyes of the juries, those lay persons who often are the tryers of fact.

It may be said that in any case where an insanity defense is tendered the prosecution is arguing that the insanity is feigned. This is not entirely true. Most often the prosecution argues their case based upon its merits. It is much less common for the prosecution to argue that the individual is feigning in order to avoid or lessen the consequences associated with conviction for their alleged crime. Therefore, in the reviewing the literature, cases were expressly sought out where the prosecution accuses the defendant of "feigning," "shamming," or "simulating" mental illness. Furthermore, cases which addressed the particular insanity statute will not be addressed as these have been discussed in depth by other authors (). Their relevance to the issue of feigning is important only in that when an insanity defense is used in a notorious case (McNaughten, Hinckly, etc.) the ensuing public outcry often results in a change in the choice of insanity defense rules (McNaughten, Irresistible Impulse, Durham, ALI, etc.) o7 3

Expert Witnesses

The role of the expert witness in the nineteenth century was as controversial then as it is today. The profession was concerned about the propriety of a physician being in court, how these activities would reflect upon the profession and how lawyers would misuse physicians. In regard to the issue of forensic psychiatry however, all of our greatest founders were in fact participants. Benjamin Rush himself testified that a pulse of 20 greater than normal was "an unequivocal mark of intellectual derangement" (*American Journal of Insanity*, 1865, 22:1; 1-24).

The role of the expert can be broken down into two main areas, the proper conduct of a forensic examination with particular reference to the issue of feigning and the nature of the testimony. First however we must look to see what constitutes an "expert." As late as 1854 no precise rule was laid down as to what constitutes an expert (*Powell v. State*, 25 Alabama 21). In *Fairchild v. Bascom* (35 Vermont 398; [1862]) the court held that "physicians in general practice, and nurses accustomed to attend the sick, are experts, in respect to the mental capacity of sick persons" but that "a physician who for more than 30 years has devoted his attention almost exclusively to the treatment of insane persons, would not be an expert ... in an inquiry relating to the mental capacity of a person not previously insane, but in an enfeebled physical condition of long duration, and just about to die." This is similar to the present notion that a psychiatric expert may testify to the issue of abnormality but not to that of normality, as presumably the latter is within the province of the lay person.

In the nineteenth century there was a problem of a paucity of psychiatrists and a disproportionate allocation of those that did exist. As might be expected, Northern and more industrialized areas were more likely to have more than one psychiatrist where more rural regions were like to have none. This resulted in surgeons and general practitioners treating the insane and hence also serving as expert witnesses. This is less of an issue today but was raised even as late as the 1890's. "Expert testimony in insanity cases has, in general, proved so unsatisfactory that only those who are expert in mental diseases or psychological studies are regarded as authority, for it is a knowledge rarely attained, and involving much study, observation, and experience (*McLeod v. State*, 31 Tex Cr R 331; 20 SW 749; [1892]; *Trial of Mary Harris*. *American Journal of Insanity*, 1865; 22:333-360; *Burt v. State* 38 Tex Cr R 397; [1897]).

Conducting the Examination

A number of treatises on medical jurisprudence were written during the nineteenth century, the most famous of which was Isaac Ray's in 1838 (fifth edition 1871). Others include Benjamin Rush (1827), Ryan (1832), Taylor (1845), Wharton and Stille (1855), Ordonaux (1869), Meymott (1882). The techniques and "tricks of the trade" as outlined in these works include in the following:

1. Observation. All agree that the most likely way of proving simulation is the careful observation of the individual over time and in an inpatient or prison setting. Careful attention is to be paid to the person when he thinks himself unobserved and when sleeping. It was acceptable practice to employ an undercover agent, often another patient or inmate, who could thus serve to help relay information to the examiner.
2. All agree of the importance of a thorough history. It was especially important to look for a motive for the crime as in cases where a motive could be found, feigning was presumed. It was also deemed significant if the individual could be shown to have had an opportunity to observe someone with true mental illness. Numerous references are made to prisoners sharing secrets for successful feigning. Remember to compare the course of this individual's illness to the known course of the diagnosis.
3. Careful attention should be paid to ascertaining the nature of the stressors that may have produced the insanity, including any history of an aversion to assume a duty or job to which the individual now must subscribe, especially that of a soldier.
4. A careful and open ended interview along with a full mental status examination is required. It is important for the examiner to have no preconceived ideas about the guilt or innocence of the person nor an opinion as to their feigning.
5. Simulators do not repudiate their insanity as does a truly insane person.
6. Simulators frequently adopt the idea that the insane are either raving or incoherent at all times on all points. Thus, the simulator is likely to overact the part being played.
7. Simulators fail to recognize their own names or family members.
8. The truly insane remember events before and after the crime.
9. Simulators err in allowing the feigned disorder to explode and to recede too rapidly.
10. Intensification of symptoms when under examination is common.

