Forensic Mental Health: From Assessment to Recovery

Expert Testimony

Chapter 7

Expert Testimony: Jack's in the Box!

> *"A scene from an old movie revealed an ordeal in which a prisoner had to walk balancing on a thick hawser with threatening swords on both sides, while servants beat him with knotted towels; yes, expert testimony is like that". - Gutheil (2009)*

Sean Kaliski

Whether expected or not, a summons to appear in court, or any hearing, can arouse dismay and panic. There are some, supremely confident in their ability to dazzle the legal brains that eagerly await their testimony, who seemingly sail through the tempests of cross-examination and leave satisfied they have slain the foe. Do not succumb to the "Star-Witness Fantasy" (Brodsky, 1995)[1]. For the rest of us, regardless of our experience and knowledge, it is crucial to heed the accumulated wisdom of the forensic gods, as summarised below.

As always there are a couple of important caveats. Firstly, there are almost no empirical data on whether or how psychiatric testimony influences the outcomes of cases, such as the determination of guilt or the types of sanctions that are imposed on a defendant (Van Es et al., 2020, Diamond, 1994a, Gutheil, 2006)[2]. Another troublesome weakness is that there is practically no peer review of experts' testimonies[3] . The courts usually cannot sort the chaff from the wheat, especially if the testimony is mostly chaff[4]. Unsurprisingly mental health experts are mostly perceived to be "hired guns" who sell their testimony instead of their time (Gutheil, 2023). Many parties to a dispute, especially if they are themselves mental health professionals, express outrage at the performance of "hired guns". Thus, Hagen (1997) has written

> *"Psychology's takeover of our legal system represents not an advance into new but clearly charted areas of science but a terrifying retreat into mysticism and romanticism, a massive suspension of disbelief propelled by powerful propaganda" p.4*

[1] Robert Simon's quote that "The expert witness is a hood ornament on the vehicle of litigation, not the engine" is an excellent guiding aphorism (Gutheil, 2009).
[2] The few studies that have tried to investigate how juries are influenced have been conducted using college students in mock trials. Juries are not used in South Africa, and it is not clear what impact forensic mental health testimony has on judges and magistrates.
[3] The American Association of Psychiatry and the Law (AAPL) now offers expert peer review by examining court transcripts of their testimony. This is a voluntary service mostly aimed at inexperienced experts.
[4] A polite form of bullshit.

This chapter follows the journey from pre-trial preparation to the final farewell and exit from the court.

Pre-trial Preparation

There are various categories of witnesses (Allan and Meintjies-Van der Walt, 2006):

- "Witnesses of fact" who provide testimony based on their direct sensory perceptions. Their opinions are almost never canvassed.

- "Expert witnesses" who are not restricted solely by their own perceptions. Courts rely on these when they need facts and opinions that is beyond their knowledge or expertise[5]. Experts can be used in many guises, namely:

    - "Treatment experts" who generally only testify about their assessment and treatment of patients.

    - "Forensic experts" whose opinions based on facts are needed for the court to rule on an ultimate issue, by providing information and understanding relevant to the case in hand (Gutheil, 2009). This can be accomplished either consequent to assessing one (or more) of the involved parties, or by providing guidance to counsel either during the preparation of the case or by sitting in court to assist with cross-examination of other witnesses.

Hypothetically it is possible that an expert could be summoned to fulfil all of the above. For example, a patient under the clinician's care commits a violent act in her presence. She may have to testify what she saw, provide details about her treatment, provide expert testimony about the patient's competence, as well as a risk assessment for future violence. Nonetheless, practitioners should avoid assuming these roles simultaneously because of their obvious conflicts of interest. Preferably an independent expert should deal with the forensic issues (Allan and Meintjies-Van der Walt, 2006).

Having sorted out her role in the proceedings the expert should reflect on who is retaining her services. A myth that regardless who has engaged the witness she nonetheless is a witness for the court and consequently can be regarded as being impartial is firmly embedded in our system. All too

[5] Conversely the courts do not need experts to assist in evaluating ordinary folk who are not mentally ill or psychologically disturbed. The test is whether the evidence/issues fall "within the common knowledge of the courts" (R v Turner (1975) 1 QB 834).

frequently the expert is generously paid by one of the parties, whom the expert supports. Not uncommonly these experts are embedded in the legal team that involves discussions of strategy and sometimes includes invitations to share meals and breaks. Some experts are blatant "hired guns" who regularly appear for the same legal firms (Allan and Meintjies-Van der Walt, 2006, Brodsky, 1995, Diamond, 1994a). In other adversarial court systems, such as in the USA, it is expected that the retained expert belongs to the retaining side, and that the other side will try impeach their testimony fairly as long as the expert tells the truth. In our system obvious "hired guns" try to deny their partisanship by insisting that they are just witnesses for the court. Surprisingly our courts seem to accept this.

