International Journal of Law and Psychiatry 37 (2014) 149–154

Contents lists available at ScienceDirect

International Journal of Law and Psychiatry

Forensic psychiatric expert witnessing within the criminal justice system in Germany

Norbert Konrad [a,*], Birgit Völlm [b]

[a] Institute of Forensic Psychiatry, Charité — University Medicine Berlin, Oranienburgerstr. 285, 13437 Berlin, Germany
[b] Section of Forensic Mental Health, Division of Psychiatry, University of Nottingham, United Kingdom

ARTICLE INFO

Available online 20 November 2013

Keywords:
Expert witness
Criminal responsibility
Risk assessment

ABSTRACT

In recent years, the number of occupied beds in German forensic–psychiatric hospitals has continued to rise. Diversion refers to the removal of offenders from the criminal justice system at any stage of the procedure and court proceedings. There are no specific diversion programs in Germany but diversion does in fact happen via legal regulations that are based on the construct of legal responsibility. The assessments of responsibility as well as risk are the core tasks of forensic–psychiatric expert witnessing in Germany. Recommendations of an interdisciplinary working group serve as a guide to operationalize this forensic–psychiatric task. These recommendations list formal minimum requirements for expert reports on the question of criminal responsibility and risk assessment as well as minimum standards regarding content and in writing the report.

1. Introduction

Forensic psychiatrists are concerned with some of the most difficult patients in psychiatry. They deal with the assessment of complex cases, including risk assessment, and with the treatment of mentally disordered offenders, typically in secure settings such as secure hospitals or prisons (Konrad, Welke, & Opitz-Welke, 2012). Furthermore, forensic psychiatrists act as expert witness in court, commenting e.g. on issues of criminal responsibility and competency to stand trial.

Forensic psychiatry operates within a certain legal and societal context which undergoes constant evolution. Laws are rules that guide human behavior and as such are man-made. This means that concepts such as responsibility or competence are normative rather than clinical issues (Morse, 2008) which differ from country to country, sometimes significantly (Salize & Dreßing, 2005). Therefore, while the ethical issues facing forensic psychiatrists might be similar across cultures, they do also depend on the specific legal system and service provision within each country (Konrad & Völlm, 2010). This article will describe the role of the German forensic psychiatrist, core functions and recent developments concerning requirements for expert reports on the question of criminal responsibility and risk assessment as well as minimum standards regarding content and report writing.

2. Forensic psychiatric clientele in Germany

Those offenders in Germany declared not criminally responsible (insane) or of 'diminished responsibility' may be placed involuntarily in special psychiatric (forensic) hospitals (§63 of the German penal code) if they are expected to commit further serious crimes. The number of persons confined there was 3021 as of March 31, 2011 (Table 1).

If a person is to be admitted to a forensic psychiatric hospital, expert witnesses from the fields of psychiatry and psychology will be asked to prepare reports which typically comment on the following questions: the perpetrator's criminal responsibility, the relationship between criminal offense and mental disorder (the so-called symptomatological complex), the duration of the mental disorder and a prognosis, i.e. the likelihood and nature of future offenses (Konrad, 2001).

Offenders with a drug or alcohol dependence with sufficiently promising therapeutic prospects may be confined to special detoxification centers within forensic psychiatric hospitals (§64 of the German penal code). These hospitals held 6569 inmates on March 31, 2011 (Table 1). Expert witnesses from the fields of psychiatry and psychology are again asked to prepare reports commenting on the diagnosis of an addiction or dependency syndrome, the relationship between criminal offense and the tendency to consume psychotropic substances (so called symptomatological complex), and a prognosis, i.e. the likelihood and nature of future offenses as well as the prospects and likely degree of recovery from this addiction.

In Germany, there is a lack of methodologically sound studies on the prevalence of mental disorders in prison which examine a large, representative sample of a prison population with standardized diagnostic instruments and provide a diagnosis based on international classification systems. Due to this research deficit current data, which would enable appropriate treatment planning with regard to the needs of mentally disturbed prisoners, are not available. Likewise there is no empirical basis for determining whether prisoners in Germany, as elsewhere, have an increase in mental disorders attributable to inadequate deinstitutionalization programs (Gostin, 2008). In Germany, the majority of patients with severe mental illnesses, some of whom had spent several decades

* Corresponding author at: Tel.: +49 30 8445 1411; fax: +49 30 8445 1440.
E-mail address: norbert.konrad@charite.de (N. Konrad).

0160-2527/$ – see front matter
http://dx.doi.org/10.1016/j.ijlp.2013.11.012

Table 1
Forensic patients, prisoners and patients in general psychiatric hospitals (old West-German states including West Berlin 1970–1990, as of 1995 unified Germany).

Forensic psychiatry according to §63, §64 German Penal Code			In comparison	
Year	Psychiatric hospital (§63)	Detoxification center (§64)	Prison	General psychiatry (available beds)
1970	4222	179	35,209	117,596
1975	3494	183	34,271	115,922
1980	2593	632	42,027	108,904
1985	2472	990	48,212	94,624
1990	2489	1160	39,178	70,570
1995	2902	1373	46,516	63,807
2000	4098	1774	60,798	54,802
2005	5640	2473	63,533	52,856
2010	6569	3021	60,693	54,035
2011	6620	3354	60,067	53,932

in psychiatric hospitals, were able to be returned to the community with no detriment to their mental health (Konrad, 2002).

