

## CHAPTER 5

### MASTERING FORENSIC EXPERT EVIDENCE: REFLECTIONS FROM THE UNITED STATES OF AMERICA

“(F)or the limits to which our thoughts are confined, are small in respect of the vast extent of Nature itself; some parts of it are too large to be comprehended and some too little to be perceived, and from thence it must follow that not having a full sensation of the object; we must be very lame and imperfect in our conceptions about it, and in all the propositions which we build upon it; hence we often take the shadow of things for the substance, small appearances for good similitudes, similitudes for definitions; and even many of those which we think to be the most solid definitions are rather expressions of our misguided apprehension than of the true nature of the things themselves.”<sup>1</sup>

#### 1 Introduction

Law and medicine both represent two major scientific enterprises, each supporting its own distinctive and often disparate phenomena. On face value it would seem as though these two scientific discourses are different in respect of the points of view of each profession, professional ideologies and content. Upon closer scrutiny there are various similarities between these two sciences. Weisstub correctly asserts that there are various affinities between law and medicine: they both entail wide discretion in fashioning their respective discourses; they both lack certainty when compared with scientific data found in the hard sciences and they are both central to those values and goals within our society that address the control of deviancy.<sup>2</sup> Weisstub in addition notes:<sup>3</sup>

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<sup>1</sup> Hooke, R (1667) as quoted in Kiely, T “Forensic Evidence: Science and the Criminal Law” (2001) at 1.

<sup>2</sup> Weisstub, DN “Law and Psychiatry in the Canadian Context – cases, notes and materials” (1980) at vii. See also Brody, BA and Engelbrecht, HT “Mental Illness: Law and Public Policy” (1979) at ix, where it is noted:

“Medicine and the law are two major social institutions, each supporting various and often quite disparate practices. It is frequently unclear where certain practices fall – whether they are truly medical or really legal endeavors, whether they are attempts to cure or care for persons with diseases, or attempts to punish criminals and rectify harms. Indeed, the practices intertwine in

“Although psychiatry is arguably as uncertain in its predictions and diagnoses as law is in its interpretation of jurisprudence and prediction of legal outcomes in producing theoretical justifications of their projects, both of these groups attempt to model themselves after scientific paradigms of discovery and application.”

Law and medicine have another common characteristic – they are both inexact sciences in search of truth and vindication. Within the context of the defence of criminal incapacity, law needs medicine to explain human behaviour. Weisstub encapsulates the latter by stating:<sup>4</sup>

“Each needs the other in effect to survive, to respond meaningfully to scientific advances in knowledge, and to take responsibility where science can give no answers”.

Law is not set in stone. It constitutes an evolving science amenable to the changing values and needs of society. Criminal incapacity is probably one of the most complex and controversial defences within our current criminal justice system.

In Chapters 2 and 3 it was illustrated that one of the main problems associated with the defence of criminal incapacity relates to the problematic dialogue between law and medicine, whenever this defence is raised. In Chapter 4 the author addressed the evidential anomalies associated with criminal incapacity with specific emphasis on the lack of a codified system of evidence in respect of expert evidence by mental health professionals.

One of the greatest problems associated with the defence of criminal incapacity lies in the proof thereof. No matter how well this defence is formulated within the

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endeavors that bridge these major social institutions, where legal concerns for rectifying harms and medical concerns for cure and care are joined, as in the case of much public policy bearing on the mentally ill.”

<sup>3</sup> Weisstub (1980) *supra* note 2 at vii. See also Halleck, SL “Law in the Practice of Psychiatry – A Handbook for Clinicians” (1980) at 1-10.

<sup>4</sup> Weisstub (1980) *supra* note 2 at xi.

framework of the substantive criminal law, it will have limited value if not coupled with appropriate procedures or guidelines aimed at enhancing the application of this defence. At the heart of the application of this defence is the mental health professional who is requested to provide an expert opinion as to either the accused's competency to stand trial or his or her mental state at the time of the offence. The rules pertaining to expert evidence in South Africa are common law orientated.

The question which falls to be assessed is whether a codified system of expert evidence will not aid in enhancing a more helpful dialogue between law and medicine whenever the defence of criminal incapacity is raised. It is impossible to formulate a set criteria or model framework for expert evidence in cases of criminal incapacity as each case will be assessed on its own merits. Guidelines or some form of codification of the rules pertaining to expert evidence by mental health professionals in cases of criminal incapacity will, however, assist in determining the yardstick by which expertise should be assessed and will also assist in determining the boundaries, reliability and validity of expert testimony by mental health professionals. It is trite that whenever solutions to problem areas in law cannot be found within the framework of national law, it is useful to reflect on foreign law in search for the appropriate remedies. In this chapter the author has selected as comparator country the United States of America.<sup>5</sup> The rationale for

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<sup>5</sup> Melton, GB; Petrila, J; Poythress, NG and Slabogin, C "Psychological Evaluations for the Courts – A Handbook for Mental Health Professionals and Lawyers" (2007) at 3-24, 86-100 (hereafter "Melton *et al*"); Freckelton, I and Selby, H "Expert Evidence – Law, Practice, Procedure and Advocacy" (2005) at 21-59, 61-89, 293-294, 863-869; Graham, MH "Handbook of Federal Evidence" (1991) at 600-697; Graham, MH "Federal Rules of Evidence" (1981) at 198-217; Arrigo, A "Punishing the mentally ill – A Critical Analysis of Law and Psychiatry" (2002) at 127-144; Wright, F; Bahn, C and Rieber, RW "Forensic Psychology and Psychiatry" (1980) at 33-35; Meyer, RG; Landis, ER and Hays, JR "Law for the Psychotherapist" (1988) at 220-224; Slovenko, R "Psychiatry and Criminal Culpability" (1995) at 133-150; Ziskin, J "Coping with Psychiatric and Psychological Testimony" (1980) at 64-82; Sales, BD and Shuman, DW "Experts in Court: Reconciling Law, Science and Professional Knowledge" (2005) at 13-96; Blau, TH "The Psychologist as Expert Witness" (1998) at 29-61; Slovenko, R "Psychiatry in Law/Law in Psychiatry" (2002) at 43-64; Guttmacher, MS "The Role of Psychiatry in Law" (1968) at 74-86; Gold, L "Evidence: A Structural Approach" (2004) at 491-534; Brodsky, SL "The Expert Witness: more maxims and Guidelines for testifying in court" (1999) at 31-35; Patterson, D "Challenges to Expert Testimony Pre- and Post – Daubert" in Linder, RK and Mitchel, GN "Challenging Expert Witness Testimony" (2000) at 1-49; Shapiro, DL "Criminal Responsibility Evaluations – A manual for Practice" (1999) at 1-28; Kiely, TF "Forensic Evidence: Science and the Criminal Law" (2001) at 1-18; Rothstein, PF, Raede, MS and Crump, D "Evidence: Cases, Materials and Problems" (2006) at 321-370, 377-462; Van Kampen, PTC "Expert Evidence Compared – Rules in the Dutch and American Criminal



Justice System" (1998) at 188-201; Faigman, D: "Expert Evidence: The Rules and Rationality the Law Applies (or should Apply) to Psychological Expertise" in Carson, D and Bull, R "Handbook of Psychology in Legal Contexts" (2003) at 367-400; Sales, BD and Shuman, DW "Science, Experts and Law: Reflections on the Past and the Future" in Constanzo, M; Krauss, D and Pezdek, K "Expert Psychological Testimony for the Courts" (2007) at 9-30; Gutheil, TG, Bursztajn, HJ, Brodsky, A and Alexander, V "Decision-Making in Psychiatry and the Law" (1991) at 171-188; Wigmore, JH "Evidence in Trials at Common Law" (1978) at 1-41; Slovenko, R "Psychiatric Expert Testimony: Are the Criticisms Justified? (Part 1)" (1991) *Medicine and Law* at 1-29; Slovenko, R "Psychiatric Expert Testimony: Are the Criticisms Justified? (Part 2)" (1991) *Medicine and Law* at 107-127; Bloom, JD, Williams, MH and Bigelow, DA "The Forensic Psychiatric System in the United States" (2000) *International Journal of Law and Psychiatry* at 605-613; Morse, S "Speciality Guidelines for Forensic Psychologists" (1991) *Law and Human Behaviour* at 655-665; Gutheil, TG and Bursztajn, H "Avoiding *Ipse dixit* mislabelling: Post-Daubert Approaches to Expert Clinical Opinions" accessed at <http://www.forensic-psych.com/articles/artAvoidIpsedixit.php> [accessed on 2007/03/28] at 1-7; Slovenko, R "On a Therapist Serving as a Witness" (2002) *Journal of American Academy of Psychiatry and the Law* at 10-13; Slovenko, R "Commentary: Deceptions to the Rule on Ultimate Issue Testimony" (2006) *Journal of the American Academy of Psychiatry and the Law* at 22-25; Black, B; Ayala, FJ and Salfron-Brinks, C "Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge" (1994) *Texas Law Review* at 715-802; Pipkin, WE "Expert Opinion Testimony: Experts, Where Did they come from and Why are they there?" (1989) *Law and Psychology Review* at 103-118; Cochrane, G "logy, Expert Testimony and the Law" (2001) *Washington State Bar Review* at 24-32; Gutheil, TG "Psychiatrists as Expert Witnesses" (2004) *American Journal of Psychiatry* at 2141; Kastenber, MJE "A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in the False Confession Defenses Before the Trier of Fact" (2003) *Seattle University Law Review* at 785-805; Reid, J "Criminal Insanity and Psychiatric Evidence: The Challenge of Blocker" (1962) *Howard Law Journal* at 1-14; Bloom, JD and Rogers, JL "The Legal Basis of Forensic Psychiatry: Statutorily Mandated Psychiatric Diagnoses" (1987) *American Journal of Psychiatry* at 847-853; Lipkin, RJ "Free Will, Responsibility and the Promise of Forensic Psychiatry" (1990) *International Journal of Law and Psychiatry* at 331-359; Gorman, WF "Are there Impartial Expert Psychiatric Witnesses" (1983) at 379-382; Dahl, PR "Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials" (1985) *Calif.L.R* at 411-442; Rogers, R; Bagby, RM and Chow, MK "Psychiatrists and the Parameters of Expert Testimony" (1992) *International Journal of Law and Psychiatry* at 387-396; Marwick, C "What Constitutes an Expert Witness" (1993) *Journal of the American Medical Association* at 2057; Bromberg, W "Psychiatrists in Court: The Psychiatrist's View" (1969) *American Journal of Psychiatry* at 1343-1347; Slovenko, R "Expert Testimony: Use and Abuse" (1993) *Medicine and Law* at 627-641; Moriarty, JC (ed) "The Rule of Mental Illness in Criminal Trials – The Insanity Defense: The American Developments" (2001) at 1-124; Appelbaum, PS "The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm" (1990) *International Journal of Psychiatry* at 249-259; Perlin, ML "The Legal Status of the Psychologist in the Courtroom" (1977) at 41-45; Gutheil, TG "Psychiatric Expert Witnesses in the New Millennium" (2006) at 823-832; Slovenko, R "A history of the intermix of psychiatry and law" (2004) *The Journal of Psychiatry and Law* at 561-592; Buchanan, A "Psychiatric Evidence on the Ultimate Issue" (2006) *The Journal of the American Academy of Psychiatry and the Law* at 14-21; Cohen, D "Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)" (1988) *University of Florida Law Review* at 541-561; Sparks, J "Admissibility of Expert Psychological Evidence in the Federal Courts" (1995) *Arizona State Law Journal* at 1315-1333; Wallace, D "The Syndrome Syndrome: Problems Concerning the Admissibility of Expert Testimony on Psychological Profiles" (1985) at 1035-1058; Imwinkelried, EJ "The Standard for Admitting Scientific Evidence: A critique from the Perspective of Juror Psychology" (1983) at 554-571; Trowbridge, BC "The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts by Restoring the Use of Objective Psychological Testimony in the Courtroom" (2003) *Seattle University Law Review* at 453-523; Slobogin, C "Psychiatric Evidence in Criminal Trials: To Junk or not to Junk?" (1998) *William and Mary Law Review* at 1-56; Smith, KT "The Psychiatry Expert in the Criminal Trial: Are Bifurcation and the Rules

selecting the United States of America as comparator country include the following:

- The Federal Rules of Evidence could provide a useful framework towards a codification of the rules pertaining to opinion evidence with specific reference to expert evidence in South Africa;
- The decision of *Daubert v Merrell Dow Pharmaceuticals*<sup>6</sup> and the principles enunciated therein could assist towards setting a yardstick by which reliability and validity of expert opinions can be assessed;
- Advanced research exists in the United States of America pertaining to the topic of expert evidence by mental health professionals in cases where the mental state of the accused is an issue;<sup>7</sup>
- The DSM-IV-TR which constitutes the main source of reference for purposes of ascertaining diagnostic criteria for the assessment of mental illness is drafted by the American Psychiatric Association;<sup>8</sup>
- The ethical code and guidelines for forensic psychiatrists and psychologists could be usefully applied within the South African context.

The abovementioned principles will form the cornerstones of this chapter in order to reflect on aspects within the American system which can be sufficiently applied within the South African context to areas where there is a need for development and improvement.

## 2 Mode of discussion

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Concerning Opinion Testimony on Ultimate Issues Constitutionally Compatible?" (1987) *Marquette Law Review* at 493-533; Conley, WM "Restricting the Admission of Psychiatric Testimony on Defendant's Mental State: Wisconsin's Steel-curtain" (1981) *Wisconsin's Law Review* at 733-789; Harris, DA "Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent" (1990) *North Carolina Law Review* at 763-783; Murphy, JP "Expert Witnesses at Trial: Where are the Ethics" (2000) *Georgetown Journal of Ethics* at 217-239; Gutheil, TG and Simon, RI "Mastering Forensic Psychiatric Practice – Advanced Strategies for the Expert Witness" (2002) at 113-140; During the course of this chapter the author will in respect of selected issues refer to the "jury" – this is merely for reference purposes within the framework of the American system and for purposes of clarity and comprehension. Similarly, the word "defendant" will often be used which denotes "accused" as is the position in South Africa.

<sup>6</sup> *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993).

<sup>7</sup> See note 5 *supra*.

<sup>8</sup> See Chapter 3 *supra* where the DSM-IV-TR was comprehensively discussed.

In this chapter a *capita selecta* of principles pertaining to expert evidence as propounded in the Federal Rules of Evidence in the United States of America will be addressed. These principles will be evaluated on the backdrop of the format espoused in Chapter 4 in respect of the rules of expert evidence. This will be done to indicate the utility of a codified system of rules of expert evidence as opposed to the common law position prevailing in South Africa.

In addition thereto the ethical guidelines pertaining to forensic psychology and psychiatry prevailing in the United States of America will be addressed. This chapter should by no means be construed as an all encompassing exposition of the law and consequently the law of evidence in the United States of America. Selected issues will be assessed to illustrate possible areas where the South African system can be improved and developed in streamlining the application of the defence of criminal incapacity in South Africa.

### **3 Constitutional foundation**

It remains trite that no topic or discussion can be embarked upon without references to the constitutional relevance and premise thereof. In Chapters 2 and 3 the constitutional relevance of the current study was extensively discussed and will not be repeated in this chapter.

For purposes of this chapter, Section 39 of the Bill of Rights of the Constitution is of importance.<sup>9</sup> Section 39, which deals with the interpretation of the Bill of Rights, reads as follows:

- ”39. (1) When interpreting the Bill of Rights, a court, tribunal or forum
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law

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<sup>9</sup> Constitution of the Republic of South Africa, 1996.