A checklist before sallying forth into the courtroom:

- Ensure that the evidence required falls within your scope of practice, expertise and experience. Numerous examples of expert hubris have occurred, such as the psychiatrist who pronounced on a postmortem report as well as the significance of dents in a doorpost, a psychoanalyst who ventured opinions on neurocognitive impairment, etc.

- If your involvement in the proceedings is not formalised by your employment contract or job description then negotiate the ambit of your contribution as well as the fee with the retaining counsel[6]. There do not seem to be precedents in SA governing any recourse should the retaining lawyer not pay. In the USA Gutheil (2009) has noted that legal boards tend to regard this as a breach of contract and not of an ethical obligation.

- Optimally all parties should have been given your final report. It is not advisable to have submitted a draft report beforehand, especially if it differs significantly from the final report.

- Do not be overconfident that your assessment and gathering of information, sometimes called "data", were adequately thorough. Even though reports are distillations of a much larger body of data there is always a possibility that new information could be introduced during the hearing that may impeach your conclusions.

- Try commit as much as possible of the data to memory, so that you mostly need to refer to the clinical notes occasionally. This reinforces the impression that the expert is what the label implies.

[6] At the AAPL conference in Vancouver in 2000 the keynote speaker, Tom Gutheil, memorably asked how many in the audience had ever been stiffed by lawyers. Almost every hand shot up.

- If inexperienced, familiarise yourself with court layout and procedure. Sometimes a senior colleague could assist, or allow you to accompany her when she testifies. Or practice your testimony with a senior colleague. It may be important to learn about the legal counsel and judges who will officiate. For example, not all judges will laugh heartily at your witticisms, and some opposing counsel can be intimidating.

- Meet with counsel before testifying. Not only is this an opportunity to explore the avenues of questioning that will direct your testimony but, crucially, to discuss the strengths as well as weaknesses in the report (and assessment).
- Review the current literature on the topic or issues about which you will testify, as there are clever lawyers who are familiar with current research and opinions.

(Allan and Meintjies-Van der Walt, 2006, Gutheil, 2009, Diamond, 1994b, Brodsky, 1995, MacDonald, 1976)

In the Box

Court etiquette

Some of the once many rules about how to appear and behave in court remain despite the trend to make proceedings less formal because, vitally, all participants must display respect and awe for the legal system.

Dress

A few decades ago a psychiatrist entered the witness box wearing a bright floral open necked shirt and baggy pants. Before he could be sworn in the judge announced that he "could not see the witness". Counsel whispered to the witness that he was expected to wear a suit and tie, and therefore could not testify. Rules for dress have relaxed, but the expert is still expected to appear professionally attired and should avoid dramatic or eccentric wear.

Entering and Leaving the Courtroom

If the court is in session, all entering must bow to the bench (i.e. presiding officer/judge/magistrate), and do likewise when exiting. You may arrive in the judge's absence. This is sometimes an opportunity to be introduced to opposing counsel and to do final checks with retaining counsel. The orderly orders all to stand as the judge (or magistrate) enters. Sometimes the expert is allowed to sit in the court (or with retaining counsel) until called to testify. The court or counsel may insist the expert remain outside until called to prevent undue influence from listening to other witnesses. But

retaining counsel may insist on the expert's presence to assist with cross-examination of a witness or to hear important testimony.

Called to the stand

Judges are addressed as "M'Lord or M'Lady" and magistrates as "Your Worship".[7]. The magistrate or clerk of the court (in the High Court) swears the witness in by intoning "Raise your right hand and swear to tell the truth and nothing but the whole truth. Say so help me God!".[8].

Confirmation of credentials

The retaining counsel should establish for the record the expert's qualifications and experience. Occasionally it may be necessary to hand in the expert's resume for the record. Merely being a mental health practitioner does not automatically make her the requisite expert. Following this it is customary to ask how the evaluation was conducted. This would include describing contributions made by other colleagues in a multidisciplinary team, source documents and for how long interviews were conducted.

