

CURRENT LEGAL ISSUES IN FORENSIC PSYCHIATRY

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IT IS A CURIOUS IRONY THAT THE ROLE OF THE FORENSIC PSYCHIATRIST HAS become integral to the prosecution and defence of homicide charges but that so many fetters and limitations—legal, practical and pecuniary—circumscribe what can be offered by the expert witness in this role. The reduction of legal aid funding is reducing the use of mental health professionals in all contexts in the legal system. Australasian forensic psychiatrists still have no code of ethics specific to them as a branch of psychiatry, although the American Association of Psychiatry and Law formulated such a code some years ago. Training in legal issues for psychiatrists remains minimal in most jurisdictions in Australia and New Zealand and, on the other side of the coin, lawyers are disturbingly ignorant about the potentials and limitations of forensic psychiatry as a discipline (*see*, for similar comments, Kreiling 1990). At a legal level, the law on determination of fitness to plead remains shrouded in uncertainties, and the common law rules of expert evidence substantially reduce the testimony that may be given by psychiatrists.

This paper will concentrate upon the uncomfortable position occupied by forensic psychiatry in the anterooms of the courts and in the courts themselves as a result of the contemporary problems faced by psychiatrists who find themselves involved in the legal process. It suggests that the relationship between the law and psychiatry is one of host and unwelcome but obligatory guest. No expert witnesses are more mistrusted than those said to be unable to provide hard data, and yet lawyers have done little to educate themselves as to what forensic psychiatry can and cannot offer them.

The author will argue that reform of the restrictive common law rules of expert evidence has been unacceptably long in the coming but that these changes, when finally legislated for, will be no panacea for the fundamental tensions between the disciplines. The result of these tensions is that the service which might otherwise be provided by forensic psychiatrists in homicide and other cases is unsatisfactorily limited, depriving both Crown and defence of expert evidence which might have been extremely germane to the issues to be tried.

The Impact of the 1990s Depression

The most notable effect of the recession/depression of the 1990s for mental health professionals is that it has struck at the heart of the viability of private practice in the exclusive role as a forensic practitioner. Very few psychiatrists and psychologists continue to practise solely as consultant experts in the forensic setting—most have had to increase their clinical load, seek part-time work in universities or redirect their orientation entirely. A good part of this flows from the straitened circumstances of legal aid commissions whose requests for assessments and reports for sentencing hearings used to provide the 'bread and butter' work for the practitioner.

This has the unsatisfactory consequence that the pool of experts thoroughly versed in the ways of the courts—able to communicate diagnoses, prognoses and assessments well, and accustomed to the rules of evidence and the role of the forensic expert—is very shallow. Judges and magistrates soon become aware of the philosophical inclination and the views of the experts who are available to testify on matters such as appropriateness for rehabilitation, retributive sentencing, victim impact, malingering and the possibility of false report in sexual abuse cases. Such familiarity has the potential to inure them to the testimony of such professionals.

Moreover, areas such as intellectual disability, paraphiliac sexual activity, assessment of capacity to plead, post-accident assessment and even pre-sentence reporting are being dominated by a very small number of individuals with some names being almost mandatory for certain kinds of assessments. The result is that the different schools of thought on controversial issues in forensic psychiatry, which ideally would be represented in the forensic marketplace, are often just not available. This is detrimental to the quality of argument that can be brought in homicide cases and all other areas in which forensic psychiatrists may be called as witnesses.

Training

The consequence in the reduction in numbers of psychiatrists and psychologists practising exclusively in the forensic area reinforces the argument that training for forensic practitioners is necessary, although it might lose some of its immediate appeal. If the future of forensic mental health practice is that fewer individuals will practise exclusively as forensic experts, the need for training of all psychiatrists and psychologists will increase as a more diverse group than has hitherto experienced the phenomenon will find itself summoned to court from time to time.

Consequently the role of organisations such as the Australian and New Zealand Association of Psychiatry and Law (ANZAPPL) is crucial as a bridge between the professions and a forum for interdisciplinary training and exchange of ideas.