11. Sustained insomnia is a hallmark of many mental illnesses. Therefore, the person feigning mania will be unable to stay awake for long periods of time and will be revealed by consistent observation.
12. Studious efforts to avoid looking at the physician upon his entrance are characteristic of feigners.
13. Extravagantly absurd answers are given to simple questions.
14. Hesitation in answering questions, as though thinking up an answer was considered a hallmark.
15. Feigned movements that are uncharacteristic of mental illness.
16. Simulators complain more about odd and painful sensations in the head.
17. Simulators may say, "I have this delusion" etc. Mentally ill do not claim to have these or draw attention to them.
18. All authors agree that in general, the part being simulated is invariably overplayed by the individual. In essence, a good understanding of the clinical presentation of a given illness was considered paramount as rarely could an individual outsmart a good clinician.
19. An individual who acted on the suggestion of the examining doctor was considered to be feigning. Thus, suggestions (such as characteristic symptoms seen in the illness or specific behaviors that "would be expected") were often made and then the observers were told to look for these in the future.
20. Torture was seen as an appropriate intervention as it was often felt that if the person were truly ill then the torture might be considered part of the treatment and if feigning would serve as just punishment. It is noted in a number of cases that merely suggesting the application of a "hot iron" would bring a person to his senses. Unfortunately, this does little for those persons who are truly mentally ill and then must feign sanity in order to spare themselves great pain. Similarly, some resorted to the use of the cautery.
21. The whirling chair was also used as a device to get a person to tell the truth. The principle was that he would be unable to feign if nauseous from the spinning. Also, the truly insane were felt to be more tolerant of the spinning.
22. Drug challenges were common. The use of ether, chloroform, and opium were particularly popular. Again, the theory being that the truly insane had very high drug tolerances and hence these drugs would have little effect on them. In those feigning, these drugs acted as disinhibitors and persons so influenced were rarely able to keep quiet when so induced. The goal was to drug them to a level just short of sleep and then to question them. This is not much different from the use of narcolepsy using sodium amytal today. Informed consent however was not an issue.

23. For most of the century the resting pulse, when tachycardic, was thought to be diagnostic of mental disease and a reliable indicator as it was considered an involuntary event and thus entirely out of the control of the individual being examined.
24. Although not popular, at least two prominent physicians wrote of their ability to smell mental illness and even testified to the smell of a patient, their clothing and bedding, as proof of bona fide disease.
25. The use of the faradic brush was suggested as a helpful tool in the evaluation as was the galvanometer.
26. The simulator will wince when probed with a pin unexpectedly but will remain immobile when pricked after being warned. o7 3
27. After being accused of simulating, a simulator will try even harder to convince the examiner of the illness.
28. Past criminal history and/or history of feigning.
29. Evaluation of the torpor of the stomach and bowels under the use of emetics and purgatives. Again, the truly insane were thought to be more tolerant to the effects of these drugs.
30. Inviting the person to write will often reveal the truth.
31. It was ethically permissible to use individual skills to effectively seduce the person into revealing the truth. Lamb and Miranda type warning were not considered important by most courts and indeed the profession felt that the service to society of detecting malingering was of greater importance than was individual confidentiality and privilege.
32. Measurement of the cranium was for a while considered important and related to the popularity of phrenology.
33. A few held that "the expression of countenance furnishes an infallible proof of mental disease."
34. Simulators will often feign more than one mental illness, particularly when changed from one ward to another they are prone to develop the symptoms most common of patients on the new ward.
35. Insane persons may feign sanity. Use caution.

Nature of Testimony

Unfortunately, ascertaining the true nature of expert testimony in these cases is quite difficult. Most of the testimony occurs at the trial level and records of these are usually unavailable. If they are available they are often abridged and incomplete. On appeal reference will occasionally be made to the testimony of the expert so long as their testimony was part of the grounds for the appeal. Lastly, the cases were not catalogued in the same manner as they are today and so the research itself is challenging.

Unfortunately, many of these cases are lost to history. Again, cases where there was merely a contested insanity defense have been omitted from this presentation. In all, 24 legal cases where at least some reference to feigning exists were discovered for the period 1801-1900.

Cases will be broken down into three common areas of law: criminal, civil, and military. Criminal cases far exceed the other two categories but may reflect the bias of the courts to deal with criminal matters preferentially to civil matters in that era. As noted by Dr. Chipley in his address to the Association of Medical Superintendents of American Institutions for the Insane at their annual meeting in 1865: "By far the largest number of suspected simulators are those whose vicious lives have culminated in the perpetration of some great crime; or, actuated by avarice, have unlawfully appropriated the property of others; or, yielding to a revengeful disposition of violent temper, have shed blood of a fellow being for some trivial offence. Kleptomania, pyromania, homicidal impulse are favorite pleas in behalf of great offenders against the laws and peace of society. When guilt is beyond question, and the act is without justification, the plea of insanity is too often seized upon to shield the guilty wretch from merited punishment, and his unfortunate family from undeserved disgrace."

"Irresponsibility, by reason of insanity, is the city of refuge to which great criminals flee when the avenger can be no longer evaded by other means. These are the cases that give rise to the great public excitement, afford scope for the display of legal ingenuity, and test the discriminating judgment of the psychological expert."

Most criminal cases come from the state of Texas. This is not surprising as even today Texas is seen as one of the leading states in the development of criminal law. Indeed, the ethical dilemma of a psychiatrist's involvement in death penalty cases has its home in Texas.

71% of the cases were of a criminal nature. The earliest is a sketchy case and the only one involving a juvenile. Mary Doherty was about thirteen years of age when she was charged with the murder of her father by repeated blows with an axe to his head. The body was discovered four days later buried under the floorboards of the house; it was obvious that efforts had been taken to clean up the blood from the floor, bed and axe.

She was held in jail about four months and during that time was essentially mute. She was never seen to eat and had to be force fed. Yet, "the victuals left were gone, though (the jailer) could not say that she ate them, but supposes she did." The trial procedures of the time required a jury to first rule on the question of her being mute. If they found her mute by visitation of God then a special trial would be held and an automatic plea of not guilty entered. If she were found mute of malice then she was forced to stand trial and the malice was considered by the jury as an attempt at evasion of justice.

Mary Doherty was found mute by visitation of God and at trial the jury required only a few hours to find her not guilty. The jury based their decision largely on the notion that she was too young to have the capacity to commit the crime. However, a note appended to the case states that the day after the trial "she was found outside the courthouse quite animated and smiling at the judges in a way that indicated her pleasure with the deception."

(State v. Mary Doherty (2 Overt. Tenn. Rep. 79 [1806])

Isaac Ray in his _____ edition published in 18___. He refers to Benjamin Rush testifying that the defendant charged with treason was suffering from intellectual derangement. Rush claims that the pulse of 20 greater than normal is proof of such. Nonetheless, the jury reached a decision of guilty. The man was saved when he was pardoned by President Washington and spent the rest of his life in an institution.

Woodward, M.D. tells of a case he saw in 1845. While testifying in a capital trial in Plymouth, Massachusetts he was asked to examine an inmate who was thought to be insane, having spent the winter naked in a cell, not taking food, and with alternating affect and violent outbursts. Dr. Woodward took him back to Worcester State Hospital for treatment. The patient quickly recovered as soon as he was out of jail. Dr. Woodward concluded that he had been feigning (Woodward, Samuel. Medical Jurisprudence, 1848. Personal Manuscript)

Abraham Prescott was the adopted son of a Mr. and Mrs. Cochran of Pembroke, New Hampshire. He lived most of his youth and adolescence with them. There was no history of discord in the household. At age nineteen he awakened before daybreak and after making a fire in the kitchen to warm the house took an axe and inflicted many severe blows on his sleeping parents. He was found sitting in the corner, bloody axe in hand, dazed and seemingly unconscious. Physicians and friends believed the act was done while in a state of somnambulism, slight attacks of which he had previously suffered and their confidence in him was unshaken.

Six months later he accompanied Mrs. Cochran into the fields to pick strawberries. Later, Mr. Cochran found him sitting on a log crying bitterly. Abraham told him that he had killed Mrs. Cochran. His body was found with a bloody club by its side. No attempt to escape was made. He was tried twice and in both cases the Judge charged the jury favorably regarding the insanity defense. Nonetheless, he was found guilty of wilful murder in both trials and was sentenced to be hung.

The three State Supreme Court Justices before whom he had appeared wrote to the Governor unanimously supporting a stay of execution and a pardon by the legislature, making it clear that they felt the defendant was clearly of "unsound mind at the time of the crime." The Governor agreed to postpone the execution. Public outcry was so great that a mob assembled and broke into the jail on the day assigned for the execution, frightened a sick lady as to cause her immediate death and attempted to take the well guarded prisoner. Unsuccessful in their attempts they hung and buried him in effigy. Prescott was finally hung as one citizen noted "to appease popular indignation, and save the lives of more valuable citizens."

As time passed the citizens slowly admitted their error in condemning Prescott and began to acknowledge that he was in fact irresponsible when he killed his adopted mother and should not have been executed. (Woodward, Samuel. Medical Jurisprudence, 1848. Personal Manuscript)

Woodward also reports of the case of Rabello, a Connecticut journeyman shoemaker. The community considered him harmless and inoffensive, although somewhat eccentric. His employers son, age twelve, accidentally stepped on Rabello's toes on day. The boy immediately became rageful and threatened the boy's life. The next day he refused food and looked sullen and malicious. The following day he took the boy to the shed and brutally killed the boy and maimed the body with an axe. He admitted to the murder, made no attempt to escape and explained his reason that the boy had stepped on his toes.

Evidence was presented at trial to show that Rabello had long considered this (toe stepping) to be a heinous offense and not to be forgiven. Evidence was introduced to show that in the past he had threatened the others for the same offense. An examining physician accidentally stepped on his toes while examining him in jail and noted an immediate rise in the pulse of 40 strokes, flushed countenance, and instant rage. He was found NGRI but remained in the Connecticut prison exhibiting the most "unequivocal marks of alienation of mind."

The case of Lewis Payne is one of the two most famous insanity defense trials of the century. Payne was a co-conspirator of John Wilkes Booth in the conspiracy to murder Abraham Lincoln and to overthrow the government. The trial included a traditional "battle of the experts" although the outcome was never in doubt. The defense hoped to show that the entire conspiracy and all of Payne's actions were part of an insane delusion and a result of his upbringing. Charles Nichols, M.D., Superintendent of Government Hospital and later President of the A.P.A. (1873-1879) testified that Payne suffered from moral insanity. His testimony was regarded as clear and helpful by the press and the jury, although not convincing. Throughout the trial he refused to testify to hypothetical questions and gained much respect for this. Oddly, in a later case he wrote the hypothetical questions to be used for the defense and considered it appropriate to do so. James C. Hall, M.D., testified that Payne's eyes lacked intellectual expression and noted marked asymmetry of the cranium, left greater than right. Pulse of 130. Slow to answer questions and that Payne was severely constipated, which was an accepted cause of insanity. Mr. Doster, the defense attorney made a big issue of the constipation in his arguments to the jury. Unfortunately for Mr. Doster, after re-examining the defendant with Surgeon General J.K. Barnes, M.D., Hall changed his testimony entirely.

J.K. Barnes, M.D., was Surgeon General. He took all the experts with him to examine the defendant another time. This raises the issue of coercion of the experts. He testified that there was no evidence of insanity and that proof of this was that his findings on the second examination were the same as those of his first. B. Norris, M.D., a surgeon also testified that there was no evidence of insanity as did G. Porter, M.D., who saw the prisoner twice daily in his role as prison physician. He testified to the pulse being consistently 80 and to good sleep patterns.

The issue of insanity was dropped by the defense in the middle of the trial. This was based largely on the pressure from the press who continually reported that Payne's demeanor during the trial was always appropriate. Payne is described as being of calm composure, cheerful and with firm fortitude throughout the trial. In short he did not look mad and hence no jury was going to believe he was mad. Payne was convicted of murdering William Seward, Secretary of State and was hung.

Another case for which extensive documentation exists is the case of Mary Harris, June 20, 1865. Harris was on trial for the murder of A. Burroughs, a clerk in the treasury department. An insanity defense was tendered and the case also is the first to use premenstrual/menstrual syndrome as part of the defense. The case is also notable as it is the only one found where an insanity defense was tendered and the jury reached a decision (in five minutes) of a verdict of not guilty. It is also only one of two cases where the issue of feigning was directly raised by the prosecution and the defendant prevailed. The verdict received great press and much public outcry when she was found not guilty and set free. Follow up found that she had three admissions to St. Elizabeth's for mental illness.

The trial lacked a great battle of the experts. Dr. Nichols again worked for the defense. He testified that she was insane from being "crossed in love" and "painful dysmenorrhea." He was the only expert on insanity (psychiatrist) and as noted above prepared hypotheticals for the defense counsel (who married the defendant when he was 80 and she was 40, many years after the trial. Calvin Fitch, M.D. stated that she had "severe congestive dysmenorrhea which in some instances develops insanity...uterine irritability is one of the most frequent causes of insanity."

The prosecution based its case of feigned insanity primarily on the notion that there was a clear motive in the case and obviously clear intent. The prosecution produced John Frederick May, M.D., Past Chair of Surgery, Columbia College. He testified that she "laboured under a deranged intellect, paroxysmally deranged, produced by moral causes." Thomas Miller, M.D., Professor of Anatomy, Columbia College and President of the Washington, D.C. Board of Health said "I agree completely with Dr. May." William P. Johnston, M.D., Professor of Obstetrics and Diseases of Woman and Children, Columbia College stated: "We consider an individual suffering from hysteria as irresponsible for any act which she might commit." Noble Young, M.D., Chair of Theory and Practice of Medicine and President of the Faculty, Georgetown Medical College, stated he saw no indication of insanity or dysmenorrhea. Flordoardo Howard, M.D., Professor of Obstetrics and Diseases of Woman and Children, Georgetown Medical College, noted she was "subject to insane impulses-possibly suicidal or homicidal mania."

The prosecution may well have been more persuasive without their experts and stuck to the merits and evidence in the case.

Despite the agreement of the experts the newspaper editorials noted "the public tends to suspect fraud in defendants' pleas of insanity, particularly as such pleas are becoming more frequent."

The only case where the issue of feigned insanity was successfully refuted is interesting in that it involved no expert witness testimony. In *Thomas v. State* (40 Tex 60 [1874]), Mr. Thomas, on appeal won a reversal of a conviction for stealing a plug of tobacco worth 40 cents and a two year sentence. The appeals court ruled on the issue of non-professional witnesses and held that they "should be allowed to give their opinions, together with the facts on which their opinions are based, where it appears that their acquaintance with the defendant will enable them to form a correct estimate of his mental condition." You should also note the use of such a defense for what is clearly a rather petty crime. Today, insanity defenses are almost always reserved for major felony cases.

