CHAPTER 4
THE ROLE OF FORENSIC EXPERT EVIDENCE IN ESTABLISHING CRIMINAL INCAPACITY

Melrose said: “But of course, perjury seldom plays a role in the testimony of so-called expert witnesses. It is only too easy for both defense and prosecution to find honest authorities who oppose each other diametrically in regard to the same phenomenon, even in such a supposedly exact science as ballistics, and when the human element enters, consistency goes right out the window. Dr Brixton, for example, believes that a man who has tried to get himself mutilated can be held responsible for no subsequent act however criminal. I wager that the prosecution psychiatrist will find the same fact utterly negligible.” (Thomas Berger)  

1 Introduction

Mental health professions are increasingly being utilised by the criminal justice system to provide assistance in the assessment of issues beyond the knowledge or experience of the courts. One of the most important domains where the expertise of qualified psychiatrists and psychologists is becoming essential denotes the assessment and application of the defence of criminal incapacity. These mental health professionals will accordingly be requested by courts to assess individuals allegedly having lacked criminal capacity at the time of the commission of the defence and to consequently provide an opinion as to the mental state of the individual at the time of the offence. It is trite that the evidence presented by psychiatrists and psychologists within the paradigm of criminal capacity takes the form of expert opinion evidence.

Expert evidence is one of the exceptions to the general rule that evidence of opinion is inadmissible. The general rule is that opinion evidence is inadmissible due to the irrelevance thereof. The exception to the latter rule is when the issue is of such a nature that the opinion of the expert, in this case that of the psychiatrist or psychologist, can provide assistance to the court to adjudicate the matter. The opinion of an expert will accordingly be admissible to provide the court with scientific information which is likely to fall outside the experience and knowledge of the court. 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 deemed irrelevant and inadmissible. The main criterion for assessing the admissibility of such evidence can be traced to the relevance thereof. According to Zeffert and Paizes an opinion will be relevant if it can assist the court and if the witness is better qualified to form such an opinion. There are generally two exceptions to the general “ban” against opinion evidence. The first exception entails the opinion of a lay person as to facts observed by such a person and where it is reasonably inevitable for the witness to separate observed facts from the inferences drawn from the observed facts. It is

3 Zeffert and Paizes (2009) supra note 2 at 309; Schwikkard and Van der Merwe (2009) supra note 2 at 83-84; Hoffman (1963) supra note 2 at 175; Schmidt (1998) supra note 2 at 429; Hoffman and Zeffert (1988) supra note 2 at 83; Meintjes-Van der Walt (2001) THRHR supra note 2 at 236-237. See also Dennis, I "The Law of Evidence" (2007) 847 where it is stated that the general rule according to the common law entails that a witness may only present evidence of facts to which they have personal knowledge of and may not express their opinions of what happened or may have happened. See chapter 1 paragraph 2.6. See also Du Toit et al (2009) supra note 2 at 24-12-24-17.
4 Ibid. See also Cross and Tapper (2007) supra note 2 at 566 where they define “opinion” as: “… any inference from observed facts”. See also Delisle and Stuart (2001) supra note 2 at 645-646.
7 Zeffert and Paizes (2009) supra note 2 at 311; Schwikkard and Van der Merwe (2009) supra note 2 at 87-88.
8 Zeffert and Paizes (2009) supra note 2 at 310-311; Schwikkard and Van der Merwe (2009) supra note 2 at 87-90; Keane (2006) supra note 2 at 552; Cross and Tapper (2007) supra note 2 at 566-567; Dennis (2007) supra note 3 at 847. See also Wigmore, JH "Evidence in Trials at common Law" (1978) at paragraph 1918 where he notes that the true essence of the opinion rule simply relates to the exclusion of supererogatory evidence. He notes: “It is not that there is any fault to find with the witness himself or the sufficiency of his sources of
consequently often difficult to distinguish between facts and opinion of such witness. The second exception relates to the opinion evidence presented by a witness who by way of skill, experience and competence is in a better position to draw inferences from the facts than the court due to the fact that the subject-matter requires skill, knowledge or expertise beyond the normal experience of the court. For purposes of this chapter, emphasis will fall on the second exception relating to expert evidence. One of the principle motivations for the exclusion of opinion evidence is predicated upon the premise of protecting the function of the trier of fact or judicial authority and entails that a witness should refrain from expressing opinion evidence on issues that the court itself has to decide upon and accordingly the witness should not “usurp” the function of the court. The latter principle is more commonly referred to within the law of evidence as the so-called “ultimate issue” principle. In \( S \ v \ Harris^{11} \), Ogilvie Thomson JA indirectly encroached the ultimate issue rule by stating:

“… in the ultimate analysis, the crucial issue of appellant’s criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue the Court – initially, the trial Court; and, on appeal, this Court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period.”

The question which falls to be assessed is whether the ultimate issue rule should still be retained in our current rules of evidence. Within a climate of rapid

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9 Ibid. See also \( S \ v \ Nangatuuala and Another 1997 (4) SA 766 (SWA); Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 616 G-H.\n

11 \( S \ v \ Harris 1965 (2) SA 340 (A).\)

12 At 365 B-C. See also \( S \ v \ September 1996 (1) SACR 325 (A); Meintjes-Van der Walt (2001) \textit{THRHR supra} note 2 at 250-251.
developments in science and technology also with reference to the sciences of psychiatry and psychology, the “gap” between layman’s knowledge and expert knowledge is increasingly expanding. In the ultimate pursuit for truth and justice, various questions arise as to the admissibility, scientific reliability and validity of psychiatric and psychological evidence. Van Kampen illustrates the anomaly as follows:13

“Over many centuries, science has become pivotal to our understanding of (human) nature and its contribution to legal decision making processes has increased dramatically. But as the involvement of science itself, and various techniques based upon its insights grew, so did a number of problems related to the use of such knowledge by legal institutions.”

And further:

“The vast range of problems related to the use of (applied) scientific or otherwise specialised knowledge by legal institutions that have been identified over the years – and the manifest presence of some of these problems in more well-known miscarriages of justice – has made expert evidence one of the most hotly debated topics in legal literature.”

In chapter 2 the author addressed the controversy surrounding the need for expert evidence in support of the defence of non-pathological criminal incapacity also with reference to cases where expert evidence pertaining to the battered woman syndrome is advanced in support of non-pathological criminal incapacity. Upon closer scrutiny of the case law adhering to the traditional approach towards expert

13 Van Kampen, PTC “Expert Evidence Compared – Rules and Practices in the Dutch and American Criminal Justice System” (1998) at 4-5. See also Redmayne, M “Expert Evidence and Criminal Justice” (2001) at 36 where he states: “Fact finders need to analyse expert evidence and combine it with the other evidence that is presented to them; for their part, experts need to present their evidence in a manner that facilitates this task. These points are obvious, even banal. What is interesting is that their implementation is challenging, and even controversial.” See also Roberts, P “Science in the Criminal Process” (1994) *Oxford Journal of Legal Studies* 469 at 506 where it is stated: “… one must appreciate that forensic science is, in essence, science on the law’s terms. Although lawyers might look to science, with its popular reputation for “hard facts”, as an independent and legitimizing check on the pursuit of criminal justice, there is an important sense in which forensic science evidence is a mirror in which the criminal process admires its own reflection.”
evidence, various traces of the ultimate issue paradigm become evident.\textsuperscript{14} In chapter 2 the author in addition emphasised the lack of adequate statutory recognition of expert evidence in support of the defence of non-pathological criminal incapacity. Proper statutory recognition of expert evidence is, however, only one step towards the proper application of expert evidence in cases where the defence of criminal incapacity is raised. Obstacles such as the ultimate issue rule, reliability and validity further places a barrier on the acceptance of expert evidence which will have to be addressed. In chapter 3 the author indicated that even though expert evidence is statutorily provided for in cases of pathological criminal incapacity, the application thereof is often clouded and not coherent. The latter is further exacerbated by the divergent views of the behavioural sciences as opposed to the legal profession. Despite the necessity and pivotal role of expert evidence in cases where criminal capacity is in issue, courts frequently approach such evidence with great caution, scrutiny and scepticism. Melton \textit{et al} encapsulate this dilemma by stating:\textsuperscript{15}

“To some extent, this antipathy stems from the belief that mental health professionals too often try to answer legal questions for which there are no good behavioural science answers – or, worse, are merely selling their testimony to the highest bidder. But it also flows from the fact that even when clinicians have something useful to say and are eager to maintain their integrity, their message is often obscured or confused. Their reports are perceived as conclusory and filled with jargon; their testimony is viewed as hard to follow (on direct examination) and befuddled (on cross-examination).”

\textsuperscript{14} See chapter 2 \textit{supra} paragraph 9.1 with reference to \textit{S v Laubscher} 1988 (1) SA 163 (A) at 168 B-C; \textit{S v Calitz} 1990 (1) SACR 119 (A); \textit{S v Lesch} 1983 (1) SA 814 (EPD).

\textsuperscript{15} Melton, GB, Petrila, J, Poythress, NG and Slobogin, C \textit{“Psychological Evaluations for the Courts – A Handbook for Mental Health Professionals and Lawyers”} (2007) at 577. See also Alan in Tredoux \textit{et al} (2005) \textit{supra} note 2 at 287-288 where it is stated: “Psychologists often insert their expertise into legal proceedings, either in the form of oral evidence, or as an affidavit. Unfortunately their offerings are often perceived to be of limited value by courts, and psychologists themselves often believe that the testimony they offer is misrepresented in court.” See also Blau, TH \textit{“The Psychologist as Expert Witness”} (1998) at 2 where he quotes the words of Munsterberg who stated: “The lawyer and the judge and the jurymen are sure that they do not need the experimental psychologist. They do not wish to see that in this field pre-eminently applied experimental psychology has made strong strides ... They go on thinking that their legal instincts and their common sense supplies them with all that is needed and somewhat more; ...”
Dahl similarly refers to the ultimate issue problem and its impact on expert psychiatric evidence by stating:\textsuperscript{16}

“One reason for resistance to the use of psychiatric knowledge by the law is lingering doubt about the scientific validity of psychiatry. However, legal decision-makers are also concerned that incorporation of psychiatric concepts into the criminal law will impair the ability of the law to achieve its policy objectives. They fear two developments: one, that psychiatrists will have increasing influence on ultimate legal determinations; and two, that the law will become dependent on concepts that belong to an outside discipline.”

In this chapter the author will assess the fundamental rules of evidence pertaining to expert evidence with an evaluation of the nature, scope, presentation and evaluation of expert evidence. The nature and scope of the forensic assessment process will also be the role of the forensic psychiatrist and psychologist within the realm of the presentation of expert evidence in support of the defence of criminal incapacity.\textsuperscript{17} The ultimate issue rule in conjunction with the various other controversies surrounding the presentation of expert evidence will be discussed,


\textsuperscript{17} For purposes of this study the role of expert evidence in support of the defence of criminal incapacity will only be assessed with reference to the role of psychiatrists and psychologists as these two professions are provided for within the framework of sections 77-79 of the Criminal Procedure Act 51 of 1977. Accordingly the role of social workers, criminologists and various other professions will not be addressed in this study. It is further important to note that this chapter will deal with the nature and scope of expert evidence and the rules pertaining to the admissibility of testimony presented by expert witnesses. As psychiatrists and psychologists will assume the roles of expert witnesses when called to testify in cases where the defence of criminal incapacity is raised, these rules will inadvertently apply to them. As such, reference to “expert witness” should be construed as reference to the psychiatrist or psychologist for purposes of this study within the paradigm of the defence of criminal incapacity. This chapter will accordingly address a \textit{capita selecta} of principles pertaining to expert evidence which inadvertently also apply either directly or indirectly to the expert testimony of psychiatrists and psychologists in cases where the defence of criminal incapacity is advanced.
coupled with the competing disciplines of law and medicine and its impact on the proper presentation of expert evidence.

2 Constitutional foundation

“Whatever the system, it is surely fundamental that the truth in so far as it can be established should be established in what is regarded as a fair and therefore legitimate way.”18

An accused’s right to a fair trial is well established in terms of section 35(3) of the Bill of Rights of the Constitution.19 Section 35(3)(i) provides that every accused person has the right to a fair trial which includes the right to adduce and challenge evidence.20 Within the framework of the defence of criminal incapacity and the presentation of expert evidence, this right of an accused person to adduce and challenge evidence and specifically expert evidence, becomes a vital tool in establishing the merits of the defence of criminal incapacity. The question which falls to be considered is whether our current rules of evidence pertaining to expert evidence adequately acknowledge and promote the fundamental right of an accused person to adduce and challenge evidence. In addition it has to be assessed whether the ultimate issue rule places unnecessary barriers on the proper presentation of expert evidence also within the realm of the defence of criminal incapacity. Inherent to the right to adduce and challenge evidence lays the necessity to cross-examine expert witnesses. The right to adduce and challenge evidence can be promoted both by calling witnesses and also by cross-examining of witnesses.21 In this chapter the fundamental right of an accused to adduce and challenge evidence will be assessed with the concomitant right to cross-examine expert witnesses on the backdrop of the defence of criminal incapacity.

21 Currie and De Waal (2005) supra note 20 at 779. See also Meintjes-Van der Walt (2001) SAJHR at 302-303. See also section 166 of the Criminal Procedure Act. This section will be discussed below.
3 The foundational principles of expert evidence

“In the lush pastures of the Common Law a number of sacred cows graze and no-one dares to cull them or even try to make them healthier. One answers to the name of “expert evidence” ... It is a scraggy animal, despised by many, yet its continued existence is essential for the proper administration of justice. Properly cared for it could provide good progeny but the breeding would have to be selective as some strains may not be worth encouraging.”

3.1 Relevance and the rules of expert evidence

In order to comprehend the role of the mental health professional with reference to psychiatrists and psychologists within the paradigm of the defence of criminal incapacity, an understanding of the basic and foundational principles of expert evidence becomes essential. It has already been indicated above that expert evidence represents one of the exceptions to the general rule against opinion evidence. The opinion evidence of an expert will be deemed admissible if it is relevant in the sense that the expert by reason of specialised knowledge or skill is better qualified to draw an inference from the particular set of facts than the court itself.

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23 Zeffert and Paize (2009) supra note 2 at 310-312; Schwikkard and Van der Merwe (2009) supra note 2 at 87-88; Meintjes-Van der Walt (2001) supra note 2 at 149; Alan and Meintjes-Van der Walt in Kaliski (ed) (2006) supra note 2 at 343; Alan in Tredoux et al (eds) (2005) supra note 2 at 288; Hoffmann and Zeffert (1988) supra note 2 at 83-86; Cross and Tapper (2007) supra note 2 at 566-567; Keane (2006) supra note 2 at 552-553. See also Du Toit et al (2007) supra note 2 at 24-17 where it is stated that it is incorrect to refer to expert evidence as an “exception” to the general “opinion-rule”. It is further stated that the opinion of an expert is admissible if relevant. For purposes of this discussion the phrase “exception” will, however, be utilized in order to differentiate “expert evidence” from other forms of “opinion evidence”.
24 Ibid. See also Du Toit et al (2007) supra note 2 at 24-16A; R v Vilbro & Another 1957 (3) SA 223 (A) at 228 G; Ruto Flour Mills Ltd v Adelson (1) 1958 (4) SA 235 (T).
The evidence presented by mental health experts will be meaningless to the criminal justice system if it is not relevant to the issues before the court.25 Relevance in this sense can be deemed as one of the core requirements governing the admissibility of expert evidence within the criminal justice system. Relevance generally relates to the “probative potential of an item of information to support or negate the existence of a fact or consequence (factum probandum).”26 Paizes and Zeffert state that relevancy essentially relates to a matter of common sense and reason.27 Section 210 of the Criminal Procedure Act reads as follows:28

“No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.”

Du Toit et al similarly state that the relevance of an item of evidence entails its logical ability to show or indicate the material fact for which the evidence is adduced.29 Hiemstra notes that evidence which contributes to the proof or disproof of a fact in dispute is relevant and embraces evidence that directly proves matters in issue as well as those from which proof of a point in issue can be properly deduced and consequently all other evidence is irrelevant.30 Hiemstra further notes:31

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25 Meintjes-Van der Walt (2001) supra note 2 at 150; Paizes and Zeffert (2009) supra note 2 at 237-243. See also S v Gakool 1965 (3) SA 461 (N) at 4754; R v Matthews & Others 1960 (1) SA 752 (A) at 758 A.

26 Meintjes-Van der Walt (2001) supra note 2 at 150. See also R v Katz 1946 AD 781 where Watermeyer, CJ held: “The word relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.”


28 Criminal Procedure Act 51 of 1977; Hiemstra (2009) supra note 2 at 24-12; Du Toit et al supra note 2 at 24-12. See also Schwikkard and Van der Merwe (2009) supra note 2 at 45. See also DPP v Kilbourne 1973 AC 729 at 756 where Lord Simon held: “Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not propose to analyse what is involved in ‘logical probativeness’ except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say … that relevant evidence, is evidence which makes the matter which requires proof more or less probable.”

29 Du Toit et al supra note 2 at 24-12. See also R v Trupedo 1920 AD 58 at 62.

30 Hiemstra (2009) supra note 2 at 24-12.

31 Ibid.
“… not everything which is relevant is admissible or, as it is also sometimes put, not everything with evidential value is accepted as relevant. In principle the relevance of a fact is determined by the probative value it has regarding the facts in dispute; and the relevance of a fact determines the admissibility of evidence regarding that fact.”

The principle of relevance will inadvertently play a pivotal role in respect of the admissibility of expert psychiatric or psychological evidence in support of the defence of criminal incapacity. Merely adducing such testimony will not necessarily suffice to comply with the requirement of relevance. An opinion of a mental health expert may thus be rendered inadmissible due to the irrelevance thereof. Conversely, such opinion may be admitted if found to satisfy the prerequisite of relevance. Relevance at the end of the day is founded on “a mixture of common sense, logic and experience – and not rules of law.”32

It is trite that mental health professionals will, in cases where criminal incapacity is raised as a defence, be better qualified than the trier of fact to assess whether an accused in fact lacked criminal capacity at the time of the offence. The admissibility of expert evidence by mental health professionals will, however, be subject to the foundational principles governing expert evidence. There are generally four rules of expert evidence which regulate the reception and admissibility of opinion testimony by experts:33

- The first rule relates to the so-called “expertise rule” or “specialist” rule. This rule requires assessment as to whether the witness possess sufficient knowledge, skill or experience to render him or her an expert who can assist the trier of fact;
- The second rule is referred to as the “common knowledge rule” which entails an assessment as to whether the opinion sought from the witness relates to information beyond the ordinary or general knowledge of the court;

32 Ibid.
• The third rule is referred to as the “ultimate issue rule” in which case it has to be assessed as to whether the expert’s opinion will be “usurping” the function of the court;
• The fourth rule relates to the so-called “basis rule”. This rule requires an assessment as to whether the expert’s opinion is founded on matters within the expert’s own observation.

These rules of expert evidence will be discussed in more detail below as they play an essential role in respect of expert evidence in support of the defence of criminal incapacity.

3.2 The expertise rule

The opinion evidence of expert witnesses is only admissible in respect of matters calling for specialised skill, knowledge or expertise. Mental health professionals will accordingly have to indicate that they are in fact specialists in the relevant field and it is the function of the presiding officer to determine whether the witness possesses sufficient qualifications to enable him or her to assist the court.

In *Menday v Protea Assurance Co (Pty) Ltd*35, Addleson J stated the following:36

“However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise – of being overawed by a recital of degrees and diplomas – are obvious: the Court has then no way of being satisfied that it is not being blinded by pure “theory” untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have

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35 *Menday v Protea Assurance Co (Pty) Ltd* 1976 (1) SA 565 (E).
36 At 569 E-G. See also Schwikkard and Van der Merwe (2009) *supra* note 2 at 96-97.
in pure theory) or he must rely on knowledge or experience of experts other than themselves who are shown to be acceptable experts in that field.”

The mere fact that witnesses are mental health professionals does not render them experts in every area concerning mental health. Alan notes that the mere fact that a person is a psychologist or even possesses a doctorate qualification in psychology, does not render the person an expert in the specific issue the court has to assess. Brodsky, Caputo and Domino similarly reported that within the forensic climate the expertise of a psychologist with a doctorate degree is not always welcomed with respect and the expert will inadvertently face challenges aimed at his or her training, knowledge, methodology and opinions. Conversely, a witness is not expected to possess the highest qualifications in the specific field.

According to Allan, there are three important considerations that play a role in evaluating the expert’s expertise with reference to the field of psychology.

37 Alan and Meintjes-Van der Walt in Kaliski (ed) (2006) supra note 2 at 343; Alan in Tredoux et al (eds) (2005) supra note 2 at 289. See also Macdonald, JM “Psychiatry and the Criminal – A guide to Psychiatric Examinations for the Criminal Courts” (1976) at 450 where he states: “It is a mistake to assume that a prominent psychiatrist well-known to the judge and attorney needs no introduction. A man fearful of a barking dog was told, “You know the proverb, a barking dog never bites”. He replied, “You know the proverb, I know the proverb, but does the dog?” See also Murphy, P “Murphy on Evidence” (2008) at 364-365.

38 Alan in Tredoux et al (eds) (2005) supra note 2 at 289. See also Shuman, DW “Expertise in Law, Medicine, and Health Care” (2001) Journal of Health Politics, Policy and Law 267-290 at 272 where he notes: “When expert testimony is admissible on an issue, the requirements for admissibility under the traditional adversary approach focus predominantly on the qualifications of the expert, leaving scrutiny of the validity of the expert's methods and procedures to the fact finder as part of its assessment of the appropriate weight to be accorded to the evidence in reaching a decision on the ultimate issues. The standard applied in assessing qualifications is a functional determination to which the trial judge is accorded significant discretion.”


41 Alan in Tredoux et al (eds) (2005) supra note 2 at 289. See also the Health Professions Act 56 of 1974. Section 34 requires registration for practicing a profession in respect of which a professional board has been instituted. Section 37 deals with the specific functions of the psychologist. These were already discussed in chapter 1 above.
• It has to be ascertained whether the person acting as an expert witness is registered as a psychologist with the professional Board of Psychology of the Health Professions Council of South Africa. The requirement for registration as a psychologist entails an approved masters degree generally in either Arts (MA), Social Science (MSocSci) or Science (MSc).

• The category of psychology the psychologist specialised in and completed postgraduate studies has to be ascertained.

• The third factor relates to whether the knowledge, skill and expertise of the psychologist are such that they are relevant to the issue before the court.

Section 67(2) of the Ethical Rules of Conduct for Practitioners registered under the Health Professions Act in addition requires that a psychologist base his or her psycho-legal work on “appropriate knowledge of and competence in the areas underlying such work, including specialised knowledge concerning specific populations”. In the case of psychiatrists, registration with the Health Professions Council of South Africa as a specialist psychiatrist is essential and it is further crucial to determine the psychiatrist’s field of expertise.

In respect of the “expertise rule”, Meyer, Landis and Hays in addition note the following:

“Mental health experts, including psychologists, psychiatrists, and in some cases psychiatric social workers and nurses, are qualified for the same sorts and reasons. Jurors cannot collect, integrate, and interpret data on human behaviour and mental disorders, at least not in the sophisticated ways available to these professionals.”

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42 Ibid.
43 GNR 717 of 4 August 2006: “Ethical Rules of Conduct for Practitioners registered under the Health Professions Act, 1974 chapter 7 – Psycholegal Activities” at 64.
Meyer, Landis and Hays suggest the following six criteria for establishing expertise:46

- Education;
- Credentials;
- Relevant experience, including previous diagnostic and intervention experience;
- Research and publications;
- Knowledge and application of scientific principles;
- Use of specific tests, techniques and procedures;
- Prior court exposure as an expert.

Mental health professionals who act as expert witnesses are required to possess both theoretical as well as practical knowledge.47 Theoretical knowledge will have to be combined with personal knowledge and professional, practical experience within the specific field.48

Paizes and Zeffert submit that there is generally no hard and fast rule that an expert’s knowledge must derive from personal experience rather than from reading, but the expert, however, should have sufficient experience to enable him or her to find reliable sources and views and estimate their value.49 In *S v Van As*, Kirk-Cohen J distinguished two manifestations of expert evidence which could also be useful in terms of the expertise rule.51 The first manifestation of expert evidence relates to the situation where the expert expresses an opinion that is founded on the opinions of well-known authors or authority in the particular field. The second relates to an expert who conducts experiments and presents the results of such experiments to the court. In the latter instance it will generally be easier for courts to comprehend the evidence and render a decision based upon

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48 *Ibid*.
49 Zeffert and Paizes (2009) *supra* note 2 at 325; *S v Kimimbi* 1963 (3) SA 250 (CPD) at 252.
50 *S v Van As* 1991 (2) SACR 74 (W).
51 At 86 H-J. See also Schwikkard and Van der Merwe (2009) *supra* note 2 at 98.
such evidence as the expert is not merely expressing an opinion, but is also demonstrating the factual evidence upon which the opinion is founded. Practical experience will thus be crucial to add more probative value to the mental health expert’s opinion.

In the ultimate analysis of assessing the presence or absence of appropriate expertise, the skill, knowledge, training and professional experience of the mental health expert should be the guiding principles and the experts will have to indicate that they have been trained in a specific discipline or have experience in the particular field rising above that of ordinary laymen.52

3.3 The Common knowledge rule

The essential rationale behind the admission of expert evidence is predicated on the assumption that the expert as a result of specialised training, skill, knowledge or experience, is in a better position than the trier of fact to draw inferences from the facts. The question to be asked is whether the evidence presented by the expert will be “helpful” or to the “assistance” to the trier of fact in the sense that it can add to the existing knowledge of the trier of fact and thus provide assistance in the determination of the issues.53 The expert evidence accordingly has to be...
beyond the “common knowledge” of the court. Slovenko submits that the admissibility of expert evidence in this regard is founded on two “prongs” – the first “prong” requires the court to decide whether the witness whose expert testimony is presented, is in fact an expert within the specific scientific field and whether the witness is qualified as an expert to present evidence founded on scientific, technical or other specialised knowledge; the second “prong” requires the court to assess whether such evidence will be of “help” or assistance and the “helpfulness standard” as such requires a “valid connection to the pertinent inquiry as a precondition to admissibility”. It follows that where the triers of fact can draw their own inferences without the assistance of an expert witness, the matter falling within their own experience or “common knowledge”, the opinion evidence will be deemed inadmissible. In cases where criminal incapacity is raised as a defence and the mental state of the accused is at issue, the evidence of mental health professionals will be crucial and will inadvertently relate to concepts beyond the common knowledge of the trier of fact. Gutheil and Appelbaum note the following in this regard:

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54 Slovenko, R “Psychiatry in Law/Law in Psychiatry” (2002) at 44. See also Perlin, M “The Legal Status of the Psychologist in the Courtroom” (1977) Journal of Psychiatry 41-45 at 43 where it is noted that the answer to the question as to whether an opinion offered by an expert will aid the trier of fact in the search for truth will depend on the nature and extent of the witness’s knowledge. See also R v Morela 1947 (3) SA 147 (A) at 153.


56 Freckelton and Selby (2005) supra note 2 at 131; Murphy (2008) supra note 2 at 370; Sheldon (1991) Criminal Law Review supra note 45 at 814; Keane (2006) supra note 2 at 557; Gutheil and Appelbaum (2000) supra note 2 at 340-341. See also Alan and Meintjes-Van der Walt in Kaliski (ed)(2006) supra note 2 at 344; Alan in Tredoux et al (eds) (2005) supra note 2 at 292. See also chapter 2 where the decisions of S v Kok 1998 (1) SACR 532 (N) and S v Van der Sandt 1998 (2) SACR 627 (W) were discussed where it was held that in cases where non-pathological criminal incapacity is raised as a defence, the court was itself in a position to assess whether the accused had criminal capacity at the time of the commission of the offence. It is submitted that due to the inherent complexity of the defence of criminal incapacity, the trier of fact will without doubt need expert evidence as to the mental state of the accused at the time of the offence, be it the defence of non-pathological or pathological criminal incapacity. The further possibility cannot be negated that an accused may rely on the defence of non-pathological criminal incapacity, but psychiatric assessment may later prove that the accused suffered from a pathological state at the time of the offence. Placing a “barrier” to expert testimony in such a case could have a prejudicial effect on the outcome of a case.

“In cases of alleged mental illness, however, the courts – abandoning their historic position that even a layperson can tell if someone is crazy or not – have turned more and more to mental health professionals for help in interpreting human behaviour.”

Pipkin in addition note that expert evidence is a well established way of educating the courts in fields which are beyond its knowledge or comprehension.\(^{58}\) Pipkin states\(^ {59}\) that experts are used to bridge the gap between common knowledge and specialized knowledge, allowing (juries) to decide complex issues which they could not otherwise understand.

### 3.4 The Ultimate issue rule

Consider the following two opinions:

(i) “Mr Jones is insane.”

As opposed to:

(ii) “Mr Jones suffered from paranoid schizophrenia that, in my opinion to a reasonable degree of medical certainty, impaired his ability to appreciate the wrongfulness of his act or to act in accordance with an appreciation of the wrongfulness of his act.”

The two forms of opinion evidence which can be presented by mental health professionals as quoted above, encapsulates the salient features of the so-called “ultimate issue” rule in respect of expert evidence. In cases where mental health experts have to testify as to the mental state of the accused at the time of the commission of the offence, opinion (i) is regarded as an opinion on the “ultimate legal issue” which is regarded as an invasion of the legal arena and prohibited. Opinion (ii) is accordingly more preferable as the mental health expert refrains from expressing an opinion on the “ultimate issue” which is the lack or not of


\(^{59}\) Ibid.
criminal capacity at the time of the offence which is regarded as a legal question and not a medical one. The viability of the ultimate issue doctrine is, however, questionable and presents several dilemmas in practice.

The ultimate issue rule generally provides that an expert witness may not be asked to provide opinion evidence concerning a matter which is regarded as an “ultimate issue” in a case. The ultimate issue rule is founded upon the fear that the function of the trier of fact may be “usurped” by the expert’s exposition of expert evidence which deals with issues essential to the assessment of the case.

Freckelton and Selby define “ultimate issue” as:

“… the central question which is the responsibility of the judge or jury to determine – an important issue of fact or law.”

Jackson, in addition, defines “ultimate issues” as:

“… material facts which must be proved by the prosecution beyond reasonable doubt before a defendant can be found guilty of a particular offence …”


61 Ibid. See also S v Gouws 1967 (4) SA 527 (E) at 528 D where Kotze J stated: “The prime function of an expert seems to me to guide the court to a correct decision on questions falling within his specialized field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried.”


Within the realm of the defence of criminal incapacity, the ultimate issue will inadvertently be whether the accused lacked criminal capacity at the time of the commission of the offence, or phrased differently, was “insane”; or whether the accused is incompetent to stand trial. The ultimate issue doctrine is problematic for mental health professionals requested to provide an opinion on the mental state of an accused as it is often difficult to express an opinion without addressing the ultimate issue itself. Melton et al note that mental health professionals are often pressured to provide ultimate issue testimony. The numerous pressures on mental health professionals include the following:

- The presumption on the part of legal professionals that such expert testimony is an essential part of the mental health expert’s presentation. In many instances the courts regard ultimate issue opinions as very important and often require conclusory testimony from the mental health professional;
- Economic factors often play a role in respect of mental health professionals in private practice who may feel that their “market value” will lessen if they are too rigid in resisting providing opinions and conclusions easily obtainable elsewhere;
- The structure and dynamics of the courtroom may also tempt the professional to address questions often beyond his or her expertise;

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65 Melton et al (2007) supra note 2 at 601-602. See also Brodsky, SL and Poythress, NG “Expertise on the Witness stand: A Practitioner’s Guide” in Ewing, CP (ed) “Psychology, Psychiatry and the Law: A Clinical and Forensic Handbook” (1985) 389 at 407-408. See also Allan in Tredoux et al (eds) (2005) supra note 2 at 296. It is interesting to note that Melton et al (2007) supra note 2 at 601 in addition note that in a survey conducted as to the rated importance of certain aspects of mental health expert testimony, the findings in respect of opinion evidence on the ultimate legal issues was rated relatively high by both prosecutors as well as judges. See also Gilmer, BT, Louw, DA and Verschoor, T “Forensic Expertise: the psychological perspective” (1995) SACJ 259-270 at 264 where they note that more often than not evidence deemed as invading on ultimate legal issues which is regarded as “juristically inappropriate” is regarded by judges to retain some of the highest probative value.
66 See also Halleck (1980) supra note 2 at 214 where he notes: “I have on a number of occasions offered to go to court in insanity cases and testify as to the nature of the offender’s illness and as to how it may have influenced his criminal behavior, but have indicated that I could not make conclusory statements as to the offender’s responsibility under any standard of insanity. No attorney has accepted my offer, primarily because they assume that if the opposing side employs a psychiatrist who does make a conclusory statement, that psychiatrist’s testimony will carry more weight than mine and will prevail.”
67 See also Brodsky (1999) supra note 2 at 178 where he quotes the words of Dr Joe Dixon who was asked to testify as to the ultimate opinion with regards to the mental state of an accused: “Several years ago, when I was a new forensic “expert”, I had evaluated the defendant in a felony case and was on the stand nearing the end of my cross-examination by the defense
• Mental health professionals are often prepared to provide ultimate issue testimony due to the fact that they believe that there is no ethical or legal prohibition against doing so.

Melton et al encapsulate the clash between law and medicine in respect of the ultimate legal issue as follows.68

“On the question of the ultimate legal issue, the relationship between the law and the mental health sciences invokes the analogy of a couple in psychotherapy who are locked in an overly dependent relationship. The legal system resists dealing with problems of its own by demanding that mental health professionals accept responsibility for them, conferring special status as an inducement. For their part, mental health professionals experience an increasing awareness of the unreasonable demands being made, but are unsure how to break the bond. Although both feel ambivalence, it is a relationship with old roots and considerable inertia.”

In principle there are two approaches which could be followed in respect of the ultimate issue rule. On the one hand it could be argued that the ultimate issue rule serves the legitimate purpose of protecting the function of the trier of fact in prohibiting the mental health expert from expressing an opinion on the ultimate issue or as is often stated, “usurping” the function of the court. In this sense the mental health professional should refrain from expressing opinions on the ultimate issue and should stay within the boundaries of his or her field of expertise. On the other hand the question arises as to whether the ultimate issue rule serves any purpose. Melton et al advocate in favour of an approach by which mental health professionals should “resist the ultimate issue question”.69 In terms of this

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69 Melton et al (2007) supra note 2 at 603-604. See also Brodsky (1999) supra note 2 at 182 where he states that ultimate issue questions are legal in nature and beyond the expertise of the mental health professional.
approach mental health professionals should refrain from presenting conclusory opinions which do not fall within their professional competence. Melton et al state that although mental health professionals have a vast amount of expertise in their particular fields of specialisation, they do not have the necessary expertise to render ultimate legal judgments such as whether an accused person is incompetent or insane as these judgments are “… judgments that involve moral values and the weighing of competing social interests”. Gutheil states that mental health experts should refrain from stating an opinion on the ultimate issue such as whether the accused is “insane” or not, but should rather present an opinion as to whether an accused with a reasonable degree of medical certainty, lacked capacity to appreciate the wrongfulness of his conduct, or, in line with the capacity test in South Africa, lacked the capacity to act in accordance with such appreciation. Expert evidence in the latter fashion will consequently avoid the so-called “battle of the experts” while enhancing the trier of fact’s understanding of the clinical data. It is, however, often difficult for mental health professionals not to answer the ultimate issue when presenting their opinion. The question which falls to be assessed is whether there is a need for the perpetuation of the ultimate issue rule. Should the opinion of a mental health professional not rather be judged according to its relevance? A decision which is of relevance in this regard is Holtzhauzen v Roodt. The salient facts of this decision were briefly as follows.

The plaintiff sued the defendant for defamation arising from reports she made to her mother and allegedly her close friend and sisters consisting of a statement that she had been raped by the plaintiff. The defendant consequently gave notice in terms of Rule 39(9) of the Uniform Rules of Court of his intention to call two expert witnesses, Mr Wilkinson and Ms Breslin. Mr Wilkinson was a qualified clinical

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70 Ibid.
71 Ibid.
73 Ibid.
psychologist and a member of the South African Society of Clinical Hypnosis; and
Ms Breslin had a master’s degree in social work and was the clinical supervisor of
“People Opposing Woman Abuse” which dealt with the counselling of women who
had been raped or who were in abusive relationships. Mr Wilkinson’s testimony
was to the effect that the defendant had consulted him on a number of occasions
and had told him that she had been raped by the plaintiff and, furthermore, that
she had also done so twice whilst under hypnosis during hypnotherapy sessions.
Mr Wilkinson’s opinion further stated that the defendant was telling the truth about
the relevant incident. Ms Breslin’s testimony stated that women who had been
raped would not often reveal the incident to third parties immediately after it had
occurred and that it was common for such victims to exhibit radical changes in
behaviour. The plaintiff opposed the admission of the evidence of Mr Wilkinson
and Ms Breslin on the basis that Mr Wilkinson’s evidence usurped the function of
the court and amounted to evidence of the content of a previous consistent
statement; and further that Ms Breslin’s evidence was of a general nature as she
had had no consultation or discussion with the defendant and accordingly that the
evidence was irrelevant. Before dealing with the remarks made by Satchwell J as
to the relevance of each of the experts’ opinions, it is necessary to look at the
findings rendered in respect of expert evidence and the admissibility thereof.
Satchwell J held the following in respect of expert evidence:75

- The expert witness must be called to give evidence on matters calling for
  specialised skill or knowledge. The court will have to determine whether the
  subject of enquiry involves issues calling for specialised skill or knowledge.
  Evidence of opinion on matters which do not call for expertise is excluded as
  it does not help the court. At best, it is superfluous and, at worst, it could be a
  cause of confusion.76
- The courts are accustomed to receiving the evidence of psychologists and
  psychiatrist, particularly in criminal courts. However, the expertise of the
  witness should not be elevated to such heights that sight is lost of the court’s

75 At 772 B-773 C. See also Hiemstra (2009) supra note 2 at 24-27.
76 At 772 C-D. This dictum could also have been placed under the heading of the “common
  knowledge rule” as discussed above.
own capabilities and responsibilities in drawing inferences from the evidence.\textsuperscript{77}

- The witness must be a qualified expert. It is for the judge to determine whether the witness has undergone a course of special study or has experience or skill as will render him or her an expert in a particular field. It is not essential for the expertise to have been acquired professionally.\textsuperscript{78}

- The facts upon which the expert opinion is based must be proved by admissible evidence. Such facts either fall within the personal knowledge of the expert or form the basis of facts proved by others. If the particular expert has observed them, then the expert must testify as to their existence. The expert must further provide criteria for testing the accuracy as well as the objectivity of his or her conclusion and the court must be informed of the basis upon which the opinion is based. Due to the fact that the testimony of an expert will carry more weight, higher standards of accuracy and objectivity should be required.\textsuperscript{79}

- The guidance offered by the expert must be sufficiently relevant to the matter in issue which is to be determined by the court.\textsuperscript{80}

- Opinion evidence must not usurp the function of the court. The witness is not permitted to give an opinion on the legal or general merits of the case. The evidence of the opinion of the expert witness should not be presented on the ultimate issue. The expert should not be required to answer questions which the court has to decide.\textsuperscript{81}

The main issue in this case related to the relevance and admissibility of the expert opinions of Mr Wilkinson and Ms Breslin. With regards to Mr Wilkinson’s testimony, Satchwell J held that it was not relevant for a number of reasons, of which the most important are the following:

- The greatest part of the evidence of Mr Wilkinson was to refer the court to consultations which he had with the defendant during which she made

\textsuperscript{77} At 772 E-G. See also \textit{S v Kalogoropoulos} 1993 (1) SACR 12 (A) at 22 D-E.
\textsuperscript{78} At 772 H.
\textsuperscript{79} At 772 I-773 B.
\textsuperscript{80} At 773 B.
\textsuperscript{81} At 773 C.
particular statements to him. The only reason for the advancement of these statements was to indicate consistency in the statements made by the defendant prior to her giving evidence in court. Satchwell J held that these statements were superfluous.82

- The conclusion expressed by Mr Wilkinson displaced the value judgment of the court.83 Satchwell J in addition held:
  “It is required of this court to make certain determinations on its own on an assessment and on an evaluation of all the evidence that has been placed before the court and not just on the version as presented by the defendant.”84

- It is an established principle that litigants should have their disputes resolved by judges and not by witnesses.85 Satchwell J further held:86
  “If the Wilkinson’s of the world are too readily allowed to give their opinions on the subject-matter of litigation, then this would lead to the balancing of opinion as between witnesses. This would tend to shift responsibility from the Bench to the witness-box.”

- The evidence to be presented by Mr Wilkinson regarding the hypnosis and the conditions under which the statements were made by the defendant usurped the judgment of the court.87

In respect of Ms Breslin’s evidence Satchwell J held that the guiding criteria in the assessment of relevance in respect of Ms Breslin’s evidence were whether it was “helpful” and “of assistance to the court”.88 It was further held that the test with regard to the admissibility of expert evidence was whether a court, by reason of its lack of special knowledge and skill, was not sufficiently informed to enable it to venture the task of drawing properly reasoned inferences from the facts established by the evidence and consequently expert opinion will be admitted if such expert is by reason of special knowledge or skill better equipped than the court to advance, reject and comment on certain inferences in order to assist the

82  At 774 C-D.
83  At 774 F.
84  At 774 G-H.
85  At 774 H-I.
86  At 774 I-J.
87  At 775 A.
88  At 776 G-H.
Satchwell J held that the rape of a woman is an experience of utmost intimacy and that the ability of a judicial officer to fully comprehend the “kaleidoscope of emotion and experience of both rapist and rape survivor is extremely limited”. Satchwell J in addition held that it would be unwise for a judicial officer lacking special knowledge and skill to draw inferences from facts which have been proved by evidence in the absence of granting an expert in the field the opportunity to provide guidance on the specific aspect. Expert evidence could provide guidance as to why the rape victim failed to immediately (or at the first possible opportunity) report the rape. Satchwell J accordingly held that the evidence of Ms Breslin was admissible but stated the following:

“At the end of the day, however, I must stress that the value which I will attach to such evidence will fall to be assessed in the light of all the evidence before the court; that is the evidence of the defendant, of the plaintiff and his wife, of their son and nephew, of the defendant’s mother and her sisters. The guidance and opinion of Ms Breslin will merely be one pointer of assistance. It remains for the court to determine the probative value of Breslin’s evidence and in what manner and to what extent it is of use in understanding the facts before the court.”

If one were to reflect on the Holtzhauzen decision it becomes clear that the evidence of the experts was assessed as to its admissibility on the backdrop of the basic tenet in the law of evidence – its relevance and helpfulness. It is unfortunate that the ultimate issue rule was once again reaffirmed. It is clear that the evidence of Mr Wilkinson was irrelevant. His evidence failed the threshold test of relevance and on that basis it was held inadmissible. It could thus be argued that the argument of Mr Wilkinson “usurping” the function of the court was unnecessary and superfluous which results in questions arising as to the viability of this rule. Despite the fact that the Holtzhauzen decision was a civil hearing, the principles

89 At 777 H-J.
90 At 778 F-H.
91 At 778 I-J.
92 At 778 I-779 C.
93 At 779 C-E.
enunciated therein can also be applicable to the presentation of expert evidence in cases where criminal incapacity is raised as a defence.

Zeffert and Paizes correctly state that the Holtzhausen decision provides a good example of when the opinion of an expert witness is provided on the issue which the court ultimately has to assess. Zeffert and Paizes correctly note that it is unfortunate that the court, while, rightly basing its assessment on considerations of relevancy and achieving the correct result, resorted to the meaningless expression of “usurping the function of the court” which, as has been submitted, may obfuscate the fact that the court in assessing whether to accept expert opinion on an ultimate issue, is concerned with a flexible and practical concept that expresses “the need for relevance”.

The ultimate issue rule and consequently the rule that an expert witness should not usurp the function of the court has been described by Wigmore as a “mere bit of empty rhetoric”. Wigmore correctly notes that there is no reason for such rule as the witness is not attempting to “usurp” the function of the tribunal of fact as he or she is merely offering a portion of testimony which could still be rejected in favour of an alternative view. With regard to psychiatric testimony on the ultimate issue, Schiffer describes the rule as “an artificial and functionless rule of semantics”.

94 Zeffert and Paizes (2009) supra note 2 at 318; Schwikkard and Van der Merwe (2009) supra note 2 at 88-89. See also DPP v A and BC Chewing Gum Co Ltd 1968 AC 159 at 164 where Lord Parker held: “… I cannot help feeling that with the advance of science more and more inroads have been made into the old common law principles. Those who practice in the criminal courts see everyday cases of experts being called on the question of diminished responsibility and although technically the final question “Do you think he was suffering from diminished responsibility” is strictly inadmissible, it is allowed time and again without any objection.”

95 Ibid.

96 Emphasis added.


98 Ibid. See also Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 616 E-H.

99 Schiffer, ME “Mental Disorder and the Criminal Process” (1978) at 214 and also at 199 where he states: “Although the phrases “usurping the function of the jury” or “invading the province of the jury” are bandied about widely today in the context of expert opinion, it may be doubted whether they accurately describe the situations to which they are commonly applied. When such label is affixed to the expression by an expert witness of an opinion on an “ultimate issue” which the jury are to decide, it is submitted that the description is inaccurate. If the expert is qualified in his field, the implication is that the opinion he is expressing is one which the triers of fact could not themselves have formulated; otherwise the expert wouldn’t be there in the first place. So when a psychiatrist expresses his opinion that an accused was insane at
anymore, it is submitted that the ultimate issue rule is redundant and superfluous. Expert evidence from psychiatrists and psychologists should be received or rejected on the basis of its relevance and helpfulness.

Meintjes-Van der Walt correctly state that even where expert evidence is allowed on the ultimate issue, it remains evidence to be weighed by the trier of fact and accordingly the admission of such evidence does not imply reliance on such evidence. Expert opinion evidence should be judged on the basis of its relevance to the issues before the court and whether it can adequately assist the trier of fact in the assessment of the relevant issues. It could further be argued that mental health professionals, taking into consideration the boundaries of their own professional expertise, should be allowed to express their opinions liberally with regards to the findings as to the mental state of an accused person. At the end of the day it remains within judicial discretion to determine the appropriate weight to be accorded to such evidence. In *Ruto Flour Mills Ltd v Adelson (1)*, Boshoff J held the following:

“An expert’s opinion is received because and whenever his skill is greater than the court’s … The fact that an expert expresses an opinion on a matter which the court has to decide does not, in itself, make the evidence inadmissible … where the issue involves other elements besides purely scientific, the expert must confine himself to the latter and must not give his opinion upon the legal or general merits of the case. Where, however, the issue is substantially one of science or skill merely, the expert may, if he has himself observed the facts, be asked the very question which the jury have to decide.”

This quotation could also be applied to the sciences of psychiatry and psychology. From a psychiatric perspective, Halleck notes that psychiatric testimony is generally required for purposes of providing facts of an accused’s mental illness;

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100 Meintjes-Van der Walt (2001) *supra* note 2 at 166; Meintjes-Van der Walt (2001) *THRHR* *supra* note 2 at 251-252.
101 *Ruto Flour Mills Ltd v Adelson* 1958 (4) SA 235 (TPD).
102 *At* 237 A-F.
to provide opinions relating to the nature of that illness; and to provide opinions as to whether the individual’s illness was of such a nature to render him or her legally insane.\textsuperscript{103} Halleck suggests that it is the third task which is more often than not, problematic as the process of converting clinical data into opinions as to how mental illness renders an individual legally insane and negating criminal responsibility, is a task for which a psychiatrist has “no training, no science, and no theories to guide him”.\textsuperscript{104} The cornerstone for the admission of such testimony should be relevance and helpfulness and not whether the witness addresses the ultimate issue. Slovenko correctly states that, similar to other forms of evidence, the trier of fact retains a discretion to exclude expert evidence if it is established that its probative value is substantially outweighed by its prejudicial effect or if its admission would confuse the issues, result in a delay of the proceedings or waste of judicial resources.\textsuperscript{105} Slovenko in addition states:\textsuperscript{106}

“Ultimately, the rule simply ignores the principle that the touchstone in the law of expert evidence is helpfulness.”

Gilmer, Louw and Verschoor submit that there are principally two motivations why mental health experts should refrain from providing opinions on ultimate legal issues – the first reason relates to the ethical dilemma of purporting to be scientific where there are no bases for such pretension. The second reason relates to

\textsuperscript{103} Halleck (1980) supra note 2 at 213.
\textsuperscript{104} Ibid.
\textsuperscript{106} Ibid. See also Freckelton and Selby (2005) supra note 2 at 294-295 where they note proposed law reform in New Zealand in the form of legislation, the New Zealand Law Commission recommended that the term “expert” be defined as a “person with specialized knowledge or skill based upon training, study or experience” and that expert evidence “is evidence offered by a properly qualified expert that is within the expert’s field of expertise”. Most importantly the Commission recommended that opinion evidence should not be ruled inadmissible by the mere fact that it deals or addresses an ultimate issue. See also Roger, R, Bagby, RM and Chow, MMK “Psychiatrists and the Parameters of Expert Testimony” (1992) International Journal of Law and Psychiatry at 387-396 at 387 where they note: “The effects on judges and juries of how expert testimony is presented have gone largely unnoticed in the professional literature. One notable exception has been the barrage of criticism levied at mental health experts for their overreaching testimony in insanity trials. A particularly contentious issue is whether conclusory opinions on the matter of insanity “invade the province of the jury” by unduly influencing jurors’ perceptions and subsequent verdict.”
instances where the expert by doing so “usurps” the function of the court.\textsuperscript{107} Gilmer, Louw and Verschoor note that a court may admit whatever evidence it deems fit in a specific case, weigh the probative value thereof and assume responsibility for the result which follows.\textsuperscript{108} Where an expert, however, seeks to express an opinion beyond that arising from knowledge, training and expertise, the expert will cease in providing an expert opinion and venture into providing “an illegitimate opinion as a person who happens to be an expert in a non-relevant field”.\textsuperscript{109} According to Gilmer, Louw and Verschoor the question as to whether a witness is “usurping” the function of the court, is in principle the court’s concern and they state the following:\textsuperscript{110}

“The expert’s concern is to remain within the generally accepted terrain of that discipline and to follow the court’s direction as to the questions the court desires be answered.”

Mental health professionals should be permitted to testify as to their clinical findings in respect of an accused. Whether the opinion testimony is couched in terminology of a conclusory nature should be of less concern and should yield to the greater need for assessing the mental state of the accused at the time of the offence as comprehensively and thoroughly as possible.

3.5 The Basis rule

The essential value of a psychiatric or psychological opinion is dependent on the basis upon which it is founded. The basis rule entails that expert witnesses must state the facts or reasons upon which their opinions are founded.\textsuperscript{111} One of the


\textsuperscript{108} Ibid.

\textsuperscript{109} Ibid.

\textsuperscript{110} Ibid.

most authoritative expositions of the basis rule was expressed by Lawton LJ in the case of *R v Turner*\(^{112}\) where it was held:\(^{113}\)

“It is not for this court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the facts upon which they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked.”

In *Coopers (South Africa) (Pty) Ltd v Deutche Gesellschaft für Schädlingsbekämpfung Mbh*\(^{114}\) Wessels JA similarly described the basis rule as follows:\(^{115}\)

“… an expert’s opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some of her competent witnesses. Except possibly where it is not controverted, an expert’s bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, is disclosed by the expert.”

And further:\(^{116}\)

\(^{112}\) *R v Turner* (1975) 1 QB 834.

\(^{113}\) At 834. See also Freckelton and Selby (2005) *supra* note 2 at 213.


\(^{115}\) At 371 F-H. See also *R v Jacobs* 1940 TPD 142 at 146 where Rowbottom J held: “… it is held at the greatest importance that the value of the opinion should be capable of being tested and unless the expert states the grounds upon which he bases his opinion, it is not possible to test its correctness so as to form a proper judgment upon it.”

\(^{116}\) At 371 H-372 A. See also the decision of *R v Noll* (1999) 3 VR 704, VSCA 164 at 3 where Ormiston JA held: “As a matter of principle, as exemplified by the authorities, experts can speak of many matters with authority if their training and experience entitle them to do so, notwithstanding that they cannot describe in detail the basis of knowledge in related areas. Professional people in the guise of experts can no longer be polymaths they must, in this modern era, rely on others to provide much of their acquired expertise. Their particular talent is that they know where to go to acquire that knowledge in a reliable form.” See also Freckelton and Selby (2005) *supra* note 2 at 210.
“Where the process of reasoning is not simply a matter of ordinary logic, but involves, for example, the application of scientific principles, it will ordinarily also be necessary to set out the reasoning process in summarised form.”

Meintjes-Van der Walt submits that the basis rule is usually not deemed as an admissibility rule of expert evidence, but is rather taken into consideration during evaluation of expert evidence. The issue as to admissibility comes into play due to the practice of expert witnesses to provide opinion evidence on information or data provided by others and consequently these experts employ hearsay to a certain extent in forming their opinions. The problem that arises is that if the rule against hearsay evidence is applied strictly, an expert will be prevented from providing his or her expert opinion due to the fact that his or her inferences and conclusions are often governed by knowledge acquired during the course of his or her training, professional practice as well as information acquired through reading or which he or she heard from others who possess the specialised knowledge.

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118 Ibid.

119 Meintjes-Van der Walt (2001) supra note 2 at 167; Meintjes-Van der Walt (2001) THRHR supra note 2 at 253; Schwikkard and Van der Merwe (2009) supra note 2 at 100. For purposes of this study hearsay evidence will not be addressed but it suffices to note that matters relating to hearsay evidence are regulated in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988. Section 3(4) defines hearsay evidence as: “… evidence, whether oral or in writing the probative value of which depends upon the credibility of any person other than the person giving such evidence.” Section 3 further provides the following in respect of hearsay evidence: "(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless – (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or (c) the court having regard to – (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice. (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence. (3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.” See also Schwikkard and Van der Merwe (2009) supra note 2 at 269-284; Pattenden, R “Expert Opinion Evidence Based on Hearsay” (1982) The Criminal Law Review at 85-96.
Meintjes-Van der Walt indicates that as a result of the logistical dilemmas which would arise if every original source is to be called as a witness, the hearsay rule has been relaxed and accordingly where expert opinion evidence is presented and all its bases have not been proved to the court, the rule has developed that such basis material must be proved by way of admissible evidence. An expert witness may therefore rely on information which would technically amount to hearsay evidence as a result of the necessity thereof in practice due to the fact that scientific issues frequently entail reliance upon data and information advanced by others. In *S v Kimimbi* Watermeyer J held the following:

“No one professional man can know from personal observations more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the reported data of fellow scientists learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men … to reject a professional physician or mathematician because the fact or some of the facts to which he testifies are known to him only upon the authority of others, would be to ignore the accepted methods of professional work and to insist on impossible standards.”

Expert witnesses relying on information espoused in textbooks written by others who are not called as witnesses, will not make use of hearsay and such evidence will generally be admissible provided that the requirements as enunciated in

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122 *S v Kimimbi* 1963 (3) SA 250 (CPD). See also Schwikkard and Van der Merwe (2009) *supra* note 2 at 100-101; Zeffert and Paizes (2009) *supra* note 2 at 325. See also Moenssens, AA, Moses, RE and Inbau, FE “Scientific Evidence in Criminal Cases” (1973) at 86-87 where it is noted: “Technically, the diagnostic opinion of the psychiatrist is required by the hearsay rule of evidence to be based upon his own findings rather than those of third parties. This restriction is highly questionable since much of the information that a psychiatrist normally relies upon in forming an opinion is derived from out-of-court statements, medical reports and other sources deemed hearsay by the law … As a matter of practice, many courts informally carve out an exception to the hearsay rule and allow the defense psychiatrist to testify to an opinion based in part on hearsay. Such statements may also be permitted without the hearsay rule or as exceptions to it on the ground that the truth or falsity of the statements is not in issue, but rather that the out-of-court statements served only as a basis of the expert’s opinion.

123 At 251 H-252 A.
Menday v Protea Assurance Co Ltd\textsuperscript{124}, are complied with. These are the following:\textsuperscript{125}

- Firstly, the expert must by virtue of his or her own training be able to affirm the correctness of the statements in the particular book;
- Secondly, the work or publication must be reliable in the sense that it has been written by an individual with an established reputation or proved experience in that field.

Addleson J in addition held:\textsuperscript{126}

“… an expert with purely theoretical knowledge cannot in my view support his opinion in a special field (of which he has no personal experience) by referring to passages in a work which has itself not been shown to be authoritative. Again the dangers of holding the contrary are obvious.”

In S v Jones\textsuperscript{127}, Van Reenen J held that due to the fact that opinions expressed in textbooks do not amount to evidence per se, and strictly amount to hearsay, a court may not rely on them unless confirmed by an expert under oath.\textsuperscript{128} Hiemstra also indicates that books and publications of highly acclaimed experts, who are acknowledged within the professional field may be used only by an individual who is also an expert provided that the witness establishes a foundation by expressing

\textsuperscript{124} Menday v Protea Assurance Co Ltd 1976 (1) SA 565 (ECD).
\textsuperscript{125} At 569 H. See also Schwikkard and Van der Merwe (2009) supra note 2 at 100-101; Zeffert and Paizes (2009) supra note 2 at 325.
\textsuperscript{126} Ibid. See also Feckelton and Selby (2005) supra note 2 at 216-217 where they discuss the decision of R v Abadom (1983) 1 WLR 126 at 131, 1 ALL ER 364 at 369, 76 Crim App R 48 at 53 where it was held: “Where an expert relies on the existence of some fact which is basic to the question on which he is asked to express his opinion, that fact must be proved by admissible evidence … where the existence or non-existence of some fact is in issue, a report made by an expert who is not called as a witness is not admissible as evidence of that fact merely by the production of the report, even though it was made by an expert. These, however, are in our judgment the limits of the hearsay rule in relation to evidence of opinion given by experts, both in principle and on the authorities … Once the primary facts on which their opinion is based have been proved by admissible evidence, they are entitled to draw on the work of others as part of the process of arriving at their conclusions. However, when they have done so, they should refer to the material in their evidence so that the cogency and the probative value of their conclusion can be tested and evaluated by reference to it ….” See also Meintjes-Van der Walt (2001) THRHR supra note 2 a 253.
\textsuperscript{127} S v Jones 2004 (1) SACR 420 (CPD).
\textsuperscript{128} At 427 c-d. See also S v Collop 1981 (1) SA 150 (A) at 167 B; Zeffert and Paizes (2009) supra note 2 at 326.
his or her own professional knowledge and experience, whereafter additional supporting authority may be quoted. In terms of cross-examination, books and writings may be presented to an expert and if the expert acknowledges the authority of the work, the expert may be asked whether he or she agrees with the views enunciated therein and if he or she does, such passages will also become part of the expert evidence. Other passages from the same publications are not regarded as evidence and may not be used by the court.

Allan notes that there are various sources of information an expert can utilize to form an opinion, which include:

- Psychologists can provide an expert opinion as to statements made by their clients pertaining to specific symptoms provided it is not presented as evidence of the truth of what is contended, but rather to assess the accused’s state of mind. Evidence of this nature is only provided to prove the existence of specific symptoms and does not serve as evidence of how they were caused, and if the source of evidence is discredited, the opinion of the expert will become valueless;
- Accumulated professional knowledge;
- Notes or reports of mental health professionals who treated or assessed the individual;
- Articles, research papers, professional literature or written material published by peers in scientific journals, provided the experts have adequate experience to enable them to identify reliable and proper sources of information. The personal assessment in the general subject must enable them to estimate the viability of the views expressed. There must be no alternative means of obtaining the specific information;
- Relevant research, tests or experiments, provided that such information forms part of the general body of knowledge falling within the field of

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130 Ibid.
131 Ibid. See also R v Mofokeng 1928 (AD) 132 at 136, where a conviction was set aside where reliance was placed on a passage which was not presented to the expert witness during trial and which was in conflict with the expert’s opinion.
expertise of the experts which is related to their own research or practical work.

One of the most important aspects of the basis rule entails that the expert must provide valid and sound reasons for his or her opinion. The latter will increase the probative value of the opinion and also establish a sound foundation for it. In *S v Ramgobin and Others*¹³³, Milner JP held that an expert must be able to provide detailed reasons for his or her conclusions together with an accurate account of the assessments conducted for the purpose of arriving at such conclusions.¹³⁴ It was further held that such conclusions do not always necessarily have to be propounded in the form of a written report and accordingly experts are permitted to refresh their memories, reports and notes.¹³⁵ It is essential that expert evidence should be connected to the facts of the case and not amount to mere abstract theory or a bald statement of opinion unrelated to the circumstances or facts of the case.¹³⁶ Similarly, expert opinion will be deemed inadmissible if it is founded on a hypothetical situation which proves to be inconsistent with the proven facts.¹³⁷ It is further important that an expert opinion should be that of the expert and not counsel’s interpretation presented to the expert witness.¹³⁸ A Court of Appeal retains the same capacity as the trial court to evaluate the reasoning of an expert opinion.¹³⁹

It is pivotal that expert witnesses clearly and coherently state the reasons and facts upon which their opinion is based. In cases where the defence of criminal incapacity is invoked, this rule will inadvertently be applicable to psychiatrists and

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¹³³ *S v Ramgobin and Others* 1986 (4) SA 117 (NPD).
¹³⁴ At 146 E-G.
¹³⁶ This principle has already been addressed in chapter 3 *supra* with reference to the cases of *S v Mngomezulu* 1972 (1) SA 797 (A) and *S v Laubscher* 1979 (3) SA 47 (A) at 60 C, 62 A-B. See also Schmidt (2000) *supra* note 2 at 46; Schwikkard and Van der Merwe (2009) *supra* note 2 at 99; *S v Mkohle* 1990 (1) SACR 95 (A) at 100 C-D; *S v Boyce* 1990 (1) SACR 13 (T) at 19; Zeffert and Paizes (2009) *supra* note 2 at 326-327. See also Strauss, SA “Doctor, patient and the Law – A selection of practical issues” (1991) at 131. See also Coopers (South Africa) (Pty) Ltd v Deutche Gesellschaft für Schädlingsbekämpfung Mbh 1976 (3) SA 352 (A) at 371 F-H.
¹³⁷ Schwikkard and Van der Merwe (2009) *supra* note 2 at 99; *S v Mngomezulu* 1972 (1) SA 797 (A).
¹³⁸ *Ibid*.
¹³⁹ Schwikkard and Van der Merwe (2009) *supra* note 2 at 100. See also *Stock v Stock* 1981 (3) SA 1280 (A) at 1296 F.
psychologists. Within an era of constitutionalism, it is doubtful whether an accused or his or her legal representative or even the court will be able to adequately challenge an opinion if such basis for the opinion is absent. The constitutional right of an accused to a fair trial with reference to the right to adduce and challenge evidence will thus be jeopardised where opinion evidence by a mental health expert is not sufficiently motivated and such evidence should be inadmissible against an accused. Meintjes-Van der Walt correctly submits that stating the basis for an expert’s opinion is pivotal to the judicial decision-making process:

“… as without stating the facts or data upon which such opinions are based, their bold statements provide no means of accountability.”

4 The probative value and weight of expert evidence

One of the most problematic areas pertaining to expert evidence relates to the assessment of its probative value. As it is difficult, if not impossible, to formulate set criteria or rules for determining probative value, the task of assessing probative value will fall upon the trier of fact. The problem of assessing probative value is further exacerbated if there are divergent opinions within the medical field itself. Zeffert and Paizes note that the court often does not have any means in terms of which to test the expert’s conclusions and if consequently there is a conflict of expert evidence on issues where the motivations for the opinion is beyond the grasp of the trier of fact, it may have to resort to doubtful criteria such as the rival witness’s reputation and experience. Zeffert and Paizes state that the resolution

140 See also Schmidt (2000) supra note 2 at 467. See also S v Williams 1985 (1) SA 750 (C) at 752-753 where Aaron AJ held that the requirement that reasons be advanced for inferences of expert witnesses generally relate more to the weight accorded to the evidence, than to its admissibility. Zeffert and Paizes (2009) supra note 2 at 328, however, correctly note that often a failure to provide reasons may deprive an opinion of any weight and accordingly such opinion will lack any probative value and will be irrelevant and consequently inadmissible.

141 Meintjes-Van der Walt (2001) supra note 2 at 170-171; Meintjes-Van der Walt (2001) THRHR supra note 2 at 255. See also Zeffert and Paizes (2009) supra note 2 at 328.

142 Zeffert and Paizes (2009) supra note 2 at 328. See also S v Malindi 1983 (4) SA 99 (TPD) at 104 H-105 A where this approach was encroached by Le Roux J. See also Hoffmann and Zeffert (1988) supra note 2 at 103-104; Schmidt (2000) supra note 2 at 470. See also Crous, AJ “Die beslegtingsproblematiek in gevalle van mediese wanpraktykgeskikte” (1996) THRHR at 22-33 at 24-25 where it is stated: “Die primêre taak van ’n deskundige is om aan die hof leiding te gee om ’n juiste beslissing te maak ten opsigte van vrae wat binne sy
of such conflict will generally not be reliant on credibility, but rather on the inherent reasoning behind it. They submit the following:143

“A court which relies upon an expert’s opinion is therefore, to a greater or lesser extent, at times taking a step in the dark – something which should be done, if ever at all – only with considerable caution. But usually, the determination ..., depends on the examination of the opinions and the analysis of the reasoning behind them.”

A landmark decision where the Supreme Court of Appeal authoritatively dealt with the approach to be followed in respect of considerations applicable in the assessment of expert medical evidence, is the decision of Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another144. Although this decision dealt with medical negligence and was not a criminal matter relating to the defence of criminal incapacity, the guidelines enunciated therein for the assessment of expert medical evidence can nevertheless also be made applicable to the presentation of expert evidence in cases where the defence of criminal incapacity is raised.145 The Supreme Court of Appeal held that it is essential in the evaluation of expert evidence to determine whether and to what extent the opinions advanced are

143  Zeffert and Paizes (2009) supra note 2 at 328.
144  Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA).
145  As medical negligence falls beyond the scope of this study, the facts and decision of Michael v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA) will not be addressed and the emphasis will be placed solely on the Supreme Court of Appeal’s approach towards the assessment of expert medical evidence. For an in depth discussion of the facts and decision of this case see Carstens (2002) THRHR supra note 2 at 430; Carstens and Pearmain (2007) supra note 2 at 784-791. See also Carstens, PA “Nalatigheid en Verskillende gedagterigtings (“schools of opinion”) Binne die mediese praktyk – Pringle v Administrator Transvaal 1990 (2) SA 379 (W)” THRHR at 673; Castell v De Greeff 1994 (4) SA 408 (CPD) at 426 H-J where Ackermann J held: “Expert medical evidence would be relevant to determine what risks inherent in or are the result of particular treatment (surgical or otherwise) and might also have a bearing on their materiality but, in the words of the Supreme Court of Canada in Reibl v Hughes ... ‘this is not a question that is to be concluded on the basis of expert medical evidence alone’ – ‘The ultimate question’, ... is ‘whether (the defendant’s conduct) conforms to the standard of reasonable care demanded by the Law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community.’ This decision illustrates the approach followed in cases of medical negligence. See also Pringle v Administrator, Transvaal 1990 (2) SA 379 (WLD).
founded on logical reasons.\textsuperscript{146} It was further held, albeit with reference to medical negligence, that a court is not bound to absolve a defendant from liability for allegedly negligent medical intervention just because evidence of expert opinion, albeit genuinely held, is that the conduct in issue accorded with sound practice.\textsuperscript{147} The court must further be satisfied that such opinion had a logical basis, in other words that the expert has considered comparative risks and benefits and has reached a defensible conclusion. If a body of professional opinion overlooks an obvious risk which could have been guarded against, it will not be reasonable, even if almost universally held.\textsuperscript{148} The assessment of medical risks and benefits is a matter of clinical judgment which the court would not normally be able to make without expert evidence, and it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide the benchmark by reference to which the defendant’s conduct fails to be assessed.\textsuperscript{149} It was also held that expert scientific witnesses tend to assess likelihood in terms of scientific certainty.\textsuperscript{150} It is clear that the assessment of the probative value of expert evidence is a difficult task. It is essential, where conflicting medical opinions are advanced, to weigh each portion of expert evidence carefully.\textsuperscript{151} In cases where criminal incapacity is raised as a defence,
this principle will require the balancing of expert opinion advanced by both the prosecution and defence in order to derive at a sound decision as to the accused’s mental state at the time of the offence. Barlow encapsulates the dilemma in respect of the probative value of expert evidence by stating:\footnote{Barlow, TB “Medical Negligence Resulting in Death” (1948) THRHR 173-190 at 178. See also the approach followed in \textit{Webb v Isaacs} 1915 EDL 273; \textit{Coppen v Impey} 1916 CPD 309 in respect of medical negligence cases.}

“The question arises as to what regard the courts must pay to medical opinion. Must the courts make medical men the final judges … or must they decide questions involving medical theory and dispute? … The difficulty that faces the legal man is, however, that of judging upon the correctness of work that is highly skilled and beyond his providence. The practice of our courts has been to weigh up carefully the medical evidence presented to it by both sides but to keep the final decision in their own hands.”

In \textit{Louwrens v Oldwage}\footnote{\textit{Louwrens v Oldwage} 2006 (2) SA 161 (SCA).}, the Supreme Court of Appeal overturned a judgment of the court \textit{a quo} where the latter rejected the evidence of the defendant’s experts in favour of the plaintiff’s experts without providing reasons for doing so.\footnote{It is to be noted that this decision also dealt with medical negligence but is discussed within the scope of this study for the sole purpose of exhibiting the Supreme Court of Appeal’s approach to expert evidence. The salient facts of the decision were that the plaintiff was successful in the High Court in his action for damages for the negligent performance upon him of a surgical procedure by the defendant. The plaintiff’s success was based on a resolution in his favour of the essential dispute of fact between the parties, with the court preferring the evidence of the plaintiff and his expert witness to the evidence of the defendant and his expert witness but without providing reasons for its preference. The Supreme Court of Appeal, however, held that the evidence of the defendant and his expert was to be accepted and the evidence of the plaintiff and his expert was to be rejected (see paragraph (18) at 170 C-E of the judgment).} It was held that on a proper approach, the choice of or preference of one version over the practice. According to Carstens the court correctly found that it must be satisfied that the medical opinion advanced should have a logical basis, but the court, however, held, albeit in respect of medical negligence, that a defendant can be held liable if the supporting body of expert evidence is not capable of withstanding logical analysis and is therefore not reasonable. Carstens submits that the court’s indication that logic is indicative of reasonableness or, put differently, that the absence of logic is indicative of unreasonableness is problematic. Carstens submits that expert’s medical opinion founded on logic is not necessarily indicative of reasonableness. Carstens notes: “Logic refers to process of reasoning/rationality based on scientific or deductive cause and effect. Therefore a given result or inference is either logical or illogical. Reasonableness on the other hand is a value judgment indicative of or based on an accepted standard or norm while it is true that logic more often than not is an integral part of reasonableness, it does not necessarily follow that logic can be equated to reasonableness.” See also Carstens (2002) \textit{THRHR supra} note 2 at 434-435.
other ought to be preceded by an evaluation and assessment of the credibility of the relevant witness, their reliability and the probabilities.\textsuperscript{155} It was in addition held that the uncritical acceptance of the plaintiff’s expert evidence and the rejection of the defendant’s expert witnesses fall short of the general standard.\textsuperscript{156} The Supreme Court of Appeal reiterated that it was required of the trial Judge to determine to what extent the opinions advanced by the various experts were founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of probabilities.\textsuperscript{157} According to Carstens and Pearmain, the probative value of expert medical evidence is dependent upon the qualifications, skill and degree of expertise of the expert witness and also the ability of the court to evaluate this testimony.\textsuperscript{158} Expert medical testimony will often be so technical in nature that the court will find it difficult to reach reliable conclusions on its own, especially where there are conflicting opinions.\textsuperscript{159} It is submitted that the approach suggested in the \textit{Michael v Linksfield Park Clinic (Pty) Ltd} decision, subsequently reaffirmed in \textit{Holtzhauzen v Roodt}, provides a useful approach to follow in assessing the probative value of expert medical testimony which could inadvertently apply to cases where the defence of criminal incapacity is raised.

Carstens notes that where there are conflicting expert opinions or different schools of thought within the medical profession, even a conflicting and minority school of thought or expert opinion will be acceptable, subject to the fact that such opinion is in line with what is deemed to be reasonable within a specific branch of the medical profession.\textsuperscript{160} It is clear that the probative value of expert evidence is inherently affected when there are divergent and conflicting medical opinions advanced. The latter is also often referred to as the “battle of the experts”. Gutheil and Appelbaum indicate that the latter is precisely why mental health professionals often abstain from courtroom proceedings as this “battle of the experts” creates the impression that expert opinion is available to the “highest bidder” with an

\textsuperscript{155} At 167 H-J.
\textsuperscript{156} At 175 G-I.
\textsuperscript{157} At 175 H-J. See also Carstens and Pearmain (2007) \textit{supra} note 2 at 862.
\textsuperscript{158} Carstens and Pearmain (2007) \textit{supra} note 2 at 861.
\textsuperscript{159} Ibid.
\textsuperscript{160} Carstens (2002) \textit{THRHR supra} note 2 at 435. See also Gutheil and Appelbaum (2000) \textit{supra} note 2 at 34.
absence of knowledge on which their opinions are based. Schiffer notes that one of the main reasons psychiatrists disagree is more often than not, not related to the technical medical questions, but rather to the specific questions the law presented to them. Psychiatrists are pressured in expressing opinions beyond their fields of expertise. Schiffer states:

"Because both psychiatrists A and B have diagnosed the accused as a psychopathic personality, does it follow that they will agree on whether or not the accused "knew that an act or omission was wrong?" Often the psychiatrist's capacity for answering such questions is no better than that of the average layman; for the tools he must use in making the decision are not the tools of his profession, but rather the personalized values and morality he possesses as a private citizen."

It is submitted that mental health professionals should be required to provide expert testimony which remains within the boundaries of their respective fields of expertise. It is essential that law and medicine acknowledge the boundaries of their respective professions. Allan and Meintjes-Van der Walt suggest the following considerations to be taken into account when according appropriate weight to expert testimony:

- Whether the expert was competent to perform the required assessments and test and to adequately evaluate the results thereof;
- Whether the expert was a credible witness taking into consideration the methods employed to collect data, the thoroughness of the investigations; and whether the expert was honest in providing his or her presentation of the facts and opinions;

162 Schiffer (1978) supra note 2 at 216.
164 Ibid. See also Slovenko (1991) Medicine and Law supra note 161 at 114 where it is similarly noted: "And who has the task of translating psychobabble into legal babble? In humility, a number of psychiatrists when testifying say that "insanity", "mental illness" or "mental disease" as used in law is a legal concept … while other experts talk in the language of their discipline (for example, what is lung disease?), but the psychiatrist is obliged to talk in legal language."
• Whether the opinion is causally connected to the facts of the case;
• The credibility of the facts on which the expert’s opinion is founded and consequently if the source is discredited in court it will lessen the value of any opinion based on the facts provided by the source;
• Where two experts provide mutually exclusive opinions, courts will propose to reconcile the two opinions taking into consideration the full circumspection of the evidence and the probabilities as they view them.\textsuperscript{166}

When a court is confronted with conflicting medical opinions, one of the main considerations in the assessment of probative value should relate to the basis and reasons upon which such opinion is advanced. It is pivotal, however, that the opinion evidence on both sides be evaluated and considered on an equal footing. When a portion of expert evidence is accepted in favour of another portion or even when one side’s expert opinion is accepted and the other side’s rejected, the court should provide sound and logical reasons for doing so. When a court is forced to decide between conflicting opinions the court will be in the same position as when it has to assess the probative value of a single expert witness. The court will have to consider the expert’s qualifications, his or her overall credibility as a witness and the extent to which his or her evidence was founded on a firm basis.

5 The presentation and evaluation of expert evidence

5.1 Adversarial versus Inquisitorial systems of justice

The mental health professional encountering the legal system, is confronted with a completely different context than that of clinical practice. The mental health expert called upon to testify in criminal proceedings, and thus in cases of criminal incapacity, will be faced with either the adversarial or inquisitorial system of criminal procedure. In order to fully comprehend the role of the mental health expert and the consequent role of the expert testimony presented by such expert, a brief elaboration of the essential differences between these two systems is required. The essential characteristics will be discussed below.

\textsuperscript{166} See also Botha v Minister of Transport 1956 (4) SA 375 (W) at 378 B-E.
• The adversarial system

The adversarial system is uniquely described as a contest between two parties in the search to resolve a dispute before a passive and impartial presiding officer.\textsuperscript{167} In the adversarial system much emphasis is placed on the presentation of oral evidence. Meintjes-Van der Walt indicates that the emphasis on oral evidence as opposed to written statements can be traced to the fact that within the adversarial model, the verbal confrontation between the witness and the cross-examiner is regarded as the most effective means to test the version of the witness.\textsuperscript{168} In addition to the latter, the cross-examination of witnesses is pivotal as it is presumed that truth can be ascertained more sufficiently when parties introduce their evidence within a process which guarantees cross-examination.\textsuperscript{169} Within the adversarial system, the presiding officer remains mainly passive and his or her role is to listen to the evidence which is presented by both parties and consequently render a decision and in this sense he or she is often described as an “umpire”.\textsuperscript{170} The presiding officer may, however, intervene when necessary in order to ensure that the trial proceeds speedily and effectively and as such he or she has the authority to pose additional questions to witnesses and also to call witnesses who have not been called by either party but who can nevertheless assist the court in the assessment of the issues.\textsuperscript{171} Within the adversarial context, each party is responsible for seeking evidence in support of their respective arguments and this principle is often referred to as the “contest” or “battle” theory where each party has to prove its own case and the judge remains impartial and


\textsuperscript{168} Meintjes-Van der Walt (2001) supra note 2 at 41. See also Schwikkard and Van der Merwe (2009) supra note 2 at 9-10.

\textsuperscript{169} Ibid.

\textsuperscript{170} Meintjes-Van der Walt (2001) supra note 2 at 42.

\textsuperscript{171} Meintjes-Van der Walt (2001) supra note 2 at 43. See also section 186 of the Criminal Procedure Act 51 of 1977 which provides that a court “shall subpoena and examine any person if his evidence proves “essential to the just decision of the case”.

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ensures that the “rules of the game are observed”. The adversarial model is further epitomised by an extensive law of evidence with stringent rules in respect of the admissibility and exclusion of evidence. For the mental health professional the adversarial system will be somewhat different from clinical practice. Gutheil, Bursztajn, Brodsky and Alexander note that within mental health care, ambiguity is generally the rule rather than the exception and this ambiguity is often used as a tool and truth “… appears to be measured against an absolute standard based upon empirical observations and consensus within the scientific community.” Gutheil et al contrast the adversarial model with clinical practice and state:

“The adversarial system of the law is quite different. Its search for truth is procedural, rather than empirical, based upon the notion that each party to a dispute should argue the case from that party’s perspective and present what evidence it has, with truth determined by a neutral trier of fact according to the groundwork of rules. The law is primarily deontological – its “rightness” depends upon the extent to which proper procedures are followed in reaching the result, not whether the result provides the most good for the most people.”

South Africa, in principle, follows the adversarial system. Schwikkard and Van der Merwe indicate that the criticisms levelled towards the adversarial system mainly comprise the following:

- The adversarial system presupposes a measure of equality between the parties;

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172 Meintjes-Van der Walt (2001) supra note 2 at 44. See also Slovenko, R “Psychiatry in Law/Law in Psychiatry” (2002) at 4 where he states: “The adversary proceeding requires that lawyers, like gladiators, carry out their task in a fair or sporting manner.”
173 Ibid.
175 Ibid. See also Slovenko (2002) supra note 2 at 4 where he states that physicians are generally trained to search for medical truth whereas legal professionals are trained to represent any point of view.
177 Schwikkard and Van der Merwe (2009) supra note 2 at 9-10.
• The underlying principle that the parties are involved in a legal contest may create conflict which does not necessarily resolve the issues;
• The outcome of the case to a large extent is dependent on the experience and capabilities of the cross-examiner;
• The partisan manner by which the parties are allowed to present evidence as well as the limited capacity of the trier of fact to intervene and call witnesses may promote procedural truth at the cost of material truth.

• The inquisitorial system

In contrast to the adversarial system, the presiding officer in the inquisitorial system assumes an active role based on the predisposition that the trial is not a contest between two parties but rather an assessment in search of material truth.\textsuperscript{178} In terms of the inquisitorial system, emphasis is not placed on oral presentation of evidence or the practice of cross-examination and consequently the distinction between examination in chief and cross-examination is relatively rare.\textsuperscript{179} Within the inquisitorial model the presiding officer actively participates in the trial by questioning witnesses as well as the accused and he or she is not bound by the evidence presented by the parties but can ensure that all relevant information be assessed and presented at trial.\textsuperscript{180} Whereas quality of proof is the ultimate aim of the adversarial system, the search for truth is strived at in terms of the inquisitorial system.\textsuperscript{181} The rules of evidence are generally more relaxed and less stringent in terms of the inquisitorial system with the focus falling on the value to be attached to the evidence.\textsuperscript{182}

\textsuperscript{178} Schwikkard and Van der Merwe (2009) \textit{supra} note 2 at 10; Meintjes-Van der Walt (2001) \textit{supra} note 2 at 42-44; Gillmer, Louw and Verschoor (1995) \textit{SACJ supra} note 167 at 262.
\textsuperscript{179} \textit{Ibid}.
\textsuperscript{180} \textit{Ibid}.
\textsuperscript{181} Gillmer, Louw and Verschoor (1995) \textit{SACJ supra} note 167 at 262.
\textsuperscript{182} See Meintjes-Van der Walt (2001) \textit{supra} note 2 at 45 and also 47 where she provides a helpful synopsis of the distinctions between the adversarial and inquisitorial systems:

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The distinction between adversarial and inquisitorial systems are discussed as the specific system which is followed will inadvertently affect the role of the expert witness as well as the probative value attached to such expert evidence. As South Africa in principle follows an adversarial system, aspects such as pre-trial disclosure and cross-examination of expert witnesses become important and will be discussed below. It is apparent that from an inquisitorial point of view, the rules pertaining to expert evidence will be less stringent than in the case of the adversarial model. A question to be posed is whether the value of expert evidence will not receive better recognition in terms of a more inquisitorial model of evidence.

5.2 The role of the expert

The mental health expert witness has numerous roles to portray when engaging in the legal process and consequently also when testifying in support of the defence of criminal incapacity. Gutheil and Simon encapsulate the role of the forensic mental health expert under the labels of consultant, businessperson, teacher or
educator, advocate, witness and performer.\textsuperscript{183} The most prominent of these roles will be discussed below.

- **Consultant**

The expert witness typically functions as a consultant from the very outset of being retained by the instructing attorney and as such the expert provides consultation on aspects pertaining to psychiatry.\textsuperscript{184} Gutheil and Simon note that a consulting witness should be distinguished from a testifying witness – a testifying witness is typically one who is required to be available to testify should a case proceed to trial and such expert’s objective opinion may be received by means of discovery mechanisms such as reports and interrogatories.\textsuperscript{185} A consulting expert witness participates behind the scenes in a more partisan fashion and provides advice on various areas such as case strategy, weaknesses of the other side’s case and accordingly the views of such experts are protected from discovery.\textsuperscript{186} The consultative role of the expert witness further entails consultation pertaining to the opening statement and closing arguments of the case.\textsuperscript{187}

- **Educator**

Expert witness practice to a great extent entails educating or teaching. This role is portrayed in two distinct phases:\textsuperscript{188}

- Firstly the expert witness teaches the legal professionals as to important psychiatric aspects of the case; the specific contributions psychiatry can make to the case; the strengths and weaknesses of the case and also that which the expert witness can state regarding the issues of the case to a reasonable degree of medical certainty.

\textsuperscript{184} Ibid.  
\textsuperscript{185} Gutheil and Simon (2002) supra note 183 at 4.  
\textsuperscript{186} Ibid. See also Gillmer, Louw and Verschoor (1995) SACJ supra note 167 at 263.  
\textsuperscript{188} Ibid.
• Secondly the expert witness teaches the court regarding psychiatric issues. This phase will typically entail the translation and explanation of psychiatric terminology in terms of lay language to make these more comprehensible.

According to Camper and Lottis, proponents of the educator approach believe that the expert witness should follow the stance of the objective scientist in presenting expert evidence and as such the expert’s function is to educate the court on matters relevant to the issues. Meintjes-Van der Walt correctly asserts that legal education in respect of expert evidence in general as well as the different areas of evidence can contribute in making the judicial field more comprehensible. Meintjes-Van der Walt notes:

“It is an understanding of the nature of expert evidence and particularly scientific knowledge that informs the way in which the legal process responds to this kind of evidence … knowledge of the different theories, as well as the way in which the law views science, is crucial to participants in the legal process when scientific evidence is introduced.”

• Advocate

The role of the expert witness is also often conveyed as that of the persuader or, stated differently, the advocate. Gutheil and Simon note that it should be borne in mind that an expert, after assessment and evaluation of various data and application of training and experience, may ethically state his or her opinion persuasively but this function should be distinguished from advocacy for the side of the case that retains the expert, as this is the function of the legal professional. Adherents to the advocacy paradigm take the view that an expert is compelled by the very nature of testifying to take a stance in respect of the issues before the court and to only focus on evidence supportive of such stance and as such the “selectivity in the presentation of evidence is determined, in part,

\[\text{Camper, PM and Lottis, EF “The Role of Psychologists as Expert Witnesses in the Courtroom: No More Daniels in the Lions Den” (1985) Law and Psychology Review 1-13 at 3.}\]
\[\text{Ibid.}\]
\[\text{Simon and Gutheil (2002) supra note 183 at 5.}\]
by the consequences of advocating that particular position in the case of trial.”

The advocacy role has been subjected to criticism in that it promotes the so-called “battles of the experts”.

Gudjonsson and Howard ascribe the clinical, experimental, actuarial and advisory role to forensic psychology. The clinical role typically relates to those issues of evidence where the mental abnormality of one of the parties becomes relevant to the legal issue and concerns the mental state of the particular client. In terms of the experimental role, applied and academic psychologists are able to construct unique, innovative experiments which relate directly to some of the questions that the forensic psychologist has translated from the legal professional’s original request. The actuarial role is one in which the forensic psychologist provides evidence with regards to the probability of certain events and such information is gathered in two ways: by means of conducting a search of literature where such data is most likely reported and also by means of fieldwork. The advisory role entails the process in terms of which the evidence given by other psychologists is evaluated and consequently counsel or the court is advised concerning its strengths and weaknesses. In respect of assessing the essential roles of the various mental health professionals, it becomes crucial to distinguish between the

193 Camper and Lottis (1985) supra note 189 at 4-5.
194 Ibid. For an alternative view in support of the advocacy role see also Diamond, BL “The psychiatrist as advocate” (1973) The Journal of Psychiatry and Law at 5-21 where it is stated that an expert witness will invariably act as an advocate, either willingly or unwillingly and accordingly to accept the advocate role and to pursue such role will be ethical if performed without deceit. Diamond specifically notes (at 7): “The problem is that the expert witness who believes in his non-advocacy stance, in the impartiality of his opinions, may in fact be a potent advocate, and yet be entirely unaware of what he is advocating as well as the consequences of his advocacy. It is true that the psychiatrist who admits to himself his advocacy position may not be fully aware of all he is advocating or of all the consequences of his position. But, at least his less self-deluding posture permits further inquiry, of further self-knowledgeable, and greater understanding of both his own role and that of the social institutions in which he is engaged.” And further (at 8): “However the psychiatrist’s advocacy inevitably involves effects which go far beyond the destiny of the individual defendant or plaintiff. Here we are concerned with the impact of expert testimony upon the law itself; upon society’s attitude toward the mentally ill; and upon social policies which determine the fate of large numbers of other individuals.”
forensic psychologist and forensic psychiatrist and the approaches followed by these two professions respectively. From the outset it should be noted that the main role of the forensic psychiatrist entails a mental status examination of individuals presumed to be suffering from mental illness.  

Forensic psychology, on the other hand, relates to the collection, assessment and presentation of evidence for judicial purposes. According to Grisso, there are four essential differences between psychiatrists and psychologists, which are the following:

<table>
<thead>
<tr>
<th>Psychiatry</th>
<th>Psychology</th>
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<tbody>
<tr>
<td><strong>Content</strong></td>
<td><strong>Psychologists are trained to assess issues which go beyond mental disorder such as describing an individual’s functional abilities, personality, behaviour and coping methods.</strong></td>
</tr>
<tr>
<td>Psychiatrists are trained to primarily deal with biological, medical as well as psychopharmacological issues.</td>
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<tr>
<td><strong>Methods</strong></td>
<td><strong>Psychologists use standardised and qualitative assessment techniques in addition to interviews.</strong></td>
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<tr>
<td>Psychiatrists rely primarily on interviews and observation to conduct their assessment.</td>
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<tr>
<td><strong>Epistemological differences</strong></td>
<td><strong>Psychologists primarily conduct controlled and circumscribed experiments.</strong></td>
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<tr>
<td>Psychiatrists base their research on observations of large clinical samples.</td>
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<tr>
<td><strong>Mentoring systems</strong></td>
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• Forensic psychiatric training frequently makes use of teaching hospital departments and residency training.

• Graduate training programmes in psychology are premised within the various psychology departments of universities.

It is crucial to comprehend the differences between forensic psychiatry and psychology in order to accord the appropriate roles to each mental health professional specifically with reference to the defence of criminal incapacity.\textsuperscript{203} It is to be noted that the current section 79 of the Criminal Procedure Act only makes mention of the clinical psychologist and further leaves the appointment of such expert to the court’s discretion.\textsuperscript{204} A question to be asked is whether provision should not expressly be made for forensic psychology or adequate training in such profession? For purposes of the defence of criminal incapacity it is submitted that the specific section should expressly provide for the expertise of a forensic psychologist. It has already been illustrated in chapter 1 that there are specific differences between clinical as opposed to forensic psychology and retaining the correct expert could accordingly add probative value to the opinion of the expert.

