

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

1 Introduction

Proposing reform where inexact sciences such as law and medicine intersect is no easy task. Where the two oceans of law and medicine meet the defence of criminal incapacity falls to be assessed. Harmonising the “stormy waters” between these two professions in order to promote a more coherent application of the defence of criminal incapacity will inadvertently call for a reassessment of aspects pertaining to the formulation of the defence of criminal incapacity with specific reference to the necessity for expert evidence; the foundational principles of the rules relating to expert evidence; and the conduct of mental health professionals acting as expert witnesses in support of the defence of criminal incapacity.

The motivation for the current study is premised on the various obstacles facing the proper application of the presentation and assessment of expert forensic psychiatric and psychological evidence advanced in support of the defence of criminal incapacity. One of the cornerstones to a fair and just trial pertains to the right to adduce and challenge evidence. The latter further extends to the right to present and challenge expert evidence. Law and medicine are both sciences constantly evolving with due regard to changing values and needs of our modern society.

It was not too long ago that mental health professionals played a somewhat peripheral role in the criminal justice system. Today, mental health professionals play a vital and essential role in our criminal justice system with specific reference to the assessment of the defence of criminal incapacity. Mental health professionals do not only play a pivotal role in evaluating the intrinsic inner being and human mind or psyche of an accused, but in addition thereto fulfil an indispensable function in portraying the inner being to the ultimate trier of fact as credibly and comprehensibly as possible. The striking reality is, however, that the latter

goals are frequently not achieved.

The defence of criminal incapacity constitutes the centre stage where law and medicine meet and also where these two professions ultimately clash. In the ultimate search for truth and justice when the defence of criminal incapacity is raised as a defence, it is pivotal to enumerate some form of consensus between these two professions. The defence of criminal incapacity is probably one of the most underscored defences in our current criminal justice system and is often underestimated and misunderstood.

Research clearly indicates that despite scepticism, criticism and caution levelled towards the presentation of expert evidence in support of the defence of non-pathological criminal incapacity, it can severely prejudice an accused if adequate expert testimony is not advanced on behalf of the accused in order to canvass the mental state of an accused at the time of the offence.

A phenomenon often encountered within the realm of the defence of non-pathological criminal incapacity is the “battered woman syndrome”. Battered woman syndrome evidence advanced in support of a defence of non-pathological criminal incapacity is often underscored due to the overarching negativity towards expert evidence advanced in support of the defence of non-pathological criminal incapacity. Abuse against partners within intimate relationships is a common phenomenon of our society in modern times. Research indicates that abuse nowadays encompasses far more than merely physical abuse. In addition psychiatric and psychological advances within the context of abuse within intimate relationships have developed enormously, encompassing a vast amount of theories and explanations for abuse falling beyond the knowledge of the trier of fact.

The latter exacerbates the fundamental need for effective expert testimony albeit that the state of criminal incapacity falls within the “non-pathological” category. One of the most prevalent anomalies associated with the role of expert evidence in support of the defence of criminal incapacity relates to

the constant categorisation of a mental state either in the “non-pathological” or “pathological” boxes. Research indicates that this distinction creates confusion and places distrust in the medical testimony advanced in support of criminal incapacity. The fact remains that in the absence of a body of expert evidence in support of a defence of criminal incapacity, a court is left with merely the *ipse dixit* of an accused. The latter could be prejudicial for both the prosecution as well as the defence as without well advanced expert testimony, the prosecution will face a struggle in rebutting a malingered claim of criminal incapacity by an accused, whilst on the other hand an accused could be severely prejudiced if his or her true mental state at the time of the offence is not portrayed to the trier of fact from an expert’s point of view after a proper assessment.

The Diagnostic and Statistical Manual of Mental Disorders¹ forms the cornerstone of the diagnostic framework from which mental health professionals deduct their diagnoses of mental disorders in cases where criminal incapacity and specifically pathological criminal incapacity is raised as a defence. However, despite the essential importance of the DSM-IV for defining “mental illness” and/or “mental defect” as threshold requirements for the defence of pathological criminal incapacity, law and medicine most frequently diverge as to whether a diagnosis in terms of the manual meets the legal test for criminal incapacity. The puzzle of criminal incapacity can, however, not be completed without the correct piece from the manual, yet more often than not this piece cannot be found. The fundamental conflict between the professions of law and medicine in respect of the concept of mental illness could be traced to a lack of understanding on both sides of the respective goals, aspirations and limitations of each profession respectively. Law and medicine are both inexact sciences in a constant state of flux. As such proper recognition should be afforded to advancements made within the fields of forensic psychiatry and psychology with a concomitant appreciation of its

¹ American Psychiatric Association “Diagnostic and Statistical Manual of Mental Disorders” (DSM-IV-TR) (2000) as discussed in Chapter 3 paragraph 7 *supra* (“DSM-IV”).

contribution to the defence of criminal incapacity. Simultaneously the medical profession should also adhere to the boundaries of its profession and the knowledge associated therewith.

The assessment of the probative value, reliability and validity of expert evidence is yet another obstacle in achieving a more coherent and systematic approach to the assessment of the defence of criminal incapacity. Research indicated that a lack of systemised criteria to be utilised as a benchmark in the assessment of the reliability and validity of expert opinion renders the value attached to such opinion problematic, inadvertently resulting in the well-known dilemma of the “battle of the experts”.

A proper distinction is often not affected between the professions of psychiatry and psychology on the one hand, and forensic psychiatry and forensic psychology as specialist fields, on the other hand. The Criminal Procedure Act² in its current form does not make mention of the specific specialist fields of forensic psychiatry and forensic psychology. Without proper recognition of the specific areas of expertise required in support of the defence of criminal incapacity such evidence will inextricably lose probative value. The essential need for expert evidence in support of the defence of criminal incapacity is thus inextricably linked with the need to obtain the correct and most appropriate expert evidence. The latter is further prevalent in the light of the multifarious ethical dilemmas mental health professionals entering the forensic arena are confronted with. Forensic psychiatry and psychology are two of the least understood sub-specialties within the medical profession. The latter inadvertently exacerbates the conflict between law and medicine in the assessment of the defence of criminal incapacity. As a result of the continuous development of the scientific discourses of law and medicine, the languages spoken by the two professions respectively, differ increasingly. The translation of these languages is complicated by the lack of comprehension on both

² The Criminal Procedure Act 51 of 1977.

sides pertaining to what precisely is expected of each profession in the ultimate analysis and assessment of the defences of criminal incapacity. Triers of fact are often confused in respect of the opinions proffered by mental health professionals and in addition thereto, the exact meaning to be ascribed to a specific opinion. Specific terminology and explanations contained in an expert opinion is often not conveyed to the court in a clear and understandable manner, thus decreasing the probative value of the opinion. Mental health professionals on the other hand are often confused as to what the legal profession expects of them and where the boundaries of their expert opinions lie. The latter is further exacerbated by the “ultimate issue” doctrine barring ultimate conclusions pertaining to the mental state of accused persons at the time of the offence.