The most famous criminal case of the century (at least for psychiatry) is the case of Charles Guiteau, the assassin of President Garfield July 2, 1881. The trial transcript runs 2,000 pages, octavo. Garfield lived 80 days after the shooting before dying of the complications of the two bullets to his back.

The trial ran for ten weeks and occupied the news to the exclusion of all else. The public was treated to the lengthy discussion and testimony of the 24 expert witnesses all of whom addressed the issue of his mental condition. Every major medical and legal journal devoted whole issues to Guiteau and articles written by the experts for both sides appeared before, during, and after the trial. Therefore, the unique situation developed where the trial was fought by the experts in and out of the courtroom at the same time. Egos and notariety were clearly at stake, as well as a battle between competing schools of psychiatry, phrenology and neurology.

The defense called Drs. Kiernan, Nichols, Folsom, Godding, McBride, Channing, Fisher and Spitzka. Although they each had examined the defendent thouroughly, only the latter was asked his opinion as to the sanity of Guiteau. This appears to have been an attempt by the defense to limit cross examination as much as possible and in that regard was moderately successful. Each of the other seven was asked to answer a lengthy, two page, complex hypothetical question.

Sixteen witnesses were called by the prosecution: Drs. Young, Loring, McLane, Hamilton, Worcester, Dimon, Talcote, Staerns, Strong, Shew, Everts, Macdonald, Barksdale, Callender, Kempster and Gray. They testified as to their examinations and also answered hypothetical questions posed by both prosecution and defense.

Dr. Gray maintained a special place in the trial. He was at the time the Superintendent of the Asylum at Utica and was considered the leading expert in criminal insanity. Both sides agreed to have him come to Washington to perform the competency to stand trial examination and agreed that they would accept his recommendation. Guiteau was found fit to proceed and Gray later testified to his findings and conclusions regarding criminal responsibility. Gray is the only expert who made the purpose of his examination clear to the prisoner before examination. In fact, other experts testified that they deliberately told Guiteau false identities in an effort to get a true story from him. Gray's examination and testimony are well recorded and he took copious notes during the examination including much verbatim material from Guiteau. He was alllowed to read from these at length during the trial. His testimony was regarded as clear and extremely convincing. Gray never finished writing his story of the trial as he was assassinated by a patient shortly after trial.

Regarding the issue of feigning, Dr. Dimon stated that he "did not think that the prisoner was playing a part in the courtroom, simulating insanity,..." Dr. Shew agreed in his testimony. Dr. Everts stated that Guiteau was "acting a part and exaggerating his own peculiarities." Dr. MacDonald testified that from his observation of the prisoner in jail and his conduct through the trial, he had been playing a part all the time in court." Dr. Barksdale testified that Guiteau was feigning and also cited the difference in behavior in jail and in the courtroom. Dr. Callender opined "he is consciously and purposely exaggerating his self conceit, his impudence, his audacity and his insolence." Dr. Kempster stated "my impression is that he is feigning." Dr. Gray responded to the question "Do you think that in his conduct in the court he is acting naturally or feigning and playing a part?" by saying: "I believe he is acting a part." (Journal of Insanity, 1882, January, pages 304-448)

Essentially, each of the experts who testified were led by the prosecuting attorney to make statements that Guiteau was feigning in the courtroom when he interrupted witnesses who were testifying. Unfortunately, this clouds the issue of the retrospective nature of a criminal responsibility defense. It also supports an argument for disorganized behavior in the courtroom as part of a defense strategy, even though it failed in this trial.

The Guiteau trial is of great significance as it was as much a trial of divergent schools of psychiatry as it was a trial of a man who shot the President. No clear precedent arose from the trial in terms of law. No major change in the insanity defense statute occurred as was the case after M'Naughten or Hinckley. However, as noted previously, the similarity of the two cases is remarkable despite the obvious differences in outcome. Both also left a rift among psychiatrists and psychiatry that need time to repair.

At a case conference of the experts in the Guiteau trial, Dr. Nichols told of a case he had seen earlier which involved a patient who committed murder under what he believed was the command of the Virgin Mary. His lawyers advised him to feign insanity which he did in the form of dementia. The experts detected both the feigned dementia and the real insanity and he was sent to an asylum where his insanity fully developed (Chicago Medical Review, 1981; 4, 544).

The case of J.D. reported by M.D. Field, M.D. (Journal of Nervous and Mental Diseases, 1890; 17: 401-406), is a description of an inmate at the Tombs (N.Y. City) who was sent there for evaluation of competency to stand trial. He was charged with Grand Larceny, First Degree and faced five to ten years as a repeat offender. He remained mute and was suspected of feigning. Numerous examinations were conducted and Dr. Field presents a good description of the symptoms suggestive of feigning, many of which are sighted above. There was a good motive, sudden onset, etc. The inmate lost 25% of his body weight during while in jail as he would not eat, catatonia being part of his presentation. J.D. escaped from jail after three to four months and was not recaptured. Another inmate confessed to aiding the escape and explained the feigning.

Basham v. Commonwealth (9 SW 284 [1888]), is a Kentucky case of a man convicted of Raping his sixteen year old niece. The jailer testified that the prisoner was feigning as his behavior deviated significantly when in the courtroom from when in jail. Furthermore, the judge noted: "If the appellant did feign insanity, the jury had a right to infer from that fact that he, having no meritorious defense, proposed to fix up a spurious defense, as the only one against the truth of the charge; and, such being inconsistent with innocence, it was proper for the jury to consider it for what it was worth."

State v. Pritchett (11 SE 357 [1890]; 106 NC 667 [1890]), is a classic case where the court had trouble with the difference between the issues of competency to stand trial and criminal responsibility. The defendant underwent a clinical forensic evaluation at The Goldsborough Lunatic Asylum, after being found not fit to proceed by a jury trial. In all, three trials were held on the issue competency to stand trial. The charge was murder.

In structuring their argument the prosecution asked the defendant "why he played off crazy" at an earlier hearing. Although this provided grounds for an appeal, on appeal the decision was affirmed. The director of the mental hospital also testified that defendant was feigning. Again, the court felt that feigning was clearly a statement of guilt; an effort to evade justice.

McLeod v State (31 Tex Cr R 331 [1892]; 20 SW 749 [1892]), is one of only two cases involving substance abuse. The defense argued that the murder occurred while McLeod was suffering from delirium tremens and that he also suffered from hereditary insanity. At the first trial a judge who had seen defendant in court on other charges testified that the defendant was feigning. The appeals court held that the judge was not an expert and thus reversible error had been committed. The court also took the time to note the unsatisfactory testimony of physicians who are not experts in diseases of the mind. The Appeals Court cites Wharton and Stille as the expert text in the field.

Adams v. State (31 SW 372 [1895]), is another Texas case. Defendant was convicted of stealing a colt and appealed on the grounds that the jailer was allowed to testify to his behavior in jail and that he was not warned of this possibility. The court held that as he had put his mental state at issue by entering an insanity defense, that his behaviors and conduct while in jail were admissible without warning. The conviction was affirmed.

Crews v. State (34 Tex 533 [1895]; 31 SW 373 [1895]), is an attempt at a diminished capacity defense due to "excitement" for a murder conviction. The defense argued that Crews suffered from hereditary insanity and that this made him more excitable. The prosecution claimed that he was feigning and rested their case solely on the evidence (which was overwhelming) and used no experts. The conviction was upheld and he was sentenced to death.

Burt v. State (38 Tex Cr R 397 [1897]; 40 sw 1000 [1897]; 43 SW 344 [1897]), is an appeal of a conviction from a life sentence for murder of defendant's wife and two children. A good battle of the experts attended the trial, particularly in that related doctors testified for opposing sides. Seven experts were called by the defense who all testified to his insanity. Swearingen, M.D., testified that it was his personal belief, and against medical authority, that any man who killed his family must be insane. McLaughlin, M.D., diagnosed moral insanity and noted that any man who would kill without a motive is insane. Doctors Tally, Wallace, and Worsham agreed. J. Wooten, M.D. and G. Wooten, M.D., measured the defendant's head and noted the abnormalities.

The prosecution presented four experts. T. Wooten, M.D., testified to defendant's behavior in jail. Davis, M.D. testified that he observed the defendant at trial and that he was shamming in the courtroom. Graves, M.D. agreed. Smith, M.D., noted that since the defendant acted on a suggestion regarding hitting his head on the door jam (which was too short for him) when exiting the courtroom that he must be shamming. These "experts" clearly lost track of the importance of criminal responsibility as retrospective analysis. The defense objected to the testimony on the grounds that it was irrelevant if he was simulating now since the issue was his mental state at the time of the crime but this was overruled.

The case highlights many important issues including; improper use of hypotheticals, experts were allowed to testify to defendant's behavior in jail without warning him that this would be used against him; confusion of shamming now versus at the time of the crime; introduction of skull measurements and reports of deviations from the control group of 1200 skulls; role of experts in testifying to behavior during the trial as proof of mental state.

The last criminal case is that of Cannon v. State (41 Tex 76 1900]; 41 Tex 467 [1900]; 56 SW 35 [1900]). Cannon was a judge in Texas who was known to abuse morphine, cocaine, and alcohol. He was convicted of murdering a man he thought was having an affair with his wife. The defense was temporary insanity, substance induced. He was sentenced to life imprisonment.

The defense expert was Worsham, M.D., who noted that if defendant, by the use of cocaine and morphine had hallucinations and delusions to the extent of becoming insane, he would not likely recover in under six months. He also testified to defendant's behavior in court during the trial.

