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Adjudicating pathological criminal incapacity within a climate of ultimate issue barriers: A comparative perspective

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ABSTRACT

Mental health experts are increasingly being utilised by the criminal justice system to provide assistance to courts during the assessment of issues falling beyond the knowledge and/or experience of the courts. A particular domain where the assistance of qualified psychiatrists and psychologists is becoming essential is where the defence of pathological criminal incapacity falls to be assessed. Mental health professionals testifying during trials where the defence of pathological criminal incapacity is raised will present opinion evidence which is one of the exceptions to the rule of inadmissibility of opinion evidence. Mental health professionals providing their opinion evidence are, however, prohibited from expressing opinions on so-called "ultimate issues" upon which only the court may ultimately rule upon. The latter rule is also commonly known in practice as the "ultimate issue" rule which presents multifaceted challenges in respect of the application of the defence of pathological criminal incapacity. In this article, the author assesses the application of the ultimate issue rule with reference to the defence of pathological criminal incapacity as it operates within the South African criminal law context. A comparative analysis is also provided with reference to the rule as it operates in the United States of America and more specifically Federal Rule 704. It is concluded that the ultimate issue rule unnecessarily restricts testimony provided by mental health professionals as such placing a barrier on such evidence. As such, it is argued that the rule is superfluous as it remains within the discretion of the trier of fact to decide as to what weight to attach to such evidence.

> Melrose said: "But of course, perjury seldom plays a role in the testimony of so-called expert witnesses. It is only too easy for both defense and prosecution to find honest authorities who oppose each other diametrically in regard to the same phenomenon, even in such a supposedly exact science as ballistics, and when the human element enters, consistency goes right out the window. Dr Brixton, for example, believes that a man who has tried to get himself mutilated can be held responsible for no subsequent act however criminal. I wager that the prosecution psychiatrist will find the same fact utterly negligible." (Thomas Berger)[1]

1. Introduction

Mental health professions are increasingly being utilised by the criminal justice system to provide assistance in the assessment of issues beyond the knowledge or experience of the courts. One of the most important domains where the expertise of qualified psychiatrists and psychologists is becoming essential denotes the assessment and application of the defence of criminal incapacity. These mental health professionals will accordingly be requested by courts to assess individuals allegedly having lacked criminal capacity at the time of the commission of the offence and to consequently provide an opinion as to the mental state of the individual at the time of the offence. It is trite that the evidence presented by psychiatrists and psychologists within the paradigm of criminal capacity takes the form of expert opinion evidence.[2]

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[1] Meyer, R.G., Landis, E.R. and Hays, J.R., *Law for the psychotherapist*, Norton (1988) 220.

[2] Zeffert, D.T. and Paizes, A.P. *The South African law of evidence*, 2 ed. LexisNexis (2009) 309–329; Schwikkard, P.J. and Van der Merwe, S.E. *Principles of evidence*, 3 ed. Juta (2009) 83–103; Meintjes-Van der Walt, L. *Expert evidence in the criminal justice process*, Rozenberg (2001) 63–84; Alan, A. The psychologist as expert witness in C. Tredoux, D. Foster, A. Alan, A. Cohen and D Wassenaar, (eds) *Psychology and law*, Juta (2005) 287–314 (hereinafter Tredoux et al.); Alan, A. and Meintjes-Van der Walt, L. Expert evidence in S. Kaliski (ed) *Psycholegal assessment in South Africa*, Oxford (2006) 342–355; Freckleton, I. and Selby, H. *Expert evidence — Law, practice, procedure and advocacy*, Lawbook Co. (2005) 11–20; Halleck, S.L. *Law in the practice of psychiatry — A handbook for clinicians*, Plenum Medical Book Co. (1980) 195–206 and 207–224; Shapiro, D.L. *Forensic psychological assessment — An integrative approach*, Allan and Baron (1991) 162–183 and 199–204; Guttmacher, M.S. *The role of psychiatry in law*, Thomas, Springfield (1968) 74–92; Hess, A.K. Serving as an expert witness in A.K. Hess and I.B. Weiner (eds) *The handbook of forensic psychology*, Wiley (1999) 501–520; Sales, B.D. and Shuman, D.W. *Experts in court — Reconciling law, science and professional knowledge*, American Psychological Association (2005) 3–12; Meintjes-Van der Walt, L. Thoughts on the presentation and evaluation of scientific evidence, *South African law journal* (2003) 352–372; Gilmer, B.T., Louw, D.A. and Verschoor, T. Forensic expertise: the psychological perspective, *South African journal of criminal justice* (1995) 259–270; Carstens, P.A. Setting the boundaries for expert evidence in support of the defence of medical negligence — *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA), *Journal of contemporary Roman–Dutch law* (2002) 420–436; Slovenko, R. Expert testimony: use and abuse, *Medicine and law* (1993) 627–641. See also Du Toit, E., De Jager, F.J., Paizes, A., Skeen, A. and Van der Merwe, S. *Commentary on the Criminal Procedure Act*, Juta (2012) 24-12–24-17 (hereinafter Du Toit et al.); Melton, G.B., Petrilla, J., Poythress, N.G. and Slobogin, C. *Psychological evaluations for the courts*, Guilford Press (2007) 577–605; Carstens, P.A. and Pearmain, D. *Foundational principles of South African medical law* LexisNexis (2007) 860–862.