With the backdrop of the aforementioned as a starting point, the time has arrived for a reassessment of the role of expert evidence in support of the defence of criminal incapacity in order to promote a more consistent dialogue between the professions of law and medicine, thereby ensuring a more just and equitable application of the defence of criminal incapacity.

2 Synopsis

2.1 Chapter 1

In order to eliminate confusion in respect of specific terminology used during the course of this study and to provide an exposition of the author’s objectives and aim with the current research, Chapter 1 contained a clarification of key concepts of the theme of study. The title of this thesis, namely “the role of expert evidence in support of the defence of criminal incapacity” was nationally and thematically elucidated. As a result of the introduction and orientation a problem statement and hypothesis were presented in order to indicate the precise boundaries of the current study. In addition the central theoretical statement was formulated as follows:

“Mental health experts, and more specifically, forensic mental

health experts, play a pivotal and essentially crucial role in the assessment and proof of the merits and validity of the defence of criminal incapacity. There is a fundamental need for carefully trained specialists with a proper understanding of the mechanics of law, the sciences of psychology and psychiatry respectively and the complexities of human behaviour to assist the court in cases where the defence of criminal incapacity is raised. The role of the mental health expert in support of the defence of criminal incapacity is dual functional in the sense that it is in the first place pivotal to have the assistance of such an expert; and in the second place it is important that the expert be adequately trained and experienced in the particular field of mental health concerned.”

In the aftermath of the current study, the author can verify the abovementioned central theoretical statement. The current study further entails a theoretical descriptive and explorative research methodology aimed at assessing the fundamental role of expert evidence in support of the defence of criminal incapacity. In conclusion Chapter 1 provided an overview of the contextual framework enunciated in the consecutive chapters.

2.2 Chapter 2

The defence of non-pathological criminal incapacity is extensively assessed in Chapter 2 with specific reference to the role of expert evidence in support thereof. It is illustrated that the defence of non-pathological criminal incapacity is in need of reform. Possible developments of this defence against the backdrop of Section 39(2) of the Constitution by means of an indirect application of the Bill of Rights are suggested. It is indicated that legislative reform is essential to establish the defence of non-pathological criminal incapacity and to create legal certainty.

In addition it is illustrated that the probative value attached to and the application of expert evidence in respect of the defence of non-pathological criminal incapacity, has not been consistent. It is noted that the reason for such inconsistency lies in the fact that expert evidence is not a prerequisite in order to rely on the defence of non-pathological criminal incapacity as well as the common law rule entailing that expert evidence in cases of non-pathological criminal incapacity does not fulfil an indispensable function.

The author also illustrates the essential distinction between non-pathological criminal incapacity and sane automatism. The *onus* of proof is assessed with reference to the defence of non-pathological criminal incapacity and it is suggested that the *onus* of proof should fall on the accused. The role of the battered woman syndrome evidence advanced in support of the defence of non-pathological criminal incapacity is extensively assessed and disseminated against the backdrop of the psychosocial dynamics of abuse within intimate relationships and its impact with reference to the defence of non-pathological criminal incapacity. It is suggested that diminished non-pathological criminal incapacity should be provided for within the statutory framework of Section 78(7) of the Criminal Procedure Act.

2.3 Chapter 3

In Chapter 3 the fundamental and essential role of expert psychiatric and psychological evidence in support of an assessment of pathological criminal incapacity as a defence in criminal incapacity law is evaluated. The viability of the establishment of a fitness assessment unit is assessed and it is indicated that such unit could provide an alternative to referrals for observation as a more cost-effective and time-effective option as opposed to referrals for observation.

The conceptual analysis of the concepts of “mental illness” and/or “mental defect” as threshold requirements for the establishment of the defence of

pathological criminal incapacity is extensively assessed and it is indicated that the concepts of “mental illness” and/or “mental defect” represent one of the core areas where law and medicine do not see eye to eye. It is indicated that the DSM-IV plays a pivotal role in the definition and assessment of mental disorders as one of the main diagnostic references utilised by mental health professionals in order to diagnose an accused with a particular mental disorder or the identification of a specific mental disorder which was present at the time of the commission of the offence. Emphasis is placed on the fact that recognition of specific diagnostic categories of mental disorders within the contextual framework of the defence of pathological criminal incapacity is controversial and poses a challenge to the efficient application of the defence of pathological criminal incapacity. It is furthermore stressed that the reconciliation of diagnostic criteria with legal requirements for the defence of pathological criminal incapacity is problematic which concomitantly exacerbates the need for proper and efficient expert evidence to be advanced in such cases.

A thorough analysis of the role psychopathy plays in respect of the defence of pathological criminal incapacity is provided and it is noted that the diagnosis of psychopathy in conjunction with antisocial personality disorder remains controversial. The importance of expert psychiatric evidence in establishing extenuating circumstances in support of diminished criminal incapacity is illustrated.

The incorporation of two distinct pleas of incompetence to stand trial as well as criminal incapacity is addressed and it is indicated that such pleas could provide an alternative to the current position pertaining to competency to stand trial and criminal incapacity. The conclusion derived at is that mental health professionals fulfil an indispensable function in the assessment of competency to stand trial as well as the defence of pathological criminal incapacity. Proper judicial recognition of this fact remains crucial in the ultimate assessment of the defence of pathological criminal incapacity.

2.4 Chapter 4

In Chapter 4 the nature and scope of the basic rules of expert evidence as they would apply to mental health professionals acting as expert witnesses and accordingly testifying in support of the defence of criminal incapacity are addressed. Selected practical as well as ethical considerations relevant within the forensic context are also addressed. It is indicated that the rules of expert evidence play an essential role in respect of the role and probative value of expert evidence. It is suggested that these rules should be codified in a proper way so as to create legal certainty. The ultimate issue doctrine is extensively disseminated and it is concluded that such rule or doctrine is redundant and should be abolished. It is noted that expert evidence should be evaluated according to its relevance and not the alleged conclusory status of the opinion presented.

The assessment of the probative value of expert evidence is addressed and it is illustrated that such assessment remains a complex and intrinsic function of a court bearing upon various aspects, the most important of which are the expert's qualifications, credibility as a witness, the basis for the expert opinion and the probabilities of the case. The value of pre-trial consultations and disclosure is assessed and it is indicated that these procedures play a vital role in the assessment of expert evidence. It is emphasised that the cross-examination of expert witnesses within the adversarial climate constitutes a vital tool in order to challenge the veracity, credibility, reliability and probative value of expert evidence.

The following ethical conclusions are derived at in Chapter 4:

- Mental health professionals acting as expert witnesses should strive towards providing their opinions as impartial and unbiased as possible.
- Mental health experts should at all costs refrain from assuming dual relationships as treater and evaluator and as such treating clinicians

should not act as forensic expert witnesses and *vice versa* in cases where an assessment is requested for purposes of the defence of criminal incapacity.

- Mental health experts have an incumbent ethical duty of informing accused persons of the limitations pertaining to confidentiality within the context of the forensic assessment process.

It is indicated that the forensic report drafted and completed by the mental health professional also fulfils an integral part of the role of the mental health expert within the forensic context.

In conclusion a draft ethical code for mental health professionals acting as expert witnesses is provided.

2.5 Chapter 5

In Chapter 5 a comparative perspective is provided with reference to selected principles of expert evidence in the United States of America. An overview of the Federal Rules of Evidence is provided, with specific reference to the most important rules bearing upon opinion evidence and thus expert evidence. The scientific reliability and validity of expert psychiatric and psychological evidence are assessed against the backdrop of the influential decisions of *Daubert* and *Kumho*. It is illustrated that the Federal Rules of Evidence, and in particular the rules pertaining to relevance and expert opinion evidence, provide a template towards achieving a codified system in terms of the rules of expert evidence which could be a welcoming development in South Africa.

The ultimate issue rule as it stands in America is once again revisited and it is illustrated that despite the revival of the rule in the *Hinckley* aftermath³, research strongly indicates that the ultimate issue rule presents numerous obstacles in practice with a concomitant limitation of

³ See Chapter 5 *supra* paragraph 4.4.

the proper presentation and assessment of expert evidence.

It is illustrated that the assessment of scientific reliability and validity of expert medical evidence in support of the defence of criminal incapacity remains a complex and highly specialised task and as such the criteria enunciated in *Daubert* could provide assistance to the trier of fact during the course of assessing scientific reliability and validity.

In conclusion the ethical guidelines applicable to the professions of forensic psychiatry and psychology respectively are discussed in order to indicate the value of such guidelines for purposes of circumscribing the duties and responsibilities of these mental health professionals acting as expert witnesses.

3 Conclusions

Upon analysis of the research undertaken during the course of the current study, the following conclusions have been reached:

- In the light of the preceding literature study, the central theoretical statement is verified, namely that:
“Mental health experts, and more specifically, forensic mental health experts, play a pivotal and essentially crucial role in the assessment and proof of the merits and validity of the defence of criminal incapacity. There is a fundamental need for carefully trained specialists with a proper understanding of the mechanics of law, the sciences of psychology and psychiatry respectively, and the complexities of human behaviour to assist the court in cases where the defence of criminal incapacity is raised. The role of the mental health expert in support of the defence of criminal incapacity is dual functional in the sense that, firstly it is pivotal to have the assistance of such an expert and secondly it is important that the expert be

adequately trained and experienced in the particular field of mental health concerned.”

- Expert evidence forms an integral part of the fundamental right of an accused person to a fair and just trial encompassing the right to adduce and challenge evidence.
- Expert evidence plays an essential role in the assessment of the defence of criminal incapacity, albeit non–pathological criminal incapacity or pathological criminal incapacity.
- Negativity levelled at, as well as lack of adequate statutory recognition of, the defence of non–pathological criminal incapacity are considerations fundamentally linked to the inconsistent approach toward expert evidence in support of the defence of non–pathological criminal incapacity. The latter is exacerbated by the fact that expert evidence is not a prerequisite in order to rely on the defence of non–pathological criminal incapacity.
- The defence of non–pathological criminal incapacity constitutes one of the cornerstones of conflict between the medical and legal professions. The latter could be traced essentially to the inconsistent application of this defence and scepticism levelled at expert evidence advanced in support thereof.
- The fundamental misapprehension of the defence of non–pathological criminal incapacity and the concomitant inconsistent application of this defence, have given rise to controversial approaches in respect of battered woman syndrome evidence advanced in support of the defence of non–pathological criminal incapacity. The latter inadvertently results in the abused spouse or partner being left without a proper defence within the ambit of the criminal law due to falling in the middle of the dividing line between non–pathological and pathological criminal incapacity. The accused in such an instance will often be too “non–pathological” to rely on the defence of pathological criminal incapacity, yet at the same time not be able to satisfy the yardstick of the defence of non–pathological criminal incapacity as a result of scepticism,

controversy and ambiguity clouding such defence.

- Despite the statutory recognition of the defence of pathological criminal incapacity in conjunction with the statutory framework acknowledging expert evidence, the defence of pathological criminal incapacity more often than not represents a source of conflict between law and medicine. The latter could be traced to a lack of adequate training of mental health professionals testifying as expert witnesses in forensic psychiatry and psychology pivotal to the application and assessment of the defence of pathological criminal incapacity.
- The essential distinction between sane automatism and the defence of non-pathological criminal incapacity is often clouded and misunderstood, representing one of the main sources of conflict between mental health professionals and the law. The latter inadvertently affects the expert testimony advanced, as without a proper understanding of the specific defence raised, such expert testimony will lack probative value which in turn lessens the scientific reliability and validity of the expert opinion.
- The value of the expert opinion is founded on the knowledge, experience and training of the mental health expert. The latter factors will inherently influence the probative value, scientific reliability and validity of the expert opinion advanced in support of the defence of criminal incapacity.
- The sub-specialities of forensic psychiatry and forensic psychology are underscored in South Africa and in need of proper recognition as this will enhance the proper application of the defence of criminal incapacity.
- Expert evidence is essential not only in support of the defence of criminal incapacity, but also to aid in assessing the merits and validation of the defence with specific reference to the rebuttal of false claims of criminal incapacity.
- It is essential that both the prosecution and the defence retain their own expert witnesses as this provides a balanced view pertaining to

the defence of criminal incapacity.

- It is crucial that expert evidence advanced in support of the defence of criminal incapacity be causally connected to the facts of the case. In the absence of such causal *nexus*, the expert opinion will amount to nothing more than abstract theory.
- Mental health experts fulfil an essential role not only in support of the defence of criminal incapacity, but also in respect of the assessment of the competency to stand trial.
- The assessment of the scientific reliability and validity of expert psychiatric and psychological diagnoses and consequently expert opinions remain complex.
- The scientific reliability and validity of expert opinions inadvertently impact on the probative value of expert opinions.
- Mental health experts are faced with various ethical constraints and dilemmas when acting as forensic expert witnesses when the defence of criminal incapacity is raised.
- The approach to the role of expert evidence in support of the defence of criminal incapacity is in need of reform with the primary aim being to aid in a more coherent consistent application of the defence of criminal incapacity, in conjunction with the proper recognition of the essential role that expert evidence fulfils in support thereof.