- (2) When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

Section 39(1) accordingly requires that when interpreting the Bill of Rights a court, tribunal or forum should promote the values which underpin an open and democratic dispensation founded on human dignity, equality and freedom and in executing this function may consider foreign law.<sup>10</sup> Devenish encapsulates the need for foreign perspectives by stating:<sup>11</sup>

“It must be borne in mind that the scarcity of local precedents securing fundamental rights makes it necessary that the international and foreign case law be used to resolve jurisprudential issues precipitated by the justifiability of the provisions of the Bill of Rights.”

Even though foreign law will not be decisive when interpreting the Bill of Rights, it will play an important role within our constitutional dispensation in attempting to promote the values of human dignity, equality and freedom.<sup>12</sup>

Reference to foreign law, in this chapter the United States of America, could add value in respect of the interpretation of the Bill of Rights in order to promote the values of human dignity, freedom and equality.<sup>13</sup> Foreign law could also play a vital role in the process of developing the common law in order to provide

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<sup>10</sup> Currie, I and De Waal, J “The Bill of Rights Handbook” (2005) at 159; Devenish, GE “The South African Constitution” (2005) at 199. See also *Shabalala v The Attorney-General of Tvl* (1994) (6) BCLR 85 (T).

<sup>11</sup> Devenish (2005) *supra* note 10 at 200. See also Currie and De Waal (2005) *supra* note 10 at 160-161. *S v Makwanyane* (1995) (3) SA 391 (CC) at paragraph 37.

<sup>12</sup> *Ibid.* See also *Fose v Minister of Safety and Security* (1977) (3) SA 786 (CC).

<sup>13</sup> See Section 39(1) of the Constitution of the Republic of South Africa, 1996. See also Devenish (2005) *supra* note 10 at 205 where it is noted:  
“... the Bill of Rights encapsulates universal moral and ethical values, and therefore in its application and its interpretation it has an important moral dimension to it. It is for this reason that a value-based theory of interpretation is the most satisfactory one.”

guidelines as to how such development could possibly be effected. Frase<sup>14</sup> clearly states that a comparative study should always lead us to a closer analysis of our own system and more often than not when guided by the insights of comparative study and a systematic, empirical methodology such analysis often reveals that our own system is not as different in practice from foreign systems as we thought.

#### 4 Setting the stage: From Frye to the Federal Rules of Evidence

For the greatest part of the twentieth century, the admissibility of expert scientific and technical evidence was governed by the so-called “general acceptance” test enunciated in *Frye v United States*<sup>15</sup> by Van Orsdel J who noted:<sup>16</sup>

”Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle

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<sup>14</sup> Frase, RS “Comparative Criminal Justice as a guide to American Law Reform: How do the French Do It; How can we find out; and Why should We Care” (1990) *Cal. L. Rev* 539, 664 as quoted in Van Kampen (1998) *supra* note 5 at 237.

<sup>15</sup> *Frye, United States*, 293 F. 1013 (D.C. Cir. 1923). The facts of this decision were the following: The defendant was convicted of murder in the second degree. Counsel for the defence sought to introduce expert evidence derived from a systolic blood pressure deception test. Counsel introduced an expert who would testify as to the results of a deception test performed on the defendant. It was contended that changes in blood pressure would be induced by changes in the emotions of the witness and accordingly that systolic blood pressure increases were caused as a result of nervous impulses sent to the autonomic nervous system. The defence contended that scientific experiments established that fear, rage and pain resulted in an elevation of systolic blood pressure and that conscious deception, concealment of facts or feelings of guilt as a result of the criminal activities in conjunction with fear of detection caused an increase in the systolic blood pressure in a curve corresponding with the conflict with the individual’s mental state between fear and control of such fear due to the fact that the examination addresses those issues in respect of which the individual was trying to deceive the examiner. The main premise upon which the defendant’s (in terms of South African law the “accused”) case was founded, related to the rule that the opinions of expert or skilled witnesses were frequently admissible in cases where the matter for inquiry is of such a nature as to be beyond the experience of the lay person due to the matter dealing with science or scientific issues. The court per Van Orsdel J held that the systolic blood pressure deception test had not gained general acceptance and scientific recognition among psychological and physiological authorities as to warrant the admission of expert evidence deduced from the discovery, developments and experiments (at 1014 of judgment). See also Kiely (2000) *supra* note 5 at 11; Blair (1998) *supra* note 5 at 56; Slovenko, R (2002) *supra* note 5 at 43; Sales and Shuman (2005) *supra* note 5 at 30-33; Van Kampen (1998) *supra* note 5 at 188-193; Sparks, J “Admissibility of Expert Psychological Evidence in Federal Courts” (1995) *Arizona State Law Review* at 1315-1333; Black, Ayala and Saffron-Brinks (1994) *Texas Law Review* *supra* note 5 at 15; Shapiro (1999) *supra* note 5 at 2-3.

<sup>16</sup> At 1014. See also Graham, ES and Kabacy, RE “Expert testimony by Psychologists: Novel Scientific Evidence” (1990) *Law and Psychology Review* at 71-85.



must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have general acceptance in the particular field in which it belongs.”

The general acceptance rule entailed that the expert’s opinion should be premised on information, data or deductions that were generally accepted by the majority of professionals within the specific area of specialisation.<sup>17</sup> In applying the *Frye* test to the reliability of expert evidence pertaining to an individual’s mental state, a three-dimensional test has to be applied.<sup>18</sup>

- The individual must establish that the alleged disorder is recognised by the relevant community of experts;
- The experts then has to establish a casual *nexus* between the illness caused by the disorder and the offence committed;
- The facts must be such to create a question to the jury that the specific individual indeed suffers from such disorder.

The infusion of the “general acceptance” test in *Frye* resulted in this test prevailing for several decades thereafter.<sup>19</sup> The “general acceptance” test, however, illuminated numerous criticisms:

- The acceptance by the scientific community as the threshold test for admissibility did not keep out “junk science”;<sup>20</sup>

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<sup>17</sup> Blau (1998) *supra* note 5 at 56; Sales and Shuman (2005) *supra* note 5 at 30-31; Slovenko (2002) *supra* note 5 at 44-46. See also Freckelton and Selby (2005) *supra* note 5 at 77 where it is noted that the support of the *Frye* test averred that it promoted consistency; eliminated time consuming trials of the degree of reliability; it protected juries from having to decide complex and conflicting expert evidence; it excluded unsubstantiated scientific methods from misleading the court.

<sup>18</sup> McKay, IM “Scientific reliability of Psychiatric Expert Witness Testimony Involving the use of classifications from the diagnostic and statistical manual at Mental Disorders” (1992) *Criminal Justice Journal* 345-384 at 358.

<sup>19</sup> Kiely (2000) *supra* note 5 at 12; Slovenko (2002) *supra* note 5 at 44-45; Black, Ayala and Saffron-Brinks (1994) *Texas Law Review supra* note 5 at 722.

<sup>20</sup> Slovenko (2002) *supra* note 5 at 45.

- The rule in *Frye* obscured issues and was difficult to apply;<sup>21</sup>
- In terms of the *Frye* test, a court is required to define the scientific entity, device, method, theory or technique before it can embark upon applying the general acceptance test. The issue in this regard pertains to the fact that a court has to consider the entire pattern of reasoning by which experts arrive at their conclusions.<sup>22</sup>
- Due to the fact that *Frye* requires that a scientific principle should be generally accepted in the specific field it belongs, a court applying this test is burdened with the task of both having to define and determine the boundaries of what must be accepted.<sup>23</sup>
- As a result of the difficulties in defining what precisely should be accepted, courts end up using surrogate tests instead of assessing the scientific merits of scientific expert evidence.<sup>24</sup>
- Concerns were raised as to the soundness of the “general acceptance” theory or test in *Frye* as an analytical tool for assessing the admissibility of (novel) scientific evidence.<sup>25</sup>
- There existed the danger that the test could result in the admission of invalid theories and techniques merely as a result of the fact that they have obtained widespread acceptance,<sup>26</sup>

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<sup>21</sup> Black, Ayala and Saffron-Brinks (1994) *Texas Law Review supra* note 5 at 726-728.

<sup>22</sup> *Ibid.*

<sup>23</sup> Black, Ayala and Saffron-Brinks (1994) *Texas Law Review supra* note 5 at 729-731; Freckelton and Selby (2005) *supra* note 5 at 78.

<sup>24</sup> *Ibid.* See also *Reed v State* 391 A.2d 364 (Md 1978), *United States v Addison* 498 F.2d 741 (D.C. Cir. 1974).

<sup>25</sup> Van Kampen (1998) *supra* note 5 at 193. See also Kreiling, KR “Scientific Evidence: Toward Providing the Lay Trier with the Comprehensible and Reliable Evidence Necessary to meet the Goals of the Rules of Evidence” (1990) *Arizona Law Review* at 929-935. See also Freckelton and Selby (2005) *supra* note 5 at 79. See also *United States v Williams* 583 F.2d 1194 (1978) where the court specifically departed from the *Frye*-test at 1198 and also *United States v Jacobetz* 747 F.supp 250 (1990) where Billings, CJ listed nine factors to be taken into consideration of the admissibility which were the following (at 255):

- The expert’s qualifications and standing;
- The existence of specialised literature;
- The novelty of the technique and its connection to more established fields of scientific analysis;
- The nature and extent of the inference adduced;
- The clarity with which the technique is offered;
- The extent to which basic data may be investigated into by the court;
- The availability of other experts to assess the technique;
- The probative value of the evidence.

<sup>26</sup> Freckelton and Selby (2005) *supra* note 5 at 78-79; Van Kampen (1998) *supra* note 5 at 193.

- The test is prone to selective application;<sup>27</sup>
- The test is predicated upon the possibly erroneous belief that jurors are unable to deal effectively with complex scientific evidence;<sup>28</sup>
- It is unclear how one is to ascertain the “scienticity” of a specific theory or technique and also whether such test applies to mental health and other sciences;<sup>29</sup>
- The test only applies to theory and not the application which is controversial to most theories or techniques;<sup>30</sup>
- Criticism was also raised that the “general acceptance” test often excludes otherwise relevant and reliable evidence.<sup>31</sup>

In response to the debate as to the *Frye* test, the Federal Rules of Evidence were adopted in 1975.<sup>32</sup> Sales and Shuman note that the Federal Rules of Evidence were promulgated in 1974 with the specific aim of making the rules of evidence more accessible by codifying the vast amount of common law case law pertaining to the various rules of evidence.<sup>33</sup> In addition the Federal Rules of Evidence were aimed at modernising the law of evidence by conscious preference for the admission of relevant evidence without seeking justification for its exclusion.<sup>34</sup> The Federal Rules of Evidence advocated a more liberal approach to the admission of expert evidence.<sup>35</sup> The modernisation approach propounded in the Federal Rules of Evidence was endorsed by the majority of state courts that elected to codify

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Black, Ayala and Saffron-Brinks (1994) *Texas Law Review supra* note 5 at 740. See also *United States v Downing*, 753 F.2d 1224, 1236-1237 (3d Gr.1985). See also Freckelton and Selby (2005) *supra* note 5 at 78.

<sup>32</sup> Van Kampen (1998) *supra* note 5 at 193; Blau (1998) *supra* note 5 at 56.

<sup>33</sup> Sales and Shuman (2005) *supra* note 5 at 31. Sales and Shuman indicate that although the Federal Rules of Evidence are not binding on the states, the majority of the states have adapted those rules. See also Slobogin (1998) *William and Mary Law Review, supra* note 5 at 17; Murphy (2000) *Georgetown Journal of Ethics, supra* note 5 at 219.

<sup>34</sup> *Ibid.*

<sup>35</sup> Van Kampen (1998) *supra* note 5 at 194; Pipkin (1989) *Law and Psychology Review supra* note 5 at 110; Sales and Shuman (2005) *supra* note 5 at 29. See also Sales, BD and Shuman, DW “Science, Expert, and the Law: Reflections on the Past and the Future” in Costanzo, M; Krauss, D and Pezdek (eds), K “Expert Psychological Testimony for the Courts” (2007) at 9-30 at 11 where it is stated:  
“In both the state and federal courts, the rules that governed the admissibility of evidence at trial developed through a patchwork of judge-made, common law decision-making.”

their rules.<sup>36</sup>

The Federal Rules of Evidence constitute a set of codified rules relating to the admissibility of evidence in the federal courts. The goals of these rules are encapsulated in Rule 102 which states:<sup>37</sup>

”These rules shall be construed to secure fairness in the administration, elimination of unjustifiable expense and delay, and the promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justify determined.”

The Federal Rules of Evidence encompass the principles of fairness, efficiency, growth and development of the law, truth and justice.<sup>38</sup> Murphy submits that the Federal Rules of Evidence permeates the framework according to which every expert appears at trial before a trier of fact.<sup>39</sup>

It remains trite that regardless of the specific test applied in respect of the defence of criminal incapacity, the testimony provided by the mental health professional must describe the accused’s state of mind at the time of the offence. The relevance, admissibility, reliability and validity of such testimony will be determined by the specific rules of expert evidence. The search for a more appropriate application of the role of expert evidence in support of the defence of criminal incapacity should thus be embarked upon on the backdrop of the law of evidence. The latter forms the cornerstone for comparative reflections from the United States of America. The Federal Rules of Evidence of relevance for this study will be addressed below within the framework of the rules of expert evidence.<sup>40</sup>

#### 4.1 Relevance

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<sup>36</sup> Sales and Shuman (2005) *supra* note 5 at 31.

<sup>37</sup> Sales and Shuman (2005) *supra* note 5 at 14; Graham (1981) *supra* note 5 at 2-3; Graham (1991) *supra* note 5 at 2-3; Murphy (2000) *Georgetown Journal of Ethics supra* note 5 at 218.

<sup>38</sup> Sales and Shuman (2005) *supra* note 5 at 14.

<sup>39</sup> Murphy (2000) *Georgetown Journal of Ethics supra* note 5 at 219; Van Kampen (1998) *supra* note 5 at 194.

<sup>40</sup> See Chapter 4 above.

In terms of Federal Rule 401, “Relevant evidence” is defined as:<sup>41</sup>

“.....evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

The basic tenet of the law of evidence – relevance – is thus recognised and firmly established in terms of Federal Rule 401. The question as to whether evidence is relevant will be dependent upon whether it possesses a tendency to render a fact or consequence more or less probable than it would be without such evidence.<sup>42</sup> Blau notes that this rule acknowledges that probability is an essential component of evidentiary issues.<sup>43</sup> In addition to Federal Rule 401, Federal Rule 402 provides that all relevant evidence shall be admissible unless it is specifically otherwise provided for in terms of the Constitution of the United States or other rules prescribed by the Supreme Court pursuant to statutory authority.<sup>44</sup> The Federal Rules of Evidence thus confirm the basic principle that evidence should be relevant in order to be admitted. Federal Rule 402 to some extent corresponds with the South African equivalent in terms of Section 211 of the Criminal Procedure Act as Federal Rule 402 in addition states that evidence which is not relevant is not admissible.<sup>45</sup> The latter *proviso* empowers the judicial officer to impose basic restrictions to the admissibility of evidence in the sense of excluding irrelevant or immaterial evidence. Smith correctly notes that relevant evidence is both material as well as probative.<sup>46</sup> Smith<sup>47</sup> explains that a fact in consequence comprises of facts which include direct evidence of an element of a claim or defense, facts from whose establishment may be inferred facts amounting to elements of claims or defenses, and facts relating circumstantially to the assessment of the probative value attributed to other evidence in the case and

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<sup>41</sup> Federal Rule, 401. See also Graham (1991) *supra* note 5 at 139; Graham (1981) *supra* note 5 at 63-66; Blau (1998) *supra* note 5 at 56-57.

