Ethical Issues Pertaining to Forensic Assessments in Mental Capacity Proceedings: Reflections from South Africa

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Within the context of South African criminal law, the defence of pathological criminal incapacity, or more commonly referred to as the insanity defence, is well established. Whenever the insanity defence is invoked, the Criminal Procedure Act 1977 ('CPA') provides that an accused shall be referred for observation at a mental institution. Such observation will essentially be conducted by three forensic psychiatrists and one clinical psychologist. Within this context various ethical issues come into play. One of the primary issues relates to the confidentiality of statements made by an accused during such observation. In terms of section 79(7) of the CPA, statements made by an accused during the enquiry into his or her criminal incapacity may be admissible during the subsequent trial, provided that they are relevant to the assessment and determination of the accused's mental state. The latter section necessarily raises various ethical and constitutional concerns. The focus of this article is on the ethical dilemma of confidentiality within the context of mental capacity proceedings. Dual relationships, bias and 'hired gun' experts are also discussed canvassed against the backdrop of the defence of pathological criminal incapacity. Recommendations for possible reform are provided in conjunction with a proposed ethical code of conduct for mental health professionals conducting forensic assessments during the course of mental capacity proceedings.

Key words: confidentiality; dual relationships; pathological criminal incapacity.

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'.¹

Introduction

Within the context of South African criminal law, the defence of pathological criminal incapacity, or more commonly referred to as the insanity defence, is well established. Whenever the insanity defence is invoked, the Criminal Procedure Act 1977 (SA)² provides that an accused shall be referred for observation at a mental institution. Such observation will essentially be conducted by three forensic psychiatrists and one clinical psychologist. Within the context of such forensic assessment, various ethical issues

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arise. One of the primary issues relates to confidentiality of statements made by an accused during the observation. In terms of section 79(7) of the CPA, statements made by an accused during the enquiry into his or her criminal incapacity may be admissible during the subsequent trial, provided that it is relevant to the assessment and determination of the accused's mental state.³ The latter section raises various ethical concerns relating specifically to confidentiality. In this contribution the author will reflect on the ethical dilemma of confidentiality within the ambit of the procedure for mental capacity assessments. The ethical issue of confidentiality will be canvassed against the backdrop of section 79(7) of the CPA. Dual or multiple relationships, bias and 'hired gun' experts are canvassed against the backdrop of the defence of pathological criminal incapacity within the context of South African criminal law. Recommendations for possible reform are provided in conjunction with a proposed ethical code of conduct for mental health professionals conducting forensic assessments during the course of mental capacity proceedings.

Pathological Criminal Incapacity: A Brief Synopsis

Within the South African context, the defence of pathological criminal incapacity is embodied and as such defined in section 78(1) of the CPA.⁴ Section 78(1) provides that an accused is not criminally responsible for an act or omission which constitutes an offence if at the time of the commission of the alleged offence the accused suffered from a mental illness or mental defect which rendered him or her incapable of appreciating the wrongfulness of his or her act; or of acting in accordance with an appreciation of the wrongfulness of his or her act.⁵ According to Snyman, the test for pathological criminal incapacity consists of a pathological or biological leg, which entails that the accused should have suffered from a mental illness or

mental defect at the time of commission of the offence; and a psychological leg which entails that the accused should have, as a result of a mental illness or mental defect, lacked the capacity to appreciate the wrongfulness of the act or to act in accordance with such appreciation.⁶ The test applied is accordingly a so-called 'mixed' test in that both the pathological as well as the psychological factors are taken into account in determining whether an accused lacked criminal capacity.⁷

The threshold requirement for the defence of pathological criminal incapacity is the existence of a mental illness or mental defect at the time of the commission of the act. The latter requirement is also referred to as the pathological leg of the test for criminal responsibility. The particular mental illness or mental defect must, in addition, render the accused incapable of appreciating the wrongfulness of his or her act, or acting in accordance with an appreciation of the wrongfulness of the act.⁸ The latter two defences apply in the alternative. Snyman, as well as Burchell and Milton, opines that 'wrongfulness' for purposes of the appreciation of the wrongfulness of an act should denote either legal wrongfulness or moral wrongfulness.⁹

In respect of the defence of pathological criminal incapacity it is important to note that certain mental illnesses may not necessarily affect an accused's capacity to appreciate the wrongfulness of his or her action, but may nevertheless deprive the accused of the ability to control conduct or to act in accordance with the appreciation of wrongfulness.¹⁰ Section 78(1)(b) of the CPA accordingly provides that even though an accused was capable of appreciating the wrongfulness of his or her act, he or she will still not be criminally responsible if, at the time of the commission of the act, he or she suffered from a mental illness which rendered him or her incapable of acting in accordance with such appreciation. Africa notes that in order to successfully rely on this defence, it has to be

proved that the symptoms of the disorder resulted in a significant impairment of psychological functioning.¹¹ An inquiry in terms of section 78 and 79 can be effected at the request of either the prosecution or defence.