4 Recommendations

- **Recommendation 1**

Expert evidence should be a prerequisite in support of the defence of criminal incapacity regardless of the alleged cause of incapacity.

- **Motivation and Elucidation**

Research indicates the severely prejudicial effect resulting from the absence of expert evidence in support of the defence of criminal

incapacity.⁴ Assessing the mental state of an accused person retrospectively at the time of the commission of the offence, remains a complex and intrinsic function, which will inevitably fall beyond the knowledge and experience of the trier of fact. Research indicates that even within the medical profession itself, one accused will not necessarily be diagnosed in similar terms by two different mental health professionals. Accordingly, if there are divergent opinions within the specialist fields of the medical profession, it is doubtful whether from a legal point of view, a trier of fact will, in the absence of expert evidence, be able to assess the mental state of an accused at the time of the commission of the offence. The latter exacerbates the need for expert evidence. Labelling an accused in terms of the category of incapacity he or she belongs to, is severely prejudicial to an accused's right to a fair trial and also constitutes an unnecessarily conservative approach in respect of expert evidence. In addition an accused might, on face value, fall within the "non-pathological" category, whilst after a proper assessment it might come to light that he or she suffered from a mental illness or mental defect at the time of the commission of the offence.

- **Recommendation 2**

Reform should be effected legislatively to make provision for a general defence of criminal incapacity.

- **Motivation and Elucidation**

Research indicates that the classical distinction between the defences of non-pathological and pathological criminal incapacity creates confusion from a medical as well as a legal perspective. Mental health professionals are generally not familiar with the terminology of non-pathological and pathological criminal incapacity. At the end of the day it is the mental state of the accused at the time of the offence which has to be assessed and not the

⁴ See chapter 3 *supra* at paragraph 9.

label best suited for the particular accused.

In terms of the current position, the defence of criminal incapacity is divided into the categories of pathological and non–pathological criminal incapacity. A court will first and foremost attempt to ascertain whether the defence is one of pathological criminal incapacity and thus whether the accused at the time of the commission of the crime was suffering from a mental illness or not. The latter will determine whether the court is statutorily obliged to refer an accused for observation in terms of Section 79 of the Criminal Procedure Act. If according to the court an accused was not suffering from a mental illness or mental defect, and the defence is not one of pathological criminal incapacity, a court merely retains a discretion whether to refer an accused for observation or not.

The essential need for expert evidence is accordingly not determined by the criminal incapacity itself, but rather by the cause of the incapacity. Research indicates that other causes, save for mental illness or mental defect, can also lead to a lack of criminal capacity. A general defence of criminal incapacity will not only create legal certainty, but will provide a more judicially sound approach to the application of the defence of criminal incapacity. In terms of a general defence of criminal incapacity, emphasis will not fall on the alleged cause of the incapacity but rather on the lack of criminal capacity itself. Accordingly, any factor which causes a person to lack the ability to appreciate the wrongfulness of his or her actions or to act in accordance with an appreciation of wrongfulness will be relevant in assessing the existence or lack of criminal capacity.

- **Recommendation 3**

An accused person relying on the defence of criminal incapacity should be required to lay a factual foundation for such defence, supported by expert psychiatric and/or psychological evidence.

- **Motivation and Elucidation**

Establishing a factual foundation for the defence of criminal incapacity represents one of the primary means by which to assess the validity and merits of the defence. The need for a factual foundation will in addition be necessitated if a general defence of criminal incapacity is established. The factual foundation required to establish the defence of criminal incapacity will inadvertently be structured and premised on expert psychiatric and psychological evidence in order to lay a *prima facie* basis for the alleged lack of criminal capacity.

Again the need for effective expert testimony is proclaimed. This requirement will also be implemented to curb the defence of criminal incapacity thereby excluding unwarranted claims of criminal incapacity by the mere reliance on the *ipse dixit* of an accused. Due to the biological–psychological essence of the test for criminal incapacity and the intrinsic nature of this defence, the *ipse dixit* of an accused that he or she lacked criminal capacity, should never be sufficient. Expert evidence should thus be a prerequisite in order to establish the factual foundation in support of the defence of criminal incapacity. In order to ensure a more balanced view, it is submitted that both defence and the state or prosecution retain their own experts.

- **Recommendation 4**

Due consideration should be afforded to the possibility of the establishment of a mental assessment unit during the pre-trial phase to assist in the assessment of accused persons allegedly having lacked criminal capacity at the time of the commission of the offence.

- **Motivation and Elucidation**

It is crucial that accused persons who allegedly lacked criminal

capacity at the time of the commission of the offence, be assessed as soon as possible in order to get a clear and coherent picture of the accused's mental state at the time of the commission of the offence. The fact of the matter remains that as time passes, it becomes more difficult for psychiatric experts to assess what the accused's precise mental state was during the commission of the crime. A further reality is that as time passes, the scientific reliability of the retrospective judgment will decrease which could inadvertently prejudice the accused who, as a result of a slow system, is prejudiced in presenting his or her defence of criminal incapacity as effectively as possible. Due to the fact that an accused's mental state can improve or degenerate with the passage of time, prompt psychiatric or psychological assessment is pivotal. The need exists for assessments to be conducted as soon as possible following the commission of the crime. The greater the gap between the crime and the eventual assessment, the greater the risk that the assessment will lack accuracy and, concomitantly, reliability and validity.⁵

The establishment of a mental assessment unit for purposes of determining competency to stand trial as well as criminal incapacity inquiries could assist in combating the danger of lapse of time and also in assessing the validity of claims of criminal incapacity. The unit could also assist an accused in establishing the required factual foundation for the defence of criminal incapacity. The mental assessment unit will comprise of a forensic psychologist and additional mental health professionals if the need exists. The mental assessment unit should ideally be convened during the pre-trial stage before the accused pleads or, alternatively, at any stage

⁵ It is interesting to refer to Dwares, RE "Due Process Concerns with Delayed Psychiatry Evaluations and the Insanity Defense: Time is of the Essence" (1984) *Boston University Law Review* at 861—893 at 871 where it is noted: "Delayed evaluations can be less reliable because some mental illnesses – for example alcohol psychoses, acute psychoses due to substance abuse, organic and metabolic disorders and infectious diseases, reactive conditions, and demented – develop quickly, last a short time, and terminate with total recovery."

before the accused is referred for observation.

The functions of the mental assessment unit will be similar to the responsibilities of the forensic mental health professionals during the assessment for purposes of referral for observation in terms of Section 77, 78 and 79 of the Criminal Procedure Act. The major difference would relate to the fact that the purpose of the mental assessment unit would be to effect a speedy procedure to assess the validity of an accused's claim of criminal incapacity together with a preliminary forensic report. If it is found by the mental assessment unit that there is a strong possibility that the accused is incompetent to stand trial or that he or she lacked criminal capacity at the time of the commission of the offence, or that his or her abilities to appreciate the wrongfulness of his or her conduct, or to act in accordance with such appreciation, were diminished, such fact or facts will be noted in the report compiled by the mental assessment unit. Such report could then be used in support of an application to be referred for observation in terms of either Section 77, 78 or both. Conversely, if it is found by the unit that the accused's claim of alleged lack of capacity or competency to stand trial is false, such fact will be noted in the report compiled by the mental assessment unit.

The benefits of such a unit will be that it is cost-effective as it will be of a much shorter duration than the thirty days for purposes of a referral, consisting mainly of consultations on an hourly basis. In addition time is saved by the fact that the *prima facie* merits of the accused's defence are assessed at a relatively early stage. A further benefit would also be that the accused is assessed as soon as possible after the offence was committed. The forensic report compiled by the mental assessment unit will be preliminary and it will be within the trial court's discretion to accept or reject it. If the findings in the report are accepted, the accused will be referred for observation in the ordinary manner. If the report is rejected, the

accused will still have to establish a foundation for the defence of criminal incapacity, failure of which will result in the defence also failing.

The members of the mental assessment unit should ideally be qualified forensic mental health professionals selected from a specific list compiled for the said purposes of the mental assessment unit.

- **Recommendation 5**

There should be two distinct pleas of incompetence to stand trial and criminal incapacity incorporated within the framework of Section 106 of the Criminal Procedure Act, 51 of 1977.

- **Motivation and Elucidation**

Research indicates the benefits of incorporating two novel pleas of incompetence to stand trial, or put differently, non-triability and criminal incapacity within the contextual framework of Section 106 of the Criminal Procedure Act.⁶ By developing these two pleas, each plea could provide for its own distinct set of rules and these rules could provide evidence being advanced in support of each plea. The legislative incorporation of these two pleas would be fairly simple and it could aid in addressing fundamental problems associated with incompetence to stand trial as well as the defence of criminal incapacity, with specific reference to the role of expert evidence as the presentation of expert evidence could be incorporated as an essential requirement for reliance on such plea of either non-triability or criminal incapacity.

- **Recommendation 6**

The burden of proof should in all instances of criminal incapacity be placed on an accused where the accused pertinently relies on the

⁶ See chapter 3 *supra* at paragraph 9.

defence of criminal incapacity.

- **Motivation and Elucidation**

Research indicates the current anomalies surrounding the burden of proof pertaining to the defence of criminal incapacity. It is indicated that the current distinction relating to the burden of proof pertaining to the defences of non-pathological criminal incapacity and pathological criminal incapacity entailing that the burden of proof in the case former, falls on the State, whereas in the latter it falls on the accused, is constitutionally unviable and discriminatory. It is submitted that the burden of proof should in all cases where the criminal capacity or responsibility of an accused is in issue, be placed on the accused if the accused pertinently relies on the defence or, alternatively, the party raising the issue as specifically stated in Section 78(1B) of the Criminal Procedure Act. It is submitted that the proper interpretation of Section 78(1B) without a doubt places the burden of proof in cases where the criminal responsibility of an accused is in issue, on the party raising the issue. It is only fair that he or she bears the burden of proving it regardless of the cause of the alleged incapacity.

- **Recommendation 7**

Diminished criminal capacity should statutorily pertain to all forms of criminal incapacity regardless of the alleged cause of incapacity.

- **Motivation and Elucidation**

Research indicates that in many cases where reliance was placed on the defence of criminal incapacity, even though the defence did not succeed, the courts nevertheless took into account the accused's diminished criminal capacity as an extenuating factor during the imposition of an appropriate sentence. Section 78(7) of the Criminal Procedure Act however, only mentions diminished criminal capacity by reason of mental illness or mental defect. It is submitted that diminished criminal capacity should statutorily be

provided for in respect of all forms of criminal incapacity, irrespective of whether it is non-pathological or pathological in nature.

Making provision for diminished criminal capacity within a statutory framework creates legal certainty as it inevitably ensures that even if a defence of criminal incapacity does not succeed, such diminished capacity could be taken into account during sentencing. As criminal incapacity is often difficult to prove, reliance on diminished capacity in the alternative is accordingly advisable where the evidence in support of the defence of criminal incapacity is not strong enough for the defence to succeed but nevertheless weighs strongly in favour of mitigation of sentence.

- **Recommendation 8**

The Criminal Procedure Act should specifically provide for the introduction of the professions of forensic psychiatry and forensic psychology in cases of criminal incapacity.

- **Motivation and Elucidation**

Section 79 of the Criminal Procedure Act currently only mentions the professions of psychiatry and clinical psychology. Research with specific reference to the United States of America indicates that there are fundamental differences between the functions of psychiatrists as opposed to forensic psychiatrists as well as clinical psychologists as opposed to forensic psychologists. It is submitted that the Criminal Procedure Act should specifically require the assistance of forensic mental health professionals as the training and expertise of the mental health professional inadvertently affects the scientific reliability and validity of the expert opinion which in turn impacts on the probative value of the expert opinion. Obtaining expert evidence in support of the defence of criminal incapacity represents the first crucial step in the assessment of the defence of criminal incapacity. The second step involves obtaining the most appropriate and well credentialed forensic mental health professionals to assess an accused relying on the

defence of criminal incapacity.

- **Recommendation 9**

There should be specific training courses and/or postgraduate diploma courses pertaining to the interface between forensic psychiatry and forensic psychology and the law with specific reference to mental health professionals wishing to serve as expert witnesses in respect of the defence of criminal incapacity.

- **Motivation and Elucidation**

One of the fundamental ways of bridging the “gap” between law and medicine relates to training and education. In the first instance psychiatrists and psychologists wishing to enter the forensic practice, should obtain the appropriate postgraduate diploma and/or degree or certification to practice as forensic mental health professionals. Training courses in forensic psychiatry and forensic psychology should in addition include appropriate modules addressing fundamental legal concepts and principles relevant to forensic practice, with specific reference to the interface between law and medicine where the defence of criminal incapacity is raised. With a proper understanding of the mechanics of the law and legal terminology frequently encountered in respect of the defence of criminal incapacity, the forensic mental health professional will inevitably be in a better position to understand precisely what the law expects of him or her when the defence of criminal incapacity is raised. Similarly, legal professionals with specific reference to criminal practitioners, should receive training in basic concepts of forensic mental health practice, with specific reference to aspects pertaining to the DSM-IV as well as the basic processes followed during the assessment of accused persons with reference to standard tests and techniques employed during the assessment process. Such training will assist the legal professional towards a more informed comprehension of the forensic assessment process as well as understanding diagnosis rendered in respect of an accused from a medical perspective.