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Expert evidence is one of the exceptions to the general rule that evidence of opinion is inadmissible.[3] The general rule is that opinion evidence is inadmissible due to the irrelevance thereof. The exception to the latter rule is when the issue is of such a nature that the opinion of the expert, in this case that of the psychiatrist or psychologist, can provide assistance to the court to adjudicate the matter.[4] The opinion of an expert will accordingly be admissible to provide the court with scientific information which is likely to fall outside the experience and knowledge of the court.[5] The converse is, however, also true. If the particular opinion evidence deals with a matter that the court can decide upon in the absence of such evidence, the opinion evidence will be deemed irrelevant and inadmissible. The main criterion for assessing the admissibility of such evidence can be traced to the relevance thereof.[6] According to Zeffert and Paizes an opinion will be relevant if it can assist the court and if the witness is better qualified to form such an opinion.[7] There are generally two exceptions to the general "ban" against opinion evidence. The first exception entails the opinion of a lay person as to facts observed by such a person and where it is reasonably inevitable for the witness to separate observed facts from the inferences drawn from the observed facts.[8] It is consequently often difficult to distinguish between facts and opinion of such witness. The second exception relates to the opinion evidence presented by a witness who by way of skill, experience and competence is in a better position to draw inferences from the facts than the court due to the fact that the subject-matter requires skill, knowledge or expertise beyond the normal experience of the court.[9] For purposes of this contribution, emphasis will fall on the second exception relating to expert evidence. One of the principle motivations for the exclusion of opinion evidence is predicated upon the premise of protecting the function of the trier of fact or judicial authority and entails that a witness should refrain from expressing opinion evidence on issues that the court itself has to decide upon and accordingly the witness should not "usurp" the function of the court. The latter principle is more commonly referred to within the law of evidence as the so-called "ultimate issue" principle.[10] In *S v Harris*,[11] Ogilvie Thomson JA indirectly encroached the ultimate issue rule by stating[12]:

> "… in the ultimate analysis, the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue the Court – initially, the trial Court; and, on appeal, this Court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period."

The question which falls to be assessed is whether the ultimate issue rule should still be retained in our current rules of evidence. Within a climate of rapid developments in science and technology also with reference to the sciences of psychiatry and psychology, the "gap" between a layman's knowledge and expert knowledge is increasingly expanding. In the ultimate pursuit for truth and justice, various questions arise as to the admissibility, scientific reliability and validity of psychiatric and psychological evidence. Van Kampen illustrates the anomaly as follows[13]:

> "Over many centuries, science has become pivotal to our understanding of (human) nature and its contribution to legal decision making processes has increased dramatically. But as the involvement of science itself, and various techniques based upon its insights grew, so did a number of problems related to the use of such knowledge by legal institutions."