The test for pathological criminal incapacity or insanity does not define the terms 'mental illness' or 'mental defect' nor does it specify the particular mental disorders that constitute 'mental illness' or 'mental defect'. What becomes evident is that the test only identifies the effects which should result from a particular 'mental illness' or 'mental defect'. The pivotal role of the mental health professional in the definition and assessment of the mental illness becomes evident. A question which frequently arises is whether the definition of mental illness should be a medical or a legal prerogative. Slovenko pertinently encapsulates the dilemma as follows:

During the past two centuries the courts have often said that the term 'disease of the mind' or 'mental disease or defect' in the test of criminal responsibility is not a medical but a legal term. At the same time, however, since medical or psychiatric opinion is necessary to give meaning to the term, it becomes a fusion of legal and medical components. To be sure, no rule of law can be reliable when absolutely dependent on another discipline, but without input from other areas, the law would just be an arid system.¹²

In respect of expert evidence by mental health professionals, a court is obliged in terms of section 78(2) of the CPA to refer an accused for observation if it is alleged at criminal proceedings that an accused is by reason of mental illness or mental defect not criminally responsible or if it appears to the court that an accused is for such a reason not criminally responsible. The matter is then enquired into and reported on in accordance with section 79 of the CPA which provides for the panel of experts who are required to conduct the assessment and comply with the procedural aspects associated therewith. It is precisely within the context of the latter

assessment process where section 79(7) becomes relevant. The latter section raises ethical and constitutional concerns which will be discussed below.

Confidentiality and the Admissibility of Statements by an Accused During Mental Capacity Assessments

All that may come to my knowledge in the exercise of my profession or outside of my profession or in the daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal. (Hippocrates)

Section 79(7) provides that a statement made by an accused during the enquiry into his or her mental condition shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the mental condition of the accused.¹³ This section is contentious as it fundamentally infringes on an accused's constitutional right to privacy envisaged in section 14 of the Constitution.¹⁴ In *S v Forbes*¹⁵ the question as to the admissibility of a statement was in issue. The facts of the decision were briefly the following: the accused stood trial on charges of housebreaking with intent to steal and theft, arson and murder. The evidence revealed that after his arrest in connection with the alleged offences, the accused was taken to the police and subsequently to a magistrate to whom he voluntarily made a statement amounting to a confession of the commission of the crime of housebreaking with the intent to steal but a denial of guilt in respect of the murder and arson charges. He further denied responsibility for the fire that was started and stated:¹⁶ 'We didn't put alight to nothing [sic] – we had a torch with us'.

The accused was initially evaluated by Dr Pascoe who testified that the accused did not suffer from a mental disorder or defect at the time of the commission of the offence.¹⁷ Later during the trial, the State sought to have

the testimony of a Dr Munnik allowed. Dr Munnik was a qualified medical practitioner who was studying under Dr Pascoe. Dr Munnik interviewed the accused who spoke freely and voluntarily, but it was never suggested to him that any of the details given by him might subsequently be used as evidence at the trial. The State wished to put before the court a statement by the accused which in effect boiled down to an admission that he was the cause of the fire on the day of the offence. This statement was in direct conflict with the accused's statement to a magistrate earlier. Thereon J refused to admit the statement and held:¹⁸

It seems to me highly undesirable that any statements made by accused persons in the course of enquiries into their mental condition held in terms of the Mental Disorders Act – whether such statements constitute confessions of the crimes with which they are charged or admissions falling short of confessions – should ever be allowed to be put before the Court in evidence for the purpose of establishing the truth of any facts referred to in such statements, save possibly facts having a direct bearing upon the mental condition into which the enquiry was being conducted.

Theron J further held that the State wanted the evidence to be admitted, not to cast light upon the general mental condition of the accused, but to try and establish the existence of certain facts unconnected with the issue of mental disorder or disease.¹⁹ Theron J also held that even if the statement of Dr Munnik was admissible, a trial judge still retained a discretion to exclude it, if unfairly obtained.²⁰ Theron J in addition refused to admit the statement on grounds of public policy.²¹

If the facts in the *Forbes* decision had to be assessed in the light of section 79(7), the outcome would invariably be the same. It is clear that reliance was placed by the State on the relevance of the statement, not for the purposes of ascertaining the mental state of the accused, but to establish the contradiction

between the confession and the statement made to Dr Munnik.

