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A REGULATORY FRAMEWORK FOR PSYCHO-LEGAL ASSESSMENTS IN SOUTH AFRICA

by

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Submitted in fulfilment for the requirements of the degree

Doctor Legum

LLD

In the Faculty of Law,

University of Pretoria

November 2020

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SUMMARY

The study demonstrates that mental health professionals, more specifically psychiatrists and psychologists, conducting psycho-legal assessments in South Africa, play a pivotal role in assisting the courts in ensuring that justice is done. Mental health professionals are involved in numerous matters, ranging from criminal cases, such as conducting psycho-legal assessments regarding criminal capacity, civil proceedings concerning care and contact evaluations, personal injury claims, and many more. In reviewing case law and the complaints lodged with, and rulings made by, the Health Professions Council of South Africa, it is evident that psycho-legal assessments are often problematic. The problems relate to an inadequate level of performance in evaluations and testimony and unethical behaviour. It is argued that the lack of regulation of psycho-legal assessments is one of the main contributing factors in the increasing challenges experienced.

The study examines the current regulatory framework regarding psycho-legal assessments in South Africa by first examining the procedural and evidentiary rules that control the admissibility and evaluation of expert testimony, and secondly, the self-regulation by the mental health professions. To address the shortcomings, the regulatory mechanisms in the international context is analysed by turning to the United Kingdom as well as the United States of America. Both jurisdictions have strong ties to South Africa and a rich history concerning regulating psycho-legal assessments and psychological and psychiatric evidence in general. Drawing from the regulatory frameworks in the comparator countries recommendations for the South African context is made. The recommendations take a multi-level approach, focusing on the rules of evidence and other procedural rules within the legal system and self-regulation of mental health professions.

KEYWORDS AND PHRASES

expert evidence – psycho-legal assessments – ethical code – mental health professional – Health Professions Council of South Africa – unprofessional conduct

ACKNOWLEDGMENTS

Throughout the writing of this thesis, I received a great deal of support and assistance without which I would not have been able to complete this journey. I wish to express my heartfelt gratitude to the following people:

- Professor Pieter Carstens, my supervisor and mentor, for his invaluable guidance, encouragement, patience, and support. Your wealth of knowledge is inspiring. I cannot possibly adequately express my gratitude for all that you have done throughout this journey. It was indeed an honour to complete my thesis under your supervision.
- Professor Rian Cloete, my Head of Department, for the encouragement and support to complete my thesis.
- My friends and family, for their love, unwavering support, and encouragement.
- My writing companions, Peter and Blossom, without whom the journey would have been lonely. Thank you for always sparking joy.
- Heimie Naudé, words will never do justice in expressing my heartfelt gratitude for your unwavering support, love, patience, and belief in me. Thank you for continually encouraging me and walking this path alongside me.

Soli Deo Gloria

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CHAPTER 1
INTRODUCTION

1.1 Introductory remarks

> The life of the law has not been logic: it has been experience. The felt necessities time, the prevalent moral and political theories, intuitions of public policy, avowed unconscious, even the prejudices which judges share with their fellowmen, have good deal more to do than the syllogism in determining the rules by which men be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.[1]

This study embodies the narrative of mental health professionals acting as expert witnesses, consulting both the historical origins and the existing law to produce a new product: a comprehensive regulatory framework for psycho-legal assessments. The narrative is filled with residual attitudes of the past, an uneasy alliance, a system of pride and the peculiarity of recurring problems.

The relationship between law and mental health sciences is often seen as a marriage of opposites[2] , leading to many clashes throughout history. Mental health professionals were not welcomed in courts but seen as unnecessary as the courts placed reliance on legal instinct and common sense. King, an English lawyer, commented that the marriage between psychology and law is simply a "misguided campaign by psychologists to colonise law".[3] But as Eigen states through their persistent efforts and the continued development and promotion of their fields, mental health professionals secured a place as expert witnesses.[4] The physician and the use of medical evidence paved the way for psychiatric and later psychological evidence to be introduced in court.[5] The origins of modern forensic medicine have been traced to 1507 in the penal

1 Holmes (1887) *The common law* 1.
2 Redmayne "Expert evidence and scientific disagreement" (1997) 30 *U.C. Davis Law Review* 1035.
3 King (1986) *Psychology in and out of court: A critical examination of legal psychology* 70.
4 Eigen in Clark and Crawford (eds.) (1994) *Legal medicine in history* 193.
5 Smith (1981) *Trial by medicine: Insanity and responsibility in Victorian trials* 6.

code drawn up by the Bishop of Bamberg which, "required evidence of medical men in all cases where their testimony could enlighten the judge or assist the investigation in such cases as personal injury, murder and pretended pregnancy".[6] The key is the assistance that the expert witness must provide to the court. Throughout history, the assistance to the court has been the golden thread that ties everything together.

The "infrequent visitor to the court" became somewhat of a daily occurrence[7] because of the immense pace that scientific and technical knowledge of natural, physical, social, and commercial worlds are growing.[8] As Judge Posner in the American case of *Austin v. American Association of Neurological Surgeons* observed: "judges are not experts in any field except law".[9] The need for expertise in mental health has also grown exponentially. An analysis of South African case law and legislation indicates that the areas or matters in which mental health professionals have conducted psycho-legal work make quite an impressive list. Mental health professionals have been involved in, amongst others, cases dealing with criminal capacity,[10] capacity to stand trial,[11] the dangerousness of an offender,[12] the sentencing of an offender,[13] mental health care and the appointment of curators,[14] divorce proceedings on the grounds of mental illness,[15] care and contact evaluations,[16] disability claims,[17] testamentary capacity,[18] and personal injury claims.[19]

Considering the various contexts in which the court has used mental health professionals' expertise, it appears that the need for and importance of their evidence is not in dispute. Empirical studies have indicated that psycho-legal assessments can be highly influential in the outcome of a case.[20] The importance of psycho-legal work

6 Rosner (ed.) (2003) *Principles of practice of forensic psychiatry* 18.
7 *Twine and another v Naidoo and another* (2018) 1 All SA 297 (GJ) at par. 18.
8 *Ibid*.
9 *Austin v. American Association of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001) at 972.
10 See 3.6.1.
11 See 3.6.1.
12 See 3.6.2.
13 See 3.6.2.
14 See 3.6.5.
15 See 3.6.6.
16 See 3.6.6.
17 See 3.6.7.
18 See 3.6.8.
19 See 3.6.9.
20 Gutheil and Appelbaum (2000) *Clinical handbook of psychiatry and the law* 268.

is stressed by Cohen and Malcom who argue that it can influence the outcomes of matters and case law and as such expert opinions take on a "powerful ethical human rights dimension".[21] Davidson also attaches great significance to psychologists' expert reports by calling them an "immortal and influential document" that may "save or destroy a life".[22]

On numerous occasions, judges echoed the sentiment that expert evidence of mental health professionals plays a valuable role in assisting the courts and other triers of facts to ensure that justice is done.[23] Despite the value, various repeating problems or challenges had reared its head when mental health professionals acted as expert witnesses. As Appelbaum suggested, numerous problems can be divided into two categories, namely unethical behaviour and inadequate level of performance in evaluations and testimony.[24] From the Roman times until the twenty-first-century bias has been the *bête noire* of psycho-legal work.[25] Mental health experts have been scathingly described as "someone who wasn't there when it happened, but for a fee will gladly imagine what it must have been like".[26]

The damage caused by unethical or inaccurate expert testimony can devastate both the mental health professions and the legal system. The Constitution of the Republic of South Africa, 1996 provides that everyone has the right to a fair hearing or trial[27] , including being able to adduce and challenge evidence.[28] A fair trial should consist of objective, nonpartisan and unbiased expert evidence for justice to be rendered. Misleading evidence can violate an individual's right to a fair trial as it can lead to an

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21 Cohen and Malcom in Tredoux (ed.) (2005) *Psychology and law* 65.

22 Davidson as quoted in Genis (2008) *A content analysis of forensic psychological reports written for sentencing proceedings in criminal court cases in South Africa* (dissertation for MA Clinical Psychology, University of Pretoria) 128.

23 *Van den Berg v Le Roux* (2003) 3 All SA 599 (NC) at par. 29 and *Twine and another v Naidoo and another* at par. 19.

24 Appelbaum "Forensic psychiatry: The need for self-regulation" (1992) 20 *Bulletin of the American Academy of Psychiatry and Law* 153.

25 Gutheil *et al*. "'The wrong handle': Flawed fixes of medicolegal problems in psychiatry and law" (2005) 33 *The Journal of American Academy of Psychiatry and the Law* 433.

26 Sampson "The use and misuse of expert evidence in courts" (1993) 77 *Judicature* 76 as quoted in Hess in Hess and Weiner (eds.) (1999) *The handbook of forensic psychology* 553.

27 Section 34 and 35(3) of the Constitution of the Republic of South Africa, 1996.

28 Section 35(3)(i) of the Constitution of the Republic of South Africa, 1996.

incorrect decision impeding the rendering of justice.[29] Unethical or inaccurate expert testimony can also discredit the mental health professions with the courts and does a disservice to the professions.[30]

The problems experienced with mental health professionals acting as expert witnesses need to be addressed to benefit the legal system and the mental health professions. It will be argued that the recurring problems are mostly a result of the shortcomings in the regulation of psycho-legal work. Furthermore, it is submitted that to address the shortcomings, an investigation into the legal mechanisms and the regulation of the professional organisations must be done. Admissibility of psychological and psychiatric testimony has been described as the *raison d'être* of the psycho-legal assessments.[31] Therefore, it is crucial to examine the rules of evidence and other procedural rules to determine how expert evidence is regulated to prevent biased, misleading or unreliable evidence from entering the courtroom. As Judge Posner in *Austin* pointed out, much can escape judges in technical fields, and the courts need the help of professional organisations in screening experts.[32] Professional organisations also have a pivotal role in regulating psycho-legal work, and the study will, therefore, examine the self-regulation of the professions of psychology and psychiatry.

Therefore, the purpose of the study is to make recommendations to address the shortcomings of the current regulatory framework of psycho-legal assessments to ensure and strengthen the probative value of expert evidence of mental health experts.

1.2 Conceptualisation

Against the foregoing and before embarking on the study, it is imperative that key concepts used, and approaches taken in the study be adequately defined and explained.

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29 Appelbaum (1992) *Bulletin of the American Academy of Psychiatry and Law* 155; Smith "Mental health expert witnesses: Of science and crystal balls" (1989) 7 *Behavioral Sciences and the Law* 162 and Heilbrun *et al*. in Goldstein (ed.) (2007) *Forensic psychology: Emerging topics and expanding roles* 49.

30 Ogloff "Two steps forward and one step backward: The law and psychology movement(s) in the 20th century" (2000) 24 *Law and Human Behavior* 473.

31 Gudjonsson and Haward (1998) *Forensic psychology: A guide to practice* 180.

32 *Austin v. American Association of Neurological Surgeons* at 973.

1.2.1 Medico-legal or psycho-legal?

Medico-legal questions can be defined as legal questions informed by medical opinion.[33] *Medico-* originates from the Latin *medicus* referring to a physician or healer whereas legal originates from the Latin *legalis* meaning law, indicating that a medico-legal aspect relates to medicine and law.[34] Medico-legal was first used to describe the character of a wound.[35] Questions pertaining to mental illness or mental disorders, mental capacity, or any other aspects of the human mind are often referred to as medico-legal questions. Although it can be a medico-legal question, it is not considered to be the most apt terminology for the study given that not all experts of the human mind are physicians.[36]

The terminology psycho-legal is preferred by many South African experts in mental health.[37] Although psycho-legal can create the impression that it deals with the specific discipline psychology, the term is much more comprehensive. *Psycho-* is an ancient Greek word which means "of or relating to the mind or psyche" and when combined with legal, it indicates an aspect relating to both the law and the human mind or psyche.[38] The term psycho-legal will be used throughout the study when referring to aspects relating to both the law and the human mind.

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33 Allnut and Chaplow "General principles of forensic report writing" (2000) 34 *Australian and New Zealand Journal of Psychiatry* 985.

34 Oxford English Dictionary "Medico-,comb.form" (2020) available online at https://www-oed-com.uplib.idm.oclc.org/view/Entry/115722?result=2&rskey=QIfSMv& (last accessed on 2 April 2020).

35 The first use occurred in 1835. Oxford English Dictionary "Medico-,comb.form" (2020) available online.

36 Steyn submits that given the origin of medical broadly referring to healer all professionals involved in healing should be included in the definition of medical or medicine. Steyn (2005) *A critical assessment of the principles underlying the interactions of law, medicine and psychology: A holistic multidisciplinary management approach* (LLD thesis, University of South Africa) 47-48.

37 The terminology is used by Kaliski (ed.) (2006) *Psycholegal assessment in South Africa*; Roos *et al*. (2016) *An introduction to forensic psychology* and Louw and Allan "Ethical guidelines for psychologists who render psycholegal services" (1997) 22 *Journal for Juridical Science* 141.

38 Oxford English Dictionary "Pscyho-, comb. form" (2020) available online at https://www-oed-com.uplib.idm.oclc.org/view/Entry/153865?isAdvanced=false&result=3&rskey=jx4lwK& (last accessed on 2 April 2020).

1.2.2 Mental health care practitioners

Psycho-legal questions are usually addressed by practitioners working in mental health care. In South Africa, the Mental Health Care Act 17 of 2002[39] regulates mental health care. Section 1 of the Mental Health Care Act defines a mental health care practitioner as a:

> psychiatrist or registered medical practitioner or a nurse, occupational therapist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services.

The Mental Health Care Act should be read together with the Traditional Health Practitioners Act 22 of 2007, which provides that traditional health practitioners can also act as mental health care practitioners.[40] An analysis of South African case law and legislation, with a similar situation ensuing in the comparator countries, reveals that the legal system mostly calls upon psychiatrists and psychologists to answer psycho-legal questions.[41] Consequently, although mental health care practitioners are not limited to psychiatrists and psychologists, the study will focus on those two specific professions.

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39 The Mental Health Care Act 17 of 2002 commenced on 15 December 2002. The Mental Health Care Act repealed the Mental Health Act 18 of 1973 save for chapter 8 of Act 18 of 1973. Chapter 8 of Act 18 of 1973 was later repealed by the Mental Health Care Amendment Act 12 of 2014 which commenced with effect from 1 July 2016.

40 Section 1 of the Traditional Health Practitioners Act 22 of 2007 defines traditional health practice as:

> The performance of a function, activity, process or service based on a traditional philosophy that includes the utilisation of traditional medicine or traditional practice and which has as its object—the maintenance or restoration of physical or mental health or function; or the diagnosis, treatment or prevention of a physical or mental illness; or the rehabilitation of a person to enable that person to resume normal functioning within the family or community; or the physical or mental preparation of an individual for puberty, adulthood, pregnancy, childbirth and death but excludes the professional activities of a person practising any of the professions contemplated in the Pharmacy Act, 1974 (Act No. 53 of 1974), the Health Professions Act, 1974 (Act No. 56 of 1974), the Nursing Act, 1974 (Act No. 50 of 1974), the Allied Health Professions Act, 1982 (Act No. 63 of 1982), or the Dental Technicians Act, 1979 (Act No. 19 of 1979), and any other activity not based on traditional philosophy.

Section 1 commenced on 1 October 2018.

41 See 3.6.

1.2.3 Profession and mental health professionals

Psychiatry and psychology are both considered health professions in terms of the Health Professions Act 56 of 1974.[42] The Health Professions Act does not define profession but only refers to registrable professions in terms of the act.[43] However, the concept of a profession is a crucial aspect of understanding and developing a regulatory framework.

The Oxford English dictionary defines a profession as, "an occupation in which a professed knowledge of some subject, field, or science is applied; a vocation or career, especially one that involves prolonged training and a formal qualification".[44] The dictionary definition indicates a specialised field of knowledge, but more significance is given to learned professions. Freidson sees a profession as an occupation that has "assumed a dominant position in a division of labor"[45] and which grants it the exclusive autonomy to decide who can do the specialist work and further how it should be done.[46] Freidson describes this as the defining characteristic of a profession. Freidson argues that forming an association, providing specialised training and education, and using ethical codes are not characteristics of a profession, but rather the strategies used to gain control.[47]

Parsons argues that a profession's existence depends on "some institutional means of making sure that competence will be put to socially responsible uses".[48] A profession can, therefore, be said to profess trustworthiness in the members that practice it. As Carstens and Pearmain state professionalism is a "normative yardstick" and sets the boundaries to which the profession must conform.[49]

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42 Section 1 of the Health Professions Act 56 of 1974.

43 Section 1 defines health profession as "any profession for which a professional board has been established in terms of section 15 and includes any category or group of persons provided for by such a board;" and further defines a health practitioner as "any person, including a student, registered with the council in a profession registrable in terms of this Act".

44 Oxford English Dictionary "Profession, n" (2020) available online at https://www-oed-com.uplib.idm.oclc.org/view/Entry/152052?redirectedFrom=profession#eid (last accessed on 2 April 2020).

45 Freidson (1988) *Profession of medicine: A study of the sociology of applied knowledge* 15.

46 *Idem* 72.

47 *Ibid.*

48 Parsons as quoted in Louw "Regulating professional conduct: Part 1: Codes of ethics of national psychology associations in South Africa" (1997) 27 *South African Journal of Psychology* 183.

49 Carstens and Pearmain (2007) *Foundational principles of South African medical law* 607.

Pellegrino's definition perfectly sums up the abovementioned aspects by defining a profession as: [50]

> any group sharing a special body of knowledge, standards of education and practice, professional associations, and an ethical framework based in a social contract that permits a high degree of self-regulation.

Psychiatry and psychology are both independent professions but share a common ground, mental health. When referring to both these professions, the term mental health professionals will be used throughout the study. The term mental health professional as a collective term is preferred over the term mental health care practitioner as referred to in the Mental Health Act.[51] The preference is two-fold, firstly it indicates and emphasises the profession and the implied normative yardstick that accompanies a profession. Secondly, the Mental Health Care Act defines a mental health care user as a person that will receive care, treatment or rehabilitation.[52] By implication, the mental health care practitioner provides the care, treatment or rehabilitation to the user,[53] indicating a specific type of relationship where the practitioner is seen in a treating role. As will be discussed below,[54] in the context of psycho-legal assessments, the role is not one of treatment. Accordingly, it is preferable to collectively refer to mental health professionals to distinguish it from the terminology in the Mental Health Care Act.

1.2.4 Forensic sciences

The term forensic is often used in the alternative to psycho-legal, for example, psycho-legal assessments done by mental health professionals have been referred to as forensic assessments or evaluations.[55] Forensic, however, as Kaliski explains, is a

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50 Pellegrino "Medical professionalism: Can it, should it survive" (2000) 13 *The Journal of the American Board of Family Medicine* 147.

51 Mental Health Care Act 17 of 2002.

52 Section 1 of the Mental Health Care Act 17 of 2002.

53 The Mental Health Care Act 17 of 2002 uses the terminology of user instead of patient and mental health care practitioner instead of medical practitioner or the specific profession such as psychiatrist or psychologist. The purpose of the change is to indicate a more egalitarian approach to care. Szabo and Kaliski "Mental health and the law: A South African perspective" (2017) 14 *BJPsych International* 69.

54 See 3.7.2.1.

55 Kaliski (ed.) (2006) 2.

more general term compared to psycho-legal, which is specific.[56] Forensic originates from the Latin *forensis* referring to the Roman forum or courts.[57] Forensic, therefore, indicates that it pertains to or is used in courts or legal proceedings.[58]

Psycho-legal assessments are but one small part of the broad term forensic science, including forensic medicine and other specialities in science, such as forensic psychology. Forensic science can be defined as scientific knowledge and procedures that are applied or used in court or legal proceedings.[59] In turn, forensic medicine is defined in the Oxford English Dictionary as "medicine in its relations to law". Carstens and Pearmain define forensic medicine as: [60]

> an important medical mechanism by which qualified experts offered professional assistance to their legal colleagues for the solution of medical or scientific dilemmas involving judicial proceedings.

Forensic medicine, also known as legal medicine or medical jurisprudence, can be divided into three broad areas: post-mortem forensic pathology, clinical forensic pathology and forensic psychiatry.[61] Taking the above into consideration forensic psychiatry and forensic psychology, forming part of the broader term forensic sciences, can simply be defined as the use of psychology and psychiatry respectively in court or legal proceedings. In contrast, the precise definitions of forensic psychiatry and forensic psychology have evoked various debates and needs further clarification and delineation for the purposes of the study.

1.2.5 Forensic psychiatry

The Mental Health Care Act defines a psychiatrist as "a person registered as such in terms of the Health Professions Act" and as a "mental health care practitioner".[62] As

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56 *Idem* 2.
57 Oxford English Dictionary "Forensic, adj. and n." (2020) available online at https://www-oed-com.uplib.idm.oclc.org/view/Entry/73107?result=1&rskey=uInHlt& (last accessed on 2 April 2020).
58 *Ibid*.
59 Wecht "The history of legal medicine" (2005) 33 *The Journal of the American Academy of Psychiatry and the Law* 245.
60 Carstens and Pearmain (2007) 3.
61 Swanepoel (2009) *Law, psychiatry and psychology: A selection of constitutional, medico-legal and liability issues* (LLD thesis, University of South Africa) 10.
62 Section 1 of Mental Health Care Act 17 of 2002.

Carstens and Pearmain indicate, the definition in the Mental Health Care Act is very vague and offers no insights into the profession.[63] To this end, Carstens and Pearmain refer to the description of Kaliski who describes the role of a psychiatrist as: [64]

> primarily orientated to assess and treat mental disorders (as described in the DSM-IV), and in the first instance should be consulted to exclude the presence of these disorders, or comment on treatment strategies. Often the psychiatrist will be able to comment on so-called normal behaviour in various contexts, especially as it pertains to the disorders under discussion. Generally psychiatrists use the same methods of examination as other medical specialists (including blood tests, brain scans, cerebro-spinal fluid tests, EEGs etc and prefer to use biological treatments (together with psychotherapy). Many psychiatrists have additional expertise in the various psychotherapies (such as psychoanalysis, cognitive behavioural therapy etc), or in sub-specialities such as child psychiatry. It is always crucial to ascertain each psychiatrist's actual area of expertise.

As indicated by Kaliski, the psychiatrist's exact role will be influenced by the area of expertise or practice of the specific psychiatrist. Within the speciality of psychiatry, various subspecialties have developed including child-, geriatric-, neuro- and forensic psychiatry.[65] The subspecialty of forensic psychiatry has been officially recognised in all three comparator countries.

Forensic psychiatry is described as the area of interaction between psychiatry and law or simply referred to as psychiatry and law.[66] The American Academy of Psychiatry and Law (AAPL) 's original bylaws referred to psychiatry and law. They defined it broadly to "include all aspects of psychiatry which remain in close and significant contact with the law, legislation, or jurisprudence".[67] The term psychiatry and law was later substituted with forensic psychiatry.[68] Dr Seymour Pollack, psychiatrist and third president of the AAPL,[69] distinguished "psychiatry and law" from the concept "forensic

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63 Carstens and Pearmain (2007) 745.

64 Kaliski (ed.) (2006) 377 as quoted in Carstens and Pearmain (2007) 745.

65 The specific subspecialties have been recognised in South Africa in terms of section 35 of the Health Professions Act 56 of 1974 in the Regulations Relating to the Specialities and Subspecialties in Medicine and Dentistry (GNR 590) in the Government Gazette No.22420 of 29 June 2001 (as amended).

66 Dada and McQuoid-Masod (eds.) (2001) *Introduction to medico-legal practice* 103 and Srinivasaraghavan "International work in forensic psychiatry" (2007) 20 *Current Opinion in Psychiatry* 516.

67 Bloom "Forensic psychiatry, statutory law, and administrative rules" (2011) 39 *The Journal of the American Academy of Psychiatry and the Law* 418.

68 *Ibid*.

69 See Tuchler "In memoriam: Seymor Pollack, MA, MD, 1916-1982" (1985) 13(2) *Bulletin of the American Academy of Psychiatry and Law* 185 for more on the life and work of Seymour Pollack.

psychiatry" and described psychiatry and law as a broader term that entailed the body of law any general psychiatrist should be expected to know.[70]

Dr Howard Zonana, who was responsible for creating the Yale Law and Psychiatric Division, states that forensic psychiatry, considering the training programmes offered, essentially addresses three key areas.[71] In the first place, forensic psychiatrists can act as consultants in resolving psycho-legal questions such as competence to stand trial.[72] Secondly, Zonana states that forensic psychiatry also deals with a specific category of patients who are defined as forensic because of the close ties to the criminal justice system, such as prisoners.[73] Lastly, forensic psychiatrists can also assist in issue relating to the legal regulation of the psychiatric practice.[74] The AAPL defines forensic psychiatry as: [75]

> subspecialty of psychiatry in which scientific and clinical expertise is applied in legal contexts involving civil, criminal, correctional, regulatory or legislative matters, and in specialised clinical consultations in areas such as risk assessment or employment.

Reviewing the definition of the AAPL, the three key areas that Zonana describes can be identified, including the role of a forensic psychiatrist in correctional settings.

Pollack gives a narrower definition of forensic psychiatry and defines it as "limited to the application of psychiatry to evaluations for legal purposes".[76] According to Pollack, the evaluation's main objective is not therapeutic but is concerned with the ends of the legal system, justice.[77] Pollack's definition excludes correctional care as part of forensic psychiatry and, therefore, excludes any form of a treatment relationship.

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70 Weinstock *et al*. in Rosner (ed.) (2017) *Principles of practice of forensic psychiatry* 7 and Bloom (2011) *The Journal of the American Academy of Psychiatry and the Law* 418.
71 Zonana *et al.* "Training and credentialing in forensic psychiatry" (1990) 8 *Behavioral Sciences and Law* 236.
72 *Ibid*.
73 *Ibid*.
74 *Ibid*.
75 American Academy of Psychiatry and Law "Ethics guidelines for the practice of forensic psychiatry" (2005) available online at https://www.aapl.org/ethics-guidelines (last accessed 28 May 2020).
76 Weinstock *et al*. in Rosner (ed.) (2017) 7.
77 *Ibid*.

In England, forensic psychiatry is mostly concerned with correctional care.[78] Historically forensic psychiatry was viewed in England as the psychiatry of the mentally abnormal offenders.[79] Forensic psychiatry in England began as care and treatment of prisoners with mental health needs.[80] The Faculty of Forensic Psychiatry of the Royal College of Psychiatrists defines forensic psychiatry as: [81]

> a specialty of medicine, based on detailed knowledge of relevant law, criminal and civil justice systems, mental health systems and the relationship between mental disorder, antisocial behaviour and offending.

The Royal College of Psychiatrists further describes the work of a forensic psychiatrist in the curriculum for specialist training to entail assessment, management and treatment of offenders, prisoners, and people associated with dangerous behaviour.[82] According to the Royal College of Psychiatrists, forensic psychiatry covers three main areas.[83] Firstly, forensic psychiatry includes the assessment and treatment of offenders suffering from mental disorders.[84] Secondly, forensic psychiatry investigates the relationship between mental disorders and criminal behaviour and lastly forensic psychiatrists work with criminal justice agencies to support patients and the protection of the public.[85]

In line with the Royal College of Psychiatrists, Gunn and Taylor define forensic psychiatry as the "prevention, amelioration and treatment of victimisation which is associated with mental disease".[86] The focus of forensic psychiatry in England can be

78 Arboleda-Flo´rez "The ethics of forensic psychiatry" (2006) 19 *Current Opinion in Psychiatry* 544.
79 Adshead and Sarkar "Justice and welfare: Two ethical paradigms in forensic psychiatry" (2005) 39 *Australian and New Zealand Journal of Psychiatry* 1013.
80 *Ibid.*
81 The Royal College of Psychiatrists "Forensic psychiatry" (2020) available online at https://www.rcpsych.ac.uk/members/your-faculties/forensic-psychiatry (last accessed on 2 April 2020).
82 The Royal College of Psychiatrists "Forensic psychiatry curriculum" (2016) online at https://www.gmc-uk.org/education/standards-guidance-and-curricula/curricula/forensic-psychiatry-curriculum (last accessed on 2 April 2020).
83 The Royal College of Psychiatrists "About us" (2020) available online at https://www.rcpsych.ac.uk/members/your-faculties/forensic-psychiatry/about-us (last accessed on 2 April 2020).
84 *Ibid.*
85 *Ibid.*
86 Gunn and Taylor in Gunn and Taylor (eds.) (2014) *Forensic psychiatry: Clinical, legal and ethical issues* 1.

described as much narrower than in America, with the focus mostly on the criminal justice system and the mental health care needs of offenders and prisoners.

In South Africa, Steyn like Pollack argues that one cannot refer to law applied to psychiatry as this implies that it is a branch of law a "psychiatric jurisprudence".[87] Steyn submits that psychiatry's specialised application in a legal context is a rather a branch or subspecialty of psychiatry, namely forensic psychiatry.[88] Zabow, Van Rensburg and Vorster define the subspecialty as the area of interaction between psychiatry and the law.[89] According to their definition, forensic psychiatry entails more than evaluations for courts and includes the psychiatric management of patients[90] , including mentally ill offenders and prisoners.[91] Zabow also indicates that forensic psychiatrists' role is "documenting, obtaining, preserving and interpreting evidence in evaluations".[92]

On the other hand, Pienaar defines the subspecialty only as the management of offenders or prisoners who suffer from mental disorders and the legal aspects surrounding mental disorders.[93] Although the subspecialty of forensic psychiatry is recognised by the Health Professions Council of South Africa, no specific definition is provided by the relevant professional board. Examining the accredited post-specialisation certificate in forensic psychiatry provided by the College of Psychiatrists of South Africa, forensic psychiatry is described as "providing forensic psychiatric assessments in both criminal and civil juridical contexts and treating and rehabilitating mentally disordered offenders".[94]

Considering the various definitions proffered by academics and professional associations, forensic psychiatry is viewed as an exceptionally large subspecialty. Forensic psychiatry includes both psycho-legal assessments and correctional care in

87 Steyn (2002) *The law of malpractice liability in clinical psychiatry: Methodology, foundations and applications* (LLM dissertation, University of Pretoria) 45.
88 *Ibid*.
89 Zabow *et al*. in Robertson *et al*. (eds.) (2001) *Textbook of psychiatry for southern Africa* 383.
90 *Idem* 384-387.
91 *Idem* 390-393.
92 Zabow "Modern psychiatry – a change in ethics?" (2004) 7 *South African Psychiatry Review* 25.
93 Emsley and Pienaar (2002) *Handboek vir psigiatrie* 408; 412.
94 The Colleges of Medicine of South Africa "The College of Psychiatrists of South Africa regulations for admission to the examination for the post-specialisation subspecialty certificate in forensic psychiatry" (2018) available online at https://www.cmsa.co.za/view_exam.aspx?QualificationID=80 (last accessed 2 April 2020).

both the United States of America and South Africa. In England, forensic psychiatry deals mainly with treatment and rehabilitation of mentally ill offenders and prisoners.

1.2.6 Forensic psychology

The Mental Health Care Act defines psychologists as a "person registered as such in terms of the Health Professions Act".[95] Per the Mental Health Care Act, a psychologist is a mental health care practitioner who provides care, treatment and rehabilitation to mental health care users. The definition provided by the Mental Health Care Act, is, as in the case of psychiatry, vague but unlike psychiatry, the scope of the profession is provided for in the regulations of the Health Professions Act.[96] Highlighting some of the aspects in the regulations defining the scope, a psychologist can be described as having studied multi-dimensional facets of the mind and human behaviour to provide several services including evaluations, psychotherapy or counselling using various techniques such as psychological tests, hypnotherapy or psychotherapeutic methods.[97]

The above description is wide as various categories or specialities in psychology are recognised, which plays a role in the service provided and the psychologist's technique.[98] Forensic psychology has officially been recognised as a speciality in the United States of America and England. In South Africa, the proposal has been made to include the category, but it has not been officially recognised to date.[99] Despite the

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95 Section 1 of Mental Health Care Act 17 of 2002.

96 Regulations Defining the Scope of the Profession of Psychology (GNR 993) in the Government Gazette No. 31433 of 16 September 2008. Notice Not to Proceed with the Proposed Regulations Defining the Scope of the Profession of Psychology (GN 1169) in the Government Gazette No.42702 of 13 September 2019 determines that the Regulations under GNR 933 remains in force. The amended regulations published, Regulations Defining the Scope of the Profession of Psychology (GNR 704) in the Government Gazette No. 34581 of 2 September 2011 have been declared invalid.

97 Regulations Defining the Scope of the Profession of Psychology (GNR 993) in the Government Gazette No. 31433 of 16 September 2008.

98 In South Africa in terms of the Regulations Relating to the Qualifications which Entitle Psychologists to Registration (GNR 554) in the Government Gazette No.22390 of 22 June 2001 (as amended), specifically amended the Regulations Relating to the Qualifications which Entitles Psychologists to Registration: Amendment (GNR1490) in Government Gazette 42843 of 15 November 2019, there are six categories: industrial psychology, clinical psychology, research psychology, educational psychology, counselling psychology and neuropsychology.

99 The Regulations Defining the Scope of the Profession of Psychology (GNR 704) in the Government Gazette No. 34581 of 2 September 2011 included forensic psychology as a category. The regulations were declared invalid by the Western Cape High Court and Notice Not to Proceed with the Proposed Regulations Defining

formal recognition of the speciality in some jurisdictions, no uniform definition of forensic psychology exists.[100]

According to Brigham forensic psychology has been defined by using two general definitions: a broad definition that equates "forensic psychology" with "psychology and law" and a narrow definition which limits it to specific clinical or practical areas.[101] The definition of forensic psychology in the *Specialty Guidelines for Forensic Psychology*[102] of the American Psychological Association (APA) is considered a broad definition. The APA defines forensic psychology as a: [103]

> professional practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialised knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters.

The APA's definition indicates that the expertise provided is provided by all categories of psychologists, including clinical psychologists, and in a wide range of contexts, which includes psycho-legal assessments and as part of correctional care.

Heilbrun also defines forensic psychology in broader terms and describes it as the practice of psychologists in specific fields of professional psychology to act as experts by providing professional psychological expertise to the legal system.[104] Bartol and Bartol offer the following definition of forensic psychology: [105]

> We view forensic psychology broadly, as both (1) the research endeavor that examines aspects of human behavior directly related to the legal process… and (2) the professional practice of psychology within, or in consultation with, al legal system that embraces both civil and criminal law.

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the Scope of the Profession of Psychology (GN 1169) in the Government Gazette No.42702 of 13 September 2019 the previous regulations under GNR 933 remains in force. For a further discussion on the matter see 4.3.2.1.

100 Otto and Ogloff in Weiner and Otto (eds.) (2014) *The handbook of forensic psychology* 35.

101 Brigham "What is forensic psychology, anyway?" (1999) 23 *Law and Human Behavior* 279.

102 See 6.5.4.1.

103 American Psychological Association "Speciality guidelines for forensic psychology" (2013) 68 *American Psychologist* 7.

104 Heilbrun as quoted by Goldstein in Goldstein (ed.) (2007) 5.

105 Bartol and Bartol (2008) *Introduction to forensic psychology* 8. See also Bartol and Bartol in Weiner and Otto (eds.) (2014) 4.

Bartol and Bartol's definition emphasises two aspects: the production of forensic knowledge and the application to the legal system.[106] Brigham argues that when considering ethical guidelines and professional responsibility a broad definition, like the definitions of the APA, Bartol and Bartol as well as Heilbrun, fit best since the same ethical and professional standards must apply to everyone.[107] Brigham asserts that a second narrow definition can be used to distinguish between two varieties of forensic psychologists, namely clinical and non-clinical.[108]

In England, Gudjonsson and Haward define forensic psychology as "that branch of applied psychology which is concerned with the collection, examination and presentation of evidence for judicial purposes".[109] According to Gudjonsson, the term forensic psychology is used more broadly by American writers compared to English.[110] The narrower approach followed in England is apparent when comparing the American and British professional associations' definitions.

The Division of Forensic Psychology of the British Psychological Society (BPS) defines forensic psychology as a branch of applied psychology in the legal system with the purpose to "assess, formulate and intervene in those engaging in harmful behaviours".[111] Therefore, the focus is more on the psychology of crime and correctional psychology than on providing psycho-legal assessments. The programmes offered in forensic psychology in the United Kingdom all follow a curriculum in line with the BPS's narrower definition.[112]

In South Africa, Scholtz defines forensic psychology broadly as the "application of psychological knowledge to the legal field"[113] and indicates that the APA provided the

106 Bartol and Bartol in Weiner and Otto (eds.) (2014) 4.
107 Brigham (1999) *Law and Human Behavior* 295.
108 *Ibid*.
109 Gudjonsson and Haward (1998) 1.
110 Gudjonsson and Haward (1998) 1 and Gudjonsson in Bull and Carson (eds.) (1995) *Handbook of psychology in legal contexts* 55.
111 The British Psychological Society "About the division of forensic psychology" (2020) *The British Psychological Society* available online at https://www.bps.org.uk/member-microsites/division-forensic-psychology (last accessed on 28 March 2020).
112 See 5.5.2.2.
113 Scholtz in Roos *et al*. (2016) 1.

most comprehensive and informative definition. Allan and Louw's work regarding forensic psychology in South Africa demonstrates that they also support the broader American definition, which includes involvement in psycho-legal assessments and services to specific groups of people such as offenders.[114]

Although forensic psychology is not recognised by the Professional Board for Psychology as an official professional category in South Africa, the Board in their *Report of the working group on promulgation of regulations* suggests that forensic psychology be defined as follows: [115]

> Forensic Psychology is a specialist category within professional psychology that provides psychological expertise within the legal and criminal justice systems. Forensic psychologists assess the psychological functioning of individuals to assist with clinical-legal decisions in civil and criminal matters, and intervene to rehabilitate offenders and to prevent recidivism. They work with the perpetrators and victims of crime as well as with law enforcement agencies, correctional services, legal practitioners and the courts.

The suggested definition of the Professional Board for Psychology is similar to that of the APA, but the mention of clinical-legal decisions appears to narrow the definition to a clinical practice area excluding solely research-based work by psychologists. In general, the literature reveals that both the United States of America and South Africa view forensic psychologists' scope as broad and varied.

All the jurisdictions' descriptions and definitions concur that forensic psychology deals with the interface between law and psychology. An important conclusion that Swanepoel draws, which is evident from the literature review above, is that forensic psychologists are not defined by their particular set of skills but rather by the context within which they practice and apply their knowledge.[116]

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114 See in general Allan *et al.* "Law and psychology in South Africa: Development and recommendations (3)" (1995) 14 *Medicine and Law* 685; Allan and Louw "Lawyers' perception of psychologists who do forensic work" (2001) 31(2) *South African Journal of Psychology* 12; Louw and Allan "A profile of forensic psychologists in South Africa" (1998) 28 *South African Journal of Psychology* 234 and Allan "Ethics in correctional and forensic psychology: Getting the balance right" (2012) 48 *Australian Psychologist* 47.

115 Professional Board for Psychology (2018) *Report of the working group on promulgation of regulations* 23.

116 Swanepoel "Law, psychiatry and psychology: A selection of medico-legal and clinical issues" (2010) 73 *Tydskrif van Hedendaagse Romeins-Hollandse Reg* 185.

The focus of this study is on the application of psychiatry and psychology to legal issues for legal (not therapeutic) ends. This is distinct from other functions that forensic psychiatrists and forensic psychologists can fulfil, as mentioned above. Although essential to take note of the specialities, the purpose of this study is not to develop a regulatory framework for the subspecialty of forensic psychiatry or the speciality forensic psychology.

1.2.7 Differences between forensic psychiatry and forensic psychology

Considering the definitions of forensic psychiatry and forensic psychology, the disciplines appear quite similar. For example, both involve psycho-legal work such as evaluations for courts, and both include treating patients at correctional facilities. There are, however, important differences between the two disciplines which Grisso has outlined.[117]

The first difference lies in the training and expertise of the respective disciplines. To understand the difference between forensic psychiatry and forensic psychology, one must first understand the development of psychiatry and psychology. Psychiatry developed as a speciality of medicine and medicine is concerned with diagnosing, treating, and preventing diseases.[118] Psychology developed from philosophy with the primary purpose of understanding the human mind and behaviour.[119] As Grisso points out, a sentiment shared by Gudjonsson and Haward,[120] without mental illness or disorders psychology would still exist, but the same cannot necessarily be said of psychiatry.[121]

Given the developmental background, forensic psychiatrists' expertise lies in biological evaluations and treatments.[122] Forensic psychiatrists, as a result, are usually favoured in diagnosing severe mental disorders.[123] In comparison, forensic

117 Grisso "The differences between forensic psychiatry and forensic psychology" (1993) 21 *Bulletin of the American Academy of Psychiatry and the Law* 133.
118 *Idem* 138.
119 *Ibid*.
120 Gudjonsson and Haward (1998) 76.
121 Grisso (1993) *Bulletin of the American Academy of Psychiatry and the Law* 138.
122 *Ibid*.
123 *Ibid*.

psychologists are better able to describe the person and behavioural aspects, for example, the context of their interpersonal life concerning a mental disorder.[124]

Regarding training, forensic psychiatrists can also address the use of psychotropic medication and the effect medication can have on a person's body chemistry and physiology and impact a person's behaviour.[125] The medical training also allows the forensic psychiatrist to read medical test results such as blood reports and EEG scans.[126] In contrast, forensic psychologists have expertise in topics such as psychological testing and research design that psychiatrists do not usually study.[127]

A second difference, as indicated by Grisso, lies in the methods uses to construct forensic cases.[128] Forensic psychiatrists generally rely more on the methods applied in a clinical practice, namely interviews, observations and the review of records to reach a diagnostic and forensic conclusion.[129] In contrast, forensic psychologists rely on interviews, obtain information using standardised, quantitative assessment data, and place a higher value on knowledge derived from the cumulative results.[130]

Grisso lastly identifies a difference in the mentoring system of the two specialities.[131] According to Grisso, the training programmes for a forensic speciality in psychiatry the United States of America are more developed than forensic psychology. The differences between forensic psychiatry and forensic psychology indicate that both professions should be involved in psycho-legal assessments. The two professions complement each other, and in isolation, the value of their work to the legal system could be limited.[132]

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124 *Ibid*.
125 Dattilio "Toward a good fit between forensic psychiatrist and psychologists" (2011) 39 *Journal of Psychiatry and Law* 692.
126 *Ibid*.
127 *Ibid*.
128 Grisso (1993) *Bulletin of the American Academy of Psychiatry and the Law* 139.
129 *Ibid*.
130 *Idem* 140.
131 *Ibid*.
132 *Idem* 138.

1.2.8 Psycho-legal assessments

Psycho-legal assessments are evaluations done by mental health professionals to address a psycho-legal question and form an expert opinion that will assist the legal process.[133] Kaliski states that all psycho-legal assessments have the following three components in common:

1) the determination of a diagnosis;
2) an appreciation of the requirements as set out in the legal brief; and
3) a causal link between the diagnosis and the legal question posed.[134]

Kaliski[135] advises that the starting point of the psycho-legal assessment should be a recognised clinical diagnosis which will mostly be based on the criteria listed in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM 5)[136] or the *International Classification of Diseases* (ICD-11).[137] Although a diagnosis can play an integral part in a psycho-legal assessment, not all psycho-legal questions posed require a diagnosis. For example, during a divorce, if the parents of minor children cannot agree on a parenting plan, the court can order that a mental health professional advise the court on what will be in the children's best interests. This does not require a diagnosis but rather the expertise in the emotional development of children. It is argued that the determination of a diagnosis should not form part of the three key components.[138]

To grasp what is meant by psycho-legal assessments, it is essential to understand the fundamental differences between psycho-legal assessment and assessments done in

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133 The term psycho-legal assessment is commonly used in South African literature but is less common in the United States of America and England. Gutheil and Appelbaum refer to forensic evaluations whereas Gottlieb and Coleman use the term forensic mental health assessments. See Gutheil and Appelbaum (2000) 286 and Gottlieb and Coleman in Knapp (ed.) (2012) *APA handbook of ethics in psychology, Volume 2: Practice, teaching and research* 95.

134 Kaliski in Kaliski (ed.) (2006) 3.

135 *Idem* 4.

136 The *Diagnostic and Statistical Manual of Mental Disorders* was developed by the American Psychiatric Association and is the system most commonly used in South Africa. See Robertson *et al.* (eds.) (2001) 7-12.

137 The *International Classification of Diseases* is the official classification system used in Europe, developed by the World Health Organisation. See Robertson *et al.* (eds.) (2001) 7-12.

138 Allan (see Allan (2011) *Law and ethics in psychology: An international perspective* 92) defines a psycho-legal assessment as the assessment by a mental health professional of the mental health functioning of a person for the legal system with the purpose of reporting their findings. The use of the "mental health functioning" can be controversial and it is therefore submitted that reference should rather be made to the evaluation for purposes of a psycho-legal question.

a clinical situation.[139] The differences will be dealt with in-depth in chapter 3, but it is crucial to mention that the scope of the two assessments differs for purposes of the definitions used.[140] The scope of a psycho-legal assessment is determined by the specific legal question, as stated in a referral letter or court order.[141] The scope is narrowly defined in contrast to the broad issues such as diagnosis, personality functioning, and treatment that form part of a clinical assessment scope.[142] Within the clinical setting, the purpose is to treat a patient, whereas, in the forensic setting, the purpose is to assist the courts or legal system. As such, the person undergoing a psycho-legal assessment can no longer properly be termed a patient. Gutheil and Appelbaum[143] suggest that the term examinee or evaluee should be used to describe the person's role. The term evaluee will, therefore, be used throughout the study.

1.2.9 Ethics

Ethics, code of ethics, guidelines, principles, standards and rules are all terms that have been mentioned as part of the essential developmental history of professional organisations[144] and a key aspect of a profession. In fact, ethics is seen as the very essence of professional practice.[145] Ethics is derived from the Greek word *ethos* (character) and is a generic term dealing with the different ways in which morality can be examined and interpreted.[146] Morality, in turn, refers to the norms about what is right and wrong in respect of a person's behaviour and is comprised of general moral norms and moral character traits or virtues.[147] Morality can further be divided into common morality (universal morality) and non-universal moralities such as professional moralities.[148]

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139 Clinical assessments are also referred to as therapeutic assessments. Melton *et al.* (2018) *Psychological evaluations for the court: A handbook for mental health professionals and lawyers* 42-43.

140 See 3.7.2.1.

141 Melton *et al.* (2018) 44. See also Allnut and Chaplow (2000) *Australian and New Zealand Journal of Psychiatry* 983.

142 Melton *et al.* (2018) 44-46.

143 Gutheil and Appelbaum (2000) 286.

144 See 2.6.

145 Allan and Grisso "Ethical principles and the communication of forensic mental health assessments" (2014) 24 *Ethics and Behavior* 473.

146 Beauchamp and Childress (2019) *Principles of biomedical ethics* 1; Pienaar in Baumann (ed.) (2008) *Primary health care psychiatry: A practical guide for southern Africa* 536 and Gunn and Taylor in Gunn and Taylor (eds.) (2014) 658.

147 Beauchamp and Childress (2019) 3; Pettifor "Professional ethics across national boundaries" (2004) 9 *European Psychologist* 265 and Allan (2011) 17.

148 Beauchamp and Childress (2019) 3-10.

In mental health professions such as psychiatry and psychology, professional morality specifies the professions' general moral norms, including principles, rules, obligations, and rights.[149] Professional morality was formally codified through ethical codes, ethical guidelines, or standards of practice as the professions developed.[150] However, the ethical codes and guidelines can never be considered exhaustive as it would be impossible to capture the whole body of professional ethics in a code or guidelines.[151] The primary purpose of an ethical code is to guide the member in making consistent ethical choices and not to replace the higher moral reasoning of a person.[152] Both ethical codes (or standards) and ethical guidelines are codifications of the professional morality, but a distinction is drawn between the two as guidelines are considered merely advisory consisting of recommendations.[153]

Mental health professionals, such as psychologists and psychiatrists, also receive additional moral direction in the form of public policies. According to Beauchamp and Childress public policy refers to a "set of normative, enforceable guidelines adopted by an official public body, such as an agency of government or a legislature, to govern a particular area of conduct".[154] Professional morality can play a vital role in this regard as it can provide a normative structure for the evaluation and formulation of the public policy.[155] Public bodies often turn to professional codes of ethics when formulating public policy.

Beauchamp and Childress argue that professional codes of ethics often serve more to protect the particular profession and its members than to address broader issues

149 *Idem* 7;31.
150 *Idem* 6-7.
151 Allan (2012) *Australian Psychologist* 50.
152 Burke *et al*. "Moving beyond statutory ethical codes: Practitioner ethics as a contextual, character-based enterprise" (2007) 37 *South African Journal of Psychology* 111 and Thomson "Creating ethical guidelines for forensic psychology" (2013) 48 *Australian Psychologist* 29.
153 Nagy in Knapp (ed.) (2012) 158; Thomson (2013) *Australian Psychologist* 29 and Walsh "Introduction to ethics in psychology: Historical and philosophical grounding" (2015) 35 *Journal of Theoretical and Philosophical Psychology* 70. Martindale and Gould state that is inadvisable to emphasise the difference between ethical code or standards and ethical guidelines. Professionals often adjust their behaviour according to guidelines, despite the guidelines only being considered as recommendations. Over time the guidelines eventually define the standard of care. Martindale and Gould "The forensic model: Ethics and scientific methodology applied to custody evaluations" (2004) 1 *Journal of Child Custody* 3.
154 Beauchamp and Childress (2019) 9.
155 *Idem* 10.

such as the impact on society.[156] The problem with the development of ethics codes is that the focus is on the particular profession's traditions, which often lacks an appeal to more general ethical standards or a moral authority beyond the traditions.[157] Therefore, creating an ethical code for a profession must begin with identifying the common moral norms and moral virtues that society desires the particular profession must promote.[158] As Bersoff and Koeppl state, an ethics code should be a "grand statement of overarching principles that earns the respect of the public by reflecting the profession's moral integrity".[159]

Ethical codes can be built on different ethical frameworks or moral theories.[160] Some of the most influential moral theories include utilitarianism,[161] Kantianism,[162] rights theory[163] and virtue ethics.[164] Within the field of bioethics, Beauchamp and Childress's theory of a framework of principles (the four principles-based approach) has been highly influential.[165] The four principles-based approach has provided a framework for introducing ethical thinking to a whole range of health care professionals and influenced the development of many ethical codes of health organisations (including

156 *Idem* 8.

157 *Ibid*.

158 Appelbaum "A theory of ethics for forensic psychiatry" (1997) 25 *Journal of the American Academy of Psychiatry and the Law* 236. Examples of common binding moral norms found in common morality include, amongst others, do not kill, do not cause pain or suffering to others, prevent evil or harm from occurring, tell the truth and obey just laws. Moral character traits include, amongst others, nonmalevolence, honesty, integrity, conscientiousness, trustworthiness, fidelity, gratitude, and truthfulness. See in this regard Beauchamp and Childress (2019) 3-4.

159 Bersoff and Koeppl "The relation between ethical codes and moral principles" (1993) 3 *Ethics and Behavior* 348.

160 *Idem* 346.

161 Also known as consequentialism. Utilitarianism holds that the result of an action or behaviour dictates its morality. See in general Beauchamp and Childress (2019) 388-394; Bersoff and Koeppl (1993) *Ethics and Behavior* 347; Walsh (2015) *Journal of Theoretical and Philosophical Psychology* 73 and Lolas "Ethics in psychiatry: A framework" (2006) 5(3) *World Psychiatry* 185.

162 Also known as deontology. The Kantian theory holds that the morality of behaviour is directly related to its intrinsic or inherent nature. The consequence of the action is, therefore, irrelevant. See in general Beauchamp and Childress (2019) 394-400; Bersoff and Koeppl (1993) *Ethics and Behavior* 346; Walsh (2015) *Journal of Theoretical and Philosophical Psychology* 73 and Lolas (2006) *World Psychiatry* 185.

163 The rights theory maintains the humans are holders of certain rights and the rights determine the action that can or cannot be taken. See in general Beauchamp and Childress (2019) 400-409.

164 Virtue ethics acting morally is seen as the natural consequences of a virtuous character. See in general Beauchamp and Childress (2019) 409-416; Fowers and Davidov "The virtue of multiculturalism: Personal transformation, character, and openness to the other" (2006) 61 *American Psychologist* 582 and Walsh (2015) *Journal of Theoretical and Philosophical Psychology* 73.

165 Beauchamp and Childress have clearly indicated that although often referred to as an ethical theory they do not claim to have developed a comprehensive ethical theory. See Beauchamp and Childress (2019) 385-388 on the criteria for assessing moral theories.

mental health) professionals.[166] Various debates surround the choice of an ethical framework or moral theory within the fields of forensic psychology and forensic psychiatry, including whether the theory of Beauchamp and Childress is suitable. Beauchamp and Childress's approach is prominent within the ethical codes of psychologists[167] , and as such, the approach will be used in the study. The four basic principles of Beauchamp and Childress will be discussed below.

1.2.10 Principlism

Beauchamp and Childress's four-principles approach to biomedical ethics is commonly known as principlism and regards the following four clusters of moral principles as vital: 1) respect for autonomy, 2) nonmaleficence, 3) beneficence and 4) justice.[168] Each of the principles will only be briefly discussed as an in-depth exploration of each cluster of principles' normative content will extend beyond the scope of the study.

Respect for autonomy entails that a competent person's ability to make decisions must be respected.[169] By respecting a person's autonomy, you acknowledge their right to hold a particular view, make their own choices, and take action on their specific beliefs or values.[170] Save for the acknowledgement, respect also involves enabling the person to act autonomously.[171] A person can only act autonomously if they are fully informed and can make the decision voluntarily without any undue influence or coercion.[172]

Nonmaleficence principle is referred to as the "do no harm" principle.[173] This principle obligates us to take reasonable steps to abstain from causing harm to others.[174] Nonmaleficence principle is treated as identical to the maxim *primum non nocere*-

166 Adshead "Three faces of justice: Competing ethical paradigms in forensic psychiatry" (2014) 19 *Legal and Criminological Psychology* 1 and Allan (2011) 44.
167 Allan (2011) 44.
168 Beauchamp and Childress (2019) 13.
169 Beauchamp and Childress (2019) 104. In general, see Beauchamp and Childress (2019) 99-154.
170 Beauchamp and Childress (2019) 104 and Allan (2012) *Australian Psychologist* 50.
171 *Ibid*.
172 Beauchamp and Childress (2019) 104-105 and Allan (2012) *Australian Psychologist* 50.
173 Allan (2012) *Australian Psychologist* 51. See in general Beauchamp and Childress (2019) 155-216.
174 Beauchamp and Childress (2019) 155 and Allan (2012) *Australian Psychologist* 51.

above all (or first) do no harm- which forms part of the Hippocratic oath.[175] Beneficence relates to a person's obligation to promote the welfare of others.[176] This principle requires more from a person than the nonmaleficence principle as positive steps need to be taken to help others.[177] The last principle, justice, deals with the fair distribution of benefits, risks and costs.[178] This includes a fair distribution and application of health care resources and services within the field of health care.[179]

As Beauchamp and Childress note, the four clusters of principles do not constitute a general ethical theory by themselves.[180] To provide guidance, the principles must be specified.[181] Specification is done by narrowing the scope of the norm.[182] Beauchamp and Childress give the example of a psychiatrist conducting a forensic assessment. The principle of respect the autonomy can be specified to address the specific problem by stating: [183]

> Respect the autonomy of persons who are the subjects of forensic evaluations, where consent is not legally required, by disclosing to the evaluee the nature and purpose of the evaluation.

The principles are therefore considered a starting point for the reflection of moral problems.

1.3 Motivation and value contribution

The investigation into the disciplinary proceedings by the Health Professions Council of South Africa demonstrated that the complaints regarding psycho-legal work remain at the forefront within the profession of psychology.[184] The study of Scherrer, Louw

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175 Beauchamp and Childress (2019) 155 and Allnut and Chaplow (2000) *Australian and New Zealand Journal of Psychiatry* 980.
176 Beauchamp and Childress (2019) 217 and Allan and Grisso (2014) *Ethics and Behavior* 469. See in general Beauchamp and Childress (2019) 217-266.
177 *Idem* 217.
178 Beauchamp and Childress (2019) 13 and Adshead (2014) *Legal and Criminological Psychology* 1. See in general Beauchamp and Childress (2019) 267-326.
179 Adshead (2014) *Legal and Criminological Psychology* 1 and Zabow (2004) *South African Psychiatry Review* 26.
180 Beauchamp and Childress (2019) 17.
181 *Ibid.*
182 *Ibid.*
183 *Idem* 178.
184 See 3.7.2.

and Möller in the period of 1990 until 1999 indicated that the most complaints against psychologists related to psycho-legal work,[185] almost twenty years later in 2018 the Professional Board of Psychology again confirms that the most complaints concern psycho-legal work.[186] The problems raised in the disciplinary proceedings regarding psycho-legal work and the problems elucidated in case law coincides. On many occasions, the courts have commented on the inadequate performance or unethical behaviour of mental health experts. The problems result in irrelevant, unreliable, and misleading expert evidence. Despite being a recurring problem in South Africa, it appears that we are no closer to solving the problem than we were 20 years ago.

Problems with expert witnesses are not new, and many studies have been conducted on how courts can address the issue of biased, unreliable, and irrelevant expert evidence. However, legal mechanisms are not enough as a regulatory framework must also consider the self-regulation of a profession. Very few recent studies have been conducted regarding the regulation of psycho-legal work by South African statutory bodies and voluntary associations.[187] The research is also often fragmented or only

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185 Scherrer *et al*. "Ethical complaints and disciplinary action against South African psychologists" (2002) 32(1) *South African Journal of Psychology* 54.

186 Health Professions Council of South Africa "Psychology News: Newsletter for the Professional Board for Psychology Issue 01/06/2018" (2018) at 18-19 available online at https://www.hpcsa.co.za/Uploads/PSB_2019/PSB_Newsletter_2018.pdf (last accessed 25 January 2020).

187 Some of the research done in South Africa touching the aspect of psycho-legal assessments include Allan (2001) *The law for psychotherapists and counsellors*; Allan (2011) *Law and ethics in psychology: An international perspective;* Dada and McQuoid-Masod (eds.) (2001) *Introduction to medico-legal practice*; Kaliski (ed.) (2006) *Psycholegal assessment in South Africa*; Roos *et al*. (2016) *An introduction to forensic psychology*; Tredoux (ed.) (2005) *Psychology and law*; Allan "Psychiatric diagnosis in legal settings" (2005) 11(2) *South African Journal of Psychiatry* 52; Allan and Louw "Lawyers' perception of psychologists who do forensic work" (2001) 31(2) *South African Journal of Psychology* 12; Burchell "Non-pathological incapacity: Evaluation of psychiatric testimony" (1995) 8 *South African Journal of Criminal Justice* 37; Calitz *et al*. "Evaluering van die geestestoestand van 'n beskuldigde wat van 'n misdryf aangekla is: 'n Multiprofessionele benadering" (1993) 1 *Tydskrif vir Regswetenskap* 31; Calitz *et al*. "Psychiatric evaluation of offenders referred to the Free State Psychiatric Complex according to sections 77 and/or 78 of the Criminal Procedures Act" (2006) 12 *South African Journal of Psychiatry* 47; Houidi *et al*. "Forensic psychiatric assessment process and outcome in state patients in KwaZulu-Natal, South Africa" (2018) 24 *South African Journal of Psychiatry* 1; Jackson "'Have you heard the one about the lawyer, the politician and the psychologist?': Some other issues raised by the State v Jacob Zuma rape trial" (2006) 33 *Psychology in Society* 31; Kaliski "The prostitution of psychiatry: Some are shameless, others are just easy" (2012) 15 *South African Journal of Psychiatry* 317; Lerm "Beware the hired gun: Are expert witnesses unbiased?" (2015) May *De Rebus* 36; Louw "Regulating professional conduct: Part 1: Codes of ethics of national psychology associations in South Africa" (1997) 27 *South African Journal of Psychology* 183; Louw "Regulating professional conduct: Part 2: The Professional Board for Psychology in South Africa" (1997) 27 *South African Journal of Psychology* 189; Louw and Allan "A profile of forensic psychologists in South Africa" (1998) 28 *South African Journal of Psychology* 234; Louw and Allan "Ethical guidelines for psychologists who render psycholegal services" (1997) 22 *Journal for Juridical Science* 141; Meintjies-Van der Walt "Ethics and the expert: Some suggestions for South Africa" (2003) 4 *Child Abuse Research in*

focusses on a particular area of expertise, for example, custody evaluations. Furthermore, the South African research on the ethical guidelines for mental health professionals conducting psycho-legal assessments has rarely investigated the principles from which the code of ethics arises.

This thesis's contribution lies firstly in that it will be the first comprehensive study analysing both the role of legal mechanisms and self-regulation of the mental health professions in regulating psycho-legal assessments. Secondly, it will contribute by developing a suggested regulatory framework that aligns both the courts and the mental health professions' aims. Lastly, the thesis will, by way of a comparative study analyse the existing ethical frameworks to develop ethical guidelines for psycho-legal work based on the bedrock principles. The thesis is considered an original contribution to the field of study.

1.4 Methodology and comparative approach

This thesis is a theoretical study and will predominantly be based on a literature review of various primary and secondary sources. The sources will include the Constitution of the Republic of South Africa, 1996; South African and foreign legislation; and South African and foreign case law. In addition to these primary sources, academic writings including books and journal articles, postgraduate research studies in the form of theses and dissertations, ethical guidelines, policy documents and reports from relevant professional bodies and organisations as well as reputable online sources will be consulted. The study's interdisciplinary nature necessitates the use of sources from the different disciplines of law, psychiatry, and psychology.

South Africa 42; Meintjies-Van der Walt "Expert evidence and the right to a fair trial: A comparative perspective" (2001) 17 *South African Journal on Human Rights* 301; Meintjies-Van der Walt "Experts testifying in matters of child abuse: The need for a code of ethics" (2002) 3 *Child Abuse Research in South Africa* 24; Stevens "Ethical issues pertaining to forensic assessments in mental capacity proceedings: Reflections from South Africa" (2017) 24 *Psychiatry, Psychology and Law* 628; Swanepoel "Ethical decision-making in forensic psychology" (2010) 75 *Koers* 851; Swanepoel "Law, psychiatry and psychology: A selection of medico-legal and clinical issues" (2010) 73 *Tydskrif van Hedendaagse Romeins-Hollandse Reg* 177; Swanepoel "Legal aspects with regard to mentally ill offenders in South Africa" (2015) 18 *Potchefstroom Electronic Law Journal* 3238; Swanepoel "The development of the interface between law, medicine and psychiatry: Medico-legal perspectives in history" (2009) 12 *Potchefstroom Electronic Law Journal* 124; and Allan and Louw "The ultimate opinion rule and psychologists: A comparison of the expectations and experiences of South African lawyers" (1997) 15 *Behavioral Sciences and the Law* 307.

This study will focus on South Africa's legal framework, demonstrating the need for mental health experts but also the problems experienced with mental health professionals acting as expert witnesses. The challenges occasioned by using mental health professionals as expert witnesses demonstrates the shortcomings of the current regulatory framework in South Africa. To address the shortcomings and find possible solutions, bearing in mind section 39(1) of the Constitution of the Republic of South Africa,[188] foreign law will be considered. A comparative study with England[189] and the United States of America will be undertaken. The comparison will be limited to the regulatory frameworks of the respective countries and will not concern an extensive investigation into the problems associated with the use of mental health professionals as expert witnesses in the two comparator countries.

The choice of England and the United States of America is based on a shared legal history. All three countries follow a common-law system in law of evidence. Central to the study of regulatory frameworks of psycho-legal assessments is the rules of evidence that governs the admissibility of expert evidence. In this instance, English law plays a particularly crucial role. The law of England greatly influenced procedural law and law of evidence in South Africa after the British occupation of the Cape in 1806.[190] The Evidence Proclamation 72 of 1830, which was promulgated on 1 March 1830, in brief, provided that evidence was to be regulated by the law of England.[191] The court in *Van der Linde v Calitz*[192] clarified the position regarding the current application of English law on a matter of evidence. The court in *Van der Linde* held that only pre-1950 decisions of the Privy Council are binding on the Supreme Court of Appeal[193] if the decision was a decision of the Supreme Court of Appeal itself.[194] Although only cases pre-1950 are binding, English case law can still be persuasive in

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188 Section 39(1) of the Constitution of the Republic of South Africa, 1996 reads as follows:
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.

189 The United Kingdom has three distinct legal systems namely English law, Northern Irish law and Scottish law. The study will only focus on English law.

190 See 3.2.

191 Zeffertt and Paizes (2010) *Essential evidence* 4.

192 *Van der Linde v Calitz* (1967) 2 All SA 294 (A).

193 Previously the Appellate Division.

194 *Van der Linde v Calitz* at 295.

South African courts. The law of evidence in England will, therefore, be informative in solving the problems outlined in this study.

American law consists of federal and state laws, and this study will examine federal laws as well as the laws governing the State of California. An analysis of expert evidence cannot be complete without considering the landmark cases of *Frye v. United States*[195] and *Daubert v. Merrell Dow Pharmaceuticals Inc*.[196] that have been influential in many jurisdictions. California was chosen as the governing standard for admissibility in the state is the *Frye* standard (or *Kelly-Frye* test) being one of the few states in the United States that did not adopt the guidelines of the *Daubert*. By including a comparison with the state of California, it can be assessed whether the guidelines set in the *Daubert* achieve the goals it set out.

The comparator countries were also chosen, taking into consideration their professional and statutory organisations regulating the professions of psychiatry and psychology. The United States of America's academic base for law and psychology is the most developed[197] with the first code of ethics for psychologists published in America in 1933.[198] The American Psychological Association first code was later published in 1953 and adopted in South Africa.[199] The experience and development in the field of forensic psychiatry and forensic psychology in the United States can be of great assistance in developing a regulatory framework for the South African context. In both the United States and in England, various professionals' organisations and bodies are involved in both the interface between law and psychology and law and psychiatry. In England, the General Medical Council's regulation of the medical professional can also have massive informative value as the Health Professions Council of South Africa is structured similarly to the General Medical Council. Therefore, both the position in England and in the United States of America is essential to the study.

195 *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923).
196 *Daubert v. Merrell Dow Pharmaceuticals Inc*., 509 U.S. 579 (1993).
197 Carson and Bull in Bull and Carson (eds.) (1995) 8.
198 Allan (2011) 37.
199 *Ibid*.

1.5 Delimitation of study

One of the challenges of this study is the multitude of different sources in the fields of law, psychology, and psychiatry, albeit mostly international sources. These sources often deal with the issue of a regulatory framework of psycho-legal assessments in a fragmented manner, intertwined with many other research problems that plague the field of forensic psychology and forensic psychiatry. Below are some of the ancillary research problems or aspects encountered throughout the literature review that go beyond the scope of the study.

Firstly, both psychology and psychiatry provide a valuable service, but often there is a perception that psychologists are second class experts as compared to psychiatrists.[200] Psychiatry is rooted in medical science which is considered a "true" science and subsequently the preferred expertise.[201] The perception has influenced and indirectly created a form of a monopoly within the field of psycho-legal work for psychiatrists.[202] To mention but one example, section 79(1)(a) of the Criminal Procedure Act 51 of 1977 provides that the panel for purposes of enquiry and report under sections 77 and 78 of the Criminal Procedure Act must be conducted by a psychiatrist.[203]

As per Allan and Louw's recommendations, the promotion of good quality psycho-legal work draws members from all mental health professions, which includes both psychiatrists and psychologists. [204] Melton states that the various mental health professions should be perceived as equally qualified as experts, but that attention should be given to the specific specialised knowledge that the expert might offer.[205] Throughout the study, the focus is on both psychologists and psychiatrist and their

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200 Louw and Allan (1998) *South African Journal of Psychology* 235. See also Davies *et al.* (eds.) (1995) *Psychology, law and criminal justice* 191-192.

201 Clifford in Davies *et al.* (eds.) (2008) *Forensic psychology* 236.

202 Louw and Allan (1998) *South African Journal of Psychology* 235.

203 Section 79(1)(a) of the Criminal Procedure Act 51 of 1977 reads as follows:
(1)Where a court issues a direction under section 77(1) or 78 (2), the relevant enquiry shall be conducted and be reported on where the accused is charged with an offence other than one referred to in paragraph (b), by the head of the designated health establishment designated by the court, or by another psychiatrist delegated by the head concerned.

204 Louw and Allan (1998) *South African Journal of Psychology* 239.

205 Melton *et al.* (1997) *Psychological evaluations for the court: A handbook for mental health professionals and lawyers* 23-24.

specific expertise. However, the study will not engage in the debate on whether the monopoly of psychiatrists, as mentioned above, is warranted or whether the scope of work for psychologists in the forensic field should be expanded.

In addition to the current statutory framework that regulates the psychological and the psychiatric professions, the Traditional Health Practitioners Act 22 of 2007[206] could also play a regulatory role. The Traditional Health Practitioners Act[207] seeks to establish an Interim Traditional Health Practitioners Council of South Africa. Among others, the role of the Interim Traditional Practitioners Council of South Africa would be to provide a regulatory framework for traditional health care services. According to section 1 of the Traditional Health Practitioners Act, the health care practice involves "the diagnosis, treatment or prevention of a physical or mental illness".[208]

There is still much uncertainty with regards to the implementation of the Traditional Health Practitioners Act,[209] with only some sections of the act having come into operation at the stage of writing this thesis. This study will not address the possible collaboration between the Traditional Health Practitioners Council of South Africa with the Health Professions Council of South Africa,[210] but will only address the current position regulated by the Health Professions Council of South Africa.

Lastly, there is no fee structure or set of guidelines for fees for psycho-legal work in South Africa.[211] The legal system, including psychological and psychiatric services, remain largely unaffordable to most of the population. An investigation into the provision of psychological services to those who cannot afford it must be done to ensure real access to justice. This is, however, beyond the scope of this study.

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206 The Traditional Health Practitioners Act 35 of 2004 was assented to but never promulgated. In the case of *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) the Traditional Health Practitioners Act 35 of 2004 was declared invalid by the Constitutional Court as it had not been adopted in line with the requirements of section 72(1) of the Constitution of the Republic of South Africa, 1996. The Parliament re-enacted the act as the Traditional Health Practitioners Act 22 of 2007.

207 Traditional Health Practitioners Act 22 of 2007.

208 *Ibid.*

209 *Ibid.*

210 For more information on the collaboration see Robertson "Does the evidence support collaboration between psychiatry and traditional healers? Findings from three South African studies" (2006) 9 *South African Psychiatry Review* 87.

211 Themistocleous-Rothner (2017) *Child care and contact evaluations: Psychologists' contributions to the problem-determined divorce process in South Africa* (PhD thesis, University of South Africa) 40.

1.6 Overview of the chapters

Chapter 2 provides a historical overview of the mental health professional as an expert witness. The chapter provides the foundation for the subsequent chapters as it explains how the need arose for mental health professionals to act as expert witnesses to assist the court and how the development of professional associations greatly influenced the esteem of mental health experts. The chapter will further illustrate how the criticisms against mental health experts have throughout history largely remained the same and that residual attitudes still influence the treatment of mental health experts.

Chapter 3 will investigate psycho-legal assessments in South Africa, starting by briefly outlining the South African legal system's basic structure and the court structure, including the relevant historical context. The chapter will examine the nature of expert evidence in South Africa and take an in-depth look at the mental health professionals' role as expert witnesses. The extent of the need for mental health professionals to assist the court will be examined in this chapter through an analysis of case law where courts have utilised the services as well as legislation dealing with mandatory or recommended psycho-legal assessments. The chapter further aims to investigate the challenges that are occasioned by using mental health professionals as expert witnesses. This will be done by examining the complaints and disciplinary proceedings of the Health Professions Council of South Africa and selected case law in which the court remarked on the unethical and inadequate behaviour of the mental health professionals. Chapter 3 will briefly contextualise the problems by highlighting the impact of lack of resources, the adversarial system and the legal culture.

Chapter 4 will examine the procedural rules and rules of evidence in the South African legal system that regulates the admissibility, presentation, and evaluation of expert evidence. The use of court assessors and court-appointed experts in South Africa will be investigated. The last aspect that will be examined is the immunity afforded to expert witnesses against civil proceedings. Part of the examination will include a closer look into awarding cost orders against a negligent witness. The second main part of

the chapter will investigate the regulation of the professions of psychiatry and psychology. In South Africa, both psychology and psychiatry are regulated by the statutory body, the Health Professions Council of South Africa (HPCSA). The chapter will examine the structure of the HPCSA, including focussing on the Professional Board for Psychology and the Medical, Dental and Medical Science Professional Board. The guiding ethical principles and standards of the HPCSA will be analysed together with the processes in place to enforce the standards. The ethical guidance provided by voluntary organisations, specifically the South African Society of Psychiatrists and the Psychological Society of South Africa, will be examined. The chapter aims to demonstrate the shortcomings in regulating psycho-legal work within the legal system and professional organisations.

Chapter 5 and 6 are structured in the same way as chapter 4 and examine the regulatory frameworks in England and the United States of America. The examination of the evidentiary and procedural rules governing expert evidence will be structured to mirror chapter 4 for ease of comparison. In England and the United States of America, there are numerous professional organisations and voluntary associations that are involved in the promotion and development of psychology and psychiatry. The study will only examine the statutory bodies together with the most prominent and influential voluntary associations. Therefore, the study will focus on the General Medical Council and Health and Care Professions Council, together with the Royal College of Psychiatrists and the British Psychological Society in England. In the United States of America, the focus will be on the American Medical Association, American Psychiatric Association, American Academy of Psychiatry and Law and American Psychological Association. Drawing from the positions in England and the United States of America, the last chapter will provide recommendations to address the shortcomings in the regulatory framework. The recommendations will address both the legal mechanisms and the regulation within the profession. At the close of chapter 7, all the conclusions throughout the study will be compounded.

1.7 Conclusion

Mental health professionals have come a long way to establish themselves as valuable in the legal arena. The continued success is, however, threatened by the potential erosion of psychologists' and psychiatrists' credibility as expert witnesses. Grisso, in an article on the differences between forensic psychiatry and forensic psychology, remarked that:[212]

> the threat arises not from each other as competitors… and from weaknesses inherent in both disciplines. I propose that they begin thinking about how the two disciplines can survive collaboratively, lest they both perish independently.

Although referring to forensic psychology and forensic psychiatry, it can equally be applied to the legal profession and mental health professions' position. The threat arises from the weaknesses in both the law and the mental health professions, but both disciplines will suffer if the confidence in mental health experts deteriorates. The solution lies not in the endeavours of either the legal system or the mental health professions but the collaboration. As remarked at the onset of this chapter to understand where we are going, we must consult history and existing theories of legislation, which includes understanding the intertwined history of the law and mental health professions. In the following chapters, the study will examine the intertwined history and the current regulatory frameworks in all three comparator countries to provide a recommendation.

[212] Grisso (1993) *Bulletin of the American Academy of Psychiatry and the Law* 134.

CHAPTER 2
A HISTORICAL OVERVIEW OF THE MENTAL HEALTH PROFESSIONAL AS EXPERT WITNESS

2.1 Introduction

> The law uses psychology like a drunk uses a lamp post-more for support than illumination.[1]

On reflection of the history of mental health professionals acting as expert witnesses, the above metaphor comes to mind. Historically expert witnesses, including mental health experts, were unknown and unnecessary. As knowledge accrued and the law developed, a need arose for expert witnesses to assist the court. Expert evidence in the field of mental health (or illness) was still deemed unnecessary as the courts placed reliance on legal instinct and common sense. The experts, especially in the field of medicine, paved the way for the introduction of mental health experts. Legal counsel started using mental health experts to support an argument or position. In many instances, they were, however, merely hired champions bolstering a crafted argument. Reliance on legal instinct and common sense prevailed, and the view of mental health experts was dim. Residual attitudes towards mental health experts remain, but the legal system is seeing the light, using the experts more and more for illumination.

By examining the history of the evolution of mental health professionals[2] as expert witnesses the chapter endeavours to shed light on the residual attitudes towards expert witnesses and the rules that developed. History is about understanding[3] and enables us to draw on past failures and successes to evaluate the success of future

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1 Loh as quoted in Ogloff "Two steps forward and one step backward: The law and psychology movement(s) in the 20th century" (2000) 24 *Law and Human Behavior* 477.

2 As mentioned in chapter 1 mental health professionals for purposes of this study will include psychiatrists and psychologists. See 1.2.3.

3 For further readings on the importance of history see Krumbhaar "The lure of medical history" (1927) 66 *American Association for the Advancement of Science* 1; Smith (1981) *Trial by medicine: Insanity and responsibility in Victorian trials* 1 and Ion and Beer "Valuing the past: The importance of an understanding of the history of psychiatry for healthcare professionals, service users and carers" (2003) 12 *International Journal of Mental Health Nursing* 238.

changes.[4] Studying the history of a subject matter is also a method of ensuring a proper perspective is retained.[5] The chapter, however, is not intended to be a full exposition of the history of either expert witnesses or mental health professions. Only a brief overview of the main aspects will be discussed to understand the framework in which mental health professionals act as expert witnesses find themselves.

The chapter will firstly explore the historical origins of expert evidence and focus on Roman and English law. As mentioned,[6] the three comparator countries of this study are South Africa, England and the United States of America. Although the South African legal system largely stems from the Roman-Dutch law, the South African criminal procedure and the law of evidence is based on English law.[7] All three the comparator countries' history of proof can therefore be traced back to the development of English law. It is, however, important to also consider Roman law which strongly influenced Germanic law.[8] Meintjies-Van der Walt indicates that the true history of English law developed when Angles and Saxons invaded England[9] and the law of the Anglo-Saxons was typically Germanic.[10] In 476 A.D. the fall of the Western Roman Empire took place when the last Roman Emperor was overthrown by a Germanic leader.[11] Despite the fall of the Roman Empire the *Corpus Iuris Civilis*[12] still greatly influenced the Germanic legal system.[13]

Secondly, the chapter will briefly examine the influence of the mentally ill on the legal system and the use of medical experts. Both the treatment of the mentally ill under Roman law and English law will be discussed. Mental health professionals do not only focus on the mentally ill but historically mental illness, especially in criminal trials, pushed psychiatric evidence to the forefront. Before the development of the medical

4 Ion and Beer (2003) *International Journal of Mental Health Nursing* 241.
5 Swanepoel (2009) *Law, psychiatry and psychology: A selection of constitutional, medico-legal and liability issues* (LLD thesis, University of South Africa) 25.
6 See 1.4.
7 Schwikkard and Van der Merwe (2016) *Principles of evidence* 2.
8 Van Zyl (1979) *Geskiedenis van die Romeins-Hollandse reg* 1.
9 Meintjies-Van Der Walt (2001) *Expert evidence in the criminal justice process: A comparative perspective* 30.
10 *Ibid*.
11 Van Zyl (1979) 17.
12 The *Corpus Iuris Civilis* is also referred to as the Code of Justinian. The compiling of the *Corpus Iuris Civilis* occurred in phases during the period of 528 A.D. until 534 A.D. See in general Van Zyl (1979) 30-37 on the codification process.
13 Van Zyl (1979) 1 and Meintjies-Van Der Walt (2001) 36.

speciality of psychiatry physicians who were interested in mental functioning acted as experts. The so-called mad doctor, later alienist and eventually psychiatrist functioned as experts. Although the development of the medical speciality is referred to, the chapter focuses on the well-known cases in the 1800s, where psychiatric evidence was called upon.[14]

Psychology as an independent field of study developed later than psychiatry, and subsequently, the use of psychological evidence occurred much later. As with the interface between psychiatry and law, the chapter will briefly refer to the development of the discipline of psychology but focuses on the first reported cases using psychological evidence.[15]

Lastly, the chapter will outline the major historical developments of formal professional associations and professional ethics in psychiatry and psychology of the comparator countries. The developmental history of formal professional associations intends to provide a perspective of the history of the regulation of the fields. It is, however, beyond the scope of the study to give a full developmental analysis against the social and political background of the specific country at that time.

The chapter will conclude by establishing, in light of the above, that the criticism against the use of mental health professionals as an expert witness has, throughout history, remained largely the same. The chapter, further, endeavours to illustrate that despite the remaining criticism, professionalisation and subsequent founding of professional associations greatly influenced the esteem of mental health experts.

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14 Chapter 2 deals with the historical perspective and the events that preceded the recognition of psychiatrists as expert witnesses. As such only cases until the end of the nineteenth century is discussed whereupon it is considered that psychiatric evidence was readily used. Subsequent cases dealing with the development of the use of psychiatric evidence will be discussed in the respective chapters of the comparator countries.

15 As per note 14 only a few of the landmark cases dealing with the initial recognition of psychological evidence will be dealt with. The cases that further aided in the development of the interface between psychology and law will be discussed at a later stage in the chapters dealing with the comparator countries.

2.2 Historical origins of expert evidence

2.2.1. Roman law

In his work on criminal trials in Roman law, Strachan-Davidson compares a trial to a duel being fought between parties.[16] The manner in which the duel is fought is unknown; however, the weapons in the legal duel are described as "the speeches of the advocates and evidence of the witnesses".[17] Evident from Strachan-Davidson's description is that very little (known) evidentiary guidance existed in classic Roman law- the courts merely relied on the evidence of lay witnesses. In fact, one of the oldest means of establishing a fact is the testimony of witnesses.[18] In Roman law, only a few specific cases of a technical nature required more than the mere establishment of facts, where the use of experts was mandatory.[19]

Procedural rules for legal proceedings were codified for the first time in the *Lex Duodecim Tabularum* (Twelve Tables).[20] Civil proceedings were divided into two stages.[21] At the first stage, the *praetor*[22] assisted the litigant with the necessary knowledge of the law, including defining and formulating the legal question before the second stage, where the matter was heard and judgment given by the *iudex*.[23] By 130 A.D. the role of the *praetor* had started to disappear and eventually ceased to exist.[24] After that, only the *cognitio extra ordinem* procedure was used.[25] The *iudex*, in the *cognitio* procedure, resembled the modern-day judge and was responsible for defining

16 Strachan-Davidson (1969) *Problems of the roman criminal law* 112.
17 *Idem* 113.
18 Ferguson"Day in Court in Justinian's Rome: Some Problems of Evidence, Proof, and Justice in Roman Law" (1961) 46 *Iowa Law Review* 745.
19 Amundsen and Ferngren "The forensic role of the physician in Roman law" (1979) 53(1) *Bulletin of the History of Medicine* 46-47.
20 The Twelve Tables was the first codification of Roman laws in 451 B.C. which dealt primarily with matters of private law and addressed a few elements in public law. See Van Zyl (1979) 22-23 and Brittain "Roman law: *Lex Duodecim Tabularum*" (1967) 35 *Medico-Legal Journal* 71.
21 Van Zyl (1979) 20-21; Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 45 and Thomas *et al*. (2000) *Historiese grondslae van die Suid-Afrikaanse privaatreg* 31.
22 Created in 367 B.C. the *praetor* was a judicial officer in Roman law who assisted in cases and issued edicts. For further readings on the role of the praetor see Van Zyl (1979) 20-21 and Thomas *et al*. (2000) 31-32.
23 Thomas *et al*. (2000) 31 and Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 45.
24 The *praetor* was also responsible for the development of legal remedies. In 130 A.D. the edicts of the *praetors* and other judicial officers were codified. The codification, known as the *Edictum Perpetuum*, led to the diminished and eventually end of the role of the *praetor*. See Van Zyl (1979) 21 and Thomas *et al*. (2000) 32.
25 Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 45.

the legal issue and handing down the judgment.[26] The *iudex* relied on and was bound by the facts and evidence provided but, as alluded to above, little guidance was given regarding the weight or probatory value of evidence. The *iudex* was free to use his discretion which was known as the principle of free weighing of proof.[27] The exception to that principle was the mandatory use of expert witnesses.

The *Corpus Iuris Civilis*[28] refers to the mandatory use of three different experts: midwives,[29] *agrimensores* or land surveyors[30] and handwriting experts.[31] The oldest of the three, land surveyors, were ordered to fix boundaries of the land and to answer any questions regarding disputes of boundaries.[32] The fear of bias was already evident in the *Corpus Iuris Civilis* provisions as land surveyors had to be appointed by the *iudex* and not by a party to the dispute.[33] Midwives were used as experts to certify that a woman was pregnant in disputed pregnancy cases.[34] At least three midwives had to be appointed by the *iudex* and not by the parties themselves.[35] In the instance of handwriting experts, employed in forgery cases to compare written documents, three experts also had to be appointed and further take an oath of impartiality.[36]

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26 *Ibid*.
27 *Idem* 46.
28 See in general Van Zyl (1979) 30-37.
29 *Digesta* 25, 4, 4, 1 pr. (Ulpian). See discussion in Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 47. See also Prosono in Rosner (ed.) (2003) *Principles of practice of forensic psychiatry* 15; Meintjies-Van Der Walt (2001) 13 and Ferguson (1961) *Iowa Law Review* 757.
30 *Digesta* 10, 1, 8 (Ulpian). See discussion in Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 47. See also Prosono in Rosner (ed.) (2003) 15 and Ferguson (1961) *Iowa Law Review* 757. Allan *et al*. argue that it is not clear whether the land surveyors were acting as expert witnesses or arbiters. See Allan *et al*. "Law and psychology: A historical perspective (1)" (1995) 14 *Medicine and Law* 673.
31 *Codex* 4, 20, 3 (Justinian); *Novellae* 5, 4, 2, 2. See the discussion in Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 48; Prosono in Rosner (ed.) (2003) 15 and Ferguson (1961) *Iowa Law Review* 757.
32 *Digesta* 10, 1, 8 (Ulpian). See discussion in Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 47. See also Prosono in Rosner (ed.) (2003) 15 and Ferguson (1961) *Iowa Law Review* 757 and Allan *et al*. (1995) *Medicine and Law* 673.
33 Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 47. See also Prosono in Rosner (ed.) (2003 15 and Ferguson (1961) *Iowa Law Review* 757 and Allan *et al*. (1995) *Medicine and Law* 673.
34 *Digesta* 25, 4, 4, 1 pr. (Ulpian). See discussion in Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 47. See also Prosono in Rosner (ed.) (2003) 15; Meintjies-Van Der Walt (2001) 13 and Ferguson (1961) *Iowa Law Review* 757.
35 Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 47.
36 *Codex* 4, 20, 3 (Justinian); *Novellae* 5, 4, 2, 2. See the discussion in Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 48; Prosono in Rosner (ed.) (2003) 15 and Ferguson (1961) *Iowa Law Review* 757.

Expert or specialist knowledge in Roman law took the form of an expert witness and skilled persons assisting the court.[37] The *iudices* could be advised by *adsessores* who rendered advice on points of law.[38] There is no evidence that the *adsessores* were of a specific profession or chosen based on the specific case at hand.[39] It appears that the *adsessores* were mostly men trained in law.[40] Evident from both the mandatory use of expert witnesses and the use of *adsessores* emphasises and importance of impartiality.

2.2.2. English law

Vastly different from the *congnitio* procedure in Roman period feuds or disputes in the early Middle Ages[41] in England were resolved by a trial by ordeal.[42] During the trial by ordeal, it was considered that a deity made the decision; in essence, the aid of God was sought to prove the accused's innocence (or guilt).[43] A bishop or priest undertook the duties of the trial and no testimony of witnesses, as in Roman law, was used.[44] The trial by ordeal was more of a means of proof of innocence or guilt as opposed to a modern-day trial.[45] Various forms of the trial by ordeal existed, including ordeal by means of a duel, ordeal by fire and water and purgation by oath.[46]

In 1215 the Fourth Lateran Council prohibited priests from participating in and supervising the ordeals which resulted in the disuse thereof.[47] The trials by ordeal

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37 Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 46 and Prosono in Rosner (ed.) (2003) 16.

38 *Ibid*.

39 Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 46.

40 *Ibid*.

41 Middle Ages, also known as medieval times, is the period of European history from fifth century until the middle of the fifteenth century.

42 Robertson "Trial by ordeal" (1926) 38(1) *Juridical Review* 70; Landsman "Of witches, madmen, and products liability: An historical survey of the use of expert testimony" (1995) 13 *Behavioral Sciences and the Law* 133; Schwikkard and Van der Merwe (2016) 3 and Meintjies-Van Der Walt (2001) 24-25; 30-31.

43 Robertson (1926) *Juridical Review* 70; Landsman (1995) *Behavioral Sciences and the Law* 133; Schwikkard and Van der Merwe (2016) 3 and Meintjies-Van Der Walt (2001) 24-25; 30-31.

44 Robertson (1926) *Juridical Review* 71; Landsman (1995) *Behavioral Sciences and the Law* 133.

45 Meintjies-Van Der Walt (2001) 30.

46 See in general Robertson (1926) *Juridical Review* 70 for a study on the trial by ordeal and the way it occurred. See further Landsman (1995) *Behavioral Sciences and the Law* 133; Schwikkard and Van der Merwe (2016) 3 and Meintjies-Van Der Walt (2001) 24-25; 30-31.

47 Robertson (1926) *Juridical Review* 78; Landsman (1995) *Behavioral Sciences and the Law* 134; Schwikkard and Van der Merwe (2016) 4; Meintjies-Van Der Walt (2001) 31 and Milroy "A brief history of the expert witness" (2017) 7(4) *Academic Forensic Pathology* 517.

were later formally abolished by order.[48] The end of the trial by ordeal meant that the legal system needed an alternative mode of proof.[49]

A crude form of trial by jury was developed to address the vacuum.[50] The jury was comprised of people from the neighbourhood where the case arose or was summoned because they knew the accused.[51] The early jury did not rely on any outside witnesses.[52] Expert evidence either took the form of assessors that could assist in giving jury instructions or the jury itself was a special jury comprised of persons with specialist knowledge.[53] For example, juries of merchants were used to settle trading disputes, "because it was conceived they might have a better knowledge of the matters in difference which were to be tried, than others could, who were not of that profession".[54] Another example of a special jury was female jurors who had given birth who had to determine whether a woman was pregnant.[55] The use of special juries declined and was formally abolished in England in 1971.[56]

By the fourteenth century, the courts not only employed the use of special juries, but specialist court advisors were also being summoned to court to testify or give advice where the courts lacked knowledge.[57] For example, in 1493 “masters of grammar” were called to decipher the Latin phrases in a statute.[58]

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48 Robertson (1926) *Juridical Review* 78 and Meintjies-Van Der Walt (2001) 31.

49 Meintjies-Van Der Walt (2001) 36.

50 Schwikkard and Van der Merwe (2016) 4; Meintjies-Van Der Walt (2001) 31 and Landsman (1995) *Behavioral Sciences and the Law* 134. Milroy indicates that a right to a jury trial had already existed in the time of trial by ordeal but only become the regular process when the trial by ordeal was abolished. Milroy (2017) *Academic Forensic Pathology* 517.

51 Meintjies-Van Der Walt (2001) 32; Landsman (1995) *Behavioral Sciences and the Law* 134 and Milroy (2017) *Academic Forensic Pathology* 517.

52 Meintjies-Van Der Walt (2001) 32 and Landsman (1995) *Behavioral Sciences and the Law* 134.

53 Hodgkinson and James (2007) *Expert evidence: Law and practice* 8; Meintjies-Van Der Walt (2001) 32; Landsman (1995) *Behavioral Sciences and the Law* 134; Buchanan “Psychiatric evidence on the ultimate issue” (2006) 34 *The Journal of the American Academy of Psychiatry and the Law* 15; Hand “Historical and practical considerations regarding expert testimony” (1901) 15 *Harvard Law Review* 40 and Rosenthal “The development of the use of expert testimony” (1935) 2 *Law and Contemporary Problems* 407.

54 Hand (1901) *Harvard Law Review* 42. See also Buchanan (2006) *The Journal of the American Academy of Psychiatry and the Law* 15; Hodgkinson and James (2007) 8 and Rosenthal (1935) *Law and Contemporary Problems* 407 for further examples of cases in the 14th century where specific juries were empanelled.

55 Milroy (2017) *Academic Forensic Pathology* 517.

56 Section 40 of the Courts Act 1971 (c.23) formally abolished special juries. The section was later repealed by the Juries Act 1974 (c.23).

57 Hodgkinson and James (2007) 8; Buchanan (2006) *The Journal of the American Academy of Psychiatry and the Law* 15; Meintjies-Van Der Walt (2001) 33; Harno “Uniform Expert Testimony Act” (1938) 21 *American Judicature Society* 156 and Milroy (2017) *Academic Forensic Pathology* 517.

58 Hodgkinson and James (2007) 8; Rosenthal (1935) *Law and Contemporary Problems* 408 and Meintjies-Van Der Walt (2001) 33.

By the 1600s the use of oral evidence by experts became increasingly popular and accepted practice, in 1665, for example, in the *Witches Trial*[59] Sir Thomas Browne, a physician testified on the scientific explanation of bewitchment.[60] Dr Browne's testimony was his opinion which he formulated based on fact witnesses. Shortly after this case, the courts started to formalise the difference between evidence of fact, opinion and inference.[61] In the *Bushell*'s case (1671), the court stated that: [62]

> a witness swears to what he has heard or seen ... to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses by the act and force of the understanding.

Towards the seventeenth century, many more examples of cases where experts gave evidence emerged[63] , and by the eighteenth century, the notion of the expert witness as the exception to the opinion rule (that a witness could only give evidence on what they have perceived) was established.[64] The approach was expressed in the case of *Carter v Boehm* (1766),[65] where Lord Mansfield stated that:

> Great stress was laid upon the opinion of the broker. But we think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness.

Although the opinion of the broker in *Carter* could not be brought before the court, Lord Mansfield stated in the *Folkes v Chadd* (1782),[66] also known as the Wells Harbour

59 *R v Cullender and Duny*, 6 How. St. Tr. 687 (1665).
60 Rosenthal (1935) *Law and Contemporary Problems* 409; Hand (1901) *Harvard Law Review* 46 and Prosono in Rosner (ed.) (2003) 17-18.
61 Hodgkinson and James (2007) 9 and Meintjies-Van Der Walt (2001) 34.
62 Bushell (1670) 6 St. Tr. 999 as quoted in Hodgkinson and James (2007) 9.
63 Hodgkinson and James (2007) 9. See also Rosenthal (1935) *Law and Contemporary Problems* 409-411 for examples.
64 Hodgkinson and James (2007) 10; Rosenthal (1935) *Law and Contemporary Problems* 411-412 and Meintjies-Van Der Walt (2001) 34.
65 *Carter v Boehm* (1766) 3 Burr. 1905. See Hodgkinson and James (2007) 10 for a discussion on the case.
66 *Folkes v Chadd* (1782) 3 Doug. 157.

Case,[67] that evidence of "men of science"[68] in the form of opinion evidence as to a "matter of science" was proper testimony.[69] The case of *Folkes v Chadd*[70] is considered to have laid down the first rules of admissibility of opinion evidence. The *Folkes*-case was also held as the leading case on the law of expert witnesses in the United States of America.[71] The criteria for the admission of expert testimony remained relatively unchanged between 1850 and 1920, merely requiring the inquiry into whether the proffered expert was appropriately "qualified" to render the issue before the court.[72]

The admission of the expert witness was not without criticism. The use of expert witnesses was heavily criticised in the nineteenth century. In 1843 Lord Campbell stated that:[73]

> skilled witnesses come with such bias on their minds to support the case in which they are embarked that hardly any weight should be given to their evidence.

In the case of *Lord Abinger v Ashton* (1873)[74] concerns regarding the bias of expert witnesses were again raised and expert witnesses were considered "paid agents".[75] In *Thorn v Worthing Skating Rink* (1876) the comment was made that it is almost impossible to find an unbiased witness.[76] The criticism of expert witnesses was echoed in courts in the United States of America.[77] In *Winans v New York and Eric Railroad* (1859) the Judge inferred that any supporting expert opinion could be obtained at the right price.[78] The sentiment was shared in the case of *Keegan v Minneapolis and St.*

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67 The court in this case had to determine whether the position of an artificial embankment had caused the silting up of the harbour at the town Wells by the Sea, constituting a nuisance. Mr. Smeaton, a well-known scientist, had not seen the harbour but gave opinion evidence. His evidence was initially considered inadmissible but on appeal Lord Mansfield considered it "proper evidence". *Folkes v Chadd* (1782) 3 Doug. 157 at 159.

68 *Folkes v Chadd* (1782) 3 Doug. 157 at 159.

69 Hodgkinson and James (2007) 10; Rosenthal (1935) *Law and Contemporary Problems* 413 and Meintjies-Van Der Walt (2001) 34.

70 *Folkes v Chadd* (1782) 3 Doug. 157.

71 *Lincoln v The Saratoga and Schenectady Railroad Company* 23 Wend., 425 (1840).

72 Landsman (1995) *Behavioral Sciences and the Law* 150.

73 *Tracy Peerage Case* (1843) 10 C1 & F 191.

74 *Lord Abinger v Ashton* (1873) 17 LR Eq 358.

75 *Lord Abinger v Ashton* (1873) 17 LR Eq 358 at 358.

76 *Thorn v Worthing Skating Rink* (1876) 6 Ch D 415.

77 Milroy (2017) *Academic Forensic Pathology* 520.

78 *Winans v New York and Eric Railroad* 21 How. 88 (1859).

Louis Railroad (1899) where the court stated that experts are mere "paid advocates or partisans".[79]

In 1901 Judge Learned Hand, an American judge, in an attempt to give guidance on the use of expert testimony, argued that the use of an expert witness is objectionable for several reasons.[80] Firstly, Judge Hand argued that human nature is too weak for an expert witness not to be biased and to become a "hired champion" of a side.[81] Secondly, experts were bound to be contradicted by another expert, which in turn confuses juries as they do not know which expert to believe.[82] Judge Hand argued that instead of an expert witness, courts should make use of an advisory tribunal of experts.[83] Despite all of the nineteenth-century criticisms and recommendations, courts continued to use expert witnesses.

2.3 "Madmen" and the medical expert

Whether in Roman law or English law, the use of expert witnesses was an exception to the general opinion rule and limited to specific cases.[84] Against this background, the question arises as to when was psychiatric evidence included as an exception to the rule? The increasing use of medical evidence in history has been described as establishing a precedent for the later use of psychiatric evidence.[85] As such, it is crucial that the history of psychiatry first be related to its setting within the history of "madmen" and "medical men" as an expert witness.

"Madmen", "the insane", or "lunatics" are all terms that have been used in the past to refer to people who suffer from a mental illness or disorder.[86] Mental disorders were believed to be caused by supernatural phenomena and were not considered part of

79 *Keegan v Minneapolis and St. Louis Railroad* 76 Minn. 90, 78 N.W. 965 (1899).
80 Hand (1901) *Harvard Law Review* 53. See also the discussion in Buchanan (2006) *The Journal of the American Academy of Psychiatry and the Law* 15.
81 Hand (1901) *Harvard Law Review* 53.
82 *Ibid*.
83 *Ibid*.
84 See 2.2.
85 Smith (1981) 6.
86 Gillis "The historical development of psychiatry in South Africa since 1652" (2012) 18 *South African Journal of Psychiatry* 78.

the medical discipline.[87] Some of the common beliefs included that demons possessed the mentally ill,[88] that it was the result of witchcraft[89] or that the person had sold themselves to the devil.[90] It was only later that the concept of mental illness and the psychiatric diagnosis, as we know it today, evolved.[91]

Until the modern age, the mentally ill formed part of a larger group of the poor, the morally disreputable, the disabled, elderly and children who were considered dependant, a burden and incapable of productive labour.[92] The Romans recognised that the mentally ill were capable of causing harm to themselves or others and to prevent this, the mentally ill were placed in the care of their relatives.[93] Given that the cause of "madness" was supernatural, treatment did not exist, the only remedy that could be sought was from clergymen or practitioners of temple medicine.[94] The healers used spells, charms and purification rites to induce divine intervention.[95] The official treatment for the mentally ill was usually exorcism.[96]

Influenced by the Hippocratic Corpus "madness" was later also given a naturalistic account.[97] According to Scull "[r]eligious and secular, supernatural and what purported to be naturalistic explanations of all these myriad phenomena would persist alongside one another down the centuries".[98] As a result, both physicians, or medical men, and priests started to offer treatment in differing ways.[99] Despite the movement towards a

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87 Stone (1997) *Healing the mind: A history of psychiatry from antiquity to present* 6. See also Scull (2015) *Madness in civilization: A cultural history of insanity, from the Bible to Freud, from the madhouse to modern medicine* 16-26; Allan *et al*. (1995) *Medicine and Law* 674 and Swanepoel "The development of the interface between law, medicine and psychiatry: Medico-legal perspectives in history" (2009) 12 *Potchefstroom Electronic Law Journal* 129.

88 Gillis (2012) *South African Journal of Psychiatry* 78.

89 Prosono in Rosner (ed.) (2003) 17 and Fink "Medical malpractice: The liability of psychiatrists" (1973) 48 *Notre Dame Law Review* 696.

90 Gutheil "The history of forensic psychiatry" (2005) 33 *The Journal of the American Academy for Psychiatry and the Law* 260. The last execution of an alleged witch occurred in 1775 in Germany.

91 Gillis (2012) *South African Journal of Psychiatry* 78 and Fink (1973) *Notre Dame Law Review* 696.

92 Scull (2015) 122.

93 Swanepoel (2009) *Potchefstroom Electronic Law Journal* 144; Scull (2015) 31; 121; Smith (1981) 5 and Gillis (2012) *South African Journal of Psychiatry* 78.

94 Scull (2015) 31; 85 and Allan *et al*. (1995) *Medicine and Law* 674.

95 Scull (2015) 31.

96 Allan *et al*. (1995) *Medicine and Law* 674.

97 Hippocrates (460 B.C.-357 B.C.), a Greek physician, rejected the notion that diseases, including mental illnesses, were caused by magic or any other supernatural phenomenon. Scull (2015) 26-33; Prosono in Rosner (ed.) (2003) 15 and Swanepoel (2009) *Potchefstroom Electronic Law Journal* 143.

98 Scull (2015) 35.

99 *Ibid*.

naturalistic explanation of mental illness, the change was slow, and the old beliefs and traditions still retained power.[100] This is reflected in the law of that time. In the sections below[101] a very brief account of the early laws dealing with the mentally ill as well as the use of medical men as expert witnesses will be given.[102]

2.3.1 Roman law

In Roman law, the reference to the mentally ill was made in relation to guardianship and status.[103] The Twelve Tables determined that the mentally ill's property must be placed under the care of their paternal relatives.[104] The *Corpus Iuris Civilis* also contained references to the mentally ill, mostly in the context of their rights and custody.[105] In respect of criminal law, the *Corpus Iuris Civilis* held that the mentally ill could not be held responsible for their acts.[106]

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100 *Idem* 121.

101 See 2.3.1 and 2.3.2.

102 As mentioned in the introductory paragraph of 2.3.1 and 2.3.2, dealing with the mentally ill and the physician as expert witness in context of the Roman and English law respectively, it is only a brief outline to explain the evolution of the mental health professional as an expert witness. A more complete history is beyond the scope of this study. For further readings regarding the mentally ill in society see Foucault and Howard (1989) *Madness and civilization: A history of insanity in the age of reason*; Stone (1997) *Healing the mind: A history of psychiatry from antiquity to present* and Scull (2015) *Madness in civilization: A cultural history of insanity, from the Bible to Freud, from the madhouse to modern medicine*. For further readings on the history of medicine as a profession see Bynum and Porter (1993) *Companion encyclopaedia of the history of medicine*.

103 The *Corpus Iuris Civils* states that, "if a madman commits homicide he is not covered by the Cornelian Law because he is excused by the misfortune of his fate". The *Lex Cornelia* excuses children and the insane from punishment. See in general Walker "The insanity defense before 1800" (1985) 477 *The Annals of the American Academy of Political and Social Science* 26 and Prosono in Rosner (ed.) (2003) 16.

104 The Twelve Tables, Table V, 11 states, "When no guardian has been appointed for an insane person, or a spendthrift, his nearest agnates, or if there are none, his other relatives, must take charge of his property". Brittain (1967) *Medico-Legal Journal* 71. See also Prosono in Rosner (ed.) (2003) 16 and Allan *et al*. (1995) *Medicine and Law* 673.

105 The *Corpus Iuris Civilis* determined:

> The insane, therefore, was to retain not only the ownership of his property for the duration of his illness, but also his position, rank and even his magistracy, if he were a magistrate at the time the illness struck him. However, the law did recognize the juridical capacity of the insane person. He was likened to a person who was absent, asleep or even dead. Consequently, he was considered unable to make a valid will according to the principle of law. Soundness of mind, not health of body, is required of a testator when he makes his will.

See Allan *et al*. (1995) 14 *Medicine and Law* 673; Walker (1985) *The Annals of the American Academy of Political and Social Science* 26; Prosono in Rosner (ed.) (2003) 16 and Swanepoel (2009) *Potchefstroom Electronic Law Journal* 145.

106 The *Corpus Iuris Civilis* determines that "if a madman commits homicide he is not covered by the Cornelian Law because he is excused by the misfortune of his fate". Walker (1985) *The Annals of the American Academy of Political and Social Science* 26; Prosono in Rosner (ed.) (2003) 16 and Ladikos "A historical overview of crime, mental disorder and the insanity defence" (1996) 9(2) *Acta Criminologica* 103.

Although it is clear from the Twelve Tables and *Corpus Iuris Civils* that specific legal principles applied to the mentally ill, it was not indicated who was responsible for determining whether the person was indeed mentally ill.[107] It appears that the question of mental illness, or insanity, was traditionally a community judgment.[108] Relatives, friends or spectators gave evidence on mental illness as it was considered to be common sense.[109] What then was the role of medical men?

According to Payne-James and Stark[110] as well as various other scholars,[111] the *Corpus Iuris Civilis* makes provision for physicians to act as experts and give an impartial opinion. Smith also states that the *Corpus Iuris Civilis* refers to physicians acting as experts, including in cases dealing with mental illness.[112] Smith strengthens his argument by referring to the dictum, "*Medici proprie non sunt testes, sed majus est judicium quam testimonium*" which he attributes to Roman law.[113] When freely translated, the dictum means that the medical expert should assist the court with his specialised knowledge by being an impartial witness and not appearing for a particular side.[114]

Amundsen and Ferngren[115] and Allan, Louw and Verschoor,[116] however, argue that there is no evidence in the *Corpus Iuris Civilis* to support the notion that physicians were used in Roman times as experts.[117] Amundsen and Ferngren point out that Smith's reference is made without qualification, without a reference to the source.

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107 Prosono in Rosner (ed.) (2003) 16.

108 Prosono in Rosner (ed.) (2003) 16 and Walker (1985) *The Annals of the American Academy of Political and Social Science* 30.

109 Prosono in Rosner (ed.) (2003 16 and Walker (1985) *The Annals of the American Academy of Political and Social Science* 30.

110 Payne-James and Stark in Stark (ed.) (2011) *Clinical forensic medicine: A physician's guide* 4.

111 See in this regard Wecht "The history of legal medicine" (2005) 33 *The Journal of the American Academy of Psychiatry and the Law* 246; Smith "The history and development of forensic medicine" (1951) 1 *The British Medical Journal* 601 and Payne-James and Stark in Stark (ed.) (2011) 4. Specific reference is made to the various medico-legal matters in the *Corpus Iuris Civilis* and the Twelve Tables, Law IV of the second table of the Twelve Tables provided that "when a woman brings forth a son within the next ten months after the death of her husband, he shall be born in lawful marriage and shall be the legal heir of his estate".

112 Smith (1951) *The British Medical Journal* 601. Smith also refers to the use of medical experts in cases where pregnancy needs to be established, cases of sterility and impotence, and cases of poisoning and survivorship.

113 Smith (1951) *The British Medical Journal* 601.

114 *Ibid.*

115 Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 40.

116 Allan *et al.* (1995) *Medicine and Law* 673.

117 Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 40.

Furthermore, it does not accord with the classical Roman evidentiary and probatory principles.[118]

A reference to the source of the dictum above can be found in the work of John Ordronaux.[119] Ordronaux also refers to physicians who were called experts but stated that they were considered more as an amicus curia than a witness in Roman law.[120] Ordronaux supports his argument by referring to the abovementioned dictum[121] and attributes said dictum to Baldus de Ubaldis.[122] Baldus de Ubaldis (1327 A.D.-1400 A.D.) is one of the well-known commentators who attempted to interpret the *Corpus Iuris Civilis* as well as various other sources such as canon law and Italian statutes in light of the conditions of life in the thirteenth and fourteenth centuries.[123] The dictum in all probability formed part of the "second life" of Roman law on the European continent from the late 1300s and was not part of the *Corpus Iuris Civilis*. Given the origin of the dictum, the argument put forward by Amundsen and Ferngren[124] is supported.

Medicine was not as advanced as the law in the Roman era.[125] Medicine men contributed very little to law. Brittain states that the reason was, amongst others, that much of the knowledge required to aid the law did not exist at that time and also because of the poor quality of the physicians.[126] In the Roman era, there were no requirements to be a "medicine man," physicians only needed permission from the local magistrate.[127] Anyone could, therefore, call themselves a physician and practice the art of healing.[128] For many, the physician at that time was seen as a person of low standing[129] or feared as a poisoner.[130]

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118 *Ibid*.
119 Ordronaux (1869) *Jurisprudence of medicine in relation to the law of contracts, torts and evidence*.
120 Ordronaux (1869) 125.
121 *Medici proprie non sunt testes, sed majus est judicium quam testimonium*.
122 Ordronaux (1869) 125.
123 Van Zyl (1979) 124-125; 135.
124 Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 40.
125 Brittain (1967) *Medico-Legal Journal* 72.
126 *Ibid*.
127 Amundsen "Images of physicians in classical times" (1977) 11(3) *Journal of Popular Culture* 647 and Cilliers and Retief "Medical practice in Graeco-Roman antiquity" (2006) 29(2) *Curationes* 37.
128 Amundsen (1977) *Journal of Popular Culture* 647.
129 Cilliers and Retief (2006) *Curationes* 37. Cicero (106-43 B.C.) considered doctors as a tradesman rather than a gentleman.
130 Amundsen (1977) *Journal of Popular Culture* 644.

Given the dim view of physicians in the Roman era and the classical Roman evidentiary and probatory principles, it appears unlikely that physicians were called upon to be an expert witness.[131] Even if physicians acted as experts in specific instances, there is no indication that evidence was required to prove mental illness.[132]

2.3.2 English law

In England, various laws also existed that dealt with the mentally ill and addressed issues such as their responsibility and guardianship.[133] The *Praerogativa Regis* dating from the reign of Edward I (1272-1307) dealt specifically with the guardianship of the mentally ill and drew an important distinction between those who were termed "natural born idiots" and those who were "lunatics".[134] Lunatics' symptoms of mental illness only appeared later in their lives.[135] In terms of the *Praerogativa Regis* the profits of the estate of the naturally born idiot belonged to the king, but in the case of the lunatic, the king was to provide maintenance but could not make any profit from the estate.[136] For the provisions of the *Praerogativa Regis* to be applied, an inquisition was held.[137] The diagnosis of the person involved was determined by a commissioner, often a public official or presiding bishop, in consultation with a jury of local people.[138] As in the Roman era, the judgment of mental illness was considered a community judgment, albeit in this instance supported by royal authority. No physicians were involved.[139]

Physicians, however, played a role in introducing medical evidence in English courts from the thirteenth century onwards. In 1209 legislation was introduced that medical evidence must be led in cases of suspected murder in the ecclesiastical courts.[140] Around 1353, in an appeal of mayhem, the court had summoned surgeons from

131 Amundsen and Ferngren (1979) *Bulletin of the History of Medicine* 40 and Allan *et al*. (1995) *Medicine and Law* 674.
132 Allan *et al*. (1995) *Medicine and Law* 674.
133 Roffe and Roffe "Madness and care in the community: a medieval perspective" (1995) 311 *The British Medical Journal* 1709.
134 Roffe and Roffe (1995) *The British Medical Journal* 1709; Prosono in Rosner (ed.) (2003) 16 and Allan *et al*. (1995) *Medicine and Law* 674.
135 *Ibid*.
136 Roffe and Roffe (1995) *The British Medical Journal* 1709.
137 *Idem* 1708;1710.
138 *Idem* 1710.
139 Prosono in Rosner (ed.) (2003) 17.
140 Allan *et al*. (1995) *Medicine and Law* 674.

London to assist the court on deciding whether a wound had rendered the victim defenceless or not.[141] In *Buckley v Rice* (1554)[142] the court considered the use of medical experts, including the use of surgeons in mayhem cases, as a "honorable and commendable thing".[143]

Until the early 1800s, expert medical evidence was primarily confined to injuries and diseases of a physical nature, and even then, it was limited in use.[144] In a few exceptional cases, mainly criminal law trials, expert medical evidence regarding the mental state of a person was used. For many scholars, the first introduction of expert medical evidence regarding a person's mental state can be traced back to witchcraft trials.[145] As noted above[146] , in the late 1500s and 1600s, physicians were being called upon to testify whether the person involved was indeed possessed or suffered from a mental illness.[147]

In rare instances, physicians were also called upon in criminal cases where the accused raised insanity[148] , but they played a marginal role.[149] In the 1600s, very few insanity cases were reported in English criminal law.[150] Different formulations for the tests for insanity developed over the years.[151] During the insanity trials, it was usually

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141 In English law referred to as whether the wound was mayhem or not. Hodgkinson and James (2007) 8; Rosenthal (1935) *Law and Contemporary Problems* 407; Hand (1901) *Harvard Law Review* 42-43 and Eigen and Andoll "From mad-doctor to forensic witness: The evolution of early English court psychiatry" (1986) 9 *International Journal of Law and Psychiatry* 159.

142 *Buckley v Rice* 1. Plowd. 125 (1554).

143 *Buckley v Rice* at 125.

144 Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 159. For example, Forbes, in his study on homicide trials in the eighteenth century at the Old Bailey, determined that from 1729 until 1768 157 trials were heard and 91, almost 60%, had no medical expert witnesses. See Forbes (1985) as quoted in Milroy (2017) *Academic Forensic Pathology* 519.

145 Eigen in Clark and Crawford (eds.) (1994) *Legal medicine in history* 169.

146 See 2.2.2.

147 Allan *et al*. (1995) *Medicine and Law* 674; 675. The distinction can be ascribed to the works of the physician Johann Weyer (1515-1588) who is known for his work in *De Praestigiis Demonum* (1563). Stone (1997) 30.

148 In South Africa there is no insanity defence, but a defence of pathological criminal incapacity.

149 English common law did not recognise an insanity defence. It was considered a tool for pardon. See Ladikos (1996) *Acta Criminologica* 104.

150 Platt and Diamond "The origins of the right and wrong test of criminal responsibility and its subsequent development in the United State: An Historical Survey" (1966) 54 *California Law Review* 1234.

151 For the history and development of the insanity defence see Platt and Diamond (1966) *California Law Review* 1227; Melton *et al*. (2018) 199-212; Ladikos (1996) *Acta Criminologica* 102; Gudjonsson and Haward (1998) *Forensic psychology: A guide to practice* 8; Walker (1985) *The Annals of the American Academy of Political and Social Science* 25; Smith (1981); Eigen "Delusion in the courtroom: The role of partial insanity in early forensic testimony" (1991) 35 *Medical History* 25; Van Oosten "The insanity

the testimony of relatives, friends or other lay witnesses and the statements of the accused themselves that were most often used, which persuaded the court.[152]

Expert medical witnesses testifying regarding mental illness steadily increased in the English criminal courts.[153] According to a study done by Eigen, between 1760 until 1845, medical witnesses were called in fewer than a quarter of the insanity cases.[154] Before 1825 more than half of the medical witnesses in insanity trials were not testifying as independent expert witnesses, but rather as friends, family members, or (previously) treating physicians.[155] Eigen describes their capacity as an expert witness as "…an extension of their role as neighbour or friend".[156] It is clear from Eigen's study that physicians were considered to occupy the role of treater of the mentally ill even when testifying. According to Gutheil, only after 1825, the independent medical witness began to replace the treater as a witness.[157]

The lack of physicians testifying in insanity trials can also be attributed to their testimony which was considered unremarkable and very similar to that of the layman.[158] In the Old Bailey Session Papers,[159] it appears that in many of the cases a physician would simply declare "I have looked upon him as a man insane".[160] When asked to explain the "expert" testimony, the physician would merely refer to the

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defence: Its place and role in criminal law" (1990) 3 *South African Journal of Criminal Justice* 1 and White "The insanity defense in England and Wales since 1843" (1985) 477 *The Annals of the American Academy of Political and Social Science* 43.

152 Walker (1985) *The Annals of the American Academy of Political and Social Science* 30 and Gutheil (2005) *The Journal of the American Academy for Psychiatry and the Law* 260.

153 Eigen in Clark and Crawford (eds.) (1994) 171 and Smith (1981) 3.

154 Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 161. An example is the case of Lord Ferrers who was tried for murder in 1760 and attempted to use the defence of insanity. A doctor was called to comment on the matter of insanity. Some scholars describe the evidence of the physician, Dr Munro as the first "psychiatric evidence". See Prosono in Rosner (ed.) (2003) 19. See also the discussion of this case in Rosenthal (1935) *Law and Contemporary Problems* 415; Hand (1901) *Harvard Law Review* 47 and Eigen in Clark and Crawford (eds.) (1994) 169.

155 Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 161 and Ferguson and Ogloff "Criminal responsibility evaluations: Role of psychologists in assessment" (2011) 18 *Psychiatry, Psychology and Law* 81.

156 Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 161.

157 Gutheil (2005) *The Journal of the American Academy for Psychiatry and the Law* 260.

158 Eigen in Clark and Crawford (eds.) (1994) 17 and Eigen (1991) *Medical History* 29.

159 Before regular court reporting tabloids reported on the criminal trials which took place at the Old Bailey and is known as Old Bailey Session Papers or Old Bailey Proceedings. In some instances, the account contained *verbatim* testimonies of the trials. See Old Bailey Proceedings Online "Publishing history of the proceedings" (2018) available online at https://www.oldbaileyonline.org/static/Publishinghistory.jsp (last accessed on 29 January 2020).

160 Eigen in Clark and Crawford (eds.) (1994) 171.

accused's flighty speech, an incoherent conversation, or the inability of the accused to answer a question logically.[161] The answer by the physician requires no medical training.[162] The relatives or friends who testified were often better positioned to give examples of where an accused had acted out of the ordinary.[163]

Only in the late nineteenth century physicians started testifying in their professional capacity and as independent expert witnesses. By then, it was expected that physicians, as medical experts give testimony in various cases.[164] As with the expert witness in general, the testimony of the physicians was heavily criticised in the nineteenth century. An example of such criticism can be found in the 1863 volume of the British Medical Journal, which observed: [165]

> Medical evidence delivered in our courts of law has of late become a public scandal and a professional dishonour. The Bar delights to sneer at and ridicule it; the judge on the bench solemnly rebukes it; and the public stand by in amazement; and honourably minded members of our profession are ashamed of it.

2.4 From mad doctor to expert witness: the interface between psychiatry and law

In 1801 John Lawrence was accused of stealing three silver teaspoons and a silver salt-spoon.[166] Dr Louis Leo, a physician, appeared on his (Lawrence's) behalf to further the insanity plea. During the trial, the following was recorded: [167]

Court:	Are you particularly versed in this disorder of the human mind?
Dr Leo:	I am
Court:	Then you are what is called a mad doctor
Dr Leo:	It is not my particular profession to attend persons under that complaint: I have attended them, we call it mania.

161 Eigen in Clark and Crawford (eds.) (1994) 171.
162 Eigen (1991) *Medical History* 29.
163 *Ibid*.
164 Smith (1981) 7.
165 Unknown "Medical evidence in courts of law" (1863) 1 (122) *The British Medical Journal* 456.
166 Old Bailey Proceedings Online "May 1801, trial of John Lawrence (t18010520-8)" available online at www.oldbaileyonline.org (last accessed 29 January 2020).
167 Old Bailey Session Paper, (1801- Case #445, fifth session) at 319 as quoted in Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 163.

Before the specialised field of psychiatry was coined, psychiatrists, or the physicians who specialised in the mental state of people, were referred to as alienists or simply mad doctors.[168] Alienists or mad doctors had to deal with the stigma of being associated with the mentally ill and the antagonism and disdain with which they were met when they defended an accused which is evident in their "title".[169]

The precise date that the medical speciality of psychiatry developed cannot be pinpointed, the process of development, however, is said to have its origin in the late 1700s or early 1800s.[170] One of the most influential work in this area was done by a French physician, Philippe Pinel, who published *Medico-Philosophical Treatise on Mental Alienation or Mania* in 1801.[171] For many Pinel is considered instrumental in the founding of psychiatry but the term *Psychiatrie*, German for psychiatry, was coined and first used in the early 1800s by a German physician, Johann Christian Reil.[172]

Foucault commented that what preceded psychiatry was only a commentary on different physical and mental afflictions by physicians and not a discipline.[173] Eigen and Andoll in their study on the evolution of what they considered court psychiatry demonstrates that the case of John Lawrence in 1801[174] was a clear indication that the subspeciality, psychiatry, had indeed arrived.[175]

Another case that brought the speciality to the forefront was in 1840 when Edward Oxford attempted to assassinate Queen Victoria and Prince Albert.[176] Oxford suffered from a hereditary mental illness, and it was argued that he was not guilty due to

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168 Smith (1981) 3.
169 *Idem* 7.
170 Prosono in Rosner (ed.) (2003) 14; Bauman (ed.) (2008) *Primary health care psychiatry: A practical guide for southern Africa* 38 and Greig (2002) *Neither bad nor mad: The competing discourses of psychiatry, law and politics* 19.
171 Allan *et al*. "Expert evidence: The emergence of psychiatry and psychology (2)" (1995) 14 *Medicine and Law* 678.
172 Stone (1997) 72; Gillis (2012) *South African Journal of Psychiatry* 78 and Allan *et al*. "Expert evidence: The emergence of psychiatry and psychology (2)" (1995) 14 *Medicine and Law* 678.
173 Foucault as quoted by Prosono in Rosner (ed.) (2003) 14.
174 Old Bailey Proceedings Online "May 1801, trial of John Lawrence (t18010520-8)" available online.
175 Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 168. Eigen and Andoll in their article did, however, warn against placing too much emphasis on a single case.
176 Old Bailey Proceedings Online "July 1840, trial of Edward Oxford (t18400706-1877)" (2018) available online at www.oldbaileyonline.org, (last accessed on 29 January 2020).

insanity. At his trial, Dr John Davis testified that he was of the opinion that Oxford suffered from a mental illness when he attempted to kill the Queen. During cross-examination, Dr Davis was asked in which capacity he answered the questions during chief.[177] Dr Davis promptly answered, "I answer as a physician".[178] It appears from Oxford's case that medical specialists in court were starting to see themselves as professionals.[179] There are other cases where physicians were asked regarding their diagnosis, but in the *Oxford* case,[180] there is an explicit distinction between the lay witness and the medical expert witness.[181]

The nineteenth century was also marked by American psychiatry that started to enter the medical arena.[182] In 1801 Benjamin Rush first delivered a formal lecture on medical jurisprudence, more specifically diseases of the mind, at an American medical school.[183] It was, however, Isaac Ray, who is considered to have established forensic psychiatry in the United States of America.[184] Ray, an American psychiatrist, wrote *Treatise on the medical jurisprudence of insanity (*1838) which was considered an international classic on forensic psychiatry.[185] It was one of the first studies on the interface between psychiatry and law.[186] For many, his work is considered seminal in the outcome of the well-known case of Daniel M'Naghten in 1843.[187]

177 Sir Pollack asked, "You have answered some hypothetical questions put by my learned friend opposite, (Mr. Bodkin) I beg to ask you whether you give that answer from your knowledge, as a physician, or from your experience as a Coroner, or as a Magistrate, or merely as a member of society?" See Old Bailey Proceedings Online "July 1840, trial of Edward Oxford (t18400706-1877)" available online.

178 Old Bailey Proceedings Online "July 1840, trial of Edward Oxford (t18400706-1877)" available online.

179 Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 167.

180 Old Bailey Proceedings Online "July 1840, trial of Edward Oxford (t18400706-1877)" available online.

181 Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 167.

182 Stone (1997) 120; Gutheil (2005) *The Journal of the American Academy for Psychiatry and the Law* 261 and Prosono in Rosner (ed.) (2003) 20.

183 Allan *et al*. "Expert evidence: The emergence of psychiatry and psychology (2)" (1995) 14 *Medicine and Law* 679.

184 Allan *et al*. "Expert evidence: The emergence of psychiatry and psychology (2)" (1995) 14 *Medicine and Law* 679.

185 Stone (1997) 120; Gutheil (2005) *The Journal of the American Academy for Psychiatry and the Law* 261 and Prosono in Rosner (ed.) (2003) 20.

186 Prosono in Rosner (ed.) (2003) 20.

187 Prosono in Rosner (ed.) (2003) 20 and Gold "On the roots of modern forensic psychiatry: Ethics ramifications" (2012) 40 *The Journal of the American Academy of Psychiatry and the Law* 247.
Also known as *McNaghten* or *McNaughton's Case, McNaughten Rules, M'Naghten Rules, and R. v McNaghten.*

The *M'Naghten*-case[188] is considered a landmark in the development of forensic psychiatry.[189] While suffering from paranoid delusions, M'Naghten attempted to assassinate the British Prime Minister, Robert Peel. Instead, he mistakenly shot and killed the Prime Minister's secretary, Edward Drummond. M'Naghten pled not guilty by reason of insanity. During his trial, nine (9) expert medical witnesses testified.[190] The *M'Naghten* rules[191] were formulated in the wake of the trial and are still the standard to determine insanity in England[192] and various American states.[193] The hallmark case is seen as an approval of psychiatric evidence by physicians in cases dealing with insanity.[194] The case further clarified the role medical experts could play in future trials.[195]

The *Oxford*- and *M'Naghten*-cases clearly indicate a shift from a physician or mad-doctor providing information about a known patient or friend to expert testimony regarding an unknown accused.[196] The mad doctor was transformed into an expert witness that relied on clinical experience, scientific knowledge and other professional

188 *R v M'Naghten* (1843) 8 E.R. 718.

189 Greig (2002) 19; Appelbaum (1994) *Almost a revolution: Mental health law and the limits of change* 166-172; Gutheil and Appelbaum (2000) *Clinical handbook of psychiatry and the law* 275; Davies *et al.* (eds.) (1995) *Psychology, law and criminal justice* 177; Ferguson and Ogloff (2011) *Psychiatry, Psychology and Law* 80-81; Bazelon "Psychiatrists and the adversary process" (1974) 230 *Scientific American* 20-21 and Gold (2012) *The Journal of the American Academy of Psychiatry and the Law* 247.

190 Smith (1989) *Behavioral Sciences and the Law* 147.

191 The M'Naghten rule (*R v M'Naghten* (1843) 8 E.R. 718 at 719) determined that:

> To establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.

For a discussion on the M'Naghten rule see Greig (2002) 19; Appelbaum (1994) 166-172; Gutheil and Appelbaum (2000) 275; Davies *et al.* (eds.) (1995) 177; Ferguson and Ogloff (2011) *Psychiatry, Psychology and Law* 80-81; Bazelon (1974) *Scientific American* 20-21; Smith (1981) 14-18 and Ladikos (1996) *Acta Criminologica* 106-107.

The M'Naghten rules were heavily criticised by psychiatrists. In the American courts Judge Bazelon later formulated the *Durham* rule in the 1954 housebreaking case. The intension of the rule was to bridge the gap between psychiatry and law but instead resulted in confusion. The rule was later replaced. See Slovenko "A history of the intermix of psychiatry and law" (2004) 32 *The Journal of Psychiatry and Law* 578 and Bazelon (1974) *Scientific American* 18. Bazelon himself favoured the abandonment of the rule because in practice it had failed to take the issue of criminal responsibility away from experts. According to Bazelon psychiatrists continued to testify to the naked conclusion instead of providing information about the accused. See also Ladikos (1996) *Acta Criminologica* 107-108.

192 Gutheil (2005) *The Journal of the American Academy for Psychiatry and the Law* 262; White (1985) *The Annals of the American Academy of Political and Social Science* 43 and Bartlett "Legal madness in the nineteenth century" (2001) 14 *Social History of Medicine* 110.

193 Prosono in Rosner (ed.) (2003) 21 and Brigham "What is forensic psychology, anyway?" (1999) 23 *Law and Human Behavior* 275.

194 Prosono in Rosner (ed.) (2003) 20.

195 Greig (2002) 19.

196 Gold (2012) *The Journal of the American Academy of Psychiatry and the Law* 247.

skills in their testimony.[197] The mad doctor was also transformed because of the insights into mental illness that became more advance and "fast becoming an important element for the 'Counsel for the Defence'".[198] In other words, the evidence was needed by the defence to secure their cases.

Another influential case in the United States of America was that of Charles Guiteau who, in 1881, assassinated President Garfield.[199] The trial is marked with tension between the experts who disagreed over fundamental aspects regarding mental illness. Controversies regarding the nature of mental illness[200] were already heavily debated in the 1850s and 1860, and further enflamed by psychiatric experts in the *Guiteau*-case.[201] The case placed the problem of polarization of experts or the "battle of the experts" in the public light. The medical expert's role in the courtroom was met with much dissatisfaction from both the members of the profession and the public.[202]

As illustrated by the abovementioned case law, the history of psychiatry and law has been largely influenced by the history of establishing competency and attributing responsibility in criminal cases.[203] As a result, most literature deals with psychiatrists' expert oral testimony and references to written medico-legal or psycho-legal reports are uncommon.[204] The first use of medico-legal reports, specifically psycho-legal reports, seems to have been in civil cases.[205] The reports were used, especially cases dealing with disputed wills such as the well-known 1856 Parish will-case.[206] Isaac Ray, one of the Parish will-case experts, commended the court for such forward-thinking of requesting written reports, according to Ray this was a "movement in the right

197 Gold (2012) *The Journal of the American Academy of Psychiatry and the Law* 247 and Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 167.
198 Eigen in Clark and Crawford (eds.) (1994) 193.
199 Prosono in Rosner (ed.) (2003) 22.
200 Gutheil (2005) *The Journal of the American Academy for Psychiatry and the Law* 261.
201 Prosono in Rosner (ed.) (2003) 21.
202 *Idem* 22.
203 *Idem* 20.
204 Buchanan and Norko (2011) *The psychiatric report: Principles and practice of forensic writing* 11.
205 *Ibid.*
206 *Idem* 12. In the *Parish* case the validity of the will of the late Henry Parish was in dispute. In this case the evidence and the testimonies were published in six volumes and contained the reports of psychiatrists, including that of Isaac Ray.

direction".[207] Buchanan and Norko note that the reports included in the Parish will-case were a "spectacular example of nineteenth-century forensic reportage".[208]

Given the history of expert witnesses and more specifically physicians as experts, it is not surprising that psychiatrists were met with antagonism in court. History reveals that common sense was preferred over expert evidence and that, along with the fact that physicians used commonly available criteria, many laymen assumed they could also diagnose a person with a mental illness.[209] A prime example is that of Judge Bramwell, who insisted that juries should make the decisions regarding insanity as it was common sense.[210] In the case of William Dove, Judge Bramwell was very irritated with the "experts in madness" and expressed his disapproval of the evidence in no uncertain terms.[211] Again, despite the criticism psychiatric evidence was sought after in a wide range of cases, not only limited to criminal law cases.

2.5 The start of an uneasy alliance: The interface between psychology and law

By the nineteenth century, the need for psychiatrists' testimony had grown. Psychology, on the other hand, had a much slower impact on the law and courts. This can be attributed to various factors, including the fact that psychology only established itself as an independent discipline during the nineteenth century when a widely asserted primacy of psychiatry already existed.

The term psychology comes from two Greek words, *psyche*, meaning soul and *logos*, referring to the study of the subject.[212] Psychology originated from the disciplines philosophy and physiology.[213] In 1879 Wilhelm Wundt (1832-1920) succeeded in establishing the first formal laboratory for research in psychology at the University of

207 Ray (1873) *Contributions to Mental Pathology* 316.
208 Buchanan and Norko (2011) 12.
209 Smith (1981) 62.
210 *Ibid*.
211 *Idem* 1536.
212 Oxford English Dictionary "Psychology, n." (2019) available online at https://www-oed-com.uplib.idm.oclc.org/view/Entry/153907?redirectedFrom=psychology#eid (last accessed on 4 December 2019).
213 *Ibid*.

Leipzig, which is considered by many the "birthplace" of the discipline psychology.[214] The campaign by Wundt led to psychology being seen as an independent discipline and Wundt being characterised as the father of psychology.[215]

Not surprising given the country of origin of psychology, one of the earliest recorded testimony by a psychologist occurred in Germany in 1896 by Dr Albert von Schrenck-Notzing.[216] Dr Von Schrenck-Notzing testified at the trial of a man accused of murdering three women in Munich.[217] The trial was highly publicised, and Dr Von Schrenck-Notzing indicated the witness statements could not readily be accepted because of possible contamination after the trial's intense pre-publicity. He described this as "retroactive memory-falsification".[218] Dr Van Schrenck-Notzing's testimony was, however, disregarded.[219]

At first, psychology developed as an experimental science, but later various branches developed including applied psychology.[220] Hugo Münsterberg (1863-1916), one of Wundt's students, is best known as the founder of applied psychology[221] but also considered pivotal in the origins of the speciality of forensic psychology.[222] Münsterberg wrote several articles dealing with, amongst others, psychological analyses of legal aspects of testimony, eyewitness identification, and confessions.[223] The articles were gathered together and published in 1908 in the popular book *On the*

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214 Ogloff *et al*. "Education and training in psychology and law/criminal justice: Historical foundations, present structures, and future developments" (1996) 23 *Criminal Justice and Behavior* 204; Gudjonsson "Psychology brings justice: the science of forensic psychology" (2003) 13 *Criminal Behaviour and Mental Health* 160; Gudjonsson and Haward (1998) *Forensic psychology: A guide to practice* 204 and Hess and Weiner (eds.) (1999) *The handbook of forensic psychology* 5.

215 Ogloff *et al*. (1996) *Criminal Justice and Behavior* 204.

216 Hess and Weiner in Hess and Weiner (eds.) (1999) 5 and Davies in Bull and Carson (eds.) (1995) *Handbook of psychology in legal contexts* 179.

217 Hess and Weiner in Hess and Weiner (eds.) (1999) 5.

218 Hess and Weiner in Hess and Weiner (eds.) (1999) 5 and Davies in Bull and Carson (eds.) (1995) 179.

219 Davies in Bull and Carson (eds.) (1995) 179.

220 Candilis and Neal "Not just welfare over justice: Ethics in forensic consultation" (2014) 19 *Legal and Criminological Psychology* 20. One of the branches of applied psychology is clinical psychology.

221 Moskowitz "Hugo Münsterberg: A study in the history of applied psychology" (1977) *American Psychologist* 824 and Ogloff "Two steps forward and one step backward: The law and psychology movement(s) in the 20th century" (2000) 24 *Law and Human Behavior* 460.

222 Gottlieb and Coleman in Knapp (ed.) (2012) *APA handbook of ethics in psychology, Volume 2: Practice, teaching and research* 9; Ogloff "Law and psychology in Canada: The need for training and research" (1990) 31(1) *Canadian Psychology* 61; Varela and Conroy "Professional competencies in forensic psychology" (2012) 43 *Professional Psychology: Research and Practice* 410-411 and Allan *et al*. "Expert evidence: The emergence of psychiatry and psychology (2)" (1995) 14 *Medicine and Law* 680.

223 Moskowitz (1977) *American Psychologist* 831; Gottlieb and Coleman in Knapp (ed.) (2012) 91; Ogloff (1996) *Criminal Justice and Behavior* 205 and Ogloff (2000) *Law and Human Behavior* 458.

Witness Stand.[224] In his introduction of the book he ended it by writing that, "my only purpose is to turn the attention of serious men to an absurdly neglected field which demands the full attention of the social community".[225]

Münsterberg's studies in legal applications of psychology continued but were considered more popular than scientific.[226] Münsterberg's work was not received openly, and he was considered by some more of an opportunist than a true pioneer.[227] In 1909 John Wigmore, a professor in the law of evidence, rebuked the work of Münsterberg with a satirical article.[228] The article, written as if it were a defamation case, accused Münsterberg of claiming "more than his science could offer".[229]

Despite the criticism and lack of scientific rigour, the popularity of Münsterberg's work succeeded in bringing about changes in the court and eventually introducing psychologists as experts in court.[230] As Bartol and Bartol emphasised, "he undeniably pushed his reluctant American colleagues into the practical legal arena and made a seminal contribution to forensic psychology".[231] Several psychologists followed in Münsterberg's footsteps in the early 1900s and wrote about the application of psychology to law.[232]

In 1911 Professor Karl Marbe, another of Wundt's students, created legal history by being the first psychologist to testify at a civil trial regarding a train accident near Müllheim, Germany.[233] Professor Marbe explained the phenomenon of reaction time and testified that the driver of the train would not, as a result, have been able to stop

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224 Moskowitz (1977) *American Psychologist* 831.
225 Ogloff (2000) *Law and Human Behavior* 460.
226 Moskowitz (1977) *American Psychologist* 833.
227 Hess and Weiner (eds.) (1999) 7; Brigham (1999) *Law and Human Behavior* 277 and Ogloff (2000) *Law and Human Behavior* 458.
228 Ogloff (2000) *Law and Human Behavior* 460; Slovenko (2004) *The Journal of Psychiatry and Law* 566 and Slovenko "Psychiatric opinion without examination" (2000) 28 *The Journal of Psychiatry and Law* 121-122.
229 Ogloff (2000) *Law and Human Behavior* 460; Slovenko (2004) *The Journal of Psychiatry and Law* 566 and Allan *et al*. "Expert evidence: The emergence of psychiatry and psychology (2)" (1995) 14 *Medicine and Law* 681.
230 Moskowitz (1977) *American Psychologist* 833.
231 Bartol and Bartol as quoted in Brigham (1999) *Law and Human Behavior* 277.
232 Ogloff (2000) *Law and Human Behavior* 461. See also Bartol and Bartol in Weiner and Otto (eds.) (2014) *The handbook of forensic psychology* 3-28 on prominent psychologists during that time period.
233 Gudjonsson and Haward (1998) 11. Bartol and Bartol in Weiner and Otto (eds.) (2014) 8 indicate that the trial occurred in 1912.

the train in time.[234] Also in 1911, Professor Marbe testified in a sexual assault case regarding the testimony of children.[235] He persuaded the jury that the testimonies of the young girls were unreliable.[236]

Ten years later, in 1921, the first published case of a psychologist that was qualified to testify as an expert witness appeared in the United States of America.[237] The psychological evidence in *State v Driver* was, however, rejected by the court.[238] Preceding the *Driver* case, psychologists had already started providing the courts with information in the form of a legal brief.[239] The first legal brief containing social science knowledge was in the case of *Muller v Oregon*[240] in 1908.[241] Despite the use of a legal brief as early as 1908 it did not become common until the late 1930s.[242]

After psychology and law's interface initially gained momentum with Münsterberg's influence, the interest started to wane.[243] The development of the field was then further curtailed with the two World Wars and the Great Depression.[244] By the 1940s and 1950s, the discipline started to regain its momentum.[245] One of the most influential cases at that time was *People v. Hawthorne*[246] in 1940 where the Michigan Supreme Court held that an expert's status is not determined by a degree (including a medical degree) but the extent of the expert witness's knowledge.[247] The court made it clear that "medical men" were not superior to psychologists when determining insanity.[248] The triumphs for the field continued, and in 1954, the United States Supreme Court

234 Gudjonsson and Haward (1998) 11 and Bartol and Bartol in Weiner and Otto (eds.) (2014) 8.
235 Bartol and Bartol in Weiner and Otto (eds.) (2014) 8.
236 *Ibid*.
237 Gudjonsson and Haward (1998) 11-12. And Bartol and Bartol in Hess and Weiner (eds.) (1999) 10.
238 Gudjonsson and Haward (1998) 12.
239 Bartol and Bartol in Hess and Weiner (eds.) (1999) 10.
240 *Muller v. Oregon*, 208 U.S. 412 (1908).
241 Brigham (1999) *Law and Human Behavior* 278. According to statutes of that time women's workdays were limited to 10 hours. The brief indicated that any longer workdays would be detrimental to the well-being of women. The court took the brief into consideration and upheld that the statute was not unconstitutional. See *Muller v. Oregon*, 208 U.S. 412 (1908).
242 Brigham (1999) *Law and Human Behavior* 278.
243 Ogloff *et al*. (1996) *Criminal Justice and Behavior* 206.
244 Bartol and Bartol in Hess and Weiner (eds.) (1999) 9; Ogloff (2000) *Law and Human Behavior* 462; Slovenko (2004) *The Journal of Psychiatry and Law* 561 and Smith (1989) *Behavioral Sciences and the Law* 147.
245 Bartol and Bartol in Weiner and Otto (eds.) (2014) 14.
246 *People v. Hawthorne*, 293 Mich., 15, 291 N.W. 205 (1940).
247 Bartol and Bartol in Weiner and Otto (eds.) (2014) 15 and Allan *et al*. "Expert evidence: The emergence of psychiatry and psychology (2)" (1995) 14 *Medicine and Law* 682.
248 *Ibid*.

handed down the judgment in the landmark case of *Brown v. Board of Education of Topeka* regarding the state-sanctioned segregation in public schools.[249] A brief, written by social psychologists, was submitted in this case detailing the research on the effects of segregation on the self-esteem of black children.[250] The Supreme Court's reference to the brief demonstrated the important role of social science in the field of law.[251]

By the 1960s, there was a significant increase in mental health experts in court.[252] In 1962 in the United States of America Judge Bazelon watershed decision in *Jenkins v. United States*[253] provided a breakthrough for psychologists, as it was held that not only physicians or psychiatrists were qualified independent witnesses with expertise on mental disorders, but also psychologists.[254] Following the opinion, more courts certified psychologists as expert witnesses.[255]

The interface between psychology and the law had a much slower start in the United Kingdom than in the United States of America.[256] It was only in 1958 that the first psychologist testified in a criminal trial in England.[257] Prior to 1958 psychological evidence was given in English courts mostly by medical officers or psychiatrists.[258] The use of psychologists in English courts has increased despite the slow start, although psychologists are used much less England than in the United States of America.[259]

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249 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
250 Brigham (1999) *Law and Human Behavior* 278; Ogloff *et al*. (1996) *Criminal Justice and Behavior* 207; Gottlieb and Coleman in Knapp (ed.) (2012) 91 and Slovenko (2004) *The Journal of Psychiatry and Law* 586.
251 Varela and Conroy (2012) *Professional Psychology: Research and Practice* 411.
252 Smith (1989) *Behavioral Sciences and the Law* 147.
253 *Jenkins v. United States*, 307 F 2d 637 (1962).
254 Smith (1989) *Behavioral Sciences and the Law* 147; Bartol and Bartol in Weiner and Otto (eds.) (2014) 16; Varela and Conroy (2012) *Professional Psychology: Research and Practice* 411 and Allan *et al*. "Expert evidence: The emergence of psychiatry and psychology (2)" (1995) 14 *Medicine and Law* 682.
255 Bartol and Bartol in Weiner and Otto (eds.) (2014) 16.
256 Gudjonsson and Haward (1998) 204.
257 Gudjonsson and Haward (1998) 204; Scholtz in Roos *et al*. (2016) *An introduction to forensic psychology* 3 and Gudjonsson (2003) *Criminal Behaviour and Mental Health* 160.
258 Gudjonsson and Haward (1998) 204.
259 Allan *et al*. "Expert evidence: The emergence of psychiatry and psychology (2)" (1995) 14 *Medicine and Law* 683.

2.6 The development of professional organisations and regulatory bodies

Eigen and Andoll, and correctly so, are of the opinion that the recognition of a profession was part of the reason that prompted the legal community to start using expert psychiatric and psychological evidence more.[260] Prosono emphasises that the history of what is now known as forensic psychiatry is, in essence, a history of the professionalisation of medicine and the specialisation of psychiatry.[261] The same can be said of the history of forensic psychology.

Along with the professionalisation of psychology and psychiatry, professional associations or organisations emerged. Many associations and statutory bodies also developed ethical codes, guidelines or standards of practice to assist and govern their members. The developmental history of formal professional associations and professional ethics in psychology and psychiatry provides a perspective on the history of the regulation of the field. The need to transform professional structures is emphasised through historical development.

The historical perspective provided in 2.6.1 below is a brief overview. Only an outline of major historical developments is discussed. Al three the comparator countries follow a two-tier regulatory structure with separate voluntary associations and statutory bodies. The precise working of the regulatory structure of each organisation will only be discussed in the following chapters, but the leading associations and statutory bodies of each of the comparator country will be mentioned below.

2.6.1 Statutory and voluntary organisations or associations regulating psychiatry

2.6.1.1 South Africa

In 1928, in terms of the Medical, Dental and Pharmacy Act 13 of 1928, the South African Medical and Dental Council (SAMDC) was established to regulate the medical

260 Eigen and Andoll (1986) *International Journal of Law and Psychiatry* 167.
261 Prosono in Rosner (ed.) (2003) 14.

and dental professions.[262] The Medical, Dental and Pharmacy Act was later repealed by the Health Professions Act 56 of 1974,[263] and the Council renamed to the Health Professions Council of South Africa (HPCSA).[264] The HPCSA to date is the statutory body regulating health professions, including the practice of psychiatry. In *Veriava v President, South Africa Medical and Dental Council* the court held that the Council (at that stage the SAMDC) was the *custos morum* of the medical profession.[265] The court described the Council as, "the guardian of the prestige, status and dignity of the profession and public interests".[266]

Although all psychiatrists in South Africa must be registered in terms of the Health Professions Act to practice,[267] it was only in 1949 that the first academic training in the specialist field of psychiatry was offered, thereafter a medical practitioner could register as a medical specialist with the HPCSA.[268] Section 15 of the Health Professions Act further provides for establishing Professional Boards that operate in conjunction with the HPCSA.[269] Psychiatrists are registered within the Medical, Dental and Medical Science Board as medical specialists.[270]

The first *Code of ethical rules of the HPCSA* published in 1976,[271] was repealed and replaced by the *Ethical rules of conduct for practitioners registered under the Health Professions Act, 1974* in Augusts 2006.[272] The Code of Ethical Rules, as amended, still applies today.[273] No specific ethical code was formulated for psychiatrists by the Medical, Dental and Medical Science Board.

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262 Van Niekerk "HPCSA: A mess in the Health Department's pocket" (2009) 99 *South African Medical Journal* 203. See also Health Professions Council of South Africa "About us" (2020) available online at https://www.hpcsa.co.za/?contentId=334&actionName=About%20Us (last accessed on 28 March 2020).

263 Section 64 of Health Professions Act 56 of 1974.

264 Section 2 of Health Professions Act 56 of 1974.

265 *Veriava v President, South Africa Medical and Dental Council* 1985 (2) SA 293 (T) at 307.

266 *Ibid*.

267 Section 17 of Health Professions Act 56 of 1974.

268 Gillis (2012) *South African Journal of Psychiatry* 80.

269 There are 12 professional boards established under the HPCSA. See 4.3.2.

270 Psychiatry is listed as a specialty in the Regulations Relating to the Specialities and Subspecialties in Medicine and Dentistry (GNR 590) in the Government Gazette No.22420 of 29 June 2001 (as amended).

271 Rules Specifying the Acts or Omissions in respect of which Disciplinary Steps may be taken by a Professional Board and the Council (GNR 2278) in Government Gazette No. 5349 dated 3 December 1976 (repealed).

272 Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

273 Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

In 1952 the Society of Psychiatrists was formed in South Africa which later became known as the South African Society of Psychiatrists (SASOP).[274] SASOP endeavours to help promote the field of psychiatry, whilst assisting its members and helping to destigmatise mental illness.[275] SASOP did not formulate its own code of ethics or guidelines but states in its company rules that as a member of the World Psychiatric Association it is committed to the Madrid Declaration on Ethical Standards for Psychiatric Practice, 1996.[276]

2.6.1.2 England

In England, the eighteenth and nineteenth-centuries were marked with increased asylums or madhouses as they were known.[277] Unfortunately, many abuses in the asylums came to light and called for greater intervention in the care of the mentally ill.[278] Under the 1828 Madhouses Act and the 1845 Lunacy Act, provision was made for a resident medical officer (physician superintendent) at each asylum to prevent any abuses.[279] The physician superintendents placed in charge of the asylums were the force behind the founding of the Association of Medical Officers of Asylums and Hospitals for the Insane in 1841 which later became the Association the Medico-Psychological Association in 1865.[280] The change of name indicated a move towards a more professional organisation outside the confines of the asylums.[281]

In 1926 the Medico-Psychological Association's prestige was acknowledged with the receipt of a Royal Charter of Incorporation.[282] The association was then known as the

274 Gillis (2012) *South African Journal of Psychiatry* 81.
275 South African Society of Psychiatrists "Company overview" (2019) available online at https://www.sasop.co.za/company-overview (last accessed on 28 March 2020).
276 South African Society of Psychiatrists "Company rules of the South African Society of Psychiatrists" (2014) available online at https://725cc624-3241-417c-afa5-33a5f7de3449.filesusr.com/ugd/cc5d8c_18a9a7e63f8e446085ff37ca0312865f.pdf (last accessed on 28 March 2020).
277 Bewley (2008) *Madness to mental illness: A history of the Royal College of Psychiatrists* 4.
278 *Idem* 6-7.
279 *Idem* 8.
280 Bewley (2008) 8; Smith (1981) 13 and Rollin "The Royal College of Psychiatrists, 150 years on" (1991) 303 *The British Medical Journal* 238.
281 Bewley (2008) 23.
282 Rollin (1991) *The British Medical Journal* 239.

Royal Medico-Psychological Association (RMPA) for the next 45 years.[283] RMPA after years of negotiation with the Privy Council became the Royal College of Psychiatrists in 1971.[284] To date, the Royal College of Psychiatrists is the professional medical body and the educational body responsible for supporting psychiatrists in the United Kingdom.[285]

At the onset of the association and before it became the Royal College for Psychiatrists, no ethical code or guidelines had been developed to guide the psychiatrists. It was only in 2000 that the Royal College of Psychiatrists published the first edition of the *Good Psychiatric Practice* which sets out the standards of practice for psychiatrists.[286] The set of standards was later followed by various other documents guiding the practising psychiatrists.

Furthermore, the psychiatric profession is regulated by the General Medical Council (GMC), which was established in 1858.[287] The purpose of the GMC was and still is, to regulate the medical profession, including the registration of medical practitioners.[288] Psychiatrists need to be registered on the specialist register of the GMC.[289] Although already established in 1858 it was only in 1995 that the first edition on the standard of care for patients, *Good Medical Practice*, was published.[290] The latest edition of the

283 *Ibid.*

284 *Ibid.*

285 The Royal College of Psychiatrists "The Royal College of Psychiatrists (1971-)" (2020) available online at https://www.rcpsych.ac.uk/about-us/library-and-archives/our-history/the-rcpsych (last accessed on 25 March 2020). For further readings on the history of the Royal College of Psychiatrists see Bewley (2008) *Madness to mental illness: A history of the Royal College of Psychiatrists.*

286 The Royal College of Psychiatrists "Good psychiatric practice" (2020) available online at https://www.rcpsych.ac.uk/docs/default-source/improving-care/better-mh-policy/college-reports/college-report-cr154.pdf?sfvrsn=e196928b_2 (last accessed on 25 March 2020).

287 Van Niekerk (2009) *South African Medical Journal* 203.

288 General Medical Council "Who we are" (2020) available online at https://www.gmc-uk.org/about/who-we-are (last accessed on 25 March 2020). See section 1 of the Medical Act (c.54) 1983 that sets out the objectives of the General Medical Council.

289 Section 30 of the Medical Act 1983 (c.54) refers to the different registers and section 34D of the Act deals with the specialist register. For more information on the different specialities see General Medical Council "GMC approved postgraduate curricula" (2020) available online at https://www.gmc-uk.org/education/standards-guidance-and-curricula/curricula)last accessed on 26 March 2020).

290 General Medical Council "Our history" (2020) available online at https://www.gmc-uk.org/about/who-we-are/our-history (last accessed on 26 March 2020).

Good Medical Practice came into effect on 22 April 2013 and was last updated on 29 April 2019.[291]

2.6.1.3 United States of America

The Association of Medical Superintendents of American Institutions for the Insane (AMSAII) was the first formal national professional association of physicians in the United States of America working with mental disorders.[292] In 1892 AMSAII changed its name to American Medico Psychological Association (AMPA).[293] The change indicated a move towards a more encompassing association which was not only focussed on the asylums. AMPA, however, only became genuinely active after World War I.[294] AMPA changed its name a final time in 1921 when it became known as the American Psychiatric Association (APA).[295]

APA created the Commission on Judicial Action (CJA) in 1974 to present the views of organised psychiatry to the courts and established the Council on Psychiatry and Law (CPL) in 1979 to prepare model statutes and regulations for legislatures and executive agencies.[296] In 1973 the APA published the first edition of the *Principles of medical ethics with annotations especially applicable to psychiatry*[297] and over the years the code of ethics has been revised as the field developed.

Although the APA is the leading psychiatric organisation in the United States of America, various associations and organisations were founded to develop subspecialties in psychiatry. The recognition of the area of psychiatry and law specifically sparked the founding of the American Academy of Psychiatry and Law (AAPL) in 1969, largely through the efforts of Dr Jonas Rappeport and Dr Robert

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291 General Medical Council "Good medical practice" (2020) available online at https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/good-medical-practice (last accessed on 26 March 2020).

292 Dunn *et al*. in Gunn and Taylor (eds.) (2014) *Forensic psychiatry: Clinical, legal and ethical issues* 118.

293 Prosono in Rosner (ed.) (2003) 24.

294 *Ibid*.

295 Dunn *et al*. in Gunn and Taylor (eds.) (2014) 118.

296 Bonnie "Howard Zonana and the transformation of forensic psychiatry" (2010) 38 *The Journal of the American Academy of Psychiatry and the Law* 572 and Prosono in Rosner (ed.) (2003) 24.

297 American Psychiatric Association (2013) *The principles of medical ethics with annotations especially applicable to psychiatry* 1.

Sadoff.[298] The purpose of the AAPL was to "reshape the field of forensic psychiatry"[299] and develop and ensure the growth in the subspeciality.[300] From the AAPL came the boards for forensic certification in 1976 when the American Board of Forensic Psychiatry was established.[301] AAPL also published ethical guidelines for practising forensic psychiatrists, which the organisation adopted in May 2005.[302]

APA and AAPL are both voluntary organisations, but psychiatry is also regulated by statutory bodies. In the United States of America, psychiatrists must hold a licence to practice issued by the specific state's medical board. In California, the Medical Board of California is responsible for the licenses and disciplinary actions against medical doctors, including psychiatrists.[303] The Medical Board of California was established in 1878.[304]

2.6.2 Statutory and voluntary organisations or associations regulating psychology

2.6.2.1 South Africa

As with psychiatrists, psychologists are regulated by the HPCSA, but the profession was not always regulated by statute. In 1946 the South African Medical Association recommended the registration of "medical psychologists".[305] It was only from 1955 that non-compulsory registration of psychologists with the SAMDC took place.[306] Psychology attained legal status as a profession in South Africa after the Health

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298 Slovenko (2004) *The Journal of Psychiatry and Law* 563; Scott "Believing doesn't make it so: Forensic education and the search for truth" (2013) 41 *The Journal of American Academy of Psychiatry and the Law* 18; Grisso "A developmental history of the American psychology" (1991) 15 *Law and Human Behavior* 213; Buchanan and Norko (2011) 16; Dunn *et al*. in Gunn and Taylor (eds.) (2014) 118 and Prosono in Rosner (ed.) (2003) 25.

299 Bonnie (2010) *The Journal of the American Academy of Psychiatry and the Law* 571-572.

300 *Ibid*.

301 Slovenko (2004) *The Journal of Psychiatry and Law* 563.

302 American Academy of Psychiatry and Law "Ethics guidelines for the practice of forensic psychiatry" (2005) available online at https://www.aapl.org/ethics-guidelines (last accessed 28 May 2020).

303 Medical Board of California "Role of the Medical Board of California" (2020) available online at https://www.mbc.ca.gov/About_Us/Role.aspx (last accessed on 26 March 2020).

304 *Ibid*.

305 Allan *et al*. "Law and psychology in South Africa: Development and recommendations (3)" (1995) 14 *Medicine and Law* 685.

306 Wassenaar "A history of ethical codes in South African psychology: An insider's view" (1998) 28(3) *South African Journal of Psychology* 135.

Professions Act[307] was promulgated in 1975.[308] The Psychology Board of the HPCSA was constituted under which psychologists are registered.[309] As mentioned above,[310] the HPCSA first published their ethics code in 1976, followed by the *Ethical rules of conduct for practitioners registered under the Health Professions Act, 1974* in Augusts 2006.[311] Annexure 12 of the ethical code of the HPCSA deals specifically with ethical guidelines for psychologists.

Together with the Professional Board of Psychology, voluntary associations also exist that regulate and promote psychology. The early professional associations in South Africa with the aim to represent, develop and promote psychology included the South African Psychological Association (SAPA), founded in 1948, and the Psychological Institute of the Republic of South Africa (PIRSA), founded in 1962.[312] According to the study by Wassenaar, no documentation could be found regarding the ethics policies of PIRSA.[313] SAPA published its first ethical code, the *Digest of Ethical Standards*, in 1955.[314] The code of SAPA was almost wholly based on the APA's ethics code.[315]

Clinical psychologists felt that these two associations were not serving their interests, and in 1977 the South African Society of Clinical Psychology (SASCP) was founded.[316] Other categories of psychologists, including education, industrial and counselling psychologists, followed SASCP's lead and established their own societies.
By 1982 all the above-mentioned associations came together to discuss the possibility of forming one organisation from which the Psychological Association of South Africa (PASA) was constituted.[317] In 1987 the first ethical code of PASA was published.

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307 Health Professions Act 56 of 1974.
308 Wassenaar (1998) *South African Journal of Psychology* 135.
309 Regulations Relating to the Constitution of the Professional Board for Psychology (GNR 1249) in the Government Gazette No.31633 of 28 November 2008.
310 See 2.6.1.1.
311 Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
312 Wassenaar (1998) *South African Journal of Psychology* 136 and Louw "Regulating professional conduct: Part 2: The Professional Board for Psychology in South Africa" (1997) 27 *South African Journal of Psychology* 189.
313 Wassenaar (1998) *South African Journal of Psychology* 136.
314 *Ibid*.
315 Louw "Regulating professional conduct: Part 2: The Professional Board for Psychology in South Africa" (1997) 27 *South African Journal of Psychology* 190.
316 Wassenaar (1998) *South African Journal of Psychology* 136.
317 *Ibid*.

PASA was, however, disbanded in 1993[318] and, in 1994, the Psychological Society of South Africa (PsySSA) was founded.[319] PsySSA to date is dedicated to promoting psychology and protecting its members and the interests of society. PsySSA, as with the other associations, established guidelines for their members, and in 2007 the ethical code, the *South African professional conduct in psychology* was published.[320]

2.6.2.2 England

In England, the British Psychological Society (BPS), founded in 1901, is responsible for developing, promoting, and applying psychology.[321] The BPS was first known as the Psychological Society and in 1906 changed its name.[322] The name change was merely to prevent confusion with another organisation that already existed.[323] The BPS was granted a Royal Charter in 1965 after their petition for incorporation was approved.[324] The BPS later set up various divisions to promote the development of subspecialties, and in 1976 the Division Criminological and Legal Psychology was set up, which was renamed the Division of Forensic Psychology in 1999.[325]

In 1954 the BPS's Charter Committee prepared the first draft of an ethical code or statement on the Standards of Professional Conduct of the British Psychological Society.[326] The rules were not incorporated into the bylaws.[327] Various documents were drafted, but in 1983 the *Professional Code of Conduct for Psychologists* was

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318 See Wassenaar (1998) *South African Journal of Psychology* 135 for more information regarding the reasons behind the disbandment and the history of PASA.

319 Wassenaar (1998) *South African Journal of Psychology* 136.

320 Psychological Society of South Africa "South African professional conduct guidelines in psychology, 2007" (2007) available online at https://www.psyssa.com/ethics/ (last accessed on 16 January 2019).

321 Bunn "A short history of the British Psychological Society" (2001) available online at https://www.bps.org.uk/sites/www.bps.org.uk/files/History%20of%20Psychology/A%20Short%20History%20of%20The%20British%20Psychological%20Society.pdf (last accessed on 28 March 2020). See also British Psychological Society "Who we are" (2020) available online at https://www.bps.org.uk/about-us/who-we-are (last accessed 28 March 2020).

322 Edgell "The British Psychological Society" (2001) 92 *British Journal of Psychology* 6.

323 *Ibid.*

324 Bunn "A short history of the British Psychological Society" (2001) available online.

325 British Psychological Society "History of the British Psychological Society: Timeline 1901 to 2009" (2009) available online at https://www.bps.org.uk/sites/www.bps.org.uk/files/History%20of%20Psychology/Timeline%20of%20the%20BPS%201901%20to%202009.pdf (last accessed on 28 March 2020).

326 *Ibid.*

327 British Psychological Society "BPS Ethical Standards 1958-2018" (2018) available online at https://archives.bps.org.uk/Record.aspx?src=CalmView.Catalog&id=BPS%2f001%2f9%2f06 (last accessed on 28 March 2020).

agreed upon and published in 1985.[328] In 1991 a revised document which amalgamated all of the earlier documents was published, namely the *Code of Conduct, Ethical Principles and Guidelines*.[329] The 1991 Code was revised and updated and in 2006 and again in 2009 rewritten completely.[330] The *Code of Ethics and Conduct* continues to be updated regularly as the discipline develops.

The BPS was also responsible for the registration of psychologists in the earlier years and still maintains a register for chartered psychologists. The BPS considered statutory regulation of psychologists and submitted an application to the Health and Care Professions Council (HCPC) in 2003.[331] The HCPC, previously known as the Health Professions Council (HPC), was established in the United Kingdom in 2001 and was the first multi-profession regulator.[332] In May 2009 statutory regulation under the HCPC was implemented and 15 536 psychologists transferred to the HCPC register.[333] The HCPC was established in terms of the Health Professions Order 2001 which specified that the Council must establish a set of standards of conduct, performance and ethics.[334] The first set of standards was published in 2002 and subsequently revised.[335]

2.6.2.3 United States of America

The American Psychological Association (APA) is the largest professional and scientific organisation representing psychology in the United States of America.[336] The APA was founded in 1892 by a few men interested in what they called "the new psychology".[337] The APA later organised itself into various divisions, and by 1944 there

328 *Ibid.*
329 *Ibid.*
330 *Ibid.*
331 Health and Care Professions Council "Research report: The making of a multi-professional regulator: the Health and Care Professions Council 2001–15" (2015) available online at https://www.hcpc-uk.org/globalassets/meetings-attachments3/council-meeting/2015/october/enc-06--the-making-of-a-multi-professional-regulator-the-hcpc-2001-to-2015/ (last accessed on 28 March 2020).
332 *Ibid.*
333 *Ibid.*
334 Section 21 of Health Professions Order 2001.
335 Health and Care Professions Council "Standards of conduct, performance and ethics" (2016) available online at https://www.hcpc-uk.org/resources/standards/standards-of-conduct-performance-and-ethics/ (last accessed on 28 March 2020).
336 Candilis and Neal (2014) *Legal and Criminological Psychology* 21.
337 American Psychological Association "APA History" (2020) available online at https://www.apa.org/about/apa/archives/apa-history (last accessed on 28 March 2020).

were 19 divisions. It was only in 1980-1981 that Division 41, Psychology and Law Division, was established and in 1984 Division 41 merged with the American Psychology-Law Society (AP-LS). [338] The AP-LS was founded in 1968-1969 advancing the science psychology-law and the translation of psychology-law knowledge into practice and policy.[339]

In 1947 the APA established a committee on Ethical Standards for Psychologists in order to develop an ethics code.[340] The APA, thereafter, adopted its first ethics code in 1953.[341] The ethics code contained aspirational standards, ideal standards of conduct that psychologists should strive to, and professional values and practical techniques.[342] The APA's ethics code was revised from time to time[343] , and 1992 the ethics code devoted an entire section to forensic activities.[344] The section dealing with forensic activities was, however, removed from the APA's 2002 ethics code.[345] The 2002 ethics code, as amended, *Ethical principles of psychologists and code of conduct*, is still applicable today.[346]

The AP-LS also developed a set of guidelines for forensic psychology, *Specialty Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines for Forensic Psychologists, 1991).[347] The guidelines were revised and replaced with the current guidelines, *Specialty Guidelines For Forensic Psychology*, which APA Council of Representatives adopted in 2011.[348] The Speciality Guidelines replaced the previous section in the 1992 APA ethics code.

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338 Ogloff (2000) *Law and Human Behavior* 463-464 and Grisso (1991) *Law and Human Behavior* 213.

339 American-Psychology Law Society "AP-LS mission, vision and core values" (2020) available online at https://www.apadivisions.org/division-41/about/mission (last accessed on 28 March 2020).

340 Canter *et al*. (1994) *Ethics for Psychologists: A commentary on the APA Ethics Code* 10; Candilis and Neal (2014) *Legal and Criminological Psychology* 21 and Walsh "Introduction to ethics in psychology: Historical and philosophical grounding" (2015) 35 *Journal of Theoretical and Philosophical Psychology* 70.

341 Allan in Allan and Love (eds.) (2010) *Ethical practice in psychology: Reflections from the creators of the APS Code of Ethics* 1 and Walsh (2015) *Journal of Theoretical and Philosophical Psychology* 70.

342 Candilis and Neal (2014) *Legal and Criminological Psychology* 21.

343 For more information regarding the previous revisions see American Psychological Association "Ethical principles of psychologists and code of conduct" (2017) available online at https://www.apa.org/ethics/code (last accessed on 28 March 2020).

344 Canter *et al*. (1994) 22.

345 *Ibid*.

346 American Psychological Association "Ethical principles of psychologists and code of conduct" (2017) available online.

347 Grisso (1991) *Law and Human Behavior* 230 and American Psychological Association "Speciality guidelines for forensic psychology" (2013) 68 *American Psychologist* 7.

348 American Psychological Association (2013) *American Psychologist* 7.

2.7 Conclusion

Eigen describes the psychiatric expert's success, which can also be said of the mental health expert in general, as the “persistent effort to question the perpetual sets of laymen”.[349] The mental health expert continued to question, develop and promote their own fields and as Eigen states at first, they did not enter the courtroom with an established profession or reputation, but still succeeded in securing a place as an expert.[350] What does the history of the mental health experts uncover that can help ensure that mental health professionals remain as expert witnesses whilst the probative value of their evidence increases?

In the chapter, it is evident from the exposition of the origin of expert evidence and the history of psychology and psychiatry that several factors can possibly account for the increase in the use of mental health evidence.[351] These include the development of a scientific basis for the disciplines; courts allowing professionals to testify on more issues; changes in the rules of admissibility of evidence; an increase in the number of practising mental health professionals; and the improved public image of psychiatrists and psychologists.[352] Another critical factor is the professionalisation of the disciplines. When reviewing the timeline of the increase of use in mental health experts and establishing professional associations and regulatory bodies, a pattern emerges. As the disciplines organised themselves, the esteem grew, and the courts used mental health professionals more readily.

As can been seen from above[353] the development of ethical codes or guidelines did not occur immediately, mostly it occurred well after the founding of an association. It appears that concerns with ethical matters did not have a high profile, but as the professions moved towards building strong and autonomous professional organisations, ethical codes were developed. The history of professional

349 Eigen in Clark and Crawford (eds.) (1994) 193.
350 *Ibid*.
351 Smith (1989) *Behavioral Sciences and the Law* 147.
352 *Idem* 147-148.
353 See 2.6.

organisations' development and their ethical codes or guidelines indicates a need to transform as the discipline grows.

Evident throughout the chapter is that despite the growth of the use of mental health experts, specific problems kept rearing its head from Roman times through to the nineteenth century. The first and most common problem is bias or impartiality of the expert witness. Expert witnesses were considered hired guns or paid agents who were willing to testify for the right price. The courts, furthermore, have over time been wary of admitting expert evidence regarding the mental state of a person for two main reasons. Firstly, as in the case of other expert witnesses, courts fear that the expert witness will usurp the court's role. Secondly, because of the history of mental illness, the diagnosis and aspects relating to a person's mental state were considered a common-sense judgment, something layman could do. The last problem with mental health professionals acting as expert witnesses is the so-called battle of the experts where experts called from opposing sides contradict each other. The contradiction emphasised that experts were merely hired guns and created the problem of having to decide between two experts without having the expertise to do so.

Past problems with mental health professionals acting as expert witnesses remain problems today but are worsened by the residual attitudes created throughout history. When addressing the problems facing mental health professionals acting as expert witnesses today, cognisance must be taken of the residual attitudes and that same be addressed. The historical overview in the chapter exposes the past problems and attitudes and gives insights into changes that assisted in securing the role and reliability of the expert witness and highlights aspects that need further investigation, such as the role of assessors and written reports.

Although not too much emphasis must be placed on history, the historical perspective in this chapter still provides useful insights from which a regulatory framework for psycho-legal assessments in South Africa can be developed. History has taught certain lessons, including that the key to success in proper regulation of expert witnesses lies not only in the hands of the law but also in the profession itself. The law must allow the mental health expert to not only support it but to illuminate as well.

CHAPTER 3
PSYCHO-LEGAL ASSESSMENTS IN SOUTH AFRICA

3.1 Introduction

The relationship between the legal profession and the mental health profession has been described as an uneasy alliance,[1] a marriage between opposites,[2] clash of cultures[3] and a flirtation forced into a shotgun wedding.[4] Looking at the relationship, the most fitting description was made by Donald Bersoff, an American psychologist, attorney and previous president of the American Psychological Association who asserted that: [5]

> In fact, if that relationship were to be examined by a Freudian, the analyst would no doubt conclude that it is a highly neurotic, conflict-ridden ambivalent affair (I stress affair because it is certainly no marriage). Like an insensitive scoundrel involved with an attractive but fundamentally irksome lover who too much wants to be courted, the judiciary shamelessly uses the social sciences.

The affair is characterised by the need (or use) for the relationship on the one side and the problem of a sometimes-irksome lover on the other. The chapter endeavours to illustrate that the legal profession, the insensitive scoundrel, has repeatedly recognised that it needs the expert knowledge and skills of mental health professionals. Unfortunately, mental health professionals acting as expert witnesses have brought about challenges relating to competency and ethical behaviour. These challenges threaten both the legal profession and the mental health professions.

The chapter will briefly outline the basic structure of the South African legal system and the court structure, including the relevant historical context followed by an examination of the differences between an accusatorial and inquisitorial system. The reason for including the basic overview is two-fold. Firstly, the nature of expert

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1 Melton *et al.* (2018) *Psychological evaluations for the court: A handbook for mental health professionals and lawyers* 3.
2 Redmayne "Expert evidence and scientific disagreement" (1997) 30 *U.C. Davis Law Review* 1035.
3 *Ibid.*
4 Rix "Psychiatry and the law: uneasy bedfellows" (2006) 74 *Medico-Legal Journal* 148.
5 Bersoff "Psychologists and the judicial system: broader perspectives" (1986) 10(1) *Law and Human Behavior* 155-156.

evidence must be evaluated against the specific legal system. Secondly, this a comparative study and a comparative analysis cannot be attempted without understanding the basic structure of each country's legal system, including the court structure.

The chapter will give an introduction into the nature of expert evidence which will be elaborated on in chapter 4, reiterating once again the need for expertise as mentioned above. Often this need is easily expressed without much further consideration. But to what extent has the South African legal system really recognised the need for guidance of mental health professionals? The chapter will explore the various areas of the law where the South African courts have called upon the services of the mental health professionals as well as investigate legislation dealing with mandatory or recommended psycho-legal assessments.

The chapter further aims to demonstrate the need for a regulatory framework by investigating the challenges that are occasioned by using mental health professionals as expert witnesses. The investigation will deal with the complaints and disciplinary enquiries against registered psychologists dealt with by the Health Professions Council of South Africa along with the problems elucidated in case law and literature. Lastly, to place the problems and alleged low standard of psycho-legal work in context, the impact of lack of resources, the adversarial system and legal culture will be briefly mentioned.

3.2 Overview of the South African legal system

The South African legal system is a mixed legal system reflecting elements from civil (Roman-Dutch law) and common (English law) as well as African customary law.[6] In determining the sources of the law of evidence in South Africa, the influence of English law is of particular importance.[7] Throughout the discussion of the historical roots of the mixed legal system in South Africa below, emphasis will be placed on the sources of law of evidence.

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6 Tetley "Mixed jurisdictions: Common law v. civil law (codified and uncodified)" (2000) 60(3) *Louisiana Law Review* 692.

7 Zeffertt and Paizes (2010) *Essential evidence* 4.

In 1652, with the arrival of the Dutch East India Company,[8] Roman-Dutch law was introduced into South Africa and treated as the common law of the land, marking the civil heritage of the legal system.[9] In 1795 Britain took occupation of the Cape but the Netherlands, in the form of the Batavian Republic, resumed control of the colony from 1803 to 1806.[10] During the first occupation, the law that was applied from 1652 and onwards was still being applied.[11] The second British occupation of the Cape took place in 1806, but because the main aim of the occupation was to secure the sea route to the east, at first no far-reaching amendments were made to the law.[12]

Roman-Dutch law continued to be applied in South Africa, but the recommendation was made that principles and institutions from English law should gradually be assimilated into the legal system.[13] Procedural law was considered lacking and adjustments needed to be made to bring it in line with English practice.[14] Major changes occurred when the First Charter of Justice in 1827 and the Second Charter of Justice in 1832 was enacted.[15] The English influence became more evident with the incorporation of the Cape Evidence Ordinance 72 of 1830 and the establishment of the jury system in 1831.[16] The Cape Evidence Ordinance 72 of 1830, which was promulgated on 1 March 1830, in brief, provided that law of evidence was to be regulated by the law of England.[17]

Following the Anglo-Boer War (1899-1902) and the establishment of the Union of South Africa in 1910[18] the Roman-Dutch law and the English law was merged into a single system, with customary law applied to a separate system of courts.[19] During the

8 Vereenigde Geoctroyeerde Oost-Indische Compagnie.
9 Van Zyl (1979) *Geskiedenis van die Romeins-Hollandse reg* 420; Hoexter in Hoexter and Olivier (eds.) (2014) *The judiciary in South Africa* 2 and Tetley (2000) *Louisiana Law Review* 692.
10 Van Zyl (1979) 446-448 and Hoexter in Hoexter and Olivier (eds.) (2014) 2.
11 Van Zyl (1979) 447.
12 Van Zyl (1979) 448 and Hoexter in Hoexter and Olivier (eds.) (2014) 2-3.
13 Van Zyl (1979) 448 and Hoexter in Hoexter and Olivier (eds.) (2014) 2-3.
14 Van Zyl (1979) 451.
15 Van Zyl (1979) 451 and Hoexter in Hoexter and Olivier (eds.) (2014) 3.
16 Van Zyl (1979) 451.
17 Zeffertt and Paizes (2010) 4.
18 Hoexter in Hoexter and Olivier (eds.) (2014) 4 and Tetley (2000) *Louisiana Law Review* 693.
19 By 1910, South Africa had become the Union of South Africa, and customary law was recognised to a certain extent in all the provinces of the Union. The Black Administration Act 38 of 1927 enabled customary law to be applied in a separate system of courts, courts responsible for most of the African civil litigation. Tetley (2000) *Louisiana Law Review* 693.

period from 1860 until 1910, the height of the influence of English law in South Africa was reached, and as Hahlo and Kahn describe it, the "Roman-Dutch law was assuming an anglicised look".[20]

The English statutes regulating civil proceedings remained in force during the days of the Union of South Africa[21] and the Criminal Procedure and Evidence Act 31 of 1917 consolidated the English statutes regarding criminal procedure.[22] On 31 May 1961, South Africa became a republic outside the British Commonwealth which brought about various changes.[23] The changes included, amongst others, trial by jury in criminal cases being abolished in 1969[24] and the law of evidence being governed by the Civil Proceedings Evidence Act 25 of 1965 and the now-repealed Criminal Procedure Act 56 of 1955, which was replaced with the Criminal Procedure Act 51 of 1977.[25] The respective acts both determine that English statutes and decisions of the "Supreme Court of Judicature in England" before 30 May 1961 would remain in force and binding.[26]

In 1994 South Africa entered a democratic era[27] and moved from parliamentary sovereignty to constitutional supremacy.[28] The Constitution of the Republic of South

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20 Hahlo and Kahn (1960) *The Union of South Africa: The development of its laws and Constitution* 578.

21 Zeffertt and Paizes (2010) 5.

22 *Ibid*.

23 Hoexter in Hoexter and Olivier (eds.) (2014) 4 and Tetley (2000) *Louisiana Law Review* 693.

24 Abolition of Juries Act 34 of 1969. The trial by jury in civil cases had already been abolished in 1927 by Section 3 of the Administration of Justice (Further Amendment) Act 11 of 1927 that repealed the Jury Act 22 of 1891. It is often considered that the strict evidentiary rules of English owed to the existence of the trial by jury. Van der Merwe in Schwikkard and Van der Merwe (2016) *Principles of evidence* 7.

25 Zeffertt and Paizes (2010) 6.

26 Section 42 of the Civil Proceedings Evidence Act 25 of 1965 determines:

> Cases not otherwise provided for.—The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the thirtieth day of May, 1961, shall apply in any case not provided for by this Act or any other law.

Section 206 of the Criminal Procedure Act 51 of 1977 determines:

> The law in cases not provided for- The law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May 1961, shall apply in any case not expressly provided for by this Act or any other law.

Similarly, section 252 of the Criminal Procedure Act 51 of 1977 determines:

> The law in cases not provided for.—The law as to the admissibility of evidence which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law.

Within the Criminal Procedure Act 51 of 1977 the following sections also refer to 30 May 1961 in respect of the specific topic, namely, sections 190(1), 201, 202, 203, 227(1), and 230.

27 The interim Constitution of the Republic of South Africa came into effect on 27 April 1994.

28 Section 2 of the Constitution of the Republic of South Africa, 1996.

Africa, 1996 (the Constitution) determines that the Constitution is the supreme law of the land and that all legislation, common law and customary law must promote the spirit, purport and objects of the Bill of Rights.[29] Zeffertt and Paizes consider the law of evidence to a certain extent frozen at 30 May 1961 only subject to the Constitution.[30]

The South African legal system, although a mixed legal system, displays accusatorial traits within the law of evidence.[31] In order to properly understand the role of the expert witness, the fundamental differences between the accusatorial and the inquisitorial procedure must be examined.

3.3 Accusatorial versus an inquisitorial procedure

Within the law of evidence, countries usually follow a common-law system (Anglo-American) or a civil-law system (Continental).[32] The Anglo-American procedure is based upon adversarial or accusatorial principles as opposed to the Continental procedure, which is based on inquisitorial principles.[33]

The inquisitorial procedure can be depicted as an investigation with the purpose of establishing the truth.[34] The presiding officer plays an active role in the process of fact-finding.[35] Unlike the accusatorial procedure, there is no right to cross-examination and documentary evidence or written statements are emphasised.[36] In general, the inquisitorial trial uses the principle of free evaluation of evidence where, save for a few exceptions, there are no exclusionary rules of evidence, the real issue is the weight given to the evidence.[37]

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29 Section 39 of the Constitution of the Republic of South Africa, 1996.
30 Zeffertt and Paizes (2010) 6.
31 Meintjies-Van Der Walt (2001) *Expert evidence in the criminal justice process: A comparative perspective* 39. Meintjies-Van der Walt specifically refers to adversarial (accusatorial) traits because the South African criminal procedure, although accusatorial in character, at times displays inquisitorial traits. No legal system is purely adversarial or inquisitorial. See Goldstein "Reflection on two models: Inquisitorial themes in American criminal procedure" (1974) 26 *Stanford Law Review* 1019 and Snyman "The accusatorial and inquisitorial approaches to criminal procedure: Some points of comparison between South African and Continental Systems" (1975) 8(1) *The Comparative and International Law Journal of Southern Africa* 100.
32 Schwikkard and Van der Merwe (2016) 8.
33 *Ibid*.
34 Schwikkard and Van der Merwe (2016) 12 and Meintjies-Van Der Walt (2001) 40.
35 *Ibid*.
36 Schwikkard and Van der Merwe (2016) 12.
37 *Idem* 14.

In contrast, the accusatorial procedure is said to have its roots in the trial by ordeal[38] and can, therefore, be depicted as a battle between two parties.[39] The aim is to seek the truth by pronouncement by a trier of facts or jury that one of the versions of the parties is the truth.[40] Van der Merwe identified three key features of the accusatorial procedure: 1) the parties involved are responsible for obtaining and presenting the evidence to support their respective cases; 2) the presiding officer plays a passive role; and 3) oral presentation of evidence, including the cross-examination of witnesses, is emphasised.[41]

Oral testimony, as a way of presenting evidence, is preferred in the accusatorial procedure as it is seen as the most effective way to test the version of a witness.[42] Cross-examination is, therefore, a crucial tool in the accusatorial procedure. The use of cross-examination has been described as the "greatest legal engine ever invented for the discovery of truth".[43] The accusatorial system is accompanied by a strict system of evidence.[44] Within a strict system of evidence, the admissibility of evidence is a matter of law and the weight a question of fact.[45] The accusatorial trial system is, however, as Van Der Merwe explains, not beyond criticism.[46] Expert witnesses are often criticised, but some of the problems related to the presentation of expert evidence are directly linked to the nature of the accusatorial system. The criticism and problems against the accusatorial system will be discussed below in context of mental health professionals as expert witnesses.[47]

Another difference between the accusatorial and the inquisitorial systems is that accusatorial systems apply the doctrine of *stare decisis* for continuity and considers case law as an important source of the law. The inquisitorial system, in comparison, considers legislation as an important source of law and does not apply the *stare decisis*

38 See 2.2.2. See also Schwikkard and Van der Merwe (2016) 6; 11.
39 Meintjies-Van Der Walt (2001) 40.
40 *Ibid.*
41 Schwikkard and Van der Merwe (2016) 11.
42 Meintjies-Van Der Walt (2001) 41.
43 Wigmore as quoted in Schwikkard and Van der Merwe (2016) 12.
44 Schwikkard and Van der Merwe (2016) 14.
45 *Ibid.*
46 *Ibid.*
47 See 3.7.

doctrine. A brief description of the court structure in South Africa will be provided in order to understand the *stare decisis* doctrine within the South African context and compare same with the comparator countries.

3.4 Court structure in South Africa

The court structure in South Africa is regulated by chapter 8 of the Constitution[48] read with the relevant legislation[49] , including the Superior Courts Act 10 of 2013 and the Magistrates' Court Act 32 of 1944. The South African court system can be divided into two levels, superior courts and lower courts. Superior courts are comprised of the Constitutional Court, Supreme Court of Appeal and High Court, whereas the lower courts are comprised of the magistrates' courts. Section 166 of the Constitution further provides for any other court established or recognised in terms of an act of parliament.

The magistrates' courts in South Africa are divided into the district and regional magistrates' courts.[50] The magistrates' courts can hear civil and criminal matters but have limited jurisdiction in respect of both.[51] All matters heard in the magistrates' court can be appealed to a high court having jurisdiction.[52] Magistrates' courts do not create precedents and are not bound by a decision made by another magistrate.[53] The magistrates' courts are only bound by decisions of a superior court.[54]

48 Sections 165-180 of the Constitution of the Republic of South Africa, 1996.

49 Section 171 of the Constitution of the Republic of South Africa, 1996 provides that all courts will function in terms of national legislation.

50 Section 2 of the Magistrates' Courts Act 32 of 1944.

51 Chapter 6 of the Magistrates' Courts Act 32 of 1944 deals with civil jurisdiction and section 29 deals specifically with jurisdiction in respect of causes of action. Chapter 12 of the Magistrates' Courts Act 32 of 1944 deals with criminal jurisdiction with section 89 dealing specifically with the jurisdiction in respect of offences and section 92 with the limits regarding punishment. In terms of section 89 the district court has jurisdiction over all offences except treason, murder, rape and compelled rape whereas the regional court has jurisdiction over all offences except treason.

52 Section 83 of the Magistrates' Courts Act 32 of 1944 and Rule 51 of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa (GNR 740) in the Government Gazette No. 33487 dated 23 August 2010 (as amended) deal with civil appeals. Criminal appeals are dealt with in section 309 of the Criminal Procedure Act 51 of 1977 and Rule 67 of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa (GNR 740) in the Government Gazette No. 33487 dated 23 August 2010 (as amended).

53 *Johannesburg City Council v Arumugan* 1961 (3) SA 748 (W) at 752-753.

54 *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) and *S v Sisulu* 1963 (2) SA 596 (W).

The High Court is divided into nine divisions situated within the different provinces in South Africa.[55] A division of the High Court can sit as a court of first instance for any civil or criminal matter or as a court of appeal.[56] The only matters that the divisions of the High Court cannot decide on are constitutional matters that the Constitutional Court will hear directly and constitutional matters that are assigned by an act to another court.[57] A division of the High Court is bound by their own decisions.[58] Previously the high courts were not bound by the decision of another high court, but Wallis argues that because of the change of structure of the courts, it is debatable whether the rule remains.[59] The courts are now divisions of the same High Court of South Africa and as such Wallis submits that courts should be bound by decisions of all divisions of the High Court.[60]

The Supreme Court of Appeal is situated in Bloemfontein[61] and may only decide appeals and issues connected with appeals.[62] In order to approach the Supreme Court of Appeal leave to appeal has to be granted by the High Court or if no such leave is granted a petition can be filed with the Supreme Court of Appeal to grant leave.[63] The Supreme Court of Appeal is the highest court in the country in matters other than constitutional matters. The judgments of the Supreme Court of Appeal are binding on all lower courts in South Africa, and the Supreme Court of Appeal is bound by their own decisions.[64]

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55 Section 169(2) of the Constitution of the Republic of South Africa, 1996 and section 6 of the Superior Courts Act 10 of 2013.

56 Section 169(1)(b) of the Constitution of the Republic of South Africa, 1996.

57 Section 169(1)(a) of the Constitution of the Republic of South Africa, 1996.

58 The division can only depart from the decision if it is satisfied that the decision was incorrectly decided. See *R v Philips Dairy (Pty) Ltd* 1955 (4) SA 120 (T) at 122 and Wallis (2017) *Law of South Africa* (ed. Joubert) Volume 10 par. 527.

59 Wallis (2017) *Law of South Africa* par. 527

60 Wallis (2017) *Law of South Africa* par. 527. Previously the courts in the area of jurisdiction were known as a High Court, for example North Gauteng High Court. The structure was changed into divisions of one single High Court, the High Court of South Africa. See sections 6(1); 6(3) and 50 of the Superior Courts Act 10 of 2013. The courts were renamed in terms of the regulation: Renaming of Courts in terms of Section 6 of the Superior Courts Act 10 of 2013 (GNR 148) in the Government Gazette No.37390 of 28 February 2014.

61 Section 5(1)(b) of the Superior Courts Act 10 of 2013 indicates that the seat is in Bloemfontein unless in the interests of justice the hearing must take place elsewhere.

62 Section 168(3) of the Constitution of the Republic of South Africa, 1996.

63 Section 16(1) of the Superior Courts Act 10 of 2013.

64 The Supreme Court of Appeal will only depart from its previous decisions if it is clear that an error was made. See in this regard Wallis (2017) *Law of South Africa* par. 526.

The Constitutional Court is the highest Court in South Africa[65] regarding constitutional matters.[66] The Constitutional Court must also apply the doctrine of *stare decisis* only departing from a previous decision if it was clearly wrong.[67] Given the hierarchy of the courts and the application of the doctrine of *stare decisis* in South Africa, in reviewing South African case law, judgments from the Constitutional Court and the Supreme Court of Appeal (if any) will be discussed first followed by judgments from the all the different divisions of the High Court.

3.5 Nature of expert evidence

> There are, however, cases where the court is, by reason of a lack of special knowledge and skill, not sufficiently informed to enable it to undertake the task of drawing properly reasoned inferences from the facts established by the evidence. In such cases, …. the evidence of expert witnesses may be received because, by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact.[68]

Judge Wessels, in the well-known *Coopers*-case[69] succinctly describes the role and importance of the expert witness. There are instances where the court simply cannot decide on a matter without the guidance of an expert in the field. History has shown an ever-increasing reliance by the courts on expert witnesses and as the fields develop and grow so does the need for experts in those areas.[70] In the recent case of *Twine and another v Naidoo and another,*[71] the court commented that the once "infrequent visitor to the court" has become somewhat of a daily occurrence.[72] The court in *Twine* opines further that there are two broad reasons for the increase in expert witnesses, firstly, litigation has grown over the last decades, and, secondly, at the same time

65 Section 167(3)(a) of the Constitution of the Republic of South Africa, 1996.
66 Section 167 of the Constitution of the Republic of South Africa, 1996 determines the jurisdiction of the Constitutional Court.
67 Wallis (2017) *Law of South Africa* (ed. Joubert) 525.
68 *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung Mbh* 1976 (3) SA 352 (A) at 370F-G.
69 *Ibid.*
70 See 2.4 and 2.5. Meintjies-Van der Walt "The proof of the pudding: The presentation and proof of expert evidence in South Africa" (2003) 47 *Journal of African Law* 92.
71 *Twine and another v Naidoo and another* (2018) 1 All SA 297 (GJ).
72 *Twine and another v Naidoo and another* at par. 18.

scientific and technical knowledge of the natural, physical, social and commercial world has also grown vastly.[73]

In *Gentiruco AG v Firestone SA (Pty) Ltd* the court confirmed that courts need not only rely on expert witnesses when absolutely necessary but can also rely on expert witnesses when the admission would be useful.[74] As Judge Boshoff held in *Ruto Flour Mills (Pty) Ltd v Adelson (1)*[75] the only true criterion for the admission of expert evidence is whether the trier of fact has received "appreciable help".[76] This was reiterated in *S v Van As* where the court held that the reason for introducing expert evidence is the possibility that it could assist the trier of fact in deciding the issues.[77]

What constitutes an expert opinion will be determined by the court.[78] A witness can only be deemed an expert witness by virtue of the specialised knowledge, skill or training of the witness[79] as opposed to a lay witness who is usually an observational witness.[80] The lay witness as a general rule can only give evidence on facts falling within their personal knowledge and may not express an opinion.[81] In contrast, the expert witness is called for the purpose of giving their opinion based on the specialised body of knowledge in their field.[82] Often the admissibility of opinion evidence is approached by distinguishing between a lay witness and an expert witness.[83] The admissibility of opinion evidence is, however, not dependent on the distinction.[84] The distinction between a lay and expert witness is, however, important for procedural purposes[85] and also demonstrates how the accusatorial system has created some of the problems experienced with expert witnesses.[86]

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73 *Ibid*.
74 *Gentiruco AG v Firestone SA (Pty) Ltd* at 616H. See also *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung Mbh* at 370G.
75 *Ruto Flour Mills (Pty) Ltd v Adelson* (1) 1958 (4) SA 235 (T).
76 *Ruto Flour Mills (Pty) Ltd v Adelson* (1) at 237C.
77 *S v Van As* 1991 (2) SACR 74 (W).
78 *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569D.
79 *Idem* 569D-E.
80 Schmidt and Rademeyer (2003) *Law of evidence, Issue 16* 17-3.
81 Schwikkard and Van der Merwe (2016) 91 and Schmidt and Rademeyer (2003) 17-3.
82 Meintjies-Van Der Walt (2001) 70.
83 Schwikkard and Van der Merwe (2016) 96.
84 *Ibid*.
85 Schwikkard and Van der Merwe (2016) 96.
86 See 3.8.

When obtaining an expert witness, in line with the accusatorial trial procedure, the parties can appoint an expert witness that is best suited to prove their case based on the expert's knowledge, skill or training.[87] This is in contrast with a lay witness where the legal representatives are usually forced to seek evidence from a closed set of people who witnessed the event in question.[88] Lay witnesses are, furthermore, not paid for their testimony but at most will receive a nominal fee to cover travel expenses.[89] Due to the financial incentive, an expert witness is also more likely to play a larger part in the preparation of the trial than lay witnesses.[90]

Usually witnesses, both lay and expert, cannot rely on hearsay evidence.[91] In respect of expert testimony, the hearsay rule can be relaxed if the expert witness who relies on hearsay evidence meets specific conditions.[92] Another difference between the lay witness and the expert witness lies in the evaluation of the evidence. When there are conflicting expert opinions, the court cannot merely rely on the credibility based on the demeanour[93] of the respective experts.[94]

Considering the nature of expert evidence described above the importance lies in the assistance provided to the courts. In Roman times a lay witness, and not an expert witness, was called to "diagnose" mental illness.[95] Questions regarding insanity of an accused or issues surrounding mental illness were historically a common-sense judgment, not within the realm of specialised knowledge, and therefore no assistance or guidance of an expert witness such as a psychiatrist was considered necessary.[96] As illustrated in chapter 2, the approach of the courts gradually changed as the knowledge of psychiatry and psychology grew immensely. The mental health

87 Meintjies-Van Der Walt (2001) 68.
88 Gross "Expert evidence" (1991) 6 *Wisconsin Law Review* 1126.
89 Section 37 of the Superior Courts Act 10 of 2013 and Section 51*bis* of the Magistrates' Courts Act 32 of 1944.
90 Gross (1991) *Wisconsin Law Review* 1136-1153 as discussed in Meintjies-Van Der Walt (2001) 69.
91 Schwikkard and Van der Merwe (2016) 107. Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 defines hearsay as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".
92 Schwikkard and Van der Merwe (2016) 107.
93 Demeanour of a witnesses was described in *Cloete v Birch* 1993 (2) PH F17 (E) 51 as including "their manner of testifying, their behaviour in the witness-box, their character and personality, and the impression they create".
94 *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) 175 at par. 27.
95 See 2.4.
96 See 2.4.

professionals have succeeded over the years in demonstrating the ability to truly assist the trier of facts by reason of their special knowledge and skill. To what extent will be discussed below.

3.6 Mental health professionals as expert witnesses: The role and function

The purpose of a psycho-legal assessment, as mentioned above, is to address a psycho-legal question and form an expert opinion that will assist the legal process.[97] In South Africa, psycho-legal assessments can be a statutory requirement; for example, when an accused raises pathological incapacity as a defence, a psycho-legal assessment must be conducted.[98] Psycho-legal assessments can also be necessitated by the psycho-legal question before the court as evident from reviewing case law. Mental health professionals are not always involved in legal processes in order to conduct a psycho-legal assessment, and a distinction needs to be drawn between the different capacities of mental health professionals.

Greenberg and Shuman indicate that there are two types of witnesses in the context of mental health professionals, a treating expert and the forensic expert.[99] Mental health professionals who have treated or are treating patients that are now before the court can testify as a fact witness, for example, testifying with regard to the type of treatment prescribed to their patient. There is a conflict of roles when a treating mental health professional attempts to offer an opinion on the psycho-legal question. As explained below[100] , it is not appropriate for a treating mental health professional to render opinions on psycho-legal issues. The psycho-legal question falls within the purview of the forensic mental health professional.

There are instances where a mental health professional acts in both a forensic role and therapeutic role which Greenberg and Gould refer to as a quasi-forensic clinical function.[101] For example, the court can direct that the psychologist who provided an

97 See 1.2.8.
98 See 3.6.1.
99 Greenberg and Shuman "Irreconcilable conflict between therapeutic and forensic roles" (1997) 28 *Professional Psychology: Research and Practice* 50-57 as discussed in Greenberg and Gould "The treating expert: A hybrid role with firm boundaries" (2001) 32 *Professional Psychology: Research and Practice* 473.
100 See 3.7.2.1.
101 Greenberg and Gould (2001) *Professional Psychology: Research and Practice* 470.

expert opinion in a care and contact evaluation must assist the child and parent to rebuild a relationship.[102]

According to Woody, there are, in fact, five roles that a mental health professional can assume in the legal process.[103] The five roles are academic or behavioural science expert; fact witness as a treating therapist; expert witness based on a psycho-legal assessment; pretrial and/or trial consultant; and lastly professional critic of other experts.[104] There are instances where the lines between the roles are blurry such as the quasi-forensic clinical function, but the focus of this study is on the role as an expert witness based on a psycho-legal assessment. The other roles will be mentioned at times to illustrate the importance of the difference between the roles.

The section below examines the various instances where psycho-legal assessments have been conducted with the purpose of giving an expert opinion in court. Legislation, together with selected civil and criminal cases dealing with the mental health professional as an expert witness, will be reviewed. An attempt has been made to include most of the matters where the expertise of mental health professional has been called to demonstrate the importance and extensive role that mental health professionals can play. This is, however, not an exhaustive list and will continue to expand as the knowledge base develops. The selection of cases has been made based on the prominence of mental health professionals in that particular area.

3.6.1 Criminal capacity and capacity to stand trial

Historically it was mostly in criminal cases, more specifically where the capacity of an accused was in question, where mental health professionals fulfilled the role of an expert witness.[105] Not surprising given the long history of mental health professionals engaged in criminal trials that the Criminal Procedure Act 51 of 1977 codifies the requirements for psycho-legal assessments dealing with criminal capacity and the

102 *Ibid.*
103 Woody "Ethical considerations of multiple roles in forensic services" (2009) 19 *Ethics and Behavior* 85.
104 *Ibid.*
105 See 2.4.

capacity to stand trial. The Criminal Procedure Act (CPA) outlines the instances when an accused must undergo a psycho-legal assessment by a mental health professional.

Firstly, section 77(1) of the CPA determines that if it appears that an accused, at any stage, by reason of mental illness or intellectual disability is not capable of understanding the court proceedings, the court can direct that an enquiry be made in terms of section 79 of the CPA,[106] colloquially referred to as the "30-day observation".[107] Although the parties to the proceedings can agree that the accused be referred, the court must still make the order in terms of section 77(1).[108] In terms of a section 77(1)-referral, the court must be satisfied that there is a factual or medical basis for the allegation of lack of fitness to stand trial.[109]

Section 78(2) determines that if it appears that the accused by reason of mental illness or intellectual disability is not criminally responsible[110] for the charged offence the matter must also be dealt with in terms of a section 79 enquiry.[111] In terms of section 78(2), unlike section 77(1), the accused can also be referred for observation for "any other reason" and not only by reason of mental illness or intellectual disability.[112] The section 79 enquiry is mandatory if the reason for the enquiry is mental illness or intellectual disability (pathological incapacity), but the court *may* direct that an enquiry

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106 See the following case law dealing with section 77 of the Criminal Procedure Act 51 of 1977: *De Vos NO and others v Minister of Justice and Constitutional Development and others* 2015 (9) BCLR 1026 (CC); *Ntshakala v S* (2019) JOL 43822 (GP); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Thanda* (2015) JOL 34358 (ECG); *S v Ramokoka* (2006) JOL 17262 (W); *S v Ralane* (2016) JOL 35905 (ECB); *S v Monamotsane* (2019) JOL 44817 (FB) *S v Dumba* (2010) JOL 26577 (NCK) and *S v Nxumalo* (2019) JOL 44199 (KZP).

107 Pillay "Could *S v Pistorius* influence reform in the traditional forensic mental health evaluation format?" (2014) 44(4) *South African Journal of Psychology* 378.

108 Kruger (ed.) (2019) *Hiemstra's criminal procedure SI12* 13-8(2).

109 *Ibid*.

110 Section 78(1) of the Criminal Procedure Act 51 of 1977 determines that criminal capacity is the ability to appreciate the wrongfulness of an act (section 78(1)(a)) and to act in accordance with an appreciation of the wrongfulness (section 78(1)(b)).

111 The following cases are a few examples where a section 79 enquiry based on section 78(2) was conducted: *S v Volkman* 2005 (2) SACR 402 (C); *S v Mcbride* 1979 (4) SA 313 (W); *S v Stellmacher* 1983 (2) SA 181 (SWA); *S v Seroba* 2015 (2) SACR 429 (GJ); *S v Di Blasi* 1996 (1) SACR 1 (A) and *S v Kavin* 1978 (2) SA 731 (W).

112 Section 78(2) reads as follows:

> If it is alleged at criminal proceedings that the accused is by reason of mental illness or intellectual disability or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or intellectual disability, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

be made "for any other reason".[113] When an accused relies on the defence of non-pathological incapacity[114] the section 79 enquiry is, therefore, not mandatory.[115] Prior to the amendment of section 78(2) to include "for any other reason"[116] the courts often expressed the view that psychiatric or psychological evidence in cases dealing with non-pathological incapacity is not indispensable.[117] Despite the fact that it is not mandatory or considered crucial, courts have expressed the important and helpful role expert evidence can play in matters dealing with the defence of non-pathological incapacity. In *S v Henry* the court held: [118]

> Generally speaking expert evidence of a psychiatric nature will be of much assistance to the court in pointing to factors which may be consistent, or inconsistent as the case may be, with involuntary conduct which is nonpathological and emotion induced.

In *S v Volkman*[119] the court referred to and supported an article by Burchell indicating that psychiatric or psychological evidence in matters involving the defence of non-pathological incapacity is "strongly encouraged".[120] Most cases where the defence of non-pathological incapacity and sane automatism is raised, the accused supports the defence with the use of psycho-legal reports in order to lay the factual foundation that is required.[121] As the court in the recent and highly publicised case of Vicki Momberg

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113 Kruger (ed.) (2019) 13-8(2).

114 The term non-pathological incapacity is considered to have first been coined by Judge of Appeal Joubert in *S v Laubscher* 1988 (1) SA 163 (A) at 167D-I.

115 *S v Volkman* at 405E-G Acting Judge Hockey states:

> Clearly, the Legislature made a distinction between allegations of criminal incapacity based on mental illness or mental defect, on the one hand, and such incapacity based on 'any other reason' on the other. Where there is an allegation or appearance of mental illness or mental defect, the court is obliged ('the court shall') to direct that the accused be referred for observation in terms of s 79 of the Act. If, however, there is an allegation of lack of criminal responsibility for any reason other than mental illness or mental defect, the court has a discretion whether to refer the accused for observation or not. Nonpathological incapacity falls within the latter category. Entrusting the court with discretion in cases of nonpathological incapacity is not surprising.

116 Section 78(2) of the Criminal Procedure Act 51 of 1977 was substituted with section 5(c) of the Criminal Matters Amendment Act 68 of 1998 that commenced on 28 February 2002.

117 *S v Harris* 1965 (2) SA 340 (A) at 365B-C; *S v Kalogoropoulos* 1993 (1) SACR 12 (A) at 21H-22A and *Director of Public Prosecution, Transvaal v Venter* 2009 (1) SACR 165 (SCA) at par. 67.

118 *S v Henry* 1999 (1) SACR 13 (SCA) at 20E-F.

119 *S v Volkman* 2005 (2) SACR 402 (C).

120 Burchell "Non-pathological incapacity: Evaluation of psychiatric testimony" (1995) 8 *South African Journal of Criminal Justice* 41-42 as quoted in *S v Volkman* at 406H-J.

121 See for example *Kok v S* (2001) 4 All SA 291 (A); *Momberg v S* (2019) JOL 46182 (GJ) (in this case the accused called a general practitioner); *S v Volkman* 2005 (2) SACR 402 (C); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Henry* 1999 (1) SACR 13 (SCA); *S v Wiid* 1990 (1) SACR 561 (A); *S v Stellmacher* 1983 (2) SA 181 (SWA); *S v Shivute* 1991 (1) SACR 656 (NM)*; S v Mthethwa* JDR 0551 (WCC); *S v Dumba* (2010) JOL 26577 (NCK); *S v Moses* 1996 (1) SACR 701 (C); *S v Nursingh* 1995 (2) SACR 331 (D); *S v Olivier*

indicated, "[p]sychologists and psychiatrists are frequently requested to offer expert opinion regarding the defences of nonpathological criminal incapacity and sane automatism, which are increasingly raised in criminal courts in this country".[122] It is submitted that although it is not mandatory, the accused is unlikely to succeed with a defence of non-pathological incapacity without expert evidence by a mental health professional.[123]

Section 79 of the CPA details how the enquiry should take place and be reported on. In terms of section 79(1), the mental health professional conducting the psycho-legal assessment is determined by the offence that the accused is charged with.[124] When an accused is charged with murder or culpable homicide or rape or compelled rape,[125] or another charge involving serious violence, the enquiry shall be conducted: [126]

(i) by the head of the designated health establishment, or by another psychiatrist delegated by the head concerned;
(ii) by a psychiatrist appointed by the court;
(iii) by a psychiatrist appointed by the court, upon application and on good cause shown by the accused for such appointment; and
(iv) by a clinical psychologist where the court so directs.

Any other offence, other than those described above, the psycho-legal assessment will be conducted by the head of the designated health establishment, or by another psychiatrist delegated by the head concerned.[127] In brief, with less serious charges the assessment is conducted by one psychiatrist and in the case of more serious charges at least two psychiatrists, and if the court directs, a clinical psychologist can

2007 (2) SACR 596 (C); *S v Di Blasi* 1996 (1) SACR 1 (A) *S v Eadie* 2002 (1) SACR 663 (SCA); *S v Kalogoropoulos* 1993 (1) SACR 12 (A) and *S v Laubscher* 1988 (1) SA 163 (A).

122 *Momberg v S* at par. 16.

123 For further reading on the use of and need for expert evidence when using the defence of non-pathological incapacity see Stevens (2011) *The role of expert evidence in support of the defence of criminal capacity* (LLD thesis, University of Pretoria).

124 Section 79(1)(a) and 79(1)(b) of the Criminal Procedure Act 51 of 1977.

125 As provided for in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

126 Section 79(1)(b) of the Criminal Procedure Act 51 of 1977.

127 Section 79(1)(a) of the Criminal Procedure Act 51 of 1977.

also form part of the panel.[128] The accused can also apply for a third psychiatrist to form part of the panel.

Prior to the amendment of section 79(1)(b) in 2017,[129] controversy surrounded the previous amendment with uncertainty regarding the constitution of the panel of psychiatrists with courts inconsistently applying the section. In *S v Pedro*[130] the court comprehensively discussed the number of psychiatrists that must conduct the enquiry in terms of section 79 of the CPA to properly constitute a panel.[131] In line with *S v Pedro,*[132] the legislature sought to amend the section in order to bring clarity to the composition of the panels and to ensure that the section is applied consistently by all the courts in South Africa.[133] The position of the clinical psychologist remained unchanged after the 2017 amendment, still only forming part of the panel if the court so directs. It is not clear from case law under which circumstances the court will find it necessary to direct that a clinical psychologist form part of the panel. According to Pillay the courts rarely appoint clinical psychologists, and it appears that the courts are usually influenced by the nature of the case, appointing psychologists when the defence of the accused suggests psychological process rather than a diagnosable mental illness.[134]

In terms of section 79(1A) the mental health professionals responsible for conducting the enquiry must be provided with specific information, as listed in the act, which

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128 The reference to psychiatrist and psychologist in the section is defined in section 79(12) as a person registered as such under the Health Professions Act 56 of 1974. In terms of section 79(9)(a) Director-General of Health needs to compile and keep a list of psychiatrists and psychologists who are prepared to conduct an enquiry under section 79.

129 Section 79(1)(b) of the Criminal Procedure Act 51 of 1977 was amended by section 3(a) of the Criminal Procedure Amendment Act 4 of 2017 that came into operation on 27 June 2017.

130 *S v Pedro* (2014) 4 All SA 114 (WCC).

131 Judge Rogers and Binns-Ward requested submissions by the Director of Public Prosecutions, Legal Aid Board (representing the accused) and the Minister of Justice and Constitutional Development regarding the compositions of psychiatric panels in terms of section 79. *S v Pedro* at par. 10.

132 *S v Pedro* (2014) 4 All SA 114 (WCC).

133 Explanatory memorandum in the Criminal Procedure Amendment Bill B2-2017.

134 Pillay "Competency to stand trial and criminal responsibility examinations: are there solutions to the extensive waiting list?" (2014) 44(1) *South African Journal of Psychology* 54. One of the few cases where a psychologist formed part of the panel was the highly publicised trial of Oscar Pistorius. See *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014). In the matter of *S v Thanda* a clinical psychologist also formed part of the panel. The High Court criticised the court *a quo* because no directive was given to appoint a clinical psychologist as part of the panel in terms of section 79(1)(b)(iv) as required. The lack of directive to appoint a psychologist is an irregularity and as such the panel was not properly constituted.

includes whether the referral is in terms of section 77 or 78; any statements made by the accused; nature of the charge, information regarding the accused near relatives and any other evidence or fact that would be relevant to the evaluation of the accused's mental condition or mental capacity.[135] The evaluation is then done at the psychiatric hospital or place designated by the court for a period that does not exceed thirty (30) days at a time.[136] The enquiry can be made on a "day visit" basis,[137] if the court so directs, where the accused would only be seen during the daytime without having to be committed to an institution for 30 days including nights.[138]

After completion of the psycho-legal assessment, the mental health professional must submit a written report indicating the nature of the enquiry, diagnosis (if any) and the finding.[139] If the evaluation is made under section 77(1), the finding must state whether the accused is capable of understanding the proceedings well enough to make a proper defence.[140] If the evaluation is done in terms of section 78(2), the finding must indicate the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of the act was, at the time of the commission of the act, affected by mental illness or intellectual disability or by any other cause.[141] The submitted psycho-legal report will by mere submission be proof of its contents. If the appointed panel's finding was

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135 Section 79(1A) of the Criminal Procedure Act 51 of 1977 reads as follows:
> The prosecutor undertaking the prosecution of the accused or any other prosecutor attached to the same court shall provide the persons who, in terms of subsection (1), have to conduct the enquiry and report on the accused's mental condition or mental capacity with a report in which the following are stated, namely:
> (a) whether the referral is taking place in terms of section 77 or 78;
> (b) at whose request or on whose initiative the referral is taking place;
> (c) the nature of the charge against the accused;
> (d) the stage of the proceedings at which the referral took place;
> (e) the purport of any statement made by the accused before or during the court proceedings that is relevant with regard to his or her mental condition or mental capacity;
> (f) the purport of evidence that has been given that is relevant to the accused's mental condition or mental capacity;
> (g) in so far as it is within the knowledge of the prosecutor, the accused's social background and family composition and the names and addresses of his or her near relatives; and
> (h) any other fact that may in the opinion of the prosecutor be relevant in the evaluation of the accused's mental condition or mental capacity.

136 Section 79(2)(a) of the Criminal Procedure Act 51 of 1977.

137 The word day visitor or day visit is used as opposed to the more common term "outpatient". As indicated by Pillay the evaluee is not a patient and the term outpatient is, therefore, not appropriate. Pillay (2014) *South African Journal of Psychology* 54-55.

138 See 3.8 for a discussion of the problems related to day-visit observations.

139 Section 79(4) of the Criminal Procedure Act 51 of 1977.

140 Section 79(4)(b) of the Criminal Procedure Act 51 of 1977.

141 Section 79(4)(d) of the Criminal Procedure Act 51 of 1977.

unanimous, there is no need to call the mental health professionals to testify unless the State or defence disputes the contents.[142]

The enquiry into the criminal capacity and capacity to stand trial differs slightly in the case of minors. In the case of accused minors, the Child Justice Act 75 of 2008 regulates the matter. The Child Justice Act (CJA) was enacted with the purpose to establish a criminal justice system for children who are in conflict with the law. The CJA specifically provides for the minimum age of criminal capacity of children[143] and determines that a child who is ten years or older but under the age of 14 years who commits an offence is presumed to lack criminal capacity unless the State proves otherwise.[144]

Section 11(3) determines that the court can order, on own accord or upon request by any of the parties, that an evaluation be done by a suitably qualified person, and the evaluation report must be submitted within 30 days of the date of the order.[145] Section 11(4A) determines that the provisions of section 77(2), (3) and (4) of the CPA applies with the changes as required by the context to the report referred to in section 11(4). This entails that the report can be used without the need to call the expert witnesses to testify in court if the finding is unanimous and the parties do not object.[146] Unlike the section 79 enquiry in the CPA, the evaluation is not done by a panel of psychiatrists. The CJA determines that registered psychiatrists and registered clinical, educational or counselling psychologists are all competent to conduct the evaluations involving minors.[147]

142 Section 77(2) and 78(3) of the Criminal Procedure Act 51 of 1977.
143 Section 7 of the Child Justice Act 75 of 2008.
144 Section 7(2) of the Child Justice Act 75 of 2008. The section will be amended by Child Justice Amendment Act 28 of 2019 to increase minimum age to 12 years. At the time of writing this the date of commencement was still to be proclaimed.
145 Section 11(4) of the Child Justice Act 75 of 2008.
146 Section 77(2) of the Criminal Procedure Act 51 of 1977.
147 Determination of persons or category or class of persons competent to conduct evaluations of criminal capacity of children and allowances and remuneration: Section 97(3) of the Child Justice Act (GNR 1338) in the Government Gazette No.41288 of 1 December 2017.

3.6.2 Dangerousness and sentencing

In deciding on an appropriate sentence, the court must make a value judgment considering all the circumstances of the case.[148] Regarding the procedural aspects of sentencing, the main source of law is the Criminal Procedure Act 51 of 1977 (CPA). Section 274(1) of the CPA determines that the court may receive any evidence to be able to pass a proper sentence. The manner of proof required and the degree of formality to present evidence, whether evidence in mitigation or aggravation, is determined by the circumstances of the case and the importance of the material.[149] Psycho-legal (pre-sentencing) reports by psychologists and psychiatrists are not mandatory, save for determining the dangerousness of an offender, but are often submitted as mitigating[150] or aggravating evidence.[151] The courts also refer to and use the psycho-legal reports that were compiled in terms of section 79 of the CPA.[152]

Some courts have been hesitant to place any weight on the psycho-legal reports in sentencing. In *S v Lister* Judge Nienaber pointed out that a psychiatrist is concerned with "diagnosis and rehabilitation" and does not necessarily take into account the aims of sentencing as a probation officer would.[153] As a result, the court did not place much consideration on the psycho-legal report as it was considered to address only the well-being of the accused.[154] It appears as if the court (and perhaps the psychiatrist) did not distinguish between the forensic role and the therapeutic role of a mental health professional, as discussed below.[155] Most presiding officers have, however, welcomed the submission of psycho-legal reports in sentencing trials.

In *S v Dlamini* the Acting Judge of Appeal Nicholas indicated that it would serve the courts well to make more use of pre-sentencing reports by persons such as

148 Terblanche (2016) *A guide to sentencing in South Africa* 160.
149 *Idem* 210.
150 See in this regard *Henricks and another v S* (2001) JOL 8023 (C); *NDV v S* (2015) JOL 33914 (SCA); *S v Lister* 1993 (2) SACR 228 (A) (in this case the psychiatrist only testified and did not submit a report); *S v Schutte* (1995) 4 All SA 295 (C); *S v "IS"* (2017) JOL 37577 (KZD); *S v Bull and another; S v Chavulla and others* 2002 (1) SA 535 (SCA); *S v Dr Marole* 2003 JDR 0139 (T) (unreported judgment); *S v Lehnberg* 1975 (4) SA 553 (A) and *S v Matshili* 1991 (3) SA 264 (A).
151 *S v Olivier* at 596.
152 *Ibid.*
153 *S v Lister* at 232H.
154 *Ibid*.
155 See 3.7.2.1.

psychologists to garner information about the accused that the courts are not able to.[156] Although the statement was made with reference to the decision of a court to impose the death sentence, it is submitted that it is equally applicable to any serious sentence. With regard to minors who have committed an offence Acting Judge Thulare in *S v Kriel and another*[157] regarded a referral for further investigation by a clinical psychologist as crucial in order to assist the court with a "reliable opinion to guide the court in its determination of an appropriate judicial response".[158] The judge considered the opinion of an expert "invaluable to a judicial officer who is interested in knowing the child in the position of the accused as an individual".[159] In his judgment, Acting Judge Thulare remitted the matter back to the trial court for further investigation and a report by a clinical psychologist.[160]

The CPA makes provision to sentence an offender to undergo imprisonment for an indefinite period if they have been declared a dangerous criminal.[161]A psycho-legal assessment may be ordered if it appears or is alleged that the accused is a dangerous criminal.[162] The enquiry done in terms of section 286A must be conducted by a psychiatrist appointed by the court.[163] The accused can also request that a second psychiatrist be appointed on their behalf.[164] The psychiatrist(s) must compile a written report which should include a description of the nature of the enquiry and the finding on whether the accused represents a danger to the physical or mental well-being of other persons.[165] Most of the provisions pertaining to the enquiry in terms of section 286A are similar to that of section 79 of the CPA including that the psycho-legal report can be handed in without further evidence if the finding is unanimous and the parties do not dispute the report.[166]

156 *S v Dlamini* 1992 (1) SA 18 (A) at 31E.
157 *S v Kriel and another* (2019) JOL 44159 (WCC).
158 *Idem* par. 34.
159 *Idem* par. 32.
160 *Idem* par. 39.
161 Section 286B(1) of the Criminal Procedure Act 51 of 1977.
162 Section 286A(2) of the Criminal Procedure Act 51 of 1977. See in this regard *S v Chimboza* 2015 JDR 1094 (WCC) (unreported judgment) *and S v Bull and another; S v Chavulla and others*.
163 Section 286A(3)(a) determines that, "…the relevant enquiry shall be conducted and reported on (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court".
164 Section 286A(3)(a)(ii) of the Criminal Procedure Act 51 of 1977.
165 Section 286A(3)(d) of the Criminal Procedure Act 51 of 1977.
166 Section 286A(4)(a) of the Criminal Procedure Act 51 of 1977.

In the matter of *S v Bull and another; S v Chavulla and others*[167] the appellants challenged the constitutional validity of section 286A and 286B of the CPA. The court emphasised that the psychiatric evidence required by section 286A ensures that the "declaration of dangerousness will not be made lightly".[168] The purpose of the psycho-legal assessment in terms of section 286A is to provide an expert opinion on the accused's likely future behaviour based on an analysis of past conduct and personal characteristics.[169] The evaluation is a predictive judgment which is a difficult task, but it is for the court to make the final decision given all of the available information. Given the safeguards and requirements of section 286A, the court found that the sections were not unconstitutional.[170]

3.6.3 Psychological autopsy

Much debated within the field of psychiatry and psychology is the psychological autopsy, also known as equivocal death analysis, where a psychiatrist or psychologist conducts a psycho-legal assessment that is retrospective and independent.[171] A psychological autopsy is usually done in cases of suspicious death.[172] It is seen as an investigative aid to help understand the manner of death by assessing the individuals' behaviour and personality before their death.[173] A psychological autopsy can also be conducted in cases where the testamentary capacity of the deceased is disputed but is usually associated with suicide research.[174]

In the case of *S v Rohde,*[175] the state charged the husband of the deceased with murder alleging that he had killed his wife and staged it to look like a suicide. The accused appointed Dr Panieri-Peter, a forensic psychiatrist, who conducted a psychological autopsy to comment on the likelihood that the deceased had committed suicide. Judge Salie-Hlophe discussed the concept of a psychological autopsy in great

167 *S v Bull and another; S v Chavulla and others* 2002 (1) SA 535 (SCA).
168 *S v Bull and another; S v Chavulla and others* at par. 19.
169 *Ibid.*
170 *S v Bull and another; S v Chavulla and others* at par. 16.
171 Schrivner *et al*. in Weiner and Otto (eds.) (2014) *The handbook of forensic psychology* 458.
172 *Ibid.*
173 *Ibid.*
174 *Ibid.*
175 *S v Rohde* (2019) 1 All SA 740 (WCC).

detail[176] and indicated that the term psychological autopsy is "neither particularly well defined nor standardised".[177]

The court in *Rohde*, reviewing the academic literature regarding psychological autopsies, found that it is mostly considered more of an investigative tool to be used outside the court as opposed to as expert evidence inside the court.[178] The report by Dr Panier-Peter was highly criticised in the case,[179] and the court was not persuaded that the science upon which a psychological autopsy is based is reliable.[180] The court subsequently found the report of Dr Panieri-Peter inadmissible.[181] Psychological autopsies are still approached with caution in South African courts and until professional controversy disappears is not likely to form part of expert evidence relied on, save perhaps for in the case of testamentary capacity.

3.6.4 Competency of witnesses

In both criminal and civil cases, a witness must be competent to testify. In terms of section 194 of the Criminal Procedure Act 51 of 1977, if it appears that a person suffers from a mental illness or "labours under imbecility of mind due to intoxication or drugs or the like" and as a result is deprived of their proper use of reason, the person is not competent to act as a witness.[182] Similar to the provision in section 194, section 9 of the Civil Proceedings Evidence Act 25 of 1965 excludes a witness from testifying if they, as a result of mental illness or intoxication, are deprived of the proper use of reason.

In *S v Dladla*[183] the appellant argued that the complainant who had testified in court was not a competent witness because he (the complainant) suffered from a mental illness and was diagnosed with schizophrenia. In the trial court, the magistrate held

176 *Idem* 822E-823E.
177 *Idem* 823A.
178 *Idem* 823C.
179 See 3.7.2.1.
180 *S v Rohde* at 825F.
181 *Idem* 827C.
182 See in general the commentary on section 194 of the Criminal Procedure Act in Kruger (ed.) (2019) 23-30.
183 *S v Dladla* 2011 (1) SACR 80 (KZP).

that the complainant had a lucid interval without hearing any medical evidence.[184] On appeal, Judge Madondo held that it was trite that whether a witness was or is suffering from a mental illness or mental defect must be determined with the aid of psychiatric evidence.[185] The judge criticised the magistrate as having had "assumed the role of a medical expert".[186]

The Criminal Procedure Act was recently amended inserting section 194A, which provides for the evaluation of competency of witnesses due to state of mind.[187] No similar provision is contained in the Civil Proceedings Evidence Act. When a court is to decide on the competency of a witness, as contemplated in section 194 of the CPA, the court *may* order that the witness be examined by a medical practitioner, a psychiatrist or clinical psychologist who must furnish the court with a report.[188] Section 194A of the CPA provides the court with an opportunity to appoint an expert to assist; however, the word *may* indicate that it is not mandatory. Considering cases such as *S v Dladla*[189] and *S v Mahlinza*[190] the psycho-legal assessment can be considered mandatory when the competency of the witness is questioned due to state of mind.

3.6.5 Mental health care and the appointment of a curator

The main purpose of the Mental Health Care Act 17 of 2002 is the care, treatment and rehabilitation of persons who are mentally ill.[191] The mental health professionals mainly fulfil therapeutic/clinical role as opposed to a forensic role in terms of the Mental Health Care Act.[192] The Mental Health Care Act does, however, still contain a few provisions where the need for psycho-legal assessments arises.

184 *Idem* par. 16.
185 *Idem* par. 16 and par. 19.
186 *Idem* par. 19.
187 Section 194A was inserted by section 10 of the Judicial Matters Amendment Act 8 of 2017. The Judicial Matters Amendment Act commenced on 2 August 2017 save for sections 19, 20, 21, 24, 35 and 38.
188 Section 194A(1) of the Criminal Procedure Act 51 of 1977.
189 *S v Dladla* 2011 (1) SACR 80 (KZP).
190 *S v Mahlinza* 1967 (1) SA 408 (A).
191 See section 3 of the Mental Health Care Act 17 of 2002 for the objects of the act.
192 See 3.7.2.1. for the differences between a therapeutic and forensic role.

Evaluations of mental health care users, as they are referred to in the Mental Health Care Act,[193] can take place when an application is made to obtain involuntary care, treatment and rehabilitation[194] and when an application is made into the mental health status of a prisoner to determine whether the prisoner must be transferred to a designated health establishment.[195]

Once a health establishment receives an application in terms of section 33(2) for the involuntary care, treatment and rehabilitation, the head of that establishment must ensure that the mental health care user (evaluee) is examined by two mental health care practitioners.[196] The two mental health care practitioners submit their findings in writing, including their opinion on whether the mental health care user (evaluee) must receive involuntary care, treatment and rehabilitation services.[197] The mental health care user (evaluee) can be examined by another independent mental health care practitioner if the findings of the two mental health care practitioners differ.[198]

In terms of the Mental Health Care Act, specific health establishments have been designated for the admittance, care, treatment, and rehabilitation services to mentally ill prisoners.[199] To determine whether a prisoner is mentally ill, an enquiry is made by a psychiatrist or if a psychiatrist is not available a medical practitioner and a mental health care practitioner such as a psychologist.[200] If the written findings of the enquiry revealed that the prisoner must be cared and treated for by a designated health establishment, a magistrate must order a further enquiry by two mental health care practitioners.[201] Of the two mental health care practitioners commissioned by the magistrate, at least one must be a psychiatrist, psychologist or medical practitioner with specialist training in mental health.[202]

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193 Section 1 of the Mental Health Care Act 17 of 2002.
194 Section 33 of the Mental Health Care Act 17 of 2002.
195 Sections 50 and 52 of the Mental Health Care Act 17 of 2002.
196 Section 33(4)(a) of the Mental Health Care Act 17 of 2002. Section 1 defines a mental care practitioner as a psychiatrist or registered medical practitioner or a nurse, occupational therapist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services. See also 1.2.2.
197 Section 33(5) of the Mental Health Care Act 17 of 2002.
198 Section 33(6)(a) of the Mental Health Care Act 17 of 2002.
199 Section 49 of the Mental Health Care Act 17 of 2002.
200 Section 50 of the Mental Health Care Act 17 of 2002. The enquiry is done if information provided or from observations it appears that the prisoner is mentally ill.
201 Section 52 of the Mental Health Care Act 17 of 2002.
202 Section 52(2) of the Mental Health Care Act 17 of 2002.

The Mental Health Care Act also make provision for the appointment of an administrator for care and administration of the property of a mentally ill person or person with severe or profound intellectual disability.[203] The application for the appointment of an administrator must, amongst others, include available mental health-related medical certificates or reports relevant to the mental health status of the person.[204] No specific provisions are made with regard to the medical reports that must be submitted, but these sections must be read together with the Uniform Rules of Court dealing with the appointment of curators.

Rule 57 of the Uniform Rules of Court deals with the appointment of a curator for the person or property of a person who is considered to be of unsound mind and incapable of managing their own affairs. The application for the appointment of a curator *ad litem* must be supported by an affidavit by at least two medical practitioners, one of whom should, if possible, be a psychiatrist.[205] In accordance with Rule 57(3), (b) the medical practitioner and psychiatrist must, as far as possible, be unrelated to the patient and without any personal interest in terms of the order sought.[206]

The rule also makes provision for the release of a person from curatorship[207] , but unlike the appointment of a curator, the rule does not stipulate that an application must be accompanied by an affidavit from a psychiatrist. Uniform Rule 57(17) does stipulate that upon hearing of the matter, the court can call for such further evidence as it considers desirable, which can include an affidavit.

3.6.6 Divorce, child care and contact evaluations and other family law matters

In South Africa, a marriage may be dissolved by a court on the following grounds: the irretrievable breakdown of the marriage or because of the mental illness or the continuous unconsciousness of a party to the marriage.[208] For the marriage to be

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203 Chapter 8 of the Mental Health Care Act 17 of 2002 deals with the care and administration of property of mentally ill persons or persons with severe or profound intellectual disability.
204 Section 60(2)(a) of the Mental Health Care Act 17 of 2002.
205 Rule 57(3)(b) of the Uniform Rules of Court.
206 *Ibid.*
207 Rule 57(13) of the Uniform Rules of Court.
208 Section 3 of the Divorce Act 70 of 1979.

dissolved on the grounds of mental illness at least two psychiatrists appointed by the court must give evidence that the person is mentally ill and that there is no reasonable prospect that the person will be cured of their mental illness.[209] The Divorce Act does not contain any further requirements regarding the psycho-legal assessment.

Most divorce proceedings involve mental health professionals because of disputes involving the care and contact of minor children. In 1998 Louw and Allan, in their study on the profile of the forensic psychologists in South Africa, found that the activity that constituted the largest part of forensic psychological (psycho-legal) activities in South Africa was care and contact evaluations.[210] Apparent from the multitude of cases (and the workings of the offices of the Family Advocate) care and contact evaluations have, more than 20 years later, remained one of the most prominent areas of psycho-legal work by mental health professionals.

Care and contact disputes, which are not limited to parties in divorce proceedings, are often referred to as custody disputes. Section 1(2) of the Children's Act 38 of 2005 determines that the term "care" is to replace the term "custody" and any reference to the term "custody" in any other law or in the common law, must be construed to mean "care" as defined in section 1(1) of the act. "Contact" furthermore replaces the term "access'" in family law.[211] In light of the changes, all references in case law or other studies to custody and access will be replaced with care and contact when discussed.

The Divorce Act provides for the safeguarding of the interests of minor children during a divorce and requires that an enquiry be instituted by the Family Advocate in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.[212] The Family Advocate is an officer in public service[213] and acts as an advisor to the court in care and contact disputes.[214] The role of the Family Advocate is required, as stated in *Soller NO v Greenberg & another*[215] "to be neutral in approach to order that the wishes and desires

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209 Section 5(1)(b) of the Divorce Act 70 of 1979.
210 Louw and Allan "A profile of forensic psychologists in South Africa" (1998) 28 *South African Journal of Psychology* 236.
211 Section 1(2) of the Children's Act 38 of 2005.
212 Section 6(1) of the Divorce Act 70 of 1979.
213 Section 2 of the Mediation in Certain Divorce Matters Act 24 of 1987.
214 *Soller NO v Greenberg & another* (2004) JOL 12124 (W) at par 22.
215 *Idem* par 23.

of disputing parties can be more closely examined and the true facts and circumstances be ascertained".[216] The Family Advocate, similar to an expert witness, should not take sides against any party in favour of another.[217] Psychologists and psychiatrists are often used in care and contact evaluations to assist the Family Advocates' offices with their investigations.[218] The Mediation in Certain Divorce Matters Act makes provision for the appointment of family counsellors to assist the Family Advocates in their investigations, but the Family Advocate can also appoint a psychologist.[219] The parties to the dispute can likewise appoint independent psychologists or psychiatrists to investigate the matter.[220]

Mental health professionals have been appointed to address various aspects relating to the ultimate issue of what is in the best interests of the child. Parental Alienation Syndrome,[221] recommendations with regards to relocation,[222] and allegations of sexual abuse[223] are some of the prominent aspects that mental health professionals have assessed. Gathered from the information given in the reported cases psycho-legal assessment in care and contact evaluations usually entail interviews with all the relevant family members,[224] use of other documentation such as medical reports and school records and the administration of psychometric tests,[225] such as the Minnesota Multiphase Personality Inventory (MMPI) test.[226] In almost all the reviewed cases, the

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216 *Ibid*.

217 *Soller NO v Greenberg & another* at par 24.

218 See for example: *Potgieter v Potgieter* (2007) JOL 19597 (SCA); *Van Niekerk v Van Niekerk (Van Niekerk and another intervening)* (2006) JOL 17166 (T); *Prins v Claasen* (2008) JOL 21693 (SE); *Olwagen v Olwagen* (2003) JOL 11541 (SE); *Joubert v Joubert* (2004) JOL 12900 (T) *Katz v Katz* (2009) JOL 23557 (GSJ); *Ismail v Soubai* (1999) JOL 5857 (C); *DG v DG* (2010) JOL 25706 (E) and *Fish v Fish* (2019) JOL 40926 (FB).

219 Section 3 of the Mediation in Certain Divorce Matters Act 24 of 1987. See for example *Haskins v Wildgoose and others* (1996) 3 All SA 446 (T).

220 See for example: *Potgieter v Potgieter* (2007) JOL 19597 (SCA); *Van Niekerk v Van Niekerk (Van Niekerk and another intervening)* (2006) JOL 17166 (T); *Schmidt v Schmidt* (1996) 1 All SA 676 (W); *Rosen v Havenga and another* (2005) JOL 15235 (C); *Latouf v Latouf* (2001) 2 All SA 377 (T); *JM v MM (born R)* (2017) JOL 39106 (ECG); *Joubert v Joubert* (2004) JOL 12900 (T); *Katz v Katz* (2009) JOL 23557 (GSJ); *Kahn v Kahn* (2005) JOL 15142 (T); *Heynike v Roets* (2001) 2 All SA 79 (C); *DG v DG* (2010) JOL 25706 (E); *Ford v Ford* (2006) JOL 16386 (W); *Clark v Clark* (2005) JOL 15108 (D); *Fish v Fish* (2019) JOL 40926 (FB); *Davy v Douglas and another* (1998) JOL 1798 (N); *LS v AT and another* 2001 (2) BCLR 152 (CC) and *Van den Berg v Le Roux* (2003) 3 All SA 599 (NC).

221 *Soller NO v Greenberg & another*.

222 *Latouf v Latouf*; *Joubert v Joubert*; *Katz v Katz*; *Heynike v Roets*; *DG v DG* and *Ford v Ford*.

223 *Katz v Katz*.

224 *Olwagen v Olwagen*; *Prins v Claasen*; *Schmidt v Schmidt*; *Soller NO v Greenberg & another* and *Haskins v Wildgoose and others*.

225 *Fish v Fish*.

226 *Potgieter v Potgieter* and *Olwagen v Olwagen*.

mental health professional submitted a written psycho-legal report.[227] Unlike criminal proceedings, the mental health professional rarely testified as most of the matters were applications proceedings.[228] Mental health professionals were called to give oral testimony in application proceedings in a few rare instances.[229]

In matters concerning minor children, the courts are not hesitant to appoint experts to assist them and have on numerous occasions expressed the significant value of experts in these matters.[230] In *Van den Berg v Le Roux*[231] Judge President Kgomo said in respect of the two psychologists that testified that "[i]t is impossible to do justice to their helpful evidence in court".[232] In *Schmidt v Schmidt* Judge Wunsh commented that "I attach great importance to these reports which come from objective and disinterested parties".[233] In *Schmidt,* the court viewed the report in high regard because of the "careful and closely reasoned opinion of the clinical psychologists". [234] In *Fish v Fish,*[235] the court expressed the sentiment that the reports were "vital in assisting the courts to make a decision which is sensitive, delicate and emotional for the parties".[236] The recommendations by the independent psychologist in *Fish v Fish*[237] was considered as being based on a solid and thorough examination of all the relevant factors and as such, the court followed the recommendations.

The Children's Act also makes provisions for the involvement of psychologists and, to a lesser extent, psychiatrists in various other matters involving children.[238] Firstly, if

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227 *Prins v Claasen*; *Schmidt v Schmidt*; *Soller NO v Greenberg & another*; *Joubert v Joubert*; *Katz v Katz*; *Ismail v Soubai*; *DG v DG*; *Clark v Clark*; *Fish v Fish*; *Davy v Douglas and another*; *LS v AT and another*; *Potgieter v Potgieter*; *Van Niekerk v Van Niekerk (Van Niekerk and another intervening)*; *Prins v Claasen*; *Olwagen v Olwagen*; *Heynike v Roets* and *Ford v Ford*.

228 *Prins v Claasen*; *Schmidt v Schmidt*; *Soller NO v Greenberg & another*; *Joubert v Joubert*; *Katz v Katz*; *Ismail v Soubai*; *DG v DG*; *Clark v Clark*; *Fish v Fish*; *Davy v Douglas and another* and *LS v AT and another*.

229 *Heynike v Roets*; *Ford v Ford* and *Van den Berg v Le Roux*.

230 *Van Niekerk v Van Niekerk (Van Niekerk and another intervening)* at par. 15.

231 *Van den Berg v Le Roux* (2003) 3 All SA 599 (NC).

232 *Van den Berg v Le Roux* at par.29.

233 *Schmidt v Schmidt* at 680.

234 *Idem* 682.

235 *Fish v Fish* (2019) JOL 40926 (FB).

236 *Idem* par. 23.

237 *Ibid*.

238 The need for the involvement of mental health professionals is not always to conduct psycho-legal assessment but often includes a therapeutic role. For example, section 33(5)(a) of the Children's Act determines that when parties prepare a parenting plan in terms of section 32(2), they must seek the assistance of either a Family Advocate, social worker, or psychologist.

during an application to the court for the assignment of contact and care of a child[239] it is brought to the attention of the court that an application for the adoption of a child has been made by another applicant the court is obliged to request either the Family Advocate, social worker or a psychologist to furnish it with a report and recommendations as to what is in the best interests of the child.[240]

Another example of psycho-legal assessments in the Children's Act is found in section 62, which deals specifically with the professional reports that may be ordered by the court. When deciding a matter, the court *may* order, if it is deemed necessary, a designated social worker, Family Advocate, psychologists, medical practitioner, *or* suitably qualified person to carry out an investigation to establish the circumstances of the child or any other relevant person such as the parents of the child.[241] The qualified person conducting the investigation may then be required by the court to testify or to submit a written report or both.[242]

The Children's Act further determines that the Director-General must keep and maintain a National Child Protection Register[243] , which includes in the names of persons found to be unsuitable to work with children.[244] An application can be made to remove the name from the register on the grounds that the affected person has been rehabilitated.[245] The regulations specify that an application for the removal must be accompanied by proof of rehabilitation which must include, amongst others, a report, obtained at the applicant's own cost, compiled by a duly registered psychologist or psychiatrist or a registered social worker to the effect that the applicant has been rehabilitated and is unlikely to commit another act or offence similar to that which has led to the inclusion of the applicant's name in Part B of the National Child Protection Register.[246] The regulations further determine that the court may if it is deemed

239 Section 23 of the Children's Act 38 of 2005 sets out the requirements of the application.
240 Section 23(3)(a) of the Children's Act 38 of 2005.
241 Section 62(1) of the Children's Act 38 of 2005.
242 Section 62(2)(b) of the Children's Act 38 of 2005.
243 Section 111 of the Children's Act 38 of 2005.
244 The names are included in part B of the register as provided for in section 119 of the Children's Act 38 of 2005.
245 Section 128(3) of the Children's Act 38 of 2005. Section 128(3) also determines that the application may only be made after at least five years have lapsed since the entry was made.
246 Regulation 45(2)(a)(i) of General Regulations Regarding Children to the Children's Act 38 of 2005 (GNR 261) in the Government Gazette No. 33076 of 1 April 2010 (as amended).

necessary require the applicant to be evaluated by an additional psychologist or psychiatrist or social worker.[247] The Children's Act does not regulate the manner in which the psycho-legal assessment must take place.

3.6.7 Compensation for occupational injuries and disability claims

In the event that an employee is involved in an accident that arose out of and in the course of the employment and as a result of the accused is disabled or died, the employee or dependents of the employee can claim compensation from the Compensation Fund in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).[248] The employee who claims compensation can be required to submit to a medical examination which is done by a designated medical practitioner.[249] A medical practitioner is defined as a person registered as a medical practitioner in terms of the Health Professions Act 56 of 1974,[250] which will include a psychiatrist.

Section 65(1)(a) read with schedule 3 of COIDA**,** provides a list of diseases that are considered to be occupational diseases but does not include any reference to a mental injury. In terms of section 65(1)(b) of COIDA, an employee is, however, entitled to claim compensation for any other disease not listed in schedule 3, provided it arose out of and in the course of his or her employment. A psychiatric injury can, therefore, constitute an occupational injury or occupational disease.[251] In a circular, issued by the Director-General of Labour, Post-Traumatic Stress Disorder is officially regarded as an occupational injury in terms of the COIDA.[252] The circular determines that only a psychiatrist may confirm the diagnosis of Post-Traumatic Stress Syndrome. The Compensation Commissioner can, if deemed fit, constitute a panel of psychiatrists,

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247 Regulation 45(3)(b) of General Regulations Regarding Children to the Children's Act 38 of 2005 (GNR 261) in the Government Gazette No. 33076 of 1 April 2010 (as amended).

248 Section 22 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 deals with the right of the employee to compensation.

249 Section 42(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

250 Section 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

251 See Landman and Ndou "Some thoughts on developments regarding the recovery of damages for pure psychiatric or psychological injury sustained in the workplace" (2015) 36(10) *Industrial Law Journal (Juta)* 2460 and Du Plessis "Mental stress claims in South African Worker's Compensations" (2009) 30(7) *Industrial Law Journal* 1476 for discussions on claiming for psychiatric or psychological injury in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

252 Circular Instruction 172 (GN 936) in the Government Gazette No. 25132 of 27 June 2003.

clinical psychologists, and when necessary occupational therapists, to assess the impairment and the psycho-legal report of the psychiatrist that diagnosed the employee.[253]

The ill-health or injury of an employee can also give rise to disability claims and eventual medical boarding. In South Africa, there has been a tremendous increase in applications for disability claims based on psychiatric grounds.[254] Before an employer can dismiss an employee based on incapacity due to ill health or injury, labour legislation determines that all possible alternatives short of dismissal must be considered in order to accommodate the employee.[255] Should the employee not be able to continue working and alternative work arrangements are not feasible, they may be eligible for medical boarding. Item 11 of Schedule 8 of the Labour Relations Act 66 of 1995 determines that a thorough assessment of the employee's impairment must be conducted. Depending on the type of illness or injury, the assessment can be conducted by mental health professionals such as psychiatrists.[256]

For example, in *Mthembu v Iscor*[257] the employer considered medically boarding the complainant. The complainant consequently had to undergo various medical examinations and tests, including an assessment by a specialist psychiatrist. The psychiatrist prepared a report for consideration by the medical panel in which he diagnosed the complainant as suffering from narcolepsy affecting the complainant's abilities to work. The psychiatrist concluded his report by recommending medical boarding on psychiatric grounds.[258]

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253 *Ibid.*

254 Mokoka *et al*. "Disability claims on psychiatric grounds in the South African context: A review" (2012) 18(2) *South African Journal of Psychiatry* 34.

255 Item 10 of Schedule 8 of the Labour Relations Act 66 of 1995.

256 For example, *Rikhotso v MEC for Education* (2004) JOL 13349 (LC). In *Rikhotso* the applicant sought medical boarding and had supplied medical reports from a clinical psychologist and a psychiatrist. It is important to note that the disability assessment by the Compensation Commissioner in terms of the Compensations for Occupational Injuries and Diseases Act 130 of 1993 is conducted according to specific rules and regulations that differ from the criteria applied by pension funds and the insurance industry. The differing rules and regulations can influence the report and the assessment by the mental health professionals.

257 *Mthembu v Iscor Ltd and Another* (2001) 9 BPLR 2516 (PFA).

258 *Mthembu v Iscor Ltd and Another* at par. 16. The complainant did not succeed with his claim. The neurologists that the complainant also consulted contended that he suffers from sleep apnoea. The Pension Funds Adjudicator in the matter agreed with the submission made by the respondents that sleeping disorders are neurological conditions which are "best diagnosed by neurologists".

The legislation that governs a specific sector can expand on the provision of the Labour Relations Act and prescribe how a disability or impairment assessment must take place. For example, in the education sector Schedule 1 of the Employment of Educators Act 76 of 1998, the Incapacity Code and Procedures for Poor Work Performance, determines that the employer must when conducting any investigation into the performance of the employee as a result of poor health or injury, appoint at least one registered medical practitioner to examine the educator.[259] The medical practitioner must, after completing the medical examination, provide the employer with a report[260] which is used to determine the expected period of the educator's incapacity.[261] A mental health professional conducting an assessment to determine an employee's incapacity must ensure that the relevant legislation that governs a specific sector is complied with.

3.6.8 Testamentary capacity

The Wills Act 7 of 1953 determines that any person sixteen years and older is competent to make a will unless it is proven that at the time of making the will the person did not have the necessary testamentary capacity.[262] The Wills Act indicates that the person must be mentally capable of appreciating the nature and effect of their actions.[263] The burden of proof rests on the person alleging the testamentary incapacity.[264] The Wills Act does not require psychiatric or medical reports to prove the incapacity, but mental health professionals have on occasion been called to assist the court in the testamentary disputes.

In the unreported judgment of *Van Niekerk v Kruger and others,*[265] the court had to determine whether the deceased had the necessary testamentary capacity to execute a will.[266] The respondents called three expert witnesses, a neurosurgeon- Dr Edeling, a neuropsychologist- Mr Ormond-Brown and a psychiatrist- Professor Vorster. Dr

259 Item 3(a) of Schedule 1 of the Employment of Educators Act 76 of 1998.
260 Item 3(d) of Schedule 1 of the Employment of Educators Act 76 of 1998.
261 Item 4 of Schedule 1 of the Employment of Educators Act 76 of 1998.
262 Section 4 of the Wills Act 7 of 1953.
263 *Ibid.*
264 *Ibid.*
265 *Van Niekerk v Kruger and others* (20632/14) (2016) ZASCA 55 (unreported judgment).
266 The deceased had suffered two strokes shortly before her death on 24 December 2006.

Edeling and Professor Vorster had not treated the deceased but based their opinions on the relevant medical records.[267] An opposing expert opinion was made by the neurologist, Dr Rowji, who treated the deceased before her death. Appeal Judge Saldulker and Acting Judge of Appeal Baartman briefly examined the role of the expert witness[268] and commended the respondent's three expert witnesses for their outstanding testimony and reports. The judges stated that the three expert witnesses' opinions were based on objective facts, and throughout the report and testimony, they thoroughly explained their reasoning.[269] The appeal was dismissed based on the expert evidence and other supporting evidence that the deceased was not of sound mind and did not have the requisite testamentary capacity.

In *Gildenhuys v Gildenhuys and Others,*[270] the validity of the will was also attacked on the basis that the deceased lacked the necessary testamentary capacity. The plaintiff in this matter contended that the sign and symptoms of Alzheimer's disease were already present when the will was executed, and as a result, the deceased lacked the necessary capacity.[271] Professor Zabow, a psychiatrist, was the only expert witness before the court and prepared a report based on the medical reports by the physicians and psychiatrists that had treated and evaluated the deceased before her death.[272] Based on his knowledge of Alzheimer's disease and the medical reports provided, Professor Zabow concluded that it is highly likely that the deceased lacked the mental capacity to execute a will.[273] The court held that "[b]ased on the evidence at trial, particularly the views and opinion expressed by Prof Zabow and the evidence of the lay witness in the plaintiff's case, I have no hesitation in concluding that, as at 14 February 2000, the deceased did not have the mental capacity to execute a valid will or any other contractual undertaking".[274]

267 *Van Niekerk v Kruger and others* at par. 25.
268 The criticism levelled against Dr Rowji is discussed below. See 3.7.2.
269 *Van Niekerk v Kruger and others* at par. 50.
270 *Gildenhuys v Gildenhuys and Others* (11130/07) [2010] ZAWCHC 21 (19 February 2010) (unreported judgment).
271 *Idem* par. 9.
272 *Idem* par.14.
273 *Idem* par. 19.
274 *Idem* par. 55.

In *Meyer v Meester, Vrystaat Hoë Hof en Andere*,[275] like the case of *Gildenhuys*, the court concluded that the testator in question, an elderly woman suffering from Alzheimer's disease, lacked testamentary capacity. The court based its conclusion on the evidence of the expert witness and lay witnesses, measuring the veracity of the testimony of the lay witness against the expert evidence supplied. In *Meyer,* the psycho-legal report of a clinical psychologist was pivotal.[276]

3.6.9 Personal injury claims

Damages claimed for personal injuries usually includes medical expenses, loss of earnings or earning capacity, pain and suffering, loss of amenities and psychiatric injury.[277] The plaintiff must prove the damage and the amount of compensation the plaintiff is entitled to[278] , which is usually done by submitting medico-legal and psycho-legal reports. In the case of injuries sustained in a motor vehicle accident, it is regulated by the Road Accident Fund Act 56 of 1996. Most personal injury claims are Road Accident Fund matters that require submitting reports from various experts depending on the type of injury sustained.

In civil cases, such as personal injury claims, the Uniform Rules of Court determine that before the trial can commence the parties must receive ample notice of the expert witness that the other party intends to call in order to sufficiently prepare for trial or to decide if the matter can be settled out of court. The Uniform Rules of Court determine that any party to the proceedings relying on an expert witness must file a notice with the details of the expert[279] and file a "summary of such expert's opinion and his reason therefor"[280] within a specific time frame. The rules further determine that when claiming damages or compensation in respect of bodily injury, which includes both mental and physical injury, the plaintiff can be required to submit to a medical examination.[281] In

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275 *Meyer v Meester, Vrystaat Hoë Hof, Bloemfontein en Andere* (452/2010) [2010] ZAFSHC 85 (29 July 2010) (unreported judgment).

276 *Meyer v Meester, Vrystaat Hoë Hof, Bloemfontein en Andere* (452/2010) [2010] ZAFSHC 85 (29 July 2010) (unreported judgment).

277 Dendy (2018) *Law of South Africa* (ed. Joubert) Volume 14(1) at par. 87.

278 Dendy (2018) *Law of South Africa* at par.124. Rule 18(10) to (12) of the Uniform Rules of Court sets out the manner in which the damages must be set out to enable the defendant to reasonably assess the quantum.

279 Rule 36(9)(a) of the Uniform Rules of Court.

280 Rule 36(9)(b) of the Uniform Rules of Court.

281 Rule 36(1) of the Uniform Rules of Court.

terms of Rule 36(8)(a) of the Uniform Rules of Court the practitioner that examined the plaintiff must give a full written report of the examination and the opinion that has been formed as a result thereof.

In the case of a mental injury, referred to as a psychiatric injury, a psycho-legal report by a mental health professional is of key importance, and a plaintiff will not succeed with a claim without the expert evidence. The reports are often used during settlement negotiations. In cases where a joint minute is filed by the opposing sides' experts, the court often accepts the report without the need to call the expert witnesses. The parties can also agree to argue the matter based solely on the reports of the experts. If no agreement has been reached, the parties will need to call their expert witnesses to testify in court.

A multitude of cases deals with Road Accident Fund matters and other personal injury claims where one or both of the parties relied on the expert opinion of a psychologist or psychiatrist to prove (or disprove) a psychological or psychiatric injury.[282] Most of the cases do not deal extensively with the psycho-legal assessments or the psycho-legal report but merely highlights the diagnosis and conclusions by the experts. One of the few cases that dealt with the evidence of the mental health experts in length was *Dlwathi v Minister of Safety and Security.*[283]

In *Dlwathi* the plaintiff, a practising advocate of the Johannesburg Bar, had been assaulted by members of the South African Police Service. The plaintiff claimed that because of the assault, he suffered psychiatric and psychological injuries, specifically post-traumatic stress disorder and clinical or major depression.[284] Various reports

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[282] See for example *Komape and others Minister of Basic Education and others* 2020 (2) SA 347 (SCA); *De Klerk v Minister of Police* (2018) 2 All SA 597 (SCA); *Nsibande v Road Accident Fund* (2019) JOL 45904 (GP); *Mercy v Road Accident Fund* (2019) JOL 43398 (GP); *Lepheane v Road Accident* (2019) JOL 45836 (FB); *Bostelmann v Road Accident Fund* (2019) JOL 44887 (GP); *Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W); *N v T* (1994) 1 All SA 496 (C); *Gethe and others v City of Tswane Metropolitan Municipality and another* (2019) JOL 42862 (GP); *Jonathan v General Accident Insurance Co of South Africa Ltd* 1992 (4) SA 618 (C); *Maart v Minister of Police* (2016) JOL 36662 (ECG); *Latha and another v Minister of Police and others* (2019) JOL 43115 (KZP); *Dlwathi v Minister of Safety and Security* 2016 JDR 0391 (GJ); *Machavi v Road Accident Fund* (2019) JOL 44902 (GP) and *Bee v The Road Accident Fund* (093/2017) [2018] ZASCA 52 (29 March 2018).

[283] *Dlwathi v Minister of Safety and Security* 2016 JDR 0391 (GJ). The matter was taken on appeal, but the Supreme Court of Appeal did not deal with the evidence by the mental health experts. See *Minister of Police v Dlwathi* (20604/14) [2016] ZASCA 6 (2 March 2016).

[284] *Dlwathi v Minister of Safety and Security* at par. 27.

were filed by clinical psychologists and psychiatrists who evaluated the plaintiff.[285] The court emphasised the importance of expert evidence regarding psychiatric and psychological injury, stating that: [286]

> While outsiders may in certain instances observe certain indicative behaviours, reactions or degree of competence or lack thereof with life tasks, the courts rely on the opinion of expert witnesses in the area. It has been held that whether or not a psychiatric injury exists is a question that must be answered through expert evidence of psychiatrists to enable the courts to draw the necessary distinctions rationally.

3.6.10 Alteration of sex description and sex status

The Alteration of Sex Description and Sex Status Act 49 of 2003 allows certain individuals who meet the set requirements to apply for an alteration of the sex description in their birth register. When applying for an alteration of the sex description, the application must be accompanied by a report prepared by a medical practitioner who was not involved in the surgical or medical treatment resulting in the gender reassignment to establish the sexual characteristics of the applicant.[287] A medical practitioner for purposes of the act includes a practitioner in terms of the Health Profession Act 56 of 1974 and the Mental Health Care Act 17 of 2002,[288] which in all probability will be a psychiatrist.

In the case of a person who is intersexed section 2(2)(d)(ii) of the Alteration of Sex Description and Sex Status Act determines that the application must be accompanied by, “a report prepared by a qualified psychologist or social worker corroborating that the applicant is living and has lived stably and satisfactorily, for an unbroken period of at least two years, in the gender role corresponding to the sex description under which he or she seeks to be registered”. The Alteration of Sex Description and Sex Status Act recognises the importance of a psycho-legal report for purposes of the application

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285 The court indicated its displeasure with some of the psycho-legal assessments which will be discussed below in 3.7.2.

286 *Dlwathi v Minister of Safety and Security* at par. 57-58.

287 Section 2(2)(c) of the Alteration of Sex Description and Sex Status Act 49 of 2003.

288 Section 1 of the Alteration of Sex Description and Sex Status Act 49 of 2003 also refers to the Allied Health Professions Act 63 of 1982, Nursing Act 50 of 1978, Pharmacy Act 53 of 1974, and Dental Technicians Act 19 of 1979.

but does not provide any further requirements or guidelines on how the psycho-legal assessment must be conducted.

3.6.11 Termination of pregnancy and sterilisation

The Choice on Termination of Pregnancy Act 92 of 1996 provides for the circumstances and conditions under which a pregnancy may be terminated. Where a woman is severely mentally disabled and incapable of understanding and appreciating the nature and consequences of the termination of the pregnancy, the pregnancy can be terminated upon request.[289] It may only be terminated if two medical practitioners who have completed the prescribed training course consent thereto.[290] Usually, under those circumstances, one of the medical practitioners is a psychiatrist.

The Sterilisation Act 44 of 1998 determines that sterilisation can in general only take place if a person capable of consenting consents to the sterilisation.[291] Should a person be incapable of consenting or incompetent to consent due to mental disability, the sterilisation can take place upon request by the relevant party.[292] Upon the request of the sterilisation of a person with a mental disability, the person in charge of the hospital where the request was made must convene a panel consisting of a psychiatrist, psychologist and a nurse.[293] The panel must consider all of the information and concur that sterilisation may be performed.[294]

3.7 Problems experienced with mental health professionals acting as expert witnesses

Case law and statutory requirements make it abundantly clear that the legal system needs the guidance of mental health professionals in various areas of the law. Judges have, on numerous occasions, echoed the sentiment that expert evidence of mental health professionals plays a valuable role in assisting the courts and other triers of fact

289 Section 5(4)(a) of the Choice on Termination of Pregnancy Act 92 of 1996.
290 Section 5(4) of the Choice on Termination of Pregnancy Act 92 of 1996.
291 Section 2(1) of the Sterilisation Act 44 of 1998.
292 Section 3(1) of the Sterilisation Act 44 of 1998.
293 Section 3(2) of the Sterilisation Act 44 of 1998.
294 Section 3(1)(b) of the Sterilisation Act 44 of 1998.

to ensure that justice is done.[295] The prevalence of expert witnesses, whether mental health professionals or experts in other fields, is not without fault and many recurring problems hamper the usefulness of expert evidence.

The purpose of the expert evidence is to assist the court and also to promote court efficiency.[296] The validity and reliability of expert evidence are, therefore, critical to efficiency.[297] Expert evidence that is irrelevant and unreliable will waste time and effort of everyone involved and increases the cost of a trial.[298] Costs and time aside, the damage caused by unethical or inaccurate expert testimony can be devasting both for the particular profession and the legal system. Firstly, misleading expert testimony can lead to incorrect decisions impeding the rendering of justice.[299] Secondly, misleading expert evidence is considered to be more damaging than inaccurate testimony by a lay witness because of the status of the expertise of the witness.[300] Unethical behaviour can also discredit a profession with the courts and does a disservice to the profession.[301] Furthermore, the public perception of the profession can be damaged and also pave the way for possible negligence claims.[302] Lastly, the damage to the profession can dissuade potential patients from seeking help from mental health professionals.[303]

Various repeating problems or challenges have reared their head when mental health professionals act as expert witnesses. In 1999 Judge Booysen emphasised a few problems in psycho-legal work done by psychologists including the lack of objectivity;

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295 *Van den Berg v Le Roux* at par. 29 and *Twine and another v Naidoo and another* at par. 19.

296 Smith "Mental health expert witnesses: Of science and crystal balls" (1989) 7 *Behavioral Sciences and the Law* 163.

297 *Ibid.*

298 Smith (1989) *Behavioral Sciences and the Law* 163 and Kaliski "The prostitution of psychiatry: Some are shameless, others are just easy" (2012) 15 *South African Journal of Psychiatry* 321. In the case of *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ) at par. 123 Judge Spilg commented that the court had to take much more time in weighing the evidence because of the lack of diligence and the significant oversights on the part of a number of experts.

299 Appelbaum "Forensic psychiatry: The need for self-regulation" (1992) 20 *Bulletin of the American Academy of Psychiatry and Law* 155; Smith (1989) *Behavioral Sciences and the Law* 162 and Heilbrun *et al*. in Goldstein (ed.) (2007) *Forensic psychology: Emerging topics and expanding roles* 49.

300 Smith (1989) *Behavioral Sciences and the Law* 162 and McEwan (2003) *The verdict of the court: Passing judgment in law and psychology* 3.

301 Ogloff "Two steps forward and one step backward: The law and psychology movement(s) in the 20th century" (2000) 24 *Law and Human Behavior* 473.

302 Appelbaum (1992) *Bulletin of the American Academy of Psychiatry and Law* 155 and Smith (1989) 7 *Behavioral Sciences and the Law* 163.

303 Appelbaum (1992) *Bulletin of the American Academy of Psychiatry and Law* 155.

believing patients and their relatives too easily; inability to make any concessions despite circumstances changing or facts that were relied upon being proved incorrect; and using technical jargon without explaining the terms.[304] Two decades later and the same problems still frequently occur with many more added to the list such as the lengthy reports filed which often include gratuitous information[305] or the mental health professionals that testify beyond their expertise[306] -and of course not forgetting the ever problematic hired-gun phenomenon.[307]

Appelbaum notes that most of the challenges can be divided into two categories: inadequate level of performance in evaluations and testimony and unethical behaviour.[308] It is not always possible or easy to distinguish whether the problem relates to competency or to ethics as it involves an investigation into the motive and behaviour of the mental health professional.[309] Certain acts by mental health professionals can also blur the lines because the level of incompetence can cross the line to unethical behaviour.[310]

To determine the challenges that currently plague South Africa, case law, the disciplinary proceedings, and ethical complaints against South African psychologists registered with the Health Professions Council of South Africa (HPCSA) will be examined. The section below is divided into two parts- the first part deals with the ethical complaints and guilty findings against South African psychologists, and the second part reviews the literature and case law. The review of case law and literature has further been divided into the two main categories that Appelbaum specified. The division is as Appelbaum indicated is not exact but has been used for ease of reference.

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304 Nicholas and Coleridge "Expert witness testimony in the criminal trial of Eugene de Kock: A critique of the Posttraumatic Stress Disorder (PTSD) Defence" (2000) 30 *South African Journal of Psychology* 36.

305 Kaliski (2012) *South African Journal of Psychiatry* 321.

306 Kaliski (2012) *South African Journal of Psychiatry* 318. Kaliski states that he personally witnessed an industrial psychologist who diagnosed an accused's personality disorder using only a PF-16 scale and a psychiatrist who was willing to provide an opinion on the strength of the blow to the head of a victim based on the impression left on a door frame.

307 See 3.7.2.1.

308 Appelbaum (1992) *Bulletin of the American Academy of Psychiatry and Law* 153.

309 *Idem* 160.

310 *Ibid*.

3.7.1 Complaints and disciplinary proceedings against registered psychologists

Various studies have been conducted over the years to investigate ethical dilemmas and misconduct surrounding psychologists.[311] The literature, as Nortje and Hoffman have pointed out,[312] can be divided into three different categories, namely, ethical dilemmas experienced by psychologists themselves, complaints against psychologists and records of disciplinary actions taken against psychologists. The studies discussed below refer to the two last categories and will be expanded on. The studies focus solely on registered psychologists and not psychiatrists. It appears from the literature review that similar studies regarding the complaints and disciplinary actions against registered psychiatrists in South Africa have not been undertaken. The lists of disciplinary proceedings against registered health practitioners made available by the Health Professions Council of South Africa (HPCSA) does not specify the specialist registration such as psychiatry. Given the difficulty to determine whether the medical practitioner is a registered psychiatrist, the investigation below will only focus on registered psychologists.

In 2002 the study of Scherrer, Louw and Möller was published and investigated the scope, nature and frequency of the complaints relating to the ethical misconduct of South African psychologists registered with the HPCSA[313] between 1990 and 1999.[314] The study further investigated the preliminary and disciplinary inquiries resulting from the complaints.[315] Within their study, the total number of complaints was 480 for the period of 1990 until 1999 but included a few complaints lodged prior to 1990 which brought the number down to 461 complaints.[316] In relation to the number of registered

311 Scherrer *et al*. "Ethical complaints and disciplinary action against South African psychologists" (2002) 32(1) *South African Journal of Psychology* 54; Nortje and Hoffman "Ethical misconduct by registered psychologists in South Africa during the period 2007-2013" (2015) 45 *South African Journal of Psychology* 260; Louw "Regulating professional conduct: Part 1: Codes of ethics of national psychology associations in South Africa" (1997) 27 *South African Journal of Psychology* 183 and Louw "Regulating professional conduct: Part 2: The Professional Board for Psychology in South Africa" (1997) 27 *South African Journal of Psychology* 189.

312 Nortje and Hoffman (2015) *South African Journal of Psychology* 260.

313 The role and function of the HPCSA will be discussed in 4.3 below.

314 Scherrer *et al*. (2002) *South African Journal of Psychology* 54. The focus of their study fell on registered psychologists and any complaints pertaining to intern psychologists were not included in the study.

315 Scherrer *et al*. (2002) *South African Journal of Psychology* 56.

316 *Ibid*.

psychologists during the period of the study, this translates to ethical complaints being lodged against 1.2% of all registered psychologists at that time.[317]

In their study, Scherrer, Louw and Möller broadly categorised the nature of the complaints into complaints dealing with the rendering of services and other complaints. Within the category "other complaints" the complaints included psychologists neglecting to pay their annual registration fees to the HPCSA which comprised the most complaints at 21.3%.[318] Considering the category "complaints relating to the rendering of services" the most complaints (16.0%) were made with regard to inaccurate or false accounts where the psychologists claimed payment for sessions that did not occur or claimed for a longer period than the session lasted.[319] This is followed by problems regarding psycho-legal reports which constituted 13.1% of the complaints.[320] The complaints regarding psycho-legal reports were clarified by Scherrer, Louw and Möller as the instance where psychologists produced unprofessional or inaccurate reports.[321]

Further complaints regarding "rendering of services" included incompetence (12.9%), improper behaviour (11.5%), breach of confidentiality (6.0%), rendering services outside category of registration (2.3%), unacceptable rendering of services (1.5%), and consulting with a minor without the guardian's consent (1.5%).[322] Of these, it appeared from the explanatory notes that it was only the rendering of services outside the category of registration that dealt with psycho-legal services where psychologists gave evidence in court on an aspect that they did not receive proper training in.[323] Overall complaints regarding the "rendering of services" compromised 315 of the 461 complaints.

Complaints regarding psycho-legal work constitute 23.5% (74) of the 315 complaints regarding the rendering of services. The number of complaints concerning psycho-legal work is calculated by adding the 63 complaints about psycho-legal reports

317 Scherrer *et al*. (2002) *South African Journal of Psychology* 62.
318 *Idem* 58.
319 *Idem* 59.
320 *Ibid*.
321 *Ibid*.
322 *Ibid*.
323 *Ibid*.

together with the 11 complaints about the rendering of services outside a category of registration, making this the second-highest category of complaints—only slightly less than the 24,4% (77) of complaints concerning accounts.

Scherrer, Louw and Möller indicate that when investigating the matter the nature of the psycho-legal report in question was not always available, but it was evident that a quarter of these complaints emanated from psycho-legal work done by psychologists in contact and care evaluations.[324] The reports in these evaluations were often one-sided.[325] In their study, they acknowledge that the type of dispute is a fertile breeding ground for disgruntlement, but the impression was created that many of the psychologists involved did not always grasp the implication of psycho-legal work.[326]

A Committee of Preliminary Inquiry decided whether the complaints warranted a further investigation.[327] Of the total number of complaints, 15% were investigated further, and a disciplinary inquiry held.[328] Unfortunately, the study does not provide data regarding the nature of the complaints that were referred for disciplinary inquiries. The shortcomings of the study, as indicated by the authors included that some of the complaints on the HPCSA's system was incomplete and owing to missing data, only a basic statistical analysis could be used.[329] The study also included various unique variables, and it was not always possible to compare the results with those of other countries.[330]

In 2015, the study by Nortje and Hoffman regarding the ethical misconduct by registered psychologists in South Africa during the period of 2007 until 2013 was published.[331] The study by Nortje and Hoffman, unlike the study of Scherrer, Louw and Möller, focused only on the guilty verdicts and disciplinary proceedings as published by the HPCSA.[332] As indicated by Nortje and Hoffman, the HPCSA has since 2007 published lists with the guilty verdicts and disciplinary proceedings related to

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324 Scherrer *et al*. (2002) *South African Journal of Psychology* 59.
325 *Idem* 62.
326 *Idem* 62-63.
327 *Idem* 57.
328 *Idem* 58.
329 *Idem* 62-63.
330 *Idem* 63.
331 Nortje and Hoffman (2015) *South African Journal of Psychology* 260.
332 *Ibid*.

professional standard breaches and ethics misconduct against registered health practitioners.[333] Unfortunately, the number and nature of complaints regarding psychologists, including those that did not lead to a guilty verdict, was not available for purposes of their study.[334]

The results of their study indicated that over the period of 2007 until 2013, the majority of the transgressions (33%) can be regarded as "improper professional role conduct".[335] The category of improper professional role conduct includes, amongst others, conflict of interest where multiple roles are assumed (such as acting as a mediator in a divorce matter and later acting as an expert witness for one of the parties)[336] and practising outside the scope or category of practice.[337] This transgression category is followed by "negligence and/or incompetence in evaluating, treating, or caring for patients" which constituted 27% of the transgressions.[338] The specific misconduct that falls under the category "negligence and/or incompetence in evaluating, treating, or caring for patients" is described by Nortje and Hoffman as:

(i) Inadequate client examination and subsequent inadequate and/or incorrect psychological report;
(ii) Making biased recommendations for custodial placement without proper assessment of all parties;
(iii) Failure to use correct and/or indicated test instruments; and
(iv) Compiling psychological report without interviewing all concerned parties.[339]

The third category, fraudulent claims, constituted 20% of the transgressions and included compiling a report without seeing a patient as well as fraudulent medical claims.[340] The further categories include disclosing confidential information without permission (13%), performing procedures and/or interventions without patient consent (4%), and lastly negligence regarding patient documents/records (2%).[341]

333 Nortje and Hoffman (2015) *South African Journal of Psychology* 262.
334 *Idem* 268.
335 *Idem* 264.
336 *Idem* 265.
337 *Idem* 265-266.
338 *Idem* 264-265.
339 *Idem* 265.
340 *Ibid*.
341 *Ibid*.

In view of the descriptions of the specific misconduct that falls under the six categories, transgressions relating to psycho-legal work fall in the ambit of three categories, namely improper professional role conduct, negligence and/or incompetence in evaluating, treating, or caring for patients and fraudulent claims. The study does not provide a further breakdown of the percentages of the specific misconduct under each category. The percentage of transgressions relating to psycho-legal work can, therefore, not be determined with certainty. It is submitted that given the specification in all probability at least 30% of the transgressions relate to psycho-legal work.

A comparison between the two studies above is not truly possible given the scope, nature, and variables between them. Scherrer, Louw and Möller focussed on the nature of complaints whereas Nortje and Hoffman focused on the guilty verdicts/disciplinary proceedings. Both studies, however, provide valuable input with regard to problems in context of psycho-legal services rendered in the period the studies were conducted. Evident from both studies is that transgressions (including alleged transgressions in the form of complaints) concerning psycho-legal services is the forerunner in respect of ethical misconduct by psychologists, being the second most cited transgression.

In order to compare whether the situation has changed in the last six (6) years since the study was done by Nortje and Hoffman, the data regarding disciplinary proceedings provided on the website of the HPCSA was analysed.[342] The analysis has been done in a similar manner to that of Nortje and Hoffman to provide for better comparison with their study. The annual lists of judgments of 2014 until and including 2019 was used, all of which indicate the registration number and name of practitioner, nature of the complaint, penalty and the town.[343] For purposes of the analysis, the name of the practitioner and the town was excluded. The penalty imposed will not be analysed below but is discussed in chapter 4 regarding the role and function of the HPCSA in regulating the profession.[344]

342 Health Professions Council of South Africa "Publications: Judgements" (2020) available online at https://www.hpcsa.co.za/?contentId=338&actionName=Publications (last accessed on 25 January 2020).
343 *Ibid*.
344 See 4.3.3.2.

Table 1 below is a summary of the registered psychologists per year[345] to the number of matters that were subject to a disciplinary inquiry as per the published lists.[346] Comparing the percentages in table 1 below to the study done by Nortje and Hoffman it is noteworthy that the average percentage from 2007 until 2013 (7 years) was 0,09% whereas from 2014 until 2019 (6 years) it was considerably less at 0,04%. The results indicate that in general, there is an exceedingly small percentage of psychologists that are found guilty of ethical misconduct.[347] The low percentage can indicate general ethical behaviour by psychologists in South Africa. In contrast, the results can also be because evaluees or patients are not aware of their rights or that ethical misconduct has occurred,[348] or because of the nature of the matter is personal, the evaluee or patient does not want to report the complaint.[349] Kaliski opines that the rarity in complaints could also be because of the lack of regulation.[350]

Table 1. Percentage of disciplinary enquiries compared to registered psychologists

	2014	**2015**	**2016**	**2017**	**2018**	**2019**
Psychologists	7417	7622	8190	8453	8565	8742
Disciplinary inquiries	8	1	9	2	1	0
Percentage	0.11	0.01	0.11	0.02	0.01	0

345 Health Professions Council of South Africa "Health Professions Council of South Africa Annual Report 2015/16" (2016) available online at https://nationalgovernment.co.za/entity_annual/940/2016-health-professions-council-of-south-africa-(hpcsa)-annual-report.pdf (last accessed on 5 May 2020). The HPCSA's annual report of 2015/2016 indicate the number of registered psychologists from April 2013 until March 2016 and the HPCSA's annual report of 2018/19 indicates the number of registered psychologists from April 2016 until April 2019.

346 Health Professions Council of South Africa "Publications: Judgements" (2020) available online.

347 See also Nortje and Hoffman (2015) *South African Journal of Psychology* 263. According to the 2018 Newsletter for the Professional Board of Psychology an approximate 12 to 15 cases are referred to the HPCSA for inquiry, which is more than what is indicated on the lists even when including the rare case against other categories of health practitioners registered under the Professional Board of Psychology. It is plausible that some of the lists that have been uploaded on the website is incomplete. For example, the judgments for 2019 that were published only indicated matters for March 2019 and April 2019. It is uncertain whether these were the only months that disciplinary inquiries were held or if the list was not finalised. The analysis will, however, be done on the data as published and considered a true reflection.
Health Professions Council of South Africa *Psychology News: Newsletter for the Professional Board for Psychology Issue 01/06/2018* at 18 (2018) available online at https://www.hpcsa.co.za/Uploads/PSB_2019/PSB_Newsletter_2018.pdf (last accessed on 25 January 2020).

348 Nortje and Hoffman (2015) *South African Journal of Psychology* 263.

349 *Ibid*.

350 Kaliski (2012) *South African Journal of Psychiatry* 321.

Table 2 below deals with the nature of the transgressions committed by psychologists for the period of 2014 until 2019. The transgression categories used and listed in table 2 below is based on the categories used by Nortje and Hoffman[351] in their research to better enable a comparison between their study for the period of 2007 until 2013 with the analysis of 2014 until 2019. The results indicate that most of the transgressions (38%) concern negligence and/or incompetence in evaluating, treating, or caring for patients. At 33%, the second-highest category is transgressions that involve improper professional role conduct. The majority of the transgressions in the study of Nortje and Hoffman also fell in those two categories.[352]

Table 2. The nature and frequency of transgressions

Transgression category	**Number of transgressions**	**Percentage of all transgressions**
Improper professional role conduct	7	33
Negligence and/or incompetence in evaluating, treating, or caring for patients	8	38
Fraudulent conduct	3	14
Disclose confidential information without permission	1	5
Perform procedures and/or interventions without patient consent	2	10
Negligence regarding patient documents/records	0	0
TOTAL	21	100

None of the categories, as formulated by Nortje and Hoffman,[353] contain transgressions that only relate to psycho-legal services. For purposes of this study, the data of the lists of judgments of 2014 until 2019 was further analysed to determine the percentage of transgressions relating to psycho-legal work only. It is submitted that based on the nature of the complaint, as described in the published lists, 14 of the

351 Nortje and Hoffman (2015) *South African Journal of Psychology* 260.
352 *Idem* 265.
353 *Ibid*.

21 matters dealt with psycho-legal work, an astounding 67%. The specific transgressions relating to psycho-legal work included:

(i) Recommendations made in care and contact evaluations without consulting all of the relevant parties or failing to conduct proper investigations;
(ii) Psycho-legal report containing unsubstantiated allegations that were not confirmed by collateral sources;
(iii) Psycho-legal report containing aspersions regarding the psychological state of a party who was not evaluated by the psychologist or making assumptions about a person that had not been interviewed;
(iv) Psycho-legal report failing to include the limitations or potential bias in the findings;
(v) Entering of multiple relationships, acting both in a therapeutic and forensic role;
(vi) Psycho-legal report failing to include the focus or purpose of the report;
(vii) Failing to provide a report within a reasonable time; and
(viii) Writing a psycho-legal report with recommendations based on therapy as opposed to a comprehensive assessment.

Most of the complaints in 2014 until 2019 appear to have emanated from psycho-legal work done by psychologists in contact and care evaluations.[354] Albeit the percentage of guilty verdicts is low in comparison to the number of registered psychologists, it is problematic that the greatest obstacle of the profession appears to be psycho-legal work. This is echoed by the Professional Board of Psychology's Committee for Preliminary Inquiry who has recognised that most of the complaints received are related to psycho-legal activities with the high-risk area being identified as psycho-legal work done in divorce and care and contact evaluations.[355]

In 2016 the first national survey was commissioned by the Professional Board for Psychology to explore, amongst others, the professional activities of registered psychologists. An approximate 20% of the registered practitioners completed the

354 Scherrer *et al*. (2002) *South African Journal of Psychology* 59.
355 Health Professions Council of South Africa "*Psychology News: Newsletter for the Professional Board for Psychology Issue 01/06/2018"* (2018) at 18-19 available online.

survey.[356] The survey indicated that psycho-legal or forensic assessments were considered a secondary activity performed by a few practitioners.[357] Of the different psycho-legal assessments, parental competence assessments were performed most with 87 practitioners (6.5%) indicating undertaken the activity.[358] Although not a global statistic, a lack of experience can also add to the problems regarding psycho-legal work.

3.7.2 The problems with mental health experts as outlined by case law and literature

3.7.2.1 Unethical behaviour

Bias- the golden thread running through the narrative of the expert witness and the reason behind most of the unethical behaviour by mental health professionals. From the Roman times until the twenty-first century, bias has been the *bête noire* of psycho-legal work.[359] Gutheil and Simon submit that there are several external and internal sources of bias.[360] The external sources of potential bias include treater bias, money, entrepreneurial bias, attorney pressures,[361] political bias, extra-forensic relationship, fame, hindsight bias and confirmatory bias.[362] Some of the examples of internal sources of bias that can influence the expert are research, personal, professional beliefs, gender, advocacy and traumatic experience.[363] Most of the sources of bias are self-explanatory, but a selected few will be expanded on below.

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356 Health Professions Council of South Africa (2017) *Research report: National survey of all registered psychology practitioners* 3.

357 *Idem* 13.

358 *Ibid*.

359 Gutheil *et al*. "'The wrong handle': Flawed fixes of medicolegal problems in psychiatry and law" (2005) 33 *The Journal of American Academy of Psychiatry and the Law* 433. See also chapter 2 on the historical overview of the mental health professional as expert witness.

360 Gutheil and Simon "Avoiding bias in expert testimony" (2004) 34 *Psychiatric Annals* 261. See also the different sources of bias identified by Otto in Otto "Bias and expert testimony of mental health professionals in adversarial proceedings: a preliminary investigation" (1989) 7 *Behavioral Sciences and Law* 268. Scott also states that the five most common biases that may affect forensic psychiatry is anchoring bias, confirmation bias, attribution bias, observer bias, and hindsight bias. Scott "Believing doesn't make it so: Forensic education and the search for truth" (2013) 41 *The Journal of American Academy of Psychiatry and the Law* 27. The factors mentioned by Gutheil and Simon best explain the bias as demonstrated by case law.

361 Ogloff (2000) *Law and Human Behavior* 473.

362 Gutheil and Simon (2004) *Psychiatric Annals* 261.

363 *Ibid*.

Treater bias often occurs as the transitioning between a clinical or therapeutic role, and a forensic role is not as easy as it seems. The mental health professional can be subject to bias because they unconsciously treat the psycho-legal assessment as a normal clinical assessment.[364] The complication of treater bias occurs when mental health professionals act as expert witnesses and simultaneously treat the patients in question. This creates an ethical dilemma. Most ethical codes of regulating bodies advise against the multiple roles of being both treater and forensic expert. In some circumstances it is argued that no pure division between treater and expert witness exists, for example, psychiatrists providing mental health services to prisoners fulfil both a forensic and therapeutic role due to the nature of their work.[365] As a result, the rigorous separation of the roles has been considered unpractical and inadvisable.[366] Despite the criticism against the clear distinction between roles, the conflict that arises from a dual relationship can be very damaging. As Greenberg and Shuman state, "[w]hen a therapist also serves as a forensic expert, the therapist is part of the fabric of the case".[367]

The damage or conflict that arises from multiple roles is best understood with reference to the distinguishing factors. A psycho-legal assessment, where the mental health professional assumes a forensic role, differs vastly from a typical assessment in a clinical setting, where a therapeutic role is assumed. It is crucial to reiterate, as stated in chapter 1, that the purpose of the psycho-legal assessment within the forensic context is to benefit society by assisting the court or legal system as opposed to the therapeutic context where the purpose is to benefit the patient by promoting healing.[368] Strasburger, Gutheil and Brodsky refer to the outcomes as justice versus insight.[369] Melton distinguishes between psycho-legal assessments and therapeutic assessments on seven dimensions, namely, scope, the importance of client's perspective, voluntariness, autonomy, threats to validity, relationship and dynamics and lastly pace and setting.[370] The differences between psycho-legal assessment and

364 Gutheil and Simon (2004) *Psychiatric Annals* 261.
365 Strasburger *et al*. "On wearing two hats: Role conflict in serving as both psychotherapist and expert witness" (1997) 154 *American Journal of Psychiatry* 451.
366 *Idem* 450.
367 Greenberg and Shuman "When worlds collide: Therapeutic and forensic roles" (2007) 38(2) *Professional Psychology* 130.
368 See 1.2.8. Strasburger *et al*. (1997) *American Journal of Psychiatry* 451.
369 Strasburger *et al*. (1997) *American Journal of Psychiatry* 451.
370 Melton *et al.* (2018) 43.

therapeutic assessments will be discussed using the dimensions as referred to by Melton.[371]

During a clinical assessment, the mental health professional is interested in the patient's perspective, and experience and a more "objective" understanding are of secondary importance.[372] The primary focus of a psycho-legal assessment is to try and ensure the accuracy of the evaluee's version. The information must be verified with all relevant sources, and the mental health professional cannot only rely on an interview.[373] A psycho-legal assessment requires the use of multiple collateral data sources.[374] The purpose of a therapeutic assessment is not fact-finding but gaining insight, something which cannot be validated or corroborated by external sources.[375] The therapeutic goal will not be achieved if the mental health professional is trying to build a record for court testimony.[376]

Unlike in a clinical setting, a person undergoing a psycho-legal assessment usually does so under the request of a third party such as a judge or employer.[377] When a patient voluntarily seeks mental health therapy, there is also a greater autonomy regarding the objectives and procedures used during the assessment.[378] In contrast, the objectives and procedures during a psycho-legal assessment are determined by the legal question, legislation and other relevant legal principles.[379]

The relationship between the parties also differs in a forensic role as compared to a therapeutic role.[380] In a forensic setting, the mental health professional is much more detached, whereas in a therapeutic setting, the mental health professional will be more empathic with the patient.[381] Some commentators consider the use of empathy during a psycho-legal assessment as unethical.[382] Empathy can be used during a psycho-

371 *Ibid*.
372 Melton *et al.* (2018) 44 and Strasburger *et al*. (1997) *American Journal of Psychiatry* 451.
373 Melton *et al.* (2018) 44.
374 De Ruiter and Kaser-Boyd (2015*) Forensic psychological assessment in practice: Case studies* 13.
375 Strasburger *et al*. (1997) *American Journal of Psychiatry* 451.
376 *Ibid*.
377 Melton *et al.* (2018) 44-45.
378 *Idem* 43.
379 *Idem* 43.
380 *Idem* 45.
381 *Idem* 45-46.
382 *Idem* 46.

legal assessment but must be balanced by objectivity; otherwise, it can bias a forensic evaluation.[383] Using empathy can lead to the evaluee considering it a therapeutic relationship and left feeling betrayed by the mental health professional's report, hurting any future therapy.[384] The mental health professional who does not distinguish between the different relationships brought on by the roles can also be subject to treater bias influencing the objectivity of the psycho-legal assessment.

The pace with which a psycho-legal assessment is done is also more urgent than the time limit for therapeutic assessments.[385] The psycho-legal assessment process is also relatively finite because the matter in court must be finalised. In contrast, treatment is usually done over time, and the mental health professional waits for the correct time to intervene.[386] The timing in a therapeutic setting is determined by the patient.[387]

Combining the role of treater and evaluator is to embark on treacherous waters because multiple roles by a mental health professional compromise the objectivity of the expert opinion that is given.[388] The mental health professional may be vulnerable to a conflict of interest[389] and cause damage not only to the evaluee or patient but also to the profession. Having failed to carry out the duties imposed by one of the two roles can also open the possibility of future claims of negligence.[390]

Despite the problems with multiple roles, the courts have "created" a hybrid or blended role for mental health professionals in especially care and contact evaluations.[391] This is the case where the court orders a form of psychotherapeutic treatment for the minor children and requests the mental health professional to report back to the court regarding the treatment and to make recommendations as to the questions before the

383 Strasburger *et al*. (1997) *American Journal of Psychiatry* 452.
384 *Ibid*.
385 Melton *et al.* (2018) 46 and Strasburger *et al*. (1997) *American Journal of Psychiatry* 453.
386 *Ibid*.
387 *Ibid*.
388 Woody "Ethical considerations of multiple roles in forensic services" (2009) 19 *Ethics and Behavior* 80.
389 *Ibid*.
390 Strasburger *et al*. (1997) *American Journal of Psychiatry* 452.
391 Stahl and Simon (2013) *Forensic psychology consultation in child custody litigation: A handbook for work product review, case preparation, and expert testimony* 96-97.

court.[392] For example, in *Van Niekerk v Van Niekerk (Van Niekerk and another intervening)*[393] the court ordered that the minor children remain in the professional psychological care of the current psychologists for treatment and that the psychologists must furnish a joint report on what is in the best interests of the minor children.[394] The psychologists were also ordered to address the psycho-legal question on whether Parental Alienation Syndrome was present as alleged by one of the parties.[395] The mental health professionals in the *Van Niekerk*-case acted in a hybrid role and is only one of many examples in care and contact evaluations.

The reasoning behind the creation of the hybrid role in care and contact evaluations is to prevent further trauma for the child by having to be assessed by various mental health professionals. Whether this is truly in the best interest of the minor children will need to be investigated because the hybrid role in itself is problematic.[396] By providing therapy, the mental health professional would need to foster a healthy therapeutic relationship with the patient.[397] At the same time, the mental health professional has reporting and recommending responsibilities to the court. The mental health professional must, therefore, also strive to remain neutral and think forensically.[398]

The second source of bias, money, needs no introduction. The expert that sells their testimony[399] is certainly not new nor restricted to mental health professionals, but unquestionably a central touchstone of the contempt towards psycho-legal work.[400] As

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392 *Ibid.*
393 *Van Niekerk v Van Niekerk (Van Niekerk and another intervening)* (2006) JOL 17166 (T).
394 *Van Niekerk v Van Niekerk (Van Niekerk and another intervening)* at par. 28.7.1 and 28.7.5.
395 *Ibid.*
396 Stahl and Simon (2013) 97.
397 *Ibid.*
398 *Ibid.*
399 Mossman "'Hired guns', 'whores', and 'prostitutes': Case law references to clinicians of ill repute" (1999) 27 *Journal of American Academy of Psychiatry and Law* 415; Gutheil *et al*. (2005) *The Journal of American Academy of Psychiatry and the Law* 433; Meintjies-Van der Walt "Ethics and the expert: Some suggestions for South Africa" (2003) 4 *Child Abuse Research in South Africa* 43; Stevens "Ethical issues pertaining to forensic assessments in mental capacity proceedings: Reflections from South Africa" (2017) 24 *Psychiatry, Psychology and Law* 632; Lerm "Beware the hired gun: Are expert witnesses unbiased?" (2015) May *De Rebus* 37 and Kaliski (2012) *South African Journal of Psychiatry* 317.
400 Gutheil and Simon (2004) *Psychiatric Annals* 265; Meintjies-Van der (2003) *Child Abuse Research in South Africa* 43; Ogloff (2000) *Law and Human Behavior* 473; Adshead and Sarkar "Justice and welfare: Two ethical paradigms in forensic psychiatry" (2005) 39 *Australian and New Zealand Journal of Psychiatry* 1016; Gutheil and Appelbaum (2000) *Clinical handbook of psychiatry and the law* 281;320; Gudjonsson and Haward (1998) *Forensic psychology: A guide to practice* 210 and Allan and Louw "Lawyers' perception of psychologists who do forensic work" (2001) 31(2) *South African Journal of Psychology* 18.

Gutheil states "ethical experts sell time, while unethical experts sell testimony".[401] This is often referred to as the hired gun phenomenon and known by various other descriptions and descriptive names including "saxophones" as the expert witnesses play the musical instrument while the lawyer hums the tune,[402] the commodification of the expert,[403] and the prostitution of the profession.[404] A variant is the "carpetbagger expert" specifically referring to an expert who testifies in medical negligence cases and travels to different towns and cities to act as opposing expert against the local practitioners.[405] According to Judge Valley in *Twine and another v Naidoo*,[406] and also pertinently referred to by Judge Spilg in *Ndlovu v Road Accident Fund*,[407] an entire industry has been created for experts to sell their skills, knowledge and/or experience, especially in personal injury claims. [408]

The hired gun is usually associated with money, but the source of bias can also be the pressure from the retaining attorney or fame. This is reflected in the definition of a hired gun of Diamond who defines it as a person who "knowingly gives false or misleading testimony by intentionally violating the oath, with the underlying motive for doing so usually being money; but there can also be other reasons such as a desire for publicity, to bolster self-esteem, to please legal representatives or to further some personal endeavour".[409] The hired gun changes their testimony knowingly as in the oft-cited American case of *Ladner v Higgens*[410] where a mental health professional, Dr Herbert Unsworth, had been called to act as an expert witness.[411] Dr Unsworth testified that the plaintiff was not suffering from any mental illness and when asked to confirm the conclusion that the plaintiff was a malingerer, Dr Unsworth replied, "I

401 Gutheil as quoted in Gaughwin "Beyond the noise and smoke: Some challenges for mental health professionals entering the forensic arena" (2004) 11 *Psychiatry, Psychology and Law* 48.
402 Genis 2008) *A content analysis of forensic psychological reports written for sentencing proceedings in criminal court cases in South Africa* (dissertation for MA Clinical Psychology, University of Pretoria) 27.
403 The term was used by Jasanoff as referred to by Meintjies-Van der Walt "The presentation of expert evidence at trials in South Africa, Netherlands and England and Wales" (2001) 12 *Stellenbosch Law Review* 295.
404 Kaliski (2012) *South African Journal of Psychiatry* 317; Norko "Commentary: Compassion at the core of forensic ethics" (2005) 33(3) *The Journal of the American Academy of Psychiatry and the Law* 386 and Ogloff (2000) *Law and Human Behavior* 473.
405 Gutheil *et al*. (2005) *The Journal of American Academy of Psychiatry and the Law* 433-434.
406 *Twine and another v Naidoo and another* (2018) 1 All SA 297 (GJ).
407 *Ndlovu v Road Accident Fund* at par. 113.
408 *Twine and another v Naidoo and another* at par. 18.
409 Diamond in Rosner and Weinstock (eds.) (1990) *Ethical practice in psychiatry and the law* 76-77.
410 *Ladner v Higgens* 71 So. 2d 242, 244 (La App 1954).
411 *Ibid*.

wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a posttraumatic condition".[412]

Although expert witnesses are often depicted as hired guns, bias need not always be intentional.[413] The process of forensic identification, where mental health professionals adopt the viewpoint of the attorneys that have retained them, can be unintentional.[414] In the English case of *Lord Abinger v Ashton* the court stated that: [415]

> Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witness, rather consider themselves as the paid agents of the persons who employ them.

Whether intentional or not, bias can threaten the objectivity of the expert witness. As emphasised in the well-known case of *Stock v Stock*: [416]

> An expert in the field of psychology or psychiatry who is asked to testify in a case of this nature, a case in which difficult emotional, intellectual and psychological problems arise within the family, must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him.

Reviewing case law, the criticism levelled most often against mental health professionals is bias.[417] A few selected cases will be discussed starting with the recent case of *S v Rohde*, where the court held that it was clear that the forensic psychiatrist was biased and had simply set about to find confirmatory evidence to support her

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412 Smith (1989) *Behavioral Sciences and the Law* 167.
413 Strasburger *et al*. (1997) *American Journal of Psychiatry* 454.
414 *Ibid*.
415 *Lord Abinger v Ashton* (1873) 17 LR Eq 358 at 374.
416 *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E-F.
417 See for example *Schneider NO and others v AA and another* 2010 (5) SA 203 (WCC); *B v M* 2006 (9) BCLR 1034 (W); *Stock v Stock* 1981 (3) SA 1280 (A); *S v Rohde* (2019) 1 All SA 740 (WCC); *M v G* (2011) JOL 27822 (ECG); *S v Dr Marole* 2003 JDR 0139 (T) (unreported judgment); *Dlwathi v Minister of Safety and Security* 2016 JDR 0391 (GJ); *Cunningham (born Ferreira) v Pretorius* (2010) JOL 25638 (GNP); *Van den Berg v Le Roux* (2003) 3 All SA 599 (NC); *Jackson v Jackson* 2002 (2) SA 303 (SCA); *DG v DG* (2010) JOL 25706 (E); *Van Niekerk v Kruger and others* (20632/14) (2016) ZASCA 55 and *Jonathan v General Accident Insurance Co of South Africa Ltd* 1992 (4) SA 618 (C).
There are a few cases where bias was merely raised by the opposing side as a tactic to discredit the expert witness. See in this regard *Olwagen v Olwagen*; *JM v MM (born R)*; *Rosen v Havenga and another* and *Blumenow v Blumenow* (2008) JOL 21382 (W).

client's version of the events.[418] The court commented that the collateral information collected by the psychiatrist was taken out of context in order to "fit the mould" of what she had set out to establish.[419] The court heavily criticised the psychiatrist and held that the evaluation was not only an attempt to usurp the role and function of the court but "amounted to a modern-day version of an "oath-helper." ... Such expert testimony is to be rejected without exception".[420]

In the well-known case of *Schneider NO and others, v AA and another,* the question before the court was whether it would be in the best interests of the minor children for the first respondent to home-school them.[421] In support of their case, the respondent called Dr K, an educational psychologist, to give an expert opinion. The court dealt with the evidence of Dr K in detail and expressed its concern indicating that the expert was "questionable...there were doubts about her independence, there were doubts about the quality of her evidence, her reluctance to answer candidly".[422] It was clear from an e-mail sent to Dr K and her subsequent testimony that she was a hired gun.[423]

In the unreported judgment of *S v Dr Marole,*[424] the accused called Dr Irma Labuschagne, a psychologist, to testify regarding the mitigating factors for sentencing purposes. The court criticised Dr Labuschagne and held that her report and testimony presented a one-sided picture of the offender portraying him as a "proverbial victim".[425] According to Judge Patel, the bias towards the accused was evident in that she elected to only present evidence which was in his favour.[426]

Even in cases where the mental health professional's performance was inadequate, the court seemed to criticise and reject the evidence-based on bias rather than incompetence. In *DG v DG*[427] the applicant applied for a variation of care and contact order to relocate with her minor children to Dubai. The applicant approached a social

418 *S v Rohde* at 823H-I.
419 *Idem* 824H-I.
420 *Idem* 826A.
421 *Schneider NO and others v AA and another* 2010 (5) SA 203 (WCC).
422 *Idem* 216B.
423 *Idem* 213A.
424 *S v Dr Marole* 2003 JDR 0139 (T) (unreported judgment).
425 *Idem* 8.
426 *Ibid*.
427 *DG v DG* (2010) JOL 25706 (E).

worker and clinical psychologist to investigate the matter and compile a (joint) report with their recommendations.[428] The court commented that report was contradictory and inconsistent as the recommendations were not based on any of the findings made.[429] The court described the report as not being "a model of clarity"[430] and went on to reject the report because of the bias stating that "having been commissioned by the applicant, their loyalty to her cause appears to have influenced their final recommendations".[431]

In *Jackson v Jackson,* the Supreme Court of Appeal judges differed in opinion regarding the expert witnesses. [432] The matter dealt with a father, who was the primary caregiver, applying to emigrate to Australia with his two minor children. Several experts testified, including three clinical psychologists and two social workers, one of whom was a family counsellor appointed by the Family Advocate. The experts were divided on the severity of the emotional damage that the younger child would suffer should she be separated from her mother. In the trial court, Judge Jappie found that the clinical psychologist, Mrs Killian, who was called by the mother, was biased and based her opinion on sympathy towards the mother, rather than objectively assessing the present situation.[433] On appeal, the full court found that although Mrs Killian's opinion was "coloured by the fact that she believed that an injustice had been perpetrated against the defendant…" it was reliable and placed emphasis on her expertise.[434] The full court followed her recommendations, overturning the ruling in the trial court.[435]

The majority judgment in the Supreme Court of Appeal, Scott JA (Hefer ACJ and Brand AJA concurring) held that the finding of the trial judge that Mrs Killian's opinions were biased and based on sympathy was not in any way motivated.[436] Judge of Appeal Scott considered the finding that Mrs Killian was partisan and unreasonably supporting the cause of the mother as far-reaching and could not find anything in the record to

428 *Idem* par. 11.
429 *Idem* par. 16.
430 *Ibid*.
431 *DG v DG* at par. 21.
432 *Jackson v Jackson* 2002 (2) SA 303 (SCA).
433 *Idem* 309J-310A.
434 *Idem* 310B.
435 *Ibid*.
436 *Jackson v Jackson* at 323.

suggest such bias.[437] In contrast, Acting Judge of Appeal Cloete, in a dissenting judgment, agreed with the trial court that Mrs Killian was biased. Cloete AJA criticised the full court for acknowledging the bias of Mrs Killian but emphasising her expertise to rely on her evidence.[438] Cloete AJA held that the impartiality inevitably detracts from the value of the expert's evidence, and the expertise in a field cannot compensate for the bias.[439] Cloete AJA referred to *Stock v Stock* in this regard where the court emphasised the importance of neutrality of an expert witness.[440]

Judge of Appeal Marais, in a dissenting judgment, agreed with the outcome reached by Cloete AJA and pointed out that this case is a clear example of the difficulty with human as opposed to legal problems.[441] Marais JA also considered the validity of the finding of bias of the expert witness, Mrs Killian, and pointed out that it was not bias in the sense of given false evidence but rather being so "emotionally wedded" that the expert's objectivity was impaired.[442] Marais JA indicated that the bias of the expert witness was not spelt out by either of the courts, but upon reviewing the records, it was not difficult to find.[443] In the dissenting judgment, Marais JA quoted passages from the record where Mrs Killian was cross-examined.[444] Upon perusal of the testimony by Mrs Killian, Marais JA found that she was reluctant to make any concession that would place the mother (the respondent) in a bad light, even when faced with a valid reason to do so.[445] Marais JA further held that the "convoluted and almost incoherent" manner in which she justified her stance was an illustration of insufficient objectivity.[446]

Reading the extracts included in Marais JA's judgement, it becomes evident that the expert witness, Mrs Killian, believed that the initial care and contact order was a miscarriage of justice as the respondent had been deceived by the appellant to agree thereto. The validity of the information regarding the deception given to Mrs Killian by the respondent was never questioned. The psycho-legal assessment was done by her

437 *Idem* 323-324.
438 *Idem* 311F-G.
439 *Ibid*.
440 *Stock v Stock* at 1296E-F as quoted in *Jackson v Jackson* at 312A.
441 *Jackson v Jackson* at 324H.
442 *Idem* 327G-H.
443 *Idem* 327H.
444 *Idem* 328A-329C.
445 *Idem* 329B-C.
446 *Idem* 329C.

(Mrs Killian) with the deception in mind, and it is submitted that this impaired her objectivity as found by the dissenting judgments and the trial court.

In *Jackson* Judge of Appeal Scott stated, and rightly so, that the finding of bias can be detrimental to a professional who acted as an expert witness.[447] Courts should be careful when making such a finding and keep in mind that an agreement with the side that calls the expert witness is not in itself an indication that a witness is partisan.[448] Nor is the fact that a mental health professional is being paid by one party indicative of partisanship.[449] There are many cases where an accurate and honest opinion of a witness may support a particular party's case. Unfortunately, it has happened that where conflicting and contradictory opinions are offered by the expert witnesses from opposing sides, is said to be a consequence of the hired gun phenomenon or bias of the mental health professional- the so-called battle of the experts.[450] The battle of the experts creates the impression that there is no "common store of knowledge" upon which expert opinions rest, and that opinions are simply for sale to the highest bidder.[451] Although negatively construed the difference in opinion can often be contributed to complicated facts of a matter that professionals can easily and honestly express a difference of opinion.[452]

The battle of the experts can still cause a predicament for the trier of fact. As Learned Hand articulated the inherent contradiction when he stated, "they will do no better with the so-called testimony of experts than without, except where it is unanimous. If the jury must decide between such they are as badly off as if they had none to help".[453]

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447 *Idem* 324A.

448 Allan and Louw (2001) *South African Journal of Psychology* 18.

449 *Ibid.*

450 Morse "Failed explanations and criminal responsibility: Experts and the unconscious" (1982) 68 *Virginia Law Review* 1057; Gutheil and Appelbaum (2000) 351 and Meintjies-Van Der Walt (2001) 5. According to Gudjonsson and Haward a survey by the British Psychological Society indicated that half of the psychologists found themselves in a battle of experts. See Gudjonsson and Haward (1998) 33.

451 Gutheil and Appelbaum (2000) 351.

452 *Ibid.*

453 Hand "Historical and practical considerations regarding expert testimony" (1901) 15 *Harvard Law Review* 56.

3.7.2.2 Inadequate level of performance in evaluations and testimony

Psycho-legal assessments and the subsequent testimony by the mental health professionals have been criticised on various fronts. Psycho-legal assessments can be extremely challenging as there are a variety of ambiguities in the evaluation itself and the clinical findings need to be translated into legally relevant data in a psycho-legal report.[454] A major factor in the barrier to effective psycho-legal practice lies in the fundamental difference in thinking styles and terminology of mental health professionals and attorneys.[455] In cases where the defence of non-pathological incapacity was raised, the tension between law and psychiatry and/or psychology becomes evident.[456]

For example, in both the controversial cases of *S v Moses*[457] and *S v Nursingh*[458] the accused relied on the defence of non-pathological incapacity and a heavy reliance was placed on the testimony of expert witnesses. In *Moses,* the court rejected the evidence of the psychiatrist, Dr Jedaar, as Judge Hlophe held that it "..flies in the face of South African law".[459] According to Louw, the problem with both the *Moses* and *Nursingh* cases was the fact that "self-control" was never properly defined.[460] The problem, as per Louw, with the concept "self-control", is that it is not a psychological concept, but rather a legal one, and as a result uncertainties exist.[461] Many similar examples can be extracted from cases where the defence of non-pathological incapacity was raised and iterates the general comment by Judge Booysen and others that using too much technical jargon should be avoided.[462]

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454 Gutheil and Appelbaum (2000) 28 and Gudjonsson and Haward (1998) 163.
455 Gunn and Taylor in Gunn and Taylor (eds.) (2014) *Forensic psychiatry: Clinical, legal and ethical issues* 14.
456 See 3.6.1.
457 *S v Moses* 1996 (1) SACR 701 (C).
458 *S v Nursingh* 1995 (2) SACR 331 (D).
459 *S v Moses* 712.
460 Louw in Kaliski (ed.) (2006) *Psycholegal assessment* 52-53.
461 *Ibid*.
462 Grisso "Guidance for improving forensic reports: A review of common errors" (2010) 2 *Open Access Journal of Forensic Psychology* 112 and Bazelon "Veils, values and social responsibility" (1982) 37 *American Psychologist* 116.

Related thereto, and as Grisso submits one of the most frequent problems with psycho-legal reports when opinions are rendered without sufficient explanation.[463] Often these psycho-legal reports are very superficial and done in a short space of time.[464] In *Katz v Katz*[465] the psychologist's "report", which appeared to be more of a letter than a report, addressed a letter sent by the applicant's attorneys. The report dealt with recommendations made regarding the respondent's contact with the minor child.[466] The court stated that the report was "very superficial"[467] and the ensuing recommendations were not motivated or justified in any way.[468] From the facts, it appears that the applicant had requested the psychologist, in all probability on short notice, to reply to their request. The psychologist, without consulting or seeing the parties, wrote the report.[469] The court suspects that the psychologist based her recommendations on a previous report and consultation, which occurred four months earlier.[470] The previous report was, however, prepared to establish whether the minor child had been sexually molested.[471] The psychologist could, therefore, not base her recommendations on the previous report and as pointed out statements made in the earlier report stands in contrast with the recommendations made at the request of the attorneys.[472] The court without hesitation rejected the recommendations made by the psychologist and stated that "[t]hey are so bad that no reasonable person would have relied on them".[473]

Sufficient explanation of an opinion also includes explaining the reasoning for a diagnosis.[474] The American judge, Judge David Bazelon, reprimanded psychiatrists for "[continuing] adamantly to cling to conclusory labels without explaining the origin, development, or manifestations of a disease".[475] Bazelon wrote, paraphrasing Lewis

463 Grisso (2010) *Open Access Journal of Forensic Psychology* 110.
464 *Prins v Claasen* at 7; *Rosen v Havenga and another* at par. 17 and *Katz v Katz* at par. 23.
465 *Katz v Katz* (2009) JOL 23557 (GSJ).
466 *Katz v Katz* at par. 23.
467 *Ibid.*
468 *Ibid.*
469 *Ibid.*
470 *Ibid.*
471 *Ibid.*
472 *Ibid.*
473 *Ibid.*
474 In *S v Seroba* at par. 85 the court criticised one of the psychiatrists for diagnosing the accused with schizophrenia but not being able to explain in detail how she reached the conclusion. *S v Dr Marole* at 7 the psychologist was criticised for making "bald statement" without providing any source reference.
475 Katz "'The fallacy of the impartial expert' revisited" (1992) 20 *Bulletin for the American Academy of Psychiatry and the Law* 149 and Bazelon (1982) *American Psychologist* 117.

Caroll, that the mental health professionals use "labels as shrouds rather than guides".[476] Diagnostic construct should be used with caution in a legal setting as attorneys can misuse a diagnosis to try and prove that the diagnosis substantiates an allegation by a complainant that a traumatic event took place.[477]

Psycho-legal reports have also been criticised as being incomplete or vague[478] and consequently not adequately addressing the legal question.[479] In *Fish v Fish,*[480] the court expressed its concern with regards to the report filed by the mental health professional assisting the Family Advocate. Firstly, it appeared that certain considerations regarding the manipulative behaviour of the applicant, which was addressed by other experts in their reports, were not dealt with in his report. Secondly, from the testimony before court, it was established that the mental health professional held an extensive interview with the maternal grandfather of the minor child. Nothing was, however, mentioned or included in the report regarding the interview.[481] The court drew a negative inference from this, indicating that it caused concern regarding the accuracy and reliability of the conclusions in the report.[482] In contrast, the independent psychologist in the matter was praised for the thorough manner in which the relevant factors were examined in order to make an appropriate recommendation.[483]

In *Ndlovu v Road Accident Fund*[484] the court had to determine whether the plaintiff sustained an alleged head injury which resulted in neuropsychological impairment rendering the plaintiff incapable of operating his business.[485] Various expert reports were submitted into evidence, including the reports of two industrial psychologists and two clinical psychologists. Judge Spilg indicated his "profound disappointment in the quality of some of the experts' reports".[486] In this case, it is uncertain whether the experts acted unethically in not being objective or whether this is a case of an

476 Bazelon (1982) *American Psychologist* 116.
477 Allan "Psychiatric diagnosis in legal settings" (2005) 11(2) *South African Journal of Psychiatry* 54.
478 *Fish v Fish* at par. 21 and *S v Shivute* at 663G.
479 *S v Shivute* at 663G and *Rosen v Havenga and another* at par. 17.
480 *Fish v Fish* (2019) JOL 40926 (FB).
481 *Idem* 21.
482 *Ibid*.
483 *Fish v Fish* at par. 22.
484 *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ).
485 *Idem* par.4.
486 *Idem* par. 122.

inadequate level of performance. The court indicated two main problems with the reports. The first problem is that psychologists' reports tend to be overly lengthy.[487] This is not necessarily due to explanations of tests that were conducted that could result in lengthening the report, but rather large "tracts of text are repeated in the same document".[488] The lengthy reports only increased the time spent to read it and did not add to the value.

The second problem is that experts, including mental health professionals, do not identify the source of the primary facts that they rely on.[489] The court explains that if an expert's report does not distinguish between primary extrinsic data and a patient's comments it is difficult to maintain the requisite distinction between opinion evidence and an untested version which amounts to an assumption.[490] In personal injury claims, there is a need to identify the originating source data and identifying or raising concerns regarding their effect on quantum because "in practice there can be a significant difference in the consequences where a court does the best it can with available evidence, and cases where the court finds that the plaintiff has not been frank with it or with the experts".[491] In the first-mentioned scenario, the court will be able to utilise a contingency if the say-so of the plaintiff was presented as a fact the court can reject the evidence if it is subsequently shown to be incorrect and precludes the court from adopting a contingency.[492] If the report does not distinguish between opinion evidence and whether it can be supported by primary source documents, such as medical records, and plaintiff's untested assertations the report will "impermissibly encroach on the judicial function of determining facts".[493]

Judges have also voiced their discontent with mental health professionals' grossly exaggerated statements. In *Central Authority v Reynders (born Jones) (LS intervening)*[494] Judge Fabricius made the remark that the comments by the educational psychologist that "LS was exposed to some of the most traumatising

487 *Idem* par. 113.
488 *Ndlovu v Road Accident Fund* at par.113.
489 *Ibid*.
490 *Ndlovu v Road Accident Fund* at par. 115.
491 *Idem* par. 117.
492 *Idem* par. 118.
493 *Idem* par. 121.
494 *Central Authority v Reynders (born Jones) (LS intervening)* (2010) JOL 26494 (GNP).

events known to man" was a gross exaggeration and suggested that "..perhaps respondent's counsel would like to present him with one or two history books".[495] The suggestion perhaps uncalled for but as Judge Fabricius indicated such gross exaggeration if not contextualised could guide a court into the wrong direction.[496]

Mental health professionals do not always acknowledge the limits of their expertise or conclusions or the division of opinions.[497] Appelbaum submits that it is the responsibility of the expert witnesses to bring any limitation under the fact finder's attention.[498] Doing so is not only in line with the objective of an expert witness but will also protect the expert during cross-examination. Usually, during cross-examination, the possible limitation of their opinions, opposing opinions and new facts that transpired during the trial are put to the mental health professional. Mental health professionals must be able to make concessions if need be or explain why their opinion remains unchanged. The court in *Potgieter v Potgieter*[499] held that the clinical psychologist's attitude and unwillingness to make any concessions indicated her lack of objectivity.[500] In this case, the trial court granted the mother primary care over the minor children, subject to reasonable contact by the father, Dr Potgieter. Various experts were called to testify during the trial, all of whom agreed that primary care over the children should be awarded to Dr Potgieter. Despite same, the appeal against the decision was dismissed by the Supreme Court of Appeal.

Notwithstanding the agreement between the expert witnesses, Judge Chetty in the trial court was unimpressed by the various experts.[501] On appeal in the full court, Judge Erasmus was similarly critical and unimpressed by the experts. Judge Erasmus (the judges in the Supreme Court of Appeal agreeing) that the clinical psychologist's unwillingness to make concessions and attitude was not one to be expected of an expert whose task is to assist the court in an objective manner.[502] Judge Chetty in the trial court considered the main problem with the expert witnesses, not their specialised

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495 *Idem* par. 29.
496 *Central Authority v Reynders (born Jones) (LS intervening)* at par. 29.
497 Katz (1992) *Bulletin for the American Academy of Psychiatry and the Law* 150.
498 *Ibid*.
499 *Potgieter v Potgieter* (2007) JOL 19597 (SCA).
500 *Idem* par. 11.
501 *Idem* par. 10.
502 *Idem* par. 11.

knowledge, training or experience, but "[their] inability…to draw a line between matters of fact and matters of value thereby distorting the judicial process by acting like judges".[503] For this reason, he found that the evidence had no real probative value.[504] The Supreme Court of Appeal found that the dismissal of the expert evidence as having little probative value was not entirely justified.[505] The Supreme Court of Appeal criticised the expert witnesses because they did not base their opinions on the facts but the acceptance of allegations by Dr Potgieter and Ms Zama, the domestic worker. The experts were also "by large not prepared to reconsider their opinions when these facts were put to them during the course of their testimony".[506]

Another problem illustrated by the *Potgieter*-case was the willingness of an expert to be influenced by the recommendations of another expert to an appreciable degree.[507] The Family Advocate's recommendations were also based on the recommendations by the expert resulting in the court not gaining assistance from the reports.[508] In a similar vein in *S v Seroba* the court also criticised one of the psychiatrists for compiling a joint minute based on the report of another psychiatrist without having consulted with the accused at that stage and merely following the recommendations of the other psychiatrist.[509] Whether the influence can be considered as unethical behaviour (bias) or an inadequate level of performance will depend on the facts.

Several scholars have indicated that a major problem with psycho-legal work is the ignorance or lack of knowledge of professional literature and of existing validated psychological tests and instruments.[510] Psychological tests and instruments are designed for specific purposes, and as indicated by Dr Louise Olivier in *S v Zuma*,[511] a whole battery of tests is usually undertaken during a psycho-legal assessment. The tests can only be administered by practitioners registered to use the tests, which include psychologists and psychometrists and any other health practitioners that completed the necessary courses. In using the tests, the mental health professional

503 *Idem* par. 17.
504 *Potgieter v Potgieter* at par. 17.
505 *Idem* par. 19.
506 *Idem* par. 21.
507 *Idem* par. 12.
508 *Idem* par. 12.
509 *S v Seroba* at 441B-C.
510 Gutheil and Simon (2004) *Psychiatric Annals* 261.
511 *S v Zuma* 2006 (2) SACR 191 (W) at 193.

must be able to explain why the specific test was used or not used. Grisso argues that using psychological tests while there is little or no empirical research to back up the claim degrades the profession.[512] In South Africa, the Professional Board of Psychology has issued a stern warning against the use of tests that are not registered and against the training of unregistered persons.[513] The warning comes after several complaints were received regarding the unethical practices regarding the tests.

In *S v Zuma* the state called Dr Friedman, a clinical psychologist, to testify regarding complainant's behaviour during and after she was allegedly raped.[514] Dr Friedman relied on a clinical interview with the complainant and police statements to formulate her opinion, but no psychometric or psychological tests were conducted.[515] The court criticised Dr Friedman for not conducting a proper psycho-legal assessment because she did conduct any psychological tests.[516] The criticism is unjustified in light of the HPCSA's guidelines and ethical code that does not require that psychological tests be conducted during a psycho-legal assessment.[517]

3.8 Looking beyond the mental health expert

The resulting low standard and lack of integrity of psycho-legal work from the problems expounded above is easily placed squarely at the door of the mental health professional. The mental health professional is seen as incompetent, unethical, or simply biased, whilst many legal representatives try to take advantage of the situation. The criticism levelled against mental health professionals is, however, not always warranted. Many outside factors, including resources, the adversarial system, and legal culture could play a role. Although the purpose of this study is to formulate an effective regulatory framework to address the incompetence and unethical behaviour of mental health experts, it would not be placed in its proper context without acknowledging that there are other factors at play. Further research will need to be

512 Grisso "The differences between forensic psychiatry and forensic psychology" (1993) 21 *Bulletin of the American Academy of Psychiatry and the Law* 136.
513 Makgoke "Media statement by the Health Professions Council of South Africa (HPCSA): Board is concerned about administration of psychological tests" (2004) 7 South African Psychiatry Review 39.
514 *S v Zuma* at 193.
515 *Ibid.*
516 *S v Zuma* at 222.
517 Jackson "'Have you heard the one about the lawyer, the politician and the psychologist?': Some other issues raised by the *State v Jacob Zuma* rape trial" (2006) 33 *Psychology in Society* 31.

conducted to determine the extent of the influence, but this is beyond the scope of this study.

Cameron states that when judges or triers of fact interpret and apply the law, they are influenced not only by a set of values, preconceptions, or beliefs held personally but also by the legal culture in which the judge finds himself.[518] Current legal thinking has been shaped by the way mental health experts were treated throughout history. Ignoring this, as Van der Walt states, will be assuming that history had no lasting or intrinsic effect on the law.[519]

Throughout the historical development of the mental health expert discussed in chapter 2, the courts were hesitant to allow psychologists and psychiatrists to give expert testimony for various reasons, including the lack of scientific basis of the field or the fear that the expert would usurp the role and function of the court. For example, Judge Van Den Heever in *R v Von Zell*[520] who described psychiatry as "a speculative science with rather elastic notation and terminology, which is usually wise after the event".[521] Attitudes towards mental health professionals are changing, but the residual attitudes do sometimes seep through and can influence the weight given to the expert evidence.

Meintjies-Van der Walt, correctly so, submits that many of the criticisms levelled against the expert witness is the result of the accusatorial system.[522] One of the key features of the accusatorial system is that the parties are responsible for collecting and presenting evidence for their case.[523] This results in undisputed or neutral data often being neglected because the focus is on eliciting favourable data.[524] Van der Merwe describes the manner in which the parties are allowed to present evidence as "selfish and partial".[525] Unfortunately, mental health professionals should be aware

518 Cameron "Judicial accountability in South Africa" (1990) 6 *South African Journal on Human Rights* 258.
519 Van Der Walt "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina* 19.
520 *R v Von Zell* 1953 (3) SA 303 (A) at 311A-B.
521 Haysom *et al.* "The mad Mr Rochester revisited: The involuntary confinement of the mentally ill in South Africa" (1990) 6 *South African Journal on Human Rights* 344.
522 Meintjies-Van der Walt (2002) *Child Abuse Research in South Africa* 25.
523 See 3.3. above.
524 Meintjies-Van der Walt (2002) *Child Abuse Research in South Africa* 25.
525 Schwikkard and Van der Merwe (2016) 12.

that legal representatives in trying to elicit favourable data do not always forward all relevant material to avoid alerting mental health professionals to the content of possible negative information.[526] Easton argues that attorneys "craft their expert's opinions" by controlling the information the expert receives.[527]

Meintjies-Van Der Walt and various other scholars also stress the fact that the accusatorial system can be a breeding ground for bias as the expert witnesses are paid and retained by one side because they are advocates of a particular view.[528] A natural bias can occur. As Mossman describes it, the mental health professional can be "seduced and assaulted by the power of the adversarial system".[529]

The last factor that needs mentioning is the lack of resources and its implications. Mental health professional, particularly those working in the state sector, are faced with a lack of resources.[530] There is, amongst others, a limited number of facilities and a severe shortage of mental health professionals that are able to evaluate accused persons for purposes of the Criminal Procedure Act 51 of 1977.[531] The appalling state of some of the facilities have been well-documented, for example in *S v Volkman*[532] the accused refused to be admitted for observation at Valkenberg Psychiatric Hospital on the terms as requested by the state because the conditions were inhumane. Kaliski who gave evidence on behalf of the State, testified and confirmed that the conditions in the ward are "appalling and abject".[533] This can have an impact on the standard of forensic observations.

To address the lack of resources, the courts have resorted to the use of single psychiatrist reports and the observation of an accused as a day visitor. In 2010, a National Department of Health report found that "it was legally compatible to conduct

526 Gudjonsson and Haward (1998) 187.
527 Caudill "Dirty experts: Ethical challenges concerning, and a comparative perspective on, the use of consulting experts" (2018) 8 *St. Mary's Journal on Legal Malpractice and Ethics* 352.
528 Meintjies-Van der Walt (2002) *Child Abuse Research in South Africa* 25; Thomson "Creating ethical guidelines for forensic psychology" (2013) 48 *Australian Psychologist* 30 and Gudjonsson and Haward (1998) 183.
529 Mossman (1999) *Journal of American Academy of Psychiatry and Law* 415.
530 Houidi *et al*. "Forensic psychiatric assessment process and outcome in state patients in KwaZulu-Natal, South Africa" (2018) 24 *South African Journal of Psychiatry* 1.
531 *Ibid*.
532 *S v Volkman* 2005 (2) SACR 402 (C).
533 *S v Volkman* at par.18.

single psychiatrist forensic observations in prisons or on an out-patient basis in health establishments".[534] The report concluded the evaluees of psycho-legal assessments need not be admitted to a psychiatric hospital for 30 days which includes both days and nights.[535] Although the approaches are not new, it is not generally favoured.[536] The quality and reliability of day visitor assessments depend on several factors and lack the benefit of longitudinal nursing observations.[537] The approach has been met with criticism by many mental health professionals, one of the main concerns being that the integrity of the reports will be compromised.[538]

3.9 Conclusion

The history of the South African legal system confirms the strong ties that our system has with the English legal system, in particular with procedural law. Consequently, the South African legal system follows an accusatorial or adversarial system (Anglo-American system) where the emphasis is placed on the dual between the opponents. The parties in an adversarial system are responsible for the collection and presentation of their evidence for the "dual," including expert evidence. In studying the differences between the lay witness and the expert witness, the distinguishing features lie in the opinion of the expert being of appreciable help to the court by virtue of their specialised knowledge, skill, or training.

The mental health expert has entered the legal arena in a variety of roles which needs to be distinguished. For purposes of the study, the focus is on the forensic expert- the mental health professional called to conduct a psycho-legal assessment with the purpose of giving an expert opinion. Studying case law, a particularly important source of law in an accusatorial system, and legislation to determine the areas or matters in which mental health professionals have conducted psycho-legal work made quite an impressive list. Mental health professionals have been involved in the matters dealing with criminal capacity, the capacity to stand trial, the dangerousness of an offender,

534 Sukeri *et al*. "Forensic mental health services: Current service provision and planning for a prison mental health service in the Eastern Cape" (2016) 1 *South African Journal of Psychiatry* 790.
535 *Ibid*.
536 Pillay (2014) *South African Journal of Psychology* 378.
537 Sukeri *et al*. (2016) *South African Journal of Psychiatry* 790.
538 *Ibid*.

the sentencing of offender, mental health care and the appointment of curators, divorce proceedings on the grounds of mental illness, care and contact evaluations, disability claims, testamentary capacity, personal injury claims, alteration of sex descriptions and sex status and lastly the termination of pregnancies and sterilisation.

The mental health professionals were, however, not always praised for their stellar work. The investigation into the problems experienced with mental health experts yielded interesting results as many of the challenges appeared to be a recurring feature. Within the profession of psychology, the complaints regarding psycho-legal work remain at the forefront. The study of Scherrer, Louw and Möller in the period of 1990 until 1999 indicated that the most complaints related to psycho-legal work, [539] fast forward to 2018 and nothing has changed as the Professional Board of Psychology confirms that the most complaints concern psycho-legal work.[540]

From 1990 until 2019, a period of almost 30 years, it appears that the most problematic area of psycho-legal work is care and contact evaluations. The study by Scherrer, Louw and Möller, the study by Nortje and Hoffman, the investigation done into the disciplinary proceedings between 2014 and 2019 as well as case law all indicate that care and contact evaluations are responsible for the most problems. This is echoed by the Professional Board of Psychology's Committee for Preliminary Inquiry that identified psycho-legal work done in divorce and care and contact evaluations as a high-risk area.[541]

The problems raised in the disciplinary proceedings from 2014 until 2019 and the problems revealed in the case law coincided. Both investigations revealed that bias remains the biggest thorn in the side of psycho-legal work. Both investigations further also revealed the following problems: psycho-legal reports that were vague, incomplete or contained unsubstantiated allegations; psycho-legal reports that were compiled without interviewing all of the parties involved; psycho-legal reports and or

539 Scherrer *et al*. (2002) *South African Journal of Psychology* 54.
540 Health Professions Council of South Africa "Psychology News: Newsletter for the Professional Board for Psychology Issue 01/06/2018" (2018) at 18-19 available online.
541 *Ibid*.

testimony that failed to indicate the limitations or potential bias in the findings; and mental health professionals who acted as both treating clinician and forensic expert.

The problems result in irrelevant, unreliable, and misleading expert evidence that damages both the profession and impedes the rendering of justice. One could argue that the affair between law and mental health professions should end, but this would be a great loss- the mental health professions can be of invaluable of assistance to the legal system. A mutually benefiting relationship between the law and mental health professions is the ideal as Rix states to ensure this will "depend on the two professions learning each other's language, paying attention to their respective codes of ethics, [and] discovering their histories and customs".[542]

[542] Rix (2006) *Medico-Legal Journal* 158.

CHAPTER 4

REGULATION OF PSYCHO-LEGAL ASSESSMENTS IN SOUTH AFRICA

4.1 Introduction

In *Twine and another v Naidoo and another* Judge Valley remarked that most of the challenges faced by the courts regarding expert witnesses are owing to the fundamental principles about the role, relevance and value of an expert's testimony often being ignored by the expert witnesses and the parties calling them.[1] As Judge Valley further reminds us, the basic principles of expert evidence have developed over time and also raised challenges of its own.[2] The first aim of this chapter is to navigate the landscape of expert evidence, including psychological and psychiatric expert evidence, in South Africa not only to understand the role and relevance of expert testimony but to identify the shortcomings in regulating expert evidence.

The first part of the chapter, the examination of the regulation of expert evidence within the legal system, will be structured akin to a typical trial process. The admissibility rules of evidence will be examined focussing on the field of expertise rule, common knowledge rule, basis rule and ultimate issue rule. The chapter will continue by evaluating the process of disclosure in criminal and civil proceedings and how the process influences the regulation of expert evidence. The way in which expert evidence is presented at trial will be examined, and in particular, the use of cross-examination as a safeguard against unreliable evidence will be evaluated. The chapter will study the factors that the courts take into account when evaluating expert evidence and specifically consider factors that negatively influence the weight attached to psychological or psychiatric evidence. The use of court assessors and court-appointed experts as possible solutions to the problem of hired guns will be investigated.

The last aspect that will be examined within the regulation of the legal system is the immunity afforded to expert witness against civil proceedings. The chapter will examine the reasons for immunity and in what instances immunity is granted to expert

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1 *Twine and another v Naidoo and another* (2018) 1 All SA 297 (GJ) at par. 18.
2 *Ibid*.

witnesses. Part of the examination will include a closer look into cost orders and whether a court has the discretion to award a cost order against a negligent expert witness.

Meintjies-Van der Walt draws a crucial conclusion in her study on expert evidence that the selection, admission and evaluation of expert evidence cannot occur in a vacuum but occurs with the cognisance of the scientific, methodological and professional standards relevant to the particular discipline.[3] Expert witnesses, therefore "owes duties not only to the particular case in which they have been called to give evidence, but also to their respective disciplines or professions".[4] The regulation within the professional organisations is, therefore, crucial to the study. The second aim of this chapter is to examine how statutory and voluntary organisations in South Africa are regulating the professions of psychology and psychiatry. In South Africa, both professions are regulated by the same statutory body, the Health Professions Council of South Africa (HPCSA). The chapter will examine the structure of the HPCSA and the approach that the Council takes in regulating the health professions.

Within the structure of the HPCSA, the chapter will focus on the Professional Board for Psychology and the Medical, Dental and Medical Science Professional Board. An in-depth analysis of the guiding principles and ethical standards of the HPCSA and the relevant professional boards will be done. The chapter intends to illustrate the shortcomings of the HPCSA's ethical codes in relation to psycho-legal work in South Africa. Critical to the regulation is the disciplinary proceedings of the HPCSA. The disciplinary process will be described, and the penalties imposed by the HPCSA over the years will be scrutinised by reviewing cases of the HPCSA.

The professions of psychology and psychiatry are not only guided by the HPCSA but the voluntary organisations, South African Society of Psychiatrists and the Psychological Society of South Africa, also play pivotal roles in the professions. The chapter will take a closer look at the structures of the organisations and the guidance provided by them for members conducting psycho-legal work. In addition, the chapter

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3 Meintjies-Van Der Walt (2001) *Expert evidence in the criminal justice process: A comparative perspective* 72.

4 *Ibid.*

will examine the role of the independent organisation, the South African Medico-Legal Association, and their proposal that an independent multi-disciplinary medico-legal regulatory authority needs to be established. The chapter will conclude by summarising the main shortcomings within the legal system and professional organisations that need to be addressed to ensure that a proper regulatory framework for psycho-legal assessments is in place.

4.2 Regulation within the legal system

4.2.1 Evidentiary rules for expert evidence

The rules of evidence are as Justice Holmes noted a "concession to the shortness of life".[5] Rules of evidence promote court efficiency to prevent burdening crowded court dockets with irrelevant and unnecessary evidence.[6] In an accusatorial system, the strict system of evidence applies, and admissibility of evidence is a matter of law and the weight a matter of fact.[7] The characteristic of strict inadmissibility in our law of evidence is, according to Schmidt and Rademeyer, the result of the system of precedent together with the accusatorial system.[8]

The rule determines that irrelevant evidence is inadmissible.[9] The relevance requirement is confirmed in section 2 of the Civil Proceedings Evidence Act 25 of 1965 and section 210 of the Criminal Procedure Act 51 of 1977. Many attempts have been made to try and define relevance. Van der Merwe stresses that the determination of relevance is not an abstract thought but is a matter of practicality.[10] In the case of *R v Matthews and others,*[11] Judge of Appeal Schreiner emphasises the context and practicality of the matter and states that: [12]

5 Holmes as quoted in Smith "Mental health expert witnesses: Of science and crystal balls" (1989) 7 *Behavioral Sciences and the Law* 163.
6 Smith (1989) *Behavioral Sciences and the Law* 163.
7 Schwikkard and Van der Merwe (2016) *Principles of evidence* 14.
8 Schmidt and Rademeyer (2003) *Law of evidence, Issue 16* 13-3.
9 Schwikkard and Van der Merwe (2016) 49.
10 *Idem* 50.
11 *R v Matthews and others* 1960 (1) SA 752 (A).
12 *Idem* 758A-B.

> Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the resultant being what is legally relevant and therefore admissible.

In general, an opinion is considered inadmissible because it is irrelevant.[13] An exception to the rule is the admission of expert evidence but again only if the expert evidence is relevant.[14] Relevance, however, is not the only test for admissibility.[15] For expert evidence to be admitted there are three requirements that have to be met namely, the competence of the witness, grounds for the opinion and the requirement that the court must not defer to the opinion of the witness.[16] The requirements have been developed into evidentiary rules for the admission of expert evidence known as the field of expertise rule, the common knowledge rule, the ultimate issue rule and the basis rule. Each of the rules is discussed below.

4.2.1.1 Field of expertise rule and common knowledge rule

The requirement of relevance contains two evidentiary rules, namely the field of expertise rule and the common knowledge rule.[17] In South Africa, the assessment of the competence of a witness is not based on whether a witness possesses the highest qualifications.[18] The court must be persuaded that based on the specialised knowledge, skill or training the witness is competent to testify as an expert on the subject matter concerned.[19] The fact that a witness is trained or possesses qualifications does not automatically render them competent. In *Menday v Protea Assurance Co (Pty) Ltd* Judge Addleson stated that: [20]

> However, eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise - of being overawed by a recital of

13 Schmidt and Rademeyer (2003) 17-3.
14 *Ibid*.
15 Schwikkard and Van der Merwe (2016) 49.
16 Schmidt and Rademeyer (2003) 17-12 to 17-16.
17 Meintjies-Van Der Walt (2001) 149.
18 Schmidt and Rademeyer (2003) 17-12.
19 Schmidt and Rademeyer (2003) 17-12. See *Menday v Protea Assurance* 1976 (1) SA 565 (E) at 569B.
20 *Menday v Proteas Assurance* 1976 (1) SA 565 (E) at 569D-F.

> degrees and diplomas - are obvious; the Court has then no way of being satisfied that it is not being blinded by pure 'theory' untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field.

It is for the court to decide whether the witness has the necessary qualifications.[21] When mental health professionals are called as expert witnesses, formal qualifications are necessary, but a mere qualification as a psychiatrist or psychologist is not enough. The courts also consider the experience of mental health professionals, in *S v Van As*[22] Judge Kirk-Cohen indicated that a court would more readily rely on an expert opinion based on practical experience than an opinion based on textbook information.[23]

The type of qualification can, however, be relevant. For example, in *S v Shivute* the court held that the expert witness, a clinical psychologist, was not qualified to give evidence on whether the accused suffered from a pathological illness as the Criminal Procedure Act[24] prescribes that a qualified panel of psychiatrists must evaluate the accused. [25] The scope of the different categories of psychologists also influences the area of expertise.[26] A registered counselling psychologist, for example, is not allowed to diagnose a patient or evaluee. Noticeable from evaluating case law is that psychiatrists and clinical psychologists are preferred and most often conduct psycho-legal assessments. In matters involving children, educational psychologists and counselling psychologists have also acted as expert witnesses.

In 4.3.2.1 below the scope of the profession and the different categories of psychologists will be discussed in more detail. In South Africa, the psychologists cannot register as forensic psychologists[27] , but reference has been made to forensic

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21 *Mahomed v Shaik* 1978 (4) SA 523 (N) at 528A. See in general Zeffertt and Paizes (2010) *Essential evidence* 105.
22 *S v Van As* 1991 (2) SACR 74 (W).
23 *Idem* 86H.
24 Criminal Procedure Act 51 of 1977.
25 *S v Shivute* 1991 (1) SACR 656 (NM).
26 See 4.3.2.1.
27 See 4.3.2.1.

psychology in court cases. In *S v Zuma*[28] the court specifically referred to the difference between a clinical psychologist and a forensic psychologist when reviewing the evidence of the experts. The State in the *Zuma*-case called Dr Friedman, a clinical psychologist with a doctorate in psychology who is described as a trauma expert.[29] The defence also called an expert witness, Dr Olivier, a clinical and counselling psychologist.[30] The court relied heavily on the testimony of Dr Olivier and agreed with her conclusions. Dr Olivier was critical of the evidence by Dr Friedman and stated (as paraphrased by the court) that, "Dr Friedman is a trauma specialist. Dr Olivier did not say that that means that her evidence is of no value to the court. What Dr Olivier did say was that the work of a trauma specialist is not that of a forensic psychologist. The evaluation by Dr Friedman as a trauma expert is not acceptable as a full forensic evaluation".[31] In this case, the lack of training in or experience with psycho-legal work did not render the evidence inadmissible but played a role in the weight assigned. In reviewing case law, it appears that experience or training in psycho-legal work is an advantage but does not influence the admissibility.

To be admissible, the field of expertise must be a *recognised* field of expertise.[32] With the vast growth and development of scientific and technical knowledge, the courts are also confronted with an enquiry into the admissibility of novel theories, techniques, and novel forms of scientific expertise. Justice Van Ordsel, in the well-known case of *Frye,* referred to the area between accepted fields and experimental as the twilight zone.[33] To address the issue of how the legal system should deal with novel scientific techniques, the courts in the United States of America use the admissibility tests formulated in *Frye v. United States*[34] or *Daubert v. Merrell Dow Pharmaceuticals Inc*.[35] In South Africa, no unambiguous test has been defined to determine whether or not the field of expertise is indeed recognised. Kaliski opines that because no such test exists courts too often allow any testimony from those who lack the requisite

28 *S v Zuma* 2006 JDR 0343 (W).
29 *S v Zuma* at 63. See also the discussion of the case in 3.7.2.2.
30 *S v Zuma* at 135.
31 *S v Zuma* at 138.
32 *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 772.
33 *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923) at 1014.
34 *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923).
35 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

expertise.[36] The existing practice in South African courts is to allow the testimony of the expert witness and then determine the value to be attached to the evidence.[37]

In *Frye v United States*, which will be discussed in more detail in chapter 6, the court held that the criterion for admissibility was whether the basis of the theory or technique had gained "general acceptance" within the relevant field.[38] The *Frye* standard was subsequently substituted in federal courts and most state courts with the *Daubert* test. In the majority judgment of *Daubert v. Merrell Dow Pharmaceuticals Inc.*,[39] the court held that further to general acceptance certain factors needs to be taken into account.[40] These factors include whether the construct can be, and has been, tested; second, whether it has been subjected to peer review and publication; and finally, the known or potential rate of error.[41] Swanepoel opines that in general, the South African courts appear to apply the *Frye* test of general acceptance.[42] This evident in many cases such as *S v Van As* were emphasis was placed, and preference is given to evidence that was based on recognised and accepted principles in the expert's field of expertise constituting the general body of knowledge in that field.[43]

The *Daubert*-test has been referred to in few cases, but the factors have not been incorporated into South African law. In the *Twine* case, the court extensively dealt with the principles regarding expert witnesses that have been established over the years[44] and held that in terms of *R v Jacobs* the expert's evidence must be capable of being tested and must be verifiable.[45] The court in *Twine* further indicated that this principle was expanded on in the *Daubert* case but did not directly apply the *Daubert* factors. In *S v Rohde*, discussed in 3.7.3, the court in referring to principles applicable to the admissibility of expert opinion evidence also referred to the case of *Daubert*.[46] The

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36 Kaliski "The prostitution of psychiatry: Some are shameless, others are just easy" (2012) 15 *South African Journal of Psychiatry* 318.
37 Allan and Louw "Lawyers' perception of psychologists who do forensic work" (2001) 31(2) *South African Journal of Psychology* 13 and Meintjies-Van Der Walt (2001) 157.
38 *Frye v. United States*, 293 F.1013 (D.C. Cir. 1023). See 6.4.1.1.
39 *Daubert v. Merrell Dow Pharmaceuticals* Inc., 509 U.S. 579 (1993).
40 *Daubert v. Merrell Dow Pharmaceuticals* Inc. at 594.
41 *Ibid.*
42 Swanepoel "Law, psychiatry and psychology: A selection of medico-legal and clinical issues" (2010) 73 *Tydskrif van Hedendaagse Romeins-Hollandse Reg* 195.
43 *S v Van As* at 106A.
44 *Twine and another v Naidoo and another* at par.18(a)-(u).
45 *Ibid.*
46 *S v Rohde* (2019) 1 All SA 740 (WCC) at 804d-e.

court listed the *Daubert* factors used to determine the reliability of expert evidence and stressed that the topic upon which the expert opinion is based must have been subjected to peer review and accepted within the society from which the expert hails.[47] Judge Salie-Hlope in determining whether the psycho-legal report by the forensic psychiatrist should be admitted applied some of the *Daubert* factors. The court examined whether psychological autopsies are accepted within the discipline, whether the procedures involved in conducting the evaluation has been tested and considered the peer review and publications on the topic.[48] The psycho-legal report was found to be inadmissible, and the court remarked that psychological autopsies were still "searching for its legitimacy and place as an evidentiary tool in the investigation of a crime, let alone a criminal trial".[49]

Not only should experts be properly designated experts, but the matter that is testified about should not fall within the area of common knowledge.[50] The leading case on the common knowledge rule is the English case of *R v Turner*[51] which was incorporated into South African law through the case of *S v Nel*.[52] In *R v Turner* the accused was convicted of murder and sentenced to life imprisonment. The accused appealed on the ground that the trial court refused to admit the evidence of the psychiatrist who evaluated him. The court in *R v Turner* held that:[53]

> An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.

47 *Ibid*.
48 *S v Rohde* at 822e-823e.
49 *Idem* 822d-e.
50 Meintjies-Van Der Walt (2001) 157.
51 *R v Turner* (1975) 1 All ER 70.
52 *S v Nel* 1990 (2) SACR 136 (C).
53 *R v Turner* at 74.

The court specifically emphasised the fact that jurors do not need a psychiatrist to explain how people, who do not suffer from a mental illness, react to the normal strains of life.[54] The court concluded that "psychiatry has not yet become a satisfactory substitute for the common sense of juries or magistrates on matters within their experience of life".[55] Evidence relating to human behaviour has the potential to present difficulties because it can be seen as part of common knowledge.[56] Part of the initial difficulties for mental health professionals to be able to enter the arena of the court was the fact that their specialised knowledge of psychiatry and psychology was often equated with mere common knowledge.[57]

In the *Turner*-case the court indicated that the judgment should not discourage the calling of psychiatric evidence, but it certainly influenced the approach of many judges in England where they are ambivalent towards hearing evidence on mental conditions.[58] The *Turner*-case led to a practice in England where mental health experts mostly testify in cases where there is a degree of abnormality.[59] Although the *Turner*-case is incorporated in South African law, the application of the *Turner* rule differs. South African courts do not strictly adhere to a distinction between normal and abnormal or whether the evidence falls within the common knowledge.[60] The courts, as explained above,[61] see the true criterion for admission of expert evidence as to whether it would be of appreciable help.[62] In both *Twine*[63] and *Rohde,*[64] the judges dealt with the principles applicable to the admissibility of expert evidence and referred to *R v Turne*r confirming the principle enunciated from the case that expert testimony is only admissible if there a possibility of assisting the court.[65]

S v Rohde emphasised that in terms of *Turner* the expert must possess a specialised skill or knowledge and an expert opinion on human behaviour that falls within in the

54 *Ibid*.
55 *R v Turner* at 75.
56 Meintjies-Van Der Walt (2001) 158.
57 See 2.3 and 2.5.
58 Meintjies-Van Der Walt (2001) 158.
59 *Idem* 158-159.
60 Meintjies-Van Der Walt (2001) 158.
61 See 3.5.
62 *Ruto Flour Mills (Pty) Ltd v Adelson* (1) 1958 (4) SA 235 (T) at 237C.
63 *Twine and another v Naidoo and another* (2018) 1 All SA 297 (GJ).
64 *S v Rohde* (2019) 1 All SA 740 (WCC).
65 *Twine and another v Naidoo and another* at par. 18.

"limits of normality" is not helpful to the court.[66] This reinforces the argument of Meintjies-Van der Walt, who submits that the focus on the assistance by the expert does not mean that courts do not still subscribe to the *Turner* rule of distinguishing between normal and abnormal.[67] For example, in *S v Nel* the court found that the psychiatric evidence that the accused wish to led was inadmissible based on the *Turner* rule. The purpose of the psychiatric evidence was to show that part of the defence witness's evidence should be disregarded because the witness was "mildly or mentally retarded".[68] It should be noted that the accused did not argue that the witness was incompetent to testify as provided for in the Criminal Procedure Act 51 of 1977. The court, applying the *Turner* rule, concluded that a court could reasonably adequately assess the intellectual and psychological disabilities affecting personality, powers of exposition and articulation and the ability to recall of a witness.[69] In this way, they are differentiating between what is considered normal and abnormal.

Meintjies-Van der Walt argues that the *Turner* rule needs to be revisited because an uncritical application of the rule has the potential to lead to the exclusion of expert evidence that could assist the court.[70] In support of her argument, she refers to an Australian case *Murphy v Queen*[71] where the court commented on the difficulties of the statement made in the *Turner* case.[72] The court in *Murphy v Queen* remarked that the statement in the *Turner* case is based on a few assumptions namely, that normal and abnormal can be defined clearly, that the distinction between the two is well recognised and that the expertise of psychiatrists and psychologists are limited to the "abnormal".[73] The problem, as highlighted by the *Murphy* case, is that the assumptions would not survive close scrutiny.

It is submitted that the application of the distinction of abnormal/normal as per the *Turner*-case should, as proposed by Meintjies-Van der Walt, be reconsidered. The *Nel* case, although it does distinguish between the so-called normal and abnormal, the

66 *S v Rohde* at 803H.
67 Meintjies-Van Der Walt (2001) 161.
68 *S v Nel* at 138.
69 *Idem* 144.
70 Meintjies-Van Der Walt (2001) 163.
71 *Murphy v Queen* (1988-89) 167 CLR 94-110 as quoted in Meintjies-Van Der Walt (2001) 163.
72 Meintjies-Van Der Walt (2001) 163.
73 *Murphy v Queen* (1988-89) 167 CLR 94-110 as quoted in Meintjies-Van Der Walt (2001) 163.

reasoning was not solely focused on the dichotomy. As Zeffertt points out the reasoning in *Nel* was based on *legal* relevance in comparison to *logical* relevance to ensure that there was no proliferation of issues.[74] The court in *S v Nel* acknowledged that expert evidence could assist in a more accurate and reliable assessment, but the costs would exceed any benefit.[75] The possible probative value does not outweigh the disadvantages, such as a more costly and lengthy trial, and as a result, the evidence was legally irrelevant and inadmissible.

4.2.1.2 Basis rule

The basis rule is not usually considered an admissibility rule but impacts the weight attached to the evidence.[76] Because of hearsay evidence that an expert can rely on the admissibility of the opinion can come into play.[77] Schmidt and Rademeyer also submit that the Constitutional era has changed the position of the basis rule in that the absence of reasons for an expert opinion will result in the accused or legal representative not being able to properly test the expert opinion.[78] This is not in line with the right to a fair trial as provided for in the Constitution[79] and it could be argued that in such circumstances the evidence should be inadmissible.[80]

The basis rule determines that the expert witness must provide the basis of their opinion to the court, in other words, the process of reasoning, including the premise on which it was based, that led to the opinion.[81] As held in *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung Mbh* "an expert's bald statement of his opinion is not of any real assistance".[82] By stating the grounds upon which the expert witness bases their opinion, it enables the court to independently test the expert's opinion. In the oft-quoted *R v Jacobs* Judge Ramsbottom held that "... it is of the greatest importance that the value of the opinion should be capable of being tested

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74 Zeffert as quoted Schwikkard and Van der Merwe (2016) 55.
75 *S v Nel* at 143E-F.
76 Schmidt and Rademeyer (2003) 17-15 and Meintjies-Van Der Walt (2001) 167.
77 Meintjies-Van Der Walt (2001) 169.
78 Schmidt and Rademeyer (2003) 17-15.
79 Section 35(3) of the Constitution of the Republic of South Africa, 1996.
80 Schmidt and Rademeyer (2003) 17-16.
81 *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung Mbh* 1976 (3) SA 352 (A) at 371; *S v Adams* 1983 2 SA 577 (A) at 586B and *R v Jacobs* 1940 TPD 142 at 146.
82 *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung* at 371G.

and unless the expert states the grounds upon which he basis his opinion, it is not possible to test its correctness so as to form a proper judgment upon it".[83]

The basis rule is, however, not an absolute rule when it comes to expert evidence.[84] In very technical cases the reasoning would not be required, for example having to explain exactly how an apparatus or device works.[85] This is dependent on whether or not the evidence is disputed.

The expert opinion must also relate to the facts.[86] In *S v Mngomezulu*[87] the court held that the psychiatrist's evidence was not admissible. The court held that there was no attempt to link the psychiatrist's general evidence regarding epilepsy to the facts of the matter.[88] The court in *Mngomezulu* emphasised the fact that when psychological or psychiatric evidence is given a proper foundation of facts must be laid for the opinion to be based on.[89] If a mental health professional did not conduct a psycho-legal assessment and is called to give an opinion on the matter, the legal representative must put the facts to them hypothetically, or the expert must listen while the other witnesses give their testimony.[90] For example, in *S v Zuma*[91] the complainant refused to undergo a psycho-legal assessment conducted by the State's expert. Dr Olivier remained in court to listen to the evidence of the other witnesses and based her opinion on hypothetical questions. In such a case, the mental health professional must be wary of the limitation set. Dr Olivier, in the *Zuma* case, correctly refused to at any stage diagnose the complainant as she had not conducted a psycho-legal assessment herself.[92]

The facts upon which expert witnesses base their opinion must also be proved by admissible facts.[93] An expert's opinion is often based on hearsay evidence such as

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83 *R v Jacobs* at 146.
84 Schmidt and Rademeyer (2003) 17-15 and Schwikkard and Van der Merwe (2016) 104.
85 Schmidt and Rademeyer (2003) *Law of evidence, Issue 16 (July 2018)* at 17-15 and Van der Merwe in Schwikkard *et al*. (2016) *Principles of evidence* at 104.
86 Schmidt and Rademeyer (2003) 17-14.
87 *S v Mngomezulu* 1972 (1) SA 797 (A).
88 *Idem* 799H.
89 *Idem* 798G.
90 Schmidt and Rademeyer (2003) 17-14.
91 *S v Zuma* 2006 JDR 0343 (W).
92 *Idem* 136.
93 Schmidt and Rademeyer (2003) 17-14.

textbooks which can create logistical issues if the original source, the author, is to be called to testify.[94] In *S v Kimimbi* the court emphasised the realities of practice in that professionals will rely on books and journals hence to exclude the evidence would be to set impossible standards.[95] To circumvent the problem, expert witnesses can rely on sources, such as a book that is technically hearsay, if certain conditions are met.[96] In *Menday v Protea Assurance*[97] the court held that reliance could be placed on books by expert witnesses if the expert has personal knowledge of the subject and uses the book to refresh or to support their opinion.[98] Similar to a book, an expert witness can refresh their memory by referring to a report that they prepared.[99] The report, when confirmed in the witness stand, becomes part of the evidence and cannot simply be handed in.[100] The presentation and use of expert reports will be discussed in more detail below in 4.2.3.

4.2.1.3 Ultimate issue rule

The ultimate issue rule determines that a witness may not give an opinion on one of the issues that the court must rule on. It is contended that doing so will usurp the role or function of the court.[101] Whether the ultimate issue rule should form part of the evidentiary rules has, however, elicited much debate and unfavourable criticism.[102] The problem with the ultimate issue rule is that it will be very difficult for many expert witnesses to give a relevant opinion without touching on the ultimate issue.

Zeffertt and Paizes contend that the phrase usurps the function of the court is nothing but “empty rhetoric” and the ultimate issue rule as phrased should not form part of the evidentiary rules.[103] Similar to their argument, Schmidt and Rademeyer argue that the ultimate issue rule does contain a principle that is both valid and correct, but the

94 Meintjies-Van Der Walt (2001) 167.
95 *S v Kimimbi* 1963 SA 250 (C) at 251H-252A.
96 Schwikkard and Van der Merwe (2016) 107.
97 *Menday v Protea Assurance* 1976 (1) SA 565 (E).
98 *Idem* 569H.
99 Schmidt and Rademeyer (2003) 17-19.
100 *Ibid*.
101 Schmidt and Rademeyer (2003) 17-7.
102 *Idem* 17-8.
103 Zeffertt and Paizes (2010) 102.

emphasis that is placed on the usurping of the role of the court is incorrect.[104] The real issue is that the court must itself decide on the matter.[105] The court must not defer to the opinion of a witness.[106] Zeffertt and Paizes indicate that the *Wigmore/Vilbro* approach is supported in many cases- referring to Wigmore's approach that relevance is measured by the appreciable assistance to the court which was applied for the first time in *R v Vilbro and another*.[107] Although the *Wigmore/Vilbro* approach is supported in many cases, the decisions are not "harmonious".[108]

According to Zeffertt and Paizes, the correct approach by the court is that there should be no general rule that witnesses can never state their opinion on the ultimate issue save for certain matters where it will always be superfluous and inadmissible.[109] These matters include giving an opinion on the legal or general merits of the case,[110] expert witnesses cannot, for example, determine the credibility of a witness. For example, in *Holtzhauzen v Roodt*[111] the court found the evidence of the clinical psychologist, Mr Wilkinson, inadmissible. The defendant wished to call Mr Wilkinson to testify that in his opinion, the defendant was telling the truth. The court held that the opinion of the clinical psychologist would "displace the value judgment of the Court".[112]

Meintjies-Van der Walt has also weighed in on the debate contending that since there is no jury the judges decide what weight is attached to the expert opinion and there is, therefore, no need to continue to use the ultimate issue rule as an exclusionary rule.[113] In contrast, Allan and Louw argue that psychologists conducting psycho-legal assessments should not give an opinion on the ultimate issue.[114] According to Allan and Louw, preventing this would restrict the battle of the experts and also encourage lazy and incompetent psychologist from only including a conclusion in their reports.[115]

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104 Schmidt and Rademeyer (2003) 17-8.
105 *Ibid*.
106 *Ibid*.
107 *R v Vilbro and another* 1957 (3) SA 233 (A).
108 *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616E.
109 Zeffertt and Paizes (2010) 103.
110 *Ibid*.
111 *Holtzhauzen v Roodt* 1997 (4) SA 766 (W).
112 *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 77.
113 Meintjies-Van Der Walt (2001) 166.
114 Allan and Louw "The ultimate opinion rule and psychologists: A comparison of the expectations and experiences of South African lawyers" (1997) 15 *Behavioral Sciences and the Law* 309.
115 *Idem* 310.

They argue that it is more challenging to provide concrete and comprehensible reasons to support a conclusion than simply providing an opinion on the ultimate issue.[116] A further problem that Allan and Louw have identified is that once a psychologist expresses an opinion on an ultimate issue, it tends to become the focal point of the cross-examination.[117] The result is that the courts then disregard relevant and valuable information if the opinion is found to be wrong.[118] Allan and Louw propose that the profession should lay down clear ethical guidelines to discourage psychologist giving an opinion on the ultimate issue before the court.[119] It is submitted that given the other evidentiary rules in place and the fact that often psychological and psychiatric evidence will touch on the ultimate issue that the exclusionary rule should not form part of the evidentiary rules.

4.2.2 Disclosure of expert evidence and pre-trial conferences

Before expert evidence can be presented in a trial, the rules of court in civil cases determine that the parties must deliver a notice within the prescribed time period indicating their intention to call an expert[120] and thereafter deliver a summary of the expert's opinion and the reason therefor.[121] The courts will determine whether the expert witnesses' report or summary complies with the requirements.[122] The subrule only requires a summary of the reasons to ensure that the other party is not surprised, the testimony which the expert witness needs to give, therefore, need not be fully set out.[123] The purpose of the rule is to ensure that none of the parties are caught by

116 Allan and Louw (1997) *Behavioral Sciences and the Law* 310.
117 *Ibid.*
118 *Ibid.*
119 Allan and Louw (1997) *Behavioral Sciences and the Law* 318.
120 Rule 24(9)(a) of the Magistrates' Courts Rules determines that a notice must be delivered not less than 15 days before the hearing. Rule 36(9)(a) of the Uniform Rules of Court has recently been amended and stipulates that where a plaintiff intends to call an expert witness the notice must be delivered 30 days after the close of pleadings and where a defendant wishes to call an expert the notice must be delivered not more than 60 days after close of pleadings.
121 Rule 24(9)(b) of the Magistrates' Courts Rules determines that the expert's summary and reasons must be filed at least 10 days before the hearing. Rule 36(9)(b) of the Uniform Rules of Court was amended and came into operation on 1 July 2019 changing the time period to 90 days after the close of pleadings for the plaintiff and 120 days after close of pleadings for the defendant. Rule 36(9)(b) of the Uniform Rules of Court further stipulates that the notice and the summary in any event must be delivered before the first case management conference.
122 Schmidt and Rademeyer (2003) 17-18.
123 *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbh* at 371.

surprise and can properly prepare for the case, thereby limiting the duration of the trial and legal costs.[124]

The courts, especially the divisions of the High Court, are faced with congested trial rolls and delays in the finalisation of cases. The courts rely on practice directives to assist and enable courts to deliver a better service to litigants and alleviate the mentioned problems- as described in the introduction of the Practice Manual of the High Court, Gauteng Division (previously the North Gauteng High Court), "it is concerned mainly with how the Rules of Court are applied in the daily functioning of the courts".[125] The practice directives do not, however, bind the judges but complement the rules to ensure efficiency and uniformity.[126] As such the Uniform Rules of Court needed to be amended to ensure that all of the divisions of the High Court apply the same rules to ease the problems which could then be further supplemented by each division's practice directives.

The amendments to the Uniform Rules of Court include, amongst others, the insertion of Rule 36(9A) which came into operation on 1 July 2019.[127] In terms of Rule 36(9A), the parties must endeavour to as far as possible appoint a single joint expert on any or all of the issues in the case.[128] The judicial case management system, as dealt with in Rule 37A, also emphasises the instruction by the parties to appoint a single joint expert and should this not be feasible the parties must indicate the reason.[129] The appointment of a single joint expert has the potential to not only assist in curbing costs and curtailing the duration of trials but may also reduce bias or potential bias, often the main concern with expert witnesses. Whether the amendment will achieve this remains to be seen, and it is suggested that further studies need to be done to

124 Schmidt and Rademeyer (2003) 17-18.
125 Van der Merwe J, Preface in Practice Manual of the North Gauteng High Court, 31 May 2011 (as amended from time to time).
126 Chapter 1 of the Practice Manual of the North Gauteng High Court, 31 May 2011 (as amended from time to time). Each division of the High Court of the Republic of South Africa as well as the Supreme Court of Appeal and Constitutional Court have their own practice manuals comprising of the practice directives. The magistrate courts also have practice directives, but they are much less extensive than that of the superior courts.
127 Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (GNR 842) in the Government Gazette No.42497 of 31 May 2019.
128 Rule 36(9A)(a) of the Uniform Rules of Court.
129 Rule 37A(10)(d) of the Uniform Rules of Court.

determine the effectiveness of the amendments. The Rules do not prohibit parties from appointing their own experts: parties should only be able to provide reasons for not appointing a single joint expert. Given the adversarial nature of the courts, it is submitted that the amendment will not stop parties from appointing their own expert witnesses and continuing to do expert "shopping". In all probability should a single joint expert's report not be favourable to one party that party is likely to appoint their own expert with an opposing view. Without further amendments to the Rules, the courts will unlikely be able to prohibit this.

In matters where there are more than one expert, a joint minute of the expert witnesses must be filed.[130] If done effectively, the joint minutes can assist the court in identifying the issues before the court and narrow down the issues. As to the status of joint minutes, Judge Sutherland in *Thomas v BD Sarens (Pty)Ltd* held that the agreements reached by opposing experts about the facts enjoy the same "*de facto* status as facts that are expressly common cause on pleadings or facts agreed in a pre-trial conference or in an exchange of admissions".[131] If the opposing experts agree on an opinion in their joint minutes, the courts, as with all opinion evidence, is not bound by it.[132]

Of all the divisions of the High Court, the Gauteng Division and Gauteng Local Division are the busiest jurisdictions and have compiled the most comprehensive practice manual to aid in efficiently expediting trials. Given the extensive directives, particularly in relation to expert witnesses, the focus will solely be placed on the Gauteng Division's Practice Directives. Before the insertion of Rule 36(9A), the practice manual stipulated that all expert witnesses in respect of whom reports have been filed are obliged to compile joint minutes with the corresponding expert.[133] The Judge President of the Gauteng Division further issued a directive, Practice Directive 2 of 2019, to supplement the amendments to the Uniform Rules of Court in order to alleviate the congested trial court rolls.[134] Practice Directive 2 of 2019 determines that in cases where the

130 Rule 36(9A)(b) of the Uniform Rules of Court. The joint minute must in terms of the subrule be filed within 20 days of the date of the last filing of such experts' reports.
131 *Thomas v BD Sarens (Pty) Ltd* (2016) JOL 35481 (GSJ) at par.12.
132 *Idem* par.13.
133 Chapter 6, part 6.13, section 3.5.10 of the Practice Manual of the North Gauteng High Court, 31 May 2011 (as amended from time to time).
134 Practice Directive 2 of 2019 came into operation on 8 July 2019.

defendant is the Road Accident Fund (RAF), MEC of the Gauteng Department of Health or Passenger Rail Agency of South Africa (PRASA) (category Y-cases) the following apply to expert reports: [135]

7.4.1.4.1 Expert reports must be drafted in a format designed for lucidity, brevity, and convenient cross-referencing, and to this end, must be in numbered paragraphs, and when referring to other expert reports, refer to the numbered paragraphs therein.

7.4.1.4.2 Where more than one expert has given a report on a given aspect, joint minutes of experts must identify exactly what is agreed and what is not agreed, with reasons stated why agreement cannot be achieved, especially as to whether the disagreement relates to a fact clinically observed or an interpretation of the facts.

7.4.1.4.3 The attorney responsible for the procurement of the reports shall be responsible for compliance in this regard, and failure to adhere hereto may imperil certification.

By providing more guidance on expert reports in the Practice Directive and placing a duty on attorneys to ensure that there is compliance will assist in better expert reports being compiled, improving the expert evidence received. Other cases will also benefit from following the directives. Practice Directive 2 of 2019 further determines, in respect of category Y cases, that the pre-trial minute must address whether it would be feasible and reasonable that the parties appoint one expert witness in respect of an issue or aspect of the trial and if a single joint expert witness is not appointed the parties must explain why it was inappropriate.[136] Similar to that provision the Practice Directive further determines that in all other matters, save for category Y cases, the parties when applying for a trial date, must provide a signed statement by the attorney indicating that the parties considered appointing a single expert and if a single joint expert was not appointed the parties must provide a reason for not appointing a single joint expert.[137]

135 Part A, section 7.4.1.4. of the Practice Directive 2 of 2019.
136 Part A, section 8.1.3 of the Practice Directive 2 of 2019.
137 Part A, section 15.2.5. of the Practice Directive 2 of 2019.

Cases that are not subject to judicial case management[138] must hold a pre-trial conference before a trial date in the High Court will be allocated.[139] The purpose of the pre-trial conferences is also to curtail the duration of the trial and to facilitate settlements.[140] The Uniform Rules provide that the specific issues must be addressed at the pre-trial conference including any admissions made by the parties, whether the parties have tried to settle the matter and whether an agreement has been reached regarding the production of proof by way of an affidavit.[141] The minutes of the pre-trial conference must be signed by both parties and filed with the registrar.[142] In cases other than Y category cases, the Practice Directives determine that the expert witnesses to be called must be included in the pre-trial minutes and whether joint minutes have been filed.[143] Cases, where case management applies, will not hold a pre-trial conference but will hold a case management conference before a judge.[144] During the conference, the parties must address, amongst others, the feasibility and reasonableness in the circumstances of the case that a single joint expert is appointed by the parties.[145] The court will, furthermore, address the sufficiency of expert witness reports and joint minutes and whether the documents comply with the Practice Directive in form as discussed above.[146]

In criminal cases, the procedural aspects differ. Save for the terms of section 77 to 79 of the Criminal Procedure Act 51 of 1977, there are no formal prescriptions regulating the disclosure of expert evidence in criminal cases.[147] However, prior disclosure of the expert witnesses in criminal cases may be demanded.[148] Before the adoption of the Interim Constitution[149] a "blanket docket privilege" existed which enabled the

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138 Rule 37A(1)(a) of the Uniform Rules of Court determines that judicial case management shall apply to such categories of defended actions as the Judge President of any division may determine in a Practice Note or Directive. The Practice Directive of the Gauteng Division dated 11 June 2019 (Directive to regulate the Case Management, Trial Allocation and Enrolment of Trial Matters) determines that case management shall apply to all category Y cases. This is confirmed in part A, section 6 of the Practice Directive 2 of 2019.

139 Rule 37(2)(a) of the Uniform Rules of Court.

140 Harms (2003) *Civil procedure in the superior courts* B37.1.

141 Rule 37(6) of the Uniform Rules of Court.

142 Rule 37(7) of the Uniform Rules of Court.

143 Chapter 6, part 6.13, section 3.5.5 of the Practice Manual of the North Gauteng High Court, 31 May 2011 (as amended from time to time).

144 Rule 37A(7) of the Uniform Rules of Court.

145 Rule 37A(10)(d) of the Uniform Rules of Court.

146 Part A, section 10.5 of the Practice Directive 2 of 2019.

147 Schmidt and Rademeyer (2003) 17-18.

148 Schwikkard and Van der Merwe (2016) 108.

149 The Interim Constitution of the Republic of South, 200 of 1993 commenced on 27 April 1994.

prosecution to refuse to release information and documents from the police docket.[150] The Constitutional Court in *Shabalala and Others v Attorney-General of Transvaal and Another*[151] declared that the "blanket docket privilege" is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police dockets, in all circumstances, regardless as to whether or not such disclosure is justified for the purposes of enabling the accused to properly to exercise their right to a fair trial.[152] The consequence of the judgment is that the prior disclosure of the expert witnesses should be granted and in the interest of achieving equality of arms, there is no reason that the defence should not know which experts the prosecution intends to call.[153]

Criminal trials to be heard in the Gauteng Division, Gauteng Local Division and the Gauteng Division acting as the Mpumalanga Division of the High shall hold a pre-trial conference in terms of the Practice Notice issued on 5 October 2016.[154] The purpose of the pre-trial conference is to eliminate unnecessary delays in criminal trials and to "introduce necessary enhancements".[155] Pre-trial conference held in terms of the Practice Note will be presided over by a judge.[156] The pre-trial can address matters such as the readiness of the trial and also explore ways of shortening the proceedings where possible.[157] No specific reference is made to expert witness, but ways that could shorten the proceedings could possibly include joint minutes. It is submitted that it would be cogent for the courts to also address the disclosure and presentation of expert witnesses at pre-trial conferences for criminal cases.

150 Schwikkard and Van der Merwe (2016) 184-185.
151 *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC).
152 *Idem* 790C-791B.
153 Schwikkard and Van der Merwe (2016) 108 and Schmidt and Rademeyer (2003) 17-18.
154 Practice Note 1 of 2016, Pre-trial conferences in criminal matters, Gauteng Division and Gauteng Local Division came into operation on 7 October 2016.
155 Par.2 of Practice Note 1 of 2016, Pre-trial conferences in criminal matters, Gauteng Division and Gauteng Local Division.
156 Par.6 of Practice Note 1 of 2016, Pre-trial conferences in criminal matters, Gauteng Division and Gauteng Local Division.
157 Par.8 of Practice Note 1 of 2016, Pre-trial conferences in criminal matters, Gauteng Division and Gauteng Local Division.

4.2.3 Presentation of expert evidence at trial

In both criminal and civil trials, the evidence of expert witnesses is usually presented *viva voce*.[158] The focus on oral evidence is attributed to the adversarial system and the fact that parties should be able to challenge the evidence by way of cross-examination.[159] The focus on orality further provides the court with the opportunity to observe the demeanour of the witness to assess the credibility.[160] In criminal cases the oral testimony is considered especially important as Schultz JA stated in *S v Ramavhale*, "an accused person usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness".[161]

There are specific statutory provisions that allow expert evidence by way of affidavit or certificate. In civil cases, a statement of an expert can be admissible if it complies with section 22[162] or 34[163] of the Civil Proceedings Evidence Act 25 of 1965. Rule 38(2) of the Uniform Rules of Court also applies and determines that a witness at a trial must give their evidence *viva voce* but if there is sufficient reason the evidence can be provided by way of affidavit. In *Madibeng Local Municipality v Public Investment Corporation Ltd,*[164] it was held that when a court exercises its discretion in terms of Rule 38(2) two important factors that are taken into consideration is the saving

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158 Schwikkard and Van der Merwe (2016) 108;388. See also 3.3.

159 Schwikkard and Van der Merwe (2016) 388 and Meintjies-Van Der Walt (2001) 123.

160 Schwikkard and Van der Merwe (2016) 388.

161 *S v Ramavhale* 1996 (1) SACR 639 (A) at 639A-B.

162 Section 22(1) of the Civil Proceedings Evidence Act 25 of 1965 determines that an affidavit can be submitted as evidence if it relates to proving a fact which is ascertained by any examination or process requiring any skill bacteriology, biology, chemistry, physics, astronomy, anatomy or pathology. An affidavit by a psychiatrist could possibly meet the requirements of section 22 of the Civil Proceedings Evidence Act 25 of 1965.

163 Section 34(1) of the Civil Proceedings Evidence Act 25 of 1965 reads as follows:

> In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided—
>
> a. the person who made the statement either-
>
> i. had personal knowledge of the matters dealt with in the statement; or
>
> ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and
>
> b. the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

164 *Madibeng Local Municipality v Public Investment Corporation Ltd* 2018 (6) SA 55 (SCA).

of costs and saving of time.[165] Plasket AJA in *Madibeng Local Municipality* further held that the exercise of the discretion will also require consideration of the following factors: [166]

> the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit is by agreement; and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.

In criminal cases, section 161(1) of Criminal Procedure Act 51 of 1977 determines that a witness in criminal proceedings must give their evidence *viva voce* except where the act or other legislation expressly provides otherwise. Section 212 of the Criminal Procedure Act determines when such an affidavit or certificate of an expert will by mere production constitute *prima facie* proof of the facts contained therein. Section 212(4)(a)(iv) specifically relates to experts in the mental health profession and determines that:

> Whenever any fact established by any examination or process requiring any skill in anatomy or in human behavioural sciences is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person…, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact:

Section 213 of the Criminal Procedure Act also provides for a written statement where consent is given by the parties, and the statement can be admitted as evidence on its mere production. The provision is wide enough to include reports and statements by expert witnesses. Unless qualified by one of the statutory requirements, the written report of the expert witness is not automatically received as evidence. Various conflicting case law has emerged dealing with the procedure to be adopted where an expert testifies from a written report.[167]

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165 *Idem* par. 26.
166 *Madibeng Local Municipality v Public Investment Corporation Ltd* at par. 26-27.
167 Schwikkard and Van der Merwe (2016) 108.

An expert witness is not allowed to merely hand in a written report or read it out in court.[168] The rule of given evidence *viva voce* cannot be circumvented by simply reading out a report.[169] In *S v Ramgobin* the court held that an expert witness is permitted to refresh their memories from reports but "[t]hey are not, however, evidence. The evidence is the oral evidence given by the expert, and the notes merely an *aide-memoire*".[170] Refreshing the memory of a witness, including an expert witness, may only occur if certain conditions are met.[171] If experts have no independent recollection of the case and they can only confirm the accuracy of the recorded observations, the report is received as evidence.[172] If aided by a report, the court in *R v Mbongwe* held that the correct procedure to follow is to read out the report, confirm the contents and hand the report in.[173] Reading out was, however, held not a necessary requirement if the expert adopts the report according to the court in *R v Birch-Monchrieff*.[174]

In general, witnesses are required to wait outside before being called to testify, but expert witnesses can be allowed to be present in court before testifying.[175] By allowing the expert witness to be present gives them an opportunity to assess the various issues and the other witness, which affords them an opportunity to reassess their opinion.[176] For example, in *S v Kavin*[177] the accused had omitted to mention an encounter he had on the night of the murder to the psychiatrists who evaluated him. After hearing the evidence in court one of the psychiatrists, Professor Bodemer

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168 Schwikkard and Van der Merwe (2016) 109 and Schmidt and Rademeyer (2003) 17-19. See also *S v Ramgobin* 1986 (4) SA 117 (N) at 146F-G; *S v Molefe* 1975 (3) SA 495 (T) and *S v Mthatha* 1965 (1) SA 560 (N).

169 *S v Heller* 1964 (1) SA 520 (W) at 524.

170 *S v Ramgobin* at 146F-G. See also *Harris v Meyer* 1911 AD 260; *S v Van Tonder* 1971 (1) SA 310 (T) and *S v Smuts* 1972 (4) SA 358 (T).

171 Schwikkard and Van der Merwe (2016) 470 and Meintjies-Van Der Walt (2001) 123. The requirements are:

i The report must have been prepared by the expert or upon their instructions.
ii At the time the report was made the events or facts to which it refers should have been fresh in the mind of the expert.
iii The original report must be supplied where the witness has no independent recollection of the facts recorded.
iv The report that is used to refresh the memory must be available to the court and opponent.

See Schwikkard and Van der Merwe (2016) 474-478 for a discussion on the requirements.

172 Schwikkard and Van der Merwe (2016) 109.

173 *R v Mbongwe* 1954 (3) SA 1016 (T) at 1018D-E.

174 *R v Birch-Monchrieff* 1960 (4) SA 425 (T) at 427.

175 Schwikkard and Van der Merwe (2016) 461.

176 Schwikkard and Van der Merwe (2016) 461. See also Burchell "Non-pathological incapacity: Evaluation of psychiatric testimony" (1995) 8 *South African Journal of Criminal Justice* 39.

177 *S v Kavin* 1978 (2) SA 731 (W).

changed his opinion regarding a specific aspect.[178] In *Olwagen and Olwagen*[179] the psychologists, Mr Goosen attended the court whilst all the lay witnesses testified and was given the opportunity to indicate whether anything was testified to that would change his recommendation.[180] In *S v Wiid* Mr Gilmer, a psychologist attended the trial and after hearing all of the evidence testified that it strengthened his conclusion that the accused's judgment was impaired.[181] These examples in cases illustrate the value of having expert witnesses attend the trial.

In civil proceedings, the calling of witnesses is governed by the principle of party control, which means the parties decide which witnesses to call.[182] In the case of an expert witness, the parties should have complied with the notice requirement as described above, before being able to call the expert witness at trial. In a civil case, the court cannot call a witness *mero motu*.[183] In criminal cases, the prosecution and/or the defence can call witnesses relevant to the case.[184] Section 186 of the Criminal Procedure Act 51 of 1977 further determines that a court may subpoena a witness if it appears that the evidence of the witness will be essential to the just decision of the case. If the court does not call a witness whose evidence is essential for the case, it is an irregularity.[185] The right to call a witness includes an expert witness; this will be discussed in 4.2.6 below.

During the normal course of events in a civil trial, there is no fixed order in which witnesses should testify. A traditional approach is followed where a witness is called, examined, cross-examined by the opposing party, and possible re-examination can occur.[186] Judges can only ask questions to clear up any ambiguous points and may never take the examination of a witness upon themselves.[187] In criminal proceedings, the state must lead evidence first.[188] The traditional approach of only one witness

178 *S v Kavin* at 740G-741A. See also the discussion in Burchell (1995) *South African Journal of Criminal Justice* 39.
179 *Olwagen v Olwagen* (2003) JOL 11541 (SE).
180 *Idem* par. 25.
181 *S v Wiid* 1990 (1) SACR 561 (A) at 567E.
182 Schwikkard and Van der Merwe (2016) at 464.
183 *Idem* 467.
184 *Idem* 461-462.
185 *Idem* 464.
186 *Idem* 465.
187 *Ibid*.
188 *Idem* 461.

being called at a time and examined is also followed in criminal proceedings.[189] The civil procedure rules and criminal procedure rules do not at this stage allow for the process of concurrent expert evidence. Concurrent expert evidence or "hot-tubbing" as it is colloquially known, is the process by which expert witnesses from the same discipline or related discipline give evidence during a joint session.[190]

The process of concurrent expert evidence is credited to Australian courts who have used the model with great success.[191] There are different approaches to concurrent expert evidence. The first approach is where the process is led by the adjudicator or trier of fact, and the expert witnesses are heard concurrently instead of sequentially.[192] The trier of fact acts as moderator and will ask questions and thereafter open the floor for the expert witnesses to ask questions and even debate the matter.[193] The legal representatives will then have an opportunity to ask questions relevant to the matter.[194] Another procedure that is sometimes followed is a "sequential back-to-back" process whereby the expert witness is still called sequentially examined and cross-examined but only on one aspect.[195] After all the experts have testified on the one issue or aspect the hearing moves on to the next issue that the experts will testify on.[196] All of the experts are sworn in at the same time.[197] The last approach is a hybrid approach to concurrent expert evidence whereby the trier of fact modifies the process, for example, the role that legal representatives can play is varied, or the trier of fact will not lead the discussion.[198]

189 *Ibid*.
190 Butt "Concurrent expert evidence in U.S. toxic harms cases and civil cases more generally: Is there a proper role for "hot tubbing"?" (2017) 40 *Houston Journal of International Law* 3; Quilliam "Piloting a discord of experts in a hot-tub" (2018) June *Without Prejudice* 14 and Barrie and De Villiers "Revisiting the adversarial approach of dealing with expert evidence: The treatment of expert witnesses by the State Administrative Tribunal of Western Australia" (2017) 1 *Journal of South African Law* 65.
191 Butt (2017) *Houston Journal of International Law* 3 and Quilliam (2018) *Without Prejudice* 14.
192 Butt (2017) *Houston Journal of International Law* 3; Barrie and De Villiers (2017) *Journal of South African Law* 65-66; Quilliam (2018) *Without Prejudice* 14 and Civil Justice Council (2016) *Concurrent expert evidence and 'hot-tubbing' in English litigation since the 'Jackson reforms: A legal and empirical study* 16.
193 Butt (2017) *Houston Journal of International Law* 3; Barrie and De Villiers (2017) *Journal of South African Law* 65-66 and Quilliam (2018) *Without Prejudice* 14.
194 *Ibid*.
195 Civil Justice Council (2016) 15 and Quilliam (2018) *Without Prejudice* 14.
196 *Ibid*.
197 *Ibid*.
198 Civil Justice Council (2016) 17 and Quilliam (2018) *Without Prejudice* 14.

Although the current framework in civil and criminal proceedings do not allow for the process, it has been used in South Africa by the Competition Tribunal. The Competition Tribunal is an inquisitorial body empowered by the Competition Act 89 of 1998.[199] In 2018 the Competition Tribunal used concurrent expert evidence for the first time in the case of *Timrite (Pty) Ltd and The Mining Bag Division of Tufbag (Pty) Ltd*.[200] Both parties in the *Timrite* case led expert witnesses who testified simultaneously. The Tribunal remarked that: "[w]e are grateful to both for being the pioneers and using the process effectively".[201] It is submitted that the use of concurrent expert evidence in civil and criminal proceedings should be investigated as a possible solution to the problems experienced with expert witnesses.

4.2.4 The right to challenge expert witnesses

An important component to the right to a fair trial is the right to challenge (expert) witnesses.[202] In an adversarial system where the emphasis is placed on orality, cross-examination is a fundamental procedural right and essential to challenge evidence.[203] As briefly mentioned above, every witness, including expert witnesses, will be subjected to examination-in-chief followed by cross-examination and if need be, re-examination.[204] The examination must take place under oath[205] , and a failure to administer the oath will result in inadmissibility.[206] The court also has an opportunity to examine witnesses usually to clarify any uncertain points.[207] The extent to which the court can examine a witness is limited, although such limitation is not precisely defined.[208] The court cannot, however, cross-examine a witness.[209]

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199 Section 52(2)(b) of the Competition Act 89 of 1998.
200 *Timrite (Pty) Ltd and The Mining Bag Division of Tufbag (Pty) Ltd* (IM100Jul17).
201 *Idem* par. 23.
202 Meintjies-Van Der Walt (2001) 173.
203 Schwikkard and Van der Merwe (2016) 392 and Meintjies-Van Der Walt (2001) 175. Section 166 of the Criminal Procedure Act 51 of 1977 confirms the right to cross-examine a witness in a criminal trial. See *Distillers Korporasie (SA) Bpk v Kotze* 1956 (1) SA 357 (A) at 361H for a discussion on cross-examination as a fundamental procedural right in civil proceedings.
204 Schmidt and Rademeyer (2003) 9-50(1).
205 Section 162 of the Criminal Procedure Act 51 of 1977.
206 *S v Naidoo* 1962 (2) SA 625 (A) at 633.
207 Schmidt and Rademeyer (2003) 9-74 and Schwikkard and Van der Merwe (2016) 402.
208 *S v Rall* 1982 (1) SA 828 (A) at 831. See in general Schwikkard and Van der Merwe (2016) 401.
209 Schmidt and Rademeyer (2003) 9-74.

Cross-examination is seen as the most effective way to uncover inconsistency and inaccuracy in oral testimony.[210] During cross-examination, the cross-examiner is not restricted to the issues covered during evidence in chief.[211] A party to the dispute has the right to cross-examine the opponent's witness and can also cross-examine witnesses called by the court.[212] There rests a duty on a party to cross-examine a witness on aspects which they dispute and must put their own case or defence to the opposing witness.[213] Failure to do so can have the result that the disputed evidence cannot be called into question later.[214]

Cross-examination is used to assess the strengths and weaknesses of expert testimony[215] and often seen as a remedy for the hired gun problem.[216] Wettstein argues that despite the gatekeeping efforts of evidentiary rules, the adversarial legal system relies on cross-examination as "primary filter for excluding pseudoscience and inadequate expertise".[217] Cross-examination is, however, not a particularly good vehicle or safeguard to ensure the validity and reliability of psychological and psychiatric evidence[218] and has varying degrees of success.[219]

Smith argues that a confident expert witness who might have had previous courtroom experience may simply deny any validity or reliability issues put to them during cross-examination.[220] As an example, Smith refers to the American case of *Barefoot v Estelle*[221] where one of the psychiatrists, when asked about inaccuracy surrounding predictions of dangerous, acknowledged he could at times be wrong, "but in this case, I'm not".[222] A further problem that often accompanies this is the fact that expert

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210 Schwikkard and Van der Merwe (2016) 392 and Meintjies-Van Der Walt (2001) 175.
211 Schwikkard and Van der Merwe (2016) 393.
212 *Ibid*.
213 *S v Van As* at 108B. See also Schwikkard and Van der Merwe (2016) 394.
214 Schmidt and Rademeyer (2003) 9-72.
215 Bonnie and Slobogin "The role of mental health professionals in the criminal process: The case for informed speculation" (1980) 66 *Virginia Law Review* 466 and Meintjies-Van Der Walt (2001) 189.
216 Gutheil *et al*. "'The wrong handle': Flawed fixes of medicolegal problems in psychiatry and law" (2005) 33 *The Journal of American Academy of Psychiatry and the Law* 434; Smith (1989) *Behavioral Sciences and the Law* 177 and Bazelon "Psychiatrists and the adversary process" (1974) 230 *Scientific American* 18.
217 Wettstein "Quality and quality improvement in forensic mental health evaluations" (2005) 33 *The Journal of the American Academy of Psychiatry and the Law* 172.
218 Smith (1989) *Behavioral Sciences and the Law* 164.
219 Wettstein (2005) *The Journal of the American Academy of Psychiatry and the Law* 169 and Alldridge "Forensic science and expert evidence" (1994) 21 *Journal of Law and Society* 142.
220 Smith (1989) *Behavioral Sciences and the Law* 164.
221 *Barefoot v. Estelle*, 463 U.S. 880 (1983).
222 *Barefoot v. Estelle* as quoted in Smith (1989) *Behavioral Sciences and the Law* 164.

witnesses often testify on matters that are beyond the knowledge of the legal representative questioning the witness.[223] This can preclude any effective cross-examination.[224] Defence counsel also has a tendency to exploit the belief in a verified version of science and try to highlight the fact that an expert witness cannot be absolutely certain.[225] Essential to successful cross-examination is the general advice that you should not ask a question which you do not know the answer to.[226] In the case of expert evidence, this can prove to be difficult if the issues extend beyond the knowledge of the cross-examiner, which could result in losing cross-examiner control over the witness.[227] Reservations are held about whether cross-examination is appropriate to test the veracity and accuracy of expert witnesses.[228]

The effectiveness of cross-examination is also based on the skills, sophistication, and resources available to the opposing legal representative.[229] This can be particularly challenging when an indignant accused does not have the financial means to secure their own expert assistance and either defend themselves, or the appointed legal representative does not possess the necessary skills. The court can draw a cross-examiner's attention to specific matters to assist, especially in the case of inexperienced counsel or an undefended accused.[230] This cannot, however, replace proper cross-examination by counsel.

In a civil case, an unskilled and/or unprepared legal representative provides for a more problematic situation. A prime example of this occurred in the case of *Ndlovu v Road Accident Fund*[231] where there was no "effective cross-examination" by the defendant's counsel[232] paired with a lack of diligence and professional skill with which the Road Accident Fund and its legal representatives conducted the litigation.[233] As a result, the

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223 Moore *et al*. "Liability in litigation support and courtroom testimony: Is it time to rethink the risks?" (1999) 9 *Journal of Legal Economics* 56.
224 *Ibid*.
225 Meintjies-Van der Walt "Expert evidence and the right to a fair trial: A comparative perspective" (2001) 17 *South African Journal on Human Rights* 318.
226 Morris *et al*. (2010) *Technique in litigation* 237.
227 Morris *et al*. (2010) 237 and Meintjies-Van Der Walt (2001) 190.
228 Meintjies-Van Der Walt (2001) 189.
229 Appelbaum "Forensic psychiatry: The need for self-regulation" (1992) 20 *Bulletin of the American Academy of Psychiatry and Law* 156.
230 Schwikkard and Van der Merwe (2016) 400.
231 *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ). The case is discussed in more detail in 3.7.2.2.
232 *Ndlovu v Road Accident Fund* at par. 102.
233 *Idem* par. 103.

court stated that it had to "constantly guard itself" to not go beyond clarification.[234] The court stressed that in an adversarial system it cannot "supplant inadequate or non-existent cross-examination by a legal representative with its own line of questioning"[235] The court referred to the English case of *Jones v National Coal Board* in which the court said of the adversarial system that: [236]

> …it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other…The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure…

In the *Ndlovu* case, because the discrepancies in the expert reports and the plaintiff's statements were not dealt with during cross-examination, the court had to accept the evidence that was placed before them which had a significant impact on the quantum.[237]

A further problem with cross-examining, and even questioning, an expert witness, in general, is that it may elicit distorted testimony.[238] When questioning an expert witness, counsel designs the questions to focus on their client's case, which can be misleading and constricted.[239] Asking leading questions in cross-examination can distort the testimony by rendering it inappropriately conclusionary instead of allowing an expert witness to explain the reasoning which is necessary.[240] The suggestions in the cross-examination can also steer the witness in a specific direction and does not elicit the actual truth.[241] Meintjies-Van der Walt describes this as a "paradox of the adversarial system" as the role of the expert witness is to assist the trier of fact to find the truth, but instead, the message of the expert reaches the trier of fact in a filtered and contorted manner.[242]

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234 *Idem* par. 104.
235 *Idem* par. 105.
236 *Jones v National Coal Board* (1957) 2 All ER 155 (CA) at 159A-B as quoted in *Ndlovu v Road Accident Fund* at par. 106.
237 *Ndlovu v Road Accident Fund* at par. 105.
238 Gutheil and Bursztajn "Avoiding *ipse dixit* mislabelling: Post-Daubert approaches to expert clinical opinions" (2003) 31 *The Journal of the American Academy for Psychiatry and Law* 207.
239 *Ibid*.
240 *Ibid*.
241 Meintjies-Van Der Walt (2001) 192.
242 Meintjies-Van der Walt "Experts testifying in matters of child abuse: The need for a code of ethics" (2002) 3 *Child Abuse Research in South Africa* 25.

The two main objectives of cross-examination are usually seen as obtaining evidence to favour your case and to weaken the evidence of the opponent.[243] The third objective is seen by Harris as a last resort, which is to attack the credibility of the witness[244] , but this objective is often emphasised. Jasanoff expresses the concern with the fact that cross-examination of expert witnesses is often concerned with "an almost obsessive concern with inconsistencies in the witness's testimony and with biases, such as ties to economic interests, that are considered important in common-sense tests of credibility".[245] Evident from the review of cases in chapter 3 is that the main attack, whether with or without merit, was a form of bias to attack the credibility of the expert witness. The credibility of a witness is not only affected by bias but also by the demeanour and candour the witness and contradictions in the evidence.[246] Demeanour as a reliable indicator of credibility has, however, been questioned especially with regard to expert witnesses.[247] In *S v Kelly* Diemont JA held that: [248]

> …as counsel conceded in a homely metaphor, demeanour is, at best, a tricky horse to ride. There is no doubt that demeanour- 'that vague and indefinable factor in estimating a witness's credibility' … - can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour…: A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story.

In *Michael and another v Linksfield Park Clinic (Pty) Ltd* in the court's approach to evaluating expert evidence, it determined that as a general rule evaluating the expert evidence will not involve, "considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court's reaching its own conclusion on the issues raised".[249] Zeffertt and Paizes commented that this does not mean that credibility will always be irrelevant when evaluating expert

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243 Morris *et al.* (2010) 237.
244 Keeton as quoted in Morris *et al.* (2010) 237.
245 Jasanoff as quoted in Meintjies-Van Der Walt (2001) 192-193.
246 Morris *et al.* (2010) 62.
247 Gravett "Spotting the liar in the witness box- How valuable is demeanour evidence really? (1)" (2018) 81 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 441 and Meintjies-Van Der Walt (2001) 190.
248 *S v Kelly* 1980 (3) SA 301 (A) at 308B-E.
249 *Michael and another v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) at 1200D-E.

evidence.[250] Factors such as bias, as mentioned above, can seriously affect the weight of the testimony.[251]

Whether the performance of expert witnesses in court indicates anything relating to their skills or experience in their given field of expertise is questionable.[252] Despite criticism against the use of cross-examination as an effective manner to solve the hired gun problem or test the veracity of the witness, cross-examination will not be abandoned as a forensic tool any time soon.[253] Even if the cross-examiner is skilful and thoroughly prepared the purpose of cross-examination is not to improve the quality of the psycho-legal assessments or reports.[254] Legal representatives can, therefore, be complacent about any deficiency in the quality if they retained the expert.[255] Cross-examination, therefore, cannot assist in improving the quality of psycho-legal assessments.

When challenging expert witnesses access to expertise can influence counsel's ability.[256] In cases dealing with competency, the court appoints the experts in terms of the Criminal Procedure Act, but in general, there is no specific resource allocation for the purpose of the assistance of expert witnesses for indignant accused.[257] In *S v Huma* Claasen J held that the in cases where it is "necessary in order that proper justice may be done" the court can appoint an expert for the accused.[258] No specific criteria have been set out to determine when the appointment of expert witnesses will be in the interests of justice.[259] This can influence the cross-examination and regulation of expert evidence and should be kept in mind. A further investigation into the impact of a lack of resources is, however, beyond the scope of the study.

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250 Zeffertt and Paizes (2010) 106.
251 Zeffertt and Paizes (2010) 106.
252 Meintjies-Van Der Walt (2001) 191.
253 *Idem* 193.
254 Wettstein (2005) *The Journal of the American Academy of Psychiatry and the Law* 169.
255 *Ibid*.
256 Meintjies-Van der Walt (2001) *South African Journal on Human Rights* 310.
257 *Ibid*.
258 *S v Huma and another* (1) 1995 (2) SACR 407 (W) at 410C.
259 Meintjies-Van der Walt suggests that the courts should consider the criteria set out by the European Court of Human Rights. See the discussion in Meintjies-Van der Walt "The proof of the pudding: The presentation and proof of expert evidence in South Africa" (2003) 47 *Journal of African Law* 101.

4.2.5 Evaluating expert evidence

After expert evidence is introduced the triers of fact must determine the quality, reliability and overall validity of the evidence.[260] When deciding the weight that should be attached to expert evidence, it is trite that a court is not bound by or obliged to accept the expert evidence,[261] including opinions agreed upon by two or more experts.[262] As indicated in the leading case in medical negligence, *Van Wyk v Lewis* the court "..will pay high regard to the views of the profession but is not bound to adopt them".[263] In the case of a joint minute where two or more experts agree on an opinion, the court may also reject the opinion on various grounds including that the opinion was unconvincing.[264] The evaluation of evidence is not governed by extensive legal rules; the rules that can assist the court largely stem from case law.[265] There is no hard and fast rule when evaluating expert evidence to determine the probative value.[266] A factor that is taking into consideration in determining the cogency of the expert evidence is whether the evidence has been challenged or not.[267] In cases where expert evidence is introduced the triers of fact are challenged with finding the means to assess the evidence before them.[268]

When evaluating evidence, narrative coherence is important.[269] Decision-making is often approached using a narrative where the trier of facts organises and interprets the evidence in context of the facts that tell a story.[270] The evidence in a case is evaluated in its totality and with consideration of the standard of proof that is applicable. In *S v Van As* Judge Kirk-Cohen emphasised that when evaluating evidence consideration is given to the aspects on their own merits but also as part of a puzzle where one fact compliments another and supports the decision to reveal a

260 Meintjies-Van Der Walt (2001) 202.
261 *Twine and another v Naidoo and another* at 306 and *S v Mngomezulu* at 798.
262 *Thomas v BD Sarens (Pty) Ltd* at par.13.
263 *Van Wyk v Lewis* 1924 AD 438 at 447.
264 *Thomas v BD Sarens (Pty) Ltd* at par.13.
265 Schwikkard and Van der Merwe (2016) 567.
266 Meintjies-Van Der Walt (2001) 213.
267 Meintjies-Van der Walt (2003) *Journal of African Law* 104.
268 *Ibid*.
269 Meintjies-Van Der Walt (2001) 213.
270 *Ibid*.

final picture.[271] The cogency of expert evidence should be weighed "in the contextual matrix of the case with which he [the Court] is seized".[272]

When evaluating expert evidence, the weight of the opinion will depend on the reliability of the facts on which it is based.[273] The expert opinion of a mental health professional who conducted a psycho-legal assessment is largely based on facts given by the evaluee, which can be detrimental to the psychiatric or psychological evidence. In *S v Mthethwa*[274] Goliath DJP recognised that the weakness of psychiatric evidence lay in the reliance on the facts given by the evaluee and referred to the English case of *Singh v Parkfield* which held that, "[i]t is common sense and both the psychiatrists before me agree, that particularly in matters of psychiatry the accuracy and honesty of the patient is all important. Clearly in this case, my own assessment of the plaintiff is, therefore crucial".[275]

The result is that if the testimony of the evaluee is discredited the opinion of the mental health professional that relied on the evaluee's testimony will be of little or no value since the weight attached to the opinion is inextricably linked to the reliability of the evaluee.[276] Burchell opines, based on the judgment by Kumleben JA in *S v Potgieter*, that because the weight of psychiatric (or psychological evidence) depends on the cogency of the evaluee's testimony the hearing of the expert evidence should be delayed in order for the psychologist or psychiatrist to re-evaluate their opinion.[277]

In cases where the evaluee does not testify, the court cannot determine the truthfulness of the account, and the expert evidence will be of no value.[278] In *S v Di Blasi* the accused handed in a written statement in terms of section 112(2) of the Criminal Procedure Act.[279] The defence argued in mitigation of sentence that the

271 *S v Van As* at 110F-G.
272 *S v M* 1991 (1) SACR 91 (T) at 100A.
273 See in general Schmidt and Rademeyer (2003) 17-19.
274 *S v Mthethwa* (CC03/2014) [2017] ZAWCHC 28 (16 March 2017).
275 *Singh v Parkfield* (1996) PIQR Q 110 as referred to in *S v Mthethwa* at par. 97.
276 Schmidt and Rademeyer (2003) 17-19; *S v Mthethwa* at par. 98; *S v Shivute* at 661H; *S v Mngomezulu* at 798F-H and *S v Potgieter* 1994 (1) SACR 61 (A) at 81D-E.
277 Burchell "Non-pathological incapacity: Evaluation of psychiatric testimony" (1995) 8 *South African Journal of Criminal Justice* 42.
278 *S v Mthethwa* at par. 97 and *S v Shivute* at 661H.
279 *S v Di Blasi* 1996 (1) SACR 1 (A).

accused had acted with diminished criminal responsibility.[280] Dr Zabow, a psychiatrist, and Dr Venter, a clinical psychologist, both evaluated the accused and testified on the issue of diminished criminal responsibility. Vivier JA remarked that as the accused did not give evidence, his plea explanation was largely untested and as such reduces the weight that can be attached to the expert evidence.[281]

In *S v M* the court emphasised the fact that expert evidence will not lightly be rejected in the case where an expert furnished the reasons in a satisfactory manner.[282] As discussed above, the basis rule is applied during the evaluation of the expert opinion.[283] An expert witness must give sufficient detail when explaining the reasons behind their opinion to enable the court to evaluate and assess the evidence. The court in *S v Baleka* admonished the expert witness for merely confirming what was put by counsel to the opposing expert during cross-examination and falling back on generalisations.[284] The Court in *Baleka* indicated that an expert witness must "put his evidence across in his own words *viva voce*"[285] and not hide "behind the words of counsel".[286] Not only is the expert evidence not evaluated *in vacuo,* but common sense should also play a role.[287]

Another aspect that is considered when evaluating expert evidence is the conflicting opinions of expert witnesses. Numerous cases have been reported where the courts were faced with two opposing opinions of expert witnesses. In the case of *Burger and another v Executor of the Estate of the Late Malan NO and others,*[288] the judge set out the main principles in cases where expert witnesses' opinions conflict. In the *Burger*-case, it was alleged that the signature on the last will had been forged. Both the plaintiffs and the defendants called handwriting experts, the plaintiffs' expert being of the view that the signatures were a consequence of a forgery and the defendants' expert opined that no form of forgery was apparent. Both expert witnesses compiled

280 *Idem* 6C.
281 *Idem* 6F-G.
282 *S v M* at 99H-100C.
283 See 4.2.1.2.
284 *S v Baleka and others* (3) 1986 (4) SA 1005 (T) at 1021C-D.
285 *Idem* 1021D.
286 *Ibid.*
287 *S v Van As* at 111B-C.
288 *Burger and another v Executor of the Estate of the Late Malan NO and others* (2016) 1 All SA 733 (WCC).

reports and testified in court. Judge Yekiso referred to *R v Jacobs*[289] and reiterated that the role of the expert is not to replace the finding made by the presiding officer.[290] The presiding officer is required to evaluate whether and to what extent the expert opinions are founded on logical reasoning.[291] Judge Yekiso approved the decision in *S v Malindi*[292] where the court indicated that it must decide which of the competing experts are the most credible.[293] The reputation and experience are considered[294] in the determination, but the ultimate analysis is to determine whether the expert's opinion was founded on logical reasoning.[295]

Judge Yekiso in the *Burger*-case pointed out that a court "does not ask whether a particular scientific thesis has been proved or disproved".[296] The judicial proof in civil proceedings lies in the balance of probabilities on a "conspectus of the totality of the evidence".[297] The court followed the decision of *Abdo NO v Senator Insurance Co Ltd*[298] which dealt with mutually destructive accounts by expert witnesses where the court stated that it must first look at the direct evidence.[299] The court must, if the direct evidence is unacceptable, decide which opinion is preferable and base its decision on it.[300] In this case, the court emphasised the thorough and logical manner which the expert witness of the plaintiff based her opinion clearly indicating its preference to her opinion.[301]

In *S v Van* Judge Kirk-Cohen upon evaluating the expert witnesses of the opposing sides reiterated the importance of giving sound reasons and relying on authority when giving an opinion.[302] In the matter of *Joubert v Joubert,*[303] the applicant sought

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289 *R v Jacobs* at 146-147.
290 *Burger and another v Executor of the Estate of the Late Malan NO and others* at par.27.
291 *Ibid.*
292 *S v Malindi* 1983 (4) SA 99 (T).
293 *S v Malindi* at 104-105 quoted in *Burger and another v Executor of the Estate of the Late Malan NO and others* at par. 27.
294 The court in *Burger and another v Executor of the Estate of the Late Malan NO and others* dealt in detail with the curriculum vitae of both experts.
295 *Burger and another v Executor of the Estate of the Late Malan NO and others* at par. 27.
296 *Idem* 29.
297 *Ibid.*
298 *Abdo NO v Senator Insurance Co Ltd and Another* 1983 (4) SA 721 (E).
299 *Burger and another v Executor of the Estate of the Late Malan NO and others* at par. 61.
300 *Ibid.*
301 *Idem* par. 62.
302 *S v Van As* at 115E.
303 *Joubert v Joubert* (2004) JOL 12900 (T).

permission from the court to relocate to Gabon with her minor child. Various expert reports were filed, including the report by the Family Advocate together with an educational psychologist that assisted the Family Advocate. The applicant filed a report by Dr Marais, a medical doctor as well as Professor Swanepoel, an educational psychologist. The respondent also filed a report by an educational psychologist, Professor Naudé. The experts differed vastly with regards to the diagnosis of the minor child as well as the appropriate treatment.[304] Counsel for the respondent submitted that the matter be referred to trial in order for the expert witnesses to testify, arguing that this would enable the court to better evaluate the evidence.[305] The court held that the differences did not necessitate the referral to trial but that a common-sense approach must be followed and bearing in mind what will be in the best interests of the child.[306] The court referred to *Jackson v Jackson*[307] arguing that the differing conclusion merely reflects the difficulty in addressing human, as opposed to legal, problems.[308] Weighing all the evidence against the best interests of the child, the court made a value judgment.

In another family law matter, *Heynike v Roets*,[309] the two clinical psychologists did not agree on the recommendations regarding the relocation of the minor child.[310] Despite the disagreement, the court did not consider that the experts were biased, but instead considered the reasoning of each expert witness and based on the facts at hand decided which expert's approach was preferred.[311]

The Supreme Court of Appeal in *Michael and another v Linksfield Park Clinic (Pty) Ltd*[312] laid down guidelines to approach a conflict between expert medical witnesses in delictual cases based on negligence. The court emphasised the logical analysis

304 *Joubert v Joubert* at par. 11.
305 *Ibid.*
306 *Ibid.*
307 *Jackson v Jackson* 2002 (2) SA 303 (SCA).
308 *Joubert v Joubert* at par. 16.
309 *Heynike v Roets* (2001) 2 All SA 79 (C).
310 *Idem* 83.
311 *Idem* 84.
312 *Michael and another v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA). For a discussion on the case see Carstens "Setting the boundaries for expert evidence in support or defence of medical negligence" (2002) 65 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 430 and Swanepoel "Law, psychiatry and psychology: A selection of medico-legal and clinical issues" (2010) 73 *Tydskrif van Hedendaagse Romeins-Hollandse Reg* 197-198.

stating that when evaluating evidence and diverging expert opinions, one must determine whether and to what extent it is founded on logical reasoning.[313] A logical basis means that the court must be satisfied that the expert considered comparative risks and benefits, and on that basis reached a defensible conclusion.[314] If a body of professional opinion overlooks an obvious risk, which could have been guarded against, it will not be reasonable, even if almost universally held.[315] The court held that despite the support of a body of professional opinion, an expert opinion that does not withstand logical analysis is not reasonable.[316] The court lastly emphasised that expert scientific witnesses tend to assess likelihood in terms of scientific certainty, and not in terms of where the balance of probabilities lies on a review of the whole of the evidence.[317] The approach in *Linksfield Park Clinic* is generally followed in cases with conflicting expert testimony. In *Medic-Clinic v Vermeulen* the Supreme Court used the approach in *Linksfield Park Clinic* and held that:[318]

> Experts may legitimately hold diametrically opposed views and be able to support them by logical reasoning. In that event it is not open to a court simply to express a preference for the one rather than the other and on that basis to hold the medical practitioner to have been negligent. Provided a medical practitioner acts in accordance with a reasonable and respectable body of medical opinion his conduct cannot be condemned as negligent merely because another equally reasonable and respectable body of medical opinion would have acted differently.

With regard to the evaluation of expert opinions, the appeal court has confirmed that it is in as good a position to evaluate the value to be attached to the opinion as to the court *a quo*.[319] In the majority judgment of the Supreme Court of Appeal in *Jackson v Jackson*, discussed in chapter 3,[320] Scott JA explained that when it comes to a witness,

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313 *Michael and another v Linksfield Park Clinic (Pty) Ltd* at 1200H.

314 *Michael and another v Linksfield Park Clinic (Pty) Ltd* at 1200H. Carstens submits that the court correctly ruled that it must be satisfied that the tendered medical opinion must have a logical basis, but criticises the judgement as the court held that logic is indicative of reasonableness. Logic cannot necessarily be equated with reasonableness which is a value judgment. See Carstens "Setting the boundaries for expert evidence in support or defence of medical negligence" (2002) 65 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 430.

315 *Michael and another v Linksfield Park Clinic (Pty) Ltd* at 1200H.

316 *Idem* 1201C-D.

317 *Idem* 1201E-F.

318 *Medic-Clinic Limited v Vermeulen* (504/13) [2014] ZASCA at par.5

319 *Jackson v Jackson* at par. 16 of the majority judgment and *Jacobs and another v Transnet Ltd t/a Metrorail and another* 2015 (1) SA 139 (SCA) at par. 15.

320 See 3.7.2.

especially a professional person such a psychologist, the trial court's observation of the witnesses should not be overemphasised.[321]

Certain guidelines and rules have developed over the years to assist in the weighing up of expert evidence. As Meintjies-Van Der Walt eloquently states the traditional approaches to weighing up evidence "may flounder in the sea of expertise".[322] To ensure that the expert evidence is of a high-quality before reaching the courts, the regulation within the professional organisation plays a critical role.

4.2.6 Court assessors and court-appointed experts

A judge or magistrate can be assisted by an assessor during a trial. In criminal trials section 145(1)(b) of the Criminal Procedure Act determines that an assessor who sits with a judge in a superior court is a person "in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial". The phrase "experience in administration of justice" has led to the appointment of advocates, magistrates, attorneys, and legal academics as assessors. For example, in the highly publicised trial of Oscar Pistorius Judge Masipa of the Gauteng High Court appointed two advocates to assist her with the trial.[323] In complex cases, the particular knowledge of the matter will be useful, such as a mental health professional in a complex case dealing with a psycho-legal aspect. Before the assessor hears any evidence, they must first take an oath or make an affirmation administered by the presiding judge and confirm that they will give a true verdict upon the issues to be tried.[324] The judge is the co-finder of fact with the assessor or assessors, and the finding of the majority of the members of the court will be the decision of the court.[325] In the case where there is only one assessor, and there is a difference of opinion, the judge's decision will be the finding of the court.[326] The

321 Meintjies-Van der Walt (2002) *Child Abuse Research in South Africa* 25.
322 Meintjies-Van der Walt (2003) *Journal of African Law* 89.
323 *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014).
324 Section 145(3) of the Criminal Procedure Act 51 of 1977.
325 Section 145(4)(a) of the Criminal Procedure Act 51 of 1977.
326 Section 145(4)(a) of the Criminal Procedure Act 51 of 1977.

judge must decide alone on any questions of law[327] and must give reasons for the decision or finding of the court.[328]

The importance of assessors was emphasised in the Constitutional Court case of *S v Jaipal*[329] where the court held that the importance of the role of assessors lies not only in their participation in judicial decision making but "…if chosen carefully, could represent a significant degree of community involvement in the judicial process".[330] The court further stressed that as with presiding officers the assessors must be impartial[331] and because of their important role in the functioning as well as the legitimacy of criminal courts "[t]heir dignity, status and needs must be respected by all those who interact with them in the performance of their judicial duties".[332]

For regional and district courts provision is also made for the appointment of assessors. Section 93*ter* of the Magistrates' Court Act 32 of 1994 also makes provision for a magistrate to be assisted by one or two assessors during a criminal trial. The presiding officer can appoint the assessor(s) if they deem it expedient for the administration of justice and before any evidence has been led or in the case of a sentencing trial, in considering a community-based punishment.[333] The appointment of assessors is peremptory in murder cases in the regional court unless the accused request that the trial proceeds in their absence.[334] Unlike section 145(1)(b) and section 34 of the Magistrates' Courts Act the assessor is a "lay" assessor and need not have any specific skill and experience in the matter. The presiding officer must only be of the opinion that the assessor will assist the court.[335] To determine whether the assessors would be expedient for the administration of justice there are several factors that the presiding officer must take into account: cultural and social environment from which the accused originates; the accused's educational background; nature and

327 Section 145(4)(c) of the Criminal Procedure Act 51 of 1977.
328 Section 146(b) of the Criminal Procedure Act 51 of 1977.
329 *S v Jaipal* 2005 (1) SACR 215 (CC).
330 *Idem* par. 36.
331 *Idem* par. 37.
332 *Idem* par. 53.
333 Section 93*ter*(1) of the Magistrates' Courts Act 32 of 1944.
334 Section 93*ter*(1) of the Magistrates' Courts Act 32 of 1944. See also *S v Khambule* 1999 (2) SACR 365 (O) and *S v Du Plessis* 2012 (2) SACR 247 (GSJ). In *S v Gayiya* 2016 (2) SACR 165 (SCA) the Supreme Court of Appeal confirmed that the appointment of assessors in murder trial in the regional court is peremptory unless the accused requests that the trial proceed without the assessors.
335 Section 93*ter*(1) of the Magistrates' Courts Act 32 of 1944.

seriousness of the offence; extent or probable extent of the punishment if convicted; any other matter or circumstances which may deem the use of an assessor desirable.[336] When an assessor is involved, the presiding officer is a co-finder of fact[337], but any matter of law arising for decision at a trial is for the presiding officer to decide alone.[338]

In civil trials in the magistrates' courts, section 34 of the Magistrates' Courts Act, read with rule 59,[339] allows for one of two assessors to act in an advisory capacity upon application of either party. The assessor(s) must have skill and experience in the matter.[340] The "expert" assessors can be of great assistance in matters where the specific expertise fall beyond the scope of the magistrate's expertise. The assessor need not have any legal training and can, for example, be a mental health professional that can help the court navigate through a case dealing with an intricate psycho-legal question.

A court can also call their own expert witness in criminal proceedings.[341] The court-appointed expert in a criminal case has an inquisitorial nature, but as Meintjies-Van der Walt argues in the strong adversarial climate, the courts rarely rely on this power to call expert witnesses.[342] Despite the wariness, it appears that there is growing support to exercise the rights in terms of section 186.[343] Judge of Appeal Mpati in *Rammoko v Director of Public Prosecutions*[344] remarked that the court also has a duty in sentencing procedures and that the court *a quo* could have benefitted from having

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336 Section 93*ter*(2) of the Magistrates' Courts Act 32 of 1944.

337 Schwikkard and Van der Merwe (2016) 16.

338 Section 93*ter*(3)(a) of the Magistrates' Courts Act 32 of 1944.

339 Rule 59 of Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa (GNR 740) in the Government Gazette No. 33487 dated 23 August 2010 (as amended).
In terms of Rule 59(1) the court may from time to time frame a list of persons who appear to be qualified and willing to act as assessors under section 34 of the Magistrates' Courts Act 32 of 1944.

340 Section 34 of the Magistrates' Courts Act 32 of 1944. Section 34 is pending an amendment by section 1 of the Magistrates' Courts Amendment Act 67 of 1998. Act 67 of 1998 was already assented to on 28 September 1998 but the date of commencement is still to be proclaimed. The amended section 34 will read as follows:

> In any action the court may, upon the application of either party, summon to its assistance one or two persons who are suitable and available and who may be willing to sit and act as assessors in an advisory capacity.

The amendment will have the effect that the "skill and experience" is removed as requirements.

341 Section 186 of the Criminal Procedure Act 51 of 1977.

342 Meintjies-Van Der Walt (2001) 134.

343 Meintjies-Van der Walt (2003) *Child Abuse Research in South Africa* 45.

344 *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

the "complainant be interviewed by a psychologist or other appropriately qualified or trained person to establish the effects of the rape on her, present and future".[345] There is no equivalent in civil cases where the witnesses are party controlled.

4.2.7 Duties of the expert witness

Beyond the evidentiary rules and guidelines discussed above the courts have also emphasised the duties and the role of expert witnesses. The duties of an expert witness have been set out in the well-known English case, *Ikarian Reefer,*[346] which has been cited with approval in *Schneider NO and others v AA and another.*[347] The duties as set out are: [348]

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise . . . An expert witness should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

345 *Idem* 251H-I.
346 *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd ("The Ikarian Reefer")* (1993) Lloyd's Law Reports (2) (Q.B. (Com. Ct.) 68.
347 *Schneider NO and others v AA and another* 2010 (5) SA 203 (WCC).
348 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')* as quoted in *Schneider NO and others v AA and another* at 211E-I.

In addition to the duties quoted in the case of *Schneider NO* the court in the *Ikarian Reefer* case also referred to the following duties:[349]

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and where appropriate to the court.
7. Where expert evidence refers to photographs, plans, calculations… survey reports or other similar documents there must be provided to the opposite party at the same time as the exchange of reports…

The expert witness has a duty not only to provide the court with their expertise but to do so in an objective and unbiased manner.[350] In amplification of the duties listed in the *Ikarian Reefer* case and developed in case law through the years, Judge Valley in *Twine* also extensively dealt with the role and responsibilities of the expert witness.[351] In the judgment, the court also referred to the duty of an expert witnesses not to burden the court with what is sometimes referred to as "expertise that is *fausse* and science that is junky" referring to expert witnesses who repeatedly provide opinions to party, and the evidence is then repeated from case to case or an opinion that is only mildly altered from case to case.[352] The judge also referred to the English case of *Meadow v General Medical Council* emphasising that an expert witness is not tied to any party as there "is no property in an expert witness".[353]

The failure by an expert witness to observe the duties will influence the value to be attached to the opinion.[354] The professional organisations should ensure that the professionals who act as expert witnesses are aware of the duties placed on them. It is submitted that the failure to adhere to the duties should not only influence the weight of the evidence but should also hold consequences for the professional, whether in the form of disciplinary proceedings or a cost order as will be discussed below in 4.2.8.

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349 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')* at 69.
350 *Schneider NO and others v AA and another* at 211I-J.
351 *Twine and another v Naidoo and another* at par. 18.
352 *Idem* par. 18(u).
353 *Meadow v General Medical Counci*l (2007) 1 All ER 1 (CA) at par. 23 as quoted in *Twine and another v Naidoo and another* at par. 18(o).
354 Zeffertt and Paizes (2010) 104.

4.2.8 Immunity and cost orders

As witnesses, including expert witnesses, form an integral part of the legal system, it is important that they should not be discouraged to testify voluntarily because of the potential threat of a damages action.[355] In *Preston v Luyt* the court stated that: [356]

> [T]he great importance to the administration of justice that witnesses should testify with minds absolutely free from the apprehension of being annoyed by civil actions for anything they may say as such, has already been pointed out. They are brought into court by the mandate of the law and compelled to testify, usually for the benefit of others.

The court in *Preston* recognised that the privilege of a witness is recognised but does not go as far as an absolute privilege.[357] As confirmed in *Black v Joffe*,[358] in South African law, there is no absolute immunity for witnesses; instead, there is a qualified privilege for statements made by a witness under oath.[359] The qualified privilege is in place to protect a witness but will not protect the witness if they exceed the limit by making intentional false, malicious statements or statements made with the intention to injure or insult.[360]

Swanepoel opines that although expert witnesses were often protected, mental health professionals who act as expert witnesses are beginning to be held accountable for their testimony.[361] Mental health professionals who act as expert witnesses are subjected to sanctions by both professional organisations and delictual actions.[362] Case law and research on the matter is, however, limited to almost non-existent. According to Appelbaum civil action against expert witnesses are very rare because of the immunity that has been granted to experts and the frequent lack of a relationship between the party who is aggrieved by the testimony and the offending expert.[363]

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355 *Black v Joffe* (2007) 2 All SA 161 (C) at par. 27 and Swanepoel (2010) *Tydskrif van Hedendaagse Romeins-Hollandse Reg* 198.
356 *Preston v Luyt* 1911 EDL 298 at 319 as quoted in *Black v Joffe* at par. 28.
357 *Preston v Luyt* 1911 EDL 298 at 310 as quoted in *Black v Joffe* at par. 28.
358 *Black v Joffe* (2007) 2 All SA 161 (C).
359 *Idem* par. 27.
360 *Idem* par. 29.
361 Swanepoel (2010) *Tydskrif van Hedendaagse Romeins-Hollandse Reg* 199.
362 *Ibid*.
363 Appelbaum (1992) *Bulletin of the American Academy of Psychiatry and Law* 157.

Although Appelbaum's comment refers to the American context, it is submitted that it is equally applicable in South Africa.

In the South African context, cost orders are usually subject to the qualification that it may only be given against a person who is truly a party before the court.[364] A non-party can, however, under certain instances, be ordered to pay costs *de bonis propriis*.[365] Cost *de bonis propriis* can be awarded against an attorney.[366] This is usually only done in serious cases, including cases of professional negligence.[367] The tendency, according to Cilliers is for courts to in the alternative or adjunct to an order of *costs de bonis propriis* to disallow all or part of the fees recoverable by the offending legal practitioners.[368] In *Ndlovu v Road Accident Fund*, discussed in detail in 3.7.2.2, the court after considering all of the evidence made the following comment:[369]

> However, a time may come when a court will consider that an expert's lack of care, skill and diligence will have adverse cost consequences upon the successful litigant, or will direct that the expert is limited in what may be recovered from the instructing party (particularly where there is a contingency-fee arrangement and this may constitute an additional disbursement reducing the ultimate reward received.)

It is submitted that the courts should act against an expert witness who lacks the care, skill and diligence required by awarding a cost order against them. This would be similar to the construct of attorneys who owe a duty to the court. As remarked in *Ndlovu,* the consequences can include limiting the amount that an expert can recover from the instructing party or in serious cases, and it should even result in a cost order *de bonis propriis*. Cost orders of this nature have been made against expert witnesses in other common law jurisdictions such as England which will be dealt with in the following chapter.[370]

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364 *Mitchell v Mossel Bay Liquor Licensing Board* 1954 (1) SA 398 (C) at 417-418. See also Cilliers (2020) *Law of costs* par.2.03.
365 Cilliers (2020) par.2.02.
366 *Idem* par.10.25.
367 Cilliers (2020) *Law of costs* par.10.25.
368 Cilliers (2020) *Law of costs* par.10.25.
369 *Ndlovu v Road Accident Fund* at par. 122.
370 See 5.4.9.

4.3 Regulation within the professional organisations

4.3.1 Health Professions Council of South Africa

Health Professions Council of South Africa (HPCSA) is the supreme statutory body that regulates the health professions in South Africa.[371] Section 3 of the Health Professions Act[372] sets out the objectives of the council. As Carstens and Pearmain indicate the listed objectives in section 3 makes it clear that the HPCSA is a value-driven regulatory body with the ultimate aim of ensuring quality health standards, protection of the public and also to provide guidance to medical professionals.[373] Some of the objectives listed in section 3 include:

- to co-ordinate the activities of the professional boards established in terms of the Health Professions Act and to act as an advisory and communicatory body for such professional boards;[374]
- to serve and protect the public in matters involving the rendering of health services by persons practising a health profession;[375] and
- to uphold and maintain professional and ethical standards within the health professions.[376]

In terms of section 4 of the Health Professions Act, the HPCSA has wide powers to enable the Council to achieve the objectives of section 3. Of particular importance for this study is the power of the HPCSA to delegate any powers as it may determine to any professional board or committee.[377] The professional boards referred to, operate in conjunction with, and under the jurisdiction of, the HPCSA. The relevant professional boards will be discussed in 4.3.2. below. Amongst the various committees established by the HPCSA[378] is the Professional Conduct Review Committee that deals with inquiries into any complaint, charge or allegation of unprofessional conduct

371 Section 2 of the Health Professions Act 56 of 1974.
372 Health Professions Act 56 of 1974.
373 Carstens and Pearmain (2007) *Foundational principles of South African medical law* 251.
374 Section 3(a) of the Health Professions Act 56 of 1974.
375 Section 3(j) of the Health Professions Act 56 of 1974.
376 Section 3(m) of the Health Professions Act 56 of 1974.
377 Section 4(e) of the Health Professions Act 56 of 1974.
378 The HPCSA can establish a committee as it may deem necessary in terms of section 10 of the Health Professions Act 56 of 1974.

and the Human Rights, Ethics and Professional Practice Committee which is constituted, as the name suggests, to promote human rights and ethical conduct by the registered health practitioners.[379] The ensure the promotion of human rights and ethical conduct the HPCSA in consultation with all of the professional boards drew up ethical guidelines for good practice in the health care profession. The roles of the committees and the ethical guidelines, including the ethical and professional rules of the HPCSA, will be discussed under the section of disciplinary proceedings.

4.3.2 Professional boards of the HPCSA

Section 15 of the Health Professions Act determines that a professional board can be established with regard to any health profession, or two or more such professions, in terms of which a register is kept. There are currently twelve professional boards that operate under the jurisdiction of the HPCSA.[380] In context of this study, the Professional Board for Psychology and the Medical, Dental and Medical Science Professional Board are of particular importance and will be dealt with in detail.

The objects of the professional boards are set out in section 15A of the Health Professions Act. Many of the objects, such as promoting health and enhancing the dignity of the profession and guiding the professionals whilst protecting the public overlap with the objects of the HPCSA. As Carstens and Pearmain point out, the similarities support the notion that the professional boards are an extension of the

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379 Health Professions Council of South Africa "Governance" (2020) available online at https://www.hpcsa.co.za/?contentId=0&menuSubId=15&actionName=About%20Us (last accessed on 18 March 2020).

380 The twelve professional boards are:

- Professional Board for Dental Assisting, Dental Therapy and Oral Hygiene
- Professional Board for Dietetics and Nutrition
- Professional Board for Emergency Care
- Professional Board for Environmental Health
- Medical, Dental and Medical Science Professional Board
- Professional Board for Medical Technology
- Professional Board for Occupational Therapy, Medical Orthotics/Prosthetics and Art Therapy
- Professional Board for Optometry and Dispensing Opticians
- Professional Board for Physiotherapy, Podiatry and Biokinetics
- Professional Board for Psychology
- Professional Board for Radiography and Clinical Technology
- Professional Board for Speech, Language and Hearing Professions

The regulations relating to the constitution of the respective professional boards can be found in GNR 1245-1256 in Government Gazette No. 31633 of 28 November 2008.

HPCSA "operating as it were as the bureaucratic arm that regulates the respective professions …, while the HPCSA can be seen as the executive, over-arching regulatory body".[381] When assessing the role of the Professional Board for Psychology or any other professional board, it must be done in conjunction with the HPCSA.[382]

Section 15B(1) of the Health Professions Act, in turn, deals with the general powers of professional boards.[383] Many of the general powers relate to the education, training and registration of the practitioners with the respective professional boards but also contains a catch-all clause indicating that the professional boards can perform any other functions that are necessary or expedient to achieve the objects of the Health Professions Act.[384] If the matter falls entirely in the ambit of the relevant professional board, the decision made will not be subject to ratification by the HPCSA.[385]

4.3.2.1 Scope of the profession and registration of the practitioner

The scope of all of the health professions registrable in terms of the Health Professions Act is defined and provided for in regulations to the Act.[386] The professional boards are responsible for registering the names of persons practising in the particular discipline as per the requirements set out in section 33(2) of the Health Professions Act.[387] All persons wishing to practise in South Africa must register in terms of the

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381 Carstens and Pearmain (2007) 253-254.

382 *Idem* 254.

383 All of the paragraphs in section 15B(1), save for 15B(1)(f), of the Health Professions Act 56 of 1974 are pending an amendment by section 14 of Health Professions Amendment Act 29 of 2007. The date of commencement of the amendments is still to be proclaimed.

384 Section 15B(1)(g) of the Health Professions Act 56 of 1974.

385 Section 15B(2) of the Health Professions Act 56 of 1974.

386 Section 33(1) of the Health Professions Act 56 of 1974.

387 Section 33(2) of the Health Professions Act 56 of 1974 reads as follows:

> When a professional board has been established under section 15 in respect of any health profession, the professional board shall, subject to such restrictions in respect of his or her professional activities as it may determine, register in respect of such profession, the name of any person who—
>
> (a) (i) was engaged in the practice of such profession in the Republic or in a territory which formerly formed part of the Republic for a continuous period of not less than five years immediately prior to the date referred to in paragraph (c);
> (ii) is dependent, wholly or mainly, for his or her livelihood on the practice of such profession; and
> (iii) submits a certificate to the professional board stating that he or she is of good character; and
>
> (b) ….
>
> (c) submits to the professional board an application in the prescribed form containing proof to the satisfaction of the professional board of the facts referred to in subparagraphs (i) and (ii) of paragraph (a), within six months (or such longer period as the professional board may allow) after the date on which the scope of such profession was defined by the Minister in regulations contemplated in subsection (1).

Act.[388] It is important to note that any person registered in respect of any health profession shall only be entitled to practise the profession subject to any restrictions in respect of their professional activities and the use of such name, title and description in respect of their profession as the professional board may determine.[389] Any person who wishes to be registered in terms of the Health Professions Act must apply to the registrar and must submit their qualification together with proof of identity and good character and any other documents as required by the professional board concerned.[390] A certificate of registration is evidence of the registration but is only valid for a period of one year.[391] Every year a health practitioner must pay the prescribed registration fees and submit information as may be required by the HPCSA to enable it to keep accurate statistics on human resources in the field.[392] Registration is also subject to conditions relating to continuing professional developed discussed in 4.3.4.[393] The specific requirements concerning psychiatry and psychology will be discussed below.

As discussed in chapter 2,[394] psychiatrists are registered within the Medical, Dental and Medical Science Professional Board as medical specialists.[395] The acts that are deemed to determine the scope of the medical profession are listed as:[396]

(a) the physical medical and/or clinical examination of any person;
(b) performing medical and/or clinical procedures and/or prescribing medicines and managing the health of a patient (prevention, treatment and rehabilitation);
(c) advising any person on his or her physical health status;
(d) on the basis of information provided by any person or obtained from him or her in any manner whatsoever- (i) diagnosing such person's physical health status; (ii) advising such person on his or her physical health status; (iii) administering or selling to or prescribing for such person any medicine or medical treatment;

388 Section 17 of the Health Professions Act 56 of 1974.
389 Section 33(4) of the Health Professions Act 56 of 1974.
390 Section 17(2) of the Health Professions Act 56 of 1974.
391 Section 22(2) of the Health Professions Act 56 of 1974.
392 Section 22(2) of the Health Professions Act 56 of 1974.
393 Section 26 of the Health Professions Act 56 of 1974 deals with the compliance with conditions relating to continuing professional development as prerequisite for continued registration.
394 See 2.6.1.1.
395 Psychiatry is listed as a speciality in the Regulations Relating to the Specialities and Subspecialties in Medicine and Dentistry (GNR 590) in the Government Gazette No.22420 of 29 June 2001 (as amended) as prescribed in section 35 of the Health Professions Act 56 of 1974.
396 Regulations Defining the Scope of the Profession of Medicine (GNR 237) in Government Gazette No.31958 of 6 March 2009.

(e) prescribing, administering or providing any medicine, substance or medical device as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965);

(f) any other act specifically pertaining to the medical profession based on the education and training of medical practitioners as approved by the board from time to time.

Within the speciality field psychiatry, there are further registrable subspecialties that include addiction psychiatry,[397] child psychiatry,[398] consultation-liaison psychiatry,[399] forensic psychiatry,[400] geriatric psychiatry,[401] and neuropsychiatry.[402] To be able to register as medical specialists in psychiatry the registered medical practitioner must have obtained four years satisfactory education and training as the holder of a board-approved post as a registrar at a hospital, department or facility accredited by the board for specialist education and training[403] of which shall include a minimum of twelve months' education and training in a psychiatric hospital, of which at least six months shall have been in a psychiatric hospital which is also a teaching hospital.[404]

The subspecialty of forensic psychiatry is relatively new, having been added to the regulations of the Health Professions Act in October 2015.[405] A limited number of institutions offer a programme in the subspeciality forensic psychiatry to enable psychiatrists to register as forensic psychiatrists. Currently, the University of Cape Town offers an MPhil in Forensic Psychiatry,[406] University of Pretoria offers an MPhil

397 Regulations Relating to the Specialities and Subspecialities in Medicine and Dentistry: Amendment (GNR 376) in Government Gazette No.43145 of 27 March 2020.

398 Regulations Relating to the Specialities and Subspecialities in Medicine and Dentistry (GNR 590) in Government Gazette No. 22420 of 29 June 2001 (as amended).

399 Regulations Relating to the Specialities and Subspecialities in Medicine and Dentistry: Amendment (GNR 376) in Government Gazette No.43145 of 27 March 2020.

400 Regulations Relating to the Specialities and Subspecialities in Medicine and Dentistry (GNR 590) in Government Gazette No. 22420 of 29 June 2001 as amended by GNR 992 in Government Gazette No.39304 of 20 October 2015.

401 *Ibid.*

402 *Ibid.*

403 Regulation 6(2)(a) of Regulations Relating to the Specialities and Subspecialities in Medicine and Dentistry (GNR 590) in Government Gazette No. 22420 of 29 June 2001 (as amended).

404 Regulation 6(2)(j) of Regulations Relating to the Specialities and Subspecialities in Medicine and Dentistry (GNR 590) in Government Gazette No. 22420 of 29 June 2001 (as amended).

405 Regulations Relating to the Specialities and Subspecialities in Medicine and Dentistry: Amendment (GNR 992) in Government Gazette No.39304 of 20 October 2015.

406 University of Cape Town, Department of Psychiatry and Mental Health "Teaching: postgraduate" (2020) available online at http://www.psychiatry.uct.ac.za/psych/postgraduate-teaching (last accessed on 27 January 2020).

in Forensic Psychiatry,[407] and the College for Psychiatrists offers a subspecialty certificate in forensic psychiatry.[408] The regulations pertaining to the subspecialties do not define the precise scope of the practice of the subspecialties. To conduct psycho-legal assessments or forensic work, the Medical, Dental and Medical Science Professional Board does not prescribe any formal requirements, and a psychiatrist need not be qualified as a forensic psychiatrist.

Psychologists are registered under the Professional Board for Psychology and register within a category or categories of psychology. There are currently six registrable categories of psychology, namely, clinical, counselling, educational, industrial, research and the recently added neuropsychology.[409] Psychologists cannot at this stage register as forensic psychiatrists. In September 2011, the Minister of Health published an amendment of the regulations defining the scope of the profession of psychology.[410] The effect of the amendment was to introduce two new scopes of practice, namely forensic psychology and neuropsychology and to define the individual scopes of practice for each registration category that falls under the Professional Board for Psychology. The scope of practice of forensic psychology in the amended regulation indicated that the acts are in addition to the scope as provided for the practice of clinical psychologists. The acts included the following:

(a) conducting psychological assessments, diagnoses, and interventions, referring clients to appropriate professionals for further assessment or intervention;
(b) providing therapeutic interventions;
(c) advising on the development of policies, based on forensic psychological theory and research;

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407 University of Pretoria, Faculty of Health Sciences "MPhil Forensic Psychiatry (Coursework)" (2020) available online at https://www.up.ac.za/programmes/programmeid/1886247/year/2020 (last accessed on 27 January 2020).

408 The College of Psychiatrists "Sub-speciality certificate in forensic psychiatry of the college of psychiatrists of South Africa" (2020) available online at https://www.cmsa.co.za/view_exam.aspx?QualificationID=80 (last accessed on 27 January 2020).

409 The qualification of MA (Neuropsychology) at the University of Cape Town was added to the regulations by the Regulations Relating to the Qualifications which Entitles Psychologists to Registration: Amendment (GNR 1490) Government Gazette No. 42843 of 15 November 2019.

410 Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa (GNR 740) in the Government Gazette No. 33487 dated 23 August 2010 (as amended).

(d) designing, managing, and evaluating forensic psychology-based programmes, and interventions; designing, managing, and conducting research; reporting on, and supervising research, in forensic psychology;

(e) training, supervising students, interns, and other registered psychology practitioners in forensic psychology;

(f) conducting psychological practice and research in accordance with the Ethical Rules of Conduct for Practitioners registered under the Health Professions Act, 1974, adhering to the scope of practice of forensic psychologists; and

(g) providing expert evidence and/or opinions.

In Augusts 2013, the 2011 amendments to the regulations were challenged by the Recognition of Life Long Learning in Psychology Action Group (ReLPAG) and the Justice Alliance of South Africa (JASA). The case led to a settlement agreement which was made an order of court in November 2016.[411] The order stated that the regulations would be declared invalid, but the declaration of invalidity would be suspended for 24 months to afford the Minister of Health, HPCSA and the Professional Board an opportunity to correct the defects.[412] To address this, the Professional Board for Psychology established a Working Group on the Promulgation of Regulations. The Working Group on the Promulgation of Regulations invited the relevant stakeholders to give their input regarding the scope of the profession and the scopes of practice and investigated international positions.[413] The Working Group made proposals regarding the definitions of the different categories of psychologists by collecting and analysing the various international definitions from American Psychological Association, American Board of Professional Psychology, Canadian Psychological Association, New Zealand Psychologists Board, Psychological Society of Ireland, Australian Psychological Society, British Psychological Society, Association of Educational Psychologists, and International School Psychology Association.[414] Using that approach forensic psychology is defined by the Working Group as: [415]

411 *RelPAG and JASA v Sodi N.O. and others* (12420/13) [2016] ZAWCHC (14 November 2016) (unreported judgment). See the discussion of the case in the Health Professions Council of South Africa (2016-2017) *Annual Report* 101-102 and the Professional Board of Psychology (2018) *Report of the working group on promulgation of regulations* 7-10.

412 Health Professions Council of South Africa (2016-2017) *Annual Report* 101-102.

413 All practitioners, professional associations, universities, and internship sites were invited to partake. See Professional Board of Psychology (2018) 16-17.

414 *Idem* 23.

415 Professional Board of Psychology (2018) 23.

> A specialist category within professional psychology that provides psychological expertise within the legal and criminal justice systems. Forensic psychologists assess the psychological functioning of individuals to assist with clinical-legal decisions in civil and criminal matters, and intervene to rehabilitate offenders and to prevent recidivism. They work with the perpetrators and victims of crime as well as with law enforcement agencies, correctional services, legal practitioners and the courts.

From the Working Group's research, they found that the category of forensic psychology only exists in a few jurisdictions.[416] They further found that in most cases the clinical-legal function was fulfilled by other categories of psychologists.[417] Relying on the definition of forensic psychology of the American Psychological Association the Working Group emphasised that the practitioners performing psycho-legal work require a foundation in one of the existing categories of psychology to thereafter acquire further expertise to assist the courts.[418] Given the approach and the fact that a task team for forensic psychology is still investigating the training requirements and grand-parenting criteria, the Working Group advised that the regulations should not at this stage include a scope of practice for the category of forensic psychology.[419] It is submitted that given the extent of psycho-legal work, as discussed in chapter 3, by providing for a further registrable category in forensic psychology will not assist in regulating psycho-legal assessments. From the analysis of case law involving psycho-legal work,[420] it is evident that as per the submissions of the Working Group a psychologist will need the foundation of an existing category with further training in the skill of giving expert evidence.

The proposal of the Working Group cumulated in revised draft regulations. The draft regulations defining the scope of the profession of psychology was published for comments on 12 September 2018 which, as per the proposal, did not include forensic psychology as a category.[421] After considering the comments and engaging with the relevant stakeholders, the Professional Board for Psychology resolved that it would be

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416 *Idem* 24.
417 Professional Board of Psychology (2018) 24.
418 *Ibid.*
419 *Ibid.*
420 See 3.6.
421 Regulations Defining the Scope of the Profession of Psychology (Board Notice 101) in Government Gazette No. 41900 of 12 September 2018.

best to revert back to the September 2008 Regulations of Scope of the Profession.[422] The Office of the Minister of Health was advised accordingly, and on 13 September 2019, a notice not to proceed with the proposed regulations defining the scope of the profession of psychology was published in the Government Gazette.[423]

As mentioned above, to be able to use the title of psychologist, a person must be registered as such.[424] Section 40(c) of the Health Professions Act stipulates that it is an offence to use any name declared by regulation to be a name which may not be used.[425] The regulation promulgated under section 40(c) determines that no person who is not registered as a psychologist, psychometrist or registered counsellor may use the title or any derivatives thereof.[426] The Professional Board for Psychology has expressed its concern in the use of the term "forensic psychologists" and "forensic psychology" by registered practitioners.[427] As there is no registration category for forensic psychology, psychologists cannot refer to themselves as forensic psychologists. The Professional Board for Psychology has indicated that psychologists assessing for example, families and children in divorce cases are not conducting forensic work or medico-legal work but psycho-legal work.[428] A person using the term forensic psychologist can, therefore, be guilty of an offence in terms of section 40(c) of the Health Professions Act. Currently, there are no formal requirements to be able to conduct psycho-legal work save for being registered as a mental health professional. To act as an expert witness, one needs a separate skill set, and it will be cogent for the Professional Board for Psychology to consider introducing training and further qualifications for professionals wanting to act as expert witnesses.

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422 Health Professions Council of South Africa (2018-2019) *Annual Report* 139.

423 Notice not to Proceed with the Proposed Regulations Defining the Scope of the Profession of Psychology (GNR 1169) in Government Gazette No. 42702 of 13 September 2019.

424 Section 33(4)(b) of the Health Professions Act 56 of 1974 read with Regulations Relating to Names that May Not be Used in Relation to the Profession of Psychology (GNR 1208) in Government Gazette No. 26897 of 22 October 2004.

425 Section 40(c) of the Health Professions Act 56 of 1974.

426 Regulation 2 of Regulations Relating to Names that May Not be Used in Relation to the Profession of Psychology (GNR 1208) in Government Gazette No. 26897 of 22 October 2004.

427 Health Professions Council of South Africa "Psychology News: Newsletter for the Professional Board for Psychology Issue 01/06/2018" (2018) available online at https://www.hpcsa.co.za/Uploads/PSB_2019/PSB_Newsletter_2018.pdf (last accessed 25 January 2020).

428 *Ibid*.

4.3.2.2 Regulating the use of psychological tests

Psychological questionnaires, tests, techniques, apparatus and instruments or similar methods may be developed, used, and controlled by registered persons who have received recognised and appropriate education and training in the field.[429] Psychometrics Committee of the Professional Board for Psychology primarily regulate the classification of tests and the training requirements for the different categories of the tests. Psychological tests which evaluate any psychological construct and/or are being used to perform a psychological act or an act limited to the profession of psychology may only be used by registered psychologists.[430] Certain psychological tests can, however, be used by psychometrists, psycho-technicians and other professionals registered with the HPCSA such as speech and occupational therapists.[431] To determine whether the tests can be used by other registered practitioners, it is necessary to classify the tests.[432] The list of classified tests that may be used by registered psychologists is published in accordance with the regulations by the Professional Board of Psychology.[433] The use of psychological tests that have not been classified as per the published list of tests or the use of tests by unregistered practitioners have resulted in the HPCSA issuing a stern statement that the Professional Board for Psychology will institute disciplinary proceedings against any persons found contravening the legislation and ethical codes in place and furthermore, will not hesitate to refer the matters to the Public Prosecutor for further action.[434]

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429 Regulation 2(d),(e), and (f) of Regulations Defining the Scope of the Profession of Psychology (GNR 993) in the Government Gazette No. 31433 of 16 September 2008 (as amended). See also Makgoke "Media statement by the Health Professions Council of South Africa (HPCSA): Board is concerned about administration of psychological tests" (2004) 7 *South African Psychiatry Review* 39.

430 Form 207, List of tests classified as being psychological tests compiled by the Psychometrics Committee of the Professional Board for Psychology. See also Tredoux *et al*. "Test Review and Classification in South Africa: Where are we and where are, we going?" (2016) Psychological Society of South Africa available online at https://www.psyssa.com/psychological-testing-and-assessment-2/ (last accessed on 27 January 2020).

431 Form 207, List of tests classified as being psychological tests compiled by the Psychometrics Committee of the Professional Board for Psychology.

432 Form 207, List of tests classified as being psychological tests compiled by the Psychometrics Committee of the Professional Board for Psychology.

433 Regulation 2(f) of Regulations Defining the Scope of the Profession of Psychology (GNR 993) in the Government Gazette No. 31433 of 16 September 2008 as amended and List of classified tests (BN 155) in the Government Gazette No. 41100 of 8 September 2017.

434 Makgoke (2004) *South African Psychiatry Review* 39.

The review and classification of psychological tests have drawn significant criticism on various fronts[435] but came under close scrutiny again after the promulgation of the amendment of section 8 of the Employment Equity Act 55 of 1998. In *Association of Test Publishers of South Africa v The President of South Africa and others*[436] the Association of Test Publishers of South Africa approached the court to declare Proclamation 50 published in Government Gazette 37871 as null and void. Proclamation 50 determined that the Employment Equity Amendment Act 47 of 2013 would come into operation on 1 August 2014, which sought to amend section 8 of the Employment Equity Act 55 of 1998. Section 8 of the Employment Equity prior to the amendment read as follows:

> Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used –
> (a) has been scientifically shown to be valid and reliable;
> (b) can be applied fairly to employees; and
> (c) is not biased against any employee or group

Section 4 of the Employment Equity Amendment Act amended section 8 of the Employment Equity Act by the addition of the following paragraph, "(d) has been certified by the Health Professions Council of South Africa established by section 2 of the Health Professions Act, 1974 (Act No. 56 of 1974), or any other body which may be authorised by law to certify those tests or assessments". Association of Test Publishers of South Africa argued that currently there is no regulatory framework in place for the certification of psychological tests and other similar assessments nor anybody that has been identified to certify tests or assessments that are not psychological tests.[437] The Association further argued that the amendment will have the effect of immediately prohibiting the use of tests which are currently being used without first having established objective procedures and criteria to obtain certification of the tests.[438]

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435 Criticism against the process include the turnaround times and the quality of the review reports. A further discussion of the current problems with the classification process of psychological tests in South Africa is, however, beyond the scope of the study. See in general Tredoux *et al*. "Test Review and Classification in South Africa: Where are we and where are, we going?" (2016) Psychological Society of South Africa available online for a discussion on some of the current problems.

436 *Association of Test Publishers of South Africa v President of the Republic of South Africa and Others* (89564/14) [2017] ZAGPPHC.

437 *Idem* par. 16.

438 *Idem* par. 20.

Judge Mali considered the framework that the respondent's argued existed for the certification of psychological testing, specifically looking at the meaning of "certify", "classify" and "evaluate".[439] The court emphasised that certify and classify do not mean the same thing and that "[c]ertification is the highest standard of compliance set in any environment".[440] The current regulatory framework only provides for the classification by the HPCSA or professional board and not the certification of the tests. The court declared Proclamation 50 published in Government Gazette No. 37871 on 25 July 2014 as null and void and of no force and effect to the extent that it brings into operation the amendment of section 8 of the Employment Equity Act.

The HPCSA did not challenge the High Court decision. In a statement issued by the HPCSA, it confirmed that in line with the HPCSA's regulatory framework the revised mandate of the Psychometrics Committee is to deal with all matters pertaining test classification (and not evaluation or certification), the education and training of psychometrics and psychological assessment.[441] Included in the revised mandate of the Psychometrics Committee is the development of guidelines for ethical practice related to test use and psychological assessment and how to assess whether a psychological test meets the required standard.[442] The preamble of the latest updated list of classified tests[443] determines that the list merely contains classified tests and "the onus rests on the psychology professional to use the tests in fair and ethical ways". In this regard, annexure 12 of the Ethical Rules of Conduct, as discussed below,[444] provides guidelines on the ethical assessment practice.

439 *Idem* par. 30-33.
440 *Idem* par. 36.
441 Chuma "Media statement: Revised mandate for the Psychometrics Committee of the Professional Board for Psychology" (2019) available online at https://www.hpcsa.co.za/Uploads/Press%20Realeses/Media%20Release%20-%20REVISED%20MANDATE%20OF%20THE%20PSYCHOMETRICS%20COMMITTEE%20OF%20THE%20PROFESSIONAL%20BOARD%20FOR%20PSYCHOLOGY%20(1).pdf (last accessed on 28 March 2020).
442 *Ibid*.
443 Health Professions Council of South Africa "Classified tests" (2020) available online at https://www.hpcsa.co.za/Uploads/PSB_2019/Tests%20Classifications/Classified_tests_revised_28092020.pdf (last accessed on 1 June 2020).
444 See 4.3.3.1.

The reliability and ethical use of psychological tests, in view of cases such as *S v Zuma,*[445] is equally as important for psycho-legal assessments and perhaps even more so. Ethical guidelines for psycho-legal assessments must take into consideration that the tests are not quality assured by the Psychometrics Committee. Courts will need to rely on the expert witnesses to provide them with the relevant information to determine the relevance and reliability of the test, including any shortcomings.

4.3.3 Disciplinary proceedings of the HPCSA

In addition to the objectives and functions of the HPCSA listed above the Council also has the important function of ensuring the investigation of complaints concerning persons registered in terms of the Health Professions Act and to ensure that appropriate disciplinary action is taken against such persons in accordance with the act in order to protect the interest of the public.[446] The HPCSA, furthermore, must ensure that persons registered in terms of the act behave towards users of health services in a manner that respects their constitutional rights to human dignity, bodily and psychological integrity and equality, and that disciplinary action is taken against persons who fail to act accordingly.[447]

In terms of the Health Professions Act, the investigation of complaints must relate to the unprofessional conduct of the registered practitioner.[448] The Health Professions Act defines "unprofessional conduct" as "improper or disgraceful or dishonourable or unworthy conduct or conduct which, when regard is had to the profession of a person who is registered in terms of this Act, is improper or disgraceful or dishonourable or unworthy".[449] The professional board has the power to determine whether the conduct of a registered practitioner is "improper or disgraceful conduct".[450] In *Groenewald v*

445 *S v Zuma* 2006 JDR 0343 (W).
446 Section 3(n) of the Health Professions Act 56 of 1974.
447 Section 3(o) of the Health Professions Act 56 of 1974.
448 Section 41(1) of the Health Professions Act 56 of 1974.
449 Section 1 of the Health Professions Act 56 of 1974.
450 *Meyer v South African Medical and Dental Council and Others* (1982) 4 All SA 379 (T) at 384. In *Groenewald v South African Medical Council* 1934 TPD 404 at 410 the court held that it "depends largely on the Council whether the members of the profession maintain a high degree of moral and professional rectitude or otherwise. And of that the Council are the best judges". See also the discussion in Carstens and Pearmain (2007) 263.

South African Medical Council,[451] the court relied on the English case of *Allinson v General Council of Medical Education and Registration*[452] to determine what constitutes unprofessional conduct which held that: [453]

> 'If it is shown that a medical man, in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency,' then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect.'

The court in *Groenewald* explained that the question into unprofessional conduct is "not merely whether what a medical man has done would be an infamous thing for anyone else to do, but whether it is infamous for a medical man to do".[454] The court emphasised the fact that the inquiry must pay regard to the conduct in relation to the person's profession and "whether regard either to his patients or to his professional brethren, may be fairly considered 'infamous conduct in a professional respect".[455]

Section 42 of the Health Professions Act does not refer to the generic term of unprofessional conduct but to "improper or disgraceful conduct" indicating that a finding must be made whether the conduct was improper or disgraceful and not merely unprofessional.[456] Taitz, as discussed by Carstens and Pearmain, suggests that improper or disgraceful conduct may be divided under four headings namely medical malpractice; improper or disgraceful behaviour concerning patients; improper or disgraceful conduct concerning fellow practitioners; and other improper or disgraceful conduct unbecoming to a medical practitioner.[457]

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451 *Groenewald v South African Medical Council* at 404.
452 *Allinson v General Council of Medical Education and Registration* (1894) 1 Q.B. Div. 750.
453 *Allinson v General Council of Medical Education and Registration* at 760 as quoted in *Groenewald v South African Medical Council* at 411.
454 *Groenewald v South African Medical Council* at 411.
455 *Ibid*.
456 Carstens and Pearmain (2007) 262.
457 Taitz "The disciplinary powers of the South African Medical and Dental Council" (1988) 18 *Acta Juridica* 46 as referred to by Carstens and Pearmain (2007) 263. See also in general McQuoid-Mason (2018) *Law of South Africa* (ed. Joubert) Volume 29 par.9.

The court will usually accept that the HPCSA or the relevant professional board is the final arbiter in deciding what constitutes disgraceful or improper conduct.[458] The court usually only interferes on review if the penalty imposed is considered "shockingly inappropriate".[459] The disciplinary procedures that must be followed in the case of alleged unprofessional conduct and the disciplinary powers of the professional boards when a practitioner is found guilty are discussed in more detail below. Although not limited to the acts or omissions specified in the Ethical Rules of Conduct of the HPCSA the rules play an integral part to determine whether disciplinary steps will be taken and will be dealt with in detail before reviewing the disciplinary procedure.

4.3.3.1 Ethical guidelines and rules of the HPCSA

To ensure that the ethical standards within the health professions are upheld, and ethical conduct among registered practitioners is promoted, the Health Professions Council of South Africa, in consultation with professional boards, drafted Ethical Rules of Conduct for health professionals.[460] In addition, the rules also contain annexures dealing with the rules of conduct pertaining to the professions of dental therapy,[461] dietetics,[462] emergency care practitioners,[463] environmental health practitioners,[464] medical technology,[465] medical and dental professions,[466] occupational therapy and

458 *Pretorius v SA Geneeskundige en Tandheelkundige Raad* 1980 (2) SA 354 (T) at 358 and *Nel v SA Geneeskundige en Tandheelkundige Raad* 1996 (4) SA 1120 (T) at 1121.

459 *Nel v SA Geneeskundige en Tandheelkundige Raad* at 1130. The court in *Nel* held that it was "skokkend onvanpas" which has been directly translated to shockingly inappropriate.

460 The rules are drafted in terms of section 49 of the Health Professions Act 56 of 1974. Health Professions Council of South Africa (2016) *Booklet 2: Ethical and professional rules of the Health Professions Council of South Africa* as promulgated Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

461 Annexure 1 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

462 Annexure 2 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

463 Annexure 3 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

464 Annexure 4 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

465 Annexure 5 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

466 Annexure 6 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

medical orthotics or prosthetics,[467] optometry and dispensing opticians,[468] physiotherapy, podiatry and biokinetics,[469] radiography and clinical technology,[470] speech, language and hearing,[471] and psychology.[472] The Ethical Rules of Conduct are also supplemented by general ethical guidelines for health care professions and various guidelines on specific aspects.[473] The primary purpose of the ethical and professional rules is often described as providing a measure of self-regulation for the profession and also to protect the public from unethical and incompetent practitioners.[474]

4.3.3.1.1 General Ethical Guidelines: Core ethical values and standards for good practice

As mentioned in chapter 1, guidelines are considered merely advisory, consisting of recommendations.[475] The General Ethical Guidelines for the Health Care Professional, drafted by the HPCSA, (referred to as the Ethical Guidelines) confirms this and states that the guidelines express the "most honourable ideals to which members of the health care profession should subscribe in terms of their conduct".[476] The core ethical values and standards provide the framework from which the Ethical Rules of Conduct have been developed.[477] The Ethical Guidelines are divided into different sections dealing with the thirteen (13) core ethical values and standards that

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467 Annexure 7 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

468 Annexure 8 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

469 Annexure 9 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

470 Annexure 10 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

471 Annexure 11 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

472 Annexure 12 to Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

473 Health Professions Council of South Africa has issued 17 booklets in total of which 15 deal with various ethical guidelines, booklet 2 deals with the Ethical and Professional Rules of the Health Professions Council of South Africa and booklet 3 deals with the National Patients' Rights Charter. All of the booklets are available online at Health Professions Council of South Africa "Conduct and ethics" (2020) available online at https://www.hpcsa.co.za/?contentId=79 (last accessed on 25 June 2020).

474 Louw "Regulating professional conduct: Part 2: The Professional Board for Psychology in South Africa" (1997) 27 *South African Journal of Psychology* 191.

475 See 1.2.9.

476 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 1.

477 *Ibid*.

underlie professional and ethical practice to which practitioners must strive to; resolving of ethical dilemmas; the meaning of duty and the general ethical duties of the health care practitioners.

Values are defined as "the principles or moral standards held by a person or social group; the generally accepted or personally held judgement of what is valuable and important in life".[478] The Ethical Guidelines describes the set of core ethical values and standards of good practice as *basic ethical principles*.[479] Despite the reference, it is submitted that the listed core ethical values and standards in the Ethical Guidelines do not contain ethical principles only but also contains moral norms, rules, obligations and virtues.[480] As Beauchamp and Childress indicate, moral norms are usually in the form of principles, rules and obligations, that focus on right and wrong action, whereas moral virtues focus on the agent that performs the actions and the virtues that make them a morally worthy person.[481] Whether the values contained in the Ethical Guidelines are principles or moral virtues does not detract from the fact that both are important for the normative structure of the health care profession.[482]

The HPCSA's list in the Ethical Guidelines, firstly, contains the four principles of Beauchamp and Childress's approach to biomedical ethics[483] to wit non-maleficence, beneficence, respect for autonomy, and justice. The explanations provided for in the guidelines to the four principles are similar to the broad definitions given in chapter 1.[484] Non-maleficence and beneficence are explained in the context of the value of best interest or well-being.[485] The Ethical Guidelines places a duty on the health care practitioner to "not harm or act against the best interests of patients, even when the interests of the latter conflict with their own self-interest" and at the same time places a duty to take positive steps to ensure the health care practitioner acts in the best

478 Oxford English Dictionary "Value, n" (2020) available online at https://www-oed-com.uplib.idm.oclc.org/view/Entry/221253?rskey=r0JO7V&result=1#eid (last accessed on 2 April 2020).
479 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 5.
480 See Beauchamp and Childress (2019) *Principles of biomedical ethics* 414-415 in general for a discussion on the correspondence of moral virtues and moral obligations.
481 Beauchamp and Childress (2019) 31.
482 *Idem* 10.
483 *Idem* 13.
484 See 1.2.10.
485 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 2.

interest of the patient. Autonomy, in terms of the Ethical Guidelines, places an obligation on the health care practitioner to honour the right of self-determination or to make choices- the choices can only be made if informed, and a practitioner must allow a patient to make the choices based on the patient's own belief, values and preferences.[486] The last principle, justice, is described in the Ethical Guidelines as treatment of all individuals or groups in an impartial, fair and just manner.[487] The description provided relates to the formal principles of justice.[488] Beauchamp and Childress include in their discussion on justice distributive justice which refers to the "fair, equitable, and appropriate distribution of benefits and burdens".[489] The principle of justice, as explained in the Ethical Guidelines, can also be interpreted to include distributive justice.

The guidelines further contain a total of seven (7) moral rules or obligations, namely respect for persons, truthfulness, human rights, confidentiality, tolerance, professional competence, and self-improvement and lastly community.[490] The Ethical Guidelines, as explained above, provides general guidance and more specific content and a restricted scope is provided in the Ethical Rules of Conduct. In reviewing the current regulatory framework for psycho-legal assessments, the automatic response is to consider the specifications of the general norms, but the specifications must still be connected to the initial general norm.[491] The connection between the general norm in the form of a principle, rule or obligation gives the moral authority to the specification.[492] Specification is merely the process of reducing the indeterminacy of abstract norms.[493] Close attention must, therefore, be paid to the definitions or descriptions attached to each of the moral rules or obligations. Evident from the discussion below obligations or rules based on different ethical theories can appear to be similar but differ once the description is included and can, therefore, not simply be applied or specified in the same manner. This is specifically true in the case of respect for persons and truthfulness contained in the Ethical Guidelines.

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486 *Ibid.*
487 *Ibid.*
488 Beauchamp and Childress (2019) 268.
489 *Ibid.*
490 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 2-3.
491 Beauchamp and Childress (2019) 17.
492 *Ibid.*
493 *Ibid.*

Respect for persons is described as respecting patients as persons and acknowledging their intrinsic worth, dignity and sense of value.[494] Appelbaum, in his seminal work on developing an ethical theory for forensic psychiatry also refers to respect for persons but explains that it means "acting to negate the risks associated with one's role".[495] In other words, respect for persons for Appelbaum means acknowledging the right of the person being evaluated by a forensic psychiatrist to be informed of the implications of the assessment before entering into the process. It is submitted that Appelbaum's definition is more of a specification of the principle of autonomy. The principle of respect for autonomy places the obligation on health care professionals to disclose information that fosters autonomous decision-making.[496]

Truthfulness in the Ethical Guidelines is described as the basis of trust in professional relationships with patients.[497] In Appelbaum's theory of ethics, truthfulness or truth-telling is seen in the context of presenting the truth in court from both subjective and objective point of view.[498] According to Appelbaum, subjective truth-telling implies that that the professional believes what they say is true and the objective aspect is when the professional, as far as possible and to the best of their abilities, acknowledges the limitation of their testimony, which includes the limits relating to the expert's professional and scientific knowledge as well as the limitations with respect to the case.[499] Appelbaum, as in the case of respect for persons, specifies the principle. In the case of truthfulness, it is focused on the justice system and differs from truthfulness in the Ethical Guidelines, which is based on truthfulness towards the patients only.

Confidentiality is not a new rule to ethical guidelines and appeared as early as the Hippocratic Oath.[500] In terms of the Ethical Guidelines confidentiality entails that a health practitioner should treat personal or private information as confidential in professional relationships with patients but also contains the condition this rule can be

494 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 2.
495 Appelbaum (1997) *Journal of the American Academy of Psychiatry and the Law* 241.
496 Beauchamp and Childress (2019) 105.
497 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 2.
498 Appelbaum (1997) *Journal of the American Academy of Psychiatry and the Law* 240.
499 *Ibid*.
500 Beauchamp and Childress (2019) 343.

infringed when there are overriding reasons that confer a moral or legal right to disclosure.[501] The Ethical Guidelines, furthermore, places the obligation and confirms the constitutional duty that health practitioners should recognise the human rights of all individuals.[502] Although not expressly stated it is assumed that the human rights referred to are the rights contained in Chapter 2 of the Constitution of the Republic of South Africa. Linked to the recognition of human rights is the ethical value of tolerance which is described as respecting the rights of people to have different ethical beliefs as these may arise from deeply held personal, religious or cultural convictions. In a multi-cultural country such as South Africa tolerance is particularly important.

The value of professional competence and self-improvement recognises the obligation of health care practitioners to continually improve themselves by trying to attain the highest level of skills and knowledge within their practice. Most of the core ethical values discussed focusses on the profession which is in line with the view that ethical guidelines and codes often only serve to protect the profession's interests.[503] The HPCSA's Ethical Guidelines also contains the value community, which addresses the issues of importance to society. Community is an aspirational value that encourages health care practitioners to strive to contribute to the betterment of society in accordance with their professional abilities and standing in the community.[504]

The remaining two core values in the Ethical Guidelines are moral virtues, namely integrity and compassion, that do not have a direct one-to-one correspondence to a principle in bioethics.[505] Beauchamp and Childress consider integrity and compassion, along with discernment, trustworthiness and conscientiousness as the five focal virtues for health professionals.[506] Beauchamp and Childress have further indicated that integrity is considered by many scholars in bioethics as the primary virtue in health care.[507] In the Ethical Guidelines integrity is explained as the incorporation of core ethical values and standards by the health care practitioner as the foundation for their

501 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 2.
502 *Ibid*.
503 Beauchamp and Childress (2019) 8.
504 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 3.
505 Beauchamp and Childress (2019) 415.
506 *Idem* 38.
507 *Idem* 41.

character and practice as responsible health care professionals.[508] The description of integrity relates to Beauchamp and Childress's notion that integrity represents two aspects of a person's character.[509] The first is to integrate the different aspects such as aspirations, knowledge and the like.[510] The second aspect is being faithful to moral values and standing up in their defence if need be.[511] Integrity, therefore, involves the integration, incorporation and adherence to the values in the Ethical Guidelines.

Compassion is explained in the guidelines as health care practitioners being sensitive to, and empathising with, individual and social needs of their patients and the creation of mechanisms to provide comfort and support where appropriate and possible.[512] Similarly, Beauchamp and Childress explain that compassion "presupposes sympathy, has affinities with mercy and is expressed in acts of beneficence that attempt to alleviate the misfortune or suffering of another person".[513] Considering empathy is part of the description provided for compassion, it is important to note, as Beauchamp and Childress indicate, that although empathy is important to compassion, it does not necessarily lead to compassion.[514] Numerous scholars argue that compassion can prevent impartial reflection and obscure reason and should, as a result, be approached with caution. In psycho-legal assessments where objectivity is of great importance, even greater caution must be exercised when using empathy when acting compassionately.[515] As discussed in chapter 3, the use of empathy in a forensic setting is considered by many scholars as unethical.[516]

508 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 2.
509 Beauchamp and Childress (2019) 41.
510 *Ibid.*
511 *Ibid.*
512 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 2.
513 Beauchamp and Childress (2019) 38.
514 *Ibid.*
515 See 3.7.2.1.
516 See 3.7.2.1.

4.3.3.1.2 General Ethical Guidelines: Duties of the health care practitioner

The Ethical Guidelines explains that a duty "is an obligation to do or refrain from doing something" and that there are four different kinds of duties.[517] The different types of duties include natural duties,[518] moral obligations or professional duties,[519] institutional duties[520] and legal duties.[521] The duties listed are mostly professional duties.[522] The duties are a way of specifying the principles and rules listed in the set of core ethical values to achieve more concrete guidance.[523] The duties are classified into seven main categories, namely, duties to patients;[524] duties to colleagues and other health care practitioners;[525] duties to patients of other health care practitioners;[526] duties to themselves;[527] duties to society;[528] duties to the health care profession;[529] and duties to the environment.[530] Contained in the Ethical Guidelines is an explanation of what is meant by having a duty and it is explained that a list of duties can never be complete but that the list provided provides a "comprehensive picture of what it is, in general, that binds any health care provider as a professional to his or her patients, as well as to others".[531] Apparent from this is that the duties have been drafted from the focal point of the relationship between a treater and their patients. This is echoed in the first

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517 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 4.

518 Natural duties are defined as unacquired general duties simply because a person is a member of the human community. These duties include the duty to promote good. Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 4.

519 Professional duties or moral obligations are general duties that qualified and licensed professionals acquire when entering a contractional relationship with a patient as a professional. Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 4.

520 Institutional duties are specific to the institutionalised role of the practitioner, for example, duties imposed by the company at which the practitioner is employed. Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 4.

521 Legal duties are imposed by common law and legislation such as the Health Professions Act 56 of 1974. Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 5.

522 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 5.

523 Beauchamp and Childress (2019) 17.

524 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 5-9.

525 *Idem* 10.

526 *Idem* 10-11.

527 *Idem* 11.

528 *Idem* 12.

529 *Ibid.*

530 *Ibid.*

531 *Idem* 5.

duty listed under the duties to patients which is to "always regard concern for the best interests or well-being of their patients as their primary professional duty".[532]

Given the differences in the treater role as compared to a forensic role,[533] it is submitted that the duties contained in the Ethical Guidelines provide little guidance to mental health care professionals conducting psycho-legal assessments. In a forensic role, many of the duties contained in the Ethical Guidelines will be difficult to honour, for example, informed consent takes on quite a different dimension in a forensic setting compared to a clinical setting. There are duties that are overriding which are applicable in both clinical and forensic settings such as responding to criticism and complaints promptly and constructively or duties regarding being adequately educated or trained.[534] A few of the duties that can be of particular importance when conducting psycho-legal assessments will be discussed below.

Firstly, the duties owed to patients are divided into further subsections the first being the patients' best interest or well-being.[535] As part of this duty, the Ethical Guidelines provides for the duty to be adequately educated and/or trained and sufficiently experienced. Psycho-legal assessments are done to ultimately provide an expert opinion to the courts or legal system. For the expert opinion to be admissible, the expertise and experience are key. The Ethical Guidelines regards sufficiently experienced as a practitioner that must: [536]

(i) Have performed a minimum number of interventions annually to remain proficient, taking into account and judged by the standards and norms considered reasonable by the professional board, for the circumstances under which the intervention took place.

(ii) With regard to the introduction of new interventions within the practitioners' scope of professional practice, have undergone further appropriate training and credentialing as approved by the professional board.

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532 *Ibid*.
533 See 3.7.2.1.
534 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 6.
535 *Idem* 5-7.
536 *Idem* 7.

The standards and norms set by the specific professional board are pertinent to determine whether a health care practitioner is sufficiently experienced. In the case of psycho-legal assessments, if there are no standards or norms in place, it is difficult to determine whether the practitioner can be considered sufficiently experienced.

In the second subsection of duties to patients, the Ethical Guidelines deal with respect for patients. The general norm of human rights is specified, and the duty placed on the health care practitioner is to "guard against human rights violations of patients, and not allow, participate in or condone any actions that lead to the violations of the rights of patients".[537]

The general norm of confidentiality is specified in the duties and again emphasises that confidential information can be disclosed under specific circumstances which include with the patient's consent, in accordance with a court order to that effect, if it is required by law or is in in the interest of the patient.[538] Confidentiality is discussed in greater detail in booklet 5 of the HPCSA's guidelines for good practice in the health care professions and is also contained in the Ethical Rules of Conduct.[539] In conducting psycho-legal assessments, it is done with the express intent of sharing the findings with others such as the court.[540] Often the psycho-legal report will be made public as it forms part of the court record.[541] This creates a conflict with the general norm of confidentiality. Confidentiality is of paramount importance in clinical settings, but in a forensic setting, disclosure is inevitable emphasising the preceding discussion in chapter 3 that the roles of the treater and evaluator are distinct and should at all costs not be combined.[542] The guidelines on confidentiality are mostly concerned with the clinical setting but do make provision for circumstances in which health care practitioners are most frequently asked to disclose information.[543] The guidelines specifically provide for situations where health care practitioners have contractual

537 *Ibid.*
538 *Idem* 8.
539 Rule 13 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
540 Melton *et al.* (2018) 78.
541 *Ibid.*
542 See 3.7.2.1.
543 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 5* 6.

obligations to third parties as well as obligations to patients, described as dual responsibilities. The examples of such situations include when practitioners: [544]

(i) provide occupational health services or medical care for employees of a company or organisation.
(ii) are employed by an organisation such as an insurance company.
(iii) work for an agency assessing claims for benefits.
(iv) provide medical care to patients and are subsequently asked to provide medical reports or information for third parties about them.
(v) work as district medical officers or forensic pathologists.
(vi) work in the armed forces.
(vii) work in correctional service.

The situations include possible areas where psycho-legal assessments can be conducted, such as assessing a claim for a benefit. The guidelines place specific duties on the health care practitioners before writing the report and/ or examining the patient. The health care practitioner must ensure that the patient has been told at the earliest opportunity about the purpose of the examination. The health care practitioner must also explain the extent of the information to be disclosed that relevant information cannot be concealed or withheld.[545] When writing the report or disclosing the information, the health care practitioner must only include the information that is relevant to the request and only include factual information that they can substantiate.[546] The factual information contained in the report must be presented in an unbiased manner, and health practitioners must check whether patients wish to see the report before disclosure.[547] Provision is further made for the disclosure in connection with judicial or other statutory proceedings.[548] Information can be disclosed if there is a statutory requirement which can include the requirements of sections 77-79 of the Criminal Procedure Act. Whether there is a court order or statutory requirements, the health care practitioners must, in terms of the guidelines, be prepared to explain and justify their decisions regarding the disclosure of information.[549] For mental health professionals conducting psycho-legal assessments,

544 *Idem* 8.
545 *Ibid.*
546 *Idem* 9.
547 *Ibid.*
548 *Idem* 11.
549 *Ibid.*

the guidance provided in the Ethical Guidelines regarding confidentiality is not sufficient to clearly establish the different roles and provide guidance when dealing with an evaluee. For example, in criminal cases, what is the ethical obligation if the accused incriminates themselves during the psycho-legal assessment?

In the section dealing with duties to themselves, the first subsection deals with knowledge and skills. It is a duty of the health practitioner to "[a]cknowledge the limits of their professional knowledge and competence. They should not pretend to know everything".[550] The duties relating to knowledge and skills further include keeping up to date with laws that affect their practice and update their skills, including their knowledge of ethics and human rights.[551] The duties as contained in the Ethical Guidelines could be expanded by including the duties that are required of expert witnesses. Although this will not be applicable to all health professionals, it will provide clear guidance to practitioners who act as an expert witness to understand how the core values are specified in relation to their duties as an expert witness.

4.3.3.1.3 Ethical Rules of Conduct

The Ethical Rules of Conduct of the HPCSA (Ethical Rules) is a crucial part of the regulatory framework to determine which transgressions of the rules and annexures may constitute unprofessional conduct.[552] Rule 2(2) of the Ethical Rules determines that the conduct contained in the rules should not be considered as a complete list, but the board concerned can deal with any complaint of unprofessional conduct which may be brought before it. The Ethical Rules are divided into 28 sections dealing with a variety of matters which include the following aspects: interpretation and application;[553] advertising and canvassing or touting;[554] information on professional

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550 *Ibid.*

551 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 11.

552 Rule 2(1) of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended). See also Carstens and Pearmain (2007) 267.

553 Rule 2 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

554 Rule 3 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

stationery;[555] naming of practice;[556] itinerant practice;[557] fees and commission;[558] partnership and juristic persons;[559] sharing of rooms;[560] covering;[561] supersession;[562] impeding a patient;[563] professional reputation of colleagues;[564] professional confidentiality;[565] retention of human organs;[566] signing of official documents;[567] certificates and reports;[568] issuing of prescriptions;[569] professional appointments;[570] secret remedies;[571] defeating or obstructing the council or board in the performance of duties;[572] performance of professional acts;[573] exploitation;[574] medicine and medical

555 Rule 4 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
556 Rule 5 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
557 Rule 6 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
558 Rule 7 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
559 Rule 8 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
560 Rule 8A of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
561 Rule 9 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
562 Rule 10 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
563 Rule 11 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
564 Rule 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
565 Rule 13 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
566 Rule 14 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
567 Rule 15 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
568 Rule 16 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
569 Rule 17 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
570 Rule 18 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
571 Rule 19 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
572 Rule 20 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
573 Rule 21 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).
574 Rule 22 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

devices,[575] financial interests in hospitals;[576] referral of patients to hospitals;[577] reporting of impairment or unprofessional, illegal or unethical conduct;[578] research, development and use of chemical, biological and nuclear capabilities;[579] multiple registration;[580] and the main responsibilities of health practitioners.[581]

As to the legal status, Ethical Rules together with prevailing practices of medicine, do not bind the courts but are taken into consideration when ascertaining what constitutes medical malpractice.[582]

Examining the Ethical Rules, none of the rules directly address forensic or psycho-legal work done by health care practitioners, but it must be kept in mind that the Ethical Rules have been drafted to address more general aspects regarding the health care profession and practice. A health care professional needs to seek further guidance from the relevant annexures to the Ethical Rules relating to their specific profession. The annexures should provide content to the general norms contained in the Ethical Guidelines and give more concrete guidance to the health care professional. The only rule that is considered necessary to discuss is rule 27A of the Ethical Rules, which deals with the main responsibilities of health practitioners and reads as follows:

> A practitioner shall at all times-
>
> (a) act in the best interests of his or her patients;
>
> (b) respect patient confidentiality, privacy, choices and dignity;
>
> (c) maintain the highest standards of personal conduct and integrity;
>
> (d) provide adequate information about the patient's diagnosis, treatment options and alternatives, costs associated with each such alternative and any other pertinent

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575 Rule 23 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

576 Rule 23A of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

577 Rule 24 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

578 Rule 25 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

579 Rule 26 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

580 Rule 27 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

581 Rule 27A of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

582 Carstens and Pearmain (2007) 264.

information to enable the patient to exercise a choice in terms of treatment and informed decision-making pertaining to his or her health and that of others;

(e) keep his or her professional knowledge and skills up to date;

(f) maintain proper and effective communication with his or her patients and other professionals;

(g) except in an emergency, obtain informed consent from a patient or, in the event that the patient is unable to provide consent for treatment himself or herself, from his or her next of kin; and

(h) keep accurate patient records.

Rule 27A echoes the general norms and duties in the Ethical Guidelines and is based on the role that a health care practitioner usually fulfils, that of healer or treater. A mental health care professional who conducts a psycho-legal assessment will be confronted with a conflict between some of the main responsibilities set out in rule 27A and the forensic setting. The specific annexures dealing with medical and dental professions and the profession of psychology will be examined below to determine to what extent these annexures provide guidance for mental health care professionals conducting psycho-legal assessments.

4.3.3.1.4 Ethical Rules of Conduct for medical and dental professions and the profession of psychology

Annexure 6 to the Ethical Rules provides the rules of conduct pertaining specifically to medical and dental professions which includes medical specialists such as psychiatrists. Annexure 6 does not provide any specific guidance for psychiatrists conducting psycho-legal assessments. The only reference to medical specialists is to confirm the adherence to the regulations relating to the specialities and subspecialties in medicine and dentistry.[583] The regulations prescribe the education and training of specialists before they can be registered.

The rules of conduct pertaining to psychologists found in annexure 12 is much more comprehensive than the Ethical Rules in annexure 6. Annexure 12 is divided into

[583] Annexure 6 of the Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

eleven chapters dealing respectively with professional competence; professional relations; privacy, confidentiality and records; fees and financial arrangements; assessment activities; therapeutic activities; psycho-legal activities; activities in respect of advertising and other public statements; teaching, training and supervision; research and publication; and resolving ethical issues.[584] The Ethical Rules of Conduct for psychologists specifically makes provision in chapter 7 for psycho-legal activities.

The first rule in chapter 7, rule 67, places an obligation on a psychologist to comply with the provision of the rules contained in chapter 7 to the extent that the rules are applicable.[585] From this rule, it is clear that psycho-legal functions and forensic functions are not treated as synonyms, but examples of (seemingly both) psycho-legal and forensic functions are assessments, interviews, consultations, reports and/or expert testimony.[586] Psycho-legal activities and forensic activities are not defined elsewhere in the rules. Rule 67 further requires that the psychologist must have the "appropriate knowledge of and competence in the areas underlying such work, including specialised knowledge concerning specific populations".[587]

Both rule 68 and 69 deal with the psycho-legal opinion. In terms of rule 68, the psychologist must be able to provide an appropriate substantiation for their psycho-legal opinion, which is based on information and techniques. Read together with rule 69; the opinion must also be based on the examination conducted on the client. A client is defined in annexure 12 as a "user of psychological services, irrespective of whether the recipient of such services is an individual, a family, a group, an organisation or a community".[588] Psychological services, in turn, is defined as "acts of psychological assessment, diagnosis and intervention rendered to a client".[589] The use of the word client steers away from the typical use of patient that could indicate a

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584 Annexure 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

585 Rule 67(1) in annexure 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

586 Rule 67(1) in annexure 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

587 Rule 67(2) in annexure 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

588 Rule 1 in annexure 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

589 Rule 1 in annexure 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

therapeutic relationship but it is submitted that client is not the best terminology to use when referring to psycho-legal activities. Evaluee or examinee better describes the role of the person being subjected to a psycho-legal assessment as the evaluee is not necessarily a client in the general sense of the word. The rule stipulates that the psychologist may provide a psycho-legal report or give testimony of the psychological characteristics only after conducting an examination, but if the examination is not feasible, the psychologist must explain what the effect is on the reliability and validity of their reports and testimony and then limit the nature and extent of their findings accordingly.[590] In respect of rule 70, the general norm of truthfulness is specified, and the psychologist shall: "(a) testify truthfully, honestly and candidly and in a manner consistent with the applicable legal procedures; and (b) describe fairly the basis for his or her testimony and conclusions". Rule 70 again reiterates the importance of the basis of the psycho-legal opinion.

Rule 71 until 74 deals with the role and the relationships of the psychologists. Rules 73 and 74 both deal with psychologists acting as lay witnesses and not as expert witnesses. Rule 73 states that if a psychologist had a prior professional relationship with a client, they could still testify as a lay witness to the extent that it is permitted by law.[591] If the prior relationship affects the professional objectivity or opinion of the psychologist, this must be disclosed.[592] Reading Rule 73(2) gives the impression that a psychologist who had a previous professional relationship with a client can give an expert opinion if the previous relationship and the effect that the previous relationship could have on the practitioner's objectivity is disclosed. In the alternative, if the rule, read together with Rule 73(1), only relates to a psychologist testifying as a fact, witness the phrasing of Rule 73(2) should be reconsidered. A lay witness is not usually allowed to give an opinion. Rule 74 is the last rule in chapter 7 and places the duty on a psychologist that acts as a lay witness to be truthful and fully disclosing. Rule 74(2) determines that a psychologist may declare that they are reluctant to appear as a lay witness and they will therefore appear as a witness under protest.

590 Rule 69 in annexure 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

591 Rule 73(1) in annexure 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

592 Rule 73(2) in annexure 12 of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended).

The current ethical code for psychologists has been criticised as only providing a vague and brief guideline for resolving ethical issues.[593] Burke *et al*., furthermore, indicates that the South African context poses an additional challenge of multiple levels of practitioner registration referring to, for example, psychological counsellors and psychologists. Because of the difference between these categories, this may necessitate a manual of ethics as opposed to only a simple code of ethics.[594] In the Health Professional's annual report of 2018-2019, the Professional Board for Psychology indicated in its annual performance plan that they are still in the process of revising the ethical rules and guidelines and formulating an oath or affirmation for psychologists.[595] In addition to the necessity to revisit ethics from a forensic perspective, the professionals also voiced a need for the development of guidelines, protocols, and a model that provides a framework of how to conduct custody evaluations.[596]

There is a need for research in the South African context, a clear set of ethical guidelines applicable to psycho-legal work, a collaborative approach between professions and on-going supervision.[597] It is submitted that a comparative study is necessary to determine how other countries have approached the ethical guidelines for psycho-legal work to ensure that a proper regulatory framework is in place. In concurrence with Burke *et al*. and the HPCSA itself, it is submitted that the current ethical guidelines need to be revised.

4.3.3.2 Disciplinary procedure

The Health Professions Act's regulations provide for two stages: the preliminary inquiry and a disciplinary inquiry.[598] A complainant must lodge a written complaint

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593 Burke *et al*. "Moving beyond statutory ethical codes: Practitioner ethics as a contextual, character-based enterprise" (2007) 37 *South African Journal of Psychology* 114.

594 *Ibid*.

595 Health Professions Council of South Africa (2018-2019) *Annual Report* 133.

596 Themistocleous-Rothner (2017) *Childcare and contact evaluations: Psychologists' contributions to the problem-determined divorce process in South Africa* (PhD thesis, University of South Africa) 278.

597 *Ibid*.

598 Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 as amended by GNR 53 in Government Gazette No. 42980 of 31 January 2020.

indicating the alleged unprofessional conduct with the registrar of the HPCSA or the relevant professional board.[599] The registrar will subsequently peruse and analyse the complaints received, categorise them and record each complaint.[600] The minor transgressions and matters not falling under the jurisdiction of the HPCSA will be referred to the ombudsman.[601] The preliminary inquiry entails that the registrar may after receipt of the complaint call for further information or an affidavit confirming the allegations by the complainant[602] and must thereafter send a copy of the complaint to the registered health practitioner requesting a written response.[603] The registrar may thereafter refer the complaint to the Committee of Preliminary Inquiry[604] for further instructions for a full investigation of the matter[605] or may direct that an investigation in terms of section 41A of the Health Professions Act be conducted.[606]

The Committee of Preliminary Inquiry may after receipt of the complaint and the relevant information decide there is no ground for a professional conduct inquiry or allow the health practitioner to pay an admission of guilt fine in terms of section 42(8)

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599 Regulation 2(1) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

600 Regulation 2(1)(a)-(c) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

601 Regulation 2(1)(d) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).
The regulations define "ombudsman" as "a person appointed by the council to mediate in the case of minor transgressions referred to him or her by the registrar for mediation". The Office of the Health Ombud is an independent body established in terms of the National Health Amendment Act 12 of 2013.

602 Regulation 4(1)(a) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

603 Regulation 4(1)(b)(i) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).
The regulations further determine that the registrar must also advise the practitioner that the failure to respond will constitute contempt of the council and must warn the practitioner that the written response may be used in evidence against them. If the practitioner does not respond the regulations make provision for the process and steps to be followed in Regulation 2-6.

604 The preliminary committee of inquiry is defined as a committee established by a professional board in terms of section 15(5)(*f*) of the Health Professions Act 56 of 1974 for the preliminary investigation of complaints to make a determination thereon.

605 Regulation 4(1)(c) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

606 Regulation 4(1)(d) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

and 9 of the Health Professions Act.[607] If the Committee of Preliminary Inquiry finds that the health practitioner acted unprofessionally but that the conduct in question is a minor transgression it can determine a suitable penalty to impose and notify the practitioner that the penalty must be accepted or rejected with 14 days from the receipt of the communication.[608] In the case of minor transgressions the Committee of Preliminary Inquiry can impose the penalties provided for in section 42(1) (a) and (d) being a caution or reprimand or a reprimand and a caution[609] and a prescribed fine.[610]

The major function of the Committee of Preliminary Inquiry is to investigate and ascertain whether there is a *prima facie* case against the health practitioner and not whether the charge will be proved.[611] The purpose is to determine whether the case must continue to the second stage- a disciplinary inquiry. Cases where there is a fundamental dispute of fact, and there appears to be *prima facie* unprofessional conduct by practitioner a disciplinary inquiry must be held.[612] As indicated in *VRM v The Health Professions Council of South Africa,* the purpose of the Committee of Preliminary Inquiry is to:[613]

> act as a sieve so as to eliminate complaints without substance lest the council be burdened unnecessarily and practitioners be subject to complaints that cannot be sustained. But it is not its function to adjudicate complaints that raise disputes of fact, unless the complaint, accepting it to be true, in itself does not, in the view of the Committee of Preliminary Inquiry, constitute improper or disgraceful conduct.

A Professional Conduct Committee is constituted to hear the proceedings and must be composed of at least two public representatives, one of whom must be the chairperson; two persons registered in the profession in which the respondent is registered, at least one of whom is registered in the same discipline as the respondent;

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607 Regulation 4(8) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

608 Regulation 4(9) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

609 Section 42(1)(a) of the Health Professions Act 56 of 1974.

610 Section 42(1)(d) of the Health Professions Act 56 of 1974.

611 Carstens and Pearmain (2007) 271 and McQuoid-Mason (2018) *Law of South Africa* par. 10.

612 *VRM v Health Professions Council of South Africa* 2003 JOL 11944 (T) at par. 20.

613 *VRM v Health Professions Council of South Africa* par. 20. This case dealt with previous regulations GNR 2303 published in Government Gazette No. 12759 of 28 September 1990.

and one member of the board.[614] Prior to the amendment in January 2020, the Professional Conduct Committee also included one legal assessor.[615] A person who served as a member of the Committee of Preliminary Inquiry may not be appointed to serve of the Professional Conduct Committee dealing with the same matter.[616] Before the inquiry takes place, a pre-inquiry conference must be held, similar to a pre-trial conference.[617] As with a pre-trial conference, this is done to limit and determine the issues in dispute to be investigated at the inquiry.[618]

The disciplinary enquiry by the Professional Conduct Committee is for all intents and purposes akin to a trial in a court.[619] The Professional Conduct Committee functions as an administrative body and is, therefore, subject not only to the Constitution of the Republic of South Africa but also the Promotion of Administrative Justice Act 3 of 2000. The administrative decision taken by the Professional Conduct Committee must be lawful, reasonable and procedurally fair and the Committee must furnish reasons for their decisions.[620] Generally, the Professional Conduct Committee is bound by the ordinary rules of evidence.[621]

If the Professional Conduct Committee finds that the practitioner is guilty of unprofessional conduct, a suitable penalty is imposed.[622] If the Professional Conduct

614 Regulation 6(2) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

615 Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the Health Professions Act, 1974: Amendment (GNR 53) in Government Gazette No. 42980 of 31 January 2020.

616 Regulation 6(3) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

617 Regulation 8 of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

618 The procedure of the pre-inquiry conference is dealt with in regulation 8(1) of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

619 Strauss as discussed in Carstens and Pearmain (2007) 274. The procedure of the inquiry is set out in Regulation 9 of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

620 Section 33(2) of the Constitution of the Republic of South Africa, 1996 and section 5 of the Promotion of Administrative Justice Act 3 of 2000.

621 Carstens and Pearmain (2007) 275.

622 Regulation 22 of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).

Committee finds that there was a poor performance on the part of the respondent practitioner the Committee can, in addition to the penalty for unprofessional conduct, impose practice restrictions and refer the matter to a Performance Assessment Committee.[623] The Performance Management Committee will determine the appropriate management and arrange for performance assessment.[624] The Professional Conduct Committee is empowered in terms of the Health Professions Act to impose the following penalties for improper or disgraceful conduct:[625]

(a) A caution or a reprimand or a reprimand and a caution;
(b) suspension for a specified period from practising or performing acts specially pertaining to his or her profession;
(c) removal of his or her name from the register;
(d) a prescribed fine;
(e) a compulsory period of professional service as may be determined by the professional board; or
(f) the payment of the costs of the proceedings or restitution or both.

The Professional Conduct Committee may postpone the imposition of the penalty and suspend the operation on the conditions that it may determine.[626] The accused or the *pro forma* complainant[627] may appeal against the finding and/or the penalty of the Professional Conduct Committee.[628] The Health Professions Act further provides for the right to appeal to the appropriate High Court should any person be aggrieved by a decision of the HPCSA, a professional board or a disciplinary appeal committee.[629]

623 Regulation 23 of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).
624 *Ibid*.
625 Section 42(1) of the Health Professions Act 56 of 1974.
626 Carstens and Pearmain (2007) 269.
627 A *pro forma* complainant means a person appointed by the registrar to represent the complainant and to present the complaint to a professional conduct committee. Regulation 1 of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).
628 Regulation 11 of Health Professions Council of South Africa: Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (GNR 102) in Government Gazette No. 31859 of 6 February 2009 (as amended).
629 Section 20 of the Health Professions Act 56 of 1974.

Although the disciplinary proceedings are similar to that of a court, the dynamics of the sentencing or sanctioning of the guilty practitioner differs.[630] Taitz states that the first difference lies in the triers of fact: in a professional conduct inquiry the panel is composed of "peer" judges from the same profession as opposed to a court of law with magistrates and judges from the legal profession.[631] Taitz further indicates that when sentencing an accused in a criminal trial the court must balance the crime, the accused and interests of society whereas in a professional conduct inquiry the Committee or council must balance the interests of the medical profession as a whole, the individual members of the medical profession, the complainant, the accused practitioner and the society as a whole.[632] The appropriate sentence will depend on the circumstances of each case.[633] Carstens and Pearmain indicate that the imposition of the appropriate penalty will also depend on whether the practitioner was convicted of disgraceful or improper conduct.[634] Disgraceful conduct is viewed as more severe and, therefore, a stricter sanction will be imposed.[635] For example, the ultimate penalty of being removed from the register is usually imposed for sexual misconduct and cases of gross negligence[636] which is demonstrated by the studies and data discussed below.

In the study done by Scherrer, Louw and Möller,[637] as well as the study done by Nortje and Hoffman,[638] discussed in chapter 3,[639] both studies analysed the penalty content of all guilty verdicts related to professional standard breaches and ethical misconduct against the HPCSA by registered psychologists. From 1990 until 1999 Scherrer *et al*. found that a warning was applicable in almost one third (32%) of all the guilty verdicts, followed by a suspended sentence which constituted 32% and thereafter a fine which was imposed in 20% of the cases.[640] According to their study warnings were issued in transgressions relating to unacceptable advertising practices and poor reports.[641] The

630 Carstens and Pearmain (2007) 278.
631 Taitz (1988) *Acta Juridica* 59 as referred to by Carstens and Pearmain (2007) 278.
632 Taitz (1988) *Acta Juridica* 60. Taitz is also discussed in Carstens and Pearmain (2007) 278.
633 Carstens and Pearmain (2007) 278.
634 *Ibid*.
635 *Ibid*.
636 *Ibid*.
637 Scherrer *et al*. "Ethical complaints and disciplinary action against South African psychologists" (2002) 32(1) *South African Journal of Psychology* 54.
638 Nortje and Hoffman "Ethical misconduct by registered psychologists in South Africa during the period 2007-2013" (2015) 45 *South African Journal of Psychology* 260.
639 See 3.7.1.
640 Scherrer *et al*. (2002) *South African Journal of Psychology* 58.
641 *Ibid*.

study does not indicate which transgressions resulted in a fine being imposed. Disbarment and removal from the register occurred in only a few serious cases and was mostly imposed when the psychologists had an improper sexual relationship with a patient.[642]

Nortje and Hoffman's research indicated that the most frequent penalty was a fine (53%) and thereafter a suspended suspension (27%).[643] Nortje and Hoffman divided the penalty of a fine into three further categories: a fine of between R1 000-R8 000 (38%); a fine between R10 000 and R15 000 (13%) and a fine between R20 000 and R25 000 (2%).[644] The transgressions linked to the penalty of a fine under R10 000 were misrepresentation on formal letterheads, making derogatory/rude remarks towards the client, making biased recommendation for custodial placement without proper assessment of all parties, and using a self-developed questionnaire of sub-optimal standard.[645] Fines of R10 000 and higher were imposed for conducting assessment without informed consent, failing to avoid harm to a client by refusing to co-operate with colleagues, and failing to inform a client of above-medical-aid fee structure.[646] About 11% of the total penalties was caution or caution and reprimand.[647] Removal from the HPCSA register was enforced in cases where psychologists were found guilty of entering into a sexual relationship with a client, fraudulent medical aid claims, abuse or exploitation of a client and practising while not duly registered.[648] From their research Nortje and Hoffman drew a critical conclusion that Scherrer *et al*. had already argued in 2002 that "inadequate training in ethics seems to be the proverbial root cause of the evil in many cases of ethics misconduct", but despite this, the HPCSA from 2007-2013 only imposed financial or suspended suspension period penalties without imposing additional ethical awareness training.[649] According to Nortje and Hoffman, this can result in practitioners regarding ethical misconduct as merely a "business/financial risk but not primarily as an ethics and integrity matter".[650]

642 *Ibid*.
643 Nortje and Hoffman (2015) *South African Journal of Psychology* 263.
644 *Ibid*.
645 *Idem* 265.
646 *Ibid*.
647 *Ibid*.
648 *Idem* 265-266.
649 *Idem* 269.
650 *Ibid*.

Using the published judgments of the HPCSA for the period of 2014 until 2019, the frequency and type of penalty imposed on sanctioned registered psychologists was determined[651] and tabulated in table 3 below.

Table 3: Frequency and type of penalties imposed (2014-2019)

Penalty	**Number of penalties**	**Percentage of all penalties**
Caution or caution and reprimand	10	47
Fine (ranging between R5 000 and R20 000)	8	38
Suspended suspension with compulsory attendance of ethics course	1	5
Suspended suspension	1	5
Suspended removal from the register	1	5
Total	21	100

A caution or caution and reprimand was imposed in cases of unprofessional conduct which include billing a patient for professional services that were not rendered; failing to state the focus and the limitations of a psycho-legal report, rude remarks to the patient; compiling a psycho-legal report without obtaining sufficient collateral information; failing to provide a psycho-legal report within a reasonable time; entering into a therapeutic and forensic relationship with a patient; and sharing confidential information. In one of the matters in 2016, a psychologist was found guilty of unprofessional conduct and only cautioned. The complaints against the specific psychologist were made by the father of minor children based on a psycho-legal report which the psychologist had compiled. The complaints which the psychologist was found guilty of included:[652]

(i) failed and/or neglected to ensure that the statement made in their report was based on sufficient information to substantiate their findings and/or

(ii) compiled a report with or based on sufficient collateral information; and/or

(iii) wrote a psycho-legal report with recommendations based on therapy as opposed to a comprehensive assessment; and/or

651 Health Professions Council of South Africa "Publications: Judgements" (2020) available online at https://www.hpcsa.co.za/?contentId=338&actionName=Publications (last accessed on 25 January 2020).

652 Health Professions Council of South Africa "Publications: Judgements: 2016" (2020) available online at https://www.hpcsa.co.za/Uploads/Publications%202019/Judgements/Guilty_Verdicts_updates_Final_2016.pdf (last accessed on 25 January 2020).

(iv) made assumptions about a person that they had not interviewed and/or consulted.

Without any further information regarding the matter, it is difficult to assess the appropriateness of the penalty imposed, however, from the details of the complaint and without having insights into the specific circumstances of the case it appears that a mere caution or warning is very lenient in this example. The ethics and integrity of the matter are not taken in a serious light. A psycho-legal report that is unsubstantiated, and one-sided would in all probability have been of no value for the party in care and contact dispute. In court, such a report is not only damaging for the case and hampering of justice but also damages the view of the profession from the court's point of view. Many of the listed examples where caution or caution and reprimand was imposed as a penalty also calls for additional ethical awareness training as Nortje and Hoffman indicated in their study.

Fines were imposed in cases where the psychologist failed to interview both parents in care and custody evaluations and made aspersions regarding the psychological state of the party who was not evaluated; consulting minor children without the mother's consent; overcharging for services rendered; failing to obtain informed consent before filing a report and preparing a report without conducting proper investigations; entering multiple relationships with a patient; failure to obtain sufficient collateral information to compile a psycho-legal report; failing to obtain informed consent, and failing to include the limitations or potential bias in the findings of a psycho-legal report. Apparent from the list is that many of the same transgressions where a caution or caution and reprimand was imposed also appears here. Without further information on the circumstances of each case, it cannot be determined on what basis the Committee imposed a fine or caution or reprimand for a similar transgression. Iterating the concern by Nortje and Hoffman is that many of the listed transgressions are in all probability a result of inadequate training in ethics. Given the prominence of imposing a fine Nortje and Hoffman's sentiment is shared as the ethical misconduct appears to be more of a business or financial risk than a matter of ethics and integrity.

Suspended suspension was imposed where the psychologist misled the public by failing to specify their category of registration. The most severe sanction, removal from the register, in this case, it was suspended for a period with certain conditions, was imposed in where a psychologist made several fraudulent medical aid claims over a few years. In only one of the 21 cases, the psychologist was ordered to attend an ethics course as one of the conditions of the suspended penalty of suspension. The particular psychologist was found guilty in 2014 of unprofessional conduct relating to psycho-legal work, the complaints being:[653]

(i) Failed and/or neglected to maintain a confidential relationship with the patient; and/or

(ii) Failed and/or neglected to ensure that statements made in their letter about the patient were based on sufficient information to substantiate their findings; and/or

(iii) Failed and/or neglected to state the limitations and/or potential bias of their findings in their letter; and/or

(iv) Deserted the patients by failing and/or neglecting to continue with marital therapy; and/or

(v) Failed and/or omitted to indicate on the letterhead that they are registered as an Educational Psychologist; and/or

(vi) Entered into multiple relationships with the patients by acting as both, marital therapist and as a witness for the court; and/or

(vii) Entered into multiple relationships with the patients by acting as both marital therapist and family therapist.

It is submitted that the HPCSA should re-evaluate the penalties imposed to ensure that health professionals who undertake forensic or psycho-legal work do so with the utmost care and diligence.

653 Health Professions Council of South Africa "Publications: Judgements: 2014" (2020) available online at https://www.hpcsa.co.za/Uploads/Publications%202019/Judgements/Guilty%20Verdicts%20%20Nov%202014.pdf (last accessed on 25 January 2020).

4.3.4 Continuing education and training

The Health Professions Act determines that registered health practitioners in South Africa must undergo compulsory continuing education and training.[654] The HPCSA, after consulting with the professional boards, determines the rules relating to the conditions of continuing professional development[655] and nature and extent thereof.[656] Practically the registered practitioners must obtain CPD (continuing professional development) points by attending and/or participating in accredited CPD programmes.[657] The criteria for recognising or accrediting the programmes are made by the HPCSA in consultation with the relevant professional board.[658]

The current rules relating to continuing education and training determine that a practitioner must "accumulate at least 30 continuing education units, of which at least five must be on human rights, ethics and medical law, within every year".[659] The area of human rights, ethics and medical law is the only specified area which indicates a need for improvement and more knowledge in that specific area. The practitioner may obtain units within their own discipline, speciality or subspecialty or within another relevant discipline, speciality or subspecialty.[660] The annual performance plan of the Professional Board for Psychology indicated in the HPCSA annual report of 2018-2019 that there is a need to develop a focus on psycho-legal work in CPD programmes in line with the scope of practice with special focus on psychometrists and registered counsellors.[661] It is clear from the transgressions that there is a dire need for more training in psycho-legal work.

The HPCSA conducts random mandatory audits on practitioners to ensure that they have adhered to the compulsory CPD requirements.[662] In 2018/2019 review year, the

654 Section 26 of the Health Professions Act 56 of 1974.
655 Section 26(a) of the Health Professions Act 56 of 1974.
656 Section 26(b) of the Health Professions Act 56 of 1974.
657 Carstens and Pearmain (2007) 256.
658 Section 26(c) of the Health Professions Act 56 of 1974.
659 Rule 4(1) of Rules Relating to Continuing Education and Training for Registered Health Practitioners (BN 29) in Government Gazette No.29716 of 23 March 2007.
660 Rule 6 of Rules Relating to Continuing Education and Training for Registered Health Practitioners (BN 29) in Government Gazette No.29716 of 23 March 2007.
661 Health Professions Council of South Africa (2018-2019) *Annual Report* 134.
662 Health Professions Council of South Africa "Core operations: CPD" (2020) available online at https://www.hpcsa.co.za/?contentId=228 (last accessed on 23 July 2020).

HPCSA conducted an audit of 6000 practitioners registered with the HPCSA.[663] If it appears from the audit that the practitioner is non-compliant, they will be given six (6) months to comply.[664] Thereafter, another audit is conducted, and if there is still non-compliance with requirements for CPD units within the specific time frame the rules determine that the relevant professional board may impose the following conditions on their registration:[665]

(a) registration in a category of supervised practice as may be considered appropriate by the board;
(b) a remedial programme of continuing education and training as may be determined by the board;
(c) an examination as may be determined by the board;
(d) suspension, for a specified period, from practice, as may be determined by the board; or
(e) any other appropriate action as may be determined by the board.

The HPCSA has reflected on the current CPD programme and considered research on the effectiveness of the programme.[666] Many professional bodies, like the HPCSA, have questioned whether the units accumulated or time spent is a real indication of genuine learning and whether it will bring about improvement and changes in the health practitioner's practice.[667] Research on traditional CPD activities, such as conferences and lectures, indicate that the impact on improving professional practice and healthcare outcomes was almost non-existent.[668] According to Wallace and May, the traditional CPD activities can positively impact practitioner performance and patient outcomes if carried out in an outcomes-based framework.[669] An outcomes-based framework has four main stages:[670]

663 Health Professions Council of South Africa (2018-2019) *Annual Report* 34.
664 Health Professions Council of South Africa "Core operations: CPD" (2020) *Health Professions Council of South Africa* available online.
665 Rule 9 of Rules Relating to Continuing Education and Training for Registered Health Practitioners (BN 29) in Government Gazette No.29716 of 23 March 2007.
666 Health Professions Council of South Africa "Events: Maintenance of licensure" (2020) available online at https://www.hpcsa.co.za/?contentId=521 (last accessed on 23 July 2020).
667 Wallace and May "Assessing and enhancing quality through outcomes-based continuing professional development (CPD): a review of current practice" (2016) 179 *Veterinary Record* 515.
668 *Idem* 516.
669 *Idem* 518.
670 *Idem* 516.

i. Self-reflection by the practitioner on their practice and own developmental needs.
ii. Undertaking appropriate CPD activities to meet the needs identified.
iii. Applying the knowledge acquired in their practice.
iv. Measuring the impact of the CPD on their practice and patient health.

The General Medical Council in the United Kingdom is one of the professional bodies that have moved away from the traditional approach to a framework of outcome-based CPD.[671] Given the evidence of the impact of traditional CPD activities, the HPCSA on 6 September 2019 presented a discussion on an integrated model of professional development and maintenance of license to stakeholders.[672] The HPCSA has resolved to change the model of assessing CPD to a system that will assist the practitioner to demonstrate competence linked to patient outcomes.[673] The programme to enhance the current CPD structure is referred to as the Maintenance of Licensure.[674] To investigate the viability and readiness, and to develop a toolkit, three professional boards have volunteered to spearhead the investigation, being the Medical and Dental Board (focussing on the medical profession and representing acute care), Medical Technology Board (laboratory science section) and Occupational Therapy Board (sustained rehabilitation).[675]

The HPCSA is still in the developmental phase of the Maintenance of Licensure; there is, therefore, limited information available on how exactly the Maintenance of Licensure can be implemented in South Africa. The proposal of the Maintenance of Licensure is similar to the revalidation process used by the General Medical Council in the United Kingdom. The revalidation process in the United Kingdom will be investigated in chapter 5 to determine whether this can improve the current regulatory framework.[676] From the information at hand, it is submitted that the Maintenance of Licensure can strengthen the regulatory framework of psycho-legal assessments.

671 See 5.5.1.1.
672 Health Professions Council of South Africa "Events: Maintenance of licensure" (2020) available online.
673 *Ibid.*
674 Health Professions Council of South Africa "Events: Maintenance of licensure" (2020) available online and Health Professions Council of South Africa (2018-2019) *Annual Report* 35.
675 Health Professions Council of South Africa (2018-2019) *Annual Report* 35.
676 See 5.5.1.1.

4.3.5 Other voluntary organisations and associations

The HPCSA is the statutory body that is mandated by the Health Professions Act to regulate the health care professions, but within the professions, various voluntary associations have been established to advance the specific professions.[677] In chapter 2, the historical development of some of the societies was discussed, and the aims and purposes will be discussed below in more detail.

4.3.5.1 The South African Society of Psychiatrists (SASOP)

The South African Society of Psychiatrists (SASOP) promotes the field of psychiatry and is registered as a non-profit company incorporated in terms of the Companies Act 71 of 2008. One of the main objectives of SASOP is to promote and uphold the principles of human rights, dignity and ethics in the practice of psychiatry.[678] In order to co-ordinate activities according to SASOP's objectives divisions were created as set out in Schedule 1 of the SASOP Rules.[679] The divisions include special interest groups (SIG) Divisions such as Forensic Psychiatry SIG. SASOP states in its Company's Rules that are committed to the Madrid Declaration of Ethical Standards for Psychiatric Practice (Madrid Declaration).[680] The Madrid Declaration was approved by the General Assembly of the World Psychiatric Association on 25 August 1996.[681] No further ethical guidance is provided for SASOP members.

The Madrid Declaration emphasises that although there "may be cultural, social and national differences, the need for ethical conduct and continual review of ethical standards is universal".[682] The Madrid Declaration provides for seven ethical

677 See 2.6.1 for the historical development of some of the organisations or associations.
678 South African Society of Psychiatrists "Governance: SASOP Company rules" (2019) available online at https://725cc624-3241-417c-afa5-33a5f7de3449.filesusr.com/ugd/cc5d8c_18a9a7e63f8e446085ff37ca0312865f.pdf (last accessed on 28 March 2020).
679 *Ibid.*
680 *Ibid.*
681 World Psychiatric Organisation "Declaration of Madrid" (2019) available online at https://www.wpanet.org/current-madrid-declaration (last accessed on 28 March 2020).
682 *Ibid.*

standards and 16 further guidelines concerning specific situations. For purposes of regulating psycho-legal assessments, the following standard is of importance: [683]

> When psychiatrists are requested to assess a person, it is their duty first to inform and advise the person being assessed about the purpose of the intervention, the use of the findings, and the possible repercussions of the assessment. This is particularly important when psychiatrists are involved in third party situations.

In the guidelines concerning specific situations, two sections deal with psycho-legal assessments, namely the death penalty and the dual responsibilities of psychiatrists. The guidelines determine that a psychiatrist should not take part in assessments of competency in cases where the person is to be executed.[684] In South Africa, the death penalty has been abolished; there is, therefore, no need for a specific guideline dealing with the death penalty. The guideline regarding dual responsibilities places a duty on the psychiatrist who is confronted with dual responsibilities, i.e., evaluating a person for legal proceedings and the therapeutic relationship with the patient, to disclose this to the person being assessed and explain the absence of a therapeutic relationship as well as the obligation to report the findings. The guideline states that a psychiatrist can choose not to proceed with the assessment but does not prohibit dual roles. Furthermore, the guideline provides for psychiatrists to advocate for "separation of records and for limits to the exposure of information such that only elements of information that are essential for purposes of the agency can be revealed".[685]

As a voluntary organisation, SASOP is not responsible for disciplinary procedures against psychiatrists which much be referred to the HPCSA. SASOP can take disciplinary steps against its members if they do not comply with the provisions in the Company Rules.[686] The Company Rules merely mention disciplinary procedures regarding the disqualification as director which is dealt with in the Memorandum of Incorporation.[687] The disciplinary procedures of SASOP will, therefore, not be discussed.

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683 *Ibid.*
684 *Ibid.*
685 *Ibid.*
686 South African Society of Psychiatrists "Company Rules of the South African Society of Psychiatrists NPC" (2020) available online at https://www.sasop.co.za/governance (last accessed 28 March 2020).
687 South African Society of Psychiatrists "Company Rules of the South African Society of Psychiatrists NPC" (2020) at clause 8 available online.

4.3.5.2 The Psychological Society of South Africa (PsySSA)

The Psychological Society of South Africa (PsySSA), as discussed in chapter 2, was formed in 1994 to unite the various bodies representing the discipline of psychology.[688] The core values of the PsySSA is excellence; integrity and ethics; people-centredness; human rights and social justice orientation; social relevance and responsiveness; democratic, transparent and accountable governance; and nonpartisan and civil society based.[689] PsySSA's council is the highest decision-making body of the society and is comprised of the executive, representatives of the divisions, representative of the branches and representatives of standing committees. PsySSA has a division dedicated to neuro- and forensic psychology with the mission of promoting an understanding of those fields.[690]

PsySSA developed a set of ethical guidelines (PsySSA Guidelines) to ensure ethical behaviours and attitudes.[691] The PsySSA Guidelines are based on ethical principles which have been specified to rules and standards of ethical conduct in order to guide the psychologists.[692] The six guiding principles are described as aspirational goals, and the ethical standards set forth specific enforceable rules for conduct.[693] The PsySSA in developing the ethical guidelines replicated (with permission) aspects of the Ethics Codes and Codes of Professional Conduct of the American Psychological Association (APA), the Canadian Psychological Association and the American Association of State and Provincial Boards.[694]

In the introduction to the ethical principles, PsySSA firstly emphasises that psychologists first point of departure should be the "preservation and protection of

688 See 2.6.2.1.
689 Psychological Society of South Africa "What is PsySSA?" (2019) available online at https://www.psyssa.com/about-us/what-is-psyssa/ (last accessed on 28 March 2020).
690 Psychological Society of South Africa "Division of neuro-and forensic psychology" (2019) available online at https://www.psyssa.com/divisions/division-of-neuropsychology-and-forensic-psychology/ (last accessed on 28 March 2020).
691 Psychological Society of South Africa (2007) *South African professional guidelines in psychology* 9.
692 *Ibid.*
693 *Ibid.*
694 *Idem* 12.

fundamental human rights enshrined in the Bill of Rights".[695] The six guiding principles are competence, integrity, professional and scientific responsibility, respect for people's human rights and dignity, concern for others' welfare and social responsibility.[696]

Part 6 of the ethical standards deal specifically with psycho-legal activities.[697] The ethical standards are almost *verbatim* the same as the rules contained in annexure 12 of the HPCSA's ethical code. The same eight standards are discussed with only small variation in the wording of some of the standards. For example, ethical standard 6.2 regarding the basis for psycho-legal opinion includes the reference to interviews as an example of information and techniques.[698] Ethical standard 6.6, maintenance of expert witness role, includes an additional sentence which reads, "[i]n performing psycho-legal roles, psychologists are reasonably familiar with the rules governing their roles".[699]

PsySSA has ensured that their guidance provided by the HPCSA is integrated with the organisation's ethical standards. It is important that the various documents and guidelines provided by organisations are not seen as standalone documents that could create a conflict for psychologists. Voluntary organisations such as PsySSA should continue to communicate and ensure co-operation between them and the Professional Board for Psychology as this will further strengthen a regulatory framework.

No information is available on the internal disciplinary procedures of PsySSA but as in the case of SASOP PsySSA cannot take any disciplinary steps against psychologists resulting from unprofessional conduct. Matters must be referred to the HPCSA.

4.3.5.3 The South African Medico-Legal Association (SAMLA)

SAMLA is an independent organisation established in 2000 with the main goal of advancing the inter-relationship between medicine and law and to promote excellence

695 *Ibid.*
696 *Ibid.*
697 *Idem* 43-45.
698 *Idem* 44.
699 *Idem* 45.

in medico-legal practice by promoting dialogue and mutual understanding between members of the involved professions, guided by justice, ethical practice and Constitutional values.[700] SAMLA's members, unlike the voluntary organisations discussed above, are not only comprised of a specific profession but includes members of the legal profession and various health professionals registered with the HPCSA as well as actuaries.[701]

SAMLA, together with other leaders in the field, held a colloquium on 5 May 2019, to address the current medico-legal crisis.[702] The medico-legal crisis contains numerous elements, but two main aspects include the escalation in claims for damages based on medical negligence and the maladministration of the Road Accident Fund.[703] Arising from the colloquium SAMLA and the other relevant parties directed a letter to the President of the Republic of South Africa appealing to the President, as the principal outcome, for the establishment of an Independent Multidisciplinary Medico-Legal Regulatory Authority for South Africa which will be discussed below.[704]

Before dealing with the appeal to establish a regulatory authority, the definitions of the key aspects need to be determined. Firstly, medico-legal is defined in SAMLA's Memorandum of Incorporation as "conduct involving or relating to all areas where healthcare and law interact".[705] Medico-legal work is further defined as a generic term "used to describe a field of practice where the healthcare practitioners work with legal practitioners to resolve medical disputes and to further the cause of justice".[706] Medico-legal ethics is also defined and is described as applying to the medico-legal

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700 South African Medico-Legal Association "Our objectives" (2016) available online at https://medicolegal.org.za/index.php (last accessed 8 June 2020).

701 South African Medico-Legal Association "Our objectives" (2016) available online at https://medicolegal.org.za/index.php (last accessed 8 June 2020).

702 South African Medico-Legal Association "Medico-legal crisis presentation to the President" (2019) available online at https://medicolegal.org.za/SubmissionToThePresident/Medico-legal-Crisis-Presentation-to-the-President.html (last accessed on 8 June 2020).

703 South African Medico-Legal Association "The establishment of an Independent Multidisciplinary Medico-Legal Regulatory Authority" (2019) available online at https://medicolegal.org.za/SubmissionToThePresident/0.2-HJE-SAMLA%20-%20Letter%20to%20President%20-%20Regulatory%20Body-HJE-NC-BB-RM-M.pdf (last accessed on 8 June 2020).

704 South African Medico-Legal Association "Medico-legal crisis presentation to the President" (2019) available online.

705 South African Medico-Legal Association "Memorandum of incorporation*"* (2019) at 3 available online at https://medicolegal.org.za/files/SAMLA%20MOI-Amended%20for%20SAQA-Approved-AGM-20191130-SIGNED.pdf (last accessed on 8 June 2020).

706 *Idem* 4.

practitioners who commit themselves to ethical behaviour in not only of their own professional code of conduct but also the code of conduct designed for medico-legal work. The medico-legal code is, however, subject to the codes of conduct established by the professional bodies to whom the respective medico-legal practitioners belong.[707] SAMLA argues that the code of conduct of various professional bodies are not sufficient for medico-legal work as the codes do not make adequate provision for important elements of medico-legal practice.[708]

SAMLA further submits that because of the vacuum that exists, without proper accountability in the medico-legal field, many practitioners have abused this for their own interests at the expense of clients, the state and judiciary.[709] To address this, SAMLA has formulated a code of conduct and applied at the South African Qualifications Authority (SAQA) for professional body recognition and professional designation registration.[710]

In line with the requirements of SAQA, SAMLA formulated several policies in August 2019 which is included in their Memorandum of Incorporation. In accordance with their Professional Designation Policy to be registered as a SAMLA medico-legal practitioner, the following requirements must be met:[711]

(i) The professional must be in good standing with their own professional body, for example, the Legal Practice Council or the HPCSA.
(ii) The professional must be a SAMLA member in good standing.
(iii) The professional must pledge to practice according to the SAMLA Code of Conduct.
(iv) The Professional must provide proof of reasonable knowledge of the field by having passed the SAMLA/UCT Foundation's Course in Medico-Legal Practice.
(v) The last requirement can be waived for applicants who qualify under the SAMLA Recognition of Prior Learning Policy.

707 *Ibid.*
708 *Idem* 18.
709 *Ibid.*
710 *Ibid.*
711 *Idem* 19.

Together with the Professional Designation Policy, SAMLA also formulated a CPD Policy,[712] Foreign Qualifications Policy,[713] Disciplinary Policy,[714] Appeals Policy[715] and a Terms of Reference and Board Policy.[716]

The application to SAQA was accompanied by the proposal of an Independent Multidisciplinary Medico-Legal Regulatory Authority. The proposal states that the core functions of the regulatory authority would be the publication of entry qualifications as well as training standards; accreditation of an educational institution or institutions to train medico-legal practitioners; publications of a code of conduct for medico-legal practitioners; effective disciplinary procedures for medico-legal practitioners who violate the code; and the collaborations with stakeholders on any and all medico-legal matters.[717] SAMLA avers that despite the existence of the HPCSA, Legal Practitioners' Council and other authorities, the unethical practices continue which rise to the medico-legal crisis in South Africa.[718] This is because, according to SAMLA, the medico-legal practice "occupies a largely unregulated space between the Departments of Health, Justice, Transport and Social Development, as well as the Treasury".[719]

The SAMLA's Code of Conduct was accepted by their board on 18 June 2019 and reaffirmed the mission statement of their Memorandum of Incorporation which includes the promotion of ethics and competent practice for the benefit of public interest.[720] The Code of Conduct is divided into nine sections dealing with an introduction; definitions; general provisions; specific conduct of medico-legal practitioners; conduct of medico-legal practitioners in relations to writing medico-legal reports; consultations and appearances in court; professional competence and self-improvement; duties and

712 *Ibid.*
713 *Ibid.*
714 *Ibid.*
715 *Idem* 20.
716 *Ibid.*
717 South African Medico-Legal Association "The establishment of an Independent Multidisciplinary Medico-Legal Regulatory Authority" (2019) at 5-6 available online.
718 *Idem* 5.
719 *Ibid.*
720 The South African Medico-Legal Association "The South African Medico-Legal Association Code of Conduct for members" (2019) at 2 available online at https://medicolegal.org.za/SubmissionToThePresident/2.11.1-SAMLA%20CODE%20OF%20CONDUCT%20FINAL%2018_06_2019.pdf (last accessed on 8 June 2020).

responsibilities of educators engaged by SAMLA; acceptance of the code and lastly references. The definitions are the same as contained in the Memorandum of Incorporation and need not be repeated.

The first section that needs to be addressed is the general provisions of the code of conduct which starts with the general duties and responsibilities of practitioners. Unlike the HPCSA's Ethical Rules of Conduct SAMLA's Code of Conduct is not preceded by guidelines indicating the ethical framework or the ethical principles on which the rules contained in the code is based upon. Many of the duties contained in SAMLA's Code of Conduct are similar to the duties proscribed in the HPCSA's Ethical Guidelines,[721] such as treating colleagues with respect and integrity,[722] observing the law,[723] upholding the Constitution,[724] maintaining high standards of honesty, integrity and ethical conduct[725] and many more.[726] There are, however, duties that are unique to medico-legal practitioners and SAMLA's Code of Conduct. These duties include:

(i) To uphold their duty to the court.[727]

(ii) To act in the interest of justice.[728]

(iii) To avoid conduct which places or could place them in a position in which their interests conflict with their duties to the Court.[729]

(iv) Where applicable, retain the independence necessary to serve members of the public with unbiased advice.[730]

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721 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1*.

722 Rule 3.1.14 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

723 Rule 3.1.6 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

724 Rule 3.1.2 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

725 Rule 3.1.1. in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

726 Duties such as acting in the interests of members of the public (rule 3.1.4); charge reasonable fees for work carried out and avoid unreasonable financial benefit (rule 3.1.12); remain reasonably abreast of all developments in their respective professions (rule 3.1.13); pay membership fees and fines promptly (rule 3.1.16); reporting unprofessional conduct (rule 3.3); and not subjecting any person to any form of harassment including sexual harassment (rule 3.4).

727 Rule 3.1.3 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

728 Rule 3.1.5 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

729 Rule 3.1.9 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

730 Rule 3.1.10 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

(v) Refrain from doing anything which could bring the legal or healthcare profession into disrepute.[731]

The general provisions further contain a provision relating specifically to objectivity and independence which states that when giving advice or expressing an opinion in court or otherwise, the health care practitioner must give a true account and fair assessment. [732] Furthermore, the health care practitioner should not be influenced by any party's whims or desires or that of those who instruct them.[733] In the case where the health care practitioner is uncertain about a conclusion or an opinion, the uncertainty must be recorded.[734] None of the duties deals with informed consent or confidentiality, two important duties of a health care practitioner that differs vastly in a forensic setting.

The HPCSA's General Ethical Guidelines gives an overview of how health care professionals can resolve ethical dilemmas, especially if principles appear to be in conflict. SAMLA's code of conduct does not provide for a similar explanation of ethical reasoning. Even if the steps for ethical reasoning are included, the Code of Conduct must indicate the ethical framework upon which it is based. A code of conduct can never contain an exhaustive list of rules; practitioners need to be able to refer to the ethical framework to apply ethical reasoning. SAMLA's Code of Conduct places the general duty on medico-legal practitioners to adhere to the ethical standards prescribed by their Code but also by the ethical standards generally recognised by the professions to which the members belong.[735] The Code further places the duty on the medico-legal practitioner to comply with rules, legislation and codes of conduct of their own professions and professional bodies.[736] The practitioner would need to understand how to navigate the potential conflict between the different regulatory bodies' rules. At this point in time, the Independent Regulatory Authority is still only a

731 Rule 3.1.15 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
732 Rule 3.8 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
733 *Ibid*.
734 *Ibid*.
735 Rule 3.1.7 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
736 Rule 3.1.17 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

proposal and, therefore, any codes developed by SAMLA is subject to the statutory body of the HPCSA which is mandated by statute to regulate the health care profession.

The next section in the code of conduct, section 4, deals with specific conduct of medico-legal practitioners. Medico-legal practitioners are expected to expeditiously reply to communications,[737] respectfully deal with colleagues, court staff and members of the court,[738] undertake to co-operate in disciplinary investigations and hearings,[739] and terminate membership if they are by virtue of mental or physical impairment no longer competent to act as such.[740] Lastly, medico-legal practitioners shall not deliberately engage in "trickery or attempt to catch an opposing medico-legal practitioner off-guard".[741] The specific conduct, although considered specific to medico-legal practitioners is conduct that would be expected of all health care practitioners that act in a respectful manner and with integrity.

The last section that will be examined is section 5, which deals with the conduct of medico-legal practitioners in relation to writing medico-legal reports, consultations, and appearance in court. This section deals with the crux of the matter, the difference between what is expected of a health care practitioner conducting medico-legal work as opposed to health care practitioner in a clinical setting. The first subsection deals with the writing of medico-legal reports and explains that medico-legal reports must be comprehensive which entails that it should set out all of the "relevant facts, information, opinion, recommendations and reasons for the opinion in a clear manner".[742] The guidelines stress the overriding duty to the court and the independence of the expert witness.[743] In line with the duties mentioned in *Twine* above the guidelines warn

737 Rule 4.1 of The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
738 Rule 4.2 of The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
739 Rule 4.3 of The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
740 Rule 4.4 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
741 Rule 4.2.3 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
742 Rule 5.1.1 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
743 *Ibid*.

experts of not simply to "copy and paste" from other reports.[744] Lastly, the guidelines provided in respect of expert reports that the basis of the opinion should be properly indicated and the opinion cannot be based on speculation or conjecture.[745] The guidelines also suggest timelines for finalisation of reports, but it is submitted that timelines should be determined together with the input from legal representatives to ensure compliance with the rules of court.

The second subsection provides standards for consultations before and during trials.[746] The subsection emphasises the importance of proper joint minutes and the duty of expert witnesses to avail themselves when called upon to attend pre-trial meetings or joint meetings.[747] The guidelines explain to the expert witness the purpose of the joint minutes and the content, in other words, that the issues that are agreed upon between the experts must be clearly set out together with the issues that the expert disagree with and their reasons for disagreement.[748] The guidelines emphasise that expert witnesses must disclose any information or learning that opposes their opinion.[749] The last subsection concerns giving evidence in court.[750] Again the duty to the court and the independent, objective and unbiased opinion is emphasised.[751] The guidelines remind the expert of their duty to give evidence only within their specialised field and to do so with clarity and precision.[752]

SAMLA's Code of Conduct for Members can be described as a summary of the duties and responsibilities of expert witnesses as elucidated from case law. It is important that professionals who are acting as expert witnesses are made aware of and comply

744 Rule 5.1.2 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
745 *Ibid*.
746 Rule 5.2 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
747 Rule 5.2.1.-5.2.2 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
748 Rule 5.2.4 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
749 Rule 5.2.6. in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
750 Rule 5.3 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
751 Rule 5.3.1 in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.
752 Rule 5.3.2. in The South African Medico-Legal Association (2019) *The South African Medico-Legal Association Code of Conduct for members*.

with the duties as listed, by providing a guideline similar to the code of SAMLA will greatly assist in ensuring that this. From the research done on the problems relating to mental health experts acting as expert witnesses, it is apparent that professionals need guidance but also want profession-specific guidance. Even in providing guidance on psycho-legal work for psychologists, it appears that psychologists expressed a need for further protocols or speciality guidelines in specific areas such as care and custody evaluations. Establishing an independent multi-disciplinary medico-legal regulatory authority can assist, and SAMLA has provided a foundation for professionals acting as expert witnesses but is submitted that self-regulation within the specific profession itself would provide the best solution for addressing unethical behaviour.

4.4 Conclusion

A regulatory framework for psycho-legal assessments involves not only regulation within the legal system but self-regulation within the specific professions. The chapter examined the current regulatory framework in South Africa in its totality identifying shortcomings and specific issues that need to be explored to make recommendations.

From the examination some of the mechanisms developed to ensure that expert evidence is reliable, objective and unbiased include using cross-examination, appointing single joint experts, using court assessors or court-appointed expert witnesses, submitting joint minutes, disclosing expert witnesses, and making use of pre-trial case management or conferences. Many of the mechanism are indispensable in regulating expert evidence, but as discussed in the chapter, the effectiveness of some mechanisms such as single joint experts still need to be determined. The mechanisms on their own are not enough to ensure proper regulation of expert evidence.

Possible suggestions that have emanated from the analysis is whether the formulation of an admissibility test similar to that of *Daubert* or *Frye* is necessary. The success of *Daubert* and *Frye* will be analysed in the following chapters, but it submitted at this stage that the admissibility rules in place are sufficient. Further suggestions included

that the ultimate issue rule should not form part of the general rules. Another possibility considered was the possibility of a cost order against expert witnesses similar to the cost orders against negligent attorneys. The evaluation of expert evidence is also a fundamental aspect and given that there is no hard and fast rule for evaluating evidence consideration can be given to the factors that need to be considered when evaluating psychological and psychiatric evidence.

In part 2 of the chapter, the regulation within the professional organisations was examined. The HPCSA is the statutory body that regulates health professions and provides ethical guidance for its members. The different professional boards forming part of and operating in conjunction with the HPCSA keeps the register of the specific health professions. The chapter examined the scope of the profession, considering the categories of registration within both psychology and psychiatry. A psychiatrist is able to specialise and register as a forensic psychiatrist, but despite an attempt to introduce the category in psychology, psychologists cannot register as a specialist in forensic psychology. It is argued that given the extent of psycho-legal work, the introduction of the category will not assist in regulating psycho-legal assessments. All psychologists acting as expert witnesses, irrespective of category, needs further training to acquire the necessary skills in giving expert testimony and writing psycho-legal reports.

From the critical analysis of the ethical guidelines and rules of the HPCSA in this chapter, it is evident that the rules and guidelines are not sufficient; the HPCSA also indicated this in its annual report. The guidelines and rules will need to be revisited, and this should be done in context of the development of the law over the years. It is argued that the ethical framework or the core ethical values provided for in the ethical guidelines can create a conflict or ethical dilemma for a health professional acting as an expert witness. The guidelines must be amended to address this, or a separate guideline with an ethical framework for forensic settings needs to be provided.

The disciplinary procedure of the HPCSA is critical to regulating the profession. If there is a *prima facie* case of unprofessional conduct, the Professional Conduct Committee will hear the matter. The concern raised in this chapter regarding disciplinary action does not relate to the procedure, but the penalties imposed. From the information

available and previous studies conducted by Nortje and Hoffman, it appears that the penalties imposed makes unethical behaviour more of a business or economic risk for psychologists. Integrity and ethics are not taken seriously enough by the Professional Conduct Committee. The penalties of the HPCSA must be re-evaluated. The last concern regarding the regulation by the HPCSA is the aspect of continuing professional development. A key aspect to better expert evidence is better-trained professionals, but the current CPD programme is not effective in reaching the goals it set out to achieve. The HPCSA is set to pilot a new model which will move away from the traditional approach to a framework of outcome-based CPD. The process will be similar to the revalidation process in the United Kingdom discussed in chapter 5 and promises to change the regulation of health professionals extensively.

The chapter also investigated other voluntary organisations that play a pivotal role in psychology and psychiatry. From the investigation, it was evident that no further guidance other than that provided by the HPCSA was provided for members conducting psycho-legal work. PsySSA guidelines mirror that of the HPCSA promoting integration between the different organisations. When developing ethical guidelines, it is cogent to ensure that the bodies representing the professions are also “on-board” to ensure full integration of the regulatory framework across all relevant organisations.

The last voluntary organisation discussed in the chapter was the South African Medico-Legal Association that does not promote a specific profession but has the main aim of promoting excellence in medico-legal practice. SAMLA submits that the current codes of professional bodies do not make adequate provision for medico-legal practices. In pursuance of their goal, the organisation has applied to be recognised as a professional body and wants to establish an independent multi-disciplinary medico-legal regulatory authority. SAMLA submits that such authority will aid in addressing the current medico-legal crisis that exists in South Africa. In support of the application, SAMLA has drafted an ethical code and rules for medico-legal practitioners. As argued in the chapter, the guidelines can be of great assistance but whether an independent regulatory authority is necessary is debatable.

To address the shortcomings in the regulatory framework identified in this chapter requires further investigation into the regulatory frameworks of other countries with

similar problems. In the following two chapters, the regulatory framework of England and the United States will be compared to that of South Africa.

CHAPTER 5
REGULATION OF PSYCHO-LEGAL ASSESSMENTS IN ENGLAND

5.1 Introduction

In email correspondence that went viral, American General James Mattis is quoted as saying that a "...real understanding of history means that we face nothing new under the sun".[1] General Mattis continues by saying that by reading about history he has never been "at a loss for how any problem has been addressed… It doesn't give me all the answers, but it lights what is often a dark path ahead".[2] Lord Woolf's report on civil proceedings,[3] the report by the Law Commission on expert evidence in criminal proceedings,[4] case law and the subsequent legislative reform in England reaffirm that the problems faced regarding expert evidence in English law are truly nothing new. The problems with expert evidence are fundamentally the same as the problems that reared its head in Roman times[5] and are the same problems that the South African legal system is facing now.[6] This chapter seeks to understand how the regulatory framework in England has been reformed to address the problems experienced with expert evidence, with a specific focus on psychological and psychiatric evidence.

The focus of the chapter is on the *English* legal system. When appropriate and if not sensible to refer to England reference will be made to Great Britain or the United Kingdom. The chapter will start by providing an overview of the English legal system and the court structure, including a brief mention of the possible effect that British exit (Brexit) can have on the interpretation of case law and statutes. The difference and similarities between the English legal system and the South African legal system will be accentuated where necessary to aid the comparative analysis undertaken in the study.

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1 Ingersoll "General James 'Mad dog' Mattis email about being 'too busy to read' is a must read" (9 May 2013) available online at https://www.businessinsider.com/viral-james-mattis-email-reading-marines-2013-5?IR=T (last accessed on 20 June 2020).
2 *Ibid*.
3 Woolf (2006) *Access to justice- Final Report*.
4 The Law Commission (2011) *Expert evidence in criminal proceedings in England and Wales (com. 325)*.
5 See 2.2.
6 See 3.7.2.

The rest of this chapter has been structured to correspond with chapter 4 of the study. This chapter is, therefore, also divided into two main parts: the regulation of expert evidence within the legal system and the regulation within the statutory bodies and professional organisations. Within the regulation of the legal system, the chapter will first investigate the evidentiary rules for expert evidence and evaluate how the legislative reform in England has changed the common law position. The disclosure of expert evidence in both criminal and civil proceedings and the importance thereof will follow. In a slight deviation from the structure in chapter 4 is the inclusion of the section examining the rules relating to the content of experts' reports. Seeing as the Criminal and Civil Procedure Rules and Practice Directions deal extensively with the exact content of the reports, the evaluation of the relevant rules will be done separately.

The chapter will not only investigate the difference in the presentation of expert evidence in criminal and civil proceedings but will also distinguish between the South African and English position. The rules and practices relating to concurrent expert evidence will also be explored. As discussed in chapter 3, the English legal system, like the South African legal system follows a common-law system based upon adversarial or accusatorial principles.[7] The key features of the accusatorial system, including the emphasis and purpose of cross-examination, has already been discussed in previous chapters[8] and will not be repeated. The section dealing with the right to challenge expert witnesses will, therefore, concentrate on the problems of using cross-examination as a safeguard against unreliable expert evidence.

The duties of expert witnesses have been addressed in various English cases with *The Ikarian Reefer*[9] case being the *locus classicus*. Only brief mention will be made to the *Ikarian Reefer* case as it has been discussed in chapter 4. In England, the duties of expert witnesses have been encapsulated in the Criminal and Civil Procedure Rules and Practice Directions which will be considered at length and in context of recent

7 See 3.3.
8 See 3.3 and 4.2.4.
9 *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd ("The Ikarian Reefer")* (1993) Lloyd's Law Reports (2) (Q.B. (Com. Ct.) 68. See 4.2.7 for the duties of expert witnesses.

case law. The rules and directions not only places duties on expert witnesses but afford certain rights which will be discussed.

The chapter will analyse the factors that the courts take into consideration when evaluating expert evidence and how these factors affect the weight attached to the evidence. In light of the regulatory framework prescribed in the procedural rules, the role that assessors can play will be examined. The last aspect of the regulation of the legal system to be discussed is immunity. The chapter aims to illustrate how the abolishment of witness immunity and cost orders against expert witnesses can assist in regulating expert evidence.

In the second main part of the chapter, the bodies that regulate the psychiatric profession, and thereafter, the psychology profession will be explored. In contrast to the South African context, where there is only one statutory body that regulates both psychologists and psychiatrists, the two professions are regulated by different bodies in England. The chapter will evaluate the ethical guidance and disciplinary procedure of both statutory bodies, the General Medical Council and the Health and Care Professions Council. This will be done in the context of a brief overview of the structure and mandate of the two bodies. Within the discipline of both psychology and psychiatry, there are many professional organisations with the aim to promote the disciplines and regulate their members. The two main organisations in England, the Royal College of Psychiatrists and British Psychological Society will be discussed. The ethical guidance and disciplinary procedures of the organisations will be examined.

Considering the importance of expert witnesses a professional society and a qualifying body for qualified independent experts has also been established in England, namely the Academy of Experts. The role of this body and its contribution to regulating expert evidence will be investigated. The chapter will conclude by briefly summarising the key points of the English regulatory framework.

5.2 Overview of the English legal system

With historical roots in the English legal system, the similarities between the English legal system and South African legal system are quite apparent: both are common law countries that follow an adversarial procedure where case law is an important source of law as the doctrine of precedent is followed.[10] The two legal systems do, however, differ in many respects. The United Kingdom is, firstly, a constitutional monarchy[11] with the monarchy being limited to a purely formal role in the legislative process.[12] The parliament has the sole right to law-making and the sovereignty of parliament is recognised in the United Kingdom.[13]

Unlike South Africa, the United Kingdom does not have a formal written constitution.[14] Before the enactment of the Human Rights Act 1998,[15] the freedom of individual actions was based on negative liberties meaning that individuals were entitled to do anything that was not prohibited by law.[16] This was, however, problematic because the sovereignty of parliament meant that parliament was in effect free to restrict individual liberties by simply passing legislation- legislation which could not be tested against a constitution.[17] In 1998 the Human Rights Act was enacted, coming into force in 2000, and had profound implications on the operation of the English legal system.[18] The purpose of the Human Rights Act is to give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights (ECHR).[19] Section 3 of the Human Rights Act determines that as far as possible all legislation must be read and given effect in a way that is compatible with the rights in the ECHR.[20] In the South African context any regulatory framework must promote the spirit, purport and objects of the Bill of Rights and in England it must be compatible with the rights

10 Partington (2012) *Introduction to the English Legal System* 58.
11 *Idem* 28.
12 Slapper and Kelly (2013) *The English legal system: 2013-2014* 84.
13 Slapper and Kelly (2013) 84 and Partington (2012) 30.
14 Partington (2012) 27.
15 Human Rights Act 1998 (c42).
16 Slapper and Kelly (2013) 46.
17 *Ibid*.
18 *Idem* 49.
19 Preamble of the Human Rights Act 1998. The United Kingdom signed the European Convention on Human Rights and Fundamental Freedoms in 1950 but did not incorporate it into law at that stage. See a discussion on this in Slapper and Kelly (2013) 46-47.
20 Section 3(1) of the Human Rights Act 1998 (c42).

contained in the ECHR. However, section 4 of the Human Rights Act only empowers the court to make a declaration of incompatibility and not invalidity,[21] whereas in South Africa the Constitutional Court can declare legislation that is inconsistent with the Constitution as invalid.[22] The first declaration of incompatibility in England was made in March 2001 in the case of *R (on the application of H) v Mental Health Review Tribunal, North and East London Region*[23] where sections 72 and 73 of the Mental Health Act 1983 (c.20) was considered incompatible with the patient's right to liberty under article 5(1) and 5(4) of the ECHR. Sections 72 and 73 of the Mental Health Act reversed the burden of proof by requiring a detained person applying to a mental health review tribunal to show why they should not be detained.[24]

When interpreting the Human Rights Act the English judges must consider the jurisprudence developed by the European Court of Human Rights.[25] English law is not only influenced by the European Court of Human Rights but since the United Kingdom became a member of the European Union in 1973 this directly impacted the English legal system.[26] A condition of the membership is that European Union law must be given effect to in domestic law.[27] The principle legislation that gave effect to European Union law in the United Kingdom is the European Communities Act 1972,[28] giving European Union law supremacy over United Kingdom domestic law. In the English legal system, one must, therefore, consider the legislation and case law but also take into consideration that it operates in the framework of the European Union. [29] Sources of European Union law include international treaties and protocols; international agreements; secondary legislation and decisions of the Court of Justice of the European Union.[30]

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21 Section 4(2) of the Human Rights Act 1998 (c42).
22 Section 172(2) of the Constitution of the Republic of South Africa, 1996.
23 *R (on the application of H) v Mental Health Review Tribunal, North and East London Region* (2002) Q.B. 1.
24 *Ibid*.
25 Partington (2012) 53.
26 Partington (2012) 54 and Slapper and Kelly (2013) 83.
27 Slapper and Kelly (2013) 83.
28 European Communities Act 1972 (c.68).
29 Slapper and Kelly (2013) 83 and Partington (2012) 56.
30 Slapper and Kelly (2013) 705.

On 23 June 2016, a referendum was held to determine whether Great Britain should remain in, or leave, the European Union, known as Brexit or the British exit.[31] The "leave" vote won by a 51.89% majority.[32] On 26 June 2016 the European Union (Withdrawal) Act 2018[33] (c.16) was passed into law. Section 1 of the European (Withdrawal) Act determines that on the "exit day" the European Communities Act 1972 is repealed. To implement the agreement between the United Kingdom and the European Union, which sets out the arrangements for the United Kingdom's withdrawal from the European Union, the European Union (Withdrawal Agreement) Act 2020[34] was drafted. Most of the sections of the European Union (Withdrawal Agreement) Act 2020 came into force on 31 January 2020- the official date that the United Kingdom formally left the European Union.

Part 4 of the European Union (Withdrawal Agreement) Act ensures that the European Union Treaties and other European Union law continues to apply in the United Kingdom during the implementation period. The European Union (Withdrawal Agreement) Act converts the body of existing European Union law into domestic law.[35] The supremacy of European Union law will not operate on post-exit legislation. What effect Brexit will have on the current legislation remains to be seen and no major changes has resulted at the time of this study. Within this study, where applicable, the existing European Union law and ECHR will be considered.

5.3 Court structure in England

Before the enactment of the Courts Act 2003[36] the courts in England and Wales were managed separately by the court service and the magistrates' courts committees. The Courts Act now provides for a unified administration to be created, combining the functions of the Court Service and the Magistrates' Courts Committees.[37] Her

31 Martill and Staiger in Martill and Staiger (eds.) (2018) *Brexit and beyond: Rethinking the futures of Europe* 1.
32 *Ibid.*
33 European Union (Withdrawal) Act 2018 (c.16).
34 European Union (Withdrawal Agreement) Act 2020 (c.1).
35 Section 2 of the European Union (Withdrawal) Act 2018 (c.16).
36 Courts Act 2003 (c.39).
37 Section 6 of the Courts Act 2003 (c.39) makes provision for the abolition of the magistrates' courts committees.

Majesty's Courts and Tribunal Service (HMCTS) is the agency responsible for providing support for the administration of justice in courts and most tribunals.[38]

The courts in the English legal system are arranged within a hierarchical framework similar to South African courts. The magistrates' courts are the lowest courts in the hierarchical structure.[39] Magistrates' courts hear summary offences,[40] and acts as the Family Proceedings Court[41] and the Youth Court.[42] The cases in the magistrates' courts, save when acting as Family Proceedings or Youth Court, are usually heard by two or three lay magistrates.[43] The lay magistrates need not have formal legal qualifications but must have undertaken the prescribed training programme.[44] Most of the civil cases which do not involve family matters, failure to pay council tax or failure to pay child maintenance are heard in the county courts. The county courts are served by circuit judges and district judges.[45] In general the county courts hear smaller claims and fast-track cases and the more complex or challenging cases are dealt with in the High Court.[46] In the English law system civil cases are divided into three tracks or routes which are based on the value of the claim and how complicated the case is. The three tracks are the small claims track,[47] fast track[48] and multi-track.[49] The type of track influences the manner in which the case is prepared, the length of the hearing and can also influences the type of judge allocated.[50]

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38 Slapper and Kelly (2013) 169.
39 *Ibid.*
40 Section 44 of the Courts Act 2003 (c.39). Summary offences are created and defined by statute which include for example traffic offences and common assault. For a discussion on summary offences see Slapper and Kelly (2013) 240-243.
41 Section 31A of the Crime and Courts Act 2013 (c.22).
42 Section 50 of the Courts Act 2003 (c.39).
43 Section 9 of the Courts Act 2003 (c.39) defines "lay justice" as justice of peace who is not a District Judge. A bench of lay magistrates is advised by a justices' clerk who is legally qualified. See Slapper and Kelly (2013) 242.
44 Section 10(4) of the Courts Act 2003 (c.39). See also Ministry of Justice (2011) *Judicial and court statistics 2010* iv.
45 Slapper and Kelly (2013) 171.
46 *Ibid.*
47 Small-claims track is usually for lower value and less complicated cases with a value of up to £10 000 but there are exceptions. HM Courts and Tribunals Service (2017) "Small claims track, fast track and multi-track EX305 and EX306" available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725673/ex305-eng.pdf (last accessed on 12 July 2020).
48 Fast track claims are with a value of between £10 000 and £25 000.
49 Multi-track claims are very complicated claims with a value of £25 000 or more.
50 HM Courts and Tribunals Service (2017) "Small claims track, fast track and multi-track EX305 and EX306" available online.

The Senior Courts of England and Wales consist of the Court of Appeal, the High Court of Justice, and the Crown Court.[51] Crown courts are criminal courts and hear trials of indictable offences,[52] appeals from magistrates' courts[53] and cases for sentencing.[54] The matters in the Crown Courts are usually heard by a single judge.[55] The jurisdiction and powers of the Crown Court are exercised by High Court judges, circuit judges and recorders.[56] The less serious offences are normally tried before a circuit judge or a recorder, and the more serious offences must be tried by a High Court judge.

The higher level of the judicial structure is the High Court which divided into three divisions namely the Chancery Division,[57] Family Division,[58] and Queen's Bench Division.[59] The High Court's Queen's Bench Division primarily deals with civil actions in contract and tort (or delict) cases as well as more specialist matters such as applications for judicial reviews.[60] The Queen's Bench Division has limited criminal jurisdiction.[61] The Commercial Court is also part of the Queen's Bench Division.[62] The Chancery Division is the successor to the old Court of Chancery, and primarily deals with the disputes involving property, taxation, mortgages, insolvency, and partnerships.[63] The Chancery Division hears very specialised work and there is a Chancery Bar for barristers practising in this area of law.[64] The last division, the Family Law Division, deals with all matrimonial matters, legitimacy, adoption and proceedings under the Domestic Violence and Matrimonial Proceedings Act 1976.[65] Matters in the

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51 Section 1 of Senior Courts Act 1981 (c.54). Before the amendment by the Constitutional Reform Act 2005 (c.4) the senior courts were the Supreme Court of Judicature.

52 Section 46 of the Senior Courts Act 1981 (c.54) provides for the exclusive jurisdiction in the Crown Court on all proceedings on indictment.

53 Section 48 of the Senior Courts Act 1981 (c.54).

54 Section 74 of the Senior Courts Act 1981 (c.54).

55 Section 73(1) of the Senior Courts Act 1981 (c.54).

56 Section 8(1) and 73(2) of the Senior Courts Act 1981 (c.54).

57 Section 5(1)(a) of the Senior Courts Act 1981 (c.54.).

58 Section 5(1)(c) of the Senior Courts Act 1981 (c.54).

59 Section 5(1)(b) of the Senior Courts Act 1981 (c.54).

60 Section 61 of the Senior Courts Act 1981 (c.54) read with paragraph 2 in Schedule 1 to the act. See also Slapper and Kelly (2013) 174-175.

61 Section 61 of the Senior Courts Act 1981 (c.54) read with paragraph 2 in Schedule 1 to the act.

62 Section 61 of the Senior Courts Act 1981 (c.54) read with paragraph 2 in Schedule 1 to the act. See also Slapper and Kelly (2013) 175.

63 Section 61 of the Senior Courts Act 1981 (c.54) read with paragraph 1 in Schedule 1 to the act. See also Slapper and Kelly (2013) 176.

64 Slapper and Kelly (2013) 176.

65 Section 61 of the Senior Courts Act 1981 (c.54) read with paragraph 3 in Schedule 1 to the act. See also Slapper and Kelly (2013) 176-177.

High Court are usually heard by one judge but two or more can hear the matter and under specific circumstances a trial can be held with a jury.[66] The High Court also hears appeals involving such matters where they were originally heard in the county and magistrates' courts.[67] The divisional courts that hear the appeals must be constituted of not less than two judges.[68]

The Court of Appeal of England and Wales is the second most senior court and is divided into two division: civil and criminal.[69] The Court of Appeal's Criminal Division hears appeals concerning criminal matters originally dealt with at the Crown Court, while the Civil Division hears appeals concerning cases heard at the county courts and High Court.[70] Permission to appeal is required, either from the lower court or the Court of Appeal itself. The Court of Appeal consists of *ex-officio* judges[71] and ordinary judges.[72] The Court of Appeal can order a new trial, set aside a verdict, finding or judgment.[73] The Court of Appeal in the civil division is considered to be duly constituted if it consists of one or more judges.[74] In the criminal division three or more judges must preside and if more than three presides there must be uneven number of judges.[75] There are appeal cases that can be heard by only two judges but an appeal against a verdict of not guilty by reason of insanity or a finding regarding unfitness to plead must be heard by at least three judges.[76]

The United Kingdom Supreme Court was created in October 2009 and replaced the House of Lords as the highest court in the United Kingdom.[77] Decisions made by the Court of Appeal may be further appealed to the Supreme Court.[78] The Supreme Court hears appeals on arguable points of law of the greatest public importance, bearing in

66 Section 69 of the Senior Courts Act 1981 (c.54).
67 The appeals are heard by the Queen's Bench Divisional Court, Chancery Divisional Court and Family Divisional Court.
68 Section 66(3) of the Senior Courts Act 1981 (c.54).
69 Section 3(1) of the Senior Courts Act 1981 (c.54).
70 Section 15 and 16 of the Senior Courts Act 1981 (c.54).
71 Section 2(2) of the Senior Courts Act 1981 (c.54) determines who shall be *ex-officio* judges of the Court of Appeal.
72 Section 2(1) of the Senior Courts Act 1981 (c.54).
73 Section 17(1) of the Senior Courts Act 1981 (c.54).
74 Section 54(2) of the Senior Courts Act 1981 (c.54).
75 Section 55(2) of the Senior Courts Act 1981 (c.54).
76 Section 55(4)(a)(ii) and (iii) of the Senior Courts Act 1981 (c.54).
77 Section 23(1) of the Constitutional Reform Act 2005 (c.4).
78 Section 40(2) of the Constitutional Reform Act 2005 (c.4).

mind that the cases will have already been the subject of judicial decision in a lower court. Additionally, it hears cases on devolution matters. Cases are typically heard by a panel of three to nine Justices.[79]

There are also numerous other specialist courts and tribunals in England. Mention needs to be made of the Court of Protection which is a specialist court established by the Mental Capacity Act 2005.[80] It is a superior court of record[81] with the same rights, privileges and authority as the High Court.[82] The court has jurisdiction to make declaration on whether a person has or lacks capacity to make a decision[83] and whether an action done or yet to be done against the person is lawful.[84] The Court of Protection can also appoint a deputy for a person who lacks the necessary mental capacity[85] and make decisions regarding the deprivations of liberty under the Mental Capacity Act.[86]

5.4 Regulation within the legal system

As in South Africa, the law of evidence in England is characterised by exclusionary rules of evidence which prevent evidence from being admitted.[87] The general rule in English common law remains that opinions, beliefs and inferences of witnesses are inadmissible.[88] Opinion evidence is generally inadmissible not only based on relevance and reliability but because it is considered to usurp the function of the court.[89] An exception to the opinion evidence rule is the admissibility of expert opinion evidence where it consists of inferences to be drawn to matters involving special skills or knowledge.[90]

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79 Section 42(1) of the Constitutional Reform Act 2005 (c.4) determines that the must be a minimum of three judges.
80 Section 45 of the Mental Capacity Act 2005 (c.9).
81 Section 45(1) of the Mental Capacity Act 2005 (c.9).
82 Section 47(1) of the Mental Capacity Act 2005 (c.9).
83 Section 15(1)(a) and (b) of the Mental Capacity Act 2005 (c.9).
84 Section 15(1)(c) of the Mental Capacity Act 2005 (c.9).
85 Section 16 of the Mental Capacity Act 2005 (c.9).
86 Section 4B of the Mental Capacity Act 2005 (c.9).
87 Meintjies-Van Der Walt (2001) *Expert evidence in the criminal justice process: A comparative perspective* 147. See also Hodgkinson and James (2007) *Expert Evidence: Law and practice* 3.
88 Murphy and Glover (2013) *Murphy on evidence* 403 and Dennis (2017) *The law of evidence* 882.
89 Murphy and Glover (2013) 403.
90 Murphy and Glover (2013) 404 and Dennis (2017) 882.

Trial proceedings are subject to rules that govern the nature of the trial, such as the sequence of the proceedings, which can also in turn govern the questions relating to expert evidence such as the admissibility. The analysis of expert evidence below is structured similar to the normal sequence of a trial starting with admissibility rules followed by the disclosure, presentation, the right to challenge and evaluation of expert evidence. Lastly, the role of court assessors, the duties of the expert witness and the immunity of the expert witness will also be examined. The analysis of expert evidence in England is structured in the same manner as the analysis of expert evidence in South Africa in chapter 4 for ease of comparison.

5.4.1 Evidentiary rules for expert evidence

In England it is important to note that witnesses are divided into four classes of witnesses: ordinary, professional, expert and interpreter.[91] An expert witness is defined in the Civil Procedure Rules as a "person who has been instructed to give or prepare expert evidence for the purpose of the proceedings".[92] The definition of expert in the Criminal Procedure Rules mirrors that of the Civil Procedure Rules with the added specification that an expert can give evidence required to determine fitness to plead or for the purposes of sentencing.[93] A professional witness is defined by section 3 of the Crown Prosecution Service (Witnesses' etc. Allowances) Regulations 1988 as "a witness practising as a member of the legal or medical profession or as an accountant, dentist or veterinary surgeon". A professional witness is often formal employees of one of the parties, for example a psychologist employed by prison services, who will be able to give factual evidence of the treatment of the inmate but also at times expert evidence.[94] This study is concerned with expert witnesses, references to any other type of witness will be clearly indicated.

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91 Crown Prosecution Services "Witness expenses and allowances" (2018) available online at https://www.cps.gov.uk/legal-guidance/witness-expenses-and-allowances (last accessed on 26 June 2020).

92 Rule 35.2 of the Civil Procedure Rules 1998 (as amended). Rule 25.2(1) in the Family Procedure Rules 2010 (as amended) define expert as:

> a person who provided expert evidence for use in proceedings; Section 13(8) of the 2014 Act provides for what is not included in reference to providing expert evidence or putting expert evidence before court in children proceedings.

93 Rule 19.1 of the Criminal Procedure Rules 2015 (as amended).

94 The British Psychological Society (2017) *Psychologists as expert witnesses: Guidelines and procedure* par. 1.3.

Expert opinion evidence has generated considerable negative publicity in England, especially in criminal proceedings.[95] Many cases have resulted in a miscarriage of justice and a selected few will be discussed. Three high profile cases have placed the public eye on expert evidence being the cases of Sally Clark,[96] Angela Cannings[97] and Donna Anthony.[98] All three of the women had been convicted of murdering their infant children, the three convictions all quashed. In each of these cases the expert testified to the improbability that two or more children in the same family could die of natural causes or Sudden Infant Death Syndrome (SIDS).[99] In the *Clark* case problems with the more than one of the expert witnesses were encountered, which included the pathologist Dr Williams who failed to disclose evidence of tests having been conducted. The expert paediatrician in the *Clark* case, Professor Roy Meadow had formulated his opinion on the assumption that there were no genetic or environmental factors affecting the likelihood of naturally occurring SIDS and submitted that there was only a one in 73 million chance of two such deaths in the same family.[100]

Professor Meadow also testified as expert witness in the *Anthony* case.[101] Professor Meadow stated in his testimony that, "Natural cot death has an incidence now of about 1 in 1,000, so the chance of natural cot death happening twice in a family is 1 in 1,000 times 1 in 1,000, which is 1 in 1,000,000. It is extraordinarily unlikely …"[102] Based on his testimony and the testimony of other experts Anthony was found guilty of murder.

In the *Cannings* case the conviction of murder also resulted from the expert opinion, which again was based on a hypothesis that the mere fact of two or more unexplained infant deaths in the same family meant that murder had been committed, a hypothesis which had not been sufficiently scrutinised or supported by empirical research.[103] The *Cannings* case led to the Attorney-General reviewing cases where a parent or

95 Choo (2018) *Evidence* 295 and Ormerod "Expert evidence: where now? What next?" (2006) 5 *Archbold News* 6. As discussed in 1.4 the problems regarding expert evidence in England will not be dealt with extensively.
96 *R v Clark (Sally)(Appeal against conviction) (no.2)* (2003) EWCA Crim 1020, 2003 WL 1822883.
97 *R v Cannings (Angela)* (2004) EWCA Crim 1; 2004 WL 61959.
98 *R v Anthony (Donna)* (2005) EWCA Crim 952; 2005 WL 816001.
99 See also a discussion of the cases in Choo (2018) 295-296.
100 *R v Cannings (Angela)* at par. 175-177.
101 *R v Anthony (Donna)* (2005) EWCA Crim 952; 2005 WL 816001.
102 *R v Anthony (Donna)* at par. 69.
103 *R v Cannings (Angela)* at par. 149.

caregiver had been convicted of killing an infant under two for the period of 1994 until 2004[104] which led to 28 cases being highlighted as a cause for concern.[105]

Another case that received considerable public attention was the case of Judith Ward.[106] Ward was convicted of murdering twelve people by planting a bomb which exploded at a London railway station. Scientific evidence was a major feature of the trial with a total of six witnesses giving evidence.[107] The court found in the *Ward* case that the injustice was caused by the experts that "regarded their task as being to help the police. They became partisan".[108] As a result of the publicity and concern with expert opinion evidence, the Law Commission published a report in March 2011 regarding expert evidence in criminal proceedings in England and Wales.[109] The report raised several concerns about expert evidence including that common law had adopted a *laissez-faire* approach, with evidence "being admitted without sufficient regard to whether or not it is sufficiently reliable".[110] The concerns led the Law Commission to recommend reforms which included a new statutory test of admissibility requiring expert opinion evidence to have "sufficient reliability".[111] The test was incorporated in the Criminal Procedure Rules[112] discussed below. The Criminal Procedure Rules extensively provides for the regulation of expert evidence and have been designed to ensure that an expert opinion is unbiased but also relevant.[113]

Expert evidence in civil cases have similarly come under the spotlight. In the report by Lord Woolf[114] he considered the "development, and cost, of a system of expert witnesses was one of the principal blemishes upon the process of litigation".[115] In Lord

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104 Hansard "HL Deb vol. 667 col 1657-66" (2004) available online at https://api.parliament.uk/historic-hansard/lords/2004/dec/21/infant-death-cases-attorney-generals (last accessed on 12 July 2020).

105 The Criminal Cases Review Commission and the Court of Appeal was notified of the cases together with the defence solicitor. The defendant subsequently had to decide whether they would take the case on appeal. See Hansard "HL Deb vol. 667 col 1657-66" (2004) available online.

106 *R v Ward* (1993) 2 All ER 577.

107 *Idem* 593.

108 *Idem* 628.

109 The Law Commission (2011) *Expert evidence in criminal proceedings in England and Wales (com. 325)*.

110 *Idem* par.1.8.

111 *Idem* par.3.36 and 9.1.

112 Criminal Procedure Rules 2015 (as amended).

113 In *R v Henderson* (2010) 2. Cr. App. R 24 at 186 H2 the court refers to the Criminal Procedure Rules 2010 which was later amended.

114 Woolf (2006) *Access to justice- Final Report*.

115 Tapper and Cross (2010) *Cross and Tapper on evidence* 529.

Woolf's report some of the criticism levelled against expert evidence is that it had become an industry "generating a multi-million pound fee income"[116] and the way that the expert evidence is used leads to experts taking on the role of partisan advocates.[117] The recommendations proposed by Lord Woolf's report was implemented in part 35 of the Civil Procedure Rules as supplemented by the Practice Direction, discussed below. Aspects of the practices and procedures applicable in civil cases later also formed part of the Criminal Procedure Rules.[118] The Civil Procedure Rules and Practice Direction is further supplemented by the Guidance for the Instruction of Experts in Civil Claims (2014)[119] and pre-action protocols[120] in specific types of cases.

Family law matters are dealt with in a different division, the Family Division[121] and a separate set of procedural rules apply. The Family Procedure Rules 2010 (FPR 2010)[122] and the supporting Practice Direction set out the framework for the jurisdiction of the Family Division, and part 25 deals specifically with the use of experts and assessors in family law matters.[123] The rules are modelled on the approach to Civil Procedure Rules and as such will not be discussed in detail below. Where necessary major difference will be highlighted.

Evident from above the problems experienced in South Africa regarding expert evidence is relatable to the situation in England. England has taken positive steps to try and address the problems and the regulatory framework developed for expert witnesses needs to be analysed in detail for possible solutions for South Africa.

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116 Woolf (2006) par. 2, chapter 13.
117 *Idem* par. 5, chapter 13.
118 Part 19 of the Criminal Procedure Rules 2015 (as amended).
119 The guidance came into effect on 1 December 2014. See Courts and Tribunals Judiciary "Guidance for the instruction of experts in civil claims" (2020) available online at https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/archive/experts-and-instruction-of-experts/guidance-for-the-instruction-of-experts-in-civil-claims/ (last accessed on 19 July 2020).
120 There are numerous pre-action protocols which are applicable in specific types of cases. See Ministry of Justice "CPR- Pre-Action Protocols" (2020) available online at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol (last accessed on 19 July 2020).
121 See 5.3.
122 The Family Procedure Rules 2010 (as amended) came into force on 6 April 2011.
123 Ministry of Justice "Foreword" (2017) available online at https://www.justice.gov.uk/courts/procedure-rules/family/fpr_foreword (last accessed on 19 July 2020).

5.4.1.1 Field of expertise rule

The existing common-law tests for admissibility (in criminal proceedings) are summarised in the Criminal Practice Direction as follows:[124]

> Expert opinion evidence is admissible in criminal proceedings at common law if, in summary, (i) it is relevant to a matter in issue in the proceedings; (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and (iii) the witness is competent to give that opinion.

The third admissibility test mentioned in the Criminal Practice Direction is as Ward states simply another way of "putting the question whether the witness's opinion is founded on expertise,"[125] in other words the field of expertise rule. The qualification to give expert evidence is a matter of competence which is not measured only by the holding of a qualification. In *R v Henderson* the test for admissibility of evidence is summarised as:[126]

> First, whether the subject matter of the opinion falls within the class of subjects upon which the expert testimony is permissible and second, whether the witnesses have acquired by study or experience sufficient knowledge of the subject to render their opinion of value in resolving the issues before the court.

In *Henderson* the court remarked that when considering the admissibility of expert evidence, specifically expert medical evidence, the clinical experience may provide a more reliable source of evidence than an expert who has ceased to practice.[127] According to the court in *Henderson* the clinical practice affords the experts the opportunity to continue developing and learning in both the foreseen and unforeseen.[128] An expert also need not have the "paper qualifications" as expertise gained by experience has also rendered an expert witness competent.[129] For example, in *R v Thomas*[130] the court held that expert opinion based on experience in relation to

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124 Par.19A.1 of Criminal Practice Directions 2015 (as amended) Division V.
125 Ward "A new and more rigorous approach to expert evidence in England and Wales?" (2015) 19(4) *The International Journal of Evidence and Proof* 238.
126 *R v Henderson* at par. 206.
127 *Idem* par. 208.
128 *Ibid.*
129 Murphy and Glover (2013) 408.
130 *R v Thomas* (20110 EWCA Crim 1295.

DNA evidence was admissible. There are, however, instances where statutes can impose specific requirements for the qualifications of the expert witness. For example, section 1 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1990 determines that only registered medical practitioners with the requisite qualifications may give evidence on the accused's mental condition.[131]

The Law Commission report opines that the "relevant expertise" limb of the admissibility is sound and although the threshold is low it has the potential to exclude expert evidence and the potential to limit the evidence which an expert witness would be permitted to give.[132] Both the Criminal Procedure Rules and the Civil Procedure Rules in underscoring the admissibility test of field of expertise requires that expert witnesses provide the expert's qualifications, relevant experience and accreditation in their reports.[133] This will assist the courts in determining whether the witness is competent to give evidence. The expert's duties to the court will be discussed below[134] but several of the provisions also relate to an expert's field of expertise.

The expertise must be based on a subject whose scientific validity has been demonstrated.[135] Novel forms of scientific expertise, including novel theories and methodology, can prove to be problematic. In *R v Gilfoyle*, a husband was charged with the murder of his wife.[136] Gilfoyle (similar to the South African case of *S v Rohde*[137]) claimed that his wife committed suicide and wanted to submit evidence of a psychological autopsy by a psychologist.[138] The court held that although the psychologist was clearly in expert in his field there is no real scientific basis for

131 Section 1(2) of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (c.25) determines that:
> Subsections (2) and (3) of section 54 of the Mental Health Act 1983 ("the 1983 Act") shall have effect with respect to proof of the accused's mental condition for the purposes of the said section 2 as they have effect with respect to proof of an offender's mental condition for the purposes of section 37(2)(a) of that Act.

Section 54(1) and (2) of the Mental Health Act 1983 (c.20) refers to the medical evidence of registered medical practitioner having the requisite qualifications.

132 The Law Commission (2011) par.2.7.

133 Rule 19.4(a) of the Criminal Procedure Rules 2015 (as amended). Par.3.2(1) of the Civil Practice Direction 35 states that the expert's report must give the details of the expert's qualifications. The rules relating to the contents of the expert's report are discussed in 5.3.4. below.

134 See 5.4.6.

135 Murphy and Glover (2013) 417.

136 *R v Gilfoyle* (2001) 2 Cr. App. R. 5.

137 See 3.6.3.

138 *R v Gilfoyle* at par. 23.

psychological autopsies.[139] In determining whether to allow the psychological autopsy the court referred to and placed some reliance on the guiding principle in the American case of *Frye v United States*,[140] the general acceptance rule, that evidence based on "a developing new brand of science or medicine is not admissible until accepted by the scientific community as being able to provide accurate and reliable opinion".[141] Glover submits that although the court in Gilfoyle was correct in scrutinising expert evidence, given the difficulties with *Frye* and the fact that the *Daubert* decision had supplanted *Frye*,[142] it is doubtful whether the *Frye* standard should be applied in English courts.[143] A year after the *Gilfoyle* case the court in *Dallagher* considered the *Gilfoyle* case and stated that it is clear from *Daubert* that the guiding principles of *Frye* had been replaced.[144] The court referring with approval to Cross and Tapper held that the English approach is:[145]

> The better and now more widely accepted view is that so long as the field is sufficiently well established to pass the ordinary tests of reliability and relevance, then no enhanced test of admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere.

In *R v Henderson,* the court had to consider medical evidence where it was alleged that a baby died as a result of being shaken.[146] The court in *Henderson* indicated that, where relevant, a judge should remind a jury that medical science is continually developing and knowledge which was previously thought unknown may subsequently be recognised and acknowledged.[147] The court acknowledged that at no stage can knowledge in a field be regarded as complete or comprehensive.[148] The court, however, did not comment on the test for admissibility in the case of novel scientific theories. The court only referred to the Law Commission paper which was likely to lead to changes.[149]

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139 *Idem* par. 25.
140 *Frye v. United States* 293 F.1013 (D.C. Cir. 1923).
141 *R v Gilfoyle* at par. 25.
142 See 5.4.1.1.
143 Murphy and Glover (2013) 419.
144 *R v Dallagher* (2002) EWCA Crim 1903 at par.29.
145 *R v Reed* (2009) EWCA Crim 2698 at par.111.
146 *R v Henderson* at par.77.
147 *Idem* par. 21.
148 *Ibid*.
149 *Idem* par. 206.

At common law reliability of expert evidence influenced the weight of the evidence and not the admissibility.[150] Reliability is not precluded in the common law test for admissibility but the threshold is very low.[151] The approach was taken on the basis that juries should not be denied "… the advantages to be gained from new techniques and new advances in science".[152] The Law Commission report, discussed above, recommended a statutory test of admissibility in criminal proceedings, namely, whether the expert evidence was "sufficiently reliable to be admitted".[153] The Government declined to legislate the admissibility test and the common law rules of admissibility remain.[154] Despite it not being legislated Lord Thomas CJ states that courts have already come to recognise that the recommendations of the Law Commission should be utilised to move "away from the *laissez-faire* approach".[155] The test is referred to in the Criminal Practice Directions indicating that nothing at common law "precludes assessment by the court of the reliability of an expert opinion…and courts are encouraged actively to enquire into such factors".[156] The Criminal Practice Direction refers to the case of *R v Dlugosz and Others* where the court held that:[157]

> It is essential to recall the principle which is applicable, namely in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury.

It is uncertain whether the reference to "sufficient reliability" in Criminal Practice Direction now effectively forms another "limb" to the common law admissibility test, a reliability limb.[158] Different views have been taken with Ward arguing that the traditional common law tests for admissibility will remain[159] whereas Stockdale and

150 Stockdale and Jackson "Expert evidence in criminal proceedings: current challenges and opportunities" (2016) 80 *Journal of Criminal Law* 347.
151 *Ibid.*
152 *R v Clarke* (1995) 2 Cr App R 425 at 430 as quoted in Stockdale and Jackson (2016) *Journal of Criminal Law* 344 at 347.
153 The Law Commission (2011) par.7.21.
154 Par.19A.3 of Criminal Practice Directions 2015 (as amended) Division V.
155 Ward (2015) *The International Journal of Evidence and Proof* 233.
156 Par.19A.4 of Criminal Practice Directions 2015 (as amended) Division V.
157 *R v Dlugosz and Others* (2013) EWCA Crim 2 at par. 11.
158 Stockdale and Jackson (2016) *Journal of Criminal Law* 348.
159 Ward (2015) *The International Journal of Evidence and Proof* 229.

Jackson submit that in evaluating the case law it appears that the there is a likelihood that the Court of Appeal will in the future treat reliability as an admissibility condition.[160]

The Criminal Practice Directions includes various factors that the courts can take into consideration when determining the reliability of expert evidence, especially expert scientific evidence.[161] Paragraph 19A.5 in the Criminal Practice Directions sets out eight factors based on the recommendations by the Law Commission which the court may take into account in determining the reliability of expert opinion, especially expert scientific opinion. These factors are:

(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;
(b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;
(d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;
(e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;
(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);
(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and
(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

The Law Commission report stresses that factor (h) relating to the methods followed should not be understood to be "a presumption against the admission of expert opinion

160 Stockdale and Jackson (2016) *Journal of Criminal Law* 348.
161 Par. 19A.5 of Criminal Practice Directions 2015 (as amended) Division V.

evidence based on new or nascent developments in science and technology".[162] The Criminal Practice Directions goes on in paragraph 19A.6 to give further guidance to courts, specifically on identifying potential flaws in an expert opinion which would detract from its reliability. Given cases such as *Cannings, Clark* and *Henderson* the considerations in paragraph 19A.6 is not surprising. In accordance with paragraph 19A.6 the court must identify any hypothesis which has not been subjected to scrutiny, opinions based on flawed data or unjustifiable assumptions, opinions that rely on an inference or conclusion which has not been properly reached and any expert opinion relying on examination, technique, method or process which was not properly carried out or applied or was not appropriate for the particular case. It is submitted that the factors listed can be compared with the criteria specified in the well-known case of *Daubert v. Merrell Dow Pharmaceuticals Inc.*[163] The factors, discussed in 6.4.1.1. below, are the testability, reliability, validity and known or potential error rate all of which are incorporated in some form in the factors listed.

Stockdale and Jackson warn that the courts must recognise the potential advantages of new scientific and technological developments and a too rigid enforcement of factors in the Criminal Practice Directions can have the result that currently admissible techniques and opinion will be inadmissible whilst some techniques will face a delay before it is accepted despite it being reliable.[164] Despite the factors in the Practice Directions the meaning of sufficiently reliable still needs to be determined. Based on Nance's evaluation of the *Daubert* decision Ward argues that:[165]

> the concept of 'sufficient reliability' is vacuous in the absence of some reasonably determinate criterion of what degree of reliability is 'sufficient': it is not enough to specify (as the Practice Direction does) the factors that will weigh for and against admissibility, without any indication of the weight required for admission or exclusion.

Ward argues that the criterion of "sufficient reliability" must be extrapolated from common law authorities.[166] Ward further submits that case law which has referred to

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162 The Law Commission (2011) par. 5.35 fn. 35.
163 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).
164 Stockdale and Jackson (2016) *Journal of Criminal Law* 354.
165 Ward (2015) *The International Journal of Evidence and Proof* 229.
166 *Ibid*.

the Practice Direction and the phrase "sufficiently reliable" adds little to the well-worn formula from the Australian case of *Bonython* (1984) 38 SAAR 45.[167]

For example, in *R v Reed*, which dealt with the admissibility of expert evidence on low template DNA analysis, the court referred to the test in *Bonython* and "sufficiently reliable" suggesting they are interchangeable.[168] In *Bonython*, as referred to in *Reed*, the court held that the subject matter of the evidence must be part of:

> a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.[169]

The admissibility of expert evidence in civil proceedings is derived from statute and no similar provision of sufficient reliability for admissibility is contained in the Civil Procedure Rules or Civil Practice Direction. The Civil Evidence Act 1972 determines in section 3(1) that:

> Subject to any rules of court made in pursuance of […] this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

The court in *Barings Plc (In liquidation) v Coopers and Lybrand* applied the test of *Bonython* and stated that it constitutes a good description of what would qualify as expert evidence under section 3(1) of the Civil Evidence Act 1972.[170] The court had to determine whether expert evidence was admissible on the question of standards of professional competence in a professional negligence claim and held that test is whether:[171]

> there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and

167 Ward (2015) *The International Journal of Evidence and Proof* 234.
168 *Ibid*.
169 *R v Reed* at par. 111.
170 *Barings Plc (In Liquidation) v Coopers & Lybrand (No.2); Barings Futures (Singapore) Pty Ltd (In Liquidation) v Mattar (No.2)* (2001) Lloyd's Rep. P.N. 379; (2001) P.N.L.R 22 at par.44.
171 *Idem* par.45.

> knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues.

It appears that in both criminal and civil proceedings the formula of *Bonython* is used. According to Hodgkinson and James the better approach in deciding whether to admit pioneering scientific developments is to apply the formula or test in *Bonython* as the courts are "not a suitable forum in which to test out ideas on the frontiers of science and understanding".[172]

5.4.1.2 Common knowledge rule (Turner rule)

In the *Reed* case, discussed above, the court emphasised that even if the scientific basis of the expert evidence has been established as reliable, the evidence remains inadmissible unless it falls within the "scope of evidence an expert can properly give".[173] This guideline links to the *Turner* rule (also referred to as the common knowledge rule or helpfulness test) discussed in chapter 4, whereby courts refuse to hear expert evidence that has been classified as common knowledge as it is not considered helpful.[174] Evidence classified as common knowledge falls outside the scope of evidence that an expert may give. The purpose of the admission of psychiatric evidence in the *Turner* case was twofold, firstly Turner's counsel sought to call a psychiatrist to help the jury to accept Turner's account as credible and secondly to indicate why he was likely to be provoked.[175] The evidence was considered inadmissible on both accounts.

The *Turner* rule has been applied in many cases such as *Strudwick and Merry* where the mother of the child victim wanted to adduce evidence of two experts, a psychologist and psychiatrist.[176] Both the psychologist and psychiatrist would have testified that the mother was incapable of reacting to the sufferings of her children because of the abuse she suffered as a child.[177] The court excluded the psychological evidence as it was

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172 Hodgkinson and James (2007) 31.
173 *R v Reed* at par. 112.
174 Dennis (2017) 888. See 4.2.1.1.
175 *R v Turner* (1975) 1 All ER 70 at 72.
176 *R v Strudwick; R v Merry* (1993) Cr. App. R. 326.
177 *Idem* 332.

"not likely to afford the jury the kind of help without which they would be unable to do justice to Mrs Merry's case".[178] The psychological evidence fell within the "limits of normality".

The *Turner* rule has been criticised on various fronts such as the arbitrary distinction of abnormal and normal as discussed in chapter 4.[179] Dennis submits that the *Turner* case is concerned with a "turf war" in preventing psychiatrists and psychologists from playing a more extensive role in criminal trials.[180] He argues that the reluctance of courts to allow evidence from mental health experts is based on the "lingering scepticism" about the scientific basis of the disciplines.[181] Despite the criticisms the *Turner* rule remains. The courts, however, appear to be more willing to depart from the general rules established, having shown flexibility in admitting evidence of psychologists and psychiatrists where the evidence will clearly assist the trier of fact.[182]

One of the early victories for forensic psychology was the case of *R v Raghip*.[183] In this case the accused made confessions which he later retracted. The criteria for admissibility of psychological evidence were broadened in this case to include personality traits such as suggestibility.[184] The more flexible approach was also confirmed in *R v Pinfold and MacKenney*[185] where the Court of Appeal stated that over the years the approach to expert evidence, specifically medical evidence, has developed and become more generous.[186] In *Pinfold and MacKenney* the court, referring to *R v O'Brien*,[187] explained the development that has taken place. Firstly, the interpretation placed upon *Turner* was that expert evidence would only be heard if the admitted evidence showed a recognised mental illness.[188] This was expanded on in *R v Ward* where court stated that: [189]

178 *Idem* 333.
179 See 4.2.1.1.
180 Dennis (2017) 892.
181 *Ibid*.
182 Hodgkinson and James (2007) 20.
183 *R* v *Silcott, Braithwate & Raghip*, *The Times*, 9 December 1991.
184 See the discussion on *Raghip* in Gudjonsson "Psychology brings justice: the science of forensic psychology" (2003) 13 *Criminal Behaviour and Mental Health* 160.
185 *R v Pinfold and MacKenney* (2003) EWCA Crim 3643.
186 *Idem* par. 14.
187 *R v O'Brien* (25 January 2000) (No. 98/6926/27/28 SI) quoted in *R v Pinfold and MacKenney* at par. 14.
188 *R v O'Brien* at 19 quoted in *R v Pinfold and MacKenney* at par. 14.
189 *R v Ward* at 641 as quoted in *R v Pinfold and MacKenney* at par. 14.

> But we conclude on the authorities as they now stand that the expert evidence of a psychiatrist or a psychologist may properly be admitted if it is to the effect that a defendant is suffering from a condition not properly described as mental illness, but from a personality disorder so severe as properly to be categorised as mental disorder.

The court in *Pinfold and MacKenney* held that in contrast to the *Ward* case the test cannot be whether an abnormality fits into a recognised category.[190] The test for admissibility of the psychological or psychiatric evidence is whether it demonstrates that a person is suffering from some sort of abnormality.[191] Although *Pinfold and MacKenney* dealt with the credibility of a witness the court emphasised that the rule relating to the admission of expert evidence remains the importance and significance of the evidence to the issues at trial.[192] The abnormal/normal dichotomy should be considered as a rule of thumb rather than a rule of law.[193]

Another example of the flexibility is the case of *H (JR) (Childhood Amnesia)* where the court admitted evidence from a psychologist on memory development in young children.[194] The complainant in this case was said to have a clear and detailed memory of the indecent assaults that occurred when she was four or five years old. Expert evidence on the credibility of a witness is generally not allowed but in *H (JR) (Childhood Amnesia)* it was found to be admissible because it could assist the trier of fact. Psychological evidence has also been admitted on the topic of "coerced complaint confession" in the case of a young boy who confessed to crimes after a being subjected to prolonged period of questioning.[195]

When applying the *Turner* rule the exact scope of what constitutes common knowledge will need to be grappled with on a case-by-case basis, but the boundaries of what constitutes common knowledge can also move with advances in science and understanding. This also applies to psychological evidence. Evidence regarding battered women's syndrome, for example, is admissible as it is considered outside the

190 *R v Pinfold and MacKenney* at par. 14.
191 *Idem* par. 16.
192 *Ibid.*
193 Hodgkinson and James (2007) 412.
194 *R v H (JR) (Childhood Amnesia)* [2006] 1 Cr App R 10.
195 *R v Blackburn* (2005) EWCA Crim 1349.

knowledge of ordinary people.[196] As a result of the advances in science and understanding, cases with similar set of facts have shown different results.

5.4.1.3 Basis rule

In English law expert witnesses are also expected to state the facts or underlying data upon which their opinions are based.[197] At common law the material relied on can be inadmissible as evidence because it is hearsay evidence.[198] As in the South African context there are exceptions to the rule in the case where the expert's evidence is in part based on general works of reference, particular studies or information gathered from others in the course of their profession.[199] In both civil and criminal proceedings statutes have relaxed the common law requirements. The Civil Evidence Act 1995 determines that published works which can include, for example, scientific works, dictionaries and histories, are admissible as evidence of facts.[200] In criminal cases the Criminal Justice Act 2003 provides that expert witnesses are allowed to base their opinion on statements of fact made by others for the purposes of the proceedings subject to certain conditions.[201] The expert may also rely on any other material, such as works of reference, relevant to their field of expertise.[202]

The Criminal Procedure Rules reaffirms the basis rule and requires that the expert's report must give the (a) details of any literature or information relied on;[203] (b) contain a statement of all the facts that the opinions are based on;[204] (c) where the opinion is based on the fact or opinion of another person the identity and qualifications of the person must be included;[205] (d) where there is a range of opinion on the matter it must be summarised and reasons must be given for the expert's own opinion;[206] and (e)

196 *R v Hobson* (1998) 1 Cr App R31 and *R v Thornton (No.2)* (1996) 1 W.L.R. 1174, CA. See also Murphy and Glover (2013) 428.
197 Murphy and Glover (2013) 420.
198 Murphy and Glover (2013) 420 and Tapper and Cross (2010) 533.
199 Tapper and Cross (2010) 533.
200 Section 7(2)(a) of the Civil Evidence Act 1995 (c.38).
201 Section 127(2) of the Criminal Justice Act 2003 (c.44). The conditions are set out in section 127(1) of the Criminal Justice Act 2003 (c.44).
202 Murphy and Glover (2013) 421.
203 Rule 19.4(b) of the Criminal Procedure Rules 2015 (as amended).
204 Rule 19.4(c) of the Criminal Procedure Rules (2015) as amended.
205 Rule 19.4(e) of the Criminal Procedure Rules 2015 (as amended).
206 Rule 19.4(f) of the Criminal Procedure Rules 2015 (as amended).

any qualification to the opinion must be stated and explained.[207] The same requirements are included in the Civil Practice Direction.[208]

The Family Procedure Rules differ slightly from the requirements of criminal and civil cases and places an additional obligation on the experts involved family proceedings.[209] In addition to the requirements set out above the Family Practice Direction require that:[210]

> in expressing an opinion to the court –
>
> (i) take into consideration all of the material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time the opinion is expressed, identifying the facts, literature and any other material, including research material, that the expert has relied upon in forming an opinion;
>
> (ii) describe the expert's own professional risk assessment process and process of differential diagnosis, highlighting factual assumptions, deductions from the factual assumptions, and any unusual, contradictory or inconsistent features of the case;
>
> (iii) indicate whether any proposition in the report is an hypothesis (in particular a controversial hypothesis), or an opinion deduced in accordance with peer-reviewed and tested technique, research and experience accepted as a consensus in the scientific community;

The rules and practice directions represent a deliberate attempt to improve the quality of the expert evidence and to ensure objective assistance is provided to the court.

5.4.1.4 Ultimate issue rule

The common law rule is that a witness may not express an opinion on the ultimate issue that the court has to decide.[211] The ultimate issue rule is said to have originated from the 1821 case *R v Wright* in which the court questioned the right of the physician to state that the accused was insane, as this was for the jury to decide.[212] Despite the

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207 Rule 19.4(g) of the Criminal Procedure Rules 2015 (as amended).
208 Par.3.2 of Civil Practice Direction 35.
209 Family Procedure Rules 2010 (as amended).
210 Rule 9.1(f) of the Family Practice Direction 25B.
211 Dennis (2017) 906; Murphy and Glover (2013) 413 and Hodgkinson and James (2007) 3.
212 Allan and Louw "The ultimate opinion rule and psychologists: A comparison of the expectations and experiences of South African lawyers" (1997) 15 *Behavioral Sciences and the Law* 307.

rule, it has been inconsistently applied in the case of expert witnesses.[213] In general, the courts try to avoid that expert witnesses give evidence on the ultimate issue to avoid the risk of a jury being unduly influenced.[214] The court has also expressed its concern that allowing an expert witness to testify regarding the ultimate issue can usurp the role of the court which can have the result that "[t]he admission of the opinion of eminent expert upon the issues leads to the balance of opinions and tends to shift responsibility from the bench or the jury to the witness box".[215] The exclusion of opinion evidence on the ultimate issue has, however, been relaxed for civil proceedings by section 3 of the Civil Evidence Act 1972.[216]

In criminal proceedings it has been suggested that the judge should intervene if the expert is "short of doing the jury's work".[217] In *R v Stockwell*[218] the court dealt with what was referred to as the "vexed question" of whether an expert can give their opinion on the ultimate issue.[219] The court in *Stockwell* held that an expert is called to give their opinion and no arbitrary limit should be placed on the opinion, the jury should just be reminded that they are not bound by the opinion.[220]

5.4.2 Disclosure of expert evidence and pre-trial case management

5.4.2.1 Civil proceedings

Besides the costs involved with litigation, one of the major concerns with the civil justice system identified by Lord Woolf is the uncontrolled discovery and excessively used expert evidence.[221] The additional problem of experts being partisan and only part of the "adversarial armoury" was also a key issue.[222] In an attempt to address the problems the report by Lord Woolf recommended that expert evidence be under the

213 Dennis (2017) 906.
214 Tapper and Cross (2010) 531.
215 *Joseph Crosfield & Sons Ltd v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378 at 379.
216 Civil Evidence Act 1972 (c.30). See also *Routestone Limited v Minories Finance Limited* (1997) B.C.C. 180 at 188H.
217 Murphy and Glover (2013) 413.
218 *R v Stockwell* (1993) 97 Cr. App. R 260.
219 *Idem* 265.
220 *R v Stockwell* at 266. See also Dennis (2017) 908.
221 Woolf (2006) par. 1, chapter 13.
222 Woolf (2006) par. 5, chapter 13.

complete control of the court.[223] The recommendations were incorporated into the Civil Procedure Rules and Civil Practice Directions which now (amongst other rules) provide for strict pre-trial disclosure of evidence on which a party intends to rely. The statutory basis of the rules is section 2 of the Civil Evidence Act 1972. The disclosure is also a condition for the evidence to be admitted.[224] The admissibility of expert evidence in civil proceedings is circumscribed by the Civil Procedure Rules.[225]

The Civil Procedure Rules supersedes the right of parties to present expert evidence as they see fit.[226] Rule 35.1 determines that: "[e]xpert evidence shall be restricted to that which is required to resolve the proceedings".[227] The Civil Practice Direction explains that part 35 of the Civil Procedure Rules is intended to limit expert evidence and where possible only one expert will be appointed. No party is allowed to call an expert or submit the expert's report into evidence without the court's permission.[228] When applying for permission the party must provide the estimate of the costs of the proposed expert evidence and also identify the field in which expert evidence is required and the issue which the expert will address.[229] If practicable the name of the proposed expert must also be supplied on application.[230] The court has a wide discretion in granting permission and may specify the issues which the expert evidence should address.[231] If permission is granted for expert evidence where the claim has been allocated to the small claims track or the fast track normally only permission for one expert on a particular issue is granted.[232]

A problem that is often encountered when appointing experts is that parties wish to change experts once they discover that the specific expert's evidence is not helpful. Mindful of the concerns raised by Lord Woolf and the duties of expert witnesses the courts frown upon any form of "expert shopping".[233] In *Guntrip v Cheney Coaches Ltd*

223 Woolf (2006) par. 2, chapter 13.
224 Rule 35.4 of the Civil Procedure Rules 1998 (as amended).
225 Civil Procedure Rules 1998 (as amended).
226 Rule 35.1 of the Civil Procedure Rules 1998 (as amended).
227 *Ibid*.
228 Rule 35.4(1) of the Civil Procedure Rules 1998 (as amended).
229 Rule 35.4(2)(a) of the Civil Procedure Rules 1998 (as amended).
230 Rule 35.4(2)(b) of the Civil Procedure Rules 1998 (as amended).
231 Rule 35.4(3) of the Civil Procedure Rules 1998 (as amended).
232 Rule 35.4(3A) of the Civil Procedure Rules 1998 (as amended).
233 Murphy and Glover (2013) 412.

the plaintiff underwent a knee replacement operation and upon return to work he was given a manual coach to drive causing him pain in his knee.[234] The plaintiff issued a claim for negligence and/or breach of duty against his employer and instructed an orthopaedic surgeon to act as expert witness. The joint statement made by the two expert witnesses was unfavourable and as a result the plaintiff wanted to appoint a different expert witness. The court refused his application to rely on replacement expert evidence and held that:[235]

> If at any time the expert can no longer support the case of the person who instructed him, it is his duty to say so. Indeed, if the expert forms that view it is far better that he says so sooner rather than later before the litigation costs escalate. It is partly because an expert's overriding duty is to the court that the court discourages expert shopping, particularly where a party has had a free choice of expert and has put forward an expert report as part of his case. He must adduce good reason for changing expert. The mere fact that his chosen expert has modified or even changed his views is not enough. The expert may have had good reason for changing his views…

In the South African context, most of the rules and directives have been issued in order to assist in alleviating the congested court roles caused by the multitude of Road Accident Fund and other personal injury claims.[236] In England the Civil Procedure Rules also specifically make provision for rules relating to expert evidence in "soft tissue injury claims"[237] which should be read together with the Pre-Action Protocol relating to the personal injury claims.[238] In a soft tissue injury claim the court usually gives permission for only one expert medical report and the report must be a fixed cost medical report.[239] A fixed cost medical report is described in the RAF Pre-Action Protocol as a report in a soft tissue injury claim which is from a medical expert who, save in exceptional circumstances (a) has not provided treatment to the claimant; (b) is not associated with any person who has provided treatment; and (c) does not

234 *Guntrip v Cheney Coaches Ltd* (2012) EWCA Civ 392.
235 *Idem* par. 17.
236 See 4.2.2.
237 A soft tissue injury claim is defined as a claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury. Paragraph 1.1(16A) of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Accident (31 July 2013).
238 A list of all the pre-action protocols is available online at Ministry of Justice "CPR- Pre-Action Protocols" (2020) available online at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol (last accessed 11 July 2020).
239 Rule 35.4(3B) of the Civil Procedure Rules 1998 (as amended).

propose or recommend treatment that they or an associate then provide.[240] From the definition of a fixed cost medical report it is clear that the medical expert must only fulfil a forensic duty and to avoid any bias or purported bias the expert may not recommend or propose treatment that they could provide. A medical expert in this context includes a person registered with the General Medical Council or the General Dental Council or a psychologist or physiotherapist registered with the Health and Care Professions Council.[241]

When considering granting permission for a party to rely on expert evidence the court also takes into consideration the Practice Direction relating to single joint experts.[242] A single joint expert is defined in the Civil Procedure Rules as an expert instructed to prepare a report for the court on behalf of two or more of the parties (including the claimant) to the proceedings.[243] The Practice Direction provides a list of circumstances that the court must take into account when deciding if a single joint expert should be appointed.[244] Rule 35.7 further gives the court the power to direct that evidence should be given by a single joint expert.[245] If the parties cannot agree on the single joint expert the court may select an expert from a list prepared by the parties[246] or direct that the expert be selected in such other manner as the court may direct.[247] The relevant parties are jointly and severally liable for the single joint expert's fees and expenses is unless the court directs otherwise.[248] By both parties paying the fees this limits any suspected bias.

Where the court gives direction under Rule 35.7 for a single joint expert to be appointed any relevant party can provide the instructions to the expert.[249] Given the problems which have occurred with instructions to experts, for example legal

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240 Par. 1.1(10A) of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Accident (31 July 2013).
241 Par. 1.1(12) of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Accident (31 July 2013).
242 Par. 7 of the Civil Practice Direction 35.
243 Rule 35.2(2) of the Civil Procedure Rules 1998 (as amended).
244 Par. 7 of the Civil Practice Direction 35.
245 Rule 35.7(1) reads as follows:
> Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.
246 Rule 35.7(2)(a) of the Civil Procedure Rules 1998 (as amended).
247 Rule 35.7(2)(b) of the Civil Procedure Rules 1998 (as amended).
248 Rule 35.8(5) of the Civil Procedure Rules 1998 (as amended).
249 Rule 35.8(1) of the Civil Procedure Rules 1998 (as amended).

representatives who do not give proper and complete instructions or wilfully excludes certain information to benefit their client when giving instructions, Rule 35.8 can assist in minimising the problem. In accordance with Rule 35.8 a copy of the instructions must also be sent to the relevant parties.[250] In the case where a single joint expert is not appointed experts are still obliged to state the substance of material instructions, which includes written and oral instructions, in their report.[251] The instructions that the experts refer to in their reports is not subject to privilege.[252] However, the courts will not order disclosure of the instruction document[253] or allow cross-examination on the instructions unless there are possible grounds that the statement contained in the expert's report is inaccurate or incomplete.[254]

In accordance with the South African Uniform Rules and Practice Directives joint minutes are mandatory if there are two opposing experts in the same field.[255] In England discussions between opposing experts are mandatory if directed by the court.[256] The court may at any stage direct that the different experts conduct a discussion in order to identify and discuss the issues in the proceedings and where possible reach an agreement.[257] The purpose is not for experts to settle cases but to try and narrow issues.[258] The court may specify the issues which must be discussed[259] and direct that following the discussion a statement for the court must be prepared setting out those issues on which they agree and if they disagree the reasons for the disagreement.[260] An agreement between the experts shall not bind the parties unless the parties expressly agree to be bound by the agreement.[261] To ensure that the environment is conducive of an open discussion the Civil Procedure Rules direct that

250 Rule 35.8(2) of the Civil Procedure Rules 1998 (as amended).
251 Rule 35.10(3) of the Civil Procedure Rules 1998 (as amended).
252 Rule 35.10(4) of the Civil Procedure Rules 1998 (as amended).
253 Rule 35.10(4)(a) of the Civil Procedure Rules 1998 (as amended).
254 Rule 35.10(4)(b) of the Civil Procedure Rules 1998 (as amended). Paragraph 5 of the Civil Practice Direction 35 states that cross-examination of experts on the contents of the instruction will only be allowed if the court grants permission or if the instructing party gives consent. The court must be satisfied that there are reasonable grounds to allow the cross-examination.
255 See 4.2.2.
256 Par. 9.1 of the Civil Practice Direction 35.
257 Rule 35.12(1) of the Civil Procedure Rules 1998 (as amended).
258 Par. 9.2 of the Civil Practice Direction 35.
259 Rule 35.12(2) of the Civil Procedure Rules 1998 (as amended).
260 Rule 35.12(3) of the Civil Procedure Rules 1998 (as amended).
261 Rule 35.12(5) of the Civil Procedure Rules 1998 (as amended).

the discussion between the experts cannot be referred to at trial unless agreed by parties.[262]

The pre-trial disclosure of experts, appointment of a single joint expert and joint minutes or agreement are not foreign in the South African context but a rule that is quite different is the opportunity that is afforded to the parties to direct questions about the expert's report after the report has been submitted.[263] The written questions may only be put once[264] and must be for the purpose of clarifying the expert's report.[265] The expert's answers to the question will subsequently be treated as part of the expert's report.[266] Serious consequences can result if an expert that was instructed by another party does not answer the written questions. The court can in that instance make an order that the party who instructed the expert may not rely on the evidence together with, or in the alternative, make an order that the instructing party may not recover the fees and expenses of the expert from any other party.[267]

5.4.2.2 Criminal proceedings

The prosecution in criminal cases had a duty to disclose expert evidence that forms part of the prosecution's case.[268] The disclosure in practice was, however, less than adequate.[269] As a result of concerns many discussions and debates ensued eventually culminating in the Criminal Procedure and Investigations Act 1996 which provides for the disclosure by the prosecution of unused material[270] and provisions on defence disclosure.[271] The disclosure referred to could include disclosure of expert evidence. Section 81 of the Police and Criminal Evidence Act 1984[272] also made provision for

262 Rule 35.12(4) of the Civil Procedure Rules 1998 (as amended).
263 Rule 35.6(1) of the Civil Procedure Rules 1998 (as amended). The expert having been instructed by another party or a single joint expert appointed under Rule 35.7.
264 Rule 35.6(2)(a) of the Civil Procedure Rules 1998 (as amended).
265 Rule 35.6(2)(c) of the Civil Procedure Rules 1998 (as amended). The questions must also be directed within 28 days of service of the expert's report in terms of Rule 35.6(2)(b) of the Civil Procedure Rules 1998 (as amended).
266 Rule 35.6(3) of the Civil Procedure Rules 1998 (as amended).
267 Rule 35.6(4) of the Civil Procedure Rules 1998 (as amended).
268 Crown Court (Advance Notice Expert Evidence) Rules 1987. See the discussion in Meintjies-Van Der Walt (2001) 112-113.
269 Meintjies-Van Der Walt (2001) 113.
270 Section 3 of the Criminal Procedure and Investigations Act 1996 (c.25).
271 Section 5 of the Criminal Procedure and Investigations Act 1996 (c.25).
272 Police and Criminal Evidence Act 1984 (c.60).

the disclosure of expert evidence in the Crown Court. Both the acts have been amended by the Courts Act 2003 to make provision for Criminal Procedure Rules to require any party to the proceedings to disclose to the other parties any expert evidence which they propose to adduce in the proceedings.[273]

The Criminal Procedure Rules now determines that if a party in criminal proceedings wishes to introduce expert evidence that party must serve a summary of the expert's conclusion or the expert's report on the court officer and to each other party.[274] Before the enactment of the Criminal Justice Act 1988[275] there was no provision for the admissibility of expert reports in criminal cases. Section 30(1) of the Criminal Justice Act states that:

> An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.

If the expert witness will not give oral evidence the report will, however, only be admissible with leave from the court.[276]

A summary of an expert's conclusions needs to be served if the party wants another party to admit as fact the summary.[277] A party that wants to introduce expert evidence otherwise than as an admitted fact can apply in terms of rule 19.3(3) and must ensure that the report complies with the rules relating to the contents of the expert's report[278] as discussed below.[279] Should a party wish to introduce expert evidence under rule 19.3(3) but wants to withhold information from another party they can apply to the court for such a decision.[280] If no information is to be withheld, the complete expert's report must be served as soon as practicable[281] and must be served with a notice setting out if the party is aware of anything which might reasonably be thought capable of

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273 Section 20(3)(a) of the Criminal Procedure and Investigations Act 1996 (c.25) and section 81(1) of the Police and Criminal Evidence Act 1984 (c.60).
274 Rule 19.3 of the Criminal Procedure Rules 2015 (as amended).
275 Criminal Justice Act 1988 (c.33).
276 Section 30(2) of the Criminal Justice Act 1988 (c.33).
277 Rule 19.3(1) of the Criminal Procedure Rules 2015 (as amended).
278 Rule 19.3(3)(a) of the Criminal Procedure Rules 2015 (as amended).
279 See 5.4.3.2.
280 Rule 19.9 of the Criminal Procedure Rules 2015 (as amended). The party that applies for information to be withheld must in their application identify the information and explain why the applicant thinks that it would be in public interest to withhold it.
281 Rule 19.3(3)(b) of the Criminal Procedure Rules 2015 (as amended).

undermining the reliability of the expert's opinion or detracting from the credibility or impartiality of the expert.[282] In *R v Henderson* the court stated that the defence expert must disclose any relevant previous reports and any adverse judicial criticism.[283] The court in the *Henderson* case indicated that the history of the expert witness may not be a ground for inadmissibility but consideration whether to call the witness can be given.[284]

The party on which the report is served can request a copy or reasonable opportunity to inspect the record of any examination, measurement, test or experiment on which the expert's findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and anything on which any such examination, measurement, test or experiment was carried out.[285]

A crucial aspect of controlling expert evidence and identifying issues in relation to which expert evidence is relevant is effective pre-trial case management.[286] In *Henderson* the court stated that pre-trial management is especially import when dealing with medical evidence.[287] Without identifying the issues at the pre-trial a judge will unlikely be able to prevent experts "wandering into unnecessary, complicated and confusing detail".[288] Before the trial, if more than one party wishes to introduce expert evidence, the court can now, in terms of the Criminal Procedure Rules, direct that the experts have a pre-hearing discussion to discuss the expert issues in the proceedings and to prepare a statement for the court indicating the matters they agree and disagree on and also stating their reasons.[289] The statement can be referred to at trial.[290] The court can also in the case where more than one defendant wants to introduce expert evidence on an issue direct that only one expert be appointed. If the courts direct that a single joint expert should be used both co-defendants may give instructions to the

282 Rule 19.3(3)(c) of the Criminal Procedure Rules 2015 (as amended).
283 *R v Henderson* at 186 H2.
284 *Ibid*.
285 Rule 19.3(3)(d) of the Criminal Procedure Rules 2015 (as amended).
286 Stockdale and Jackson (2016) 349.
287 *R v Henderson* at par.204.
288 *Idem* 205.
289 Rule 19.6(2) of the Criminal Procedure Rules 2015 (as amended).
290 Rule 19.6(3) of the Criminal Procedure Rules 2015 (as amended). The content of the discussion except for the statement itself may not be referred to without the court's permission.

expert.[291] The instructions must be sent to the expert and to the other co-defendant.[292] Unless the court directs otherwise, the co-defendants are jointly and severally liable for the payment of the expert's fees and expenses.[293]

The appointment of an expert witness by the court is a controversial issue which was suggested in the Law Commission report but rejected by the Royal Commission.[294] The main objection of a court appointed expert is that the expert's opinion would impliedly carry more weight than the opinion of a party's expert without any justification.[295] Court appointed experts are used with success in continental jurisdictions but as Dennis submits it might not be as easily "transplantable to an adversarial culture".[296]

5.4.3 Contents of the expert's reports

5.4.3.1 Civil proceedings

The Civil Procedure Rules read with the Civil Practice Direction 35 stipulates the requirements that an expert's report must comply with.[297] The report must be addressed to the court and not to the party from whom the expert has received instruction.[298] This iterates the fact that the expert's duty is towards the court, stressing the impartiality of the expert. The report must start by, as mentioned above, providing the details of the expert's qualifications[299] and the details of the literature or other material that the expert relied on to write their report.[300] The experts must clearly set out the facts and instruction which are material to their opinions[301] and make clear

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291 Rule 19.8(1) of the Criminal Procedure Rules 2015 (as amended).
292 Rule 19.8(2) of the Criminal Procedure Rules 2015 (as amended).
293 Rule 19.8(5) of the Criminal Procedure Rules 2015) as amended. The court can also give direction about the payment of the expert's fees and expenses (Rule 19.8(3)(a)) and before the expert is instructed limit the fees and expenses payable to the expert.
294 Dennis (2017) 905.
295 *Ibid.*
296 *Ibid.*
297 Rule 35.10 of the Civil Procedure Rules 1998 (as amended) and par. 3.1-3.3 of the Civil Practice Direction 35.
298 Par. 3.1 of the Civil Practice Direction 35.
299 Par. 3.2(1) of the Civil Practice Direction 35.
300 Par. 3.2(2) of the Civil Practice Direction 35.
301 Par. 3.2(3) of the Civil Practice Direction 35.

which of the facts stated in their report are within their own knowledge.[302] If more than one person was involved it should be clear from the report who carried out the examination, measurement, test or experiment which the expert used for the report.[303] If another person was involved the expert must give the qualifications of that person and say whether or not the test or experiment has been carried out under the expert's supervision.[304]

Should there be varying opinions on the matters dealt with in the expert's report the expert must summarise the different opinions and give reasons why their opinion differs.[305] The conclusion reached must be summarised at the end of the report[306] and if an expert is not able to give their opinion without qualification the qualification must be stated.[307] The report must state the instructions given to the expert.[308] This is not only to assist the court but also provides protection to the expert if the instructions were lacking. The report must also contain a statement confirming that the expert understands their duty to the court, has complied with the duty and is aware of the requirements in the Civil Procedures Rules, Practice Direction and the Guidance for the Instruction of Experts in Civil Claims (2014).[309]

The lastly the expert's report must be verified by a statement of truth which reads as follows:[310]

> I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

The requirements set out are mandatory and any non-compliance can result in the court directing that the report is inadmissible as evidence.[311] Should an expert make

302 Par. 3.2(4) of the Civil Practice Direction 35.
303 Par. 3.2(5) of the Civil Practice Direction 35.
304 *Ibid.*
305 Par. 3.2(6) of the Civil Practice Direction 35.
306 Par. 3.2(7) of the Civil Practice Direction 35.
307 Par. 3.2(8) of the Civil Practice Direction 35.
308 Rule 35.10(3) of the Civil Procedure Rules 1998 (as amended).
309 Par. 3.2(9) of the Civil Practice Direction 35.
310 Par. 3.3 of the Civil Practice Direction 35.
311 Rule 22.3 of the Civil Procedure Rules 1998 (as amended).

a false statement in a document verified by a statement of truth without an honest belief in its truth the proceedings for contempt of court can also be brought against the expert.[312]

The Guidance for the Instruction of Experts in Civil Claims refers to the model forms of experts' reports from the Academy of Experts[313] and the template for medical reports created by the Ministry of Justice.[314] The Academy of Experts (TAE) provides an example of the expert's declaration required under the Civil Procedure Rules which should be inserted between the end of the expert's report and the expert's signature.[315] A copy of the TAE expert's declaration has been included in this study for ease of reference as annexure A.

As can be noted from the declaration it also includes an example of declaration for a joint statement in the case where discussion between different experts took place. The example declaration (annexure A) was specifically drafted for civil proceedings but can easily be amended for any another jurisdiction.[316] When evaluating the example of the expert's declaration is can be described as a summary of what is expected from the expert in terms of the Civil Procedure Rules and Practice Direction. The declaration can act as a checklist for an expert to ensure that they have complied with their duties and are aware of all that is expected of them before submitting their reports.

5.4.3.2 Criminal proceedings

The Criminal Procedure Rules read with the Criminal Practice Directions also stipulates the requirements for the contents of experts' reports.[317] The requirements

312 Rule 32.14 of the Civil Procedure Rules 1998 (as amended).
313 See 5.5.3.1.
314 Civil Justice Council (2014) *Guidance for the instruction of experts in civil claims* par.51. The medical report form (RTA3) of the Ministry of Justice is specifically for low value personal injury claims in road traffic accident.
315 The Academy of Experts "Expert's Declaration" (2020) available online at https://academyofexperts.org/wpcms/wp-content/uploads/2020/06/ExDecCiv14Nov.pdf (last accessed on 19 July 2020).
316 The Academy of Experts' expert's declaration for all family proceedings under the Family Proceedings Rules 2010 (as amended) is exactly the same as the expert's declaration for civil cases with the only difference being point 12 which refers to the relevant part of the Family Procedure Rules as opposed to the Civil Procedure Rules.
317 Rule 19.4 of the Criminal Procedure Rules 2015 (as amended).

are almost identical to the requirements set out in Civil Practice Direction 35[318] save for a few differences. Rule 19.4(a) requires that an expert not only provide details of their qualifications but also of relevant experience and accreditation. In many criminal cases for example *R v Thomas*[319] the courts are often confronted with experts who are experts based on skill and experience and not paper qualification which could perhaps explain the difference between the rules. The same statements and the declaration of truth described above under civil proceedings must be contained in the expert's report in criminal proceedings. The only additional requirement is that the expert's report must "include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence".[320] The expert witness will need to take into consideration the factors mentioned in par.19A.5 and 19A.6 of the Criminal Practice Directions, discussed above, to ensure that they have included the information in their report that the court will consider in determining sufficient reliability, for example including the methods followed and whether the method is established practice in the particular field.

The Academy of Experts, as in the case of the civil cases, drafted an example of an expert's declaration in criminal cases.[321] The first 11 paragraphs are exactly the same as the declaration for civil cases included annexure A. In addition to the standard declaration the expert in criminal proceedings who are instructed by the prosecution also confirm to have read the guidance contained in a booklet known as *Disclosure: Experts' Evidence and Unused Material*.[322] The expert's declaration continues to briefly record the duties of disclosure as contained in the Crown Prosecution Service booklet, which includes complying with the duties to record, retain and reveal material in accordance with the Criminal Procedure and Investigations Act 1996 (as

318 Par. 3.1-3.3 of Civil Practice Direction 35.
319 *R v Thomas* (2011) EWCA Crim 1295.
320 Rule 19.4(h) of the Criminal Procedure Rules 2015 (as amended).
321 The Academy of Experts "Expert's Declaration (criminal cases)" (2020) available online at https://academyofexperts.org/wpcms/wp-content/uploads/2020/06/ExDecCrim17Apr.pdf (last accessed on 19 July 2020).
322 The Academy of Experts "Expert's Declaration (criminal cases)" (2020) at par.14 available online. To provide guidance to expert witnesses appointed by the prosecution and to ensure the credibility in the prosecution process the Crown Prosecution Service provides a booklet for the guidance for experts on disclosure, unused material and case management.
The latest edition of the booklet was updated in September 2019 See Crown Prosecution Services "Guidance for experts on disclosure, unused material and case management" (2019) available online at https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/CPS-Guidance-for-Experts-on-Disclosure-Unused-Material-and-Case-Management-2019.pdf (last accessed on 19 July 2020).

amended)[323] and to compile and index of the material[324] and lastly if their opinion in the matter changes to as soon as possible inform the investigating officer.[325]

5.4.4 Presentation of expert evidence at trial

In adversarial systems the emphasis, as explained in chapter 4, is on orality and experts are often required to hand in a report but also testify in court.[326] In civil proceedings in England the emphasis is on written reports. The Civil Procedure Rules determine that expert evidence is to be given in a written report unless the court directs otherwise.[327] If a claim is allocated to the small claims track and or fast track the court will not direct an expert to attend a hearing unless it is necessary to do so in the interest of justice.[328] Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.[329] The Civil Procedure Rules, however, specifically prohibits a party from using an expert's report at trial or call the expert to give oral testimony if they failed to disclose the expert's report, except with leave from the court.[330]

The criminal proceedings differ in that a party cannot introduce in evidence an expert report if the expert does not give evidence in person.[331] The Criminal Justice Act 1988 does, as explained above, provide for the introduction of expert reports[332] as evidence whether or not the expert attends the proceedings to give oral evidence.[333] If no oral evidence is to be given the report shall only be admissible with leave of the court.[334] In determining whether to grant leave the court shall consider the contents of the report; the reasons why the expert shall not give oral evidence; any risk that the admission or exclusion will result in unfairness to the accused; and any other

323 The Academy of Experts "Expert's Declaration (criminal cases)" (2020) at par.14.1 available online.
324 *Idem* par.14.2.
325 *Idem* par.14.3.
326 See 4.2.3.
327 Rule 35.5(1) of the Civil Procedure Rules 1998 (as amended).
328 Rule 35.5(2) of the Civil Procedure Rules 1998 (as amended).
329 Rule 35.11 of the Civil Procedure Rules 1998 (as amended).
330 Rule 35.13 of the Civil Procedure Rules 1998 (as amended).
331 Rule 19.3(4)(b) of the Criminal Procedure Rules 2015 (as amended).
332 Expert reports are defined in section 30(5) of the Criminal Justice Act 1988 (c.33) as a "written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence".
333 Section 30(1) of the Criminal Justice Act 1988 (c.33).
334 Section 30(2) of the Criminal Justice Act 1988 (c.33).

circumstances that the court considers relevant.[335] The expert report, when admitted, shall be evidence of any fact or opinion by the expert.[336]

In civil proceedings where expert witnesses are called to testify a different approach to the traditional presentation of evidence, the practice of concurrent evidence or "hot tubbing", was considered by Lord Justice Jackson's *Review of civil litigation costs: Final report*.[337] In conserving the potential for reducing costs associated with expert evidence the Jackson's report recommended that concurrent evidence be piloted in appropriate cases where all the parties agree to it.[338] In 2010 concurrent evidence was successfully piloted in Manchester in the Mercantile Court and Technology and Construction Court (TCC).[339] The preliminary findings of the interim report of the pilot project indicated that the use of concurrent expert evidence showed time and quality of evidence benefits.[340] No definitive conclusion could be drawn as to whether concurrent expert evidence procedure led to greater objectivity.[341]

As a result of Jackson's recommendations and the pilot study in Manchester the Practice Direction 35.11 was amended to embody the rules of the pilot and formalise concurrent evidence giving.[342] The process of concurrent expert evidence usually entails that the court sets an agenda based on the areas of disagreement identified in the experts' joint statements.[343] After taking the oath or affirmation[344] the experts remain in court together and the judge will normally initiate the discussion and ask the experts questions on their opinions and thereafter invite other experts to comment on or ask the opposing expert questions.[345] The presentation takes the form of a structured discussion, controlled by the judge which is a radical departure from the traditional approach. At the discretion of the judge the procedure may be modified.[346] After the experts have asked questions and commented the parties' legal

335 Section 30(3) of the Criminal Justice Act 1988 (c.33).
336 Section 30(4) of the Criminal Justice Act 1988 (c.33).
337 Jackson (2010) *Review of civil litigation costs: Final report*.
338 *Idem* par. 3.23.
339 Genn (2012) *Manchester concurrent evidence pilot: Interim report*.
340 *Idem* par. 34.
341 *Idem* par. 31.
342 Par.11.1 of the Civil Practice Direction 35.
343 Par.11.3 of the Civil Practice Direction 35.
344 The expert witnesses will be sworn in together.
345 Par. 11.4(1) of the Civil Practice Direction 35.
346 *Idem*.

representatives will be given the opportunity to direct questions relating the correctness of an expert's view, clarification of an opinion, or to elicit evidence on any issue omitted during the process.[347] The judge will then summarise the experts' different positions on the issue.[348]

Judges have remarked on the effectiveness of concurrent evidence in various cases. In *Stratton v Patel* a claim was instituted for damages to the restaurant premises that the plaintiffs leased. The case was complex, and the court ordered that the mechanical and electrical experts give evidence concurrently. In this matter the judge commented that he found the evidence given concurrently as "extremely useful".[349] In the Family Court in a case involving the care proceedings of a disabled child, three experts, which included two psychiatrists and a forensic clinical psychologist, gave evidence on the issue of capacity of the parents to care for the minor child. The judge in the case remarked that:[350]

> The three experts commissioned to analyse the key issues were heard in oral evidence by the court. Not for the first time, this court was very greatly assisted by hearing their evidence concurrently.... This process has been tested in America and Australia, but not in this jurisdiction.…The resulting coherence of evidence and attention to the key issues rather than adversarial point scoring is marked. The evidence of experts who might have been expected to fill 2 days of court time was completed within 4 hours.

A further project was undertaken by the Civil Justice Council after the amendment of the Practice Direction 35 to determine the effect of the amendments and to understand in what areas of the litigation the processes of concurrent expert evidence were (or were not) being used.[351] The study found that despite the impression that concurrent expert evidence was only appropriate in specialists court, especially construction and commercial disputes, it has been used in various areas of the law with success including the medical negligence, motor vehicle accidents and family disputes.[352]

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347 Par 11.4(2) of the Civil Practice Direction 35.
348 Par.11.4(3) of the Civil Practice Direction 35.
349 *Stratton v Patel* (2014) EWHC 2677 (TCC).
350 *A Local Authority v A* (2011) EWCH 590 (Fam) at par.22-23.
351 Civil Justice Council (2016) *Concurrent expert evidence and 'hot-tubbing' in English litigation since the 'Jackson reforms: A legal and empirical study* 4.
352 *Idem* 10-11.

According to the study the overwhelming feedback from judges was that the process of concurrent expert evidence saved trial time.[353] In agreement with the report from the pilot project the study also found that the respondents of the survey considered that the quality of expert evidence improved.[354] Of the judicial respondents 83% considered the quality had improved and 84% of the legal practitioner respondents agreed that it had improved.[355] Only 60% of the expert respondents, however, indicated that the process of concurrent expert evidence improved the quality of the evidence.[356] The most positive response from the respondents was in relation to the question on whether the process of concurrent expert evidence assisted the court to determine disputed issues of expert evidence with 100% of judicial respondents, 94% of legal practitioner and 71% of expert witnesses agreeing.[357]

Although the general feedback is positive it appears from the study that an important feature of concurrent expert evidence is the preparation by the judge who takes the lead role in questioning the witnesses.[358] Another aspect raised by the study is that process of concurrent expert evidence is not suitable for issues arising as to credibility of the expert witness such as bias or lack of independence.[359] The recommendation is that should the issues relating to credibility arise it should be drawn to the attention of the court to continue with the court proceedings with a "hybrid approach".[360] The hybrid approach allows for some concurrent expert evidence to be given on some issues but the usual process of counsel-led cross-examination will take place on other issues.[361]

The process of concurrent expert evidence has been used in civil proceedings and there may be scope for the use of concurrent expert evidence in criminal cases as well. Glover, however, submits that in light of the adversarial nature of a criminal trial in all likelihood it will be regarded as inappropriate.[362]

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353 *Idem* 57.
354 *Idem* 58-59.
355 *Ibid.*
356 *Idem* 59.
357 *Idem* 59-60.
358 *Idem* 40.
359 *Idem* 44.
360 *Ibid.*
361 *Idem* 74.
362 Glover (2017) 633.

5.4.5 The right to challenge expert witnesses

As with any other witness, expert witnesses may be cross-examined and the expert evidence contradicted in both criminal and civil proceedings.[363] The Law Commission report also addressed the problems with cross-examination of expert witnesses.[364] Although cross-examination is assumed to provide sufficient safeguards in relation to expert evidence the Law Commission report doubts the validity of the assumption.[365] The report submits that it is more probable that juries will defer to the expert opinion, which can be problematic if the expert's opinion is unreliable.[366] Another problem highlighted by the report is that expert evidence is often not challenged effectively during cross-examination.[367] Advocates tend not to test or challenge the underlying basis of the expert's opinion but rather try to undermine the expert's credibility.[368] The report states that although cross-examination can be an effective tool in the right hands "it would appear to be an insufficient safeguard, at least generally speaking, for expert opinion evidence adduced under a *laissez-faire* approach to admissibility".[369]

5.4.6 Duties and rights of the expert witness

In the well-known case of *The Ikarian Reefer*,[370] discussed in chapter 4,[371] the role and responsibilities of expert witness, distilled from an earlier case of *Whitehouse v Jordan,*[372] was set out and remains the guiding principles. The Civil Procedure Rules read with the Practice Direction have now amplified the duties and role of expert witnesses contained in *The Ikarian Reefer* case in part 35 of the rules. The duties of expert witnesses are also now contained in part 19 of the Criminal Procedure Rules.[373]

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363 Murphy and Glover (2013) 411.
364 The Law Commission (2011) *Expert evidence in criminal proceedings in England and Wales (com. 325)*.
365 *Idem* par. 1.20.
366 *Ibid.*
367 *Idem* par. 1.21.
368 *Ibid.*
369 *Ibid.*
370 *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd ("The Ikarian Reefer")* (1993) Lloyd's Law Reports (2) (Q.B. (Com. Ct.) 68. See 4.2.7 for the duties.
371 See 4.2.7.
372 *Whitehouse v Jordan and another* (1981) 1 All ER 267.
373 Criminal Procedure Rules 2015 (as amended).

Rule 35.3(1) of the Civil Procedure Rules emphasises that the duty of experts is to help the courts on matters within their expertise.[374] The experts have the duty to make it clear when a question or issue falls outside their expertise[375] and when they are not able to reach a definite opinion, for example if they do not have enough information.[376] An expert witness is obliged to state the facts or assumptions upon which their opinion is based.[377] Experts also have a duty to present the opinion as an independent product, uninfluenced by the pressures of litigation.[378] The opinion must always be objective and unbiased and the expert must never assume the role of an advocate.[379] The duty to the court overrides any obligation to the persons from whom experts have received instructions or by whom they are paid.[380]

Since the enactment of the provisions in the Civil Procedure Rules in 1998 there have been several judicial pronouncements expanding on some of the rules. Sir Clarke in the case of *Meadow v General Medical Council*[381] considered the role and responsibilities of expert witnesses. In his judgment he referred with approval to the *Protocol for Instructions of Experts* to give evidence in civil claims more specifically paragraph 4.1 of the protocol which reads as follows:[382]

> Experts always owe a duty to exercise reasonable skill and care to those instructing, *and to comply with any relevant professional code of ethics*. However when they are instructed to give or prepare evidence for the purpose of civil proceedings in England and Wales they have an overriding duty to help the court in matters within their expertise (CPR 35.3). This duty overrides any obligations to the person instructing them or paying them. Experts must not serve the exclusive interests of those who retain them (my italics).

Crucial in the *Meadow* case is that the duties of expert witnesses are not limited to the rules and practice directions, but experts must also ensure that they comply with the relevant professional code of ethics.

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374 Rule 35.3(1) of the Civil Procedure Rules 1998 (as amended).
375 Par.2.4(a) of the Civil Practice Direction 35.
376 Par.2.4(b) of the Civil Practice Direction 35.
377 Par.3.2(3) of the Civil Practice Direction 35.
378 Par.2.1 of the Civil Practice Direction 35.
379 Par.2.2 of the Civil Practice Direction 35.
380 Rule 35.3(2) of the Civil Procedure Rules 1998 (as amended).
381 *Meadow v General Medical Council* [2006] EWCA Civ. 1390.
382 *Meadow v General Medical Council* at par.22.

Unlike in the South African context, the experts do not only have duties but also rights in terms of the Civil Procedure Rules, more specifically the right to ask the court for directions.[383] The experts may file written requests for directions for the purpose of assisting them in carrying out their functions.[384] Copies of the proposed request for directions must be provided to all the parties.[385]

Rule 19.2 of the Criminal Procedure Rules sets out the expert's duties to the court. The first duty is that the expert must help the court to achieve the overriding objective of dealing with criminal cases justly[386] by giving an objective and unbiased opinion which is within the expert's area or areas of expertise and by actively assisting the court in fulfilling its duty of case management under Rule 3.2[387] in particular.[388] This duty in Rule 19.2(1) overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.[389] The duty in accordance with Rule 19.2(3) further includes the following obligations:

(a) to define the expert's area or areas of expertise— (i) in the expert's report, and (ii) when giving evidence in person;
(b) when giving evidence in person, to draw the court's attention to any question to which the answer would be outside the expert's area or areas of expertise;
(c) to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement; and

383 Rule 35.14 of the Civil Procedure Rules 1998 (as amended).
384 Rule 35.14(1) of the Civil Procedure Rules 1998 (as amended).
385 Rule 35.14(2) of the Civil Procedure Rules 1998 (as amended). The proposed request must be provided to the instructing party seven (7) days before filing the request at court and at least four (4) days before filing to the other parties.
386 The overriding objective is stated in Rule 1.1 of Criminal Procedure Rules 2015 (as amended). Rule 1.1(2) lists factors that can be considered to ensure that cases are dealt with justly which includes the following:
(a) acquitting the innocent and convicting the guilty;
(b) dealing with the prosecution and the defence fairly;
(c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
(d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
(e) dealing with the case efficiently and expeditiously;
(f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
(g) dealing with the case in ways that take into account— (i) the gravity of the offence alleged, (ii) the complexity of what is in issue, (iii) the severity of the consequences for the defendant and others affected, and (iv) the needs of other cases.
387 Included in Rule 3.2 of the Criminal Procedure Rules 2015 (as amended) is that active case management means that evidence, whether disputed or not, must be presented in the shortest and clearest way.
388 Rule 19.2(1) of the Criminal Procedure Rules 2015 (as amended).
389 Rule 19.2(2) of the Criminal Procedure Rules 2015 (as amended).

(d) to disclose to the party for whom the expert's evidence is commissioned anything— (i) of which the expert is aware, and (ii) of which that party, if aware of it, would be required to give notice under rule 19.3(3)(c).

An expert appointed by the prosecution has further duties that arise under statute and at common law.[390] Guidance regarding the duties is provided to prosecution experts in the booklet by the Crown Prosecution Service namely, Guidance for Experts on Disclosure, Unused Material and Case Management (CPS Guidance).[391] An obligation is placed on prosecution experts to disclose any unused material.[392] Upon receipt of instructions experts for the prosecution are required to complete a self-certificate which is subsequently sent to the disclosure officer or investigating officer.[393] By completing the self-certificate the expert confirms having read the CPS Guidance and, furthermore, confirms that they are aware of their responsibilities as an expert witness.[394] The self-certificate also refers to the Criminal Procedure Rules and Practice Direction dealing with disclosure of material drawing the expert witness's attention to the relevant provisions.[395] Non-compliance of the duties can result in disciplinary steps being taken against the professional or penalties can be imposed by the court such as a cost order as discussed in 5.4.9 below.

5.4.7 Evaluating expert evidence

In *Henderson* the court made the key point that "the strength of a proposition in medicine depends upon the strength of the medical evidence on which it is based".[396] The acceptance of medical evidence depends upon the common acceptance of experts in the field- it is not for the court to decide based on previous cases or previous medical reports whether the medical evidence is to be accepted.[397] The court is only able to weigh the evidence that is presented to them.[398]

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390 The duties flow mainly from the Criminal Procedure and Investigations Act 1996 (c.25).
391 Crown Prosecution Services "Guidance for Experts on Disclosure, Unused Material and Case Management" (2019) available online.
392 *Idem* par. 1.4 and 4. Unused material is defined as relevant material that is not used as evidence.
393 *Idem* par.5.
394 *Idem* appendix B.
395 *Idem* appendix B.
396 *R v Henderson* par. 6.
397 *Ibid*.
398 *Ibid*.

When dealing with conflicting expert opinions considerations of the jury and instructions to the jury also plays a pivotal role in the English legal system. In *R v Kai-Whitewind*[399] the court emphasised that the jury must evaluate conflicting opinions[400] and rejected the contention that if there are conflicting opinions that the expert evidence called by the Crown is automatically neutralised.[401] In *Henderson* the court emphasised that before evidence is presented to a jury during the trial the evidence should already have been properly marshalled and controlled during the pre-trial process.[402] The court also provided guidance to assist both judges and juries in dealing with conflicting opinions. The jury should be asked to judge whether the witness testified outside their area of expertise, whether the expert at any time assumed the role of an advocate due to the influence of the party who's cause they are seeking to advance.[403] The jury should also examine the basis of the opinion and whether the expert relied on peer-reviewed sources.[404] Lastly, the jury should also consider whether the expert witness's clinical experience is up-to-date and equal to that of the opposing expert.[405] The court emphasised that when dealing with conflicting expert evidence the overall impression created by an expert can never be a substitute for a "rational process of analysis".[406]

The factors listed in paragraphs 19A.5 and 19A.6 of the Criminal Practice Direction, as discussed above, may be used by the courts to determine whether the expert evidence was sufficiently reliable to be admitted. It is argued that the factors should be used to provide a detailed framework in assessing the weight to be attached to the evidence. The factors in itself do not purport to constitute an adequate basis for resolving the challenge of adjudicating expert evidence, especially scientific evidence but the factors can assist as a guideline to understand how scientists go about doing

399 *R v Kai-Whitehead* (2005) 2. Cr. App. R. 31.
400 *Idem* par. 88.
401 *R v Kai-Whitehead* at par. 84. The defence relied on the decision of the *R v Cannings* (Angela) arguing that the case is authority for dealing with conflict of opinion between reputable experts and that in the case of conflict the evidence of the prosecution's expert should be disregarded.
402 *R v Henderson* at par. 203-204.
403 *Idem* par. 219.
404 *Ibid.*
405 *Ibid.*
406 *Ibid.*

their work and how they evaluate their own work (for example peer review).[407] This helps the triers of fact to evaluate the probative value of expert evidence.

5.4.8 Court assessors

Assessors in England date back to the 1930s and 1940s when judges appointed assessors in admiralty matters to advise them on nautical and technical issues.[408] The use of assessors was not initially part of the civil justice system but the report by Lord Woolf recommended a structure for the appointment of assessors in the superior courts.[409] Section 70 of the Senior Courts Act provides for the use of one or more assessors who are specially qualified to hear the matter in the High Court with the judges.[410] Section 70(1) reads as follows:

> In any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance.

Section 70(1) of the Senior Courts Act applies to the family court via the Matrimonial and Family Proceedings Act 1984 which confirms that the powers of the family court include the power under section 70(1) and (2) the Senior Courts Act.[411] Similar to the provision in the Senior Courts Act provision is made in in County Courts Act 1984 for the assistance of assessors.[412] One or more persons of "skill and experience in the matter" can act as assessors in the County Courts.[413] Assessors can also assist in the Court of Appeal in relation to causes and matters before the civil division.[414]

Together with the relevant statutory authority the respective rules of the different divisions provide further guidance on the appointment and use of assessors. Rule

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407 Meintjies-Van Der Walt (2001) 203.
408 *Richardson v Redpath Brown & Co Ltd* (1944) 1 All ER 110.
409 Woolf (2006) *Access to justice- Final Report*.
410 Section 70(1) of the Senior Courts Act 1981 (c.54).
411 Section 31J of the Matrimonial and Family Proceedings Act 1984 (c.42).
412 Section 63 of the County Courts Act 1984 (c.28).
413 Section 63(1) of the County Courts Act 1984 (c.28).
414 Section 54(8) of the Senior Courts Act 1981 (c.54).

35.15 of the Civil Procedure Rules[415] together with Practice Direction 35[416] is applicable in civil proceedings and corresponding rules in the case of family proceedings can be found in Rule 25.20 of the FPR 2010 and Practice Direction 25F. The rules relating to assessors in the Civil Procedure Rules and the FPR 2010 are identical. The rules reiterate that an assessor must have the skill and experience in the matter to assist the court.[417] The court when appointing an assessor can direct that the assessor attend the whole or only a part of the trial[418] and can also direct that the assessor prepares a report for the court on any matter at issue.[419] If the assessor prepares a report for the court before the trial begins the report is sent to each of the parties[420] and they may use it at trial.[421]

The Practice Direction 35 and 25F determine that the court must notify each of the parties in writing of the proposed assessor and the qualifications of the assessor to give assistance not less than 21 days before making an appointment.[422] After receipt of the notification parties can object the appointment either personally or in respect of the proposed assessors qualifications.[423] The objection must be made in writing and will be taken into account by the court when making the decision.[424] The advantage of the rules relating to assessors in civil matters is that the role of the assessor is not prescriptive but is guided by the direction of the court.

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415 Rule 35.15(1) of the Civil Procedure Rules 1998 (as amended) specifies that it applies where the court appoints assessors under the Senior Courts Act 1981 (c.54) or the County Courts Act 1984 (c.28).

416 The Practice Direction to the Civil Procedure Rules apply to civil litigation in the Queen's Bench Division and the Chancery Division of the High Court and to litigation in the County Courts. Where applicable the rules apply to appeals in the civil division of the court of appeal. See in general on the practice directions Ministry of Justice "Practice directions" (2017) available online at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/raprnotes (last accessed on 12 July 2020).

417 Rule 35.15(2) of the Civil Procedure Rules 1998 (as amended) and Rule 25.20(2) of the Family Procedure Rules 2010 (as amended).

418 Rule 35.15(3)(b) of the Civil Procedure Rules 1998 (as amended) and Rule 25.20(3)(b) of the Family Procedure Rules 2010 (as amended).

419 Rule 35.15(3)(a) of the Civil Procedure Rules 1998 (as amended) and Rule 25.20(3)(a) of the Family Procedure Rules 2010 (as amended).

420 Rule 35.15(4)(a) of the Civil Procedure Rules 1998 (as amended) and Rule 25.20(4)(a) of the Family Procedure Rules 2010 (as amended).

421 Rule 35.15(4)(b) of the Civil Procedure Rules 1998 (as amended) and Rule 25.20(4)(b) of the Family Procedure Rules 2010 (as amended).

422 Par. 10.1 of Civil Practice Direction 35 and par. 2.2 of Family Practice Direction 25F.

423 Par. 10.2 of Civil Practice Direction 35 and par. 2.3 of Family Practice Direction 25F.

424 Par. 10.3 of Civil Practice Direction 35 and par. 2.4 of Family Practice Direction 25F.

5.4.9 Immunity and cost orders

The witness immunity doctrine has a long-standing history in English common law.[425] Originally the immunity took the form of absolute privilege against any claim for defamation.[426] In *Taylor v Director of the Serious Fraud Office*[427] the courts stated that purpose of witness immunity was "to encourage freedom of speech and communication in judicial proceedings"[428] by taking away the fear of being sued. A second reason for witness immunity is to avoid "multiplicity of actions in which the value of truth of … evidence would be tried over again".[429] The general rule of witness immunity, however, has less weight in relation to experts.[430] The witness immunity does not extend to an expert witness being found guilty of contempt of court or perjury,[431] nor does it prevent an expert witness from being subjected to professional disciplinary proceedings in respect of sufficiently flawed expert evidence tendered.[432] In appropriate cases the costs of the expert witness could be disallowed.[433]

Previously the leading case with regard to expert witness immunity was *Stanton v Callaghan* where the court held that immunity of an expert witness extended to protect them from liability for negligence in preparing a joint expert statement.[434] The court held that the immunity was necessary to "avoid the tension between a desire to assist the court and the fear of the consequences to a departure from previous advice".[435] Whether public policy continued to justify expert witness immunity came under the spotlight again in the matter of *Jones v Kaney*[436] where the appellant, Jones, instituted a claim against a psychologist, Kaney, who acted as an expert witness. Jones had previously instituted a claim for damages resulting from a motor vehicle accident. The psychologist had been instructed to prepare a report and indicated in her initial report

425 Binder "Liability for the psychiatrist expert witness" (2002) 159 *American Journal of Psychiatry* 1819.
426 *Jones v Kaney* (2011) 2 W.L.R. 823 at par.11.
427 *Taylor and another v Director of the Serious Fraud Office* (1999) 2 A.C. 177 (1998).
428 *Idem* 208.
429 *Roy v Prior* (1971) AC 470 at 480.
430 Tapper and Cross (2010) 532.
431 *Phillips v Symes (A Bankrupt) (Expert witness: Costs)* (2004) EWHC 2330 (Ch), 204 WL 2355788 at par. 22.
432 *General Medical Council v Meadow* 1390. See also Tapper and Cross (2010) 532.
433 *Phillips v Symes (A Bankrupt) (Expert witness: Costs)* at par. 22.
434 *Stanton v Callaghan* (1998) 4 All ER 961.
435 *Idem* 962.
436 *Jones v Kaney* (2011) 2 W.L.R. 823.

that Jones suffered from post-traumatic stress disorder as a result of the accident. The defendant in the personal injury claims also instructed an expert, a psychiatrist, who expressed the view that Jones had exaggerated his physical symptoms.[437]

The judge ordered that a joint statement be prepared by the two experts which the defendant's expert drafted and was signed by Kaney without amendment or comment.[438] The joint statement was damaging to Jones's claim.[439] When questioned about the discrepancy, Kaney indicated that it did not reflect what she had agreed to telephonically but she felt pressurised to sign the joint statement.[440] Based on the principle enunciated by the *Stanton* case Jones's cases was first dismissed but his appeal was upheld by the Supreme Court (Lord Hope of Craighead DPSC and Baroness Hale of Richmond JSC dissenting). The majority of the court held that the immunity from suit for breach of duty should be abolished.[441] Justice Lord Philips in his judgment was not persuaded by the arguments that abolishment of immunity would discourage professionals to act as expert witnesses. Lord Philips held that all professionals who offer services already run the risk of being sued for breach of duty, the risk of being sued in relation to forensic services should not constitute a greater disincentive than other forms of professional service.[442]

Expert witnesses who, furthermore, by their evidence in a civil cases, causes significant expenses to be incurred, as a result of their flagrant disregard of their duties to the court, does not have any immunity against a cost order against them.[443] This was illustrated in the case of *Phillips v Symes* where a psychiatrist, Dr Zamar, provided a psycho-legal report in which he recommended that Mr Symes was not fit to provide evidence or give reliable accounts about past, present and future events and furthermore, that Mr Symes was not able to manage his own affairs and recommended that Court of Protection proceedings ought to be considered.[444] The consequences of

437 *Idem* par. 7.
438 *Ibid*.
439 *Idem* par. 8.
440 *Idem* par. 9.
441 *Idem* par. 62.
442 *Idem* par. 53.
443 *Phillips v Symes (A Bankrupt) (Expert witness: Costs)*. See also Tapper and Cross (2010) 532.
444 *Phillips v Symes (A Bankrupt) (Expert witness: Costs)* at par. 12.

such an opinion was "likely to [be] dramatic and severe".[445] The Administrators alleged that the psychiatrist in preparing his reports and forming his opinion had acted: [446]

> in serious breach of his duties to the Court by acting recklessly, irresponsibly and wholly outside the bounds of how any reasonable psychiatrists preparing an opinion for the Court could properly have acted having regard to such duties.

The specific remedy of a cost order was sought on the basis that the other consequences of an expert witness's flagrant disregarding their duties does not provide a sanction that is "effective to compensate the true victim of any such action, namely the parties".[447]

At the stage that the *Phillips* case was heard there was no case law which had held that expert witness can be held liable for costs.[448] The Administrators submitted that an analogous to advocates who have been subject to sanctions for wasted costs expert witnesses can also be held liable.[449] After dealing extensively with case law and the Civil Procedure Rules the court held that:[450]

> I do not regard the other available sanctions as being either effective or anything other than blunt instruments. The proper sanction is the ability to compensate a person who has suffered loss by reason of the evidence… I do not accept that Experts (*sic*) will, by reason of this potential exposure, be inhibited from fulfilling their duties.

It is submitted that the sanction of a cost order can be useful tool in regulating expert evidence.

445 *Idem* par. 13.
446 *Idem* par. 18-19.
447 *Idem* par. 22.
448 *Idem* par. 23.
449 *Idem* par. 24.
450 *Idem* par. 96.

5.5 Regulation within the statutory bodies and professional organisations

5.5.1 Regulation of psychiatrists

5.5.1.1 General Medical Council (GMC)

The General Medical Council (GMC), the statutory body that regulates the medical profession in the United Kingdom, was initially established in terms of the Medical Act 1858,[451] but continues as a body corporate in terms of the Medical Act 1983.[452] The GMC and the Health Professions Council of South Africa (HPCSA) are quite similar in structure, both with the over-arching objective to protect the public.[453] The GMC's objectives are contained in section 1B of the Medical Act 1983 which are to:

(a) protect, promote and maintain health, safety and well-being of the public,
(b) promote and maintain public confidence in the medical profession, and
(c) promote and maintain proper professional standards and conduct for members of that profession.

The GMC is also registered as a charity and should, therefore, also ensure that when making decisions not only the objectives, as mentioned above, but also the charitable purpose of the GMC is taken into consideration.[454] The HPCSA differs from the GMC in that it regulates all health care professions as opposed to medical professions only, as such the only mental health professionals registered under the GMC are psychiatrists. The main statutory functions of the GMC are to ensure that the registers for qualified medical professionals are up to date;[455] to foster good medical practice;[456] to promote high standards of medical education;[457] and lastly to take the necessary action against doctors whose fitness to practice is in doubt.[458] The GMC has the power to advise members of the medical profession on the standards of professional conduct,

451 Save for section 1, 47 and 52 the rest of the Medical Act 1858 (c.90) has been repealed. See 2.6.1.2.
452 Section 1(1) of the Medical Act 1983 (c.54).
453 Section 1(1A) of the Medical Act 1983 (c.54) and section 3(j) of the Health Professions Act 56 of 1974.
454 General Medical Council (2019) *Governance handbook* at 89. The Governance handbook is also available online at https://www.gmc-uk.org/-/media/documents/governance-handbook---master--september-2019_pdf-81054143.pdf (last accessed on 20 July 2020).
455 Part II of the Medical Act 1983 (c.54).
456 Part V of the Medical Act 1983 (c.54).
457 Part II of the Medical Act 1983 (c.54).
458 Section 29A-29J of the Medical Act 1983 (c.54).

standards of professional performance or medical ethics.[459] For this purpose the GMC has drafted ethical guidance on various aspects to assist medical practitioners, the ethical guidance pertinent to medical practitioners acting as expert witnesses is discussed in 5.5.1.2 below.

The Council is the governing body of the GMC[460] and is responsible for the overall control of the organisation.[461] The GMC further has several statutory committees determined by the Medical Act which have specific functions assigned to them in accordance with the act and relevant regulations.[462] Within the disciplinary proceedings the Investigation Committee, Medical Practitioners Tribunal Services, Interim Order Tribunals and the various Medical Practitioners Tribunals all play a vital role and will be discussed in more detail below.

As discussed in chapter 4, the Health Professions Act 56 of 1974 determines that registered health practitioners in South Africa must undergo compulsory continuing education and training.[463] The Medical Act does not provide for a similar compulsory system of CPD points but makes provision for system to ensure that medical practitioners' knowledge and skills are up to date.[464] GMC, as prescribed by the Medical Act, requires that all medical practitioners on the register who have a license to practice take part in a process known as revalidation.[465] Revalidation is defined in the Medical Act as the "evaluation of a medical practitioner's fitness to practice".[466] The purpose of revalidation is to show that the medical practitioners' knowledge is up to date, they are fit to practice without concerns raised and they provide a good level

459 Section 35 of the Medical Act 1983 (c.54).
460 Part I of Schedule 1 of the Medical Act 1983 (c.54) provides for the constitution of the General Medical Council.
461 General Medical Council (2019) *Governance handbook* 11. The role of the council is described in chapter 3 of the Governance handbook.
462 Section 1(3) of the Medical Act 1983 (c.54). The committees include the registration panels, registration appeal panels, Investigation Committee, the Medical Practitioners Tribunal Service, and Interim Orders Tribunals.
463 Section 26 of the Health Professions Act 56 of 1974. See 4.3.4.
464 A royal college or faculty can, however, implement a CPD scheme which requires a specific number of hours of CPD each year. See General Medical Council (2012) *Continuing professional development: Guidance for all doctors* for more information in general on the GMC and CPD.
465 Section 29A(4)(d) of the Medical Act 1983 (c.54).
466 Section 29A(5) of the Medical Act 1983 (c.54).

of care.[467] Only doctors that are both registered and hold a licence to practice need to revalidate.[468]

The process of revalidation was introduced in December 2012 and is described as "the most significant reform of medical regulation for over 150 years".[469] In 2016 Sir Keith Pearson reviewed the process of medical revalidation as the independent chair of the Revalidation Advisory Board.[470] Sir Pearson explains that there was no single event that triggered the start of the discussion around revalidation but a number of public inquires and medical malpractice cases "called into question the traditional model of medical regulation".[471] Before the implementation of revalidation, unless a serious issue was identified, doctors remained on the register without the need to demonstrate ongoing competence.[472] Sir Pearson points out that an important purpose of revalidation is that the process can identify concerns that might lead to poor performance.[473] By dealing with these generally minor concerns at an early stage could ensure that concerns are not escalated and it reduces the likelihood of harm to patients.[474] But as is made clear in the review, revalidation's sole purpose is not to identify poor performance and it is not a complaints process.[475]

Although revalidation is still a new process and various concerns have been raised the review demonstrated that it had already delivered significant benefits.[476] Some of the changes include that feedback from colleagues and patients started to drive change in practices and has helped to identify poor performing doctors and support them to improve.[477] In general, Sir Pearson expressed his confidence that the "developments will lead to safer and better care for patients".[478] But what does revalidation entail?

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467 General Medical Council (2019) *Guidance for doctors: requirements for revalidation and maintain your licence* 6.
468 *Idem* 7.
469 Dickson as quoted in Pearson (2017) *Taking revalidation forward: Improving the process of relicensing for doctors.*
470 Pearson (2017) 8.
471 *Idem* 10.
472 *Idem* 13.
473 *Idem* 14.
474 *Idem* 18.
475 *Idem* 18-19.
476 *Idem* 5.
477 *Ibid.*
478 *Ibid.*

In brief, the process of revalidation entails that the doctor needs to collect and reflect on supporting information which will demonstrate continuing professional development, quality improvement activities, significant events, feedback from patients, feedback from colleagues and any complaints or compliments.[479] Psychiatrists, for example, should also consult the Royal College of Psychiatrists for advice appropriate for the particular speciality.[480] Using the supporting information an annual whole practice appraisal is done.[481] Based on the outputs of the appraisal a recommendation needs to be made every five years.[482] The responsible officer[483] or suitable person[484] can make three recommendations: recommends that the practitioner is fit to practise,[485] cannot recommend that the practitioner is fit to practise[486] or requires more time in which to make a recommendation.[487]

Failure to comply with the revalidation process can result in the refusal to restore a practitioner's licence or the withdrawal of a licence to practise.[488] The GMC will issue a notice to the practitioner that if corrective steps are not taken the result could be a withdrawal of their licence to practise. Revalidation does not replace or override any existing procedures which are in place to deal with concerns regarding a doctor's fitness to practise. However, if in the course of the revalidation, a medical practitioner's

479 *Idem* 14.

480 General Medical Council (2019) *Guidance for doctors: requirements for revalidation and maintain your licence* 15. The Royal College of Psychiatrists issued the CR194 document, *Supporting information for appraisal and revalidation: guidance for psychiatrists*.

481 The annual whole practice appraisal is usually done by an appraiser who is either a responsible officer or suitable person as provided for in Regulation 6(7) of the General Medical Council (Licence to Practice and Revalidation) Regulations 2012. See General Medical Council (2019) *Guidance for doctors: requirements for revalidation and maintain your licence* 16.

482 The revalidation recommendation is done by the responsible officer (usually a senior doctor within a healthcare organisation) or suitable person as provided for in Regulation 6(7) of the General Medical Council (Licence to Practice and Revalidation) Regulations 2012.

483 The responsible officer is described in the General Medical Council (2019) *Guidance for doctors: requirements for revalidation and maintain your licence* 5 as "usually a senior doctor within a healthcare organisation- often the medical director". Regulation 6(7) of the General Medical Council (Licence to Practice and Revalidation) Regulations 2012.

484 A suitable person is a licensed doctor approved by the General Medical Council as suitable to make a recommendation to the General Medical Council about the revalidation of a doctor who does not have a responsible officer (RO).

485 Also known as recommendation to revalidate. Regulation 6(6)(a) of the General Medical Council (Licence to Practice and Revalidation) Regulations 2012.

486 Also known as recommendation of non-engagement. Regulation 6(6)(b) of the General Medical Council (Licence to Practice and Revalidation) Regulations 2012.

487 Also known as a recommendation to defer. Regulation 6(6)(c) of the General Medical Council (Licence to Practice and Revalidation) Regulations 2012.

488 Section 29E(1) and 29E(2)(b) of the Medical Act 1983 (c.54).

fitness to practise is called into question proceedings in terms of section 35C, discussed below under the disciplinary proceedings, can occur.[489]

5.5.1.1.1 Ethical guidance

The *Good Medical Practice* is the ethical guidance booklet provided by the GMC which describes what is expected of doctors.[490] The *Good Medical Practice* (GMP) is one of 32 booklets or as described by the GMC as "pieces of ethical guidance" providing a framework for ethical decision making.[491] GMP is the core guidance and is divided into four sections, or domains, domain 1 relates to the knowledge, skills and performance of doctors,[492] domain 2 with safety and quality,[493] domain 3 with communication, partnership and teamwork[494] and lastly domain 4 pertains to the maintaining of trust.[495] Within the section dealing with maintaining trust the GMP provides for "openness and legal or disciplinary proceedings".[496] The section determines that when a doctor (or specialist doctor) gives evidence to court or tribunals it must be honest and trustworthy at all times and the practitioner must take the necessary steps to ensure that the information is correct and that no information is deliberately left out.[497] When acting as a witness, the GMP, further stipulates that the medical practitioner must make clear the limits of their competence and knowledge.[498] These are the only guidelines in the GMP which directly relates to acting as a witness but further guidance is provided for in a separate guidance booklet, *Acting as a witness in legal proceedings* (Witness Guidance),[499] which came into effect on 22 April 2013.

The Witness Guidance provides the medical practitioner with an introduction referring to the relevant provisions in the GMP that relates to acting as a witness in legal

489 Section 29C(1)(a) and 29C(2) of the Medical Act 1983 (c.54).
490 General Medical Council (2013) *Good medical practice* 4. The guidance came into effect on 22 April 2013 and was last updated on 29 April 2019.
491 General Medical Council "Ethical guidance for doctors" (2020) available online at https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors#leadership (last accessed on 20 July 2020).
492 General Medical Council (2013) *Good medical practice* 6-9.
493 *Idem* 10-12.
494 *Idem* 13-17.
495 *Idem* 18-24.
496 *Idem* par. 72-76.
497 *Idem* par. 72.
498 *Idem* par. 73.
499 General Medical Council (2013) *Acting as a witness in legal proceedings*.

proceedings. This ensures that the GMP and the Witness Guidance is not seen as separate documents, but that Witness Guidance builds on the GMP, the GMP remaining relevant and the core guidance. The introduction, furthermore, makes it easier for a medical practitioner acting as an expert witness to navigate the of various ethical guidelines by reiterating the relevant paragraphs of the GMP.

When drafting the ethical guidance booklet on Witness Guidance, the GMC aimed to integrate the principles and ethical standards that would typically form part of the standards and guidelines of the medical profession with the legal requirements as set out in the relevant rules and practice directions. The Witness Guidance is, however, more of a user-friendly guide to the legal requirements than an ethical guideline to assist in ethical decision-making. The Witness Guidance is written in a clear and concise terms and also provides the medical practitioner with other sources of information for example the links to applicable rules and legislation.

The Witness Guidance is explained as putting the principles of the GMP into action[500] and deals with seven main aspects of acting as a witness. The first aspect is the duties of the witness and emphasises the Criminal and Civil Procedure Rules that as a witness your duty is to the court which overrides any obligation to the person that either instructed you or is paying you.[501] The duty of the witness is, therefore, to act "independently and to be honest, trustworthy, objective and impartial".[502] The further duties of a practitioner acting as an expert is to:

i. Understand their role as a witness.[503]
ii. Co-operate with case management and ensure timeous producing of reports and fulfilling of other duties.[504]
iii. Ensure that the report and/or evidence is accurate and not misleading.[505]
iv. Ensure that all relevant information is included in a report.[506]

500 *Idem* par. 2.
501 *Idem* par. 4.
502 *Ibid.*
503 *Idem* at par. 5.
504 *Ibid.*
505 *Idem* 6.
506 *Ibid.*

v. To use, where possible without misleading, language, and terminology that a person that is not medically qualified will understand. All abbreviations and medical or technical terminology should be explained.[507]

Witness Guidance indicates that to understand the role of a witness includes following the law and codes of practice that are applicable.[508] The two skills that are stressed in the guidance is that of report writing in line with the legal requirements and the skill of testifying or giving oral evidence.[509] Medical practitioners are encouraged to undertake training before acting as an expert witness[510] or if they have the expertise and experience to share this knowledge with other colleagues.[511]

The Witness Guidance distinguishes between the different types of witnesses, witness of fact[512] and an expert witness.[513] This is an important component in the guidance as it assists medical practitioners in understanding their particular role as a witness. The section dealing with "giving evidence as an expert witness" amplifies the duties of an expert witness and gives practical guidance on giving evidence. Practical guidance, for example, includes that expert witnesses should understand a question and if anything is unclear, they should ask for an explanation.[514] Or if an expert witness is asked a question on an issue that falls outside their area of expertise the expert should either refuse to answer or answer as best possible, but they should make it clear that they consider the matter to be outside their competence.[515]

Further guidance in this section stipulates if an expert opinion is asked without the expert having the opportunity to consult or examine the evaluee, the expert must clearly explain the limits that it may place on their opinion.[516] In general if the expert does not have enough information on a particular point or the opinion is qualified the

507 *Idem* par. 7.
508 *Idem* par. 18-19.
509 *Idem* par. 18.
510 *Ibid.*
511 *Idem* par. 19.
512 *Idem* par. 8-9.
513 *Idem* par. 10-16.
514 *Idem* par. 11.
515 *Idem* par. 12.
516 *Idem* par. 14.

expert must state this clearly.[517] If for any reason an expert's opinion or view changes there is a duty to inform all the relevant parties without delay.[518] Lastly, the expert witness should at all times also respect other professionals acting as expert witnesses and should not allow their behaviour to affect their professional opinion.[519]

The Witness Guidance, furthermore, deals with keeping and making of full and accurate notes and records,[520] the disclosure and information security[521] and conflict of interest.[522] If there is a possible conflict of interest the GMC has a separate booklet, *Financial and commercial arrangements and conflicts of interest*,[523] that gives detailed guidance on the how to deal with a conflict of interest. The Witness Guidance gives the example of a witness having been professionally or personally involved with a person involved in the case.[524] The expert witness must ensure that the judge and the parties are made aware of this and only if the court decides that it will not affect the case will the medical practitioner be able to continue to act as an expert.[525]

All medical practitioners must work in line with the principles and values set out in the GMP guidance and further explanatory guidance booklets. To maintain their licence medical practitioners must be able to demonstrate during the revalidation process that they complied. Any failure to follow the guidance could result in disciplinary proceedings and even possible erasure from the register.[526]

5.5.1.1.2 Disciplinary procedure of the GMC

The disciplinary procedure of the GMC is, like the procedure of HPCSA,[527] comprised of two stages: a preliminary investigation and the disciplinary inquiry. The disciplinary proceedings are governed by the Medical Act 1983 read with the relevant regulations

517 *Idem* par. 13.
518 *Idem* par. 15.
519 *Idem* par. 16.
520 *Idem* par. 17.
521 *Idem* par. 20-22.
522 *Idem* par. 23.
523 General Medical Council (2013) *Financial and commercial arrangements and conflicts of interest*.
524 General Medical Council (2013) *Acting as a witness in legal proceedings* par. 23.
525 *Ibid*.
526 General Medical Council (2013) *Good medical practice* 5.
527 See 4.3.3.2.

and rules.[528] In line with the purpose of the study the discussion focusses on fitness to practise by the medical practitioner, particularly the misconduct and deficient professional performance. Any allegation made to the GMC against a medical practitioner will initially be considered by the Registrar.[529] The Registrar must decide whether the allegation falls within the ambit of the Medical Act,[530] in other words whether the fitness of the practitioner has been impaired. In terms of section 35C(2) of the Medical Act fitness to practise is regarded as being impaired in the following instances:[531]

(a) Misconduct.
(b) Deficient professional performance.
(c) A conviction or caution for a criminal offence.[532]
(d) Adverse physical or mental health.
(da) Not having the necessary knowledge of English.[533]
(e) A determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that the person's fitness to practise as a member of that profession is impaired, or a determination by a regulatory body elsewhere to the same effect.

Misconduct is not statutorily defined and as noted in *Roylance v General Medical Council,* it is not capable of a precise delimitation, misconduct can include not only misconduct by a doctor in his clinical practice but also misconduct when giving expert medical evidence.[534] This was confirmed in the case of Professor Meadow who was found guilty by the GMC of serious professional misconduct[535] after the father of Sally

528 The General Medical Council (Fitness to Practise) Rules 2004.
529 Rule 4(1) of the General Medical Council (Fitness to Practise) Rules 2004.
530 Rule 4(2) of the General Medical Council (Fitness to Practise) Rules 2004. Rule 4(2) further determines that if it is determined that the allegation does not fall within section 35C(2) of the Medical Act 1983 (c.54) the Registrar must notify the complainant accordingly.
531 Section 35C(2) of the Medical Act 1983 (c.54).
532 Section 35C(2)(c) of the Medical Act 1983 (c.54) determines that the conviction or caution should have taken place in the British Islands or of it took place elsewhere it would constitute a crime in England and Wales.
533 Section 2(4) of the Medical Act 1983 (c.54) determines that the necessary knowledge of English referred to in section 35C(2) shall not apply in determining whether a person's fitness to practice is impaired for purposes of registration under the Medical Act 1983 (c.54).
534 *Roylance v General Medical Council* (2000) 1 AC 311 at 330F-332E.
535 At the time of Professor Meadow's disciplinary proceedings took place complaints of serious professional misconduct, seriously deficient performance and seriously impaired health were received, the concepts were later unified to impaired fitness to practice. *Meadow v General Medical Council* [2006] EWCA Civ. 1390 at par. 175.

Clark[536] made a complaint to the GMC. The matters in respect of which Professor Meadow was found guilty included the use of statistical material of which he had no expert knowledge or experience and failure to disclose the lack of expertise.[537] Professor Meadow appealed the finding and the sanction. In reaching a decision on whether the actions by Professor Meadow constituted serious professional misconduct Lord Justice Auld held that it is crucial that the disciplinary body assessing the conduct do so in the "forensic context in which it arose".[538] The disciplinary body in cases of misconduct resulting from giving expert evidence must consider the circumstances in which an expert came to give evidence, the way in which the evidence was given and the potential effect of the evidence on the outcome of the case.[539] As Lord Justice Auld remarked, this is not to absolve the expert of responsibility but to take cognisance of the "fevered process" in an adversarial system.[540]

If the requirements of section 35C(2) are met, and not more than five years have lapsed since the event that gave rise to the allegation occurred,[541] the Registrar will refer the allegation to a medical or lay case examiner for consideration.[542] The practitioner will be informed of the investigation into the allegation and will be invited to respond with written representations.[543] The case examiners, after considering the allegation may unanimously decide that the allegation should not proceed further, issue a warning to the practitioner or they can refer the allegation either to the Investigation Committee or the Medical Practitioners Tribunal Service (MPTS) to arrange for determination by a Medical Practitioner Tribunal (MPT) (previously known as the Fitness to Practise Panels).[544]

536 See 5.4 for the discussion on the case of Sally Clark (*R v Clark (Sally)(Appeal against conviction) (no.2)*.
537 *Meadow v General Medical Council* at par. 178
538 *Idem* par. 205.
539 *Ibid.*
540 *Idem* par. 207.
541 Rule 4(5) of the General Medical Council (Fitness to Practise) Rules 2004.
542 Rule 4(2) of the General Medical Council (Fitness to Practise) Rules 2004.
543 Rule 7(1) of the General Medical Council (Fitness to Practise) Rules 2004.
544 Rule 8(2) of the General Medical Council (Fitness to Practise) Rules 2004.

The Investigation Committee can after the initial investigation into the allegation[545] either determine that the matter should not proceed further,[546] refer the matter to MPT,[547] or give a warning to the person if no further investigation by the MPT is necessary.[548] In addition, if the Investigation Committee is of the opinion that the conduct of the medical professional warrants an interim order for suspension or an interim order for the conditional registration[549] they shall inform the Registrar.[550] The Registrar in turn will refer the matter to the MPTS[551] who will arrange for either an Interim Orders Tribunal or a MPT to decide whether or not such an order must be made.[552] The purpose of the bodies are, as pointed out in *General Medical Council v Meadow*, to regulate the profession for the benefit of the public.[553] As Sir Clarke held the purpose is not as many believe to "punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise".[554] This is true of all regulatory and disciplinary bodies, including the Health and Care Professions Council in England.

The MPT is empowered to impose the following penalties should they find that the medical professional's fitness to practise is impaired:

(a) Erasure from the register (except in cases of adverse health or language cases).[555]

(b) Suspension of registration for a period not exceeding twelve months[556]

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545 Section 35C(1) of the Medical Act 1983 (c.54) empowers the Investigation Committee to conduct an investigation into the allegation.

546 Section 35C(6) of the Medical Act 1983 (c.54) read with Rule 9(a) of the General Medical Council (Fitness to Practise) Rules 2004.

547 Section 35C(4) of the Medical Act 1983 (c.54). The Investigation Committee gives a direction to the Registrar to that effect, who in turn refers the allegation to the Medical Practitioners Tribunal Services who arranges for the allegation to be considered. See section 35C(5) of the Medical Act 1983 (c.54) and Rule 9(d) of the General Medical Council (Fitness to Practise) Rules 2004.

548 Section 35C(6) of the Medical Act 1983 (c.54) read with Rule 9(b) of the General Medical Council (Fitness to Practise) Rules 2004.

549 The interim orders are dealt with in more detail in section 41A of the Medical Act 1983 (c.54).

550 Section 35C(8)(a) of the Medical Act 1983 (c.54).

551 The Medical Practitioners Tribunal Service (MPTS) is one of the statutory committees established in terms of the Medical Act. The MPTS was established to provide efficient and effective hearings services to all parties. The role is separate from the investigatory role or presentation role. See in general General Medical Council (2019) *Governance handbook* 13-14. The role of the council is described in chapter 3 of the Governance handbook.

552 Section 35C(8)(b) of the Medical Act 1983 (c.54).

553 *General Medical Council v Meadow* par.32.

554 *Ibid.*

555 Section 35D(2)(a) of the Medical Act 1983 (c.54).

556 Section 35D(2)(b) of the Medical Act 1983 (c.54).

(c) Conditional registration for a period not exceeding three years, the conditions or requirements specified by the MPT.[557]

(d) Warning in respect of future conduct or performance, even if the MPT found that the person's fitness to practice is not impaired.[558]

Unlike the penalties imposed by the Professional Conduct Committee of the HPCSA there are no monetary penalties, such as the payment of a prescribed fine or the costs of the proceedings, if the practitioner is found to be unfit to practise.[559] The penalties or sanctions that can be imposed by the MPT focus on the matter of ethics and integrity. In addition, the MPT can direct that in the case of suspension the matter can be referred to another MPT for an early review, where the matter is reviewed before the expiry of the period of suspension.[560] On review the MPT may, if they think fit, extend the suspension,[561] erase the person's name from the register,[562] after expiry of the suspension place a condition on the registration of the person,[563] or revoke the direction for the remainder of the current period of suspension.[564] On review the MPT cannot extend any period of suspension for more than twelve months at a time.[565] By reviewing the matter the practitioner is aware that further consequences can result should they not comply with the initial sanction.

In the case where the penalty of a conditional registration was imposed on the medical practitioner, if the practitioner failed to meet the conditions the matter can be reviewed by the MPT and the MPT may erase the person from the register or suspend the person's registration for a period not exceeding twelve months.[566] A decision of the MPT made under section 35D of the Medical Act giving a direction for erasure, suspension or conditional registration or varying the conditions imposed by a direction for conditional consideration can be appealed by medical practitioner.[567] If the medical

557 Section 35D(2)(c) of the Medical Act 1983 (c.54).
558 Section 35D(3) of the Medical Act 1983 (c.54).
559 See 4.3.3.2.
560 Section 35D(4A) of the Medical Act 1983 (c.54).
561 Section 35D(5)(a) of the Medical Act 1983 (c.54).
562 Section 35D(5)(b) of the Medical Act 1983 (c.54). Erasure cannot take place in the case of adverse health or a language case or a case of suspension under paragraph 5A(3D) or 5C(4) of Schedule 4.
563 Section 35D(5)(c) of the Medical Act 1983 (c.54).
564 Section 35D(5)(d) of the Medical Act 1983 (c.54).
565 Section 35D(5) of the Medical Act 1983 (c.54).
566 Section 35D(10) of the Medical Act 1983 (c.54).
567 Section 40(1) of the Medical Act 1983 (c.54).

practitioner is registered in England the appeal will be heard in the High Court of Justice in England and Wales.[568] If the matter is appealed the court may either dismiss the appeal, allow the appeal and quash the direction, substitute the direction or remit the case to the MPTS for them to arrange for the MPT to dispose of the case and the court may also make an order as to cost as it thinks fit.[569] The GMC itself can also appeal against a relevant decision made by the MPT if they consider that the decision is not sufficient for the protection of the public.[570]

The sanctions of professional or statutory bodies like the GMC are crucial to the regulation of a profession. As Lord Philips remarked in the case of *Jones v Kaney*:[571]

> The potential effects of a sanction by a professional body are more serious than the effects of civil proceedings by a dissatisfied client (where the expert will usually, although not invariably, be insured). An expert may lose his livelihood and entire reputation as a result of an adverse ruling by a professional disciplinary body.

Psychiatrists acting as expert witnesses should approach the task of acting as an expert witness with the utmost care as the GMC views any non-compliance of duties in a serious light. For example, in the recent case of *Pool v General Medical Council,* the appellant doctor, a psychiatrist, appealed against a decision of the GMC that his fitness to practise was impaired by reason of misconduct.[572] The Panel imposed a sanction suspending the doctor's registration for a period of three months. Dr Pool was instructed to appear as an expert witness in the fitness to practise proceedings of another medical practitioner, a paramedic who had been diagnosed as having a personality disorder and suffering from post-traumatic stress disorder.[573] The paramedic in question objected to the admission of Dr Pool's report stating that Dr Pool was not an expert. The panel constituted by the General Medical Council, found that Dr Pool was not an expert in the field of general psychiatry and had failed to restrict his opinion to areas of which he had knowledge or direct experience and, furthermore, did not provide adequate reasoning for his opinion.[574] Dr Pool had not made it clear

568 Section 40(5)(c) of the Medical Act 1983 (c.54).
569 Section 40(7) of the Medical Act 1983 (c.54).
570 Section 41(3) of the Medical Act 1983 (c.54).
571 *Jones v Kaney* par.84.
572 *Pool v General Medical Council* (2014) EWHC 3791 (Admin).
573 *Idem* par. 2; 4.
574 *Idem* par. 3.

that he was registered on the General Medical Council's specialist register in the speciality of psychiatry of learning disabilities and not general adult psychiatry. At the hearing Dr Pool's legal representative argued that although he was not registered as a specialist in general adult psychiatry, he had gained the relevant experience through his work.[575]

In the judgment the court refers to the determination by the panel that "an expert 'stands out from his peers' and is 'deferred to by his peer', but … there is a hierarchy ranging from world-acknowledged experts to suitable qualified and trained practitioners".[576] Dr Pool was considered not to fall within the expert hierarchy as described.[577] On appeal the court found that the panel was correct in finding that Dr Pool's work experience was not focussed on the subject matter of the case and he was not qualified in adult psychiatry, simply put he was not an expert for purposes of the case.[578] The court expects that an expert should be registered in the relevant specialisation category of the General Medical Council's register.[579] The case sends a warning to medical practitioners to ensure that they receive sufficient information regarding the nature and the issues of the case to be able to make an informed choice on whether or not they have the necessary qualifications and experience to act as an expert witness.

5.5.1.2 Royal College of Psychiatrists

Medical Royal Colleges, including the Royal College of Psychiatrists, are responsible for setting the standards of care within the specific speciality and provides further guidance to members practising in the speciality.[580] As a professional and educational body in the United Kingdom the Royal College of Psychiatrists (Royal College) is responsible for education and training of psychiatrists.

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575 *Idem* par. 9.
576 *Idem* par. 15.
577 *Ibid*.
578 *Idem* par. 33.
579 Rix et *al*. (2015) *Responsibilities of psychiatrists who provide expert opinion to courts and tribunals (College Report CR193)* 3.
580 Royal College of Psychiatrists "What we do and how" (2020) available online at https://www.rcpsych.ac.uk/about-us/what-we-do-and-how (last accessed on 23 July 2020).

The work done by the Royal College is underpinned by the values of courage, innovation, respect, collaboration, learning and excellence.[581] The Royal College like the GMC is a registered charity with the Board of Trustees acting as the governing body of the College.[582] The Council of the Royal College reports to the Board of Trustees and is responsible for matters relating to education, policy, professional practice, professional standards, research and training in psychiatry.[583] The Council and Board of Trustees are assisted by Special Interests Groups and various committees such as the Disciplinary and Complaints Committee discussed below.[584]

To become a member of the Royal College the normal route usually requires that the psychiatrist has 24 months post foundation or internship experience and a pass in all of the MRCPsych examinations. All registered members enjoy the use of the protected and registered trademark "MRCPsych".[585]

5.5.1.2.1 Ethical guidance

In response to the courts' new rules that were formulated for expert witnesses and, furthermore, to acknowledge that "giving evidence as a psychiatric expert is a competency that cannot be assumed, but has to be acquired to an accepted standard" the Special Committee for Professional Practice and Ethics developed guidelines for psychiatrists giving evidence in courts.[586] The ethical standards are contained in the College Report CR193 which is not a legally binding document but it does express the Royal College's view on how a psychiatrist should act when giving an expert opinion.[587]

The ethical standards and guidance provided for in the CR193 are divided into twelve (12) sections and also includes a list of recommended reading for the psychiatrist. The CR193 starts off by giving a detailed list of all the expert's duties to the court. The list of duties reiterates the duties contained in the Civil and Criminal Procedural Rules and

581 *Ibid.*
582 *Ibid.*
583 *Ibid.*
584 See 5.5.1.2.2.
585 Paragraph 8 of Section III of the Byelaws of the Royal College of Psychiatrists (2018).
586 Rix e*t al*. (2015) 3.
587 *Ibid.*

distinguishes between the general duties that have been imposed on experts in both civil and criminal proceedings whilst highlighting the duties that have to be met in addition when acting as an expert in criminal proceedings.[588] To avoid repetition of the duties that have already been discussed throughout 5.4 above the duties will not be included here. However, the list is so succinct and well-defined that it is attached as annexure B to the study.[589]

The second section explains the nature of expert testimony by firstly, explaining the difference between a professional witness and an expert witness [590] The importance of the difference is made clear by explaining that the term expert is a legal term which indicates that the witness may give an opinion on a matter which is outside the knowledge of the court.[591] It also emphasises the difference between the types of witnesses by referring to the conflict or challenges that can arise if the roles of a psychiatrists as a professional (or treater) and expert witness collide, which is dealt with in more detail in another section.[592]

In explaining the nature of expert evidence, the section concisely and in terms that are easily understood by a non-legal reader, describes the admissibility test of expert evidence.[593] Although the section does not contain ethical standards per se, it is gives guidance on basic legal knowledge which is often assumed. The basic legal knowledge enables the psychiatrist to understand their role as expert witness. An important feature of the explanation in this section is that it ties the knowledge in by also providing a practical example. For example, after explaining that the skills test also entails that such a skill must be "paired with reasoning ability sufficient to inform the court"[594] it refers the reader to the case of *Pool v General Medical Council*[595] to illustrate the importance of explaining an opinion. In the *Pool* case, as discussed above,[596] the psychiatrist who acted as an expert witness was accused of not providing sufficient reasons for his opinion, although on its own this does not necessarily amount

588 *Idem* 6.
589 The list duplicated in annexure B is found in Rix e*t al*. (2015) 6.
590 *Idem* 7.
591 *Ibid*.
592 *Idem* 8.
593 *Idem* 7-8.
594 *Idem* 7.
595 *Pool v General Medical Council* (2014) EWHC 3791 (Admin).
596 See 5.5.1.1.2.

to impaired practice but together with other matters the court found that it can be sufficient to amount to serious misconduct.[597]

The section clarifies the current legal approach to acting as an expert witness - not only should the individual meet the requirements of skills and knowledge in a particular field but beyond this the individual must also have "expertise in being an expert witness".[598] This is described as being able to "demonstrate an adequate understanding of the role and responsibilities of the expert witness and the ability to communicate effectively in a legal setting".[599]

The third section of the CR193 report is concerned with identifying oneself as a potential expert.[600] The section refers the reader to the guidance on testifying as an expert witness provided by the GMC. Notable from the CR193 is, in general, the guidance was not drafted as a standalone document but incorporated the relevant legal aspects and, moreover, included references to the guidance provided by the registering body, the General Medical Council. By ensuring that all of the documents are in line it does what the document purports to do- it gives proper guidance without creating further uncertainty or conflict. The report reminds psychiatrists that should they act as expert witnesses their evidence can be scrutinised by the GMC which can lead to a finding of impaired fitness to practice as in the case of *Kumar v General Medical Council*[601] and *Pool v General Medical Council*.[602]

The CR193 report recommends in cases concerning children and adolescents psychiatrists must be appropriately trained and able to show that they have the necessary expertise, especially in relation to developmental issues and child-specific challenges.[603] The report also reiterates the Civil and Criminal Procedure Rules that experts have a duty to give a full range of opinion.[604] A psychiatrist giving an expert

597 Rix e*t al*. (2015) 7.
598 *Idem* 8.
599 *Ibid* 8.
600 *Idem* 9-12.
601 *Kumar v General Medical Council* (2012) EWHC 2688 (Admin)
602 *Pool v General Medical Council* (2014) EWHC 3791 (Admin).
603 Rix e*t al*. (2015) 12.
604 *Ibid*.

opinion must be able to give account of full range of opinions on the issue and explain why their opinion is to be preferred.[605]

The fourth section deals with the situation when a treating psychiatrist also acts as an expert witness.[606] In line with the guidance provided by the GMC, the Royal College also advises that it is good practice to, as far as possible, avoid acting in both a therapeutic and forensic role.[607] By acting as both treating psychiatrist and expert witness the psychiatrist runs the risk of lacking objectivity or it can be perceived that the expert it biased.[608] The CR193 report acknowledges that there are instances where the situation is unavoidable, for example, for practical reasons or if legislation demands that the treating expert also give evidence as in the case of sentencing under mental health legislation.[609] Where the dual relationship cannot be avoided the CR193 report advises that the psychiatrist must be open and explicit about the conflicts of interest to try and defuse any potential problems.[610]

The ethics of being a psychiatrist is discussed in section five, with some concepts expanded on in sections six and seven, discussing potentially negative testimony as well as information governance and confidentiality, respectively. The CR193 report stresses that psychiatrists still need to comply with medical ethical duties on top of the legal duties placed on the psychiatrist acting as an expert witness.[611] The CR193 report focusses on the ethical principles of respect for autonomy, beneficence, nonmaleficence, confidentiality and justice.[612] The report does not deal with each principle in detail but provides more of an overview.

Beneficence is, however, described in the guidance as a need to have regard to a person's welfare and is expressed when conducting a psycho-legal assessment by informing and advising the evaluee or patient that they should seek treatment for a medical condition if the psychiatrist is of the opinion that the evaluee or patient is not

605 *Ibid.*
606 *Idem* 13-14.
607 *Idem* 13.
608 *Ibid.*
609 *Ibid.*
610 *Idem* 14.
611 *Idem* 15.
612 *Idem* 15-17.

receiving any or appropriate or adequate treatment.[613] The guidance advises that should a psychiatrist advise the evaluee or patient that reference to the advice should be included in the report as a safeguard for the expert.[614] Only in very exceptional circumstances, where there is a risk of serious imminent harm, should the psychiatrist act without the patient or evaluee's consent or the approval of the instructing legal representatives.[615]

In a normal clinical setting confidentiality is crucial to the doctor-patient relationship but in the context of a psycho-legal assessment confidentiality is limited. The CR193 report recommends that a psychiatrist conducting a psycho-legal assessment give an information sheet to the person being assessed explaining the nature and purpose of the assessment and the limits of confidentiality.[616] Although the practice is to give verbal advice about the purpose of the assessment and the limited confidentiality the CR193 report suggests that psychiatrists should have the person sign a document that indicates that they understand the purpose and limitation and consent to the evaluation which can be combined with an information sheet.[617] Such a written consent which is well-constructed and signed can assist both the person being assessed, especially if they act without representation, and the psychiatrist in the event of a complaint.[618]

Despite the legal setting psychiatrists must respect confidentiality and have a duty not to disclose the contents of a report.[619] The CR193 report explains that the confidentiality is, however, limited because generally the completed report "belongs" to those who gave the instruction and not to the person being assessed.[620] The report should only be disclosed with the assessed person's consent and/or the consent of the legal representatives or if directed by the court depending on the matter at hand.[621] CR193 further draws the attention to cases concerning children where special care needs to be taken and parental consent might also need to be considered.[622] Under

613 *Idem* 15.
614 *Ibid.*
615 *Ibid.*
616 *Idem* 16.
617 *Ibid.*
618 *Ibid.*
619 *Idem* 20.
620 *Ibid.*
621 *Ibid.*
622 *Ibid.*

exceptional circumstances a psychiatrist can breach confidentiality, for example where there is significant risk of serious harm to others should the confidentiality not be breached.[623]

The report, furthermore, deals with a potential conflict with medical ethics when an expert's evidence leads to negative outcomes for the person who is being assessed.[624] Giving testimony that could have a potential negative outcome is considered by many psychiatrists as going against the principle of beneficence and non-maleficence.[625] The CR193 report notes that psychiatrists can refuse to conduct a psycho-legal assessment but should they continue they should make the following clear to the evaluee:[626]

- The evaluee can refuse evaluation or assessment.
- The report is not confidential.
- The evaluee does not have to answer all, or any, questions.
- The expert is not there to provide them with treatment.

The CR193 report acknowledges that many ethical codes have tried to lessen the tension by arguing that the relationship is not therapeutic, the person being evaluated is not a patient, and as a result the welfare of the patient is not the primary concern.[627] It is argued in the report that even if the relationship is not therapeutic the "usual ethical medical duties" remains in the background.[628] Experts still use medical skills and techniques and as a result, the authors of the report argue that a person being evaluated, even if warned that this is not a therapeutic relationship, still considers it a doctor-patient relationship.[629]

Section 8 of the report gives guidance on evidence bases and includes a brief discussion on the taking of instructions.[630] The Criminal and Civil Procedure Rules places a duty on experts to testify within their area of expertise but also to give a full

623 *Ibid.*
624 *Idem* 18.
625 *Ibid.*
626 *Idem* 19.
627 *Ibid.*
628 *Idem* 18.
629 *Ibid*
630 *Idem* 22-23.

range of opinion; the CR193 report emphasises this by explaining that this means the a psychiatrists has a duty to include and account of any evidence that is against their opinion.[631] The report further advises that psychiatrists should use "established psychiatric practice test"- they should be able to explain and justify any modification the established practice regarding an ordinary clinical interview or any other assessment technique.[632] Together with not taken instructions that go beyond their expertise and/or evidence-based data, psychiatrists should consider whether the instructions are clear.[633] If the instructions are unclear, psychiatrists can refuse to take instructions.[634] When deciding on taken the instructions the report also warns experts that they should consider whether they will be able to complete the report in the specific time frame provided for as failure could result in financial penalties in the form of a wasted cost order.[635]

In section 9 the report addresses the specific area of child protection cases. Concerns have been raised in relation to expert witnesses in child protection cases which includes experts who give evidence beyond their expertise, experts who's testimony lacks an empirical knowledge base or contains information that is out of date and biased testimony as a result of personal values.[636] Similar to the situation in South Africa cases involving children often solicits unfounded criticism against a psychiatrist but many cases also raise real concerns. The CR193 report considers cases in family courts as a complex field and emphasises that the expert must ensure that they have the "appropriate knowledge; be active in the area of practice or have sufficient experience of the issues; have relevant qualifications; have receiving appropriate training".[637]

As mentioned above, the Royal College provides guidance for the revalidation of psychiatrists which is field specific.[638] The CR193 report also makes brief reference to the revalidation and appraisal process in the report as a means of establishing

631 *Ibid.*
632 *Idem* 22.
633 *Idem* 23.
634 *Ibid.*
635 *Ibid.*
636 *Idem* 24.
637 *Ibid.*
638 See 5.5.1.1.

expertise.[639] There is a duty on psychiatrists who act as expert witnesses to include the work done as expert as part of the appraisal and revalidation process.[640] This can be done by providing for example, feedback from instructing legal representatives, the opposing party's expert(s) and the individual assessed by the psychiatrist and any comments by counsel and the judge on the quality of oral evidence given.[641]

The penultimate issue that the CR193 report addresses is psychometric testing.[642] If psychometric testing has been carried out during the psycho-legal assessment the psychiatrist must clearly indicate in their report the methodology used, who administered the tests and under whose supervision.[643] Crucial to the use of psychometric testing is that any psychiatrists who administered tests must be prepared to be cross-examined on the validity and reliability of the instrument.[644] Experts have a duty to use instruments that have been scientifically validated and evidenced as reliable.[645]

The report lastly deals with miscellaneous ethical issues concerning the conditions in which a person is kept, writing a report without assessing the person, and acting as an advisor.[646] If a psychiatrist is concerned about the conditions in which the evaluee is being held they should report this but in the interest of the justice process continue with the assessment.[647] Only if the circumstances would invalidate the psycho-legal assessment only then should the psychiatrist refuse to continue with the assessment.[648] In the event that a psychiatrist needs to prepare a report without consulting with or assessing the subject of the report this should be clearly stated in the report.[649] The report must state that it is expert commentary and not a psychiatric report.[650] A psychiatrist can also be asked to criticise another expert's report. This is

639 Rix e*t al*. (2015) 25.
640 *Ibid*.
641 *Ibid*.
642 *Idem* 27.
643 *Ibid*.
644 *Ibid*.
645 *Ibid*.
646 *Idem* 28.
647 *Ibid*.
648 *Ibid*.
649 *Ibid*.
650 *Ibid*.

not an expert report but amounts to advice to counsel.[651] Acting as an advisor is permissible but any document submitted must clearly indicate that this is advice and not an expert report.[652]

5.5.1.2.2 Disciplinary procedure

Section IX of the Byelaws of the Royal College of Psychiatrists[653] deals with the disciplinary action and complaints procedure of the Royal College. The Disciplinary and Complaints Committee (DCC) was established by the Royal College to deal with all disciplinary matters and complaints received by the Royal College.[654] The DCC is chaired by the registrar and is further constituted of the dean and two members of the Board of Trustees or the Council and one representative.[655] The representative is chosen from among honorary fellows of the Royal College who are not psychiatrists but senior colleagues in other medical specialities or lay trustees of the Royal College.[656] The DCC deals with complaints about members of the Royal College and in relation to incidents which either occur during the course of Royal College business or when a member is acting in a Royal College capacity.[657] The DCC cannot deal with complaints about individual psychiatrists and their competence or right to practice which is dealt with by the GMC.[658] The DCC can directly refer or recommend referral to an organisation such as the GMC.[659]

An individual's conduct shall be considered by the DCC if it comes to the attention of the Board of Trustees that the individual:[660]

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651 *Ibid.*
652 *Ibid.*
653 Byelaws of the Royal College of Psychiatrists (2018). The byelaws were approved by order of the Privy Council on 13 August 2018.
654 Par. 1 of Regulations relating to the Disciplinary and Complaints Committee of the Royal College of Psychiatrists: Remit and Procedures 2015 (as amended).
655 Par. 3 of Section XVIII of the Regulations of the Royal College of Psychiatrist (2020).
656 *Ibid.*
657 Par. 1.1 of Appendix C of Regulations relating to the Disciplinary and Complaints Committee of the Royal College of Psychiatrists: Remit and Procedures 2015 (as amended).
658 Par. 1.2.2.1 of Appendix C of Regulations relating to the Disciplinary and Complaints Committee of the Royal College of Psychiatrists: Remit and Procedures 2015 (as amended).
659 Par. 4.7.4 of Appendix C of Regulations relating to the Disciplinary and Complaints Committee of the Royal College of Psychiatrists: Remit and Procedures 2015 (as amended).
660 Par. 2(a)-(f) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).

(a) has been suspended from registration upon a medical register other than on the grounds of ill health.
(b) has secured election or registration by false statement, fraud or imposition.
(c) has been convicted of any serious criminal offence.
(d) has acted in any respect in a dishonourable or unprofessional manner or in a manner which has or is likely to have a serious adverse effect on the College or to bring discredit on the College or to render them unfit to remain a Member or Associate of the College or as an Officer (as the case may be).
(e) has by reason of incapacity, illness or injury become incapable of managing and administering their affairs or become unfit to remain as a Member of the College or Associate or, as the case may be, an Officer.
(f) has, in the case of an Officer, seriously or persistently neglected or been incompetent in the performance of his or her duties as an Officer or is guilty of any gross misconduct affecting the affairs of the College.

The person under investigation will receive a written notice to appear before the DCC.[661] In terms of the Byelaws the DCC may after the proceedings have been held implement the following penalty or action:

(a) censure or admonish[662]
(b) take no further action[663]
(c) suspend further action for a prescribed period[664]
(d) agree that the person in question will comply with an undertaking[665]
(e) suspended from registration[666]
(f) removal from Royal College register[667]

The undertaking by the relevant person cannot be given in cases dealing with dishonourable or unprofessional conduct, incapacity or ill health or the serious and persistent neglect or incompetence in performance.[668] Failure to comply with the undertaking can result in censure or admonition,[669] suspension or removal from the

661 Par. 2(g) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
662 Par. 6(a) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
663 Par. 6(b) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
664 Par. 6(c) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
665 Par. 6(d) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
666 Par. 7(b) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
667 Par. 7(a)of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
668 Par. 6(d) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
669 Par. 6(d)(i) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).

Royal College register[670] or if the person is an officer the suspension or removal from their office.[671] Any individual whose name has been removed or who has been suspended can appeal against the decision of the DCC.[672] There is no appeal against censure or admonition.[673]

5.5.2 Regulation of psychologists

5.5.2.1 Health and Care Professions Council (HCPC)

The Health and Care Professions Council (HCPC) regulates 15 health and care professions, including psychologists, and sets the standards for education, training, and practice in these professions. Under the Health Act 1999 the Health Professions Order came into force on 12 February 2002.[674] Since the publication of the Health Professions Order 2001 many amendments have been made but this has not been reflected in an updated version of the Order, the Order is only available in it is original version.[675] The HCPC has consolidated all the revocations and amendments made up to 2 December 2019 in the Consolidated Health Professions Order 2001 (Consolidated Order).[676] The Consolidated Order has no official status but will be referred to below.

The over-arching objective of the HCPC, as with all regulatory bodies in health professions, is the protection of the public.[677] To fulfil the over-arching objective the following objects are pursued:[678]

(a) to protect, promote and maintain the health, safety and well-being of the public;

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670 Par. 6(d)(ii) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
671 Par. 6(d)(iii) of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
672 Par. 8 of Section IX of the Byelaws of the Royal College of Psychiatrists (2018).
673 Par. 3.5.3 of Regulations Relating to the Disciplinary and Complaints Committee of the Royal College of Psychiatrists: Remit and Procedures 2015 (as amended).
674 Section 60 of the Health Act 1999 (c.8).
675 Health and Care Professions Council "Legislation" (2020) available online at https://www.hcpc-uk.org/about-us/corporate-governance/legislation/ (last accessed on 20 June 2020).
676 Health and Care Professions Council *Consolidated Health Professions Order 2001*.
677 Article 3(4)4 of the Consolidated Health Professions Order 2001. The amendment is inserted by paragraph 6(2) of Schedule to the Health and Social Care (Safety and Quality) Act 2015 (c.28).
678 Article 3(4A) of the Consolidated Health Professions Order 2001. The amendment is inserted by paragraph 6(2) of Schedule to the Health and Social Care (Safety and Quality) Act 2015 (c.28).

(b) to promote and maintain public confidence in the professions regulated under this Order; and

(c) to promote and maintain proper professional standards and conduct for members of those professions.

To discharge their functions, the HCPC is advised and assisted by committees. There are four committees, referred to in the Health Professions Order as the statutory committees.[679] The four statutory committees are the Education and Training Committee; Investigating Committee; Conduct and Competence Committee and the Health Committee.[680] The HCPC may from time to time establish other committees if the need arises and in particular the professional advisory committees may be established.[681]

The HCPC is required to establish and maintain a register of members of the relevant professions[682] which is defined as arts therapists; biomedical scientists; chiropodists and podiatrists; clinical scientists; dietitians; hearing aid dispensers; occupational therapists; operating department practitioners; orthoptists; paramedics; physiotherapists; practitioner psychologists; prosthetists and orthotists; radiographers; and speech and language therapists.[683] Practitioner psychologists is further defined in schedule 3 of the Health Professions Order as clinical psychologists, counselling psychologists, educational psychologists, forensic psychologists, health psychologists, occupational psychologists and sport and exercise psychologists which is considered a single profession for the purpose of the Health Professions Order.[684]

Registration cycle is two years and to renew their registration practitioners must meet the requirements set out in article 10(2) which includes satisfying the Education and Training Committee that "he has met any prescribed requirements for continuing

679 Article 3(10) of the Health Professions Order 2001.
680 Article 3(9) of the Health Professions Order 2001.
681 Article 3(12) of the Health Professions Order 2001.
682 Article 5(1) of the Health Professions Order 2001.
683 Schedule 3 of the Health Professions Order 2001. Practising psychologists did not initially form part of the relevant professions but was inserted by par. 16(d) of Schedule 2 of the Health Care and Associated Professions (Miscellaneous Amendments and Practitioner Psychologists) Order 2009.
684 The definition of practising psychologists did not initially form part of the Health Professions Order 2001 but was later inserted by the par. 16(c) of Schedule 2 of the Health Care and Associated Professions (Miscellaneous Amendments and Practitioner Psychologists) Order 2009.

professional development within the prescribed time period".[685] If this requirement is not met conditional renewal may be granted provided that if the practitioner does not comply with the condition their registration shall lapse and their name may be removed from the register.[686] The Health Professions Order makes provision for the HCPC to make rules regarding continuing professional development which shall be specified in standards.[687]

The HCPC's standards of continuing professional development unlike the HPCSA does not have a CPD points system. There are five standards which set out what is expected and required of professionals' continuing professional development. Standard 1 requires that practitioners carry out regular CPD activities and keep a record of the activities.[688] Standard 2 requires that the CPD activities must be relevant to a professional's current or future practice and must include a mixture of different types of learning.[689] The categories of learning include work-based learning such as feedback from service users, professional activity such as giving a presentation at a conference, formal education which includes attending registered courses and self-directed learning such as reading a journal article.[690]

Standard 3 requires the professional to ensure that their CPD activities have contributed to the quality of the practice and service delivery.[691] If the professional is chosen for an audit, they will need to indicate how the activities improved their practice. Standard 4 places the duty on a professional to ensure that their CPD benefits the service user.[692] If chosen for an audit, the professional would need to indicate how the CPD activities that were carried out benefited their service users, which includes

685 Article 10(2)(b) of the Health Professions Order 2001.
686 Article 10(3) of the Health Professions Order 2001.
687 Article 19(1) of the Health Professions Order 2001.
688 Health and Care Professions Council "Standards of continuing professional development" (2018) available online at https://www.hcpc-uk.org/standards/standards-of-continuing-professional-development/ (last accessed on 20 June 2020).
689 *Ibid.*
690 Health and Care Professions Council "What activities count as CPD?" (2019) available online at https://www.hcpc-uk.org/cpd/your-cpd/cpd-activities/ (last accessed 20 June 2020).
691 Health and Care Professions Council "Standards of continuing professional development" (2018) available online.
692 *Ibid.*

anyone who used their services or is affected by their work.[693] Unlike the revalidation process, third-party feedback is not a requirement but is encouraged.[694]

The last standard, standard 5, is relevant only if the professional is picked as part of a random sample for an audit.[695] Standard 5 requires that the practitioner, upon request, present a written profile supported by evidence explaining how they have met the standards for continuing professional development.[696] A strong emphasis is placed on the fact that the profile must be the practitioner's own work as any suspected plagiarism will be investigated.[697]

The HCPC also has the function to ensure that the registered practitioners keep to the standards of conduct, performance and ethics expected of them.[698] The ethical framework and the disciplinary procedure of the HCPC is discussed in more detail below.

5.5.2.1.1 Ethical guidance

The HCPC has published a document, the *Standards of conduct, performance and ethics* (Ethical Standards) which provides an ethical framework for registered practitioners.[699] The Ethical Standards are used in disciplinary proceedings to assist in deciding whether the HCPC needs to take action against a practitioner.[700] The Ethical Standards contain ten overarching standards namely to:

1 Promote and protect interests of service user and carers.[701]
2 Communicate appropriately and effectively.[702]
3 Work within the limits of your knowledge and skills.[703]
4 Delegate appropriately.[704]

693 *Ibid*
694 *Ibid.*
695 *Ibid.*
696 *Ibid.*
697 *Ibid.*
698 Article 21(1) of the Health Professions Order 2001.
699 Health and Care Professions Council (2016) *Standards of conduct, performance and ethics.*
700 *Idem* 3.
701 *Idem* 5.
702 *Idem* 6.
703 *Idem* 6-7.
704 *Idem* 7.

5 Respect confidentiality.[705]
6 Manage risk.[706]
7 Report concerns about safety.[707]
8 Be open when things go wrong.[708]
9 Be honest and trustworthy.[709]
10 Keep records of your work.[710]

None of the standards are specifically aimed at practitioners who act as expert witnesses, or any work related to the legal system such as psycho-legal assessments as these standards are the general standards applicable to all the different registered practitioners. Of course, many of the standards are applicable, for example treating people with respect and dignity, irrespective of the type of work done by the practitioner but does not assist with regulating psycho-legal assessments. The HCPC does however provide standards of proficiency which provides more specific guidance for unique professions.[711]

The *Standards of proficiency: Practitioner psychologists* (Psychologists' Standards) was first published in 2009 and subsequently amended to reflect the developments in the professions.[712] The latest version came into effect on 1 July 2015.[713] The Psychologists' Standards is described as including "generic elements, which apply to all our registrants, profession-specific elements which are relevant to all practitioner psychologists and domain-specific standards which apply to a particular domain".[714] Within the document the standards, or elements as referred to, has been structured to clearly illustrate the different standards and how they relate to one another. The generic or general standard is stated first followed by the profession-specific elements and if there is a specific requirement in a domain, for example in forensic psychology, this is included with a heading "Forensic psychologists only".

705 *Ibid.*
706 *Idem* 8.
707 *Ibid.*
708 *Idem* 9.
709 *Idem* 9-10.
710 *Idem* 10.
711 Health and Care Professions Council "Standards of proficiency" (2018) available online.
712 Health and Care Professions Council (2015) *Standards of proficiency: Practitioner psychologists* 1.
713 *Ibid.*
714 *Idem* 3.

There are 15 general standards with the various profession-specific elements but for purposes of this study the focus is mainly on the standards relating to forensic or psycho-legal work. Standard 13 states that practitioner psychologists must understand the key concepts of the knowledge base relevant to their profession.[715] Specific provision is made for forensic psychologists and what this standard means for practitioners of the discipline. Standard 13.39 states that forensic psychologists must understand the application of psychology in the legal system.[716] The rest of the standards do not assist in regulating psycho-legal assessments. The specific field of forensic psychology is not defined in the Health Professions Order 2001 or any of the HCPC standards, but it is evident from the standards 13.40 until 13.45 that the focus of forensic psychology is not conducting psycho-legal assessments but rather working with prisoners and offenders. For example, standard 13.44 requires that the forensic psychologists understand the development of criminal and antisocial behaviour.[717]

The same applies to standard 14 which requires psychologists to be able to draw on appropriate knowledge and skills to inform practice. The specified standards relating to forensic psychologists indicate that forensic refers to the setting and not the relationship, in other word the relationship remains therapeutic, but it applies to prison setting. For example, standard 14.73 requires the forensic psychologist to be able to integrate and implement evidence-based psychological therapy at individual or group level.[718] There are no standards of proficiency which provides guidance for psychologists who conduct psycho-legal assessments.

5.5.2.1.2 Disciplinary procedure

The HCPC will investigate allegations made against practitioners' fitness to practise if it is impaired by reason of:

(i) Misconduct.[719]

(ii) Lack of competence.[720]

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715 *Idem* 13.
716 *Idem* 17.
717 *Idem* 18.
718 *Idem* 26.
719 Article 22(1)(a)(i) of the Health Professions Order 2001.
720 Article 22(1)(a)(ii) of the Health Professions Order 2001.

(iii) Conviction or caution for a criminal offence.[721]

(iv) Physical or mental health.[722]

(v) Determination by another body that the person's fitness to practice is impaired.[723]

Any allegations made will be referred to a Screener[724] or to a Practice Committee.[725] A Screener may not be a member of a Practice Committee; a legal, medical or registrant assessor or employed by the HCPC.[726] A legal assessor[727] has the function of giving advice on questions of law to a Screener, statutory committee, the Registrar or the HCPC.[728] A medical assessor has the function to give advice on matters within their professional competence[729] and a registrant assessor provides advice on matters of professional practice.[730]

When an allegation is referred to a Screener a panel must be constituted of at least two Screeners.[731] The panel must include at least one lay person and one practitioner registered with the HCPC who has been chosen with due regard to the professional field of the person concerned.[732] Should the panel of Screeners find that the allegation falls within the ambit of the Health Professions Order, they must refer the matter together with a report of their findings to a Practice Committee.[733] If the allegation does not fall within in the ambit of the Health Professions Order the case can be closed[734] and the Registrar shall inform the person concerned.[735]

721 Article 22(1)(a)(iii) of the Health Professions Order 2001.
722 Article 22(1)(a)(iv) of the Health Professions Order 2001.
723 Article 22(1)(a)(v) of the Health Professions Order 2001.
724 Article 22(5)(b)(1) of the Health Professions Order 2001 refers to a person appointed by the HCPC in accordance with rules made under article 23 which refers to screeners.
725 Article 22(5)(b)(ii) of the Health Professions Order 2001.
726 Article 23(3) of the Health Professions Order 2001.
727 The qualifications to be appointed as a legal assessor is listed in article 34(5) of the Health Professions Order 2001.
728 Article 34(2) of the Health Professions Order 2001.
729 Article 35(2) of the Health Professions Order 2001.
730 Article 36(2) of the Health Professions Order 2001.
731 Article 24(2)(a) of the Health Professions Order 2001.
732 Article 24(2)(b) of the Health Professions Order 2001.
733 Article 24(3)(b) of the Health Professions Order 2001.
734 Article 24(3)(c) of the Health Professions Order 2001.
735 Article 24(5) of the Health Professions Order 2001.

Once established that the allegation falls within the ambit of the Health Professions Order an Investigating Committee will investigate to determine whether there is a case to answer.[736] The Investigating Committee will inform the person concerned of the allegation and request written submissions, this will be considered together with any further information obtained regarding the allegation.[737] The Investigation Committee is, however, not allowed to interview the person concerned unless they consent and may not take in account any document or other material which the person concerned has not had an opportunity to comment on.[738] If the Investigating Committee concludes that there is a case to answer they will notify the person concerned and the complainant in writing and shall either undertake mediation[739] or refer the case to Screeners for mediation,[740] or the Health Committee if the allegation relates to the physical or mental health of the practitioner,[741] or to the Conduct and Competence Committee for any other allegation.[742]

The Health Committee[743] and the Conduct and Competence Committee[744] if the conclude that the case is well founded, they can:

(i) Refer the matter for mediation.[745]
(ii) Decide it is not appropriate to take any further action.[746]
(iii) Make a striking-off order.[747]
(iv) Make a suspension order for a specific period which does not exceed one year.[748]
(v) Make a conditions of practice order which shall not exceed three years.[749]
(vi) Make a caution order.[750]

736 Article 26(2)(d) of the Health Professions Order 2001.
737 Article 24(2) of the Health Professions Order 2001.
738 Rule 4(3) of the Health and Care Professions Council (Investigating Committee) (Procedure) Rules 2003.
739 Article 26(6)(a) of the Health Professions Order 2001.
740 Article 26(6)(b)(i) of the Health Professions Order 2001.
741 Article 26(6)(b)(ii) of the Health Professions Order 2001.
742 Article 26(6)(b)(iii) of the Health Professions Order 2001.
743 Article 28 of the Health Professions Order 2001 determines the matters that the Health Committee can consider.
744 Article 28 of the Health Professions Order 2001 determines the matters that the Conduct and Competence Committee can consider.
745 Article 29(4)(a) of the Health Professions Order 2001. The matter can be referred to Screeners for mediation or the relevant committee can undertake mediation itself.
746 Article 29(4)(b) of the Health Professions Order 2001.
747 Article 29(5)(a) of the Health Professions Order 2001.
748 Article 29(5)(b) of the Health Professions Order 2001.
749 Article 29(5)(c) of the Health Professions Order 2001.
750 Article 29(5)(d) of the Health Professions Order 2001.

Before the matter is finalised, the relevant committee can make an interim order, either an interim suspension order[751] or an interim conditions of practice order,[752] if they are satisfied that it is necessary for the protection of members of the public or it is otherwise in the public interest.[753] An interim order cannot be made once the Investigating Committee refers the matter to another Practice Committee.[754]

Any practitioner may appeal to the appropriate court against a final order.[755] Similar to the process of the GMC, before the expiry of a suspension order and a condition of practice order the relevant committee shall review the order with the power to confirm the order,[756] or extend the effect of the order, and impose a conditions of practice order after expiry of a suspension order[757] or vary or revoke any conditions imposed by the order.[758]

5.5.2.2 British Psychological Society (BPS)

Psychologist practising in the United Kingdom can become a member of the British Psychological Society (BPS), a professional body and charitable organisation.[759] The objects of the BPS is described in the Royal Charter as the promotion of knowledge of psychology, and to promote the efficiency and usefulness of the members by "setting up a high standard of professional education and knowledge".[760] In pursuance of the objects the BPS has awarded there Board of Trustees various powers which include maintaining a Code of Ethics and Conduct for guidance and to compel the observance of strict rules of professional conduct.[761]

751 Article 31(2)(a) of the Health Professions Order 2001.
752 Article 31(2)(b) of the Health Professions Order 2001.
753 Article 31(2) of the Health Professions Order 2001.
754 Article 31(4) of the Health Professions Order 2001.
755 Article 29(9) of the Health Professions Order 2001.
756 Article 30(4)(a) of the Health Professions Order 2001.
757 Article 30(1) of the Health Professions Order 2001.
758 Article 30(4)(e) and (f) of the Health Professions Order 2001.
759 The BPS was established in terms of article 1 of the British Psychological Society's Royal Charter (as amended).
760 Article 3 of the British Psychological Society's Royal Charter (as amended).
761 Article 3(2) of the British Psychological Society's Royal Charter (as amended).

The Board of Trustees is the BPS's primary governing body[762] with four main boards who report to the Trustees each with a specific area of responsibility.[763] The boards are the Education and Training Board, Member Board, Practice Board and Research Board.[764] Together with the boards and their respective sub-committees the Board of Trustees are also advised by two standing committees, the Psychologist and Digest Editorial Advisory Committee and Ethics Committee, as well as three sub-committees being the Finance Committee, Risk and Assurance Committee and the HR Committee.[765] The Member Board is responsible for establishing sub-committees to manage complaints regarding members of the BPS.[766] The specific disciplinary process is dealt with in more detail below.

To promote increased co-operation and collaboration the BPS is a signatory to various Memoranda of Understanding with similar organisations around the world, which includes the Psychological Society of South Africa.[767]

5.5.2.2.1 Ethical guidance

The Ethics Committee is responsible for promoting ethical practice of psychology amongst the members and provides guidance with the *Code of Ethics and Conduct* (BPS Code).[768] The BPS Code is the over-arching guidance document and must be read together with the additional guidance which is provided in the *Practice Guidelines*.[769] The BPS Code is based on four primary ethical principles: respect, competence, responsibility and integrity[770] which aims to provide a framework to assist members in ethical decision-making.[771] Within the BPS Code each principle is

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762 Article 14 of the British Psychological Society's Royal Charter (as amended).
763 Article 14 of the British Psychological Society's Royal Charter (as amended) allows for the Board of Trustees to delegate all or any powers to Committees or Sub-Committees.
764 The British Psychological Society "Who we are" available online at https://www.bps.org.uk/about-us/who-we-are (last accessed on 28 June 2020).
765 *Ibid.*
766 The British Psychological Society "Member Board" available online at https://www.bps.org.uk/who-we-are/member-board (last accessed on 28 June 2020).
767 The British Psychological Society "How we work" available online at https://www.bps.org.uk/about-us/how-we-work (last accessed on 28 June 2020).
768 The British Psychological Society "Ethics Committee" available online at https://www.bps.org.uk/who-we-are/ethics-committee (last accessed on 29 June 2020).
769 The British Psychological Society (2017) *Practice Guidelines*.
770 The British Psychological Society (2018) *Code of Ethics and Conduct* par. 2.1.
771 *Idem* par. 1.3.

discussed referring to a statement of values and a list of issues or concerns that the members should take into consideration.[772]

The principle of respect in the BPS Code refers to respect for the dignity of persons and people whereby the inherent worth of all human beings are recognised.[773] Competence is described as the ability to provide services based on your specialist knowledge, training, skill and experience to a requisite professional standard.[774] Valuing competence includes knowing your own limits and not providing services that are outside your area of expertise.[775] The BPS Code links professional autonomy with the principle of responsibility as the autonomy is gained by accepting responsibility for what is within the "power, control, or management" of the psychologist.[776] Responsibility includes taken into consideration any potentially competing duties.[777] The last principle, integrity, includes being honest, truthful, accurate and consistent in their actions.[778] Integrity entails that a psychologist should give an accurate unbiased representation, avoid any exploitation and conflict of interests and always act in an honest, open and fair manner.[779]

The Practice Guidelines have been compiled to define good practice for all psychologists and to provide for a broad application across the full range of psychology.[780] The Practice Guidelines are divided into two main parts: the first part sets out guidance for psychologists in different contexts of practice and the second part deals with managing work with clients.[781] In part 1, section 2 of the Practice Guidelines, guidance on where psychologists work is provided, including guidance for psychologists that are "working for the court".[782] The section on working for the court gives a birds' eye view of what is expected of a psychologists that may be asked to as act as an expert witness in court.[783] To act as an expert witness, the Practice

772 *Idem* par. 2.2.
773 *Idem* par. 3.1.
774 *Idem* par. 3.2.
775 *Ibid.*
776 *Idem* par. 3.3.
777 *Ibid.*
778 *Idem* par. 3.4.
779 *Ibid.*
780 The British Psychological Society (2017) *Practice Guidelines* 3.
781 *Ibid.*
782 *Idem* at par. 2.3.
783 *Ibid.*

Guidelines emphasises that the psychologist must be sufficiently competent and an expert in the field.[784] In accordance with the Practice Guidelines indications of competence and expertise include qualifications in the area in question, post-qualification experience, academic and scientific publication in the relevant areas, demonstrations of professional practice and current experience in applying psychology in the area of claimed expertise.[785]

The section continues by explaining general legal rules and terms, such as the difference between an expert witness and an ordinary witness stressing that an expert must be sufficiently qualified.[786] It is, however, explained that it remains for the judge to decide whether the evidence that the psychologist will give is relevant and, therefore, admissible.[787] The Practice Guidelines also highlights that in accordance with the rules of court the overriding duty of the expert is to help the court and that the work done must be done in accordance with the criteria as set out in Part 35 of the Civil Procedure Rules.[788] The Practice Guidelines iterates that as part of the duty to the court the expert opinion must be independent and impartial.[789]

Two situations are considered inappropriate or unacceptable in the Practice Guidelines namely being a trainee or assistant psychologist acting as an expert witness and dual relationships.[790] Owing to the experience and qualifications needed by a psychologist to act as an expert the Practice Guidelines argues that a trainee or assistant is unlikely to meet the requirements and their supervisor remains responsible for the professional quality of their work. A dual relationship is considered unacceptable and the Practice Guidelines urges psychologists to report any conflicts of interest as soon as they arise.[791]

Section 7.4 in the second part of the Practice Guidelines is also relevant to psycho-legal assessments and deals with the “confidentiality for court”. When acting as expert

784 *Ibid.*
785 *Ibid.*
786 *Ibid.*
787 *Ibid.*
788 *Ibid.*
789 *Ibid.*
790 *Ibid.*
791 *Ibid.*

witnesses, psychologists have a duty to disclose evidence that was used to reach their opinion to the court.[792] The evidence to be disclosed includes details of tests and assessments administered, notes made during report writing and referenced studies or articles.[793] The psychologist must ensure that they explain the limits of privacy to the person being evaluated.[794] Psychologist also have a duty to ensure that their records and materials are stored in a safe manner, documents in an electronic format should be password protected.[795] In family court matters the cases are often heard in private with only selected people being involved, psychologists should be especially careful in these matters to ensure that access to the documents are protected and not share any information with the media or anyone else without the leave of the court.[796]

The Practice Guidelines, as mentioned above, gives general guidance in all areas of psychology and save for the section on working for the court and confidentiality for the court the guidance is more focussed on a treating relationship than a forensic relationship. Again, as with all ethical codes or guidelines, this does not entail that the Practice Guidelines are irrelevant to psycho-legal assessments, for example psycho-legal assessments must still be done taking into consideration the culture of the evaluee, but the general guidelines do not assist with regulating psycho-legal assessments. To provide for more specific guidance the BPS has also compiled the document *Psychologists as expert witnesses: Guidelines and Procedure* which is reviewed regularly.[797] The document will be referred to as the Expert Witness Guidelines.

The Expert Witness Guidelines includes the basic information supplied in the Practice Guidelines but expands on the information in much more detail. As explained in the background to the document the aim is to capture issues which are relevant to criminal, civil and family proceedings. The Expert Witness Guidelines not only draws from the Practice Guidelines but ensures that the guidance is in line with the most recent developments in law as enunciated in case law and statutory instruments. The Expert

792 *Idem* par. 7.4.
793 *Ibid.*
794 *Ibid.*
795 *Ibid.*
796 *Ibid.*
797 The British Psychological Society (2017) *Psychologists as expert witnesses: Guidelines and procedure.*

Witness Guidelines incorporates and refers to the legal principles throughout the guidelines but also provides a reference list[798] and a list of further useful websites[799] for a psychologist to be able to undertake their own research into what is expected of them when acting as an expert witness. From the discussion of the Expert Witness Guidelines below it is evident that a large part of the document mirrors the duties and requirements as set out in the rules of court. The inclusion of all the duties and requirements in the discussion below can possibly be viewed as repetitive but it is submitted that it is essential to include all the duties and/or requirements. The Expert Witness Guidelines might refer to the same duties but by providing practical guidance and within the structure of the document itself it provides a different perspective and context to the as requirements set out in the rules.

The Expert Witness Guidelines starts by explaining what an expert is.[800] In explaining the role of the expert witness it provides an explanation of basic legal aspects which are crucial and useful in understanding the role of an expert.[801] Often when appointing an expert witness legal representatives do not necessarily explain the basics, such as the difference between civil and criminal proceedings, as the information has become so ingrained for someone who works with the legal system every day. For psychologists, the basic legal terms can be a foreign concept. Referring to the definition provided by the Crown Prosecution Service[802] the Expert Witness Guidelines explains that an expert based on their specialised training, study or experience is able to assist the courts with their opinion.[803] The opinion must be independent and uninfluenced, and the expert should at no stage act as an advocate for any party.[804] To understand the role of the expert the Expert Witness Guidelines refers psychologists to the different rules of court, namely, Civil Procedure Rules, Criminal Procedure Rules and the Family Procedure Rules and the related practice directions which provides more detail on the role of an expert.[805]

798 *Idem* 19-20.
799 *Idem* 21.
800 *Idem* par. 1.
801 *Ibid*.
802 See 5.4.
803 The British Psychological Society (2017) *Psychologists as expert witnesses: Guidelines and procedure* par. 1.1.
804 *Idem* par. 1.2.
805 *Ibid*.

The Expert Witness Guidelines explains the different types of witnesses[806] and, as mentioned, the guidelines also distinguishes between civil and criminal proceedings to explain the difference in burden of proof.[807] The Expert Witness Guidelines explains to the reader that expert evidence is allowed only when both relevant and admissible[808] which is determined by the judge.[809] From the outset the guidelines, as part of the discussion of admissibility, deals with the evidence by psychologists that is normally not permitted.[810] Paragraph 1.10 explains that evidence about how an ordinary person is likely to react to stressful situations is not permissible but evidence relating to the reliability of witnesses may be allowed.[811] Although the evidence relating to reliability is allowed the Expert Witness Guidelines advises that this should only be approached if the question is part of the instructions and best practice tests.[812]

The second section of the Expert Witness Guidelines provides guidance on academic and professional competence.[813] Of all the areas covered in the Expert Witness Guidelines the academic and professional competence is the most detailed and lengthiest section. In broad terms this section deals with psychologists being qualified in both content and process, how to ensure that they are qualified in both and the dangers associated should they not be qualified. The Expert Witness Guidelines reiterates the Practice Guidelines list of indications of competence and explains that the qualifications and other indications of competence are usually summarised in the psycho-legal report.[814]

The Expert Witness Guidelines stresses that a psychologist acting as an expert witness should be experts in their field (content) but they should also understand the legal processes and are expected to be skilled in the delivery of evidence (process).[815] To meet the professional standards of acting as an expert witness the psychologists

806 Namely expert witness, ordinary witness (or witness to the fact) and professional witness. The British Psychological Society (2017) *Psychologists as expert witnesses: Guidelines and procedure* par. 1.3.
807 *Idem* par. 1.4.
808 *Idem* par. 1.7.
809 *Idem* par. 1.8.
810 *Idem* par. 1.9.
811 *Ibid*.
812 *Idem* par. 1.10.
813 *Idem* 4-8.
814 *Idem* par. 2.2.
815 *Idem* par. 2.3.

who are still inexperienced have a duty to secure appropriate training and support.[816] The importance of training is reflected by the Family Justice Council who, for example provides a "mini-pupillage" scheme that involves new expert witnesses shadowing barristers and judges.[817] The Expert Witness Guidelines provides practical guidance by suggesting that psychologists preparing to give oral testimony should use the process of "reducing your evidence".[818] This entails identifying issues in their reports that are likely to arise, establishing the facts and the psychological opinion.[819] This should be done instead of simply reading the report to ensure that as expert witness the psychologist is prepared and able to assist the court.[820]

Psychologists should never offer an opinion outside their area of expertise at any stage of the proceedings[821] and should be prepared to decline to give an opinion when needed.[822] With regard to referencing, psychologists are warned that it is not acceptable to rely on second-hand or "cited-in" research evidence.[823] Psychologists must ensure that the research is properly cited[824] and that they do not use dated or inappropriate assessment evidence.[825] Psychologist must also be able to explain and justify should they use a test or assessment that differs from the commonly accepted standards.[826] Interesting to note that despite not being the normal criteria applied in courts the Expert Witness Guidelines refers psychologists to the *Daubert* criteria[827] indicating that if the psychometric assessment is not widely accepted the *Daubert* criteria is valuable in determining whether the use of the psychometric assessment can be justified.[828]

816 *Idem* par. 2.4.
817 *Idem*. 2.7.
818 *Idem* 2.13.
819 *Ibid*.
820 *Ibid*.
821 *Idem* par. 2.9.
822 *Idem* par. 2.11.
823 *Idem* par. 2.10.
824 *Ibid*.
825 *Idem* par. 2.14.
826 *Idem* par. 2.15.
827 See 6.4.1.1.
828 The British Psychological Society (2017) *Psychologists as expert witnesses: Guidelines and procedure* par. 2.15.

When giving their opinion the psychologist must be able to state why and how their opinion differs from their colleagues[829] and explain to the court why a range of reasonable professional opinions may arise.[830] Psychologists should ensure that they only change the substantive content of the report or their opinion when there is new evidence which provides appropriate grounds to do so.[831] Psychologists are also advised in the Expert Witness Guidelines not to comment on some questions which is considered to lie within the remit of the court.[832] Psychologists should only answer the questions raised in the instructions received.[833]

The Expert Witness Guidelines also provides a stern warning for psychologists if they are not qualified in both content and process and fail to meet the requirements. Psychologists must be aware that failing to submit a psycho-legal report timeously can be grounds for a formal complaint.[834] As explained in the Expert Witness Guidelines despite excellent work prior to trial this can be undone or spoiled by poor court performance.[835] Negligence, whether prior to the trial or during the trial, can also result in the psychologists exposing themselves to possible civil claims as expert witnesses no longer have immunity.[836]

The third section gives guidance on receiving instructions.[837] When receiving instructions psychologists must keep in mind that the instructing body could differ.[838] If the psychologist has been appointed as a single joint expert they need to communicate either with the lead legal representative (solicitor in England) or if there is no lead legal representative the psychologist must send communications to both legal representatives to ensure impartiality.[839] When receiving the instructions the psychologists must ensure that it is clear what is expected of them.[840] Psychologists should receive sufficient information and the available documentation to assist with

829 *Idem* par. 2.26.
830 *Idem* par. 2.12.
831 *Idem* par. 2.16.
832 *Idem* par. 2.29.
833 *Ibid.*
834 *Idem* par. 2.19.
835 *Idem* par. 2.6.
836 *Idem* par. 2.21.
837 Idem 9-10.
838 *Idem* par. 3.1.
839 *Idem* par. 3.3.
840 *Idem* at par. 3.6.

the assessment.[841] Should the psychologist seek any further documents or information that is considered relevant this must be requested in writing and if this is not provided the psychologist must indicate this in their report.[842]

The fourth section follows the third and relates to the responding of instructions.[843] Psychologists are urged to ensure that they understand the instructions[844] and clarify the time frame for the work,[845] the fees[846] and their role, whether they are acting as professional witness or single or jointly instructed expert.[847] As soon as a psychologists receive instructions their independence must be clear to everyone.[848] If there is any conflict of interest,[849] especially involving a dual relationship,[850] the psychologist should decline the instructions. The Expert Witness Guidelines also reminds the psychologist should they need clarity on the instructions they can write to the court directly, although it is preferable to do so only if the clarification from the instructing party remains unclear or is not forthcoming.[851] The last aspect concerning responding to instructions relates to directions from the court. All directions from the court, whether to draft a joint statement or giving evidence concurrently, must be fully complied with by the psychologists.[852]

Confidentiality is an important aspect of the work done by psychologists, but different considerations need to be considered when acting as an expert witness. The whole of section five (5) of the Expert Witness Guidelines provides guidance on confidentiality for psychologists.[853] The reports and assessments should not be disclosed to parties outside the proceedings unless the psychologists have permission.[854] A psychologist is not in a position to offer confidentiality to the evaluee, and should ensure that the

841 *Ibid.*
842 *Idem* 3.8.
843 *Idem* 11-12.
844 *Idem* par. 4.5.
845 *Idem* par. 4.1.
846 *Ibid.*
847 *Idem* par. 4.4.
848 *Idem* par. 4.6.
849 *Ibid.*
850 *Idem* par. 4.7.
851 *Idem* par. 4.12.
852 *Idem* at par. 4.13 and par. 4.14.
853 *Idem* 13-14.
854 *Idem* par. 5.1.

evaluee understands this before the assessment is done.[855] The psychologist must also ensure that the confidential information, which can include test results, medical reports and the psycho-legal report, should be kept securely and if in an electronic format it must be password protected.[856] Confidentiality does not only relate to the report and assessment but also to expert meetings, professional meetings and counsel conferences. Expert meetings between the different experts must occur without legal representatives present as the content of the meetings are confidential and without prejudice.[857] At professional meetings the legal representatives and professionals involved meet to discuss the progress of the case and questions can be put to the experts. Minutes of the meetings form part of the court documents and the principles relating to confidentiality of court documents apply.[858]

The subject of conflict of interests was touched on in the section dealing with responding to instructions, section four, but is expanded on in section 6 of the Expert Witness Guidelines.[859] The Expert Witness Guidelines again emphasise the importance of the independent and professional position of the psychologist and producing unbiased and uncompromised reports.[860] Although psychologist must keep in mind that they have a responsibility to the court, they must also be mindful of the fact that they still have an overarching professional responsibility to any person they engage with.[861]

The penultimate section of the Expert Witness Guidelines gives guidance on the appearance by the expert witness in court.[862] This section again gives practical guidance on aspects such as being punctual, appropriate dress code, and ensuring adequate preparation.[863] The Expert Witness Guidelines expressly advises psychologists to, where possible, sit in the court to listen to the testimony to prepare themselves.[864] The last section of the Expert Witness Guidelines again provides very

855 *Idem* par. 5.8.
856 *Idem* par.5.9-5.10.
857 *Idem* par.5.5.
858 *Idem* par.5.6.
859 *Idem* 15.
860 *Idem* par.6.1.
861 *Idem* par.6.5.
862 *Idem* par.7.
863 *Ibid*.
864 *Idem* par.7.1.

practical guidance on financial aspects, such as invoicing, payment of fees, charging of expenses and other financial considerations.[865]

The BPS together with the Family Justice Council (FJC), has also compiled further guidelines for psychologists acting as expert witnesses for work done in Family Court.[866] As discussed above the rules of court for the Family Court provide minimum standards for expert witnesses in family law matters, the guidance by the BPS ad FJC is a described as a "companion document" to assist by providing further and more specific guidance to the area of family law.[867] An important feature of all the documents compiled by the BPS is that it complements the already existing documents within the regulatory framework. The guidance for experts in Family Courts expressly refers to the Expert Witness Guidelines and the Ethical Guidance of the HCPC and how it fits in with the other documents. Many of the provisions contained in the Expert Witness Guidelines and the Ethical Guidance of the HCPC is reiterated in the guidance for experts in Family Courts and will not be repeated here.

It is beyond the scope of the study to evaluate the need for specific guidelines for an area of practice such a family law and as such the guidelines for experts in Family Court will not be dealt with in detail. Mention can, however, be made of the discussion in the guidelines regarding techniques for establishing a psychological opinion[868] as this is applicable to all psychologists irrespective of the area of practice. The guidelines for experts in Family Court indicate that the technique used to establish a psychological opinion will vary between psychologists but usually includes a combination of "standardised psychometric tests, in-depth interviewing, observation of behaviour and interactions and review of other professional records (such as social care, education, medical and forensic records) in relation to family members, carers, and significant others".[869] The guidelines suggest that by using the process of triangulation, in other words using information from varied sources over time and multiple contexts, it helps to overcome bias and weaknesses of individual methods.[870]

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865 *Idem* at 17-18.
866 Family Justice Council and the British Psychological Society (2016) *Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations*.
867 *Idem* par.1.2.
868 *Idem* par.2.7.
869 *Ibid*.
870 *Idem* par.2.8.

The process of triangulation also increases the credibility and validity of analysis and psychological formulation.[871]

5.5.2.2.2 Disciplinary procedure

BPS is not responsible for statutory regulation of psychologists and can, therefore, not investigate or consider allegations about the fitness to practise. The disciplinary steps that can be taken against a member of the BPS is similar to the procedure of the HCPC. An allegation can be made against a member in the case of breach of the *Member Conduct Rules*.[872] The allegation must be made in writing and supported by relevant evidence.[873] Breaching of Member Conduct Rules includes, amongst others, acting in any way that damages or is likely to damage the reputation of the BPS,[874] or being struck of the register of the relevant statutory authority.[875] The Code of Ethics and Conduct, discussed above, should guide a member's conduct and may be used to demonstrate that they acted in a way that damaged or is likely to damage the reputation of the BPS. The Chief Executive of the BPS, or a delegated member, will first determine whether the allegation falls within the rules.[876]

If the allegation falls within the rules the Chief Executive will consider the merits of the allegations in light of the supporting evidence received.[877] If the matter is deemed to have merit the member in question will be given an opportunity to respond by way of representations.[878] After receipt of the representations, if there is sufficient evidence to take the matter forward, the matter will be referred to a panel of at least three appropriate members.[879] Unlike the disciplinary proceedings of the statutory bodies the panel dealing with a matter can do so on the papers or give the member a meeting.[880] No formal hearing takes place. The panel can decide to reprimand,

871 *Ibid.*
872 Procedure 1 of the British Psychological Society Member Conduct Rules (2018).
873 *Ibid.*
874 Rule 1 of the British Psychological Society Member Conduct Rules (2018).
875 Rule 3 of the British Psychological Society Member Conduct Rules (2018).
876 Procedure 1 of the British Psychological Society Member Conduct Rules (2018).
877 Procedure 3 of the British Psychological Society Member Conduct Rules (2018).
878 *Ibid.*
879 *Ibid.*
880 *Ibid.*

suspend or expel the member.[881] A member can appeal the decision to the President of the Society.[882] A member may also resign after being notified of an allegation made against them.[883]

5.5.3 Other societies or organisations

5.5.3.1 The Academy of Experts (TAE)

There are numerous organisations that have been established to promote greater reliability of expert evidence but not all include mental health professionals. For example, the Forensic Science Regulator's purpose is to ensure quality standards are in place in forensic sciences, but forensic psychiatry and forensic accounting is excluded from the definition of forensic science.[884] The Academy of Experts (TAE) is a well-known recognised body in the United Kingdom. TAE was founded in 1987 and is both a professional society and a qualifying body for qualified independent experts.[885] TAE is similar to SAMLA in South Africa but unlike SAMLA TAE is an accredited body for training of expert witnesses. The aims of TAE include, amongst others, the promotion of the use of independent experts in the United Kingdom and to maintain codes of practice generally and in areas of special difficulty.[886]

The codes of practice of the TAE was endorsed on 22 June 2005 by the Master of the Rolls and Chairman of the Civil Justice Council and on 26 June 2006 it was also endorsed by the Master of the Rolls and President of the Queens Bench Division for use in Criminal Proceedings.[887] The TAE Code must be followed by members of the

881 Procedure 4 of the British Psychological Society Member Conduct Rules (2018).
882 Procedure 5 of the British Psychological Society Member Conduct Rules (2018).
883 Procedure 9 of the British Psychological Society Member Conduct Rules (2018).
884 Forensic Science Regulator "Codes of practice and conduct for forensic science providers and practitioners in the criminal justice system" (2020) available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880708/Codes_of_Practice_and_Conduct_-_Issue_5.pdf (last accessed on 19 July 2020).
885 The Academy of Experts "About the academy" (2020) available online at https://academyofexperts.org/about-the-academy/ (last accessed on 19 July 2020).
886 The Academy of Experts "Aims of TAE" (2020) available online at https://academyofexperts.org/aims-of-tae/ (last accessed on 19 July 2020).
887 The Academy of Experts "Practising as an expert: Codes of practice" (2020) available online at https://academyofexperts.org/practising-as-expert/expert-witness/codes-of-practice/ (last accessed on 19 July 2020).

TAE and may be considered best practice for other experts in England and Wales.[888] In accordance with the preamble of the TAE Code, the code shows minimum standards of practice that should be maintained by all experts.[889]

The TAE Code is a short document containing six standards. The first standard places the duty on experts to refrain from doing anything that compromises or impairs or could compromise and impair the expert's (i) independence, impartiality, objectivity and integrity; (ii) duty to the court or tribunal; (iii) the good repute of the expert or of experts generally; (iv) proper standard of work; and lastly the duty to maintain confidentiality.[890] The second standard prohibits experts from entering an agreement whereby their fees are dependent on the outcome of the case, a contingency fee agreement, and further prohibits experts from accepting any benefit other than their fees and expenses.[891] This standard has been put in place to ensure that the impartiality of the expert is not compromised.

In terms of the TAE Code an expert should not accept instructions where there is or could be a conflict of interests.[892] The code does not specify or give an example of conflict of interests, but it is submitted that this could include acting in role of both treater and expert. The TAE Code, unlike any other code, also contains the provision that "an expert shall for the protection of his client maintain with a reputable insurer proper insurance for an adequate *(sic)* indemnit".[893] Lastly, experts should not publicise their practices in inaccurate or misleading way or in way that could be regarded as being in bad taste.[894]

In addition to the TAE Code the TAE has also provided guidance notes on specific aspects. Reinforcing the standards set out in the TAE Code the guidance note on contingency fees considers that any form of a contingency fee agreement is

888 *Ibid.*
889 *Ibid.*
890 *Idem* par.1.
891 *Idem* par. 2.
892 *Idem* par.3.
893 *Idem* par.4.
894 *Idem* par.5.

incompatible with an expert's duty of independence and impartiality.[895] The result of a contingency fee agreement is that the expert has a direct financial interest in the outcome of the case which can place pressure on the expert to give evidence in favour of the retaining party.[896]

As a professional society the TAE also has disciplinary procedures in place should a complaint be made against any of its members. In accordance with the disciplinary Standing Order (Order) of the TAE the Investigations Committee with investigate a complaint, charge, or allegation of improper conduct against a member.[897] Improper conduct includes:[898]

> A contravention of, or failure to comply with, any provision of any enactment, any procedure rule or practice direction which applies in the civil or criminal courts, or any order of the civil or criminal courts with which it is the Member's duty to comply.

Any judicial criticism that is made against a member will also be referred to the Investigations Committee.[899] As with the procedure of most professional organisations the Investigations Committee will first determine whether there is a *prima facie* case and falls within the jurisdiction of the TAE. If the conduct is sufficiently serious it will be subjected to disciplinary proceedings.[900] A disciplinary panel will be establishment to hold a substantive hearing.[901] If the member is found guilty of improper conduct the tribunal may impose one or more of the following orders:[902]

i Expulsion.
ii Suspension from membership indefinitely or a specified period.
iii A severe reprimand.
iv A reprimand.
v An order that the member give an undertaking as to their future conduct, which can for example include attending training.

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895 The Academy of Experts "Guidance note on contingency fees" (2020) The Academy of Experts available online at https://academyofexperts.org/knowledge-hub/guidance-note-on-contingency-fees/ (last accessed on 19 July 2020).
896 *Ibid*.
897 The Academy of Experts (2012) *Disciplinary Standing Orders 12.1* par. 2.3.
898 *Idem* par. 2.5.1.
899 *Idem* par. 4.3.
900 *Idem* par. 5.13.1.
901 *Idem* par. 6.
902 *Idem* par. 6.20.

vi An order that the member refunds or waive fees charged by them to the complainant.

vii An order that the Member be given written warning or recommendation as to their future conduct.

A member may apply for a review[903] or appeal the ruling.[904] The Order further provides for a disciplinary register to contain adequate details of the complaints investigated and the rulings by the disciplinary tribunal.[905]

As mentioned in 4.5.5.3, an independent multi-disciplinary professional organisation that focusses on professionals acting as expert witnesses can provide guidance to professionals but is submitted that self-regulation within the specific profession itself would provide the best solution for addressing unethical behaviour. Multi-disciplinary organisations should work together with other professional organisations.

5.6 Conclusion

The adoption and amendment of the rules relating to expert evidence in England have resulted in a more rigorous approach of handling of expert evidence. The developments in the field have not only influenced the manner in which expert evidence is handled at courts but has significantly impacted the approach of professional organisations.

One of the key changes examined in this chapter is the possibility of a reliability limb forming part of the admissibility test for criminal proceedings. The analysis demonstrated that despite the reference to “sufficiently reliable” in many cases most judges have not added to the test for admissibility as contained in the Australian case of *Bonython*. It appears that in both civil and criminal cases, the courts tend to apply the test as formulated in *Bonython*. Whether this will change in the future remains to be seen.

903 *Idem* par. 6.24.
904 *Idem* par. 7.
905 *Idem* par. 11.

Within criminal proceedings, the main changes relating to expert evidence can be summarised as the use of pre-trial case management which includes discussions between opposing experts, disclosure of all expert evidence by both the defence and prosecution, and in some instances the direction by the court that a single expert is appointed for co-defendants. Expert reports are also allowed in criminal proceedings with strict requirements that must be adhered to regarding the form and content. Unlike civil proceedings, the expert report is only admitted if the expert gives oral testimony unless the court gives permission for the admission of the report.

In both civil and criminal proceedings, the procedural rules require that the expert reports contain a statement of truth as well as an expert's declaration. Both the statement and declaration are welcome additions as it can act as a checklist for an expert to ensure they have complied with the rules but also brings the consequences of non-compliance and the seriousness of the matter to the attention of the expert. The Civil and Criminal Procedural Rules both amplify the duties of the expert witness as originally contained in *The Ikarian Reefer* case. Evident from the examination of the rules and practice directions throughout the chapter is the principles of independence, objectivity and an overriding duty to assist the court upon are the force behind all of the rules.

In civil proceedings, the courts are moving away from a simple adversarial system to one which incorporates more inquisitorial features. The process of concurrent expert evidence in civil proceedings is a prime example where the traditional method of hearing expert witnesses is done away with by allowing for the process of concurrent expert evidence studies found that it saved trial time and also assisted the judge in understanding the complicated expert evidence and improved the quality of the expert evidence. Another example is the reliance on written reports instead of the oral testimony of experts. The Civil Procedure Rules limit the use of expert witnesses much more extensively with only relevant expert evidence permissible with leave of the court, the use of single joint experts is promoted and can be directed by the court, in soft tissue injury claims the expert reports are limited to one fixed cost medical report, and all forms of expert shopping are discouraged. The Civil Procedure Rules also have strict pre-trial disclosure and court directed discussions between opposing experts, but an essential component of the process is the opportunity for the opposing party to

direct questions to an expert after disclosure of the expert report. The Civil Procedure Rules also provides for the appointment of an assessor with the court having wide discretionary powers as to the precise role that the assessors play. The assessors can be of great assistance in cases with very technical expert evidence.

The last aspect of the legal system that was considered was the immunity of expert witnesses. The witness immunity does not extend to an expert witness being found guilty of contempt of court or perjury; an expert witness subjected to professional disciplinary proceedings or liability for negligence in preparing a joint expert statement. In suitable cases, the costs of the expert witness could be disallowed, and the witness can also be ordered to pay the wasted costs. The abolishment of witness immunity, as mentioned, together with the costs order sends a strong message that courts are not there to protect expert witnesses whose conduct does not accord with the rules of the court or the rules of their profession.

The professional bodies also play a key role in the regulatory framework. The main function of the General Medical Council and Health and Care Professions Council is to protect the public. Both statutory bodies ensure that proper disciplinary proceedings are in place and as discussed do not view allegations of misconduct lightly. The chapter demonstrated that the General Medical Council ensures that appropriate sanctions are imposed in cases of misconduct with the sanctions focusing on ethics and integrity of the profession. Regulation of the professions by the GMC and HCPC does not start with sanctions and disciplinary procedures but ensuring that the registered professionals receive proper ethical guidance and ensuring they continue to develop and grow in their profession. The GMC has moved away from the traditional model of medical regulation and uses a new process of revalidation. As discussed in the chapter revalidation is still a new process but has already shown significant change. It is submitted that the process of revalidation could also assist in regulating expert witnesses as the process calls for the professional to collect feedback from instructing legal representatives, the opposing party's expert(s) and the individual assessed by and any comments by counsel and the judge on the quality of oral evidence given.

The chapter also assessed the different ethical guidelines of the statutory bodies, GMC and HCPC, as well as professional organisations, Royal College of Psychiatrists and the British Psychological Society. All the organisations and bodies integrated the rules of court with the values, principles and standards of the relevant organisations with the Royal College and BPS also ensuring that reference is made to the corresponding statutory body's code of conduct. A striking feature that all the documents were very well integrated. Most of the guidelines or guidance booklets focussed on relaying the rules of court in a practical and user-friendly matter. It is submitted that the CR193 report of the Royal College contained the best integration between legal principles and ethical standards incorporating the ethical principles of the Royal College, namely respect for autonomy, beneficence, non-maleficence, confidentiality, and justice. The CR193 also stressed the importance of a professional having the skills as an expert witness (process knowledge) but also the skills of the relevant profession (content), an aspect that is not stressed enough.

Bearing in mind not only the similarities between the South African and English legal system but also between the professional organisations of the two countries it is submitted that many of the components of the regulatory system in England can be adopted in South Africa, which will be discussed in chapter 7. The regulatory framework in England will perhaps not provide all the answers to the problems but, quoting Mattiss; perhaps it can light the path ahead.

CHAPTER 6
REGULATION OF PSYCHO-LEGAL ASSESSMENTS IN THE UNITED STATES OF AMERICA

6.1 Introduction

The Anglo-American legal system is characterised by the adversarial trial, the courtroom being the arena for a war between opposing parties.[1] The United States of America takes much pride in this tradition[2] as it is considered as the "optimal one to elicit the truth".[3] Many court cases have emphasised this, in *State v. Fisher* the courts stated "[t]he hallmark of the American trial is the pursuit of justice".[4] Despite the pride and the belief in the system, the American system is not without criticism as many describe the central theme as winning a lawsuit.[5] In 1906 Roscoe Pound, previous Dean of Harvard Law School, in a paper presented at the annual American Bar Association remarked the following:[6]

> Hence in America we take it as a matter of course that a judge should be a mere umpire to pass upon objections and hold counsel to the rules of the game, and that parties should fight out their own game in their own way without judicial interference. … It turns witnesses, and especially expert witnesses, into partisans pure and simple.

In an adversarial system with the emphasis on winning expert witnesses can easily be merely used as a pawn to win the game. Federal Judicial Center, in their report on *Expert testimony in federal civil trials*, found that medical and mental health experts were the most frequently presented category of experts in civil cases.[7] Given that the expert witnesses in the American legal system have been criticised as merely being hired guns and, furthermore, mental health experts play a prominent role in the courts, this chapter will examine what measures the American legal system has put in place

1 Kubicek (2006) *Adversarial justice: America's court system on trial* 12.
2 Butt "Concurrent expert evidence in U.S. toxic harms cases and civil cases more generally: Is there a proper role for "hot tubbing"?" (2017) 40 *Houston Journal of International Law* 42.
3 *Idem* 42-43.
4 *State v. Fisher*, 789 N.E.2d 222 (2003) at 228.
5 Kubicek (2006) 19.
6 Pound as quoted in Kubicek (2006) 11.
7 Johnson *et al*. (2000) *Expert testimony in federal civil trials: A preliminary analysis* 1.

to ensure that the pursuit is truly one of truth and justice. To understand the American legal system, the chapter will start with a brief overview of the legal system and the court structures. The legal system differs from that of South Africa and England as there is more than one system, a federal system and a separate system for each state. This chapter will compare the federal system with one state, the State of California. Throughout the chapter, where applicable, the position in the federal system will be discussed, followed by the position in the State of California.

This chapter has been structured to correspond with chapter 4 and chapter 5 of the study for ease of comparison between the three comparator countries. The first part of this chapter will, therefore, also focus on the procedural and evidentiary rules in place to regulate expert testimony. Within the regulation of the legal system, the chapter will start with the evidentiary rules for expert evidence. Notwithstanding the traditional framework, the American legal system has reduced some of the adversarial features recognising the importance that parties should not always be left to their own devices. The chapter will examine the seminal case of *Daubert v. Merrel Dow Pharmaceuticals Inc.* and the impact that this case has had on the American jurisprudence. The chapter will also analyse the procedural rules, such as the rules relating to discovery and the appointment of court assessors to determine in what way these rules influence the regulation of expert evidence. The first part of this chapter will end with a discussion on the immunity afforded to expert witnesses in the United States of America. Throughout the chapter, the analysis of the different rules and statutes relating to both criminal and civil proceedings will be considered. Significant differences between the American position and that of South Africa position will also be discussed.

In the second main part of the chapter, the different professional associations and organisations that regulate the psychiatric and psychology professions will be examined. In the United States psychologists and psychiatrists need a licence to practice in a particular state. The chapter will only briefly discuss the state boards as the relevant boards in California work closely together and apply the standards of the professional organisations that will be examined in detail. There are numerous organisations and associations in America that promote both psychology and

psychiatry. The American Medical Association, American Psychiatric Association, America Academy of Psychiatry and Law and the American Psychological Association will be examined in this chapter based on their prominence and global impact. The associations are not only imperative as part of the regulation of American psychologists and psychiatrists but have provided a blueprint for many associations worldwide. For example, although the ethics code of the American Psychological Association was developed to assist psychologists in the United States of America, the ethics code is used as a basis for many countries across the world, including South Africa.[8] Allan submits that the commonality demonstrates that the principles contained in the American Psychological Association's ethics code have "face validity and reflect a stable set of moral principles psychologists across the world share".[9] The purpose of this chapter is therefore also to, through a thorough analysis of all the associations, draw a conclusion on the commonalities between the organisation in relation to the ethical framework that the associations have provided and the steps taken to enforce it.

6.2 Overview of the American legal system

The American legal system encompasses a multiplicity of systems. The United States has a federal system of government, a written constitution, and a common law legal system. In July 1776, the United States declared its independence, severing their ties with England.[10] The thirteen colonies that existed at that time became the 50 states we know today, and already in 1776, the state constitutions began to be adopted.[11] In 1787 the Constitution of the United States of America was signed and submitted to Congress.[12] The Constitution was developed with the aim to ensure that the government had enough power to act at a national level but that the fundamental rights of individuals were still protected.[13] The drafters of the Constitution also wanted to ensure that the interpretation of the constitutional rights vested in one Supreme

8 Allan "Ethics in Psychology and Law: An international perspective" (2015) 25 *Ethics and Behavior* 447.
9 *Ibid*.
10 Farnsworth and Sheppard (2010) *An introduction to the legal system of the United States*.
11 *Idem* 4.
12 *Ibid*.
13 *Ibid*.

Court.[14] The federal government was established by Constitution with the individual states having their own constitutions.[15]

The American legal system remains a common law legal system and although the influence of contemporary English law is now negligible the fundamental approach, great deal of the vocabulary, and numerous principles and concepts are from the English law tradition.[16] This includes the tradition of precedent and the adversarial system with proceedings often before a jury.[17]

Procedural law in civil proceedings in the United States was first adopted from England but in 1938 the Supreme Court promulgated the Federal Rules of Civil Procedure.[18] The rules have been amended numerous times to keep up to date with latest developments in the field and has been adopted by more than half of the states in America.[19] The law of civil procedure in the United States is, however, far from uniform with procedures and remedies varying with jurisdiction.[20] In civil trials the matter can be heard before a judge who sits with or without a jury.[21] Criminal procedure in the United States is too a large extent statutory and varies considerably between jurisdictions.[22] Criminal trials in particular reflect the adversary nature of the judicial process.[23] The field of evidence in United States however shows substantial uniformity because of the adoption of the Federal Rules of Evidence.[24]

14 *Ibid.*
15 Section 1 of the Constitution of the United States of America.
16 Farnsworth and Sheppard (2010) 15.
17 *Ibid.*
18 *Idem* 110.
19 *Ibid.*
20 *Ibid.*
21 The right of trial by jury is contained in the Seventh Amendment to the Constitution of the United States of America. Rule 38 of the Federal Rules of Civil Procedure determines that a party must serve a written demand to demand a jury by trial.
22 Farnsworth and Sheppard (2010) 122.
23 *Ibid.*
24 *Idem* 127.

6.3 Court structures in the United States of America

The court structure in the United States differs vastly from England and South Africa because of the federal system of government.[25] There is no single unified court system but 51 court systems, that of the federal courts and the 50 individual states.[26] Within the federal court system there are two types of courts namely, constitutional and legislative.[27] Legislative courts are also created by Congress but pursuant to other legislative powers in Article I of the Constitution of the United States of America, for example the establishment of military tribunals.[28] Article III of the Constitution stipulates that the judicial power of the United States shall be vested in one Supreme Court and in inferior courts that are ordained and established by Congress.[29] The inferior courts are known as the constitutional courts or sometimes referred to as Article III courts.[30] The constitutional courts have jurisdiction in maritime and admiralty cases, cases where certain parties are involved such as ambassadors, public ministers, consuls, and controversies between two or more states.[31] The constitutional courts of general jurisdiction have jurisdiction on all interpretation questions arising under the Constitution, federal statutes or U.S. treaty.[32]

The constitutional courts of general jurisdiction have three tiers: the first is the U.S. district courts.[33] U.S. district courts are the main trial courts for the United States and can hear both civil and criminal matters.[34] Akin to other trial courts in the United States a single judge presides and the jury hears the evidence.[35] The second tier is the U.S. courts of appeal which only hears appeals from the U.S. district courts or federal regulatory agencies.[36] The highest tier is the U.S. