

# Where two oceans meet: Reflections on the interaction between law and psychiatry in the prediction of future dangerousness in dangerous criminals\*

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## OPSOMMING

### Waar twee oseane ontmoet: Perspektiewe rakende die wisselwerking tussen die reg en psigiatrie met betrekking tot die vasstelling van toekomstige gevaarlikheid by gevaarlike oortreders

Die bepaling en vasstelling van potensiële gevaarlikheid by gevaarlike misdadigers en die rol wat die psigiater vervul by sodanige ondersoeke, is 'n onderwerp wat al tot vele besprekings aanleiding gegee het. In hierdie artikel bespreek die outeur die rol van psigiatrie by die bepaling van gevaarlikheid spesifiek met verwysing na artikels 286A en 286B van die Strafproseswet 51 van 1977. Die klem word gevestig op die kardinale rol wat psigiaters tydens hierdie ondersoeke speel ten spyte van vele kritiek wat gehuldig word met betrekking tot die vraag of psigiaters gevaarlikheid kan bepaal al dan nie. 'n Vergelykende studie met die Kanadese regstelsel met betrekking tot hierdie onderwerp word ook gelewer. Daar word ook aangedui dat die bepalings wat handel met gevaarlike oortreders in beide Suid-Afrika en Kanada grondwetlik bevind is en gevolglik dat die psigiater 'n onontbeerlike rol vervul tydens hierdie ondersoeke. Laastens word oplossings voorgestel ten einde optimale benutting van die psigiatriese wetenskap tydens vasstelling van gevaarlikheid te bewerkstellig.

## 1 Introduction

In 1964, Edmund E. Kemper III, a fifteen-year old boy, shot and killed his grandmother and grandfather. He was committed to Atascadero State Hospital, where he was confined and treated for five years. He was returned to the jurisdiction of the California Youth Authority and in 1970, when he was twenty-one, he was released. In September 1972, he applied to the court to have his records sealed. Feeling some uncertainty about Kemper's mental condition, the court appointed two psychiatrists to examine him. Both psychiatrists stated that he was not dangerous or otherwise a threat to society. However, it was later revealed that he had murdered and dismembered six young girls, his mother and one of his mother's friends during the course of a year. One of the murders had been accomplished four days prior to the psychiatric examinations that declared him harmless.<sup>1</sup>

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\* This article is dedicated to the memory of my former friend and colleague Anton Welgemoed who sadly passed away on 2007-07-09.

<sup>1</sup> Diamond "The psychiatric prediction of dangerousness" 1974 *University of Pennsylvania Law Review* 439. Atascadero is a California institution for the criminally insane and mentally disordered sex offenders.

Cases of this nature greatly alarm the public and cast a shadow of doubt on the ability of psychiatrists to accurately predict future dangerousness in dangerous criminals. Nevertheless, courts rely heavily upon these psychiatric predictions both in criminal cases as well as civil commitments for involuntary hospitalisation. When people are victimised by violent crime, the general public assumes that the victim could have been spared if the perpetrator had been identified as potentially dangerous by mental health professionals. Yet it is also true that prediction of dangerousness is an inexact science dependent upon many uncertainties. The question then arises: Can psychiatrists accurately predict danger with reasonable certainty?

This article will focus on the role of psychiatry relating to the prediction of dangerousness and the ability of psychiatrists to predict dangerousness. A brief comparative perspective with reference to Canada will also be included with possible recommendations for making the best use of psychiatry in evaluations and assessments of dangerous offenders.

## 2 “Dangerousness” Defined and the Role of Mental Health Professionals

“Dangerousness”, according to Yannoulidis, “is a subjective concept, which is attributed to individuals taking account of calculable actuarial risk and the subjective fear which they invoke”.<sup>2</sup>

The involvement of psychologists and psychiatrists within the legal domain continues to grow rapidly but remains highly controversial. The expert testimony of psychologists and psychiatrists at hearings and trials has a profound effect on the lives of many individuals.<sup>3</sup>

Mental health practitioners have always been called upon to provide predictions on those they examine. Legislation has also entrusted psychiatrists with the responsibility to assess the likelihood that mentally ill individuals will act violently and has given them the power to admit these individuals involuntarily to psychiatric facilities, and then allowed them to decide when they can be discharged, which is usually based on a finding that the risk no longer exists.<sup>4</sup> Research reveals that clinicians tend to be intuitive, and sometimes idiosyncratic, in the methods they use to assess “dangerousness” and are often incorrect with regard to their predictions.<sup>5</sup>

The following quote from Borum is of significance:<sup>6</sup>

“Despite a long-standing controversy about the ability of mental health professionals to predict violence, the courts continue to rely on them for advice on these issues and in many cases have imposed on them a legal

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2 Yannoulidis “Negotiating ‘dangerousness’: Charting a course between Psychiatry and Law” 2002 *Psychiatry, Psychology and Law* 155.

3 Faust and Ziskin *The Expert Witness in Psychology and Psychiatry* (1988) 31–35 31.

4 Kaliski *Psycholegal Assessment in South Africa* (2006) 113.

5 *Ibid.*

6 As quoted in Hess and Weiner *The Handbook of Forensic Psychology* (2 ed) (1999) 171.

duty to take action when they know or should know that a patient poses a risk of serious danger to others.”

### 3 The Concept of “Dangerousness”

The first obstacle that arises when the prediction of dangerousness is encountered is the lack of an adequate and proper definition of the term “dangerousness”. In recent years, there has been a great deal of interest shown in the concept of dangerous behaviour and the definition of “dangerousness”.