In *S v Webb* (1)²² a more coherent approach was followed in respect of a statement by the accused. The facts of the decision entailed that before closing its case, the State called Dr Morgan, acting superintendent of the Weskoppies Hospital, to testify. Her evidence amounted to the fact that the accused in the matter was not mentally disordered and thus was fit to stand trial. The accused's defence was that at the time of the commission of the offence he suffered from a mental illness leading to criminal incapacity.²³ The defence objected to the admission of Dr Morgan's evidence and contended that the State is not entitled to make use of statements by the accused amounting to confessions or admissions. Human J held that Dr Morgan had sufficiently warned the accused that he was under no obligation to say anything and that the accused was in his sound and sober senses at the time of the interrogation.²⁴ The State contended that the statements were needed solely insofar as it was relevant to the accused's mental condition. The State referred to the *Forbes* decision and contrasted it with the present case in that admission of the statement was sought, not to indicate contradictions in statements as in the *Forbes* decision, but for determining the mental state of the accused.²⁵ Human J held:²⁶

It is apparent at once that this case and the case referred to are not in *pari materia*. The evidence in the present case is offered to rebut the defence of the accused that he was mentally disordered or defective at the time of the alleged murder.

The evidence was accordingly ruled admissible. This reasoning in the decision is important. The statements relied on should be relevant to the determination of the mental state of the accused. Due to the complexity of the defence of criminal incapacity, section 79(7) of the CPA constitutes a reasonable and justifiable limitation of the right to privacy contained in the Constitution.

Confidentiality represents a domain where forensic and therapeutic assessments differ. Within the traditional clinical or therapeutic setting, patients reveal intimate and private details about themselves to their doctors or psychotherapists with the reasonable expectation that such information will not be divulged to others. Within the clinical context, confidentiality constitutes an implied agreement that the psychotherapist will not divulge the information acquired to third parties and as such there is a professional duty on the mental health professional to adhere to confidentiality. Failure of this duty could result in an action for invasion of privacy, defamation or even breach of contract.²⁷

Within the forensic assessment context, especially when the defence of criminal incapacity is raised, the principles pertaining to confidentiality are less operative and applicable. The forensic relationship as such does not provide for a confidentiality clause and accordingly all information can be divulged as far as it is relevant in the enquiry into the accused's mental state.²⁸ Despite the reality that a forensic assessment does not create a fiduciary relationship, it is still essential that the forensic expert act ethically and as such inform the examinee that the usual doctor-patient rules do not apply.²⁹ Every evaluation should accordingly be preceded with a cautionary warning providing for the following:³⁰

- A clear exposition regarding why the expert has been retained;
- A statement providing that the contents and subsequent results of the assessment are not confidential;
- That the assessment does not entail treatment and as such the usual advantages of a therapeutic relationship do not apply;
- That the examinee need not answer questions.

It is thus clear that the ordinary principles relating to confidentiality of communications

do not apply in its strict sense within the ambit of forensic assessments. In terms of section 79(7) of the CPA, statements by an accused during the enquiry into his or her criminal incapacity may be admissible, provided that it is relevant to the assessment and determination of the accused's mental state. Reasonableness and fairness dictate, however, that the accused be informed that communications conducted during the psycho-legal assessment will not be confidential, as the interests involved are not restricted to the individual solely, but also extend more broadly, and so such information could very well be submitted to a court as evidence resulting in the accused's privacy becoming public domain.³¹ Slovenko interestingly notes that the evidential value of forensic expert testimony is often stronger than the value of therapist-expert testimony due to the fact that a psychiatrist appointed to conduct an examination obtains in a few hours (without a promise of confidentiality) more information pertaining to the legal issues than a treating psychiatrist, as the examiner conducts an interview with the relevant legal issues directly in mind, whereas in therapy, the subject may be 'diluted with fantasy and association'.³²

Reflections on Other Ethical Issues Pertaining to Forensic Assessments

Bias and the So-called 'Hired Guns'

Within the climate of an adversarial system of justice, a natural attribute of the system is that each party will endeavour to retain expert witnesses who are favourable and supportive to their respective cases. Expert witnesses are, however, consultants of the court and should strive to be as impartial and unbiased as possible. Some experts are labelled as 'hired guns' due to the fact that they are willing to express an opinion requested by the legal professional regardless of whether such opinion is, objectively speaking, the correct one.³³ Diamond defines the so-called 'hired

gun' as one who knowingly gives false or misleading testimony by intentionally violating the oath, with the underlying motive for doing so usually being money; but there can also be other reasons such as desire for publicity, to bolster self-esteem, to please legal representatives or to further some personal endeavour.³⁴

It is often difficult to disseminate whether an expert is a 'hired gun' or whether he or she is merely very favourable to his or her side's case. The 'hired gun' effect is a very unfortunate consequence of the presentation of expert evidence and does injustice to the principle of a fair and just trial. Allan and Meintjies-Van der Walt correctly assert that it is often difficult for experts to be completely impartial as a result of various factors which include the following:³⁵