<sup>42</sup> *Ibid.*

<sup>43</sup> Blau (1998) *supra* note 5 at 56.

<sup>44</sup> Federal Rule 402. See also Blau (1998) *supra* note 5 at 57; Graham (1991) *supra* note 5 at 171; Graham (1991) *supra* note 5 at 77.

<sup>45</sup> *Ibid.*

<sup>46</sup> Smith (1987) *Marquette Law Review supra* note 5 at 505.

<sup>47</sup> Smith (1987) *Marquette Law Review supra* note 5 at 505-506. See also Slobogin (1998) *William and Mary Law Review supra* note 5 at 30-42.

consequently when the mental state of an accused is an element of the crime charged, it can be assumed that psychiatric testimony would have a tendency to establish that element.

## 4.2 The Expertise Rule

Federal Rule 702 encapsulates the expertise rule as follows:<sup>48</sup>

”If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (a) the testimony is based upon sufficient facts or data; (b) the testimony is the product of reliable principles and methods, and (c) the witness has applied the principles and methods reliably to the facts of the case”.

Federal Rule 702 addresses in direct terminology the importance of expert evidence as an informal assessment of the facts is often problematic and impossible in the absence of the application of some scientific, technical or other specialised knowledge.<sup>49</sup>

Federal Rule 702 furthermore addresses three important principles:

- The expert evidence must assist the trier of fact;
- The expert witness must be qualified;
- The expert evidence should be reliable.

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<sup>48</sup> Federal Rule 702. It is notable that Federal Rule 702 as quoted above is the product of an amendment effected in 2000. The previous Federal Rule 702 did not include the second part after the words “... or otherwise”. The amendment was implemented to reequip that expert testimony should be the product of reliable principles which are reliably applied to the facts of a case. See Sales and Shuman (2005) *supra* note 5 at 40; Melton *et al* (2007) *supra* note 5 at 16; Van Kampen (1998) *supra* note 5 at 201; Slovenko (1995) *supra* note 5 at 136-137; Graham (1991) *supra* note 5 at 612; Graham (1981) *supra* note 5 at 198; Blau (1998) *supra* note 5 at 57; Wallace (1985) *University of Florida Law Review supra* note 5 at 1038; Gold (2004) *supra* note 5 at 498; Sales and Shuman in Costanzo, M; Krauss, D and Pezdek (eds), (2007) *supra* note 35 at 11.

<sup>49</sup> Gold (2004) *supra* note 5 at 498.



The first two principles will be discussed below and the third aspect, the reliability of the expert opinion, will be addressed later in this chapter.

- **The expert evidence must assist the trier of fact**

The following factors are important in respect of this portion of Federal Rule 702:<sup>50</sup>

- The expert evidence should firstly be relevant and will not “assist” if it is not connected to the facts at issue;
- Expert testimony will in addition be irrelevant if the reasoning behind it is so illogical that it cannot support the probabilities of the presence of facts in issue;
- The opinion of an expert should be supported by a sufficient foundation of relevant facts, data or opinions.

- **The expert witness must be qualified**

The following aspects are important pertaining to this section of Federal Rule 702:<sup>51</sup>

- The five bases for qualifying as an expert are “knowledge, skill, experience, training or education”.
- The level of “knowledge, skill, experience, training or education” required to qualify as an expert witness is only that which is necessary to guarantee that the testimony will “assist” the Court.
- “Gaps” in an expert witness’ qualification or training generally affect the weight rather than the admissibility of the expert evidence.
- The level and manner of knowledge and experience required of the expert is dependent on the complexity of the matter.

Federal Rule 702 thus provides a framework for both ascertaining expertise and also determining the helpfulness of expert evidence to the court. Melton *et al* note that even in cases where the research premise of opinions is weak, the underlying

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<sup>50</sup> Gold (2004) *supra* note 5 at 499-500. See also Graham (1991) *supra* note 5 at 613-619. Graham (1981) *supra* note 5 at 201-202.

<sup>51</sup> *Ibid.* See also Carson and Bull (2003) *supra* note 5 at 372 where it is noted: “Hence, experts on medical matters are expected to have medical degrees appropriate certifications and experience.”

knowledge may very well be sufficient in order to permit the admission of the opinion.<sup>52</sup>

Melton *et al*<sup>53</sup> state that mental health professionals are trained and experienced in generating explanations of abnormal behaviour and even if these formulations are at times mere “stories” their narration may provide valuable explanations of an accused’s behaviour that would otherwise be unavailable to the trier. If these explanations are presented with the necessary caution, they may assist the fact-finder in reaching a judgment despite the fact that they have not or cannot be verified.

Federal Rule 702 provides a useful balance between on the one hand, following a relatively liberal approach towards the admission of expert evidence by a trained and specialised expert whilst, on the other hand, including the *proviso* that the opinion should be based upon sufficient facts which is the product of reliable principles applied to the facts in a reliable fashion.

#### 4.3 The Basis Rule

Federal Rule 703 provides the following in respect of the basis of opinion testimony by experts:<sup>54</sup>

”The facts or data in the particular case upon which an expert bases an opinion or inference, may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the

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<sup>52</sup> Melton *et al* (2007) *supra* note 5 at 19. See also Morse, SJ “Failed Explanations and Criminal Responsibility: Experts and the Unconscious” (1982) *VA L.Rev* at 1016-1018

<sup>53</sup> Melton *et al* (2007) *supra* note 5 at 19.

<sup>54</sup> Federal Rule 703. See also Gold (2004) *supra* note 5 at 522; Melton *et al* (2007) *supra* note 5 at 16; Blau (1998) *supra* note 5 at 57; Graham (1991) *supra* note 5 at 633; Graham (1981) *supra* note 5 at 205; Van Kampen (1989) *supra* note 5 at 201-203. See also Sales, MJ and Wissler, RL “Legal and Psychological Bases of Expert Testimony: Surveys of the Law and the Jurors (1984) *Behavioural Sciences and the Law* at 435-449.

opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the experts' opinion substantially outweighs their prejudicial effect.”

Federal Rule 703 provides that the expert opinion can be based on three possible sources: first-hand knowledge; evidence already admitted; and facts or data not admitted that is of a type which is reasonably relied upon by experts within a specific field in arriving at opinions or inferences upon the specific subject.<sup>55</sup> Van Kampen notes that reliance upon data not itself admissible needs to be custom in the expert's field and also needs to be reasonable.<sup>56</sup>

Graham explains that the requirement that the facts, data or opinions should constitute those reasonably relied upon by experts within the specific field ensures reliability of both the opinion and its basis.<sup>57</sup> The fact that Federal Rule 703 permits that the underlying facts or data underlying the opinion need not be admissible in order for the opinion to be admitted, could in particular cases result in a relaxation of the traditional hearsay rule.

Van Kampen submits that some courts have held that the data should be admissible as substantive proof whenever an expert places reliance upon it, whilst other courts have held that such data or facts can only be used in assisting the trier of fact to evaluate the expert's opinion and cannot be received unless it conforms to one of the traditional exceptions to the hearsay rule.<sup>58</sup> The latter construction seems to be more in line with the purport and objectives of Federal Rule 703. The underlying data or facts are used to make the opinion more probable and increase its probative value. The underlying data and facts or opinions are also utilised to assist the trier of fact to assess the opinion. It is,

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<sup>55</sup> Gold (2004) *supra* note 5 at 522; Van Kampen (1998) *supra* note 5 at 203; Blau (1998) *supra* note 5 at 57; Graham (1991) *supra* note 5 at 634.

<sup>56</sup> Van Kampen (1998) *supra* note 5 at 203.

<sup>57</sup> Graham (1991) *supra* note 5 at 637. See also *United States v Williams* 431 F.2d 1168, 1172 (5<sup>th</sup> Cir. 1970).

<sup>58</sup> Van Kampen (1998) *supra* note 5 at 204. See also Graham (1981) *supra* note 5 at 207 where it is noted that Federal Rule 703 operates as an exception to the rule against hearsay evidence. See also Graham (1991) *supra* note 5 at 643 where it is noted that the effect of Rule 703 in most cases operates in a similar fashion as a hearsay exception to such extent that courts often fail to adequately note the distinction.

however, important to adequately weigh the probative value of such information against its prejudicial effect.<sup>59</sup> Within the ambit of the defence of criminal incapacity, a rule similar to Federal Rule 703 could assist mental health professionals when testifying as to the mental state of an accused person specifically when the expert relies on data or information which substantiates his or her opinion, but which is generally inadmissible. The facts or data relied on, should be of a type reasonably relied upon by experts within the particular field of mental health. Gold submits that Federal Rule 703 affords a trial judge more authority as a “gatekeeper” as the admissibility of an expert opinion will depend on two factors.<sup>60</sup>

- The party presenting the expert evidence should indicate that the expert relied on facts or data of a type relied on by experts in the field; and
- The party must in addition indicate that such reliance is reasonable.

One of the main considerations in applying Federal Rule 703 denotes an assessment of the probative value of the evidence as opposed to its possible prejudicial effect. The Advisory Committee to Federal Rule 703 noted the following:<sup>61</sup>

”When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert’s opinion, a trial court applying this Rule must consider the information’s probative value in assisting the jury to weigh the expert’s opinion on the one hand, and the risk of prejudice resulting from the jury’s potential misuse of the information for substantive purposes on the other.”

Slovenko is of the opinion that in terms of Federal Rule 703, the expert’s basis

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<sup>59</sup> See also Van Kampen (1998) *supra* note 5 at 211 where it is noted that even if the data upon which the expert relied on in arriving at his opinion, is deemed reliable enough for the court to rely upon it in determining a case, to admit such data could nevertheless in some instances violate an individual’s right to confront the witnesses against him or her. See also Slovenko (2002) *supra* note 5 at 56; *United States v Lawson* 653 F.2d 299 (7<sup>th</sup> Cir. 1981).

<sup>60</sup> Gold (2004) *supra* note 5 at 523. See also Federal Rule 104(9).

<sup>61</sup> Gold (2004) *supra* note 5 at 524.

need not be admissible in evidence provided that experts routinely place reliance on such data.<sup>62</sup> In terms of Federal Rule 703, the emphasis is not on the admissibility of the underlying data of the expert's opinion, but rather falls on the reliability and validity of the opinion to ensure a reliable basis for the expert's testimony.<sup>63</sup>

The specific data relied upon can vary and a psychiatrist conducting an evaluation will typically consider for example, the criminal record of an accused and may include such record in support of his or her opinion.<sup>64</sup> A rule similar to Federal Rule 703 could be usefully applied in the assessment of the defence of criminal incapacity, specifically if the mental health expert's basis of opinion rests on facts or data reasonably relied upon by other experts in the particular field. It could be argued that a similar rule could result in a more informative opinion more capable of assisting the trier of fact in the determination of the issue of criminal capacity.

#### 4.4 The Ultimate Issue Rule

It was during summer in 1976 when a young John Hinckley, Jr, watched Travis Bickle plot to assassinate a presidential candidate in the film 'Taxi Driver'. Hinckley instantaneously fell in love with actress Jodie Foster who played the role of a 12-year old prostitute in the film. Hinckley developed an obsession with Jodie Foster and the President. This obsession culminated in Hinckley shooting and wounding President Ronald Reagan on 30 March 1981 in an attempt to impress Jodie Foster.<sup>65</sup>

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<sup>62</sup> Slovenko (2002) *supra* note 5 at 53.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid* at 56.

<sup>65</sup> Cohen (1988) *University of Florida Law Review supra* note 5 at 541-542; Rogers, R and Ewing, CD "Ultimate Opinion Proscriptions: A Cosmetic Fix and a Plea for Empiricism" (1980) *Law and Human Behavior* at 357-374 at 357-358; Buchanan (2006) *Journal of the American Academy of Psychiatry and the Law*. See also *United States v Hinkley* United States District Court for the District of Columbia, Criminal Case Number 81-306 (1982). See also "The Hinkckley Trial: Hinckley's Communications with Jodie Foster" at <http://www.law.umke.edu/faculty/projects/ftrials/hinckley/jfostercommun.HTM> [accessed on 2010/03/09] where a letter from Hinckley to Jodie Foster is quoted, written shortly before the attempted assassination of President Ronald Regan which read as follows:

"3/31/81

12:45 PM

Dear Jodie,

Various psychiatrists testified for the defence and due to the fact that Hinckley suffered from “process Schizophrenia” they unanimously concluded by stating that he was insane when he shot the president. Despite contradictory expert evidence by prosecution psychiatrists, the jury nevertheless found Hinckley not guilty by

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There is a definite possibility that I will be killed in my attempt to get Reagan. It is for this very reason that I am writing this letter to you.

As you well know by now I love you very much. Over the past seven months I've left you dozens of poems, letters and love messages in the faint hope that you could develop an interest in me. Although we talked on the phone a couple of times I never had the nerve to simply approach you and introduce myself. Besides my shyness, I honestly did not wish to bother you with my constant presence. I know the many messages left at your door and in your mailbox were a nuisance, but I felt that it was the most painless way for me to express my love for you.

I feel very good about the fact that you at least know my name and know how I feel about you. And by hanging around your dormitory, I've come to realize that I'm the topic of more than a little conversation, however full of ridicule it may be. At least you know that I'll always love you.

Jodie, I would abandon this idea of getting Reagan in a second if I could only win your heart and live out the rest of my life with you, whether it be in total obscurity or whatever. I will admit to you that the reason I'm going ahead with this attempt now is because I just cannot wait any longer to impress you. I've got to do something now to make you understand, in no uncertain terms, that I am doing all of this for your sake! By sacrificing my freedom and possibly my life, I hope to change your mind about me. This letter is being written only an hour before I leave for the Hilton Hotel. Jodie, I'm asking you to please look into your heart and at least give me the chance, with this historical deed, to gain your respect and love.

love you forever,  
John Hinckley.”

See also <http://www.law.umko.edu/faculty/projects/trials/hinckley/hinckleymono.HTM> [accessed on 2010/03/09] where selected poems are quoted written by Hinckley. The one poem is entitled “Guns are fun!” and reads as follows:

“Guns are fun!  
See that living legend over there?  
With one little squeeze of this trigger  
I can put that person at my feet  
Moaning and groaning and pleading with God.  
This gun gives me pornographic power.  
If I wish, the president will fall  
And the world will look at me in disbelief  
All because I own an inexpensive gun  
Guns are lovable, Guns are fun  
Are you lucky enough to own one?”

In another poem entitled “The Painful Evolution”, the last phrase reads as follows:

“.....  
In the end,  
I cursed myself and suffered  
I have become what I wanted  
To be all along, a psychotic poet”

These poems inadvertently denotes an abnormal mind and accordingly it could be argued, despite various criticisms against the eventual finding of the court, that Hinckley was after all suffering from severe mental illness, rendering him insane at the time of the offence.



reason of insanity.<sup>66</sup> These facts are used to set the stage for the proper comprehension as to how it came about that Federal Rule 704 was eventually amended to make provision for Federal Rule 704(a) and (b) of the Federal Rules of Evidence which deals with opinion evidence pertaining to ultimate issues.

The semantics and characteristics of the ultimate issue rule have already extensively been assessed in Chapter 4. It was indicated that the author supports the abdication of the ultimate issue rule in support of a more liberal approach towards the admission of expert evidence. It was in addition noted that relevance should be the determining factor in respect of the admissibility of expert evidence and not necessarily whether the expert opinion embraces an ultimate issue.

In this section it is necessary to reflect on the ultimate issue doctrine as espoused in the Federal Rules of Evidence.