Only after German reunification and up until 2006 was there a steady rise in the number of occupied beds in forensic–psychiatric hospitals and prisons, with a simultaneous decrease in the number of beds in general psychiatry. This holds true even when taking the unification-related increase in population into account (Table 1). In recent years the number of occupied beds in forensic–psychiatric hospitals has continued to rise while the number of prisoners in the penal system as well as the number of available beds in general psychiatry has remained about the same (Konrad & Lau, 2010). This development is not primarily caused by rising admission rates but by a very restrictive practice of release. However, admission rates continue to rise for schizophrenic offenders with co-morbid substance abuse and pre-morbid aggressiveness and delinquency. Within this group, in-patient treatment in general psychiatric institutions was substantially reduced and partially replaced by specialized community treatment and care settings. Male schizophrenic patients with co-morbidity in particular have proved to be difficult to place and retain in these open alternative settings. For a sufficiently intensive and continuous treatment of these patients, specialized psychiatric hospitals should provide well equipped wards, which offer medium term interventions to patients admitted according to civil law regulations. One aim of the treatment should be fostering acceptance of the illness and treatment compliance as well as preparing after care in community care settings (Schalast, 2012).

3. Legal basis of diversion

Mentally ill offenders who have been declared not criminally responsible will be sent to a general psychiatric hospital if they are not assessed to be dangerous and if the pre-requisites for civil commitment are fulfilled or if they accept in-patient psychiatric treatment on a voluntary basis. Those offenders declared not criminally responsible or of 'diminished responsibility' who may be expected to commit further serious crimes, are involuntarily placed in special psychiatric (forensic) hospitals. Criminal responsibility is regulated in §§20 and 21 of the German Penal Code.

3.1. §20 — Non-guilty due to mental disorders (insanity)

Individuals who, due to a mental illness, a deep disturbance of consciousness or because of mental retardation or due to another severe mental abnormality are unable to understand the wrongfulness of an act or to act accordingly, are without guilt.

3.2. §21 — Diminished responsibility

The sentence can be lowered according to §49 paragraph 1, if the capacity to understand the wrongfulness of an act or to act accordingly is significantly diminished due to one of the reasons listed in §20.

Legal regulations concerning criminal responsibility require a two step procedure: In the first step it has to be verified whether – at the time of the offense – the offender suffered from a mental disorder, which falls within one of the four categories listed in §20 (mental disorder, a deep disturbance of consciousness, mental retardation or another severe mental abnormality). The second step includes an assessment as to whether the diagnosed disorder influenced the offender's capacity to understand the wrongfulness of an act or to act according to this insight.

The first step requires empirical–clinical methods of diagnosis. Clarifying the influence of the diagnosed mental disorder(s) on the capacity to understand the wrongfulness of an act or to act accordingly, on the other hand, is a normative decision made by the court. For this process of attribution the expert witness provides findings and assessments based on his or her examination.

4. The forensic psychiatrist as expert witness

Forensic psychiatrists as well as forensic psychologists appear in court as expert witnesses, giving their opinion on specific issues as requested by lawyers or a judge. As such they have to act within the law but also have to accept the authority of the legal profession. Psychiatrists in court only provide an opinion while decisions are made by the judge or jury, a situation that differs from that encountered by the highly skilled forensic psychiatrist in his or her other work context and one that can cause discomfort or even resentfulness. Difficulties met by the psychiatric expert witness may include harassment by the different parties involved in the trial (Calcedo-Barba, 2006), public criticism, low reward, poor relationships with the legal profession partly due to unfounded attacks, loss of dignity and status as a consequence of the confrontation with sharp-shooting lawyers amongst others.

Taking on duties as an expert witness is not only associated with external frustrations but has also caused grave soul searching when accepting such duties which are not traditionally core tasks of the psychiatrist (Schneider, 1977). The terms 'criminal responsibility' or 'guilt' are legal terms that do not exist as an empirical entity in within the field of psychiatry. Even if a medical expert does not comment directly on criminal responsibility – and he should not do so as a matter of fact – his expert opinion aims at enabling this finding. Helping to select the criminally irresponsible has a serious side effect (de Smit, 1977): the forensic psychiatrist legitimates the punishment of individuals labeled as responsible. The psychiatrist takes on the, at first sight, humanitarian act of treating those who are not punished due to their mental disorder. This action, however, becomes problematic as the psychiatrist does not only undertake treatment but also custodial functions. The forensic psychiatrist is "changing side", he moves from protector of the ill individual to protector of the society (Leyrie, 1977). In public consciousness, outsiders of society are treated either too softly – as nowadays perceived in Germany and many other European countries – or too harshly. Forensic psychiatry, acting on behalf of society with the doubly stigmatized, is subjected to double reproach (Rasch & Konrad, 2004). There is probably