



Reliability of repeated forensic evaluations of legal sanity



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ABSTRACT

Criminal responsibility evaluation is a very complex and controversial issue due to the gravity of its consequences. Polish legislation allows courts to request multiple sanity evaluations.

The purpose of this study was to assess the extent of agreement on sanity evaluations in written evidence provided by experts of criminal cases in Poland.

A total of 381 forensic evaluation reports addressing 117 criminal defendants were analysed. In sixty eight cases, there was more than one forensic evaluation report containing an assessment of legal sanity, including forty one cases containing two assessments of criminal responsibility, seventeen containing three assessments, eight containing four assessments and two containing five assessments.

We found that in 47% of the cases containing more than one sanity assessment, the initial criminal responsibility assessment was changed after a subsequent forensic evaluation.

The agreement between repeated criminal responsibility evaluations was found to be fair.

This study found a strong correlation between the number of forensic reports and the number of contradictory sanity assessments.

There were fewer forensic opinions involved in the cases in which the same conclusion regarding criminal responsibility was reached in subsequent forensic evaluation reports compared to the cases in which more forensic opinions were involved.

There is a clear need for further research in this area, and it is necessary to standardise criminal responsibility evaluations in order to improve their reliability and to shorten the legal proceedings.

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1. Introduction

The Judiciary of Poland requires an independent forensic evaluation of legal sanity. This forensic evaluation is always requested by the Court (or during a preliminary hearing by the public prosecutor) when the defendant is known to have a psychiatric diagnosis or to have received any psychiatric diagnosis. The Court can also request an evaluation of a defendant with no history of mental treatment when the Court itself has doubts regarding the defendant's mental health or his/her legal liability. The forensic evaluation is conducted jointly by two forensic psychiatrists (art. 202 of the Code of Penal Procedure). The court requests forensic experts to resolve specific matters related to the case, which may include the matter of criminal liability. In Poland, full criminal responsibility, diminished criminal responsibility or insanity can be stated. Insanity and diminished criminal responsibility are defined by

the penal code (art. 31 of the Penal Code). The person is not criminally responsible when affected by psychiatric illness, mental disability or other disturbances in psychological processes if he/she is not able to recognise the meaning of his/her action or control his/her behaviour. If at the time of the alleged criminal act (*tempore criminis*), the person experienced a diminished ability to recognise the meaning of his/her actions, diminished responsibility can be stated. Such a statement allows the court to rule for extraordinary mitigation of punishment. The court relies on the service of forensic experts, including both psychiatrists and psychologists. Only forensic psychiatrists can issue statements regarding criminal liability. Forensic psychologists contribute to the assessment with respect to matters not related to criminal liability. It is required that all medical doctors appointed by the court, including psychiatrists, have completed their medical specialty training.

The forensic report that is provided by the experts should address all of the court's questions. However, according to the principle of free evaluation of the evidence, the court must decide whether the forensic evaluation can be admitted as evidence in the case (art.7 §1 of the Penal Code). The court has no obligation to agree with the forensic experts and, given appropriate arguments, it can even deliver an opposing opinion (Heitzman, 1996). The parties—the defendant and the prosecutor—can disagree with a forensic opinion, and either of the parties, on the grounds

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of reasonable arguments, can request the court to appoint another forensic team to address the same or new matters related to the case. In Poland, it is the court that appoints the experts rather than the parties², and there is no need for an appeal when another forensic opinion is requested.

Driven by the necessity to resolve issues that are, in the court's view, not conclusively addressed by previous forensic experts, the court itself can request subsequent forensic opinions. When a subsequent team is asked to evaluate a defendant, all previous forensic reports written regarding the case and all written information in possession of the court are made available to this forensic team. The court's or the public prosecution's doubts must be definitively resolved, and this occasionally requires several consultations by the forensic team per case. The maximum number of forensic opinions is not defined, and it is for the court to decide whether another forensic evaluation is necessary. If the defendant is considered to be insane by the court, the proceedings are discontinued. However, a defendant who has been found insane may be sent to involuntary confinement for treatment.

Although the concept of insanity is very old and has been known to be used since the Roman era, sanity evaluation remains complex and often controversial (Allnut, Samuels & O'driscoll, 2007). No biological markers are available, and there are neither precise diagnostic instruments that enable the assessment of a subject's insight nor methods to improve the assessment (Islam, Scarone & Gambini, 2010). As a result, forensic evaluation is a very challenging task. Forensic experts are sometimes confronted with divergent diagnoses and opinions regarding a case. This complexity can result from incomplete or different observations of symptoms by subsequent forensic psychiatric experts, the subject's defence and the complex aetiology of the subject's disorder (Hajdukiewicz, 1998).

To better illustrate the complex issues involved in providing forensic opinions in Poland, we present a case that was the inspiration for this study.

A twenty seven-year-old married woman with no history of mental health problems was charged with the murder of her three year-old son and the attempted murder of her husband. She pleaded guilty to the charges. On the day of the event, she woke up to go to work at the usual time and went to the bathroom. Suddenly, without any reason, she had an idea that she had to "finish her family and herself off". She attacked her husband with a knife, wounding him, and later killed her son by hitting his head and cutting his throat. When the wounded husband suggested that if his wife faked burglary he would not tell the police that she had attacked him, the defendant started to throw things off a shelf and took some video tapes and money, which she placed in a plastic bag. She got dressed in the bathroom, placed her husband's jacket in the plastic bag with the video tapes, put the husband's and her child's passports into her handbag and went outside, leaving the door open. She threw the jacket into a trash bin and the plastic bag with tapes into another bin. Then, she bought herself some yogurt and two bread-rolls to take to work. She checked what time she had a bus towards the town centre because she wanted to go shopping after work, and she went to her office. She was arrested two hours later. A man found her husband's jacket in the trash bin containing his ID in its pocket. He went to the address provided on the ID to return the possessions to the owner. Upon entering the flat, he found the wounded man and called for help. When the ambulance came the child had died. The husband received life-saving emergency surgery at a hospital.

Before the event, the defendant's behaviour was normal; her friends and family did not notice anything unusual or suspicious about her behaviour. She was happily married, and there were no concerns regarding the manner in which she looked after her son. However, she had a stressful job situation and was forced to work overtime. She was on her own in her office for two days and found it very difficult. Then, she went on sick leave. The day of the event was her first day at work

after the five-day sick leave. The defendant exhibited a tendency to fantasise. She used to tell people things that were not true, e.g., that she had visited China, that her father was in fact her stepfather, or that her husband abused alcohol.

She was initially surprised about being detained but later pleaded guilty and revealed the details of the act. The defendant was sober while committing the act. Three forensic expert teams were asked to address the matter of the defendant's criminal responsibility. The first team stated that the defendant was fully criminally responsible. In their opinion, she exhibited symptoms of reactive depression that did not influence her ability to control her actions or to recognise their meaning. According to their opinion, she did not suffer from any psychotic disorder and did not exhibit any symptoms of a consciousness disorder. According to these experts, EEG did not reveal any abnormalities. As there were some doubts and questions after the initial forensic report had been received, the public prosecutor appointed another forensic team to address the defendant's criminal responsibility.

The second team of forensic experts concluded that the defendant had diminished criminal responsibility. In their opinion, she exhibited features of abnormal personality development and symptoms of anxiety-depressive disorder that were initiated as symptoms of acute adjustment disorder. These experts believed that the defendant's EEG abnormalities were characteristic of individuals more prone to excessive, premature and inadequate reactions than the general population. Depletion of the defendant's psychological adaptive mechanisms and frustration from the stressful situation at work that negatively affected her ability to perform her roles as a mother and a wife also influenced the defendant's behaviour *tempore criminis*. A brain CT scan did not reveal any abnormalities.

Because there were two divergent statements about the defendant's criminal responsibility, the court decided to request a third opinion. The third team stated that the defendant was not criminally responsible. Obnubilation (a state of dim awareness) was diagnosed, and the experts believed that the defendant was not able to recognise the meaning of her actions or control her actions. According to these experts, the defendant exhibited histrionic personality disorder and, in connection with adverse life circumstances, lost the ability to assimilate past events, her self-esteem, her perception and her behaviour regulation mechanisms despite the fact that her actions were relatively well ordered and purposeful. Ultimately, the court obtained three different opinions and three different conclusions about the defendant's criminal responsibility. These forensic assessments, rather than facilitating an understanding of the defendant, generated confusion. (In that case, the court ultimately agreed with the second assessment team and came to the conclusion that the defendant had diminished criminal responsibility.)

The problems arising from routine forensic work in the context of international research inspired us to undertake this study. The validity and reliability of expert opinions in legal proceedings have been previously criticised, and forensic evaluations have not been spared from critical perceptions (Caldwell, 2005; Faust & Ziskin, 1988). The gravity of forensic evaluation, especially of the conclusions regarding a defendant's sanity, cannot be overestimated. Not only can extraordinary mitigation of punishment be ruled for someone who is fully responsible for his or her deeds, but also an ill person can miss an opportunity for proper treatment.

In this study, we aimed to analyse the conclusions regarding the sanity of defendants who received multiple consecutive forensic evaluations to determine how often the defendant is categorised into a different classification of criminal responsibility by distinct forensic teams, as in the case described above. The available data regarding this issue are sparse. In a recent study by W. N. Gowensmith et al. conducted in Hawaii, agreement regarding the defendant's sanity was reached in only 55.1% of the cases (Gowensmith, Murrie & Boccaccini, 2013). That study analysed 483 independent evaluation reports on legal sanity of 165 criminal defendants. Large et al. reviewed 146 reports describing sixty one defendants who had submitted a defence of "not guilty due to

² Since the article was accepted for publication The Polish Code of Penal Procedure has been changed. Current system allows the parties themselves to appoint the experts.

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