5.3 Pre-trial consultations and disclosure

Procedural mechanisms are often underestimated for its value in the adjudication of issues within a criminal trial and also consequently with reference to the defence of criminal incapacity, entail pre-trial meetings and disclosure. Meintjes-Van der Walt correctly notes that pre-trial investigative procedures can prove to be pivotal in the assessment of the ultimate admissibility, reliability and the weight accorded to expert evidence.\textsuperscript{205} Pre-trial measures afford both the prosecution as well as the defence an adequate opportunity to prepare their cases. Prosecution disclosure of expert evidence is, as a general rule, firmly established whilst the

\begin{itemize}
  \item \textsuperscript{203} See Gudjonsson and Howard (1998) \textit{supra} note 167 at 77 where it is noted: “The main implication of the differences between psychologists and psychiatrists is that they have different skills and apply different methods to the assessment, which when used jointly can be employed to the maximum benefit of the case.”
  \item \textsuperscript{204} See section 79(2)(b)(iv) of the Criminal Procedure Act 51 of 1977.
  \item \textsuperscript{205} Meintjes-Van der Walt (2001) \textit{supra} note 2 at 86; Meintjes-Van der Walt (2003) \textit{Journal of African Law} \textit{supra} note 2 at 94; Allan in Tredoux \textit{et al} (eds) (2005) \textit{supra} note 2 at 309.
\end{itemize}
same is not true for defence disclosure of expert evidence. Pre-trial disclosure of expert evidence by the prosecution provides a means in terms of which the defence is empowered to sufficiently answer to the case and as such adequately challenge evidence. Meintjes-Van der Walt submits, and the researcher concurs with such submission, that there should be reciprocal disclosure within the ambit of expert evidence. Such disclosure will not conflict with an accused’s right to remain silent or his or her privilege against self-incrimination and, because disclosure of expert evidence to be adduced during the trial will most likely entail evidence in favour of the accused, such disclosure will not be self-incriminating. According to Meintjes-Van der Walt, the only disadvantage associated with defence disclosure of expert evidence is that the defence will most probably lose the tactical measure of surprise which is associated with “trial by ambush”.

Meintjes-Van der Walt notes that insufficient pre-trial disclosure will result in the curtailment of defence counsel’s trial preparation and will further severely prejudice the attainment of justice within the criminal justice system. The reciprocal process of disclosure can best be achieved by means of a pre-trial meeting or consultation of the prosecution, defence and their experts. During these consultations the various experts could discuss their respective assessments and conclusions and further identify the specific areas they have consensus on as well as the areas where there is a difference of opinion. The

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207 Meintjes-Van der Walt (2001) supra note 2 at 106.
208 Disclosure within the field of expert evidence. Full defence disclosure will not be addressed in this study. See Meintjes-Van der Walt (2003) SACJ supra note 2 at 361. See also Diamond, BL “The Psychiatric Expert Witness – Hones: Advocate or “Hired Gun” in Rosner, R and Weinstock, R “Ethical Practice in Psychiatry and the Law” (1990) at 81 where it is stated that there should be complete disclosure in order to facilitate an effective, credible, and righteous defence.
209 Meintjes-Van der Walt (2003) SACJ supra note 2 at 361.
210 Ibid.
211 Meintjes-Van der Walt (2001) supra note 2 at 115.
213 Ibid. See also S v Huma (1) 1995 (2) SACR 407 (W) at 410 J-411 A where Claassen J held: “I would like to commend to them the possibility of comparing one another’s finding so as to come to a joint finding, if at all possible I would commend to the experts in this particular case the procedure adopted in civil cases, where the experts meet in advance of the trial so as to indicate where they agree and disagree. Such co-operation between experts of opposing sides generally results in saving of time and costs.” See also Meintjes-Van der Walt (1996) SACJ supra note 2 at 366.
result of pre-trial meetings would in effect be that the defence would also have to disclose expert information intended to be used during the trial. Pre-trial consultations will result in only leaving the disputed issues for trial. Allan suggests the following issues which should be addressed during pre-trial conferences:214

- The psychologist’s qualifications and the accuracy thereof should be assessed;
- Legal professionals should enunciate the theory of the case as well as possible strategies of the opposing side;
- Psychologists should present an honest and accurate account of the opinions of such experts as may have been retained by the other side;
- Possible strategies for evidence in chief should be constructed and legal professionals should advise psychologists as to possible questions which could be posed but not the answers to these questions;
- Legal professionals and psychologists should objectively and critically assess the written report to determine its weaknesses and these weaknesses should ideally be addressed during the examination in chief;
- Expert witnesses should anticipate possible facts which may be used to contradict their opinions and plan strategies in respect of these facts with an opinion. The latter could be achieved by indicating that the conflicting evidence is irrelevant;
- Legal professionals can anticipate possible questions that will be asked in cross-examination but should refrain from coaching witnesses and accordingly telling them what answers to provide to questions;
- Legal professionals should ascertain what the expert witness’s view is on ultimate issue questions;
- The court procedure and etiquette should be explained to the psychologist or expert witness;
- The expert witness should, if necessary, be instructed to remain in court to hear other witnesses.

214 Allan in Tredoux et al (eds) (2005) supra note 2 at 309-310. Although the learned author refers specifically to psychology, it is submitted that these issues could equally apply to the field of psychiatry.
Meintjes-Van der Walt\(^{215}\) in respect of the necessity for pre-trial consultation and disclosure states that reciprocal disclosure of expert evidence should be construed as a method of assisting the court within the adversarial climate by means of the proper presentation and competent challenge of expert evidence, thereby reducing the obfuscating effect that “trial by ambush” can have.

5.4 **Oral versus documentary evidence**

Within our current system of evidence, there is generally a preference for oral evidence as opposed to documentary evidence. Section 161 of the Criminal Procedure Act clearly states:\(^{216}\)

>“(1) A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*.

> (2) In this section the expression ‘*viva voce*’ shall, in the case of a deaf and dumb witness, be deemed to include gesture language and, in the case of a witness under the age of eighteen years, be deemed to include demonstrations, gestures or any other form of non-verbal expression.”

An expert witness, whether for the prosecution or the defence, will be deemed a “witness” and will have to comply with this section. The underlying premise for the preference of oral testimony could be traced mainly to the fact that within an adversarial trial, the verbal interaction between the witness and the cross-examiner is deemed as the most efficient means of testing the witness’s testimony.\(^{217}\) Other reasons for the preference of oral evidence include the fact that the trier of fact is afforded the opportunity to observe the demeanour of the witness which can provide a basis for deductions relating to credibility; and further that taking the oath in an open court will emphasise to the witness the importance of speaking the truth.\(^{218}\) Inquisitorial systems, on the other hand, place much reliance on documentary evidence. There are, however, exceptions to the general


\(^{216}\) The Criminal Procedure Act 51 of 1977.


\(^{218}\) *Ibid.*
rule that a witness should provide oral evidence. Section 212(4)(a) is one such example and provides for the presentation and use of affidavits and certificates as a means of adducing expert evidence and reads as follows:219

“In whenever any fact established by any examination or process requiring any skill in biology, chemistry, physics, astronomy, geography, anatomy, human behavioural sciences, any branch of pathology or in toxicology or in the identification of finger-prints or palm-prints, is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or is in the service of or is attached to the South African Institute for Medical Research or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the Gazette, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be prima facie proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall mutatis mutandis apply with reference to such certificate: Provided further that if such affidavit or certificate contains an opinion, such affidavit or certificate shall be prima facie proof of that opinion if –

(i) the expertise of the declaring, and
(ii) the grounds on which the opinion is based can be determined from the affidavit or certificate."

This section is important as it could also pertain to the testimony by psychiatrists and psychologists as it specifically refers to “human behavioural sciences”. The mere production of the said affidavit will provide prima facie proof of the facts enunciated therein.220 It is thus of relevance to note that although oral evidence is

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220 Meintjes-Van der Walt (2001) *Stell LR* supra note 2 at 288. In *S v Veldthuizen* 1982 (3) SA 413 (A) at 416 Diemont JA held that prima facie evidence entails: “… that the judicial officer
preferred within the adversarial system in South Africa, documentary evidence can be introduced in exceptional circumstances.\textsuperscript{221}

\subsection*{5.5 Cross-examination of expert witnesses}

“Testifying in court is lecturing under combat conditions.”\textsuperscript{222}

“If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath, ‘to tell the truth, the whole truth, and nothing but the truth’, and if all advocates on either side had the necessary intelligence and were similarly sworn to develop the whole truth and nothing but the truth, of course there would be no occasion for cross-examination and the occupation of the cross-examiner would be gone. But as yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.”\textsuperscript{223}

One of the most effective ways of testing the validity and reliability of expert evidence is by means of cross-examination of the expert witness. The art of cross-

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will accept the evidence as \textit{prima facie} proof of the issue and in the absence of other credible evidence, that evidence will become conclusive proof.”
\end{flushright}

\textsuperscript{221} See also section 34 of the Civil Proceedings Evidence Act 25 of 1965 which has been incorporated into the Criminal Procedure Act by virtue of section 222 as discussed in Meintjes-Van der Walt (2001) \textit{Stell LR} supra note 2 at 289-290 for a further example of where statements of an expert can be admissible provided the requirements of the said section were complied with. See also section 213 of the Criminal Procedure Act which provides that written statements can be handed in as evidence if the parties consent thereto. It will be admissible as evidence by the mere submission thereof if no objection is made.

\textsuperscript{222} Tanay, E as quoted in Gutheil, TG and Simon, RI “Mastering forensic Psychiatric Practice – Advanced Strategies for the Expert Witness” (2002) at 93.

\textsuperscript{223} Wellman, FL as quoted in Engelbrecht, J “The Art of Cross-Examination” (1975) \textit{The Magistrate} at 54. For purposes of the current study, emphasis will fall on the cross-examination of expert witnesses in particular and as such the practice of cross-examination in general will not be addressed comprehensively. See also section 166 of the Criminal Procedure Act 51 of 1977 which specifically provides for the cross-examination of witnesses whether for the prosecution, defence or in duty of the court. The latter section reads as follows: “(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused. (2) The prosecutor and the accused may, with leave of the court, examine or cross-examine any witness called by the court at criminal proceedings.”

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examination and the success thereof to a large extent depends on the skill and experience of the cross-examiner. Within the paradigm of the defence of criminal incapacity, the prosecution as well as the defence will seek to challenge the opposing side’s expert witnesses by means of cross-examination. In general, the rules of evidence pertaining to the cross-examination of an expert witness and that of ordinary witnesses are the same.\textsuperscript{224} Morris distinctly defines the objectives of cross-examination as follows:\textsuperscript{225}

- To elicit facts favourable to your case;
- To elicit facts which may be utilised to cross-examine other witnesses;
- To show that adverse evidence is unacceptable;
- To show that the witness is not credible;
- To put your case to the witness so that it may be known and commented upon.

It is important to further distinguish between matters of scientific facts and matters of opinion as experts rarely differ on matters of scientific facts whilst differences on opinion are common practice.\textsuperscript{226} According to Morris, there are five basic methods of cross-examination, which are the following:\textsuperscript{227}

- Compare the evidence with established or clearly proven facts;
- Test the evidence for incongruities of fact, or more usefully, of conduct;

\textsuperscript{224} Engelbrecht, J “Cross-examining expert witnesses” (1982) \textit{De Rebus} at 556; Allan in Tredoux \textit{et al} (eds) \textit{De Rebus} at 556; Mullins, J and Da Silva, C “Morris – Technique in Litigation” (2010) 6\textsuperscript{th} ed at 220-221; Morris, E “Technique in Litigation” (2003) at 202; Wrottesley “On the Examination of witness” as quoted in Morris \textit{supra} similarly described the object of cross-examination as follows: “The objects of cross-examination are three in number. The first is to elicit something in your favour; the second is to weaken the force of what the witness has said against you; and the third is to show that from his present demeanour or from his past life he is unworthy of belief and thus weakens or destroys the force of his testimony.” See also Engelbrecht (1975) \textit{The Magistrate supra} note 223 at 53. See also Meintjes-Van der Walt, L “Cross-examination of expert witnesses” (2001) \textit{De Rebus} 22-25 at 23 where she states: “The objectives of cross-examination are to elicit information that is favourable to the cross-examiner and to cast doubt on the accuracy of the evidence given by the witness being cross-examined.” See also Davies, Hollin and Bull (2008) \textit{supra} at 165-166. See also Melton \textit{et al} (2007) \textit{supra} note 2 at 592-595; Wolmarans (1986) \textit{supra} note 2 at 47-49; Zeffert and Paizes (2009) \textit{supra} note 2 at 906-927; Bond, C, Solon, M and Harper, P “The Expert Witness in Court – A Practical Guide” (1999) at 112-115; Meintjes-Van der Walt, L “Eyewitness evidence and eyewitness science: Whether twain shall merit” (2009) \textit{SACJ} 305 at 322-324.

\textsuperscript{225} Mullins, J and Da Silva, C “Morris – Technique in Litigation” (2010) 6\textsuperscript{th} ed at 220-221; Morris, E “Technique in Litigation” (2003) at 202; Wrottesley “On the Examination of witness” as quoted in Morris \textit{supra} similarly described the object of cross-examination as follows: “The objects of cross-examination are three in number. The first is to elicit something in your favour; the second is to weaken the force of what the witness has said against you; and the third is to show that from his present demeanour or from his past life he is unworthy of belief and thus weakens or destroys the force of his testimony.” See also Engelbrecht (1975) \textit{The Magistrate supra} note 223 at 53. See also Meintjes-Van der Walt, L “Cross-examination of expert witnesses” (2001) \textit{De Rebus} 22-25 at 23 where she states: “The objectives of cross-examination are to elicit information that is favourable to the cross-examiner and to cast doubt on the accuracy of the evidence given by the witness being cross-examined.” See also Davies, Hollin and Bull (2008) \textit{supra} at 165-166. See also Melton \textit{et al} (2007) \textit{supra} note 2 at 592-595; Wolmarans (1986) \textit{supra} note 2 at 47-49; Zeffert and Paizes (2009) \textit{supra} note 2 at 906-927; Bond, C, Solon, M and Harper, P “The Expert Witness in Court – A Practical Guide” (1999) at 112-115; Meintjes-Van der Walt, L “Eyewitness evidence and eyewitness science: Whether twain shall merit” (2009) \textit{SACJ} 305 at 322-324.

\textsuperscript{226} Mullins, J and Da Silva, C “Morris – Technique in Litigation” (2010) 6\textsuperscript{th} ed at 220-221; Morris, E “Technique in Litigation” (2003) at 202; Wrottesley “On the Examination of witness” as quoted in Morris \textit{supra} similarly described the object of cross-examination as follows: “The objects of cross-examination are three in number. The first is to elicit something in your favour; the second is to weaken the force of what the witness has said against you; and the third is to show that from his present demeanour or from his past life he is unworthy of belief and thus weakens or destroys the force of his testimony.” See also Engelbrecht (1975) \textit{The Magistrate supra} note 223 at 53. See also Meintjes-Van der Walt, L “Cross-examination of expert witnesses” (2001) \textit{De Rebus} 22-25 at 23 where she states: “The objectives of cross-examination are to elicit information that is favourable to the cross-examiner and to cast doubt on the accuracy of the evidence given by the witness being cross-examined.” See also Davies, Hollin and Bull (2008) \textit{supra} at 165-166. See also Melton \textit{et al} (2007) \textit{supra} note 2 at 592-595; Wolmarans (1986) \textit{supra} note 2 at 47-49; Zeffert and Paizes (2009) \textit{supra} note 2 at 906-927; Bond, C, Solon, M and Harper, P “The Expert Witness in Court – A Practical Guide” (1999) at 112-115; Meintjes-Van der Walt, L “Eyewitness evidence and eyewitness science: Whether twain shall merit” (2009) \textit{SACJ} 305 at 322-324.

\textsuperscript{227} Morris (2003) \textit{supra} note 225 at 203.
• Test the evidence on the backdrop of common sense or reason;
• Test the evidence within the context of what the state of mind of the witness was or would have been at the time;
• Test the witness on collateral issue.

These principles will inadvertently also apply to the cross-examination of psychiatrists and psychologists where the defence of criminal incapacity is raised. Research pertaining to the cross-examination of expert witnesses enunciates the following basic guidelines to follow during the cross-examination of an expert witness:

• It is important to assess the expert’s qualifications, experience and capabilities in order to determine whether he or she is in fact an expert with specialized knowledge.\(^{228}\) Engelbrecht notes in this regard: \(^{229}\)

> “When the expertise of an expert witness is attacked, especially his standing in the profession, it is submitted that the cross-examiner should satisfy himself not only that the imputation is well founded but also that the answers would or might materially affect the credibility of the witness.”

Meintjes-Van der Walt in addition notes that expert evidence can be challenged by indicating that the expert does not possess the necessary expertise to provide an opinion on a specific point, or that even though the expert has the required qualifications, he or she lacks the necessary experience and accordingly less weight should be attached to his or her opinion. \(^{230}\) Engelbrecht\(^{231}\) in addition notes that the entire effect of the testimony of an expert witness can also be eliminated by putting the witness to test at the trial in respect of his qualifications, his experience and his ability and discrimination as an expert and a “failure to meet the test renders his evidence nugatory”.

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\(^{230}\) Meintjes-Van der Walt (2001) \textit{De Rebus} \textit{supra} at 23.

\(^{231}\) Engelbrecht (1975) \textit{supra} note 223 at 58.
• Test and challenge the objectivity and credibility of the expert witness.\textsuperscript{232} In this regard the evidence of the expert witness can be compared with the opinions of other experts in the field in order to assess the thoroughness of the assessments undertaken by the expert and the reliability and validity of such methods.\textsuperscript{233}

• Evaluate and challenge the relevance and scientific credibility of the expert evidence as well as the reliability and validity of specific diagnoses, diagnostic methods and theories.\textsuperscript{234}

• It is pivotal to assess and challenge the accuracy of the factual basis which constitutes the foundation of the witness's opinion.\textsuperscript{235} An expert's opinion can be founded upon data, facts, tests or other observations generally accepted within the expert's field of expertise and the cross-examiner needs to test the validity of these bases.\textsuperscript{236} The cross-examiner needs to assess whether the methodology and processes that were followed complied with adequate procedures in order to ensure accuracy and validity.\textsuperscript{237}

• Morris notes that cross-examination will proceed “on lines of pure logic or scientific analysis” and further states that one will ascertain which factors the witness has taken into consideration in arriving at his or her opinion and once an error in the premises is established, if it can be established, the inquiry relates to how far that error bears upon the result.\textsuperscript{238} Morris in addition notes: “The next attack, assuming the failure of the previous one suggested, is on

\textsuperscript{232} Allan in Tredoux \textit{et al} (eds) (2005) \textit{supra} note 2 at 313.
\textsuperscript{233} Allan and Meintjes-Van der Walt in Kaliski (ed) (2006) \textit{supra} note 2 at 351; Allan in Tredoux \textit{et al} (eds) (2005) \textit{supra} note 2 at 313. See also \textit{S v Lamprecht} 1977 (1) SA 246 (E).
\textsuperscript{234} Allan in Tredoux \textit{et al} (eds) (2005) \textit{supra} note 2 at 313.
\textsuperscript{236} Meintjes-Van der Walt (2001) \textit{De Rebus} \textit{supra} note 2 at 23.
\textsuperscript{237} Ibid.
\textsuperscript{238} Morris (2003) \textit{supra} note 224 at 251; Engelbrecht (1975) \textit{supra} note 224 at 58; Allan in Tredoux \textit{et al} (eds) (2005) \textit{supra} note 2 at 313-314.
the justification for drawing an inference or forming an opinion as the witness has done.”

- Expert witnesses should at all times be treated in a courteous and fair manner and it is incumbent upon a presiding officer to ensure that a fair cross-examination is conducted. Snyman J made the following observations in this regard in *S v Azov* where it was noted:

“I think it must be made clear to him, and perhaps to others, that witnesses who come into court, … are entitled to the ordinary courtesy one extends to decent people.”

- Cross-examination should not be aimed at wearing down the witness in order to facilitate answers favourable to the cross-examiner as a result of fatigue.

- Cross-examination should not be rendered in order to obscure the truth and there should be no misrepresentation to a witness as to what he himself testified as a basis for an attack upon the witness.

- Morris states that one of the most important points to ponder when cross-examining expert witnesses is “the essence of the matter”.

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239 *Ibid*.
241 *S v Azov* 1974 (1) SA 808 (T); Zeffert and Paizes (2009) *supra* note 2 at 211.
242 At 810-811. See also *S v Van Lil* 1969 (2) PH H 219 (T); *S v Makaula* 1964 (2) SA 575 (E).
243 Engelbrecht (1982) *De Rebus supra* note 224 at 556. See also Verschoor and Van Rensburg (1994) *supra* note 2 at 6; Bromberg, W “Psychiatrists in Court – The Psychiatrists View” (1969) at 50 where it is stated: “Courtroom tactics represent one of the Games People Play, perhaps the cause of justice would be better served if both sides renounce the game and carry out the testimony and cross-examination in a spirit of calm assertion and equally calm inquiry.”
244 *Ibid*. Engelbrecht (1982) *De Rebus supra* note 224 at 556-557 in addition notes: “While it’s perfectly permissible to test a witness’s version of events by ascertaining the details thereof and then by interrogating him about them, one ought not in cross-examination so to frame one’s questions that they appear as statements of fact to which others will depose when in truth the “facts” in question are not part of one’s case and no evidence is intended to be led thereon.” See also *S v Kubeka* 1982 (1) SA 534 (W).
It is apparent that the cross-examination of expert witnesses constitutes a vital tool in order to test the veracity, credibility, reliability and probative value of expert evidence. The use of this “tool” is, however, dependent on the skills, training and experience of the cross-examiner. Cross-examination is further an inherent feature of the right of an accused to a fair trial and more pertinently the right to adduce and challenge evidence as espoused in section 35(3)(i) of the Bill of Rights in the Constitution.246

6 Ethical issues pertaining to the forensic assessment conducted by experts

6.1 Bias and the so-called “hired guns”

Within the climate of an adversarial system of justice, a natural consequence of such system is that each party will propose to retain expert witnesses most favourable and supportive to their respective cases. Expert witnesses are, however, consultants of the court and should strive to be as impartial and unbiased as possible. Some experts are often labelled as “hired guns” due to the fact that they are willing to express and opinion requested by the legal professional regardless of whether such opinion is objectively speaking, the correct one.247 Diamond defines the so-called “hired gun” as one who knowingly gives false or misleading testimony by intentionally violating the oath with the underlying motive for doing so usually being money; but often there are also other reasons such as desire for publicity, to bolster self-esteem, to please attorneys or to further some personal endeavour.248

246 Constitution of the Republic of South Africa, 1996. See also Meintjes-Van der Walt (2001) supra note 2 at 192 where the practice of cross-examination is questioned as an appropriate measure for asserting the truth. See also Meintjes-Van der Walt (2001) SAJHR supra note 2 at 308-312.


It is often difficult to disseminate whether an expert is a “hired gun” or whether he or she is merely very favourable to his or her side’s case. The “hired gun” effect is a very unfortunate consequence of the presentation of expert evidence and does injustice to the principle of a fair and just trial. Allan and Meintjes-Van der Walt correctly assert that it is often difficult for experts to be completely impartial as a result of various factors which include the following:\textsuperscript{249}

- Legal professionals will inadvertently select an expert who supports the case they want to present to the court. As such the expert will begin to identify with the client. Meintjes-Van der Walt in addition notes that such bias may be completely unconscious as numerous sources suggest that simply being placed in the role of an adversary witness will result in testimony which is biased in favour of the party for whom it is provided and consequently an expert witness may therefore be honest yet biased.\textsuperscript{250}

- The fact that some experts are paid often creates the impression of bias and even though experts will deny this factor impacting on their impartiality, receiving remuneration will often make it difficult for the expert to remain neutral especially if the particular expert is dependent financially on the income generated by means of acting as an expert witness.

- As legal professionals are ethically obliged to present their clients’ case as positively as possible they will inadvertently be selective in respect of the information they provide to the expert so as to strengthen their case as much as possible. In this sense it is pivotal that experts assess all information critically in order to ensure that their observations are not clouded.

\textsuperscript{249} Allan and Meintjes-Van der Walt in Kaliski (ed) (2006) \textit{supra} note 2 at 353-354.

\textsuperscript{250} Meintjes-Van der Walt (2001) \textit{supra} note 2 at 136. See also Wolmarans (1986) \textit{supra} note 2 at 62 where it is noted that some motivating or causal factors towards biased experts are the fact that the expert would not be in the witness box if he or she did not support their side’s view; the instructions received could have been one-sided or incomplete, the expert’s own preparations could have been superficial; the nature of the legal process often renders it impossible to provide a scientific and objective opinion; the atmosphere in court is often unsound and distressing; inadequate knowledge can often lead to unconscious bias.
• The most problematic form of bias occurs when experts allow their own ideology, morality or theories to influence their opinions.

It is essential that expert witnesses realise that they are witnesses providing evidence based on their honest opinion, knowledge as well as admissible facts.\textsuperscript{251} There are no hard and fast rule to combat the “hired gun” problem but it remains trite that this practice severely corrupts the legal process and should be curbed as much as possible. Diamond indicates that a combination of measures by both the legal and psychiatric communities could reduce this problem with due regard to the following guidelines:\textsuperscript{252}

• Proper recognition of the boundaries of legitimate psychiatric expertise should be established within the forensic psychiatric community;
• More stringent standards for the qualification of experts should be required and adopted by courts as well as legislatures;
• It should be required that the expert be knowledgeable pertaining to the scientific literature on the subject at issue. Diamond encapsulates the latter by stating:\textsuperscript{253}
  “The logic of science, rather than the logic of the law, should be the required standard for the expert’s testimony. Total disclosure is mandatory in the logic of science.”
• Mere reliance on the “battle of the experts” in order to expose unscientific, irrational or dishonest expert evidence is not sufficient and as such the presiding officer should take responsibility for establishing criteria for expertise and should exclude evidence that fails to meet the yardstick for appropriate standards of expertise.

\textsuperscript{251} Allan and Meintjes-Van der Walt in Kaliski (ed) (2006) \textit{supra} note 2 at 354; Meintjes-Van der Walt (2001) \textit{supra} note 2 at 136. See also Memon, Vrij and Bull (2003) \textit{supra} at 178 where it is noted that during a survey conducted pertaining to the effectiveness of expert testimony, it was revealed that experts who were highly paid for their testimony were viewed by jurors as “hired guns” and were held less credible and effective. The moderately paid expert from a less well-known institution was deemed as someone who was testifying merely as a result of his expertise in a particular area. See also Gutmacher, MS “The Role of Psychiatry in Law” (1968) at 87-91.

\textsuperscript{252} Diamond in Rosner and Weinstock (eds) (1990) \textit{supra} note 247 at 81-83.

\textsuperscript{253} Diamond in Rosner and Weinstock (eds) (1990) \textit{supra} note 247 at 83.
• The law should put an end to its quest for certainty as well as its belief that certainty can be obtained by means of science as scientific knowledge is always approximate and subject to change and as such there is a degree of doubt as to every scientific conclusion.

• The role of the expert witness within the adversarial process should be exposed to the trier of fact.

• Professional organizations should play a more active role in establishing guidelines, ethical standards and also in exposing and disciplining members of their respective professions who abuse the legal principle of expert testimony. Diamond in addition note:254

“To avoid the discrediting of both law and psychiatry, the courts and bar associations must take the responsibility for control of the lawyers who wilfully encourage irresponsible expertise and the psychiatric organizations must accept responsibility for the exposure and discipline of their professionals who give unethical and dishonest testimony. The “hired gun” violates his oath as a witness to tell the truth, the whole truth, and nothing but the truth, and therefore cannot be tolerated in our system of justice.”

The defence of criminal incapacity is a complex and controversial defence. In the ultimate search for truth and the assessment of the merits of this defence, it is pivotal that mental health experts provide their opinion free of bias and impartial. Although it is difficult to formulate set rules to achieve such goal, the criteria above could provide a contextual framework toward the abolition of the “hired guns” and the proper practice of the presentation of expert testimony.

6.2 Dual relationships

Mental health professionals are often confronted with the ethical dilemma of being requested to serve as an expert witness whilst at the same instance acting as a treating clinician for the specific client or in the case of criminal incapacity, the accused. The Health Professions Council of South Africa (HPCSA) as well as the Society of Psychiatrists of South Africa (SASOP) has recommended that treating

therapists should not endeavour psycholegal assessments for their own clients.\textsuperscript{255}

The ethical conflict of serving both as a treating therapist as well as an expert witness, emanates from the essential differences in pragmatic approaches between these two relationships. Strassburger, Gutheil and Bradsky assert the following with respect to the difference between these two relationships:\textsuperscript{256}

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

In chapter 1, the fundamental differences between a therapeutic versus a forensic relationship were discussed and will not be repeated here.\textsuperscript{257} For purposes of this discussion it is, however, important to elaborate on the differences between these two relationships in order to clarify the ethical problem of assuming dual relationships.

According to Strassburger, Gutheil and Bradsky, clinical and forensic assessments are further dissimilar in the following respects:\textsuperscript{258}

\textsuperscript{255} Zabow, T and Kaliski, S "Ethical Considerations" in Kaliski (eds) (2006) \textit{supra} note 2 at 361. See also the "Rules of Conduct Pertaining Specifically to the Profession of Psychology as contained in the Ethical Rules of Conduct for Practitioners registered under the Health Professions Act, 1974 GNR 717 of 4 August 2006 at paragraph 71 which reads as follows: “Conflicting roles – (1) A psychologist shall avoid performing multiple and potentially conflicting roles in psycho-legal matters.”

\textsuperscript{256} Strassburger, LH, Gutheil, TG and Brodsky, A “On Wearing Two Hats: Role Conflict in Serving as Both Psychotherapist and Expert Witness” (1997) \textit{American Journal of Psychiatry} 448-456 at 451. See also Campbell, TW “Psychotherapy with children of divorce: the pitfalls of triangulated relationships” (1992) \textit{Psychotherapy} 646-52 where it is noted that often therapists find it difficult to competently evaluate their clients as the therapeutic alliance between the client and therapist reduces the therapist's objectivity. Conversely, evaluators will find it problematic to act therapeutically to the subjects of their evaluations. (As discussed in Slovenko, R “On a Therapist Serving as Expert Witness” (2002) \textit{Journal of American Academy of Psychiatry} 10-13 at 10).

\textsuperscript{257} See chapter 1 \textit{supra} at paragraph 2-10.

\textsuperscript{258} Strassburger, Gutheil and Brodsky (1997) \textit{supra} note 256 at 450-453. See also Melton \textit{et al} (2007) \textit{supra} note 2 at 43-47; Stone, AA “Revisiting the Parable: truth without consequences”
• The treating clinician typically follows a psychodynamic approach whereas the forensic mental health expert's view is more descriptive. Strassburger, Gutheil and Brodsky encapsulate the latter by stating:\(^{259}\)

“Whereas the treating clinician looks out from within, the forensic expert, who must adhere to an ethical standard of objectivity, looks in from outside.”

• Within the clinical context of treatment, the ultimate goal is psychological in the sense of benefiting the patient promoting healing and widening the level of individual awareness, responsibility and self-sustainability. Conversely, within the forensic context the ultimate goal is the social one of benefiting the society by promoting the resolution of cases by means of the adversarial system of justice.

• Within the treatment relationship, the psychotherapist attempts to form an alliance with that part of the patient which strives to change and move away from psychopathological symptoms and resume healthy adaptations. The forensic evaluator will seek an alliance with that part of the evaluatee seeking exculpation and exoneration from either criminal responsibility or avoidance of responsibility by means of a finding of incompetence. In this sense the forensic evaluator’s approach epitomises psychopathology whereas the psychotherapist adheres to an approach of normalization.

• Therapeutic relationships is characterised by empathy, whereas forensic relationships limits the use of empathy as it could lead to “quasi therapeutic” interaction resulting in the evaluatee being disappointed by consequent report of the evaluator if unfavourable to the evaluatee.

\(^{259}\) Ibid.

• Therapeutic assessments are less dependent on collateral sources of information whereas forensic assessments frequently require meticulous assessment of multiple sources of information.

• Psychotherapists and forensic mental health professionals further approach individuals with divergent interviewing methodologies.

• Forensic assessments are usually characterised by time constraints and a sense of urgency which does not prevail in clinical settings.

Miller notes that the potential for conflating the roles of evaluator and treater is generally reduced in criminal matters as opposed to civil trials as a result of the fact that the adversarial system is better comprehended by accused persons than by civil litigants.\textsuperscript{260} In addition, the professional boundaries of the relationship with an accused are usually more specified, allowing the mental health expert from the outset to inform the examinee as to the nature and scope of the evaluation.\textsuperscript{261} The ethical dilemma of assuming a dual relationship can also differ in respect of the order of assumption of the roles. Miller notes that the most problematic situation occurs when in an ongoing relationship primarily based on treatment the psychotherapist is called to provide an expert opinion in respect of the patient.\textsuperscript{262} Within the forensic paradigm, however, the assessment for competency to stand trial or criminal responsibility often precedes treatment.\textsuperscript{263} It is submitted, regardless of the order of assumption of roles, that a mental health expert who was the treating clinician of an accused should not act as an expert witness in a criminal trial, and \textit{vice versa}, a forensic examiner who assessed an accused for purposes of criminal capacity should not later assume a therapeutic relationship with such accused. Slovenko encapsulates the ethical dilemma of dual relationships by stating that testifying contradicts the therapeutic role and even though therapy may be formally terminated, therapy inadvertently never ends – as

\begin{footnotesize}
\begin{enumerate}
\item Miller, RD “Ethical Issues Involved in the Dual Role of Treater and Evaluator” in Rosner and Weinstock (1990) \textit{supra} note 2 at 132.
\item \textit{Ibid}.
\item \textit{Ibid}.
\item \textit{Ibid}.
\end{enumerate}
\end{footnotesize}
it is in the mind, resulting in the transference always being there and accordingly “the roles of healer and examiner get confused”.264

Slovenko also notes that assuming conflicting therapeutic and forensic relationships promotes the risk that expert witnesses will be more concerned with the outcome of the case than the accuracy of their evidence.265 The researcher concedes with the statement by Strassburger, Gutheil and Bradsky where they state:266

“Notwithstanding the growing pressures from the complex clinical/legal marketplace to perform simultaneously in multiple roles, two heads are better than one only if they really are two distinct heads, each wearing its own hat.”

Assuming dual relationships should be avoided by mental health professionals at all costs. Role conflict in being both an evaluator as well as a treater negatively impacts on a therapeutic relationship and within the forensic context, such conflict will lead to bias which inadvertently will affect the probative value of the forensic expert’s evidence, making the search for truth more controversial and problematic. It is notable that the Health Professions Council of South Africa recommends that treating clinicians should refer to other mental health professionals whenever their patients need a psycholegal evaluation.267

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265 Slovenko, R “Psychiatry in Law/Law in Psychiatry” (2002) at 8-9. See also Allan and Meintjes-Van der Walt in Kaliski (ed) (2006) supra note 2 at 355; Zabow and Kaliski in Kaliski (ed) (2006) supra note 2 at 361; Allan in Tredoux et al (eds) (2005) supra note 2 at 307. See also Cohen, A and Malcolm, C “Psychological assessment for the Courts” in Tredoux et al (eds) (2005) supra note 2 at 70. See also Shapiro, DL “Forensic Psychological Assessment – An Integrative Approach” (1991) at 235 where the problem of dual relationships is encapsulated as follows: “From the point of view of professional ethics, an important point to be made is that one cannot be an effective therapist, in terms of helping the patient deal with his or her difficulties, if one has also been involved in doing a comprehensive forensic evaluation of that individual if one has done a comprehensive assessment, interviewed many witnesses, reviewed many reports, and assessed the possibilities of malingering or secondary gain, then one in a sense “knows too much” to be of assistance to the patient and to maintain the “free-floating attention” necessary to truly help that patient unravel his or her personal difficulties.”
6.3 Confidentiality

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

Confidentiality represents another domain where forensic and therapeutic assessments differ. Within the traditional clinical or therapeutic setting, patients reveal intimate and private details about themselves to their doctors or psychotherapists with the reasonable expectation that such information will not be divulged to others. Within the clinical context confidentiality constitutes an implied agreement that the psychotherapist will not divulge the information acquired to third parties and as such there is a professional duty on the mental health professional to adhere to confidentiality. Failure of this duty could result in an action for invasion of privacy, defamation or even breach of contract.268

Within the forensic assessment context, especially when the defence of criminal incapacity is raised, the principles pertaining to confidentiality are less operative and applicable. The forensic relationship as such does not provide for a confidentiality clause and accordingly all information can be divulged as far as it is relevant in the enquiry into the accused’s mental state.269

268 Zabow and Kaliski in Kaliski (ed) (2006) supra note 2 at 362; Slovenko (2002) supra at 75; Carstens and Pearnain (2007) supra note 2 at 943-952; Kaplan and Sadock (2003) supra at 1369-1370. Section 14 of the Constitution of the Republic of South Africa, 1996 as stated in chapters 2 and 3 respectively provides that everyone has the right to privacy which includes the right not to have the privacy of their communications infringed. It is further interesting to note that the ethical guidelines of the Health Professions Council of South Africa (HPCSA) pertaining to “Confidentiality: Protecting and Providing Information” 30 May 2007 provides that a practitioner may only divulge information regarding patients amongst others if it is done in terms of statutory provisions; at the instruction of the court; in the public interest; or with the express consent of the patient. The guidelines further provide that patients have the right to expect that information regarding them will be held in confidence by health care practitioners (4.1). See also Strassburger, Gutheil and Bradsky (1997) American Journal of Psychiatry supra note 256 at 454; Gutheil and Appelbaum (2000) supra at 1-18; Slovenko, R “Psychotherapy, Confidentiality and Privileged Communication” (1966) at 18-20, 53-92; Simon, RI “Clinical Psychiatry and the Law” (1987) at 132-161.

269 Cohen and Malcolm in Tredoux et al (eds) (2005) supra note 2 at 73; Zabow and Kaliski in Kaliski (ed) (2006) supra note 2 at 363. It is notable that the Promotion of Access to Information Act 2 of 2000 defines “Personal Information” as: “…information about an identifiable individual, including, but not limited to - (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age,
forensic assessment does not create fiduciary relationships, it is still essential that the forensic expert act ethically and as such timeously inform the examinee that the usual doctor-patient rules do not apply. Every evaluation should accordingly be preceded with a cautionary warning providing for the following:

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

It is thus clear that the ordinary principles relating to confidentiality of communications do not apply in its strict sense within the ambit of forensic assessments. In chapter 2 and 3 it was further noted that in terms of section 79(7) of the Criminal Procedure Act, statements by the accused during the enquiry into his or her criminal incapacity may be admissible provided that it is relevant to the

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assessment and determination of the accused’s mental state. Reasonableness and fairness dictates, however, that the accused be informed that communications conducted during the psycholegal assessment will not be confidential as the interests involved are not restricted to the individual solely, but also extends to the society and public and accordingly such information could very well be submitted to a court as evidence resulting in the accused’s privacy becoming public domain.272 Slovenko interestingly notes that the evidential value of forensic expert testimony is often stronger than the value of therapist-expert testimony due to the fact that a psychiatrist appointed to conduct an examination obtains in a few hours (without a promise of confidentiality) more information pertaining to the legal issues than a treating psychiatrist, as the examiner conducts an interview with the relevant legal issues directly in mind, whereas in therapy, the subject may be “diluted with fantasy and association”.273

7 The forensic report

The findings of the forensic assessment conducted by the forensic mental health professional are essentially enumerated and explained in the forensic report. The forensic report represents one of the essential roles of the forensic examiner who conducted the forensic assessment for purposes of the criminal capacity enquiry. The forensic report differs markedly from the traditional therapist’s report as it is addressed to a different audience – a “non-medical” audience, where no assumptions can be made as to the degree of comprehension of medical terminology and mental health constructs.274 On the other hand, the classic therapist’s report is addressed to a medical audience including treating professionals who are educated and experienced to understand the relevance of symptoms or specific findings.275 The forensic report is further of importance as it generally represents the forensic mental health expert’s bases for his or her opinion which in turn denotes the “basis-rule” of expert evidence as discussed

274 “The Mental Health Professional and the Legal System” (1991) issued by the Group for the Advancement of Psychiatry at 93.
275 Ibid.
earlier in this chapter. According to Melton et al, the purpose of a forensic report is threefold:276

- It represents a professional record stating that an evaluation has been conducted and as such the nature of the assessment and assessment methods used during the evaluation are summarized and documented;
- In drafting a report, the mental health professional is obliged to organise data gathered from various sources and to weigh such information and as such the mental health expert is better equipped to prepare and rehearse for purposes of any direct and cross-examination evidence to be given;
- A further function of the report is to allow disposition without formal proceedings.

The rules for writing forensic reports are not set in stone. There are, however, certain basic guidelines applicable within most contexts. These guidelines will be enunciated below.

7.1 Content of the forensic report

The forensic report will contain a wide range of information collated from various sources. The most important are the following:

7.1.1 Reason for referral

It is pivotal from the outset to identify the reason for referral. As indicated in chapter 2 and 3, section 79 of the Criminal Procedure Act makes provision for the referral of an accused for psychiatric observation and requires reports from the psychiatrist appointed by the head of the Mental Health Institution to conduct the enquiry and in cases of serious violence, by a panel of up to two psychiatrists and a clinical psychologist. The assessment can either relate to assessing competency

to stand trial, criminal capacity, or both and also for any other reason and as such the reason for referral should be clearly stated.277

7.1.2 Collateral data and sources of information

In this section the mental health professional would identify and summarise sources of information other than the individual who is evaluated, including interviews with other parties, statements made by the evaluatee and other documents perused during the course of the examination.278

7.1.3 Personal background information

This section will include historical information pertaining to the evaluatee relevant to the assessment. The nature of the referral will dictate whether to focus on the accused’s current mental state as is required in terms of competency to stand trial assessments, or a historical disposition of psychiatric illness which could be relevant for purposes of assessing criminal capacity.279 Gunn and Taylor note that the previous psychiatric history of an accused will be of major importance and detail should be provided relating to previous episodes of mental disorder.280 Additional information will include previous history and family history and also previous criminal convictions.281


280  Ibid.

281  Ibid.
7.1.4 Mental status examination, clinical findings and the psychiatric diagnosis

In this part of the assessment, the clinical observations will be noted and should provide clear descriptions of the evaluatee’s behaviour and statements made by him or her.\(^{282}\) It is important that the expert separates the process of description or observation and the inferences which can be deducted therefrom.\(^{283}\) The psychological tests performed should be reported and a complete test report should be annexed to the final report.\(^{284}\) The ultimate psychiatric diagnosis is pivotal to the forensic report due to the fact that forensic reports are aimed at specific legal tests which are dependent on the existence or presence of mental disorder or mental defect.\(^{285}\) Kaliski, Allan and Meintjes-Van der Walt advise that the forensic report should deal separately with the accused’s current mental state as opposed to the retrospective mental state at the time of the alleged offence.\(^{286}\)

The psychiatric diagnosis should refer to the diagnostic criteria espoused in the DSM-IVTR or the ICD-10 manuals and the expert should ensure that all the relevant criteria for a specific diagnosis are identified in the report. If reliance is placed on diagnoses falling outside the ambit of the DSM-IV or the ICD-10, such fact should be mentioned.\(^{287}\)

7.1.5 The forensic opinion

The most crucial section of the report will relate to the mental health expert’s deductive reasoning canvassed in the opinion section. Melton et al notes the following in this regard:\(^{288}\)


\(^{286}\) Kaliski, Allan and Meintjes-Van der Walt in Kaliski (ed) (2006) supra note 2 at 333.

\(^{287}\) Kaliski, Allan and Meintjes-Van der Walt in Kaliski (ed) (2006) supra note 2 at 333; Melton et al supra note 2 at 584; “Mental Health Professional and the Legal System” (1991) supra note 274 at 98.

“In this section, the examiner would draw on information reported in the previous sections and integrate the data, using a logical or theoretical theme to indicate the possible relevance of the clinical material to the legal issue being decided.”

Gunn and Taylor note that it is advisable to restrict the opinion to a coincidental assessment of the accused’s mental state and the alleged offence without expressly presuming causality. Hess and Weiner state:

“... relative statements about people usually create fewer difficulties for forensic consultants than absolute statements ... statements about persons examined in forensic cases that are couched in terms of conditions they are more or less likely to have, behaviour they probably showed in the past or will be inclined to show in the future, and reasonable alternative implications of both for the legal issues in a case will typically stand the consultant in good stead.”

The process of reasoning behind the opinion should be clearly explained and the opinion should be expressed with reasonable medical certainty. Conclusory statements should be refrained from and the mental health professional should guard against venturing outside his or her field of expertise. The opinion should contain findings relating to whether the accused is fit to stand trial or whether he or she had the capacity to appreciate the wrongfulness of his or her conduct and to act in accordance with such appreciation. The prognosis of the accused in respect of further management and/or treatment should also be included.

7.2 Style and structure of the forensic report

The following principles are important in respect of the structure of forensic reports:

- It should be borne in mind that the forensic report is not a “case presentation” and as such constitutes the presentation of psychiatric information for a non-psychiatric purpose.²⁹⁴

- Clarity is pivotal in respect of the forensic report.²⁹⁵ Hess and Weiner indicate that mental health experts should state their findings and conclusions in ordinary English and limit the use of technical “jargon”.²⁹⁶

- It is important to avoid over as well as under inclusiveness of information in the forensic report. Melton et al note in this regard that there is, on the one hand, the school of thought who advocates reports which tend to be brief and conclusive, whilst on the other hand, there is the school of thought encouraging lengthy, overly detailed reports.²⁹⁷ The problem with the first type is that it is often not efficient, whilst the latter is often not properly understood and frequently include irrelevant information leading to the inference of lack of certainty.²⁹⁸ Kaliski, Allan and Meintjes-Van der Walt note that courts tend to prefer brevity with the exception that if issues get more complex, the report will generally be longer.²⁹⁹ Somewhere between these two extremes the mental health expert should strive to be as concise as possible without omitting crucial information relevant in the determination of the factual issues.

²⁹⁶ Ibid. See also Melton et al (2007) supra note 2 at 586. See also Kaliski, Allan and Meintjes-Van der Walt in Kaliski (ed) (2006) supra note 2 at 341 where they note: “Many reports consist of long sentences, sprinkled with complicated terms, and few attempts to break the text into comfortable paragraphs. Simple, direct language should always be a priority.” See also Gudjonssen and Howard (1998) supra note 191 at 193.
²⁹⁸ Ibid.
• Complex technical terminology should not be utilised and if it is necessary to use them, definitions and explanations should be provided.\textsuperscript{300}

• Only facts and opinions that can be defended under cross-examination should be stated in a report.\textsuperscript{301}

• The report should be compiled with constant reference to the limits of the psychiatric role.\textsuperscript{302}

• As soon as the report of the mental health professional is submitted to court, it ceases to be confidential.\textsuperscript{303}

• Mental health professionals should remain within the ambit of the referral question and should address issues required in terms of the referral and avoid opinions on issues that have not been raised.\textsuperscript{304}

• Forensic reports should ideally be written in an informative way in order to educate the non-expert.\textsuperscript{305}

The forensic report forms an essential part of the mental health expert’s role also with reference to the report by the panel of experts as required in terms of Section 79 of the Criminal Procedure Act pertaining to competency to stand trial and the defence of criminal incapacity. The forensic report should clearly and as concisely as possible set out details of all the relevant facts the mental health expert relied on to form an opinion. The important issues have to be assessed relevantly, precisely and in a manner comprehensible to other professionals.\textsuperscript{306}


\textsuperscript{301} Gunn and Taylor (1993) supra note 200 at 837.

\textsuperscript{302} Gunn and Taylor (1993) supra note 200 at 838.

\textsuperscript{303} Ibid.


\textsuperscript{305} Hess and Weiner (1999) supra note 2 at 516; Faulk (1994) supra note 200 at 292; Gunn and Taylor (1993) supra note 200 at 837.

\textsuperscript{306} Kaliski, Allan and Meintjes-Van der Walt in Kaliski (ed) (2006) supra note 2 at 341. See also “The Mental Health Professional and the Legal System” (1991) supra note 274 at 100 where it is noted: “Forensic reports should be realistic as well as objective. The quality of one’s
8 A draft ethical code for mental health professionals serving as expert witnesses

Meintjes-Van der Walt suggests that expert witnesses in criminal trials should submit to a code of ethics when serving as expert witnesses as it will not only limit bias and partisanship, but will also enhance the reliability of the expert opinion.\textsuperscript{307} As such the expert’s written report should constitute the foundation of oral evidence and should be disclosed to the other side prior to the trial and will generally follow the following principles:\textsuperscript{308}

- The expert’s written report should provide details of the expert’s qualifications as well as the literature or other material used in making the report.

- Attached to the expert report, or a summary thereof, should be the following:
  - All instructions (both original and supplementary and an indication whether written or oral) provided to the expert which defines the scope of the report;
  - The facts, matters and assumptions upon which the report is predicated; and

\textsuperscript{307} Meintjes-Van der Walt (2001) \textit{supra} note 2 at 230-232; Meintjes-Van der Walt (2003) \textit{Journal of African Law} \textit{supra} note 2 at 99. See also the decision of \textit{National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer} (1993) Lloyd’s Rep 68 at 81-82 where the duties of experts were enunciated as follows (albeit with reference to civil cases it could be useful in criminal matters): “(1) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters the High Court should never assume the role of an advocate. (3) An expert witness should state the facts or assumptions upon which his conclusion is based. He should not omit to consider material facts which could detract from his concluded opinion. (4) An expert witness should make it clear when a particular question or issue falls outside his expertise. (5) If an expert’s opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one…” See also Henderson, A “An Independent Product – The role of expert evidence in the preparation and presentation of High Court cases involving allegations of (professional) negligence” (1997) \textit{De Rebus} at 63-65.

\textsuperscript{308} Meintjes-Van der Walt (2001) \textit{supra} note 2 at 230-232.
The documents and other materials which the expert has been instructed to consider.

- The expert opinion should be clearly and fully presented.

- The report should mention all the tests or experiments used by the expert and which data the expert used in compiling the report.

- The expert should provide reasons for each opinion and conclusion drawn.

- Where the expert’s opinion is not sufficiently researched due to the fact that the expert considers that insufficient data is available, or for any other reason, this fact must be stated with an indication that the opinion is no more than a provisional one.

- Where the expert witness who has prepared a report takes the view that it might be incomplete or inaccurate without some qualification, such qualification must be stated in the report.

- The expert should make it clear when a particular question or issue falls beyond his or her field of expertise.

- Where the expert’s report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic evidence these must be conveyed to the defence/prosecution when disclosure takes place.

Meintjes-Van der Walt suggests the inclusion of a declaration in the report which should provide for the following:309

“I …….. DECLARE THAT:

309 Ibid.
(i) I understand that my over-riding duty in written reports and giving evidence is to assist the court on matters relevant to my area of expertise.

(ii) I have endeavoured in my reports and in my opinions to be accurate and to have covered all relevant issues concerning the matters stated which I have been asked to address.

(iii) I have endeavoured to include in my report those matters which I have knowledge of or of which I had been made aware of which adversely affect the validity of my opinion.

(iv) I have indicated the sources of all information I have used and all tests and experiments I have performed.

(v) I have not without forming an independent view included or excluded anything which has been suggested to me by others.

(vi) I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction, qualification or amplification.

(vii) I understand that:

   (a) my report, subject to any corrections before swearing as to its correctness, will form the evidence to be given under oath or affirmation;

   (b) I may be cross-examined on my report by a cross-examiner assisted by an expert;

   (c) I am likely to be the subject of public adverse criticism by the judge if the court concludes that I have not taken reasonable care in trying to meet the standards set out above.

(viii) I confirm that I have not entered into any arrangement where reimbursement is in any way dependent on the outcome of the case."

The author supports the view of a draft ethical code for expert witnesses which will inadvertently apply to mental health professionals providing expert evidence in support of the defence of criminal incapacity. Such ethical code will contribute towards creating a sense of certainty for the mental health professional whilst at
the same instance adding value to the scientific reliability and validity of the expert opinion.

9 Conclusion

In this chapter the author addressed the specific nature and scope of the rules of expert evidence as they would pertain to mental health experts testifying in support of the defence of criminal incapacity. Specific practical as well as ethical considerations applicable within the forensic context were also addressed. The following conclusions can be drawn from the research presented in this chapter:

- The rules of expert evidence, as they currently stand, are essential in respect of the role and probative value of expert evidence and should as such be codified in a proper manner so as to create legal certainty.

- In the absence of a jury system, the ultimate issue doctrine is redundant and should be abolished. Expert evidence should be judged on the basis of its relevance and not the alleged conclusory status of the opinion presented.

- The assessment of the probative value of expert evidence remains a complex and intrinsic function of a court where various aspects play a role of which the most important are the expert’s qualifications, credibility as a witness, the basis for the expert opinion and the probabilities of the case.

- Pre-trial consultations and disclosure play a vital role in the assessment of the admissibility and reliability of expert evidence and the assurance of a fair trial.

- The cross-examination of expert witnesses within the adversarial context constitutes a vital tool in order to challenge the veracity, credibility, reliability and probative value of expert evidence.
• Mental health experts should strive in providing their opinion in an impartial manner without bias with the concomitant alleviation of the “hired guns”.

• Mental health experts should at all costs refrain from assuming dual relationships as treater and evaluator and accordingly a treating clinician should not act as a forensic expert witness and vice versa.

• Accused persons should be made aware that the traditional principles pertaining to confidentiality will not apply or be less stringent within the scope of the forensic evaluation. This information should already from the outset of the forensic interview be stated to the accused.

• The forensic report fulfils an essential part of the function of the forensic mental health expert and it is pivotal that due regard be given to the correct content, length, format and style of such report.

• A draft ethical code for mental health professionals could be a useful step in providing guidelines, which are to a certain extent codified, to mental health professionals acting as expert witnesses.

In the following chapter the author will assess aspects pertaining to the presentation of expert evidence in the United States of America in order to illustrate areas where South Africa is in need of reform in respect of the rules pertaining to expert evidence as well as the legal status in respect of forensic mental health professionals specifically.

“An experienced judge places no confidence in an oath; he has seen it so often prostituted to the ends of falsehood. His whole attention is directed to the nature of the testimony; he scrutinises the witness, examines his tones, his air, the simplicity of his language; or his embarrassment, his variations; his agreement with himself and with others; he has marks by which to judge the probity of the witness.”310

310 Bentham, A “Treatise on Judicial Evidence” (1925) as quoted in Freckelton and Selby (2005) supra note 2 at 327.