- Legal professionals will inadvertently select an expert who supports the case they want to present to the court. As such, the expert will begin to identify with the client. Meintjies-Van der Walt in addition notes that such bias may be completely unconscious as numerous sources suggest that simply being placed in the role of an adversary witness will result in testimony which is biased in favour of the party for whom it is provided and consequently an expert witness may therefore be honest yet biased.³⁶
- The fact that most experts are paid can create the impression of bias and even though experts will deny that this factor impacts on their impartiality, receiving remuneration will often make it difficult for the expert to remain neutral, especially if the particular expert is dependent financially on the income generated from acting as an expert witness.
- As legal professionals are ethically obliged to present their clients' case as positively as possible, they will inadvertently be selective in respect of the

information they provide to the expert so as to strengthen their case as much as possible. In this sense it is pivotal that experts assess all information critically in order to ensure that their observations are not clouded.

- The most problematic form of bias occurs when experts allow their own ideology, morality or theories to influence their opinions.

It is essential that expert witnesses realise that they are witnesses providing evidence based on their honest opinions, their knowledge as well as admissible facts.³⁷ There are no hard and fast rules to combat the 'hired gun' problem but it remains the case that this practice severely corrupts the legal process and should be curbed as much as possible. Diamond indicates that a combination of measures by both the legal and psychiatric communities could reduce this problem with due regard to the following guidelines:³⁸

- Proper recognition of the boundaries of legitimate psychiatric expertise should be established within the forensic psychiatric community;
- More stringent standards for the qualification of experts should be required and adopted by courts as well as legislatures;;
- It should be required that the expert be knowledgeable pertaining to the scientific literature on the subject at issue. Diamond encapsulates the latter by stating:³⁹ 'The logic of science, rather than the logic of the law, should be the required standard for the expert's testimony. Total disclosure is mandatory in the logic of science'.
- Mere reliance on the 'battle of the experts' in order to expose unscientific, irrational or dishonest expert evidence is not sufficient and as such the presiding officer should take responsibility for establishing criteria for expertise and should exclude evidence that fails

to meet the yardstick for appropriate standards of expertise.

- The law should put an end to its quest for certainty as well as its belief that certainty can be obtained by means of science, as scientific knowledge is always approximate and subject to change and as such there is a degree of doubt as to every scientific conclusion.
- The role of the expert witness within the adversarial process should be exposed to the trier of fact.
- Professional organisations should play a more active role in establishing guidelines and ethical standards and also in exposing and disciplining members of their respective professions who abuse their forensic role. Diamond in addition notes:⁴⁰

To avoid the discrediting of both law and psychiatry, the courts and bar associations must take the responsibility for control of the lawyers who wilfully encourage irresponsible expertise and the psychiatric organizations must accept responsibility for the exposure and discipline of their professionals who give unethical and dishonest testimony. The 'hired gun' violates his oath as a witness to tell the truth, the whole truth, and nothing but the truth, and therefore cannot be tolerated in our system of justice. The defence of criminal incapacity is a complex and controversial defence. In the ultimate search for truth and the assessment of the merits of this defence, it is pivotal that mental health experts provide their opinion free of bias and partiality. Although it is difficult to formulate set rules to achieve such a goal, the considerations set out above could provide a contextual framework for the abolition of 'hired guns' and the proper practice of the presentation of expert testimony.

Dual Relationships

Mental health professionals are often confronted with the ethical dilemma of being requested to serve as an expert witness whilst at the same instance acting as a treating

clinician for the specific client or in the case of criminal incapacity, the accused. The Health Professions Council of South Africa (HPCSA) as well as the Society of Psychiatrists of South Africa (SASOP) has recommended that treating therapists should not undertake psycho-legal assessments of their own clients.⁴¹ The ethical conflict of serving both as a treating therapist as well as an expert witness emanates from essential differences in pragmatic approaches between these two relationships. Strassburger, Gutheil and Brodsky assert the following with respect to the difference between these two relationships:⁴²

The process of psychotherapy is a search for meaning more than for facts. In other words, it may be conceived of more as a search for narrative truth ... than for historical truth. Whereas the forensic examiner is sceptical, questioning even plausible assertions for purposes of evaluation, the therapist may be deliberately credulous, provisionally 'believing' even implausible assertions for therapeutic purposes. The therapist accepts the patient's narrative as representing an inner, personal reality, albeit coloured by biases and misperceptions.

For the purposes of this discussion it is important to elaborate on some of the essential differences between therapeutic and forensic relationships in order to clarify the ethical problem of assuming dual relationships.