- **Recommendation 10**

Mental health professionals need to adhere to a code of conduct when acting and serving as expert witnesses.

- **Motivations and Elucidation**

Research indicates the various ethical dilemmas facing forensic mental health professionals who have to testify in cases where the defence of criminal incapacity is raised as a defence. In order to create legal certainty as well as certainty amongst mental health professionals, the essential need exists for a formal codification of the various duties and ethical responsibilities incumbent upon forensic mental health professionals when assessing and ultimately testifying in support of the defence of criminal incapacity. Such codification will circumscribe the duties and responsibilities of mental health professionals acting as expert witnesses. Legal professionals could also benefit in such codification by being sufficiently informed as to precisely what to expect from the forensic mental health professional.

- **Recommendation 11**

The rules for expert evidence should be codified.

- **Motivation and Elucidation**

Research indicates the need for a codification of the current common law rules pertaining to expert evidence. A comparative perspective of the Federal Rules of Evidence illustrates the value of a codified system of the rules relating to expert evidence. A codified system pertaining to the rules of expert evidence will assist in providing legal certainty insofar as expert evidence is concerned and also in respect of what precisely is expected of expert witnesses. Codification of the rules of expert evidence will inadvertently apply to mental health professionals serving as expert witnesses. A codification of the rules of expert evidence will also provide certainty and clarification as to precisely what is expected of mental health professionals when acting as expert

witnesses in support of the defence of criminal incapacity.

5 Proposals

- **Proposal 1**

A proposed code of professional conduct for forensic mental health professionals serving as expert witnesses in matters relating to the criminal responsibility of accused persons and related matters.

- **Draft code**

Code of Professional and Ethical Conduct for Forensic Mental Health Professionals Serving as Expert Witnesses in Matters Relating to the Criminal Responsibility Of Accused Persons and Related Matters

1. Preamble

To relate the various professional and ethical duties and responsibilities conferred upon mental health professionals performing assessments for purposes of enquiries into the capacity of accused persons to understand proceedings and the criminal responsibility of accused persons, and to clarify the subsequent role of forensic mental health professionals presenting expert opinions in respect of the aforesaid assessments for legal purposes.

2. Definitions

In this Code, unless the context otherwise indicates, the following definitions are ascribed to the following terms:

<i>“Act”</i>	The Criminal Procedure Act, No 51 of 1977.
<i>“criminal responsibility”</i>	As defined in terms of Section 78(1) of the Act.
<i>“expert witness”</i>	A witness, who by virtue of his or her specialised training, skill or experience is deemed to have acquired specialised knowledge in a specific field of expertise to a sufficient degree enabling such witness by virtue of such specialised knowledge, training and experience to render an opinion as to

a particular fact or facts in issue and if required, to present expert testimony in support of such opinion in a court of law with the inherent aim of assisting the trier of fact in the determination of such fact or facts in issue;

“forensic psychiatry”

A sub-speciality of psychiatry encompassing the interaction between law and psychiatry applying scientific and clinical entities within the legal context with specific reference to criminal proceedings and matters relating to the criminal responsibility of accused persons and acting as a psychiatric expert on explicitly psycho-legal issues in direct assistance to courts, correctional and forensic mental health facilities.

“forensic psychiatrist”

A psychiatrist sufficiently trained in and who regularly engages in the practice of forensic psychiatry.

“forensic psychology”

A sub-speciality of psychology concerned with the collection, assessment and presentation of psychological evidence for judicial and legal purposes with reference to the application of psychological theory and skills to the understanding and functioning of the legal and criminal justice system, pertaining specifically to matters of a psycho-legal nature in direct assistance to courts, correctional and forensic mental health facilities.

“forensic psychologist”

A psychologist sufficiently trained in and who regularly engages in the practice of forensic psychology.

“forensic mental health professional”

A forensic psychiatrist and forensic psycho-psychologist, unless expressly otherwise indicated.

3. Scope

- 3.1 The Code of Professional and Ethical Conduct is specifically designed as a model of desirable professional and ethical conduct by forensic mental health professionals when they are regularly engaged as expert witnesses and accordingly represent themselves as such in activities directed primarily at providing professional forensic mental health expertise to the judicial system in matters relating to the capacity of accused persons to understand legal proceedings or matters relating to the criminal responsibility of accused persons.
- 3.2 These guidelines by no means deny its applicability to other related criminal matters such as its use within correctional and other related forensic mental health settings.
- 3.3 These guidelines should be adhered to in accordance with the *Ethical and Professional Rules of the Health Professions Council of South Africa as promulgated in Government Gazette R717/2006*.
- 3.4 These guidelines by no means purport to be all encompassing and as such address essential duties and responsibilities of forensic mental health professionals serving as expert witnesses in matters relating to the capacity of accused persons to understand proceedings as well as the criminal responsibility of accused persons.
- 3.5 These guidelines were drafted in consultation with the *Ethics Guidelines for the Practice of Forensic Psychiatry* by the American Academy of Psychiatry and the Law as well as the *Specialty Guidelines for Forensic Psychologists* by the American Psychology – Law Society.
- 3.6 These guidelines should be construed and interpreted in conjunction with Sections 77, 78 and 79 of the Act.

4. Duties and Responsibilities

- 4.1 Forensic mental health professionals have an obligation to execute their services in accordance with the highest standards of their profession.
- 4.2 Forensic mental health professionals should take reasonable steps to ensure that their services are used in a responsible fashion especially when serving as expert witnesses.
- 4.3 Forensic mental health professionals shall take reasonable steps to

ensure that evidence relating to assessments conducted or procedures applied will be of such quality as to assist the trier of fact in the determination of the issues, whether it be the capacity of the accused to understand the proceedings or the criminal responsibility of an accused person.