Federal Rule 704 states the following pertaining to opinion evidence on ultimate issues:<sup>67</sup>

”(a) Except as provided in subdivision (b), testimony in the forum

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<sup>66</sup> *Ibid.* See also Linder, D “The Trial of John Hinckley” in “Famous American Trials – The John Hinckley Trial 1982” at <http://www.law.umke.edu/faculty/projects/Ftrials/hinckleytrial.html> [accessed on 2010/03/09] where it is stated that the verdict of “not guilty” by reason of insanity in the trial of John Hinckley, Jr in 1982 for the attempted assassination of President Reagan caused intense outrage amongst many Americans. An ABC News poll conducted the day after the verdict was rendered, indicated 83% of those who polled, took the view that “justice was done”. Many other citizens, however, blamed the legal system in that they averred that it was too easy for juries to render “not guilty” verdicts in insanity trials despite the reality that these pleas were made in only 2% of felony cases and failed almost 75% of the time. The Hinckley verdict pressurised the Congress to enact new laws pertaining to the use of the insanity defence. Linder *supra* further encapsulates the dilemma in respect of trials where the defence of criminal incapacity is at issue, by stating: “The Hinckley trial highlights the difficulty of a system that forces jurors to label a defendant either ‘sane’ or ‘insane’ when the defendant may in fact be close to the middle on a spectrum ranging from Star Trek’s Mr Spock to the person who strangles his wife thinking that he’s squeezing a grapefruit”.

<sup>67</sup> Federal Rule 704. See also Melton *et al* (2007) *supra* note 5 at 16; Sales and Shuman (2005) *supra* note 5 at 32. Gold (2004) *supra* note 5 at 522; Slovenko (1995) *supra* note 5 at 138-140; Slovenko (2006) *Journal of the American Academy of Psychiatry and the Law* *supra* note 5 at 22; Buchanan (2006) *Journal of the American Academy of Psychiatry and the Law* *supra* note 5 at 14; Cohen (1988) *University of Florida Law Review* *supra* note 5 at 541-562; Murphy (2000) *supra* note 5 at 221-223; Smith (1987) *Marquette Law Review* *supra* note 5 at 493-533; Graham (1991) *supra* note 5 at 660-675; Freckelton and Selby (2005) *supra* note 5 at 293-294.

of an opinion or inference otherwise admissible is not objectionable, because it embraces an ultimate issue to be decided by the trier of fact.

- (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defence thereto. Such ultimate issues are matters for the trier of fact alone.”

When the Federal Rules of Evidence were introduced in 1975, it originally only more or less provided for part (a) as quoted above and accordingly expressly permitted expert opinions to embrace an ultimate issue provided it was helpful in assisting the trier of fact.<sup>68</sup> The common law ultimate issue rule was thus abolished as a result of Federal Rule 704.<sup>69</sup> In 1985, in the aftermath of the Hinckley verdict, Federal Rule 704 was amended and the ultimate issue rule was reinstated in cases where the mental state of a person had to be determined.<sup>70</sup>

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<sup>68</sup> Slovenko (2006) *Journal of the American Academy of Psychiatry and the Law* *supra* note 5 at 22; Buchanan (2006) *Journal of the American Academy of Psychiatry and the Law* *supra* note 5 at 14; Cohen (1988) *University of Florida Law Review* *supra* note 5 at 542-544; Slovenko (1995) *supra* note 5 at 138-139.

<sup>69</sup> *Ibid.*

<sup>70</sup> This amendment was enacted by means of the Insanity Defence Reform Act of 1984, Title IV, Pub.L. No. 98-473, 98 Stat. 2067 (1984) as discussed in Cohen (1988) *University of Florida Law Review* *supra* note 5 at 545. Buchanan (2006) *Journal of the American Academy of Psychiatry and the Law*, *supra* note 5 at 14; Slovenko (2006) *Journal of the American Academy of Psychiatry and the Law*, *supra* note 5 at 22; Slovenko (1995) *supra* note 5 at 138. See also Smith (1987) *Marquette Law Review* *supra* note 5 at 511 where it is noted that the American Psychiatric Association’s statement as to why the Ultimate Issue rule should have been re-enacted was the following:

“It is clear that psychiatrists are experts in medicine, not the law. As such, it is clear that the psychiatrist’s first obligation and expertise in the courtroom is to ‘do psychiatry’, i.e. to present medical fact and opinion about the defendant’s mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, ‘ultimate issue’ questions are formulated by the law and put to the expert witness who must then say ‘yea’ or ‘nay’, then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury. Juries thus find themselves listening to conclusory and seemingly contradictory psychiatric testimony that defendants are either ‘sane’ or ‘insane’ or that they do or do not meet the relevant legal test for insanity. This state of affairs does considerable injustice to psychiatry and, we believe, possibly to criminal defendants. In fact, in many criminal insanity trials both prosecution and defense psychiatrists do agree about the nature and even the extent of mental disorder exhibited by the defendant at the

The former Federal Rule 704 merely provided that:

”Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”<sup>71</sup>

The amendment of Federal Rule 704 was specifically aimed at curbing expert testimony in cases of insanity.<sup>72</sup> Rogers and Ewing explain that the amended rule does not completely prohibit expert evidence in insanity trials, but that such opinions may not include statements of opinion concerning so-called ultimate issue opinions.<sup>73</sup>

The *Hinckley* trial took place before the enactment of Federal Rule 704(b). It is interesting to note that the experts called by the defence unanimously held that Hinckley was psychotic when he shot the president, whilst all of the experts called for the prosecution tendered evidence that Hinckley was not psychotic at the time of the act.<sup>74</sup> Defence experts contended that the shooting was the sole consequence of Hinckley’s delusional thoughts that shooting the president would win him the love of much-adored film star Jodie Foster. Prosecution experts, on the other hand, argued that Hinckley shot the president as a result of a narcissistic

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time of the act.” (American Psychiatric Association Statement on the Insanity Defense, December 1982, p.14).

<sup>71</sup> Rogers, R and Ewing, CP “Ultimate Opinion Proscriptions: A cosmetic Fix and a Plea for Empiricism” (1989) *Law and Human Behavior* at 357-359; Slovenko (2006) *Journal of the American Academy of Psychiatry and the Law*, *supra* note 5 at 22-23.

<sup>72</sup> *Ibid.*

<sup>73</sup> Rogers and Ewing (1989) *Law and Human Behavior supra* note 71 at 360. See also Greenberg, JS “Criminal Law and Evidence Using Psychiatric Testimony to Negate *Mens Rea* Under the Insanity Defense Reform Act – *United States v Pohl*, 827 F.2d 8989 (3d Cir. 1987) cert. denied, 108 5, 710 (1988)” (1988) *Temple Law Review* 953-989 at 974 where the following is stated in respect of the Insanity Defense Reform Act of 1984 and opinion evidence pertaining to ultimate issues: “The Insanity Defense Reform Act of 1984 brought changes to the federal courts by providing the first statutory formulation of insanity ... the Act amended Rule 706(b) of the Federal Rules of Evidence by excluding expert testimony on the ultimate issue of a defendant’s mental state. ... Congress did not intend, however, to bar all evidence of mental disease where it was not offered for the affirmative defense of insanity. Instead, the Senate Judiciary Committee intended to prevent non-psychiatric disorders, such as immature personality or neuroses, from being considered legal insanity.” See also Bloom, JD and Rogers, JL “The Legal Basis of Forensic Psychiatry: Statutory Mandated Psychiatric Diagnoses” (1987) *American Journal of Psychiatry* at 847.

<sup>74</sup> Rogers and Ewing (1989) *Law and Human Behavior supra* note 71 at 360.

desire to become famous.<sup>75</sup> Rogers and Ewing interestingly note that in the event of Hinckley having been tried after Rule 704 was amended the experts would not have been permitted to express a direct conclusion as to whether Hinckley had the capacity to appreciate the wrongfulness of his conduct or the ability to conform his conduct with the requirements of the law. However, the bulk of the remaining part of their testimony which typically falls within the zone of the “battle of the experts” would still have been admissible.<sup>76</sup>

In order to assess the viability of the ultimate issue doctrine, now within the American context, it is necessary to reflect on both sides of the coin to this rule and thus the reasons in support of the reinstatement of the rule as opposed to the arguments against the rule.

Rogers and Ewing state that the submissions in favour of the proscription on ultimate opinions pertaining to the mental status of individuals are the following:<sup>77</sup>

- **Professional taint**

This argument seeks to curb the role of mental health professionals in insanity trials in an attempt to avoid public and collegial disapproval as well as the so-called “appalling circus atmosphere” which follows when mental health professionals present conflicting opinions pertaining to ultimate issues.

- **Insufficient clinical data**

This argument is premised upon the untested assumption that mental health professionals render such opinions in the absence of adequate clinical observations, test results or explicit data-based opinions and decision-making.

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> Rogers and Ewing (1989) *Law and Human Behavior supra* note 71 at 361-364. See also Cohen (1988) *University of Florida Law Review supra* note 5 at 552; Buchanan (2006) *Journal of the American Academy of Psychiatry and the Law supra* note 5 at 16-17; Slovenko (2006) *Journal of the American Academy of Psychiatry and the Law supra* note 5 at 23-25; Smith (1987) *Marquette Law Review supra* note 5 at 510; Slovenko (2002) *supra* note 5 at 138-140.

- **Undue influence**

This argument is founded on the assumption that ultimate issue testimony will unduly influence the trier of fact or usurp the function of the jury.

- **Lack of legal and moral expertise**

This argument is also often referred to as definitional exclusion. Legal professionals as well as some mental health professionals often contend that ultimate opinions are moral and not psychological in origin. The latter comment was espoused by the House Committee Report in 1984, which supported the 1984 Amendment, where it was stated:<sup>78</sup>

”While medical and psychological knowledge of expert witnesses may well provide data that will assist the jury in determining the existence of the (insanity) defense, no person can be said to have expertise regarding the legal and moral decision involved. Thus with regard to the ultimate issue, the psychiatrist, psychologist or other similar expert is no more qualified than a lay person.”

Cohen in addition notes that the rationale behind the enactment of Federal Rule 704(b) was further that mental health experts often express impermissible legal conclusions despite their lack of legal expertise.<sup>79</sup> The latter occurs when an expert incorrectly testifies that an individual was sane or insane as a result of the reliance placed on an incorrect standard when rendering an opinion.<sup>80</sup> The objection most frequently raised in support of the proscription on ultimate issue testimony relates to the fact that expert testimony pertaining to the issue of an individual’s mental condition invades the province of the trier of fact or, within the

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<sup>78</sup> Reform of the Federal Insanity Defence Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary”, 98<sup>th</sup> Congress, 1<sup>st</sup> Session, 16 (1983) as discussed in Rogers and Ewing (1989) *Law and Human Behavior supra* note 71 at 30. See also Buchanan (2006) *Journal of the American Academy of Psychiatry and the Law supra* note 5 at 16; Cohen (1988) *University of Florida Law Review supra* note 5 at 559; Gold (2004) *supra* note 5 at 525-528.

<sup>79</sup> Cohen (1988) *University of Florida Law Review supra* note 5 at 553-554.

<sup>80</sup> *Ibid.*

American context, the jury.<sup>81</sup>

Despite the statutory basis of the ultimate issue proscription and accordingly the prohibition on ultimate opinions in respect of the mental state or condition of an individual in a criminal case, it becomes clear that there is strong opposition to this rule as will be addressed below.

The ultimate issue rule contained in Federal Rule 704(b) may on face value seem quite attractive especially to those sceptical of the abilities of mental health experts. Research, however, indicates that this rule is unsatisfactory in practice. The various arguments against this rule will be summarised below.

- Clinical judgments and clinical observations are inseparable – forensic assessments and insanity evaluations are both structured and determined to a large extent by the examiner’s initial judgements pertaining to the individual’s history and presentation.<sup>82</sup> Such judgment not only sets the parameters of the evaluation, but also dictates the expert’s interpretation of the clinical observations. These observations<sup>83</sup> are also structured in accordance with the expert’s evolving clinical assessments. Denying the expert the opportunity to present these judgments does not alter but conceals their value and impact.<sup>84</sup>

Accordingly, triers of fact will have no way of evaluating the assumptions that eventually resulted in the interpretation of the expert’s assessments and there will be no way by which to assess the weight and probative value to be accorded to the expert’s observations.<sup>85</sup>

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<sup>81</sup> *Ibid.* See also Slovenko (1995) *supra* note 5 at 138.

<sup>82</sup> Rogers and Ewing (1989) *Law and Human Behavior supra* note 71 at 364-365.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* See also Note: “Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defence” (1987) *Cornell Law Review* 620 at 635 where it is stated: “Ironically, an evidentiary rule intended to make mental health testimony less confusing to fact finders may actually deprive jurors of if necessary to make that testimony helpful ... Expansive application of (the ultimate opinion rule) could lead to jury members leaving the courtroom impressed by tales of the defendant’s bizarre behavior, but with no sense of whether the defendant’s disease or defect had legal significance to the crime charged.” (As discussed in Rogers and Ewing (1989) *Law and Human Behavior supra* note 71 at 365).



- Even in the event of fact finders or juries being inclined to blindly adopt and accept psychiatric testimony, Rule 704(b) would not remedy the problem.<sup>86</sup> The mental health expert would generally be permitted to state a diagnosis and explain the phenomena of the disease even though the presence of the disease is also an ultimate issue for the trier of fact or jury.<sup>87</sup> Cohen<sup>88</sup> explains that, if courts allow opinion testimony that logically requires the jury to reach a certain conclusion and then refuse to allow the expert to state the conclusion, the jury might erroneously assume that it arrived at the conclusion itself and as such jurors are likely to be more overawed by their own conclusions of even the most impressive witness.
- Federal Rule 704(b) negatively impacts on an accused's (defendant's) right to introduce expert testimony.<sup>89</sup>
- Ultimate opinions are an inevitable and inescapable result of the forensic assessment process.<sup>90</sup> The main goal of any insanity assessment is to reach an informed conclusion as to a defendant's criminal responsibility. The ultimate opinion rule poses an impossible situation in terms of which the mental health expert is expected to strive toward a highly specific goal, but also to abandon that goal in the final stage.<sup>91</sup> The evidence of such a mental health expert will inadvertently appear contrived and leave the trier of fact with the prospect to "read between the lines" and to assess precisely what the expert knew but failed to disclose.<sup>92</sup>

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<sup>86</sup> Cohen (1988) *University of Florida Law Review supra* note 5 at 577.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Smith (1987) *Marquette Law Review supra* note 5 at 513. See also *United States v Alexander* 805 F.2d 1485 (11<sup>th</sup> Cir. 1986) at 1464 where the following was held:

"Defendants should be free, as Alexander was in this case, to question expert witnesses extensively concerning their diagnosis of the defendant's mental condition, its symptoms and treatment, and the effect such condition or illness may have on a defendant's mental state. In addition, any relevant medical records or reports should be admitted into evidence and the defendant should be allowed to question an expert witness about them so they may be explained or interpreted for the jury. The operation of Rule 704(b) makes it essential that juries be completely informed. A liberal approach towards the admissibility of evidence relating to the issue of insanity ensures this."