According to Strassburger, Gutheil and Brodsky, clinical and forensic assessments are dissimilar in the following respects:⁴³

- The treating clinician typically follows a psychodynamic approach whereas the forensic mental health expert's view is more descriptive. Strassburger, Gutheil and Brodsky encapsulate the latter by stating:⁴⁴
- 'Whereas the treating clinician looks out from within, the forensic expert, who must adhere to an ethical standard of objectivity, looks in from outside'.

- Within the clinical context of treatment, the ultimate goal is psychological in the sense of benefiting the patient, promoting healing and widening the level of individual awareness, responsibility and self-sustainability. Conversely, within the forensic context, the ultimate goal is the social one of benefiting society by promoting the resolution of cases by means of the adversarial system of justice.
- Within the treatment relationship, the psychotherapist attempts to form an alliance with that part of the patient that strives to change and move away from psychopathological symptoms and resume healthy adaptations. The forensic evaluator will seek an alliance with that part of the evaluatee seeking exculpation and exoneration from either criminal responsibility or avoidance of responsibility by means of a finding of incompetence. In this sense the forensic evaluator's approach epitomises psychopathology whereas the psychotherapist adheres to an approach of normalisation.
- Therapeutic relationships are characterised by empathy, whereas forensic relationships limit the use of empathy as it could lead to 'quasi-therapeutic' interaction resulting in the evaluatee being disappointed by the consequent report of the evaluator if unfavourable to the evaluatee.
- Therapeutic assessments are less dependent on collateral sources of information whereas forensic assessments frequently require meticulous assessment of multiple sources of information.
- Psychotherapists and forensic mental health professionals approach their role with divergent interviewing methodologies.
- Forensic assessments are usually characterised by time constraints and a sense of urgency, which do not prevail in clinical settings.

Miller notes that the potential for conflating the roles of evaluator and treater is generally reduced in criminal matters as opposed to civil trials as a result of the fact that the adversarial system is better comprehended by accused persons than by civil litigants.⁴⁵ In addition, the professional boundaries of the relationship with an accused are usually more specified, allowing the mental health expert from the outset to inform the examinee as to the nature and scope of the evaluation.⁴⁶ The ethical dilemma of assuming a dual relationship can also differ in respect of the order of assumption of the roles. Miller notes that the most problematic situation occurs when, in a relationship primarily based on treatment, the psychotherapist is called upon to provide an expert opinion in respect of the patient.⁴⁷ Within the forensic paradigm, however, the assessment for competency to stand trial or criminal responsibility often precedes treatment.⁴⁸ It is submitted, regardless of the order of assumption of roles, that a mental health expert who was the treating clinician of an accused should not act as an expert witness in a criminal trial, and *vice versa*, a forensic examiner who assessed an accused for purposes of criminal capacity should not later assume a therapeutic relationship with the accused. Slovenko encapsulates the ethical dilemma of dual relationships by stating that testifying contradicts the therapeutic role and, even though therapy may be formally terminated, therapy never ends, as it is in the mind, resulting in the transference always being there, and accordingly 'the roles of healer and examiner get confused'.⁴⁹

Slovenko also notes that assuming conflicting therapeutic and forensic relationships promotes the risk that expert witnesses will be more concerned with the outcome of the case than the accuracy of their evidence.⁵⁰ Strassburger, Gutheil and Brodsky state:⁵¹

Notwithstanding the growing pressures from the complex clinical/legal marketplace to perform simultaneously in multiple roles, two heads are better than one only if they

really are two distinct heads, each wearing its own hat.

The assumption of dual relationships should be avoided by mental health professionals at all costs. Role conflict in being both an evaluator as well as a treating clinician negatively impacts on a therapeutic relationship and within the forensic context, such conflict will lead to bias which inadvertently will affect the probative value of the forensic expert's evidence, making the search for truth more controversial and problematic. It is notable that the HPCSA recommends that treating clinicians should refer to other mental health professionals whenever their patients need a psycho-legal evaluation.⁵²

Towards a More Uniform Approach During Mental Capacity Proceedings: A Draft Ethical Code of Professional Conduct for Forensic Mental Health Professionals Serving as Expert Witnesses in Matters Relating to Criminal Responsibility

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 who are asserted to lack criminal capacity at the time of the commission of the offence and to provide an opinion as to the mental state of the individual at the time of the offence. As canvassed above, these mental health professionals face numerous ethical dilemmas which could arise during the course of the assessment process. To date, South Africa does not have an ethical code of conduct that specifically caters for mental health professionals conducting forensic assessments to assess an accused's mental capacity

where the defence of pathological criminal incapacity is raised. It is submitted that, in order to enhance uniformity and provide consistency, an ethical code of conduct should be adopted to cater for the specific needs of mental health professionals in cases where an accused's criminal capacity is in issue. The code could further provide assistance where the fitness of an accused to be tried is disputed.⁵³