Walker has pointed out:<sup>7</sup>

“[D]angerousness is not an objective quality, but an ascribed quality like trustworthiness. We feel justified in talking about a person as dangerous if he has indicated by word or deed that he is more likely than most people to do serious harm, or act in a way that is likely to result in serious harm.”

The Butler Committee<sup>8</sup> considered that dangerousness was:

“Physical violence is, we think, what the public are most worried about, but the psychological damage which may be suffered by some victims of other crimes is not to be underrated.”

The obvious problem relates to the use of the concept of “dangerousness”. Floud quoted:<sup>9</sup>

“[T]here is no such psychological or mental entity as a ‘dangerous’ person and ‘dangerousness’ is not an objective concept. Dangers are unacceptable risks. We can measure risks – actuaries make a profession of it. Risk is, in principle, a matter of fact but danger is a matter of judgment or opinion – a question of what we are prepared to put up with.”

Despite the frequency with which the term or word “dangerousness” is used, there is wide recognition that the term is not self-defining and can mean any of a number of things.<sup>10</sup> A reasonable definition of the word requires identification of both the type of behaviour at issue and the degree of probability that such behaviour will occur.<sup>11</sup>

### 4 The Role of the Psychiatrist, Expert Evidence and the Rules of Evidence

“The Perfect Expert Witness is fair of face, clad in magical raiments, and blessed with a voice the very sound of which draws the listener to hearken and drink the words like a bee draws nectar.”<sup>12</sup>

7 As quoted by Prins *Dangerous Behaviour, the Law, and Mental Disorder* (1986) 84–85.

8 *Idem* 86.

9 Floud J “Dangerousness and criminal justice” 1982 *British Journal of Criminology* 213–228 as quoted in Kaliski 116.

10 Shah “Dangerousness: A paradigm for exploring some issues in law and psychology” 1978 *American Psychologists* 224–227.

11 Dix “Clinical evaluation of the ‘dangerousness’ of ‘normal’ criminal defendants” *Virginia Law Review* <http://03a00080/0> accessed on 2007-08-15.

12 Adams.

Psychiatry is probably one of the most complex fields of medical specialisation.<sup>13</sup> In SA the practice of psychiatry is fundamentally regulated by legislation in the form of the Mental Health Care Act.<sup>14</sup>

In terms of the Mental Health Care Act a psychiatrist is a “mental health care practitioner” who has been trained to provide prescribed mental health care, treatment and rehabilitation services and is registered as such in terms of the Health Professions Act.<sup>15</sup>

Within the domain of prediction of future dangerousness, the mental health practitioner is called upon to testify as to the accused’s propensity for violent behaviour.

Psychiatrists and psychologists testifying as to future dangerousness are expert witnesses. Expert evidence is a form of opinion evidence which is generally inadmissible unless the subject enquiry and the facts in dispute are of such a nature that the court is in need of assistance from experts in the field in order to arrive at an informed judgment.

The question as to the admissibility of such evidence depends upon the relevance of such an opinion.<sup>16</sup>

If the issue, in this regard the prediction of dangerousness, is of such a nature that the opinion of the expert, in this case that of the psychiatrist or psychologist, can assist the court to adjudicate the matter, such evidence will be admissible, unless excluded by other rules of evidence, for example, hearsay.<sup>17</sup>

The converse is, however, also true. If the particular opinion evidence deals with a matter that the court can decide upon in the absence of such evidence, the opinion evidence will be irrelevant and inadmissible.

It goes without saying that issues pertaining to the prediction of future violence and dangerousness of a particular individual will, in most cases, not fall completely within the knowledge and experience of the judicial authority due to the scientific nature thereof which results in the necessity of psychiatrists and psychologists assisting the court in this regard.

The exclusion of opinion evidence is predicated upon the premise of protecting the function of the fact-finder or judicial authority and accordingly that a witness presenting an opinion should not usurp the function of the court.<sup>18</sup> The latter theory is also often referred to as the “ultimate issue” principle which entails that a witness cannot express an opinion about final issues which only the court can decide upon.

Mental health experts, who can be psychiatrists, psychologists, social workers or occupational therapists can be defined as specialists who are specifically instructed to undertake evaluations of people, form opinions

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13 See Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 745.

14 17 of 2002.

15 56 of 1974.

16 Schwikkard and Van der Merwe *Principles of Evidence* (2002) 79.

17 *Idem* 83.

18 *Idem* 84.

based on their findings, write reports and, if required, give evidence during which they express opinions and provide the facts on which their opinions are based.<sup>19</sup>

They are accordingly consultants the court uses when in need of information and opinions as to the mental functioning of a person. The role of the psychiatrist remains a complex issue.

Bazelon noted:<sup>20</sup>

“Psychiatry, I suppose, is the ultimate wizardry. My experience has shown that in no case is it more difficult to elicit productive and reliable expert testimony than in cases that call on the knowledge and practice of psychiatry . . . The discipline of psychiatry has direct relevance to cases involving human behaviour. One might hope that the psychiatrists would open up their reservoirs of knowledge in the courtroom. Unfortunately, in my experience, they try to limit their testimony to conclusory statements couched in psychiatric terminology. Thereafter, they take shelter in a defensive resistance to questions about the facts that are or ought to be in their possession, they thus refuse to submit their opinions to the scrutiny that the adversary process demands.”

In *Washington v United States*<sup>21</sup> it was held:

“The function of the psychiatrist is not to try to tell the jurors what verdict they should render but rather to portray as fully and completely as possible the mental and emotional makeup of the defendant, how his emotional and intellectual processes work and how they affected his capacity to control his conduct both generally and in the specific situation surrounding the crime charged. They should portray the ‘inner man’ as best they can without fanciful speculation. The opinions must be based on ‘reasonable medical certainty’ which has always been the legal standard for expert medical opinions.”