Evidence-in-chief

This is the retaining counsel's cue to invite the expert to read out (and therefore submit) her report to the court. Subsequent questioning should clarify or expand on issues in the report, or to add information that may be important in assisting the court.

Cross-examination

The opposing side's counsel can now impeach the expert by questioning her credentials and conduct of the assessment. What usually follows is a detailed interrogation about aspects of the submitted report. This is the juncture when the expert may regret having composed a longwinded account with opinions (and facts) that cannot be convincingly substantiated. Sometimes counsel can intimidate the witness aggressively or beguile her with politeness and respect. Some questions may be asked repeatedly with subtle differences. Overall, the intention is to lure the expert into undermining her opinion or be provoked into an inappropriate response, such as by eliciting exasperation or overt anger. Th retaining counsel can protest to the court about the tone and line of questioning pursued

[7] In the USA judges are addressed as "Your Honor". It may be necessary to check GoogleMaps to confirm where you are before addressing the presiding officer.

[8] There is a (probably apocryphal) account of the plaintiff who was being sworn in for divorce proceedings. When asked to say, "So help me God" she responded with "I do". The judge corrected her by pointing out that when one marries one says, "I do", but when divorcing she must say "So help me God".

by the opposition. But the nature of our adversarial system does give considerable leeway for aggressive questioning.

After the cross-examination, which can be centuries long, the judge (or magistrate) invites the retaining side an opportunity to re-examine the expert. This enables the retaining counsel to rectify points of contention that the opposing side elicited or to expand further on other issues. Thereafter the judge may allow the opposition another opportunity to counter this. After this toing-and-froing the judge (or magistrate) may also have questions.

How is the expert's testimony evaluated?

In South Africa there are no standards or benchmarks for determining the validity of expert opinions, and where experts differ markedly in their opinions the judge will be the arbiter (Allan and Meintjies-Van der Walt, 2006)[9]. All too frequently experts will insist that stating "in my experience" is good enough. Nor is it always acceptable to claim that her opinions conform to a consensus in her field[10]. A landmark case in the USA, *Daubert v Dow Pharmaceuticals*, laid down the following requirements:

1. *Is the theory or technique at issue testable, and has it been tested?*
2. *Has the theory or technique been subjected to peer review and publication?*
3. *In the case of scientific techniques, what is the known or potential error rate?*
4. *"General acceptance", namely, a technique that is known but not widely known should be regarded with scepticism.*

Psychiatry falls woefully short of the above (Zonana, 1994). Not only is there poor scientific validation for most psychiatric opinion but experts often use diagnostic labels that are not in DSM, such as psychopathy, "battered woman's syndrome" and "parental alienation syndrome". Even if results from large studies are quoted the court will insist on how that refers to the accused or defendant. Extrapolating findings derived from groups to particular individuals is an ongoing controversy (Faigman et al., 2014). The best the expert can offer is that his evidence is based on clinical judgement and some science and therefore constitutes "reasonable medical certainty". In the absence of peer review of testimony, the opposing side can only impeach the expert's opinions with those of their own and hope the court can reach a rational decision. But it does make the mental health expert vulnerable to rejection with ridicule. This is not as far-fetched as it seems;

[9] The authors rely on dictum in Botha vs Minister of Transport 1956(4) SA 375 (W)

[10] How does one substantiate consensus? There are many published guidelines on good practice that may not have adequate empirical evidence but can be used. Unfortunately, guidelines can contradict each other.

consider a Jungian psychotherapist testifying that the accused is not to blame but rather his shadow that conspired with an archetype, or a psychoanalyst who blames the accused's id for overwhelming his defenceless ego.

Bidding the court farewell

The witness can only leave the court when expressly "excused" by the presiding officer. No final speeches or insights can thereafter be offered, nor should she chat to counsel as she trudges out. Whether demoralised, angry or glowing with a job well done, she must pause before the door, take a final bow and "exit with dignity and grace" (Brodsky, 1995, Gutheil, 2023)[11].

Some experts keep a "win-loss" tally of their cases. This is unprofessional and potentially not good for one's mindset.

Some helpful tips

1. Aim to be clear, succinct and concise. Use plain language and avoid too many technical terms and acronyms. If used, they should be defined and explained simply. Undue loquacity can furnish counsel with openings to entangle you in side issues and unwittingly discredit your testimony (MacDonald, 1976). Verbosity, vague and indeterminate responses which Gutheil (2009) calls "major waffle" is usually perceived as a sign of incompetence or poor preparation.

2. Vary the loudness of your speech, speak relatively slowly (the judge/magistrate cannot write quickly), and personalize the testimony to tell a story. Do not irritate the court by repeating stock phrases and use humour gently and sparingly. Being jokey undermines one's gravitas. As Brodsky (1995) puts it *"credibility can vaporise with the speed of cheap perfume*" (p.185).

3. Do not express opinions on ultimate issues, unless asked, and if you do ensure that you have adequate grounds. Be careful if asked to assess the credibility of other witnesses, as it may transgress professional boundaries (Allan and Meintjies-Van der Walt, 2006, Brodsky, 1995).

4. Beware of long questions and provocations, even if personally abusive. Instead of losing your temper or appearing ruffled remain calm and either ask for the question to be reframed or state "I do not know". Gutheil and Simon (2005) advise the expert, especially during cross-examination in high profile cases, not to engage in exhibitionism or in rapid fire

[11] Occasionally the expert will be asked to remain in court to hear other testimony either to be able to be recalled for further comments or to assist counsel. This is rare.

duels, which they label as “Narcissistic Excitement”. It follows that one should avoid succumbing to narcissistic injuries and rages and ideally should be an “egoless witness”.

5. During cross-examination passages or quotes from journals and books can be produced for comment. If these are unfamiliar the expert can request an adjournment to read the extracts in their full context. Even so, one can argue that texts provide general principles that do not apply in this particular case (MacDonald, 1976). Do not change your professional opinion unless new information is produced. Nevertheless, be careful not to appear dogmatic or overly adversarial (Brodsky, 1995).

6. If you make an obvious error, try rectifying it as soon as possible, and if you cannot move onto the next issue. Unfortunately, it does make a poor impression if the expert appears flustered and pages frantically through his notes. Cross-examination is often conducted over a long time during which questions are repeated, sometimes in different but beguiling forms, for example by using double negatives, quoting experts who were not involved in the case or asking about general unrelated issues in psychiatry/psychology, as a ploy to eliciting a mistake or unwittingly contradict themselves. Stay calm and focussed.

7. Keep in mind that by remaining calm and assured when the cross-examiner is aggressive, the lawyer, to quote Gutheil (2009) “..is perpetrating suicide, not homicide” (p81).

Ethical issues

The courts are dangerous places, where private matters are aired in public spaces. Experts must be mindful of their dual loyalties, to the community (as mediated through the courts) and to the person of interest (Kaliski, 2015). The former demands the truth while the latter needs protection. Consequently, clinicians should not provide forensic testimony on their own patients as it could damage their therapeutic alliance, particularly if the obligation to provide confidentiality must be breached (Gutheil, 2009). Some experts are “hired guns”, and some allow their own beliefs, morality and pet theories to influence their opinions. As Allan and Meintjies-Van der Walt (2006) note “..*a court is not a place for missionaries, nor is it their role to win the case..nor is the court a laboratory, an academic debating arena or the place for experts to promote themselves or their beliefs*” (p.354).

The obligation to tell the truth also applies when the expert cannot support the retainer’s case. Either one should be clear about the limits of their testimony or should not accept the brief. The expert should not offer to provide therapy for the defendant in court. This may occur when one

identifies closely with retaining counsel's aims. Sometimes this is enhanced by "nonsexual seduction" whereby the lawyer lavishes praise and takes the expert out for meals (Gutheil, 2009). Our adversarial system unwittingly promotes unethical behaviour. Gutheil (2006) has proposed that experts should be retained by the court to participate in an inquisitorial system whereby both sides cooperate to move away from a guilt-based process to a restorative paradigm in which transgressions possibly can avoid harsh penalties. More discussion on this is required.

Finally, what about testimony that is delivered by Skype or Zoom? Potentially allowing experts to testify remotely may reduce costs and be more flexible, but the courts could lose control when it is not known who is with the expert but out of sight, and by reducing opportunities to read nonverbal signals.

Conclusion

It is healthy to harbour trepidation about appearing in court. Many leave the courtroom resolutely determined never to return. Others, who must testify again and again, will gain confidence if they learn and master many of the above principles with each iteration of their time in the box.

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