Conclusion

This article provides an overview of the most significant ethical issues that could arise during mental capacity assessments. The latter was canvassed against the backdrop of the defence of pathological criminal incapacity within South African criminal law. One of the primary issues relates to the confidentiality of statements made by the accused during the assessment. Due to the complexity of the defence of pathological criminal incapacity, these statements may be pivotal in terms of assessing the accused's mental state. At the outset of the enquiry, accused persons should be informed that the normal principles pertaining to confidentiality do not apply to forensic assessments and the accused is under no obligation to divulge information. It is further important that mental health experts should strive to provide their opinion in an impartial manner without bias. Mental health experts should refrain from assuming dual relationships as treater and evaluator and accordingly a treating clinician should not act as a forensic expert witness and *vice versa*. A draft ethical code for mental health professionals could be a useful step in providing guidelines for mental health professionals acting as expert witnesses.

Adhering to these ethical principles during mental health capacity assessments will ensure that such assessments are conducted within an ethical climate, ultimately strengthening the probative value of expert evidence provided by mental health professionals.

Disclosure Statement

No potential conflict of interest was reported by the author.

Notes

1. T Berger, as quoted in RG Meyer, ER Landis and JR Hays, *Law for the Psychotherapist* (W.W. Norton and Co., 1988) 220.
2. Hereinafter referred to as the 'CPA'. CR Snyman, *Criminal Law* (6th edn, LexisNexis, South Africa 2014) 164–75; CR Snyman, *Strafreg* (6th edn, LexisNexis, South Africa 2012) 167–84; J Burchell and J Milton, *Principles of Criminal Law* (3rd edn, Juta, South Africa 2005) 348–60; SZ Kaliski, *Psycholegal Assessment in South Africa* (OUP, South Africa 2006) 93–110, 237–49; C Tredoux et al, *Psychology and Law* (Juta, South Africa 2005) 384–410; SA Strauss, *Doctor, Patient and the Law: A Selection of Practical Issues* (3rd edn, Van Schaik, South Africa 1991) 121–35; Du Toit et al, *Commentary on the Criminal Procedure Act* (Juta, Durbanville, South Africa 2012) 13–1–13–30; AA Landman and WJ Landman, *A Practitioner's Guide to the Mental Health Care Act* (Juta 2014) 143–68; PHJ Van Rensburg, J Verschoor and JL Snyman, 'Psigiatriese en juridiese aspekte van die begrip geestesongesteldheid' (1983) 8 *Juridical Sciences* 162–71; FFW Van Oosten, 'The Insanity Defence: Its Place and Role in the Criminal Law' (1990) 3 *South African Journal of Criminal Justice* 1–9; J Plomp, 'Die psigiater en die vasstelling van toerekeningsvatbaarheid' (1983) 8 *Journal of Juridical Sciences* 154–61.
3. Landman and Landman (n 2) 153; Du Toit et al (n 2) 13–31.
4. Section 78(1) of the Act reads as follows: '78 Mental illness or mental defect and criminal responsibility: (1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable – (a) of appreciating the wrongfulness of his or her act or omission; or (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission'.
5. Snyman (n 2) 170; Burchell and Milton (n 2) 373; Van Oosten (n 2) 1–9; Du Toit et al (n 2) 13–18.
6. Snyman (n 2) 171.
7. Snyman (n 2) 171.
8. Snyman (n 2) 172; Burchell and Milton (n 2) 377.
9. Snyman (n 2) 173; Burchell and Milton (n 2) 380–81; Du Toit et al (n 2) 13–14. See also Landman and Landman (n 2) 143–66.
10. Snyman (n 2) 173; Burchell and Milton (n 2) 381.
11. See, for example, *S v Kavin* 1978 2 SA 371 (W); *S v McBride* 1979 4 SA 313 (W).
12. R Slovenko, 'The Meaning of Mental Illness in Criminal Responsibility' (1984) 5 *The Journal of Legal Medicine* 1–4.
13. Section 79(7) of the CPA.
14. Section 14(d) of the Constitution of the Republic of South Africa, 1996. Hereinafter referred to as the 'Constitution'.
15. *S v Forbes and Another* 1970 (2) SA 594 (C). See also Du Toit et al (n 2) 13–30.
16. At [595] H–I.
17. At [596] D.
18. At [599] A–C.
19. At [599] A–C.
20. At [600] A–B.
21. At [599] A.
22. 1971 (2) SA 340 (T). See specifically 341 C–D.
23. 1971 (2) SA 340 (T).
24. At [341] E–G.
25. At [341] H–342 F.
26. At [342] F–G.
27. See T Zabow, 'Psycho-Legal Assessment in South Africa' in Kaliski (n 2) 342–55; PA Carstens and D Pearmain, *Foundational Principles of South African Medical Law* (LexisNexis 2007) 943–52; LH Strassburger, TG Gutheil and A Brodsky, 'On Wearing Two Hats: Role Conflict in Serving as Both Psychotherapist and Expert Witness' (1997) *American Journal of Psychiatry* 451; See also R Slovenko, *Psychotherapy, Confidentiality and Privileged Communication* (C.C. Thomas 1966) 18–20, 53–92; RI Simon, *Clinical Psychiatry and the Law* (American Psychiatric Press 1987) 132–61. Section 14 of the Constitution as stated in chapters 2 and 3 provides that everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed. It is further interesting to note that the ethical guidelines of the HPCSA pertaining to 'Confidentiality: Protecting and Providing Information' 30 May 2007 provides that a practitioner may only divulge information regarding patients amongst others if it is done in terms of statutory provisions; at the

- instruction of the court; in the public interest; or with the express consent of the patient. The guidelines further provide that patients have the right to expect that information regarding them will be held in confidence by health care practitioners (4.1).
28. T Zabow and S Kaliski, 'Ethical Considerations' in Kaliski (n 2). It is notable that the Promotion of Access to Information Act 2 of 2000 defines 'personal information' as: 'information about an identifiable individual, including, but not limited to – (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual'. It is further stated in section 7 of the Act that the provisions of the Act do not apply to records required for criminal or civil proceedings after the commencement of the proceedings. Section 7 provides as follows: '(1) This Act does not apply to a record of a public body or a private body if – (a) that record is requested for the purpose of criminal or civil proceedings; (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law. (2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice'. Accordingly, within a criminal proceeding where the defence of criminal incapacity is raised, the Promotion of Access to Information Act, 2000 will not apply in respect of records requested provided that the proceedings have commenced.
 29. Zabow and Kaliski (n 28) 374. See also R Slovenko, *Psychotherapy and Confidentiality: Testimonial Privileged Communication, Breach of Confidentiality and Reporting Duties* (C.C. Thomas 1998) 154–55 where he states: 'In the case of a defendant who asserts a defense of insanity ... the prevailing law is that he cannot claim possible self-incrimination with respect to psychiatric evidence, be it by a treating or examining psychiatrist.... By pleading and offering evidence of insanity, the accused puts his mental state in issue, and thus waives any psychotherapist-patient privilege; his medical or psychiatric history is open to the prosecution'; DL Shapiro, *Forensic Psychological Assessment: An Integrative Approach* (Allyn and Bacon 1991) 202–203; TG Gutheil, 'Psychiatric Expert Witnesses in the New Millennium' (2006) *Psychiatric Clin North America* 829–30; GH Gudjonsson and LRC Howard, *Forensic Psychology: A Guide to Practice* (Routledge 1998) 48.
 30. Zabow and Kaliski (n 28) 374. See also T Zabow, 'Forensic Psychiatry' in MA Dada and DJ McQuoid-Mason (eds), *Introduction to Medico-Legal Practice* (LexisNexis 2001) 111.
 31. See S Kaliski, A Allan and L Meintjies-Van der Walt, 'Writing a Psycholegal Report' in Kaliski (n 2) 339. It is interesting to note that Regulation 41(1) of the General Regulations made by the Minister of Health Care Act 17 of 2002 states that when a person is referred to a health establishment by a court of law in terms of section 79 of the CPA for observation, he or she must be informed that a report will be compiled and submitted to the court by a mental health professional and that he or she is under no obligation to disclose information. See Du Toit et al (n 2) 13–30.
 32. Slovenko, *Psychotherapy and Confidentiality* (n 29) 537.
 33. A Allan and L Meintjies-Van der Walt, 'Expert Evidence' in Kaliski (n 2) 353; A Memon, A Vrij and R Bull, *Psychology and Law: Truthfulness, Accuracy and Credibility* (Wiley 2003) 178; L Meintjies-Van der Walt, 'Expert Evidence and the Right to a Fair Trial: A Comparative Perspective' (2001) *South African Journal of Human Rights* 134–36.
 34. BL Diamond, 'The Psychiatric Expert Witness: Honest Advocate or "Hired Gun"?' in R Rosner and R Weinstock (eds), *Ethical Practice in Psychiatry and the Law* (Springer 1990) 76–77. See also HC Weinstein, 'The Impartial Expert: Myth or Reality' in Rosner and Weinstock (eds) 117–28; R Slovenko, 'The Role of the (Psychiatric) Expert in the Judicial Process' in Rosner and Weinstock (eds) 85–105 specifically at 86 where it is noted: 'Quite often, lawyers crudely accuse their opponents of "buying" experts, and call them "hired guns". Actually there is nothing unethical about hiring those with favorable opinions, as long as the lawyers do not ask the expert to fabricate or falsify'. See also R Slovenko, 'The Lawyer and the Forensic