And further:

> "The vast range of problems related to the use of (applied) scientific or otherwise specialised knowledge by legal institutions that have been identified over the years – and the manifest presence of some of these problems in more well-known miscarriages of justice – has made expert evidence one of the most hotly debated topics in legal literature."

Within the ambit of the defence of pathological criminal incapacity as it operates within the context of South African criminal law, expert evidence is statutorily provided for. Proper statutory recognition of expert evidence is, however, only one step towards the proper application of expert evidence in cases where the defence of criminal incapacity and more specifically, pathological criminal incapacity, is raised. Obstacles such as the ultimate issue rule, reliability and validity further place a barrier on the acceptance of expert evidence which will have to be addressed. The latter is further exacerbated by the divergent views of the behavioural sciences as opposed to the legal profession. Despite the necessity and pivotal role of expert evidence in cases where criminal capacity is in issue, courts frequently approach such evidence with great caution, scrutiny and scepticism. Melton et al. encapsulate this dilemma by stating[14]:

> "To some extent, this antipathy stems from the belief that mental health professionals too often try to answer legal questions for which there are no good behavioural science answers — or, worse, are merely selling their testimony to the highest bidder. But it also flows from the fact that even when clinicians have something useful to say and are eager to maintain their integrity, their message is often obscured or confused. Their reports are perceived as conclusory and filled with jargon; their testimony is viewed as hard to follow (on direct examination) and befuddled (on cross-examination)."

[3] Zeffert, D.T. and Paizes, A.P. *supra* note 2 at 309; Schwikkard, P.J. and Van der Merwe, S.E. *supra* note 2 at 83–84; See also Dennis, I. *The law of evidence*, Sweet and Maxwell (2007) 847 where it is noted that the general rule according to the common law entails that a witness may only present evidence of facts to which they have personal knowledge of and may not express their opinions of what happened or may have happened. See also Du Toit et al. *supra* note 2 at 24-12–24-17.

[4] *Ibid.*

[5] Alan, A. and Meintjes-Van der Walt, L. in Kaliski, S. *supra* note 2 at 342–343; Schwikkard, P.J. and Van der Merwe, S.E. *supra* note 2 at 87.

[6] Schwikkard, P.J. and Van der Merwe, S.E. *supra* note 2 at 87; Zeffert, D.T. and Paizes, A.P. *supra* note 2 at 309–310.

[7] Zeffert, D.T. and Paizes, A.P. *supra* note 2 at 311; Schwikkard, P.J. and Van der Merwe, S.E. *supra* note 2 at 87–88.

[8] *Ibid.* See also Wigmore, J.H. *Evidence in trials at common law*, Little, Brown (1978) par 1918 where he states that the true essence of the opinion rule simply relates to the exclusion of supererogatory evidence. He notes: "It is not that there is any fault to find with the witness himself or the sufficiency of his sources of knowledge or the positiveness of his impression; but simply that his testimony otherwise unobjectionable, is not needed, is superfluous."

[9] *Ibid.* See also *S v Nangatuuala and another* 1997 (4) SA 766 (SWA); *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616 G–H.

[10] Paizes, D.T. and Zeffert, A.P. *supra* note 2 at 310–314; Schwikkard, P.J. and Van der Merwe, S.E. *supra* note 2 at 88.

[11] *S v Harris* 1965 (2) SA 340 (A).

[12] At 365 B–C.

[13] Van Kampen, P.J.C. *Expert evidence compared — Rules and practices in the Dutch and American Criminal justice system*, Intersentia (1998) at 4–5. See also Redmayne, M. *Expert evidence and criminal justice*, Oxford University Press (2001) at 36 where it is noted: "Fact finders need to analyse expert evidence and combine it with the other evidence that is presented to them; for their part, experts need to present their evidence in a manner that facilitates this task. These points are obvious, even banal. What is interesting is that their implementation is challenging, and even controversial."

[14] Melton et al. *supra* note 2 at 577.