<sup>90</sup> Rogers and Ewing (1989) *Law and Human Behavior supra* note 71 at 365.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

- It is impossible to meaningfully distinguish between ultimate opinions and ordinary expert opinions.<sup>93</sup> During the course of insanity assessments, mental health experts often render scores of judgments pertaining to a defendant's condition and the relevance of that particular condition to the alleged criminal conduct.<sup>94</sup> The ultimate opinion rule strives to single out particular judgments and to restrain experts from making or at the very least, reporting them to the triers of fact.<sup>95</sup>
- Prohibitions on ultimate opinions may paradoxically expand the scope of expert testimony by mental health professionals within the insanity context.<sup>96</sup>
- Prohibitions on ultimate opinions may result in mental health experts exercising less care in their assessments of criminal responsibility.<sup>97</sup>
- Federal Rule 704(b) admits the most confusing expert testimony, the mental health expert's diagnosis, whilst excluding the least confusing testimony, the expert's opinion as to the mental state or sanity of the defendant.<sup>98</sup>

It is clear that there is much controversy surrounding Federal Rule 704(b). Although penultimately framed in statutory form, this rule is unworkable and problematic as it leads to unnecessary complications in the application of the insanity defence. In order to adequately adduce and challenge evidence, it is pivotal that such evidence be tendered as comprehensively and informatively as possible. Federal Rule 704(b) unnecessarily restricts the presentation of expert evidence in insanity trials. It is clear that the addition to Federal Rule 704 has not produced success. Cohen correctly asserts that Rule 704(b) mandates the exclusion of relevant and probative evidence in the fear that it may be too persuasive and exclusion as such is prejudicial to the criminal justice system.<sup>99</sup>

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<sup>93</sup> Rogers and Ewing (1989) *Law and Human Behavior* *supra* note 71 at 365-366.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> Rogers and Ewing (1989) *Law and Human Behavior* *supra* note 71 at 367.

<sup>97</sup> *Ibid.*

<sup>98</sup> Cohen (1988) *University of Florida Law Review* *supra* note 5 at 559. See also Buchanan (2006) *Journal of the American Academy of Psychiatry and the Law* *supra* note 5 at 17.

<sup>99</sup> Cohen (1988) *University of Florida Law Review* *supra* note 5 at 561.

Federal Rule 704(a) can be welcomed also in comparison with South Africa where no such rule is codified. Federal Rule 704(b) is, however, an unnecessary amendment to the rules of evidence and as such superfluous. Slovenko submits that Federal Rule 704(b) renders expert witnesses less useful to triers of fact as it enhances indirect and incomplete testimony.<sup>100</sup> Rogers and Ewing correctly propose the elimination of the terminology “ultimate opinion” due to the fact that when opinions are at issue, the “ultimate is, by definition, unattainable”.<sup>101</sup> Rogers and Ewing encapsulate the latter by stating:<sup>102</sup>

”The expert’s opinion is not even penultimate, for it is the judge who instructs the jury as to how to weigh the evidence and reach its “ultimate” judgment. At best, the mental health expert renders what might be called an antepenultimate opinion.”

It is submitted that a rule similar to Federal Rule 704(a) is a welcoming response to the traditional ultimate issue rule and a similar rule could be usefully applied within the South African context. Federal Rule 704(b) unnecessarily restricts the presentation of expert evidence in insanity trials. As Smith correctly indicates, expert witnesses in a criminal trial should be afforded the opportunity to adequately and fully express their findings as well as their opinions pertaining to their findings.<sup>103</sup>

## **5 SCIENTIFIC RELIABILITY AND VALIDITY OF EXPERT EVIDENCE BY MENTAL HEALTH EXPERTS – APPLYING THE *DAUBERT* RESOLUTIONS**

”Soon there will be no jury. No hordes of detectives and witnesses, no charges and counter charges, and no attorney for the defense. These impedimenta of our courts will be unnecessary. The state will

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<sup>100</sup> Slovenko (1995) *supra* note 5 at 144; Slovenko (2006) *Journal of the American Academy of Psychiatry and the Law* *supra* note 5 at 25.

<sup>101</sup> Rogers and Ewing (1989) *Law and Human Behavior* *supra* note 71 at 373.

<sup>102</sup> *Ibid.*

<sup>103</sup> Smith (1987) *Marquette Law Review* *supra* note 5 at 533. See also Conley, WM “Restricting the Admission of Psychiatric Testimony on a Defendant’s mental State: Wisconsin’s Steel Curtain” (1981) *Wisconsin’s Law Review* 733-789 at 764-765

merely submit all suspects in a case to the test of scientific instruments, and as these instruments cannot be made to make mistakes nor tell lies, their evidence would be conclusive of guilt or innocence.”

(“*Electrical Machines to Tell Guilt of Criminals*“ *The New York Times* (1911) at 2)

One of the most frequently raised criticisms levelled against the scientific discourses of psychiatry and psychology and probably more in respect of forensic psychiatry and psychology, relates to the scientific reliability and validity of the testimony proffered by the respective mental health professionals.<sup>104</sup>

From the outset it should be noted that the terms “reliability” and “validity” are not synonyms but refer to two distinctly different concepts.

According to Ennis and Litwack, “reliability” refers to:<sup>105</sup>

”...the probability of frequency of agreement when two or more independent observers answer the same question.”

“Validity” refers:<sup>106</sup>

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<sup>104</sup> Ennis, BJ and Litwack, TR “Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom” (1974) *California Law Review* at 693-745, 694-699; McKay, IM “Scientific Reliability of Psychiatric Expert Witness Testimony Involving the Use of Classifications from the Diagnostic and Statistical Manual of Mental Disorders” (1992) *Criminal Justice Journal* at 345-386; Rogers, T “Diagnostic Validity and Psychiatry Expert Testimony” (2004) *International Journal of Law and Psychiatry* at 281-290; Faust, D and Ziskin, J “The Expert Witness in Psychology and Psychiatry” (1988) *Science* at 31-35. See also Freckelton, I and Selby, H (1999) *supra* note 5 at 580-581.

<sup>105</sup> Ennis and Litwack (1974) *California Law Review supra* note 104 at 697.

<sup>106</sup> *Ibid.* See also Meintjes-Van der Walt, L “Expert Evidence in the Criminal Justice Process – A Comparative Perspective” (2001) at 206-207 where it is noted that the Oxford English Dictionary defines “reliability” as “the quality of being reliable” which is defined as “that may be relied upon, in which reliance or confidence may be put; trustworthy, safe, sure”. “Validity” on the other hand is defined as “the quality of being well-founded on fact, of established on sound principles, and thoroughly applicable to the case or circumstances; soundness and strength (of argument, proof, authority, etc.)”. See also Rogers (2004) *International Journal of Law and Psychiatry supra* at 285-286, where “reliability” is defined as: “... an expression of the probability with which two independent clinicians will reach the same diagnosis.” “Validity” refers: “... to the extent to which a particular diagnosis maps on to what is known about the underlying reality”.

“not to how likely psychiatrists are to agree about a particular judgment but to how accurate their judgments are”.

Another method of assessing the essential difference between reliability and validity is by defining reliability as denoting the degree of correlation or correspondence amongst professionals employing the same method, whereas validity denotes the degree of correlation or correspondence between the judgment derived at by professionals and some fact in the external world.<sup>107</sup>

Within the ambit of the defence of criminal incapacity, the mental health expert's opinion will be founded on psychiatric classifications enunciated in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)*.<sup>108</sup>

The question which falls to be assessed is how the reliability and validity of psychiatric testimony premised upon the DSM-IV should be determined. McKay notes that some of the earliest concerns raised towards the scientific reliability and validity of expert psychiatric opinions related to the inconsistency of diagnoses amongst psychiatrists.<sup>109</sup> The fear exists that individual psychiatrists in the process of diagnosing the same condition, would arrive at different results depending on the particular methodology employed by the particular psychiatrists.<sup>110</sup> McKay further asserts that the majority of American jurisdictions, including the federal courts, have expressly acknowledged the DSM as scientifically reliable when applied in support of forensic expert evidence.<sup>111</sup> Such scientific reliability is restricted to a forensic expert's use of the DSM as a basis for the expert testimony.<sup>112</sup> Rogers in addition attests to the scientific reliability and validity of expert testimony founded on the diagnostic

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<sup>107</sup> Ennis and Litwack (1974) *supra* note 104 at 697-698.

<sup>108</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR) (2000). The diagnostic framework was extensively discussed in Chapter 3 *supra* (hereafter DSM-IV.).

<sup>109</sup> McKay (1992) *Criminal Justice Journal supra* note 104 at 353. See also Kenny, A “The psychiatric expert in court” (1984) *Psychological Medicine* at 291-302.

<sup>110</sup> *Ibid.*

<sup>111</sup> McKay (1992) *Criminal Justice Journal supra* note 104 at 356.

<sup>112</sup> *Ibid.* See also *Kramer v United States* 579 F. supp.314 (D.Md.1984).

classification in the DSM and states as follows:<sup>113</sup>

“In fact, psychiatric classification systems are few in number (only two are widely used, ICD and DSM), show a remarkable degree of confluence, and can be shown to possess high degrees of internal consistency and integrates reliability. Psychiatrists from around the world can readily agree with one another about, for example, what is meant by the term ‘schizophrenia’ and whether a given individual satisfies the criteria. For most of the major psychiatric disorders, the agreement reached by psychiatrists is as high or higher than for many general medical conditions.”

The anomaly which arises is how to assess the scientific reliability and validity of opinions by mental health experts. Which criteria should be employed to assist the trier of fact in determining reliability and validity? The fact that the diagnostic framework from which a diagnosis is made is reliable and valid, does not necessarily render the opinion based upon it, scientifically reliable and valid. Ennis and Litwack indicate that psychiatric diagnoses often have very low scientific reliability and validity.<sup>114</sup> Rogers also indicates that even though psychiatrists might agree that a specific individual has a particular disorder, it is still not indicative whether such disorder exists or whether it is merely “a taxonomic fiction”.<sup>115</sup> Freckelton and Selby, however, correctly note that “scientific in exactitude” is not a phenomenon exclusive to the fields of psychiatry and psychology and in addition does not detract from their usefulness within the judicial process and criticisms motivate these two professions to constantly assess its performance in accordance with scientific standards.<sup>116</sup>

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<sup>113</sup> Rogers (2004) *International Journal of Law and Psychiatry supra* note 104 at 285.

<sup>114</sup> Ennis and Litwack (1974) *California Law Review supra* note 104 at 708-709. See also Ziskin, J “Coping with Psychiatric and psychological Testimony” (1988) at 1, where it is critically stated: “... despite the ever increasing utilization of psychiatric and psychological evidence in the legal process, such evidence frequently does not meet reasonable criteria for admissibility and should not be admitted in a court of law and, if admitted, should be given little or no weight”. These words, it is submitted, is over-critical in respect of psychiatry and psychology as advances in these sciences, enhances the reliability and validity of each respectively. See also Faust and Ziskin (1988) *Science supra* note 104 at 32.

<sup>115</sup> Rogers (2004) *International Journal of Law and Psychiatry supra* note 104 at 287.

<sup>116</sup> Feckelton and Selby (1999) *supra* note 104 at 580.



The question which still needs to be addressed is whether set criteria should not be established in terms of which scientific reliability and validity can be assessed.

It is trite that even where criteria is formulated in terms of which reliability and validity can be measured, the application thereof will fluctuate as each case will present its own distinct characteristics. It is further important to bear in mind the divergent opinions which can ensue in respect of the mental state of an individual. Relative criteria will, however, assist the trier of fact in making a determination in respect of validity and reliability.

Davoli notes that despite media and court opinions constantly depicting psychiatry as an inexact “pseudo science”, there exists great integrity in the diagnoses of mental illness.<sup>117</sup> The validity of a diagnosis that a specific person is suffering from a mental illness such as schizophrenia is to a large extent subject to the thoroughness of the assessment similar to the validity of any other diagnosis. As easy as it is to misdiagnose a mental illness as a result of poor medical practice, just as easy is it to misdiagnose a physical illness and thus both types of assessments must adhere to accepted medical practice to ensure validity.<sup>118</sup> Davoli also notes that those scholars classifying psychiatry as an inexact science, often rely on data which is dated and such dated material fails

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<sup>117</sup> Davoli, JI “Psychiatric Evidence on Trial” (2003) *SMU Law Review* at 2191-22234 at 2217. One area where the field of Psychiatry is often the subject of much criticism and debate is in respect of the prediction of future dangerousness. For purposes of this study, future dangerousness will not be addressed. For further reading on the prediction of dangerousness see Monahan, J “Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility” (2000) *Wash & Lee L.Rev.* 901; Bonta, J; Hanson, RK and Law, J “The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meter Analysis” (1998) *Psychological Bulletin* at 125-142; Rogers, R and Lynett, E “The Role of Canadian Psychiatry in Dangerous Offender Testimony” (1991) *Canadian Journal of Psychiatry* at 79-84; Lafond, M “Disorder in the Court: The Use of Psychiatric Testimony in the Prediction of Dangerousness” (2005) *Dalhousie Journal of Legal Studies* at 1-34; Junginger, J “Command Hallucinations and the Prediction of Dangerousness” (1995) *Psychiatry Serv.* 911-915; Levinson, RM and York, MZ “The Attribution of ‘Dangerousness’ in Mental Health Evaluations” at <http://www.jstor.org/view/00221465/di976050/97po938d./0> [accessed on 2007/08/15]; Cocozzo, JJ and Steadman, HJ “Prediction in Psychiatry: An Example of Misplaced Confidence in Experts” at <http://www.jster.org/view/00377791/apo30107/05a00040/0> [accessed on 2007/08/15]; Diamond, BL “The Psychiatric Prediction of Dangerousness” (1974) *University of Pennsylvania Law Review* at 439.

<sup>118</sup> Davoli (2003) *SMU Law Review supra* note 117 at 2217-2218.

to give recognition to the great advances made in the study of mental illness and the fact that psychiatry has refined its diagnosis methods and methods of assessment over the past fifty years.<sup>119</sup>

Davoli notes the following important aspects in respect of the reliability of psychiatric diagnosis:<sup>120</sup>

- An accurate psychiatric diagnosis should be preceded by a complete assessment and examination also referred to as a diagnostic workup;
- The “diagnostic workup” should provide for the history and mental status examination; a review of the individual’s prior medical history as well as an adequate physical and neurological examination;
- Psychological tests could also assist the professional in arriving at an accurate diagnosis;
- The thoroughness of the “diagnostic workup” ensures a diagnosis with a high level of accuracy;
- The reliability of a diagnosis of mental illness is supported by scientific research;
- Psychiatric diagnosis share similar levels of reliability with other medical fields;
- The DSM-IV provides clarity and coherent standards for the diagnosis of mental illness;
- In respect of the DSM-IV numerous studies were performed to assess psychiatric diagnosis;
- Structured interviews give rise to more accurate diagnosis;
- An individual does not suffer from a mental illness merely as a result of the fact that he or she meets the criteria for a diagnosis in the DSM-IV and in addition, some mental illnesses are completely irrelevant for forensic legal purposes;
- Courts need to critically assess the relevance of a person’s diagnosis when assessing whether to admit testimony.

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<sup>119</sup> Davoli (2003) *SMU Law Review supra* note 117 at 2218.

<sup>120</sup> Davoli (2003) *SMU Law Review supra* note 117 at 2218-2221.

Probably one of the most influential American decisions relating specifically to scientific reliability and validity of expert evidence, is the case of *Daubert v Merrell Dow Pharmaceuticals*.<sup>121</sup> The facts of this decision were briefly as follows:

The plaintiffs instituted a tort claim seeking redress for injuries to children born with limb reduction birth defects. It was alleged that the birth defects were caused by the mother's use of *Bendectin*, a prescription anti-nausea drug, during the first trimester of pregnancy. The defendant then sought summary judgment on the basis of the affidavits of a physician and epidemiologist who reviewed the published studies on *Bendectin* and reported that none found it to be capable of causing malformations in human fetuses. In response, the plaintiffs presented the opinion of eight well-qualified experts who concluded that the drug caused the defects. The federal district court granted the defendant's motion for summary judgment and dismissed the lawsuit. It was concluded that the plaintiff's experts were unable to demonstrate that the defendant's drug caused the plaintiff's injury because epidemiological studies were the only generally accepted method of proving this link, and the epidemiological studies failed to prove such casual *nexus*. The United States Court of Appeals confirmed this decision and the Supreme Court granted review.<sup>122</sup> In delivering judgment per Blackmun J, the Supreme Court stated:<sup>123</sup>

“In the 70 years since its formulation in the *Frye* case, the ‘general acceptance’ test has been the dominant standard for determining the admissibility of novel scientific evidence at trial.”

It was contended on behalf of the plaintiffs that the *Frye* standard applied by the

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<sup>121</sup> *Daubert v Merrell Dow Pharmaceuticals* 509, U.S. 579 (1993). See also Sales and Shuman (2005) *supra* note 5 at 33-45; Carson and Bull (2003) *supra* note 5 at 373-385; Slovenko (2002) *supra* note 5 at 43-59; Blau (1998) *supra* note 5 at 58-59; Shapiro (1999) *supra* note 5 at 4-8; Kiely (2001) *supra* note 5 at 12-14; Brodsky (1999) *supra* note 5 at 31-34; Kastenbergl (2003) *Seattle University Law Review supra* note 5 at 816-820; Murphy (2000) *Georgetown Journal of Ethics supra* note 5 at 223-224; Black, Ayala and Saffron-Brinks (1994) *Texas Law Review supra* note 5 at 750-752.

<sup>122</sup> See Sales and Shuman (2005) *supra* note 5 at 33.

<sup>123</sup> At 585.

district court had been overridden by the Federal Rules of Evidence. It was further held that the Federal Rules of Evidence were aimed at relaxing the traditional barriers to opinion evidence by experts and that the continued reliance on the *Frye* standard would obfuscate this goal.<sup>124</sup> It was in addition held that the Federal Rules of Evidence had replaced the *Frye* test.<sup>125</sup> The court also considered that the Federal Rules of Evidence required trial judges to admit only relevant and reliable expert evidence. The court<sup>126</sup> noted that the adjective ‘scientific’ implies a foundation in the methods and procedures of science. Similarly, the word ‘knowledge’ denotes more than subjective belief or unsupported speculation but ‘applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds’ and consequently it would be unreasonable to conclude that the subject of scientific testimony must be ‘known’ to a certainty as there are no certainties in science. In order to qualify as ‘scientific knowledge’, an inference or assertion must be derived by the scientific method.

It was also held that the requirement that an expert’s evidence should relate to “scientific knowledge” establishes a standard of evidentiary reliability.<sup>127</sup> The Court distinguished scientific validity (“proof of what something is intended to prove”) from scientific reliability (“consistency in application of science”) and held that in matters pertaining to scientific evidence, *evidentiary reliability* will be premised on *scientific validity*.<sup>128</sup>

Federal Rule 702 was also addressed with specific reference to the meaning to be accorded to the terminology “assist the trier of fact to understand the evidence or to determine a fact in issue” contained in Rule 702. The Supreme Court concluded that the terminology refers to the concept of relevance and

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<sup>124</sup> At 585. See also Sales and Shuman (2005) *supra* note 5 at 34.

<sup>125</sup> See also Gutheil and Simon (2002) *supra* note 5 at 115.

<sup>126</sup> At 590. See also Sales and Shuman (2005) *supra* note 5 at 35.

<sup>127</sup> At 590. See also Sales and Shuman (2005) *supra* note 5 at 35; Redmayne, M “Expert Evidence and Criminal Justice” (2001) at 101-106. See also Murphy (2000) *Georgetown Journal of Ethics supra* note 5 at 223-224 where it is noted: “Scientific” requires a basis in the methods and procedures of science, and “knowledge connotes more than subjective belief or unsupported speculation. According to the Court, these two concepts would ensure a standard of evidentiary reliability.”

<sup>128</sup> At 593. Sales and Shuman (2005) *supra* note 5 at 35. See also Kiely (2001) *supra* note 5 at 13.

stated the following:<sup>129</sup>

“Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful. ... (“An additional consideration under Rule 702 – and another aspect of relevancy – is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving the factual dispute.”) The consideration has been aptly described ... as one of ‘fit’. ‘Fit’ is not always obvious and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes ... Rule 702’s ‘helpfulness’ standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.”

Regarding the question of admissibility of expert scientific testimony, a three-staged approach was suggested providing for the following:<sup>130</sup>

- A trier of fact should first assess whether an expert is presenting scientific evidence;
- A trier of fact then has to assess whether such evidence will be likely to assist the court to comprehend or ascertain a fact which is in issue in the trial;
- To ensure the abovementioned two criteria, the trier of fact has to

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<sup>129</sup> At 591-592. See also Sales and Shuman (2005) *supra* note 5 at 35. Carson and Bull (2003) *supra* note 5 at 371 where it is stated: “Focussing on the language ‘assist the trier of fact’ in Rule 702. Many courts and commentators characterised this rule as a “relevancy test”. In the area of scientific evidence, the Daubert court explained, relevance foremost is a question of fit. Specifically whatever the validity of the science, it must pertain to some disputed issue in the case. As the Daubert Court stated succinctly, Rule 702 ‘requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility. Only when the science pertains to a factual question in the case can expert testimony be helpful to the trier of fact. This helpfulness component is at core of Rule 702’. The latter principle is especially of importance where expert evidence of mental health professionals is presented in support of the defence of criminal incapacity. Federal Rule 702 which provides for the helpfulness of expert testimony and inadvertently requires a rational connection between the science and the factual issue, provides a useful framework for also establishing the causal *nexus* between the expert testimony presented and the issue of for example criminal capacity. See also Murphy (2000) *Georgetown Journal of Ethics supra* note 5 at 224; Carson and Bull (2003) *supra* note 5 at 380.

<sup>130</sup> At 592-593. Sales and Shuman (2005) *supra* note 5 at 36; Carson and Bull (2003) *supra* note 5 at 371-372.

assess:<sup>131</sup>

“whether the reasoning or methodology underlining the testimony is scientifically valid and whether that reasoning or methodology can properly be applied to the facts in issue.”

As a result of Federal Rule 702, the trier of fact now becomes a “gatekeeper” who assesses whether the theory or application can provide assistance in the deliberation of issues.<sup>132</sup> Regarding the assessment of scientific reliability and validity the Supreme Court outlined four factors to be considered as a contextual framework in terms of which reliability and validity can be evaluated. These criteria constitute the following:<sup>133</sup>

- In the first instance, for a theory or technique to constitute scientific knowledge, it should be established whether the theory or technique can be tested or ideally has been tested;
- Secondly, a court should ascertain as to whether the theory or technique has been subjected to peer review and publication. Although publication does not ensure evidentiary reliability, it becomes relevant as it indicates

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<sup>131</sup> *Ibid.* See also Gutheil and Simon (2002) *supra* note 5 at 115. See also Brodsky (1999) *supra* note 5 at 31-32 where it is noted: “When the U.S. Supreme Court issued its ruling in *Daubert v Merrell Dow* in 1993, an observer from Mars or Paris might have thought a revolution had taken place in admissibility of expert evidence into federal courts. No revolution occurred, but rather an existing path became more clearly marked.” Brodsky in addition submits that the essential elements necessary to ensure admissibility in terms of *Daubert*, are the following: Reliability of the Methodology; Relevance; Reasonable reliance; and probative value outweighing the prejudicial value of the evidence. See also Sparks, J “Admissibility of Expert Psychological Evidence in the Federal Courts” (1995) *Arizona State Law Journal* at 1315-1333 at 1327 where it is noted that even if a theory meets the *Daubert* requirement of “scientific knowledge” it should also be relevant and even if it is found to be relevant, it should not interfere with judicial discretion in terms of Federal Rule 405 to exclude evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”

<sup>132</sup> See Kastenberg (2003) *Seattle University Law Review supra* note 5 at 816-818.

<sup>133</sup> At 594. See also Sales and Shuman (2005) *supra* note 5 at 36-37; Kiely (2001) *supra* note 5 at 14; Carson and Bull (2003) *supra* note 5 at 373; Kastenberg (2003) *Seattle University Law Review supra* note 5 at 504, 818; Murphy (2000) *Georgetown Journal of Ethics supra* note 5 at 224; Blau (1998) *supra* note 5 at 58; Shapiro (1999) *supra* note 5 at 5; Black, Ayala and Saffron-Brinks (1994) *Texas Law Review supra* note 5 at 750-751. See also Allan, A “The Psychologist as Expert Witness” in Tredoux, C; Foster, D; Allan, A; Cohen, A and Wassenaar, D (“Tredoux *et al*”) “Psychology and Law at 292; Allan, A and Meintjes-Van der Walt, L “Expert Evidence in Kaliski (ed)(2006) *supra* note 5 at 344 where the *Daubert*-decision is specifically discussed. See also Slovenko (2002) *supra* note 5 at 44.



that the knowledge has been subjected to the scrutiny of other experts in the field which inadvertently increases the likelihood that problems in the knowledge would have been detected.<sup>134</sup>

- It was recommended that trial courts have due regard to the known or potential error rate for the knowledge and standards prescribing the manner in which the technique is to be applied;
- It should also be determined whether the methodology is generally accepted in the relevant scientific community where similar concepts are applied. General acceptance could thus still have an influence in respect of the inquiry into the validity of scientific evidence.

It was noted that these factors should be considered pertaining to the question scientific validity with reference to the specific context of the issues raised in a specific case. Factors such as vigorous cross-examination opposing evidence and due consideration of the burden of proof, were held to be adequate to deal with insufficient scientific evidence presented at a trial.<sup>135</sup> Carson and Bull note that no single list of factors can ever encapsulate the various considerations taken into account in assessing validity as a result of the following:<sup>136</sup>

“Scientists tend to speak of validity in terms of the strength of the evidence and reasoning supporting a conclusion, not in terms of its ‘truth’. Similarly, although judges must assess validity in order to make a categorical decision – admitting or excluding the testimony – judges need not have a categorical view of science. Judges are expected to use the *Daubert* factors (and others) to determine if its more likely than not that the methods and reasoning validity support the proffered expert

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<sup>134</sup> Black, Ayala and Saffron-Brinks (1994) *Texas Law Review* *supra* note 5 at 757.

<sup>135</sup> See Shapiro (1999) *supra* note 5 at 5. See also *United States v Downing* 753 F.2d 224, 1238 (3d Cir.1985) where additional factors were stated which a court could consider when assessing the admissibility of expert evidence such as the novelty of a new technique; the existence of specialised literature pertaining to the technique and its exposure to scientific scrutiny. In addition independent research emanating from established procedures which generates specialised literature would also ensure reliability. A court should also evaluate the qualifications and expertise of the expert witness. See also Murphy (2000) *Georgetown Journal of Ethics* *supra* note 5 at 225. See also “Challenging Expert Witness Testimony” (2000) by the International Association of Defense Counsel (New York) at 72.

<sup>136</sup> Carson and Bull (2003) *supra* note 5 at 374.

testimony.”

Carson and Bull elaborate on an important aspect enunciated in *Daubert* – the principle of causation which could also be useful pertaining to expert testimony in cases of criminal incapacity.<sup>137</sup> Carson and Bull distinguish “general causation” from “specific causation” present in expert testimony. General causation refers to the assertion that one factor can produce particular results. Specific causation refers to those factors having had those results pertaining to the specific case before the court.<sup>138</sup> Within the context of criminal incapacity and more specifically, pathological criminal incapacity, the general causation will denote whether schizophrenia can induce a particular result; whereas specific causation will entail whether schizophrenia had or produced those results in the specific case at hand. The dichotomy of general and specific causation is prevalent in almost all forms of scientific evidence.<sup>139</sup>

With reference to *Daubert’s* application to the field of forensic mental health assessments, Shapiro notes that the criteria in *Daubert* could prove to be very useful to forensic assessments within the paradigm of criminal responsibility.<sup>140</sup> Shapiro in addition asserts the general model adhered to by most serious forensic practitioners when conducting criminal responsibility assessments would meet the criteria enunciated in *Daubert*.<sup>141</sup>

Another important principle of *Daubert* relates to the fact that the Supreme Court entrusted the trier of fact with a prominent role as “gatekeeper” in assessing expert evidence. As such the court has to assess whether the science advanced in support of the evidence is sufficiently reliable to be deemed valid.<sup>142</sup> It is submitted that the criteria established in *Daubert* could provide a valuable benchmark in terms of assessing the scientific reliability and validity of expert evidence. Within the defence of criminal incapacity these criteria could be most

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<sup>137</sup> Carson and Bull (2003) *supra* note 5 at 376.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> Shapiro (1999) *supra* note 5 at 5-6.

<sup>141</sup> *Ibid.*

<sup>142</sup> At 592-593. See also Murphy (2000) *Georgetown Journal of Ethics supra* note 5 at 224; Kastenberg (2003) *supra* note 5 at 818.

usefully applied whenever the scientific reliability and validity of psychiatric and psychological evidence has to be assessed.

In the subsequent decision of *Kumho Tire Co. v Carmichael*,<sup>143</sup> a court's "gatekeeping" obligation was extended to apply not only to "scientific" knowledge, but also to testimony premised on "technical" and other specialised knowledge.<sup>144</sup> The salient facts of this decision were briefly the following:<sup>145</sup>

The plaintiff instituted a product liability claim against the manufacturer and retailer of a tire ["tyre" in South Africa] which allegedly failed and resulted in an accident in which one person was killed and several other persons were severely injured. Their claim was premised on the evidence of their expert witness who testified that the failure of the tire was caused by a defect in the manufacture or design of the tire. The expert, however, conducted no tests on the specific tire or on similar tires and did not provide any statistical information in relation thereto, linking the factors indicative of tire failure to a manufacturing defect. The defendant applied for the exclusion of the expert's testimony on the basis that the expert testimony failed to meet the *Daubert* yardstick as it was not based on tested research; no known error rate was proved; it had not been published in peer-reviewed journals and was not generally accepted within the specific field.

The trial court held that the expert evidence did not satisfy the criteria for reliability as set forth in *Daubert* and refused to admit it.<sup>146</sup> The plaintiffs then applied for a reconsideration of the case based on the argument that the court

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<sup>143</sup> *Kumho Tire Co. v Carmichael* 526 U.S. 137 (1999), 119 S.Ct 1167 (1999). The facts of this decision is discussed in this section for purposes of illustration within the context of expert evidence. See also *General Electric Co. v Joiner* 522 U.S. 136 (1997) where the court of appeals held in respect of the admissibility of expert testimony: "(b)ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony." See also Sales and Shuman (2005) *supra* note 5 at 41.

<sup>144</sup> At 141 (of 526 U.S. (1999)). See also Bursztajn, HJ, Pulde, MF, Dirakitikulr, D and Perlin, M "Kumho for clinicians in the courtroom" at <http://www.forensicpsych.com/articles/antkunhoClinicians.php> [accessed on 2007/05/03].

<sup>145</sup> See Carson and Bull (2003) *supra* note 5 at 385-385; Sales and Shuman (2005) *supra* note 5 at 38-40; Slovenko (2002) *supra* note 5 at 44-48; Kiely (2000) *supra* note 5 at 16-17.

<sup>146</sup> 145-146 (of 526 U.S. (1999)). See Sales and Shuman (2005) *supra* note 5 at 38-39; Carson and Bull (2003) *supra* note 5 at 385.

had applied the *Daubert* factors too inflexibly.<sup>147</sup> It was consequently held that no matter how flexibly it applied the *Daubert* test, the plaintiffs' expert testimony was not sufficiently reliable to allow. The Court of Appeals reversed the trial court's decision and held that *Daubert* only applied to scientific evidence. The United States Supreme Court reviewed the Court of Appeals' decision and noted per Breyer J that in terms of Federal Rule 702 trial judges had an obligation to assess whether expert evidence is both irrelevant and reliable regardless whether it is scientific, technical or other specialised knowledge. The general meaning of Federal Rule 702 extends the "gatekeeping" responsibility to all experts, as experts, are granted latitude in testifying and it would be extremely difficult for courts to enforce evidentiary rules in terms of which reliance is placed on a distinction between "scientific" knowledge and "technical" or "other specialised" knowledge as there is no clear dividing line distinguishing the one from the other.<sup>148</sup> In respect of evidentiary reliability the court<sup>149</sup> noted that a trial court may consider one or more of the specific factors stated in *Daubert* if it will aid in assessing the reliability of the testimony. The list of factors do not apply to all experts or to every case as the test for reliability is flexible.

It was further stressed that some of the *Daubert* questions could aid in assessing the reliability of experience-based testimony and in selected instances it will be appropriate for the trial judge to ascertain whether a specific method is generally accepted within the relevant community.<sup>150</sup> Similarly, it will be useful in some cases where an expert's expertise is founded on experience to ascertain whether his or her preparation is of such a nature that others in the field would deem it as acceptable.<sup>151</sup> It was further held per Beyer J that the legal standard for allowing expert evidence to be heard by the jury was the same standard employed by the relevant professional community:<sup>152</sup>

"The objective of ... (the *Daubert*) requirement is to ensure the

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<sup>147</sup> *Ibid.*

<sup>148</sup> At 149 (of 526 U.S. (1999)); Carson and Bull (2003) *supra* note 5 at 386.

<sup>149</sup> At 151 (of 526 U.S. (1999)); Sales and Shuman (2005) *supra* note 5 at 39; Carson and Bull (2003) *supra* note 5 at 386.

<sup>150</sup> Gutheil and Simon (2002) *supra* note 5 at 120.

<sup>151</sup> *Ibid.*

<sup>152</sup> At 1176 (of 119 S.Ct (1999)). See Gutheil and Simon (2002) *supra* note 5 at 120.

reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”

In summary, the following issues were decided in *Kumho*:<sup>153</sup>

- The requirement of “reliability” in Federal Rule 702 is not limited to “scientific” opinions only, but extends all those opinions embraced within Federal Rule 702 which includes those that are “scientific, technical or other knowledge”;
- The gatekeeping function of the trier of fact is not limited to “scientific” knowledge;
- The gatekeeping requirement in *Daubert* applies to the entire process in terms of which an expert selects “knowledge” in the term of basic principles to be applied, as well as the deductive application of such knowledge to the particular facts of a case in reaching an opinion;
- Any distinction which separates “scientific” knowledge from “technical or other specialised knowledge” is artificial as the overriding criteria for admissibility is knowledge, its selection and application.

Even though the *Daubert*- and *Kumho* decisions dealt effectively with delictual claims, the principles set forth in these two decisions pertaining to the admissibility of expert evidence provides an invaluable contribution in establishing guidelines for assessing the admissibility of expert evidence and concomitancy of determining scientific reliability and validity of expert opinions. These guidelines could inadvertently also be applied in assessing the admissibility of forensic psychiatric and psychological opinions advanced in support of a defence of criminal incapacity.

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<sup>153</sup> See “Challenging Expert Witness Testimony” (2000) by the International Association of Defence counsel at 48-49. See also Kiely (2001) *supra* note 5 at 16; Kastenberg (2003) *supra* note 5 at 819.

Within the South African context, there are currently no similar guidelines to be followed when the reliability and validity of expert opinions in support of the defence of criminal incapacity falls to be assessed. As such, the American system in this regard provides a benchmark according to which the South African position could be improvised. Upon analysis of *Daubert* and also *Kumho*, two basic tenets are emphasised which play a vital role in respect of expert testimony – *relevance* and *reliability*. It is submitted that these two considerations should be the cornerstones in establishing admissibility of expert forensic psychiatric and psychological testimony in cases where criminal incapacity is advanced as a defence. Davoli in addition notes that when a court is confronted with psychiatric evidence, it should not only be determined whether psychiatry in general is reliable and relevant, but also whether psychiatry is reliable and relevant pertaining to the specific issue it is addressing in the particular case.<sup>154</sup> The latter would entail that, in addition to expert testimony pertaining to the diagnosis and assessment of an individual, the psychiatrist would also be required to explain the significance and relevance of psychological tests administered, the error rate of such tests, the current status of scientific research into the diagnosis as well as reliability of the diagnosis.<sup>155</sup>

In the aftermath of *Daubert* and *Kumho*, Gutheil and Simon propose the following recommendations in respect of forensic psychiatric and psychological evidence:<sup>156</sup>

- Expert opinions are strengthened by gleaning from established clinical entities as opposed to *ad hoc* novel entities which require departures

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<sup>154</sup> Davoli (2003) *SMU Law Review supra* note 117 at 2232.

<sup>155</sup> *Ibid.* See also Slobogin (1998) *William and Mary Law Review supra* note 5 at 54 where it is suggested that all psychiatric evidence should be subject to admissibility thresholds which should be assessed using a four-step analysis provided by the Federal Rules of Evidence. Firstly, the evidence should be material; secondly, the evidence should be probative and as such its basis should be generally accepted by a significant number of professionals specifically if the evidence is advanced in respect of a past mental state; thirdly, it should be helpful; fourthly it must be fairly and understandably offered.

<sup>156</sup> Gutheil and Simon (2002) *supra* note 5 at 122. See also Bohan, TL and Heels, EJ “The case against Daubert: The new scientific evidence “standard” and the standards of the several states” (1995) *Journal of Forensic Science* at 1030-1044; Brodsky (1999) *supra* note 5 at 33.



from clinical traditions. Gutheil and Simon<sup>157</sup> assert that it does not mean that innovation is not possible, but only that it should be approached with great circumspection to avoid the promiscuous creation of diagnostic entities to meet the needs of a specific case.

- Literature review and the use of citations that are “on point” are extremely important techniques in order to comply with the requirements of both a general acceptance standard and a scientific reliability standard.<sup>158</sup>
- The question relating to relevance does not flow from professional literature but requires expert “self-scrutiny” and as such assessing the question as to whether psychiatry can provide a contribution to the case.
- Peer consultation embarked on confidentially and anonymously, could be useful in complicated cases.

Bursztajn *et al* suggest that experts should have a credible experience in the practice of knowledge about the legal process and standards as well as the ability to provide an adequate translation of “clinical decision-making fundamentals into a meaningful forensic opinion”.<sup>159</sup> Bursztajn *et al* further assert that the practice of evidence-based medicine and the core characteristics of *Daubert* are essentially similar - the methods employed to arrive at a conclusion should be scientifically accurate, valid and applicable to the specific case at hand.<sup>160</sup> Bursztajn *et al*<sup>161</sup> conclude by stating that in the new

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<sup>157</sup> Gutheil and Simon (2002) *supra* note 5 at 122.

<sup>158</sup> See also Brodsky (1999) *supra* note 5 at 34 where it is noted:

“For all such expert proclaiming no research evidence, I suggest looking harder. It may be that there is a related or extrapolated field of knowledge to explore. No better way exists to prepare oneself for judicial scrutiny than delving into and maturing directly related scientific research.” See also Blau (1998) *supra* note 5 at 60.

<sup>159</sup> Bursztajn, HJ, Pulde, MF; Pirakitikulr, D and Perlin, M “Kumho for Clinicians in the Courtroom – Inconsistency in the Trail Courts” at <http://www.forensicpsych.com/articles/artKumhoClinicians.php> [accessed on 2007/05/03]. Bursztajn *et al* in addition notes:

“In the post-*Daubert/Kumho* world, there are more incentives to identify and use qualified clinical expert and to collaborate with them; *Daubert/Kumho* challenges to exclude or limit expert testimony, the increased complexity of clinical decision-making and if and the growing sophistication of judges and jurors secondary to the dissemination of knowledge by the media and internet, all contribute to the need for guideline distinguishing between acceptable and unacceptable expert evidence.”

<sup>160</sup> *Ibid.* See also Gutheil, TG and Bursztajn, HJ “Avoiding *Ipse Dixit* Mislabelling: Post-*Daubert* Approaches to Expert Clinical Opinions” (2003) *American Academy of Psychiatry and the Law* at <http://www.forensic-psych.com/articles/artAvoidIpsedixit.php> [accessed on 2007/03/28], “Expertise in Law, Medicine and Health Care – Much Ado about Little: The

post–*Daubert/Kumho* environment attorneys and judges will find most helpful those experts who are able to present not merely their opinion but also the process by which they employed their expertise in data review and analysis, and the methods of inference employed to formulate their opinion to the requisite degree of professional certainty required by the trier of fact.

Psychiatry and psychology are essentially science-based professions. As such opinions advanced by forensic psychiatrists and psychologists need to comply with the threshold standards of being scientifically reliable and valid in order to contribute to the assessment of the defence of criminal incapacity. Expert opinions by forensic mental health professionals will be meaningless if the facts upon which it is based lack scientifically reliable and valid premises. The formula enunciated in *Daubert* and consequently extended in application in *Kumho* could usefully assist the trier of fact in determining the reliability and validity of expert forensic opinion evidence in order to ensure that the most relevant and reliable expert testimony is provided for where the assessment of criminal capacity is at hand.

## **6 Ethical considerations pertaining to forensic psychiatry and psychology**

### **6.1 Forensic psychiatry and the ethical guidelines for the practice of forensic psychiatry**

The American Academy of Psychiatry and the Law has adopted specific ethical guidelines for the practice of forensic psychiatry.<sup>162</sup> These guidelines provide a useful framework which could also be applied to the practice of forensic psychiatry in South Africa.

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Effect of *Daubert, Joiner* and *Kumho Tire* on Claims of Medical Expertise at <http://www.ahrq.gov/clinic/jhppl/shuman2.htm> [accessed on 2007/05/03].

<sup>161</sup> *Ibid.*

<sup>162</sup> American Academy of Psychiatry and the Law – Ethics Guidelines for the Practice of Forensic Psychiatry” adopted in May (2005) (hereafter “AAPL ethical Guidelines”) as obtained at [www.mentalhelp-net/poc/view-doc.php?type=cloc&id](http://www.mentalhelp-net/poc/view-doc.php?type=cloc&id) [accessed on 2010/03/09] at 1. See also Gutheil and Simon (2002) *supra* note 5 at 135; Melton *et al* (2007) *supra* note 5 at 87.

An aspect which is crucial to the practice of forensic psychiatry is the fact that these guidelines were specifically designed for the practice of forensic psychiatry. Such a step would be welcomed in South Africa as a codification of this nature could aid in “streamlining” the practice of forensic psychiatry in circumscribing the responsibilities of the forensic psychiatrist within an ethical context whilst at the same time defining the boundaries of the forensic assessment process. These guidelines will be summarised below.

### **6.1.1 Preamble to the ethical guidelines for the practice of forensic psychiatry**

The preamble to the ethical guidelines reads as follows:<sup>163</sup>

“The American Academy of Psychiatry and the Law (AAPL) is dedicated to the highest standards practice in forensic psychiatry. Recognizing the unique aspects of this practice, which is at the interface of the professions of psychiatry and the law, the Academy presents these guidelines for the ethical practice of forensic psychiatry.”

In terms of the ethical guidelines forensic psychiatry is defined as a sub-speciality of psychiatry in terms of which scientific and clinical expertise is applied in legal matters pertaining to, amongst other practices, criminal matters and it is further noted that the guidelines apply to psychiatrists performing a forensic role.<sup>164</sup> The ethical guidelines further acknowledge that forensic psychiatrists practice at the interface of law and psychiatry and as a result of forensic psychiatry carries the potential for various conflicts, misunderstandings and abuses.<sup>165</sup>

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<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

### 6.1.2 Confidentiality

The ethical guidelines acknowledge that within the paradigm of a forensic assessment, the forensic evaluation requires due notice to the evaluatee and also collateral sources of possible restrictions on confidentiality.<sup>166</sup> The evaluatee should in addition be informed that the psychiatrist conducting the assessment is not the evaluatee's "doctor"<sup>167</sup> and as such the necessary care should be exercised in ensuring that the evaluatee does not develop the belief that there is a treating relationship.<sup>168</sup>

### 6.1.3 Consent

The ethical guidelines provide the following principles pertaining to consent:<sup>169</sup>

- The evaluatee should be informed of the nature and purpose of the assessment and the constraints and limitations relating to confidentiality.
- The informed consent of the individual undergoing the forensic assessment (the evaluatee) should be obtained and in the event that the evaluatee is incompetent to provide consent, the evaluator should seek the proper legal recourse and adhere to the appropriate laws at the jurisdiction.
- In particular situations such as court ordered assessments for competency to stand trial, informed consent is not a prerequisite. In such cases the evaluatee should be informed that a refusal on his/her part to participate may be mentioned in any report or testimony.
- Psychiatrists should preferably not conduct forensic assessments on individuals who have not consulted with legal counsel when such individuals are charged with criminal acts; under investigation for criminal or quasi-criminal acts; held in custody or detention; or being interrogated for criminal or quasi-criminal conduct.

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<sup>166</sup> AAPL Ethical Guidelines *supra* note 162 at 2.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> AAPL Ethical Guidelines *supra* note 162 at 2. See also Gutheil and Simon (2002) *supra* note 5 at 137-138.

These guidelines reaffirm the importance of informed consent within the framework of forensic assessments. It is further pivotal that the evaluatee be informed of the limitations pertaining to confidentiality. The guidelines provide a useful framework in codifying these important aspects.

#### **6.1.4 Honesty and striving for objectivity**

The ethical guidelines provide the following principles:<sup>170</sup>

- Psychiatrists functioning as experts within the legal process, should adhere to the principles of honesty and objectivity.
- Psychiatrists should strive at arriving at objective opinions.
- Psychiatrists performing a forensic role should base their forensic opinions, forensic reports and testimony on all available data. The latter is effected by distinguishing between verified and unverified information as well as clinical “facts”, “inferences” and “impressions”.
- Psychiatrists should preferably perform a personal examination but in certain instances a personal examination is not required. When, within the forensic context, it is not feasible to perform a personal examination or assessment, an opinion may be granted based on other information.
- It is further noted that psychiatrists assuming a forensic role for patients they are treating, may adversely affect the therapeutic relationship with them.
- The forensic assessment as well as the credibility of the practitioner may be undermined by conflicts inherent in the differing clinical and forensic roles and as such treating psychiatrists should refrain from acting as an expert witness for their patients or performing assessments of their patients for legal purposes.
- In scenarios where the dual role is required or unavoidable regard should be taken of the inherent differences inherent between clinical and legal obligations.

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<sup>170</sup> AAPL Ethical Guidelines *supra* note 162 at 3. See also Gutheil and Simon (2002) *supra* note 5 at 138-139.

The most important aspect addressed in this ethical guideline relates to the problematic aspect of the assumption of dual relationships in terms of which a treating clinician in addition assumes the role of forensic evaluator. The prohibition on psychiatrists acting as expert witnesses for their patients or performing assessments on their patients is a welcoming aspect contained in the ethical guidelines.

### **6.1.5 Qualifications**

The ethical guidelines provide that expertise within the profession of forensic psychiatry will only relate to areas of actual knowledge, skills, training or experience.<sup>171</sup> It is further noted that psychiatrists should present their qualifications accurately and precisely when providing an expert opinion.<sup>172</sup>

## **6.2 Forensic psychology and the ethical guidelines for the practice of forensic psychology**

The Speciality Guidelines for Forensic Psychologists were adopted by the majority of the members of the American Psychology Law Society.<sup>173</sup> These guidelines were specifically designed to provide more specific guidance to forensic psychologists in order to control their professional conduct when providing assistance to courts, parties to legal matters, correctional and forensic mental health institutions and legislative agencies.<sup>174</sup> The main objection of these guidelines is “to improve the quality of forensic psychological services offered to individual clients and the legal system and thereby to enhance forensic psychology as a discipline and profession”.<sup>175</sup> In addition, the guidelines provide the following statement pertaining to its objective:<sup>176</sup>

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<sup>171</sup> AAPL Ethical Guidelines *supra* note 162 at 4. See also Gutheil and Simon (2002) *supra* note 5 at 139-140.

<sup>172</sup> *Ibid.*

<sup>173</sup> “Specialty Guidelines for Forensic Psychologists” (1991) (hereafter “Guidelines”) *Law and Human Behavior* at 655-685. See also Melton *et al* (2007) *supra* note 5 at 87-99.

<sup>174</sup> Guidelines (1991) *Law and Human Behavior supra* note 173 at 655.

<sup>175</sup> *Ibid.*

<sup>176</sup> Speciality Guidelines (1991) *Law and Human Behavior supra* note 173 at 656.



“The Guidelines provide an aspirational model of desirable professional practice by psychologists, within any sub-discipline of psychology, ... when they are engaged regularly as experts and represent themselves as such, in an activity primarily intended to provide professional psychological expertise to the judicial system.”

The most important aspects of these guidelines will be addressed below:

### **6.2.1 Purpose and scope of the ethical guidelines for forensic psychologists**

The guidelines provide that the professional standards pertaining to the ethical practice of psychology in general, are addressed in the American Psychological Association’s *Ethical Principles of Psychologists*, but that these principles do not relate to the objectives of desirable professional conduct for forensic psychologists.<sup>177</sup> The guidelines do not contradict any provisions of the *Ethical Principles of Psychologists*, but rather amplify them within the context of the practice of forensic psychologists.<sup>178</sup> The guidelines provide the following definitions of a “psychologist”, “forensic psychology” and a “forensic psychologist”, and these terms are distinctively defined as follows:<sup>179</sup>

- “Psychologist”  
“... any individual whose professional activities are defined by the American Psychological Association or by regulation of title by state registration or licensure, as the practice of psychology.
- “Forensic psychology”  
“... all forms of professional psychological conduct when acting, with definable foreknowledge, as a psychological expert on explicitly psychological issues, in direct assistance to courts, parties to legal proceedings, correctional and forensic mental health facilities, and

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<sup>177</sup> Guidelines (1991) *Law and Human Behavior supra* note 173 at 656. For purposes of this study, only the Specialty Guidelines for Forensic Psychologists will be discussed.

<sup>178</sup> Guidelines (1991) *Law and Human Behavior supra* note 173 at 657.

<sup>179</sup> *Ibid.*

administrative, judicial, and legislative agencies acting in an adjudicative capacity.”

- “Forensic psychologist”  
“... means psychologists who regularly engage in the practice of forensic psychology.”

An important aspect of the guidelines is the accordance of adequate definitions to the concepts of psychology, forensic psychology and a forensic psychologist and as such a clear demarcation between the professions of psychology and forensic psychology is established. The guidelines do not apply to psychologists requested to provide services when such psychologists were not informed at the time of providing such services that they were intended for use as forensic psychological services.<sup>180</sup>

### 6.2.2 Responsibility

The guidelines provide that forensic psychologists are obliged to conduct their services consistent with the highest standards of their profession and in addition forensic psychologists should take the necessary steps to ensure that their services are used in a responsible manner.<sup>181</sup>

### 6.2.3 Competence

The guidelines provide the following in respect of competence:<sup>182</sup>

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<sup>180</sup> *Ibid.*

<sup>181</sup> Guidelines (1991) *Law and Human Behavior supra* note 173 at 657-658.

<sup>182</sup> Guidelines (1991) *Law and Human Behavior supra* note 173 at 658. See also Melton *et al* (2007) *supra* note 5 at 87-88 where it is noted in respect of competence and qualifications of forensic mental health professionals that mental health professionals conducting assessments for the courts need more than basic clinical training. In addition it is noted that forensic work requires familiarity with the legal system; forensic assessment instruments, the legal doctrines which provide relevance to mental health evaluation; research pertaining to syndromes and similar phenomena; and the demands at being an expert witness. Melton *et al* notes the following: “The need for speciality training for forensic mental health practice has been noted in the professional literatures and it is reflected in the growth in recent years of interdisciplinary programs in forensic psychiatry and psychology and law. But it remains the case that most mental health professionals will

- Forensic psychologists should only render services in specific fields of psychology in which they have acquired specialised knowledge, skill, experience and education;
- Forensic psychologists are obliged to provide the court with the factual bases of their qualification as an expert and also indicating the way in which those bases to their qualifications are relevant to the specific issues in a case;
- Forensic psychologists should possess a fundamental and reasonable level of comprehension of legal and professional standards pertaining to their participation as experts in legal matters.
- Forensic psychologists should be aware of the fact that their own personal values, moral convictions, or personal and professional relationships with parties to a legal matter may interfere with their ability to practice efficiency and in such circumstances, forensic psychologists should refrain from participating or curb their assistance in a manner consistent with professional obligations.

#### 6.2.4 Relationships

The guidelines provide the following important aspects in respect of relationships:<sup>183</sup>

- The forensic psychologist has an obligation during initial consultations with the legal representative of a particular party seeking services, to inform such party of factors which may impact on a decision to contract

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obtain the significant part of their forensic training through self study, on-the-job opportunities with experienced colleagues and continuing education programs.”

Melton *et al* further notes that regard should also be taken of the fact that competence in one area of forensic assessment practice does not ensure one’s competence in another area. Appreciation should also be taken of the limits of what behavioural medical sciences have to offer the legal system. Qualifications are also no guarantee against error in practice. Mental health professionals should also be mindful of legal constraints on the practice of forensic mental health assessments.

<sup>183</sup> Guidelines (1991) *Law and Human Behavior supra* note 173 at 658-659. See also Melton *et al* (2007) *supra* note 5 at 90-91 where it is stated: “Also implicating the ethical requirement that relationships be clarified are current or prior activities, obligations, or relationships at the clinician that might produce a conflict of interest in the case.”

with the forensic psychologist. Such factors include prior and current personal or professional relationships which might result in a conflict of interests; limitations in areas of competence as well as limitations in procedures employed.

- Forensic psychologists are aware of potential conflicts of interests in dual relationships and as such they refrain from providing professional services to individuals in legal proceedings with whom they are engaged in a personal or professional relationship which conflicts with the anticipated relationship.
- In the event that it is necessary to provide both evaluation and treatment to a party in a legal proceeding, the forensic psychologist shall take reasonable measures to reduce the negative impact on rights to the party, confidentiality as well as the process of treatment and assessment.
- Forensic psychologists should inform prospective clients of their respective rights in respect of an anticipated forensic assessment, the purpose of the assessment as well as the nature of the procedures to be employed. In addition, the informed consent of the party or the particular legal representative should be obtained. If a party is unwilling to proceed after having been informed of the purposes, methods and uses of the forensic assessment, such assessment should be postponed and the forensic psychologist should seek legal advice. Where an individual lacks the capacity to provide informed consent to the assessment, the forensic psychologist should provide reasonable notice to the individual's legal representative before proceeding with the assessment.
- Whenever there is a conflict between the forensic psychologist's professional standards and the requirements of legal standards, the forensic psychologist is obliged to divulge and disclose the source of conflict and to take reasonable steps to resolve it.

The guidelines pertaining to relationships once again contain a prohibition on dual relationships. The latter is of utmost importance within a forensic context. This provision is similar to the one discussed in the preceding discussion pertaining to forensic psychiatry. Another important aspect emphasised in this section of the guidelines, is the principle of informed consent which is

reaffirmed.

### 6.2.5 Confidentiality and privilege

The guidelines state the following pertaining to confidentiality and privilege:<sup>184</sup>

- Forensic psychologists should have regard to their legal standards which may affect or limit the confidentiality or privilege that may be relevant to their services and they should further perform their professional activities in a manner which respects those rights and privileges.
- Forensic psychologists should inform their clients of the limitations to confidentiality of their services provided and in the event where a party's right to confidentiality is restricted, the forensic psychologist should take reasonable steps to maintain confidentiality in respect of any information not directly related to the purpose and scope of the assessment.

### 6.2.6 Methods and procedures

The most important aspects of the guidelines relating to specifically the methods and procedures of forensic psychologists are the following:<sup>185</sup>

- Forensic psychologists are obliged to document and be prepared to provide subject to court order or the rules of evidence, all data and information constituting the basis of their evidence.
- Forensic psychologists should be aware that hearsay evidence as well as other rules relating to expert testimony places a unique ethical burden upon them and in addition, when hearsay or other inadmissible evidence forms the basis of their opinion, they should attempt to minimise sole reliance upon such evidence.
- Forensic psychologists should refrain from providing information from their assessments which do not bear directly upon the legal purpose of

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<sup>184</sup> Guidelines (1991) *Law and Human Behavior supra* note 173 at 660. See also Melton *et al* (2007) *supra* note 5 at 93-94.

<sup>185</sup> Guidelines (1991) *Law and Human Behavior supra* note 173 at 661-663.

their professional activities and is not essential as support for their evidence or testimony except where such disclosure is required by law.

- Whenever a forensic psychologist relies upon data or information gathered by others, the origins of such information should be clarified.
- Forensic psychologists should be aware that no statement made by a defendant during the course of any forensic assessment, no testimony by the expert promised upon such statements, may be admitted into evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.<sup>186</sup>
- Forensic psychologists will avoid providing written or oral evidence pertaining to the psychological characteristics of a specific individual in the absence of having had the opportunity to conduct an examination of the individual adequate to the scope of the statements or conclusions to be issued.

### 6.2.7 Public and professional communications

The most relevant aspects pertaining to public and professional communications set forth in the guidelines are the following:<sup>187</sup>

- Forensic psychologists should have regard that their role as “expert to the court” or as “expert representing the profession” accords them a particular responsibility for fairness and accuracy in their public statements.
- Generally, forensic psychologists should refrain from rendering detailed public statements pertaining to particular legal proceedings in which they have been involved.
- Forensic psychologists should address specific legal proceedings in publications or communications only to the extent that the information relied upon forms part of the public record or the necessary consent for

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<sup>186</sup> This provision in the Guidelines is similar to Section 78(7) of the Criminal Procedure Act 51 of 1977 discussed in Chapters 2 and 3 *supra* pertaining to admissibility of statements by an accused during the course of a forensic assessment.

<sup>187</sup> Guidelines (1991) *Law and Human Behavior supra* note 173 at 663-665.



such use has been adequately obtained.

- When testifying, forensic psychologists have an overriding duty to all parties involved in the legal process to provide their findings or evidence in a fair manner and as such forensic psychologists shall not, either by commission or omission, participate in a misrepresentation of their evidence nor will they participate in partisan attempts to avoid or deny the presentation of evidence contrary to their own standing.

The guidelines conclude with the following most important statement:<sup>188</sup>

“Forensic psychologists are aware that their essential role as expert to the court is to assist the trier of fact to understand the evidence or to determine a fact in issue. In offering expert evidence, they are aware that their own professional observations, inferences, and conclusions must be distinguished from legal facts, opinions, and conclusions. Forensic psychologists are prepared to explain the relationship between their expert testimony and the legal issues and facts of an instant case.”

The motivation for a discussion of the relevant and specific aspects of the ethical guidelines on both forensic psychiatry and forensic psychology is multifarious. In the first instance specific guidelines are enunciated specifically for each distinctive profession. It has already been indicated during the course of this study that these two professions differ markedly and as such even though certain guidelines will overlap, these two professions each have certain guidelines specifically applicable to the particular profession.

Secondly, within the profession of psychology, a clear demarcation is established between the professions of psychology, on the one end, and forensic psychology on the other. The latter is especially important as an ordinary psychologist will not necessarily have qualifications and experience within the forensic field.

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<sup>188</sup> Guidelines (1991) *Law and Human Behavior* supra note 173 at 665.

Thirdly, these guidelines establish a codified set of principles according to which forensic mental health professionals can adequately measure their activities as well as the ethical consideration connected thereto. Such codification inadvertently establishes certainty for both the legal as well as forensic professions. A codified set of guidelines could be usefully applied to the defence of criminal incapacity in order to canvass the various ethical duties and responsibilities of the forensic mental health expert in a proper and informed manner. The guidelines discussed above provide a template according to which the South African system could be developed and improved.

## **7 Conclusion**

In this chapter the author focussed on specific aspects pertaining to the presentation of expert evidence which prevails in the United States of America. The background to the current Federal Rules of Evidence was illustrated in conjunction with a discussion of the most important rules contained in the Federal Rules of Evidence pertaining to expert evidence. The scientific reliability and validity of expert psychiatric and psychological evidence was disseminated against the backdrop of the influential decision of *Daubert* followed up by *Kumho*. The ethical guidelines applicable to the professions of forensic psychiatry and psychology were also assessed.

The following conclusions can be drawn from the research presented in this chapter:

- The Federal Rules of Evidence, and in particular, the rules pertaining to relevance and expert opinion evidence provide a template for a codified system of the rules of expert evidence. Such codification could provide invaluable assistance in the assessment of expert psychiatric and psychological evidence when a defence of criminal incapacity is raised. It will be naïve to suggest that a proposed framework will be applied in precisely the same manner in every case. Inexact sciences such as law and medicine negate such a proposition. A codified system, however,

provides clarity and certainty in respect of what precisely is expected of experts presenting expert opinions. As such, the Federal Rules of Evidence could be one avenue to follow.

- The Ultimate issue rule is redundant and superfluous. Despite the revival of this rule in terms of Federal Rule 704(b), authority strongly suggests that such rule presents numerous obstacles in practice and also unjustly limits the proper presentation and assessment of expert evidence. This rule, as was indicated from the American perspective, leads to unnecessary complications in the application of the insanity defence. Federal Rule 704(a) provides an example which can also be made applicable within the South African context.
- Assessing scientific reliability and validity of psychiatric and psychological expert opinions advanced in support of the defence of criminal incapacity, remains a highly specialised and complex task. The criteria set forth in *Daubert* could invariably assist the trier of fact in discharging this difficult task.
- The decision in *Daubert* further reaffirms the two most important and fundamental tenets also pivotal to the presentation of expert evidence, namely relevance and reliability. These two principles should be the cornerstones during the assessment of the probative value of expert evidence.
- The ethical guidelines applicable to the professions of forensic psychiatry and psychology respectively provide an invaluable framework for clarifying the various ethical responsibilities incumbent upon a mental health professional requested to perform a forensic assessment for purposes of the defence of criminal incapacity.

“The introduction of the scientist alters the narrative dynamic of the trial. A category of evidence and a language is introduced which requires the insertion of the expert as interpreter.”<sup>189</sup>

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<sup>189</sup> Alldridge, P “Scientific Expertise and Comparative Criminal Procedure” (1999) 141 E&P as quoted in Meintjes-Van der Walt, L “Expert Evidence in the Criminal Justice Process” (2001) at 121.