The prosecution relied again on the testimony of jailers as to defendant's behavior in jail during the time of the trial and thus undermined the expert's testimony. The case is made even more interesting by the associated forensic issues it touched.

The court held that only an expert may answer a hypothetical; drugs negate intent but alcohol does not; a juror need not be disqualified despite a stated prejudice against the insanity defense so long as he claims he could give all testimony equal consideration and; the expert may not answer the ultimate question.

Civil Cases

Although numerous civil cases were undoubtedly litigated, many were not appealed and as noted above, this precludes a good set of "landmark cases." Four cases will be reported as they are considered to be representative of the types of cases seen at the time.

The earliest case is *Fairchild v. Bascomb* (35 VT 398 [1862]), a classic case of a contested will. Specifically, the alcoholic brother of the deceased was suspected of convincing her to change her will and to make him the sole heir of her \$8,000 estate only a few hours before her death. Her other "natural heirs" contested on the basis that she was not competent to make a will in such a state of mind and so close to death. Dr. Rockwell, Superintendent of the Vermont Asylum for the Insane was called as the expert witness however his testimony was cut short by the court's ruling that he was not an expert on the mental status of the medically enfeebled if they were not previously considered to have been insane. The case was reversed and remanded.

Furthermore, the court took exception to the improper use of hypothetical questions raised by both sides. Dr. Rockwell was forbidden from answering the ultimate question.

Dr. Chipley, in the address cited above noted that Dr. Snell had previously reported to the society the case of a widow feigning insanity so as to be released from the contract to purchase a house. She was determined to be feigning based on the sudden onset, temporal relationship to the contract in question, and because she overacted the part to a great degree. "She pretended not to know the names or number of her own children, or her own age; counted twenty incorrectly, could not remember buying a house, or whether she had eaten anything during the day, and a like mistake is not uncommon among pretenders." She was convicted of perjury and sent to prison where she admitted to her simulation.

The other two cases *Insurance Company v. Rodel* (95 US 232 [1877]) and *Connecticut Mutual Life Insurance Company v. Lathrop, Administrator* (US Circuit Court for Western Missouri, 1884) both relate to the issue of suicide and life insurance. A fuller discussion of this topic is found in Tidy, C.E.: *Legal Medicine*, Wood and Company, 1882, New York. In essence, the insured would commit suicide where upon the estate would go to collect the insurance. The company would then argue that the insured was of sound mind when he killed himself and therefore, the policy was void. The burden of proof would fall to the heirs to show that the deceased was insane when he killed himself and thus the insurance was in force. Frequently the insurance companies would argue that the insured was feigning in effort to defraud the company. The *Rodel* case is noteworthy in that it is the only Supreme Court case on the topic of feigning from the nineteenth century, although the appeal issue was one of lay testimony regarding insanity.

Military Cases:

The earliest case is that of Phineas Adams, an eighteen year old soldier jailed for desertion. "From April 26th to July 8th, 1811, he lay in a state of apparent insensibility. No manner of intervention, including pins under the nails, snuff, and scalping elicited a response. His discharge was obtained and the next day he was found talking normally and at work with his father thatching a roof" (A).

Feigning insanity to avoid the draft was really never a problem, even during the Great War of Rebellion. In 1815 (*White and Voorhies v. M'Bride*, 7 KY 61) found that failure to muster because of "conscientiously scrupulous of bearing arms as a member of the Shaker religion" was not punishable.

Ryan, M.D., in his *Manual of Medical Jurisprudence* (1832) notes that in cases where insanity to avoid the draft is concerned, the process is this: "A petition, accompanied by affidavits, in support of the alleged insanity, is presented to the court, praying that a commission may issue. If the affidavits are sufficient in the opinion of the court, a commission is directed to three or five persons as commissioners, who are directed to cause a jury to be summoned by the Sheriff of the county; with which jury, the commissioners sit as a court; and hear the evidence adduced. Regularly, the lunatic, and the persons who have the care and custody of him, ought to be served with notice of the application, in the first instance: for they may either oppose the application, or offer the court their own list of commissioners."

"If a committee should be appointed, the court will allow the expense of the application, because it is always considered in favor of the lunatic: but if the finding be "of sane intellect," or to that purpose, then the court has no fund under its control, out of which it can direct the expenses to be paid."

The simulation of insanity was not common during the Civil War as there was no real draft at the time. In fact, a bounty was paid for enlistment and the greater problem was that of insane persons getting in and then being released, only to sign up again to receive another bounty in a different jurisdiction. To deal with this an order was issued forbidding the discharge of the insane. It was felt that anyone who would feign insanity in order to avoid military duty must be a monomaniac, the societal consequences of which were so great that it almost never occurred. Insane soldiers were sent to the Government Hospital for treatment.

Brigadier General W. Hammond, M.D., in his 1863 work devotes two sections of his book to this topic. He notes that disqualifying infirmities include Acute Mania, Monomania, Melancholia, Idiocy, Cretinism, Imbecility, Dementia, Suicidal Mania, Kleptomania, Erotomania, Pyromania, and Dipsomania. Incurable malingering although not grounds for exemption from the draft was considered a cause for rejection of the recruit.

Keen, Mitchell, and Morehouse wrote a seminal article On Malingering, Especially in regard to Simulation of Disease of the Nervous System (American Journal of Medical Sciences, 1864, Volume XLVIII; 367-394). On Insanity they note: "Long treatises of the greatest value have been written upon the subject. But in our army they are rendered absolutely worthless, save in reference to drafted men, and in the Government Insane Asylum, since it is forbidden to discharge insane men. And any one who would feign insanity and submit to its restraints and associations to avoid work and obtain ease, must be in reality a monomaniac. The number of cases of insanity in our army is astonishing. The assistant surgeon at the insane asylum informed us that the average admissions there from the army alone were rather over one every day."

The last military case is a mere mention of an man who feigned insanity to "escape military duty." He presented as mute and remained so for almost seven months. He was discovered when a soldier was hidden in a room where he was to meet with a friend and was heard to speak freely. The case was discussed by the New York Neurological Society in 1890 (J. Nervous Mental Disease, 1890; 17: 415-416).

Lawyers:

As noted above, lawyers are rarely interested in expert witnesses for what they have to say. Rather, lawyers hope to admit evidence and opinions into the trial through the mouth of the expert. In reviewing cases it is clear that most of the experts took their evaluation seriously and in only one case did the evaluator clearly state that his conclusion was substantially influenced by his personal beliefs. He is to be commended for stating this in his testimony as this is ethically appropriate.

Examinations and testimony in the nineteenth century do not appear to differ substantially from those done today by similarly trained professionals.

The greatest problem seen in the criminal cases was the continual confusion in criminal responsibility evaluations as to their retrospective nature. Lawyers and presumably juries are more likely to believe an insanity defense when the defendant that they see in the courtroom "looks and acts crazy." To assist in this the lawyers frequently employed a physician to sit in the courtroom throughout the trial and then at the end to call this observer as a witness. The expert would then testify as to whether the defendant's demeanor was consistent with mental illness or insanity. This of course served to confuse juries and is a tactic which is no longer in vogue. In fact, most lawyers today specifically ask that all other experts be barred from the courtroom throughout the trial.

The next most common problem concerned the use of lengthy, confusing, and even contradictory hypotheticals. The court frequently reprimanded lawyers for their omission of certain facts or the inclusion of issues of fact to be decided upon by the jury in a hypothetical. This persists as a major problem today; one which courts seem reluctant to address.

Competency to stand trial and criminal responsibility were confused by a number of lawyers, but rarely by the experts. Juries were most likely confused by the difference between these two although no cases can be found which address the jury's deliberations.

Conclusion

Use of the insanity defense is a very controversial topic in law, both in the nineteenth century and today. Although in any case in which an insanity defense is tendered it can be said that the opposing side is claiming feigning, only a very small percentage of cases actually involve testimony to this belief. Therefore, cases in which an expert witness claims that the person is feigning mental illness are among the rarest in the law.

Judges, through their decisions, clearly feel that feigning, if discovered, is proof of guilt and of an attempt to evade the law and punishment. Therefore, such testimony is especially potent in the courtroom and must be used most judiciously by the expert. In fact, of the criminal cases cited, in only one case was a defendant able to overcome the claim that he was simulating. Without the trial transcripts it is impossible to know if the evidence for feigning was truly conclusive in the remaining cases. Still, it may be that the burden on a defendant to prove they are not feigning, when so accused, may be more onerous in reality than intended by law.

Throughout the nineteenth century a clear trend developed for the use of a psychiatrist or expert on diseases of the mind to serve as an expert. Courts initially accepted lay testimony to this issue but slowly eliminated this in favor of skilled testimony. As the century drew to a close the testimony of nurses and even general practitioners and surgeons was being disallowed in favor of that of psychiatrists.

The techniques used to uncover suspected feigning became less severe as the century progressed as well. Torture, branding, scalping, and the like gave way to strict observation and careful historical documentation and retrospective analysis. Similarly, although not yet mandated by law, the best of experts appreciated the need to inform the interviewee beforehand as to the nature and purpose of the examination.

Although psychiatrists are educated in normal behavior and development, courts then and now refuse to allow testimony as to what is normal behavior. This is still considered the province of the jury. Hence, testimony is often lopsided in that a psychiatric expert may only address behaviors that are considered to be abnormal or the product of a mental illness.

Psychiatric expert witness testimony became more increasingly popular and common throughout the nineteenth century. This trend has continued in the twentieth century, however psychiatrists are more adept and standardized in their work. Still, much is left to be done to assure competent and professional psychiatric expert services to the judiciary. Similarly, the standards for insanity will continue to change as they have for the last 300 years, and will be largely influenced by the ability of psychiatry to deliver on its promises in terms of accurate diagnosis, prognosis, and treatment.