In an opinion recognising the right of indigent criminal defendants to have an expert appointed by the court to assist in their defence when mental status is an issue, the Supreme Court in *Ake v Oklahoma*<sup>22</sup> identified the importance of experts, particularly mental health experts, in furthering the aim of fairness within the adversarial system:

“The foregoing leads inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of State’s psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.”

19 Kaliski ch 23. Allan and Meintjies *Expert Evidence* (2006) 342. For purposes of this discussion social workers and occupational therapists are excluded.

20 As quoted in Greenspan “The role of the psychiatrist in the criminal justice system” 1978 *An Psychiatr Assoc J* 137 138–139.

21 390 F 2d 444 (1967) as quoted in Greenspan 1978 *An Psychiatr Assoc J* 140.

22 470 US 68, 77 (1985). See Carstens and Pearmain 784–793 and also Carstens “Setting the boundaries for expert evidence in support or defence of medical negligence – *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 3 SA 1188 (SCA)” 2002 *THRHR* 430.

This discussion pertaining to expert evidence is necessary in order to properly place the psychiatrist within the domain of prediction of dangerousness. As the prediction of dangerousness is an area where experience, qualifications and expertise are pivotal considerations, it is highly doubtful that a court can assess the probability or possibility of future dangerousness in the absence of psychiatric evidence.

## 5 The Dangerous Offender Within the South African System

“It was an act which destroyed a beautiful family forever and brought great pain and sorrow to them. (It was) An act which has broken their hearts and those of those who knew and loved Steven. An act that shocked the nation. It was an act in which I robbed little Steven of his love, his innocence, his purity, an act in which I robbed him of his little private body and worst, an act in which I robbed him of life – his right to live. I took away little Steven’s life – the life of a 6-year old child who never did any harm – and my life should be taken away from me, no matter how many tears I’ve shed or how great my remorse. And in this, I call upon the nation to stand with me and petition the Government to bring back the death sentence, and in the judgment it be passed onto me and that I be executed for this terrible deed. The full wrath of the law must fall upon me and in no way should it have any mercy, for I did not have mercy on little Steven and therefore deserve no mercy.”<sup>23</sup>

These were the words of Theuns Olivier, the accused, a previously convicted paedophile, who brutally sodomised and killed little Steven Siebert, a six-year old boy on 23 December 2005. It was a sunny day. Little Steven was playing on the beach. He was later lured away by the accused to the accused’s home. Little Steven had no idea what his fate would be. The evidence revealed that the sexual assault perpetrated by the accused was of an extremely severe and serious nature. After sexually assaulting little Steven, the accused strangled him with a telephone cord and watched him die. He was convicted of kidnapping, indecent assault and murder. The accused’s conduct was described by Moosa J as “cold, callous, cunning and calculated” and further:<sup>24</sup>

“Little Steven died a lonely and terrible death. His parents were not there to protect and comfort him – they were near, yet so far! Imagine the mental anguish endured by the parents when they discovered that he had disappeared . . . You robbed them of his love, his company and his affection.”

Little Steven’s family suffered irreversible trauma not only from the terrible loss of their son, but also from the brutal and violent way in which he was taken from them. Steven’s mother also testified to the severe traumatic effect this had on Steven’s brother Christopher: “He asks for his

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23 *S v Theuns Christiaan Olivier* (unreported case no SS 70/2007) delivered on 2007-08-08. The reported reference of this case is *S v Olivier* [2007] All SA 1029 (C). For purposes of this discussion reference will be made to the aforementioned unreported decision as it contains the relevant findings of the medical experts.

24 *S v Theuns Christiaan Olivier supra*. Judgment delivered on 2007-08-08.

Stevie, his butterfly and angel, constantly and has been severely traumatised.”

In his evidence in mitigation of sentence, the accused admitted that he was a paedophile, but contended that he suffered from a multiple personality disorder.

He was assessed by Professor Kaliski and Dr Panieri Peter who unanimously found that he did not suffer from a multiple personality disorder.

Their findings were as follows:<sup>25</sup>

“Mr Olivier has a long history of paedophilia and is not mentally ill. He will continue to be at high risk of engaging behaviours related to this assessment. He does not suffer from multiple personality (dissociative) disorder.”

The evidence disclosed that the accused’s past history was punctuated by sexual, physical and emotional abuse. Thereafter the accused became the abuser. In 1980 he was arrested on two counts of indecent assault on two eleven-year-old victims. In 1985 he was arrested for rape and on multiple charges of indecent assault and declared a State President’s patient. After being released as a State President’s patient the paedophilic acts continued. He was later arrested on five counts of indecent assault. After release from prison, the accused found his way to Plettenberg Bay where he took the life of little Steven. According to the accused he spent approximately fifteen years in a psychiatric hospital.

Moosa rejected the accused’s contention of having suffered from multiple personality disorder. It was also held that if such a defence is raised in the SA context, it will be canvassed within the ambit of criminal capacity and the usual tests applied to determine criminal capacity, that is, the ability to appreciate the wrongfulness of the offence and the ability to act in accordance with such appreciation. It was, however, held that the accused did not in fact lack any of these abilities at the time of the offence. Moosa held:<sup>26</sup>

“The Court needs to take cognizance of the fact that you are a paedophile and that you have psychopathic tendencies. The psychiatrists who testified are *ad idem* that the prognosis for recovery is poor, you yourself have admitted that if you do not receive effective treatment, you will become a repeat offender. Both Prof Kaliski and Dr Czech testified that you are a danger to children and you must be kept away from them permanently. The only way to keep you away from them is to remove you permanently from society.”