- 4.4 Forensic mental health professionals shall ensure that evidence or opinions advanced are directly related or substantially related to the specific issues before the court and as such establish a causal relation between the opinion advanced and the specific issues, whether it be the capacity to understand proceedings or the criminal responsibility of an accused person.
- 4.5 Forensic mental health professionals accept that when acting as expert witnesses, their overriding obligation and duty is to the court which duty overrides any obligation to the person or authority, whether the instructing person or authority or any other party in whatever capacity.
- 4.6 Forensic mental health professionals serving as expert witnesses and in addition providing an opinion in matters relating to the capacity of accused persons to understand proceedings or the criminal responsibility of accused persons, or both, shall as far as possible ensure that such testimony is premised upon sufficient facts or data; the testimony is the result of reliable procedures and methods; and consequently that the forensic mental health professional has applied the procedures and methods reliably to the facts of the specific case.
- 4.7 Forensic mental health professionals shall during the assessment of the reliability of procedures and methods applied, have due regard of the following criteria:
 - 4.7.1 Whether such procedures, methods or techniques have been tested;
 - 4.7.2 Whether such procedures, methods or techniques have been subjected to stringent peer review and publications;
 - 4.7.3 The extent of or known potential error rate associated with such procedures, methods or techniques;
 - 4.7.4 Whether such methods or procedures enjoy general acceptance within the scientific discourse where similar methods and

procedures are employed.

- 4.8 Forensic mental health professionals shall clearly disclose the facts or data upon which their opinion is based when serving as expert witnesses.
- 4.9 Testimony by forensic mental health professionals contextualised in the form of an opinion or inference which would otherwise be admissible, shall not be objectionable merely as a result of the fact that such opinion embraces the issue relating to the mental state or condition of an accused person, and as such embraces an ultimate issue to be decided by the trier of fact, provided that such forensic mental health professional has due regard to the professional boundaries of his or her profession, competence and experience.
- 4.10 Expert evidence presented by forensic mental health professionals shall constitute the independent product of the forensic mental health professional, uninfluenced by whichever means as to form or content.
- 4.11 Forensic mental health professionals shall provide independent assistance to the judicial authority and thus to the court by means of an objective, unbiased and impartial expert opinion.
- 4.12 A forensic mental health professional shall clearly indicate when a particular question or issue falls beyond his or her field of expertise.
- 4.13 In the event of a forensic mental health professional's opinion not being adequately researched due to insufficient data being available, such fact shall be clearly expressed and such opinion advanced shall be deemed a provisional opinion.

5. Competence and Qualifications

- 5.1 Forensic mental health professionals shall claim expertise only in relation to areas of actual specialised knowledge, skills, training, and experience.
- 5.2 Forensic mental health professionals shall, when presenting expert opinions, forensic reports or testimony, disclose their qualifications correctly, truthfully and precisely.
- 5.3 Forensic mental health professionals have an obligation to disclose to the court the boundaries of their competence and/or qualifications and

the relation of such boundaries to the specific matters in issue.

- 5.4 Forensic mental health professionals are responsible for an essential and reasonable degree of knowledge and comprehension of the various legal and professional standards regulating their participation and engagement as expert witnesses in legal proceedings.

6. Confidentiality and Privilege

- 6.1 Forensic mental health professionals have an obligation to be alert to the legal standards which may impact on or limit the confidentiality or privilege that may be associated with or connected to their services as forensic mental health professionals.
- 6.2 Forensic mental health professionals shall timeously inform an evaluatee as to an assessment as well as all other collateral sources of the anticipated limitations pertaining to confidentiality and privilege prevalent within a forensic relationship.
- 6.3 Forensic mental health professionals, to the extent applicable, shall inform an evaluatee to an assessment that such forensic mental health professional is not the evaluatee's "doctor" or "therapist" or "treating clinician".
- 6.4 Forensic mental health professionals shall to the extent possible, maintain confidentiality and only disclose information bearing upon the legal purpose of the assessment or evaluation.

7. Informed Consent

- 7.1 Forensic mental health professionals shall at the outset of an assessment, inform the evaluatee of the nature and scope of the assessment and limits of its confidentiality. The informed consent of an evaluatee to the forensic assessment shall be obtained as soon as possible.
- 7.2 Forensic mental health professionals shall inform an evaluatee that refusal to cooperate to an assessment will be duly noted in a forensic report and/or conveyed in a subsequent testimony.
- 7.3 In the event of an evaluatee not comprehending the information provided pertaining to the assessment, the forensic mental health professional

shall note such fact in any forensic report and/or convey such fact in subsequent testimony.

8. Honesty and Objectivity

- 8.1 When functioning as expert witnesses within the legal process, forensic mental health professionals shall adhere to the principle of honesty and should strive towards objectivity.
- 8.2 Forensic mental health professionals shall enhance the honesty and objectivity of their opinions by basing their opinions, forensic reports and subsequent forensic testimony on all available data and information.
- 8.3 Forensic mental health professionals shall take cognisance of the fact that their essential role as expert witnesses is to assist the trier of fact to understand the evidence or to assess a fact in issue and as such their own professional observations, deductions, inferences and conclusions should be distinguished from legal facts, opinions, inferences and conclusions.

9. Relationships

- 9.1 Forensic mental health professionals shall inform legal representatives seeking their services in respect of a potential evaluatee of any fact or facts which might impact on the proposed forensic relationship with due regard to prior and/or current personal or professional relationships that might result in a conflict of interests.
- 9.2 Forensic mental health professionals shall to the extent possible, refrain from acting as expert witnesses for patients with whom they are engaged in a treatment relationship or with whom they have any other personal or professional relationship.
- 9.3 In circumstances where the assumption of a dual relationship becomes unavoidable, regard shall be had by the forensic mental health professional to the essential differences between clinical and legal obligations and the negative impact of such dual relationships on confidentiality and the process of treatment and evaluations.

- **Proposal 2**

Selected amendments should be effected in respect of Sections 78 and 79 of the Criminal Procedure Act.

- **Draft Amendment Bill**

CRIMINAL MATTERS AMENDMENT ACT No. 1 of 2011

(ASSENTED TO) (DATE OF COMMENCEMENT:)

(English text signed by the President)

To amend the Criminal Procedure Act, 1977, so as to further regulate the referral of an accused for enquiry regarding the criminal responsibility of that accused concerning the offence with which he or she is charged, and to provide for matters connected therewith.

1. *Section 78(1) of the Criminal Procedure Act 51 of 1977 is amended as follows:*

"(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 or any other cause 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."

2. *Section 78(1C) is inserted after Section 78(1B) of the Criminal Procedure Act 51 of 1977 providing as follows:*

"Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the party who raises such issue shall establish a sufficient foundation in support of such contention which foundation shall be supported by efficient and adequate evidence, including forensic medical evidence."

3. *Section 78(2) of the Criminal Procedure Act is amended as follows:*
“If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other cause not criminally responsible for the offence charged, or it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of Section 79.”

4. *Section 78(7) of the Criminal Procedure Act is amended as follows:*
“If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act, but that his or her capacity to appreciate the wrongfulness of the act was diminished by reason of mental illness or mental defect or for any other cause, the court may take the fact of such diminished responsibility into account when sentencing the accused.”