Code of Ethics

Although forensic scientists have developed a code of ethics specific to their sub-branch of science (Freckelton & Selby 1993), this is an advance not yet matched in the fields of forensic psychiatry or psychology. In fact, the College of Psychiatry is only now in the process of drawing up a general code of ethics and one can only suspect that the drafting of provisions that relate to the many and quite different proprieties that should bind forensic psychiatrists is as yet a long way off in Australia and New Zealand. In the USA, the American Association of Psychiatry, Psychology and Law has formulated such a code—it may be that its broader based cousin ANZAPPL could attempt something similar for psychiatrists as well as for psychologists who also have no specifically forensic code of ethical practice.

Lawyers' Ignorance

Although practitioners in the criminal, family, personal injury and workers' compensation fields constantly come into contact with forensic psychiatrists, it is remarkable how few adequately understand the elements of psychiatric diagnosis and terminology. It is a rare lawyer indeed who is familiar with DSM–III–R in spite of the fact that the Manual (American Psychiatric Association 1987) is surprisingly accessible and a trove of information is in a form that can regularly be used by solicitors and barristers alike. Similarly, Ziskin and Faust's (1988) landmark work *Coping with Psychiatric and Psychological Testimony*—an essential for advocates examining or cross-examining mental health experts in the USA—is almost unknown in Australia.

The result of lawyers not adequately understanding forensic psychiatry, its warts, limitations and potentials, is that our usage of psychiatrists as expert witnesses leaves a great deal to be desired but also the quality of our cross-examination can be seriously deficient. Important 'parameter questions' may not be asked and the rigour which is regularly employed by counsel in cross-examination of other forms of witnesses is not often enough applied in the case of forensic psychiatrists, thereby providing an incentive for poor practice and creating inadequate accountability among such experts.

While trial lawyers in the USA view the acquisition of information which may assist in the quality of their cross-examination as an opportunity to gain 'the winning edge', such initiative is nowhere near as evident in Australia. The task of luring solicitors and barristers to educative sessions, training programs or forums for interdisciplinary meetings has proved a challenging one indeed for organisations such as ANZAPPL and the Australian and New Zealand Forensic Science Society. If a direct pecuniary benefit cannot be clearly demonstrated, it seems difficult to interest more than a handful of lawyers. Perhaps greater exposure to North American competitive legal practice and the development of under and post-graduate programs that have a cross-disciplinary character, such

as those in Forensic Psychiatry and Medicine and the Law, will gradually erode this unfortunate closed-mindedness.

Complexities of Forensic Mental Health Practice

Many anomalies continue to exist in the law as it relates to the practice of forensic psychiatry. Some of the complexities and quirks are of curiosity value; others are significant for the forensic practitioner on a day to day basis. The problems inherent in the defences of insanity and sane and insane automatism, as well as in their outcomes should they be established, have been discussed by many others (*see* McSherry 1992; Slovenko 1988; Halpern 1989; Myers 1989). This paper will now touch upon some of the more banal procedural and evidentiary conundra that beset forensic work for the mental health professional.

Fitness to Plead

From time to time forensic psychiatrists and others are called upon to determine whether a defendant is fit to be tried. The task of determining whether in a realistic sense a person is capable of understanding legal proceedings and of playing a role in them can pose its practical clinical difficulties. Not least among them, of course, is the fact that defendants' mental states can be constantly shifting and themselves are affected by the imminency of a homicide trial.

However, there are significant legal problems as well (*see R v. P* [1992] 57 A Crim R 211 per Nader J.; *R v. Donovan* [1989] 39 A Crim R 150; *R v. Podola* [1960] 1 QB 325). A recent County Court trial in Victoria demonstrated the many unresolved procedural complexities that attach to a psychiatrist's assessment of fitness to plead (*DPP v. Mark Dalton*, unreported, Warrnambool County Court, November 1991). The accused was charged with inflicting serious injury in bizarre circumstances on two elderly persons after he had become delusional subsequent to consuming very large amounts of marijuana. He was immediately involuntarily committed to a mental hospital after being arrested. He was diagnosed as exhibiting schizophreniform symptoms and his doctors waited to see whether the delusions would abate after cessation of drugs. That was to enable them to postulate an explanation for his behaviour such as cannabinoid psychosis or an acute onset of schizophrenia. Some symptoms persisted, so the latter diagnosis was tentatively made.