The accused was sentenced to ten years imprisonment in respect of the charge of kidnapping, fourteen years in respect of the indecent assault and life imprisonment in respect of the murder charge.

This case serves to illustrate the value of psychiatric evidence in cases dealing with dangerous offenders. It goes without saying that Olivier is an extremely dangerous offender. In this case the expert opinions and predictions of Kaliski, Peter and Czech were of much assistance to the court

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25 *Idem* 2.

26 *Idem* 24.

in delivering their judgment. The sad reality is, however, that had psychiatrists predicted this dangerousness more accurately at an earlier stage, little Steven might still be alive. This leads to the question: Are there any methods by which psychiatrists can predict future dangerousness with reasonable accuracy?

## **5 1 Legislative Provisions Pertaining to Dangerous Criminals**

Sections 286A and 286B of the Criminal Procedure Act<sup>27</sup> specifically deal with the procedure to be followed in the event of dangerous criminals. These sections were inserted into the Act by the Criminal Matters Amendment Act<sup>28</sup> as a result of the findings of the Booysen Commission of Inquiry into the “Continued Inclusion of Psychopathy as a Certifiable Mental Illness and Handling of Psychopathic and other Violent offenders”.

Section 286A states the following:<sup>29</sup>

- (1) (a) Subject to the provisions of subsections (2), (3) and (4), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal.
- (2) (a) If it appears to a court referred to in subsection (1) or if it is alleged before such court that the accused is a dangerous criminal, the court may after conviction, direct that the matter be enquired into and be reported on in accordance with the provisions in subsection (3).
- (3) (a) Where a court issues a direction under subsection (2)(a), the relevant enquiry shall be conducted and reported on –
  - (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such superintendent at the request of the court; and
  - (ii) by a psychiatrist appointed by the accused if he so wishes.
- (b) (i) The court may for the purposes of such enquiry commit the accused to a psychiatric hospital or other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may from time to time determine, and if an accused is in custody. When he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.
- (d) The report shall –
  - (i) include a description of the nature of the enquiry, and
  - (ii) include a finding as to the question whether the accused represents a danger to the physical or mental well-being of other persons.
- (g) A statement made by an accused at the enquiry shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination

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27 51 of 1977.

28 116 of 1993.

29 Du Toit *et al Commentary on the Criminal Procedure Act* (1996) 28-24A–28-24E.



of the question whether the accused is a dangerous criminal or not, in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible.

- (h) A psychiatrist appointed under paragraph (a), other than a psychiatrist appointed by an accused, shall, subject to the provisions of paragraph (i), be appointed from the list of psychiatrists referred to in section 79(9).<sup>30</sup>
  - (i) Where the list compiled and kept in terms of section 79(9) does not include a sufficient number of psychiatrists who may conveniently be appointed for any enquiry under this section, a psychiatrist may be appointed for the purposes of such enquiry notwithstanding that his name does not appear on such list.
- (4) (a) If the finding contained in the report is the unanimous finding of the persons who under subsection (3) conducted the enquiry, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.
  - (b) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under subsection (3)(a) conducted the enquiry.

## 5 2 Reflections on Section 286A

Section 286A is directed principally at accused persons who suffer from psychopathy or related anti-social disorders. Accused persons who suffer from anti-social disorders and therefore represent a danger to the physical or mental well-being of other persons, and in respect of whom the court concludes that the community should be protected, will accordingly be dealt with in accordance with section 286A.<sup>31</sup> This section affords the trial court another sentencing option when dealing with anti-social personalities. In terms of section 55(1) a superior court or regional court which convicts a person of one or more offences may, if it is satisfied that the person represents a danger to the physical or mental well-being of other persons and that the community should be protected against such person, declare such person a dangerous criminal. The declaration of a person as a dangerous criminal means that such person will spend an indefinite period in prison. The Magistrate's Court has no jurisdiction in this regard and must refer a suitable case to the regional court for punishment. The purpose of the declaration is clear: to protect the community or other persons against those who represent a danger to their physical or mental well-being or against whom the community should be protected. It is

<sup>30</sup> S 79(9) states: "The Director-General, Health shall compile and keep a list of (a) psychiatrists and clinical psychologists who are prepared to conduct any enquiry under this section; and (b) psychiatrists who are prepared to conduct any enquiry under section 286A(3) and shall provide the registrars of the high courts and all clerks of magistrates' courts with a copy thereof."

<sup>31</sup> Du Toit *et al* 28-24C.

important to take note of the fact that, even if a court is satisfied or convinced as set out above, a court is under no obligation to declare an accused a dangerous criminal – it is solely within the court’s discretion.<sup>32</sup> Where the finding contained in the report is the unanimous finding of the psychiatrists who conducted the enquiry and the finding is not disputed by the prosecutor or the accused, the court may then determine the matter on the report without hearing evidence. If the finding is not unanimous, the court will determine the matter after hearing evidence in this respect.<sup>33</sup>

Section 286B states:

- “(1) The court which declares a person a dangerous criminal shall –
- (a) sentence such person to undergo imprisonment for an indefinite period; and
  - (b) direct that such person be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court.
- (4) (b) After a court has considered a sentence in terms of this section, it may –
- confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court, convert the sentence into correctional supervision on the conditions it deems fit, or release the person unconditionally or on such conditions it deems fit.”

The legislature thus obliges the court that declared a person a dangerous criminal to sentence such person to undergo imprisonment for an indefinite period and to direct that such person shall be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court.<sup>34</sup>

Within seven days after the expiration of the period determined by the trial court, the accused must be brought before the court that sentenced him in order to enable such court to reconsider the sentence. It is clear that the legislature had in mind that the trial court should reconsider, on new evidence, the imprisonment for an indefinite period. The court will thus have to determine whether the accused still presents a physical or mental danger to other persons and whether the community must still be protected against him or her.<sup>35</sup>

One of the most prominent decisions dealing with the dangerous criminal provisions of sections 286A and 286B is the case of *S v T*.<sup>36</sup> This case serves as an excellent example of the interplay between psychiatry and law regarding prediction of future dangerousness.

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32 *Idem* 28–24D.

33 S 55(4).

34 Du Toit *et al* 28–24F.

35 *Idem* 28–24G.

36 1997 1 SACR 496.

The tragic facts of this case were as follows: The complainant, a 15-year old virgin, met the appellant, a twenty-three-year old male, one evening when she was asked by M to join them as they had to take one P to M's parents' home as he was drunk. They all drove off with the appellant. Once they arrived at M's parents' flat, M's father indicated that M had to remain at home. Consequently only the complainant and the appellant were left in the car. The appellant then drove the complainant to the beach where, after he consumed liquor, he brutally raped and sodomised her over a period of five hours. The complainant suffered severe physical and psychological trauma. The district surgeon said that her injuries showed that she had been savagely raped and sodomised. After twenty years' experience it was, he said, one of the worst cases he had seen in a child of her age.<sup>37</sup>

The clinical psychologist also stated:<sup>38</sup>

"The psychological damage caused by the rape was so devastating that it is impossible to say at this stage whether D will ever recover enough to lead a reasonably normal life."

Three professional witnesses gave evidence on the appellant's mental state: Dr Teggin, a psychiatrist in private practice for the defence, Dr Jedaar, a psychiatrist, and Mr Lay, a clinical psychologist and qualified social worker for the State. The trial court convicted the appellant and imposed a sentence of life imprisonment.

Teggin, Jedaar and Lay were all of the opinion that the appellant would repeat his conduct and that given a similar situation it was probable that he would act in the same way. All three experts diagnosed the appellant as having a mixed personality disorder which, according to Teggin, showed features of borderline personality disorder. Teggin was of the view that no matter how long the appellant was imprisoned he would remain a danger after release. Jedaar testified that there was a risk of future violent behaviour on the part of the appellant and that he fitted the profile of a dangerous individual. Jedaar was further of the view that the prognosis was poor and stated that significant changes could not be guaranteed.<sup>39</sup>

Schultz JA, who delivered the minority judgment, was of the view that the case should not be referred back to the trial court and accordingly that the appeal should be dismissed.<sup>40</sup>

There was substantial agreement between the three experts, both with regard to diagnosis and prognosis. The appellant was found not to be

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<sup>37</sup> *Idem* 502H-I.

<sup>38</sup> *Idem* 503B.

<sup>39</sup> The majority of the court held that the court *a quo* had failed to exercise a proper discretion in regard to sentence as it had failed to consider the possibility of utilising ss 286A and 286B of the Act. Accordingly it was held that it was in the interests of justice and of the appellant that the matter be referred back to the trial court with a direction that the trial court considers acting in terms of s 286A of the Act.

<sup>40</sup> Schultz focused on various portions of the expert evidence. See 503E-507A.

suffering from a mental disease. The diagnosis was one of mixed personality disorder. In Jedaar's view the appellant had features of the anti-social type (psychopathy), the borderline type, as well as of the narcissistic type.<sup>41</sup>

All three experts placed emphasis upon remorse, in the full sense of deep regret and repentance.

Jedaar testified:<sup>42</sup>

"So there was complete lack of insight and remorse for his own behaviour. In other words he did not take responsibility for his behaviour. He immediately went on to add that he had been a productive member of society who employed others and therefore did not deserve the treatment to be incarcerated in an institution for this length of time and was very indignant in fact at this incarceration at Valkenberg Hospital for the 30 days. In other words, to quote him: 'I've paid my dues.' How about the remorse for the victim? He says that all the inconsistencies that are contained in your reports that you've submitted to me at that stage and his account indicated that this was a fabrication and that this person should prove in a court of law that he actually raped her. In other words again a complete lack of empathy for the suffering and pain of the victim at that stage as well as remorse for his behaviour."

Two of the experts were of the view that the appellant would present a potential threat to the public.

Teggin stated:<sup>43</sup>

"If we were to view it from just one aspect, that is the protection of society, viewed from that aspect alone . . . I believe that if one views this situation purely from society's point of view, no matter how long the accused is in prison, I believe that he would remain a danger after being released."

Jedaar stated:<sup>44</sup>

"However, all I can comment on is he is at risk of repetitive aggressive behaviour . . . so the callousness of the actions itself indicates that this man is potentially dangerous . . . I think he is at risk of future violent behaviour and that should be considered."

Schultz JA held:<sup>45</sup>

"Having weighed all the factors I consider that the seriousness of the offence that may be repeated and the real danger that it will be are of prepondering weight so that the appropriate sentence is life imprisonment. Accordingly, if regard be had only to the evidence led at the trial, the appeal should fail."

This case is an excellent illustration of the pivotal role psychiatrists and psychologists play in dangerous offender predictions. Much weight was attached to Teggin and Jedaar's evidence especially with reference to the minority judgment of Schultz.

## 6 Constitutionality of Sections 286A and 286B

It goes without saying that the abovementioned two sections pertaining to the indefinite incarceration of dangerous criminals will *prima facie* conflict

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41 *Idem* 504B-C.

42 *Idem* 505F-G.

43 *Idem* 506B-C.

44 *Idem* 506D-J.

45 *Idem* 509C-E.

with some of the provisions contained in the Bill of Rights of the Constitution.<sup>46</sup>

Potentially indefinite incarceration may impact, amongst other rights contained in the Bill of Rights, on the right to human dignity,<sup>47</sup> the right to freedom and security of the person,<sup>48</sup> which specifically provides that everyone has the right not to be treated or punished in a cruel, inhuman or degrading way,<sup>49</sup> and the right against self-incrimination.<sup>50</sup>

In *S v Bull, S v Chavulla*<sup>51</sup> it was held that the declaration of an accused person as a dangerous criminal in terms of sections 286A and 286B is not unconstitutional.

In the first case, on appeal (“the *Bull* appeal”) the two appellants were convicted on two counts of murder, one count of robbery, one count of attempted robbery and one count each of the illegal possession of a firearm and ammunition. The charges arose out of an armed robbery on the evening of 5 October 1997 at the Superbake Bakery in Mitchell’s Plain near Cape Town. After conviction the trial court directed that an enquiry be held in terms of section 286A(3) of the Criminal Procedure Act as to whether the appellants were dangerous criminals. At the enquiry expert psychiatric evidence was led on behalf of both the State and the appellants. Both appellants were thereafter declared to be dangerous criminals and sentenced to imprisonment for an indefinite period. In terms of section 286B(l)(b) the trial court directed that they again be brought before the court upon the expiration of a period of 35 years for reconsideration of the sentences.

In the second case, on appeal (“the *Chavulla* appeal”), the five appellants were convicted on one count of housebreaking, one count of robbery, three counts of murder, one count of attempted murder and one count each of the illegal possession of firearms and ammunition. These charges all arose out of an attack at a farmhouse at Nieuwoudtville in the Western Cape on the evening of 24 September 1996.

After an enquiry in terms of section 286A(3) at which expert psychiatric evidence was led on behalf of both the State and the defence, all the appellants were declared to be dangerous criminals and sentenced to imprisonment for an indefinite period. The trial court directed that the first appellant again be brought before the court on the expiration of a period of 30 years, and that the others be brought before the court on the expiration of 50 years for reconsideration of their sentences.

The constitutional validity of the dangerous criminal provisions in sections 286A and 286B of the Act was challenged, mainly on the basis that they infringe the right guaranteed by section 12(1)(e) of the Constitution which entails the right not to be treated or punished in a cruel, inhuman

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46 Constitution of the Republic of South Africa, 1996 ch 2.

47 *Idem* s 10.

48 *Idem* s 12.

49 *Idem* s 12(1)(e).

50 *Idem* s 35(3)(j).

51 2001 2 SACR 681 (SCA). See in particular 693E–H.

or degrading way. It was contended for the appellants that the fact that sections 286A and 286B were not limited to offences of any particular nature or severity, and the fact that the criteria for designating offenders as dangerous were not specific and detailed, violated the constitutional principle against gross disproportionality. It was also submitted that the criteria in section 286A for declaring an accused a dangerous criminal were too vague and uncertain to meet the principles of legality.<sup>52</sup>

In delivering judgment Vivier held as follows:<sup>53</sup>

- (a) There could be no constitutional objection to an indeterminate sentence, *per se*, since the protection of society is a legitimate purpose of sentencing, provided that the constitutional principle against gross disproportionality is respected.<sup>54</sup>
- (b) The fact that sections 286A and 286B of the Act are not limited to offences of any particular nature or severity, and the fact that the criteria for designating offenders as dangerous are not specific and detailed as the dangerous offender provisions in, for instance, the Canadian Criminal Code,<sup>55</sup> does not violate the constitutional principle against gross disproportionality. The court is not obliged to declare an accused a dangerous criminal even where it is satisfied that all the requirements for such a declaration are present.<sup>56</sup>
- (c) In making a predictive judgment of dangerousness the court must consider, as the psychiatrists did in both appeals, the personal characteristics of the accused, as revealed by psychiatric assessment, the facts and circumstances of the case and the accused's history of violent behaviour, particularly the accused's previous convictions. The court must draw its own conclusions.<sup>57</sup>
- (d) The detailed procedures, including psychiatric evidence provided for by section 286A, ensure that a declaration of dangerousness will not be made lightly. The purpose of the psychiatric evidence is to provide the court with an expert opinion on the interpretation of the accused's past conduct and personal characteristics and the accused's likely future conduct based on that analysis.<sup>58</sup>
- (e) Accordingly the dangerous offender provisions do not offend the principle of legality and are not unconstitutional.

## 7 The Dangerous Criminal in Canada

It is interesting to briefly look at some of the dangerous offender provisions in Canada. The reason for comparing the dangerous offender provisions in SA to the provisions in Canada is to provide an example of

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52 *Idem* 682A–C.

53 *Idem* 682D–E.

54 *Idem* 690F.

55 *Idem* 690A–B.

56 *Idem* 691A–B.

57 *Idem* 692G–H.

58 *Idem* 693G–H.

another country where dangerous offender provisions similar to those in SA have survived constitutionality attacks. This reaffirms the importance of these provisions as well as the pivotal role of psychiatry as a profession in these predictions.

The current dangerous offender regime in Canada was originally enacted in 1977<sup>59</sup> largely in response to the recommendation of the Ouimet Committee, which examined the cases of eighty habitual offenders.<sup>60</sup> The Committee concluded that almost forty percent of their subjects did not represent a serious threat to public safety.<sup>61</sup> It suggested that indeterminate detention could only be justified in the case of “dangerous offenders”.<sup>62</sup>

The provisions that are of relevance for this discussion are set out in sections 752 to 761 of Part XXIV of the Criminal Code.<sup>63</sup>

The first requirement is conviction for a “serious personal injury offence”, which is either a sexual assault, or an indictable offence punishable by more than ten years imprisonment, involving violence or danger to life, safety or psychological well-being.<sup>64</sup>

If the prosecutor has grounds to believe that the offender might be found to be a dangerous offender, there may be an application to have an assessment report filed with the court as evidence.<sup>65</sup>

Section 752.1 states:

“(1) Application for remand for assessment – where an offender is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(d) and, before sentence is imposed on the offender, on application by the prosecution, the court is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1 the court may, by order in writing remand the offender, for a period not exceeding sixty days, to the custody of the person that the court directs and who can perform an assessment, or can have an assessment performed by experts.”

59 Criminal Law Amendment Act, 1977, SC 1976–77 C53S14. See Lafond “Disorder in court: The use of psychiatric testimony in the prediction of dangerousness” 2005 *Dalhousie Journal of Legal Studies* 1–34.

60 Lafond *idem* 3.

61 *Idem* 4.

62 Report of the Canadian Committee on Corrections *Towards Unity: Criminal Justice and Corrections* (Ottawa: Queen’s Printer, 1969) as discussed in Lafond *idem* 3.

63 RSC 1985, C C-46.

64 S 752 defines “serious personal injury offence” as follows: (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving: the use or attempted use of violence against another person, conduct endangering or likely to endanger the life or safety of another person on inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more, or an offence or attempt to commit an offence mentioned in s 271 (sexual assault), s 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or s 273 (aggravated sexual assault).

65 Lafond 2005 *Dalhousie Journal of Legal Studies* 4.

The prerequisites of this remand are, first, that the person has been convicted of, but not yet sentenced, a personal injury offence tending to cause severe physical danger or severe threat to life, safety or physical or mental well-being on the basis of evidence establishing:<sup>66</sup>

- “(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour;
- (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour; or
- (iii) any behaviour by the offender associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender’s behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.”<sup>67</sup>

Section 753(i) accordingly outlines the test to be used to determine if an offender is a dangerous offender and can be divided into two branches.<sup>68</sup>

The first branch is established when there has been a conviction for a violent indictable offence punishable by at least ten years’ imprisonment. It is required that there be a finding that the offender “constitutes a threat to the life, safety, or physical or mental well-being of other persons”<sup>69</sup> through failing to restrain behaviour, and a likelihood of causing death or injury, persistent aggressive behaviour showing indifference to the reasonably foreseeable consequences of behaviour, or acts:

“of such a brutal nature as to compel the conclusion that the offender’s behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint”.

The second branch applies where there has been a conviction for sexual assault. It requires a finding that the offender’s conduct shows a “failure to control his or her sexual impulses”, and there is a likelihood that he or she will cause “injury, pain or other evil to other persons through failure in the future to control . . . sexual impulses”.<sup>70</sup>

If either branch of the test is satisfied beyond a reasonable doubt of the likelihood of threat, the judge may label the offender a “dangerous offender.”<sup>71</sup>

If a dangerous offender designation is imposed, an indeterminate sentence is mandatory.<sup>72</sup> An appellate court may overturn the designation and impose a fixed sentence.<sup>73</sup> If the designation stands, a parole board

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66 Lafond *idem* 5.

67 S 753(1).

68 Lafond 2005 *Dalhousie Journal of Legal Studies* 6.

69 *Ibid.*

70 S 753(1) (6).

71 S 753(1). See Lafond 2005 *Dalhousie Journal of Legal Studies* 6.

72 S 753(4).

73 Lafond 2005 *Dalhousie Journal of Legal Studies* 7.



will review the case as soon as possible after the expiration of seven years from the date of arrest, and then every two years thereafter, to determine whether parole is appropriate.<sup>74</sup>

### **7 1 The Constitutionality of the Dangerous Offender Provisions in Canada**

The Supreme Court of Canada first considered the constitutionality of the dangerous offender provisions in *R v Lyons*.<sup>75</sup> The accused was sixteen years old and he was charged with break-and-enter. He waived his preliminary inquiry and pleaded guilty. The Crown commenced a dangerous offender application and the trial judge accordingly concluded that all requirements had been met, since the accused had a "sociopathic personality". It was argued that the indeterminate sentence provisions of the Criminal Code infringed upon sections 7, 9, 11 and 12 of the Canadian Charter of Rights and Freedoms.<sup>76</sup>

La Forest J concluded that the provisions did not violate a principle of fundamental justice.<sup>77</sup> In considering whether the use of psychiatric testimony was fundamentally unfair due to its uncertainty, La Forest distinguished between infallibility and relevance and noted:<sup>78</sup> "Indeed, inherent in the notion of dangerousness is the risk, not the certainty, of harm."

La Forest J also reminded us that the basis of law is not logic, but experience:

"The most that can be established in a future context is a likelihood of certain events occurring. To doubt this conclusion is . . . to doubt the validity of legislative objectives embodied in Part XXI . . . Psychiatric evidence is clearly relevant to the issue whether a person is likely to behave in a certain way and, indeed, is probably relatively superior in this regard to the evidence of other clinicians and lay persons."<sup>79</sup>

With regard to the problem of over prediction La Forest J held:<sup>80</sup>

"This problem does not appear to undermine the utility and fairness of the scheme so much as to fortify the conclusion that the procedural protections accorded the offender, especially on review, ought to be very rigorous."

## **8 Recommendations and Suggestions**

Hess and Weiner<sup>81</sup> are of the view that the distinction between actuarial and clinical assessments is blurring to the point where there is often no meaningful distinction between the two.