- Expert: Boundaries of Ethical Practice' (1987) Behavioral Sciences and Law 119.
35. Allan and Meintjies-Van der Walt (n 33) 353–54.
36. Meintjies-Van der Walt (n 33) 136. See also A Wolmarans, 'Die sielkundige as deskundige getuie in strafsake' (Unpublished LLM dissertation, University of Johannesburg 1986) 7–18 and 62, where it is noted that some motivating or causal factors towards biased experts are the fact that the expert would not be in the witness box if he or she did not support their side's view; the instructions received could have been one-sided or incomplete; the expert's own preparations could have been superficial; the nature of the legal process often renders it impossible to provide a scientific and objective opinion; the atmosphere in court is often unsound and distressing; inadequate knowledge can often lead to unconscious bias.
37. Allan and Meintjies-Van der Walt (n 33) 354; Meintjies-Van der Walt (n 33) 136. See also Memon, Vrij and Bull (n 33) 178 where it is noted that during a survey conducted pertaining to the effectiveness of expert testimony, it was revealed that experts who were highly paid for their testimony were viewed by jurors as 'hired guns' and were held less credible and effective. The moderately paid expert from a less well-known institution was deemed as someone who was testifying merely as a result of his expertise in a particular area. See also MS Gutmacher, *The Role of Psychiatry in Law* (C.C. Thomas 1968) 87–91.
38. Diamond (n 34) 81–83.
39. Diamond (n 34) 83.
40. Diamond (n 34) 84.
41. Zabow and Kaliski (n 28) 361. See also the 'Rules of Conduct Pertaining Specifically to the Profession of Psychology' as contained in the 'Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act' 1974 GNR 717 of 4 August 2006 at [71] which reads as follows: 'Conflicting roles – (1) A psychologist shall avoid performing multiple and potentially conflicting roles in psycho-legal matters'.
42. Strassburger, Gutheil and Brodsky (n 27) 448–56, 451. See also TW Campbell, 'Psychotherapy with Children of Divorce: The Pitfalls of Triangulated Relationships' (1992) *Psychotherapy* 646–52, where it is noted that often therapists find it difficult to competently evaluate their clients, as the therapeutic alliance between the client and therapist reduces the therapist's objectivity. Conversely, evaluators will find it problematic to act therapeutically to the subjects of their evaluations. (As discussed in R Slovenko, 'On a Therapist Serving as Expert Witness' (2002) *Journal of American Academy of Psychiatry* 10–13, 10).
43. Strassburger, Gutheil and Brodsky (n 27) 450–53. See also AA Stone, 'Revisiting the Parable: Truth Without Consequences' (1994) *International Journal of Law and Psychiatry* 79–97; PS Appelbaum, 'The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm' (1990) *International Journal of Law and Psychiatry* 249–59; JR Rappeport, 'Differences Between Forensic and General Psychiatrists' (1982) *American Journal of Psychiatry* 331–34.
44. Strassburger, Gutheil and Brodsky (n 27) 450–53.
45. RD Miller, 'Ethical Issues Involved in the Dual Role of Treater and Evaluator' in Rosner and Weinstock (n 34) 132.
46. Miller (n 45) 132.
47. Miller (n 45) 132.
48. Miller (n 45) 132.
49. Slovenko, *Psychotherapy and Confidentiality* (n 29) 527.
50. R Slovenko, *Psychiatry in Law/Law in Psychiatry* (Brunner-Routledge 2002) 8–9. See also Allan and Meintjies-Van der Walt (n 33) 355; Zabow and Kaliski (n 28) 361. See also Shapiro (n 29) at 235 where the problem of dual relationships is encapsulated as follows: 'From the point of view of professional ethics, an important point to be made is that one cannot be an effective therapist, in terms of helping the patient deal with his or her difficulties, if one has also been involved in doing a comprehensive forensic evaluation of that individual if one has done a comprehensive assessment, interviewed many witnesses, reviewed many reports, and assessed the possibilities of malingering or secondary gain, then one in a sense "knows too much" to be of assistance to the patient and to maintain the "free-floating attention" necessary to truly help that patient unravel his or her personal difficulties'.
51. Strassburger, Gutheil and Brodsky (n 27) 455. See also Appelbaum (n 43) 258.
52. Allan and Meintjies-Van der Walt (n 33) 355.
53. Competency to stand trial is another area where the input of mental health professionals is pivotal. It is regulated in terms of section 77 of the CPA.