By the time of trial the accused was stabilised on medication, although showing signs of side effects. When asked how he wished to plead by the judge, he became very confused and said that he wanted to plead guilty when in fact the reverse was his intention. His anxiety was extreme and he lowered his shaved head for all the initial stages of the trial below the level of the dock. This was enough to concern the trial judge about whether he was fit to plead. The prosecution indicated that this may be an issue but did not adopt a position on their observation. Defence counsel assured the bench that full instructions had been taken, that the accused was lucid and capable of

understanding proceedings and participating in them as contemplated under the *Presser* rules (*R v. Presser* [1958] VR 45).

The trial judge remained anxious and determined that there was an issue to be tried so a separate trial before a jury on fitness to plead was ordered. The first problem encountered was a submission from defence counsel that the accused be able to exercise a right of challenge to potential jurors for fear that some of them may know him because the case was taking part in a country town with a large mental hospital in which the accused had previously resided for a time. The difficulty was, of course, that the fitness to plead trial was in part directed to determining whether in the trial proper the accused was capable of exercising rights such as challenging potential jurors. The judge allowed the accused the right. But who was to carry the burden of proof? Neither side had wished to take the point. The judge determined after lengthy argument that the prosecution had 'raised' the matter so they had the carriage of it (*see R v. Donovan* [1990] 39 A Crim R 159; *R v. P* [1991] 57 A Crim R 211). Relying on old authority, it was in due course held that the prosecution had to prove unfitness beyond reasonable doubt but that if the defence had raised the issue, they would have had to prove unfitness on the balance of probabilities.

After the prosecution failed to adduce any psychiatric evidence, the whole fitness to plead trial coming as a surprise to them, defence counsel put a no case submission to the judge at the end of the prosecution case asking for the matter to be removed from the jury on the basis that the prosecution had tendered no up-to-date information on the issue whatever. This made a mockery of proceedings because it was clear that the defence had had a forensic psychiatrist recently examine the accused and that the expert was in the best position of anyone available to provide an informed assessment of the accused's current mental state.

The prosecution submitted that the fitness to plead trial was not truly an adversarial proceeding but was to be correctly characterised as an inquiry. Thus a no-case submission was not appropriate. Lengthy examination of the authorities demonstrated that no binding cases governed the situation but that the proposition that the trial on fitness to plead was an inquisitorial inquiry conducted by the jury with the assistance of the trial judge was a novel, if plausible proposition. The trial judge elected to allow the no-case submission and in due course upheld it on the basis that no evidence on the accused's mental state at the time of the trial had been led which was sufficient to put the issue before the jury.

The case highlights the quaintness and unsatisfactory nature of the fitness to plead trial process (Comparative Criminal Procedure [Insanity and Unfitness to Plead] Act 1991 [UK]) and the ludicrous situation whereby the only person with a professional perspective on the issue at hand could quite properly be suppressed from giving evidence by defence counsel on instructions of undetermined capacity from the accused.

The Uncertainties of the Rules of Expert Evidence

It is the common law rules of evidence that determine the admissibility of expert witnesses' testimony. To all intents and purposes, the rules have been developed in the area of expert evidence over the past 150 years. With the exception of the 'field of expertise rule', the rules of expert evidence are relatively uniform in the common law world. They operate to confine within surprisingly tightly defined boundaries the evidence of opinion that may be given by expert witnesses. The rules can fairly be criticised as both arbitrary and unpredictable in their application, resulting in a difficult hurdle for even the experienced forensic psychiatrist to jump.

Each one of the following five rules of expert evidence is the subject of significant legal controversy and uncertainty, resulting in real practical difficulties for the forensic psychiatrist endeavouring to give opinion evidence employing the techniques and knowledge which are customarily used in a clinical setting.

■ *The Expertise Rule* (see Freckelton & Selby 1993)

Experts must be experts. A line of authority has recently developed that denies the right of the forensic psychologist to give evidence on the likelihood of a person's suffering from a mental illness (*see*, for example, *R v. MacKenney & Pinfold* [1983] 76 Cr App R 271 at 275; *Pesisley v. R* [1990] 54 A Crim R 42 at 52), this apparently being adjudged a line of demarcation between forensic psychiatry and forensic psychology. While the recent words of Wood J. are particularly directed to psychologists, they also have a message for forensic psychiatrists:

I consider it necessary to observe once again that it is important that clinical psychologists do not cross the barrier of their expertise. It is appropriate for persons trained in the field of clinical psychology to give evidence of the results of psychometric and other psychological testing, and to explain the relevance of those results, and their significance so far as they reveal or support the existence of brain damage or other recognised mental states or disorders. It is not, however, appropriate for them to enter into the field of psychiatry (*Pesisley v. R* [1990] 54 A Crim R 42 at 52)

Psychiatrists also must not cross into areas such as psychopharmacology in which most are unlikely to have sufficient qualifications to match what might be said by those also possessing pharmacology qualifications. Many other areas of specialist work, such as with sex offenders, may be regarded by the courts as sufficiently specialised to demand of those purporting to give expert evidence in respect of them a history of relevant experience and study. The tendency toward such specialisation is likely to become more entrenched in the years to come with courts' adjudications on the adequacy of qualifications reflecting the phenomenon.

- *The Common Knowledge Rule* (see Freckelton & Selby 1993; Freckelton 1987)

Expert witnesses may not give evidence on matters of common knowledge, these being defined as matters within the ordinary ken of the jury on which they do not need and would not profit from expert assistance. This stricture, which is the subject of considerable legal controversy, has been interpreted to mean that forensic psychiatrists may not give evidence which assesses the propensity of a person to tell the truth or which relates to the capacity of an 'ordinary' person to form the necessary intent to commit a crime. However, the arbitrariness of this prohibition was recently noted by the Australian High Court the majority of whose members in *Murphy v. R* (1989) 167 CLR 94 expressed reservations about the utility of the normal/abnormal dichotomy and to some degree opened the door to evidence relating to witnesses' credit. Nonetheless, though, on the basis of the common law's determination that ordinary persons are capable of understanding other ordinary persons, even when they are placed in far from ordinary circumstances, the diminished responsibility and insanity defences aside, forensic psychiatrists may not give evidence about a range of matters into which they would generally be regarded as having acquired a professional insight.

- *The Field of Expertise Rule* (see Freckelton & Selby 1993)

An expert's evidence must have emerged from the experimental to the demonstrable, the test of this consisting in whether the bases of the technique or theory have been generally accepted within the relevant expert community. Recent caselaw from State Supreme Courts has gone further and further in the direction of adopting the United States Frye test (*Frye v. United States* 293 F1 1013 (1923)) as a criterion for the admissibility of evidence in new areas of expert endeavour (*Bonython v. R* (1984) 15 A Crim R 364 at 366; *R v. Tilley* [1985] VR 505 at 509; *Eagles v. Orth* [1976] Qd R 313 at 320; *R v. McHardie & Danielson* [1983] 2 NSWLR 733 at 763; *R v. Harris* [1990] VR 310 at 318; *Carroll v. R* (1985) 19 A Crim R 410; *R v. Lewis* [1987] 29 A Crim R 267), as far apart as voice analysis evidence, bite mark evidence and the evidence on the effects of wearing seatbelts. Thus, for example, in *Runjancic & Kontinnen v. R* ([1991] 53A Crim R 362) King CJ. employed the terminology of the Frye test to determine whether he should admit expert psychological evidence on the phenomenon known as 'battered woman syndrome' to assist the defence assertion that the accused had acted as she had under duress arising from her being the long-term victim of domestic violence.

Evidence arising from recent advances in biochemical understanding of mental illness, the recognition of recurrent patterns of behaviour by victims of particular stressors (see analysis in Freckelton & Selby 1993) or even capacity to predict dangerousness

may henceforth be subjected to the criteria of the *Frye* test. Such an approach is inherently extremely conservative and will operate to restrict the categories of 'new wave' evidence that might otherwise be given by forensic psychiatrists.

■ *The Basis Rule* (see Freckelton & Selby 1992)

Expert witnesses must have, as the basis of their opinion, data that are already or will be admitted in evidence. Thus, information gained from psychiatric nurses, family members or police officers can only form part of the foundation for an assessment of mental state if such data are called in evidence by counsel. This can operate as a significant restriction upon the foundational material otherwise available for the formation of professional opinions.

However, the basis rule is an emerging rule with its origin in a 1975 English case (*R v. Turner* [1975] 28 834; see also *R v. Abadom* [1983] 1 WRR 126 at 131) which is now receiving significant support from state decisions around Australia (see, for example, *R v. Perry* (1990) 49 A Crim R 243 at 249; *R v. Aldridge* (1990) 20 NSWLR 737 at 744; *R v. Gardiner* [1980] Qd R 531 at 535; *R v. Haidley & Alford* [1984] VR 229 at 234; *R v. Jeffrey* (1991) 60 A Crim R 384). Its status awaits High Court clarification. The consequence of whether an exclusionary rule of evidence exists to prevent the forensic psychiatrist functioning as a conduit for the views and impressions of others, or whether the issue is simply one of the weight properly to be accorded to such evidence, has a profound impact for the practising psychiatrist who is asked to undertake a forensic assessment.

■ *The Ultimate Issue Rule* (see Freckelton & Selby 1993)

Expert witnesses may not give evidence on the very issue to be decided by the court. The best interpretation of the current status of this rule is that expert witnesses such as forensic psychiatrists must not employ legal terminology to express views on 'insanity', 'diminished responsibility', 'testamentary capacity' or the like. In practice, forensic psychiatrists are given substantial latitude in relation to the operation of this rule but every now and again the rule is invoked to restrict the evidence given by mental health professionals.

The controversies which beset each one of the rules of expert evidence are thoroughgoing and affect the fundamentals of practice of the forensic psychiatrist and the psychiatrist in clinical practice called into court from time to time. Ironically, the only one of the rules to have received High Court scrutiny in the last twenty years is the most troubling—the common knowledge rule. After the decision in *Murphy v. R* ((1989) 167 CLR 94) the small amount of certainty that did exist—lacking in conceptual justification as it was—has now disappeared, and no substitute is immediately apparent for the determination of when expert psychiatric and psychological evidence

may be given on the accused person's mental state at the time of the commission of an offence.

The Australian Law Reform Commission (1985; 1987) proposed major changes to the technical rules of expert evidence. Its recommendations—which involve a refocussing of the expertise rule, the abolition of the common knowledge and ultimate issue rules and omission of the basis and area of expertise rules—have been adopted by the Federal and New South Wales governments in the Evidence Bill 1991 (Cwlth) and the Evidence Bill 1991 (NSW). However, even should the Bills pass both Houses of Parliament, the expert evidence provisions are sufficiently broad to leave the courts fundamental discretions in relation to the reception of expert evidence. In short, evidence law reform in the USA did not end the controversies in the expert evidence area; nor will it in Australia.

Conclusion

Forensic psychiatry in Australia is entering a new era with the establishment of professorial chairs in the various states. Unfortunately, lawyers are not as yet matching psychiatrists in preparedness to learn about their sister disciplines, but a new era of increasingly deregulated competitive legal practice may well change that. At the same time, however, a combination of the recession and what is likely to be an era of fiscal constraints for legal aid bodies is having the effect of forcing most forensic practitioners into part-time status. The onus on the clinical practitioner to be able to adapt to the courts thereby becomes the more pressing and the need for interdisciplinary understanding the more important. The formulation of a code of ethics for forensic psychiatrists has an important role to play in clarification of the role of the forensic practitioner and in establishing acceptable standards of practice.

Changes to the law have an important part to play in making the law more comprehensible and accessible for those who are subpoenaed as expert witnesses into its portals. Clarification of the law relating at least to automatism and fitness to plead is necessary, as is modernisation and codification of the rules of expert evidence. However, the fundamental issue that will continue to beset the relationship between the disciplines of law and forensic psychiatry remains one of fixing upon the criteria for deciding when expert psychiatric opinions about accused persons' mental states should be admitted as expert evidence—when ordinary persons in juries will be assisted by such opinions. In short, the issue to be resolved remains: how trusted and welcome a guest is the forensic psychiatrist at the legal table?

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