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74 S 761(1).

75 (1987) 2 SCR 309, 89 N-S-R (2d) 271. See also Lafond 2005 *Dalhousie Journal of Legal Studies* 7.

76 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, which is Schedule B to the Canada Act 1982 (UK), 1982, c.11.

77 *R v Lyons idem* par 27.

78 *Idem* par 92.

79 *Idem* par 97.

80 *Idem* par 100.

81 *The Handbook of Forensic Psychology* (2ed) (1999) 188.

They stated the following with regard to prediction of dangerousness:<sup>82</sup> When an individual has clearly exhibited a recent history of repeated violence, it is reasonable to assume that that individual poses a serious risk of acting violently again in the foreseeable future unless there has been a significant change in the attitudes or circumstances that led to violence.<sup>83</sup> Even when an individual's history of violence is a somewhat distant history of serious violence, which resulted in continuing confinement, it can reasonably be assumed that that individual remains at risk for violence.<sup>84</sup> Serious dangerousness may reasonably be said to exist when psychotic individuals make serious threats or statements of intention to commit violence.<sup>85</sup> Even in the absence of a history or threats of violence there may be occasions when an individual is so clearly on the brink of violence that a determination of dangerousness and preventive action based on that determination is justified. For example, when an individual is experiencing command hallucinations to do harm and doubts that he or she can resist the commands.<sup>86</sup> Even though mental health professionals have yet to demonstrate any special ability not shared equally by lay persons to assess dangerousness, they may well yet demonstrate such an ability, at least in certain circumstances. They may well possess special techniques or knowledge that can meaningfully and legitimately aid in making determinations of dangerousness.<sup>87</sup>

With reference to more comprehensive dangerousness assessments, Hess and Weiner make the following recommendations:<sup>88</sup> As the violent history of the accused becomes more distant in time, more efforts may be required to accurately reconstruct the accused's history of violence. All potential sources of meaningful information regarding the accused's former violence, current behaviour, and mental status should be considered.<sup>89</sup> It is often sensible to have patients assessed by clinicians not attached to the patient's ward before final decisions or recommendations are made.<sup>90</sup> Group therapy may be a useful assessment tool, both to discover underlying feelings and concerns and to evaluate whether a previously violent offender still lacks genuine empathy for others.<sup>91</sup> Determining the patient's level of insight regarding the genesis and dynamics of his or her previous violence and his or her need to comply with treatment recommendations can provide important information regarding the patient's vulnerability to regression in response to stress. If it is shown that an individual's violence in the past stemmed from and was a defence against psychic pain, evidence that the individual can now confront and appropriately deal with such feelings, is a positive prognostic sign. It must

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82 *Idem* 191.

83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Idem* 198.

89 *Ibid.*

90 *Idem* 199.

91 *Idem* 200.

be borne in mind that psychopathic and compulsive offenders may well be able to give the appearance of having considerable insight into their past difficulties while still retaining their most deep-seated and most dangerous pathologies.<sup>92</sup> A comprehensive dangerousness assessment should include an evaluation of the patient's level of self-esteem and susceptibility to narcissistic injury, as well as his or her ability to relate to other people well enough to maintain self-esteem and to tolerate personal losses should they occur.<sup>93</sup> Patients with a history of serious violence on supervised outpatient status should be monitored closely for signs of regression toward violent behaviour. Adequate follow-up treatment is the key to good assessment in all aspects of medicine, particularly with patients who are prone to impulsiveness and aggressiveness.<sup>94</sup>

It is important that the examiner conducting an assessment should, first, possess the expertise to conduct the risk assessment which includes not only the proper forensic mental health credentials, but also a good knowledge of the literature on known risk factors and, secondly, adequate information as to the accused and the index offence should be available.<sup>95</sup>

Kaliski offers the following three suggestions:<sup>96</sup> The examiner should acquire a detailed description of the circumstances surrounding the index offence. It should be determined whether the violence was an exceptional event or part of a long-standing pattern of habitual violence.<sup>97</sup> The more serious the degree of violence used during the index offence the less important the other risk factors may prove to be. This is as a result of the fact that conviction for an offence that involved profound violence should result in a heavy sentence and it also indicates that the accused has a propensity for violence.<sup>98</sup> The examiner should assess the presence of psychopathy since current research suggests that this is the most robust risk factor.<sup>99</sup>

## 9 Conclusion

Psychiatric assessments in the criminal justice system are here to stay. The dangerous offender provisions in both SA and Canada survived constitutionality attacks. Central to the issue of determining dangerousness stands the mental health practitioner or, put differently, the psychiatrist or psychologist. Despite criticism levelled towards psychiatric ability to predict dangerousness, the relevant dangerous offender provisions require psychiatric assessment. The fact remains that the assessment of dangerousness remains a field beyond the knowledge and experience of the judicial authority, as it is a specialised activity calling for particular expertise,

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92 *Ibid.*

93 *Idem* 201.

94 *Idem* 202.

95 Kaliski 122.

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

qualifications and experience. It is, however, essential that the expert bear in mind that his or her opinion is only there to assist the trier of fact in considering potential dangerousness and the expert should thus not usurp the function of the court. It is further submitted that both the State and the accused should retain their own psychiatric experts. This will provide the trier of fact with a more balanced view as it will be possible to weigh the psychiatric testimony of the State against the psychiatric testimony of the defence. These experts should be required to defend and motivate their conclusions as well as the processes by which these conclusions were arrived at. In the case of conflicting opinions between equally credible State and defence experts, impartial court-appointed experts could be of much assistance.