5. *Section 79(1)(b) is amended as follows:*
“79(1) Where a court issues a direction under Section 77(1) or 78(2), the relevant enquiry shall be conducted and
 - (a) be reported on –
 - (b) where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in Sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs –
 - (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a forensic psychiatrist appointed by such medical superintendent at the request of the court;
 - (ii) by a forensic psychiatrist appointed by the court and who is not in the full-time service of the State;

- (iii) by a forensic psychiatrist appointed for the accused by the court; and
- (iv) by a forensic psychologist where the court so directs.”

6. *Short title and commencement*

“This Act shall be called “Criminal Matters Amendment Act, 2011”, and shall come into operation on a date fixed by the President by proclamation in the Gazette.”

6 Possible criticisms and *lacunae* in respect of research

The theme of the current study represents an area where consensus has not been achieved and in terms of the recommendations enunciated in this study, the researcher acknowledges the possibility of criticisms being raised from various sources. Not all criminal practitioners acknowledge the pivotal role of expert evidence in support of the defence of criminal incapacity. More often than not mental health professionals not adequately trained or with a lack of experience testify in cases where the defence of criminal incapacity is raised as a defence, ultimately resulting in negativity, scepticism and criticisms levelled against the ability of mental health professionals to testify in support of the defence of criminal incapacity.

Each and every case where the defence of criminal incapacity is raised as a defence will differ from the previous case in the sense that no two accused persons even in the event of both having suffered from the same mental disorder at the time of the commission of the offence, will ever react precisely similar during a forensic assessment. Due to the latter dissimilarities in the outcome of assessments, trust is often lost in the reliability of the validity of assessments as no precise hard and fast rule can be applied in each and every case. The outcomes and results of assessments will differ with due regard to malingering, the specific tests and procedure employed by the specific mental health professionals as well as the possibility of “human error”. Scepticism levelled against the defence of criminal incapacity *per se* leads to

the concomitant distrust and negativity levelled towards expert evidence advanced in support thereof.

In particular, the following selected aspects could lead to criticism and *lacunae* in respect of the research undertaken in this study:

- Limited literature pertaining to cost implications of referrals for observations in the different mental health institutions;
- Limited research pertaining to the effectiveness of assessment procedures within mental health institutions;
- Supporters of the traditional approach in respect of expert evidence may still adhere to the argument that expert evidence does not fulfil an indispensable function;
- Lack of an in-depth analysis of the criticisms levelled towards the scientific reliability and validity of psychiatric diagnoses;
- Limited research pertaining to judicial perceptions of the role of expert evidence in support of the defence of criminal incapacity;
- Limited literature pertaining to the assessment of scientific reliability and validity of expert opinion within the South African context;
- Limited information pertaining to the effectiveness of tests and procedures employed by forensic mental health professionals during the forensic assessment.
- Limited reflections on the role of expert evidence in cases where criminal incapacity is raised as a defence, from the prosecution's perspective.

The purpose of this study was fundamentally to illustrate the essential and pivotal role of expert evidence in support of the defence of criminal incapacity. The realisation that expert evidence by forensic mental health professionals can play a significant role in support of the defence of criminal incapacity is proclaimed in the research enunciated in this study, in spite of the probable factors mentioned in the paragraph above.

7 Implications and possibilities for further research

The current study should by no means be construed as an all-encompassing exposition of the complete spectrum of the role of expert evidence within our current criminal justice system. The author proposes the following additional aspects relevant for purposes of further research:

- The role of expert evidence by forensic mental health professionals during sentencing;
- The role of forensic psychiatry in the prediction of future dangerousness in dangerous criminals;
- The admissibility of expert evidence concerning psychological syndromes;
- The protection and recognition of fundamental constitutional rights of accused persons whilst detained in mental institutions;
- The role of expert evidence in support of the defence of criminal incapacity raised by youthful offenders and accordingly the impact of youthfulness on criminal capacity;
- The role of expert evidence in respect of battered spouse or partner syndrome evidence advanced in support of the defence of criminal incapacity also from the male perspective;
- The impact of therapeutic jurisprudence on the defence of criminal incapacity and the concomitant role of expert evidence;
- The role of neuropsychiatry and the neurosciences in explaining criminal incapacity and criminal behaviour;
- The role of mental illness in children and youthful offenders;
- Research pertaining to the specific circumstances within mental hospitals designated for purposes of assessment and whether such circumstances constitute human rights infringements;
- The effectiveness of specific tests and procedures utilised for purposes of the forensic assessment and its impact on the defence of criminal incapacity.

8 Synthesis

The current study of the role of expert evidence in support of the defence of criminal incapacity was embarked upon in order to expose the intrinsic anomalies associated with the application of the defence of criminal incapacity. It sought to indicate that the approach followed in respect of the role and essential need for expert evidence has been inconsistent and clouded with controversy.

A further aim was to indicate that the role of the forensic mental health professional in the ultimate analysis and assessment of this defence has been largely neglected.

The fundamental cornerstone to the defence of criminal incapacity – the forensic mental health professional – has been overlooked and underestimated partially as a result of the semantic distinction drawn between non-pathological and pathological criminal incapacity rendering the proof of the defence of criminal incapacity problematic, controversial and inconsistent. The time has arrived for a proactive approach in respect of the defence of criminal incapacity. The current study proposed possible recommendations and proposals aimed at enhancing the application of the defence of criminal incapacity.

Proposing reform which is limited to legislative reform would perhaps be an overly conservative approach as improving the role of expert evidence in support of the defence of criminal incapacity extends far beyond legislation alone. It essentially encompasses a process by which two oceans are brought together in an attempt to harmonise the interaction between law and medicine by improving the dialogue between these two professions in order to enhance the application of the defence of criminal incapacity.

Only by means of proper recognition of the fundamental and essential role of expert evidence in support of the defence of criminal incapacity in conjunction with appropriate rules of ethical and professional conduct for mental health

professionals serving as expert witnesses in support of the defence of criminal incapacity, can the hope be expressed of the ultimate harmonisation of the conceptual interface between law and medicine when the defence of criminal incapacity falls to be assessed:

“Perhaps many of the lovers’ quarrels or power struggles are more semantic than anything else. However, whatever the case might be, for the sake of fairness and justice it is of utmost importance that the two lovers should sit down on a regular basis, discussing the weak and strong points of each other. This will not only lead to solutions but to a better general understanding of the other, but also to the long awaited embrace – and especially healthy offspring”.⁷

⁷ Gillmer, BT, Louw, DA and Verschoor, T “Law and Psychology: An exploration of the conceptual interface” (1997) SACJ 19-32 at 32.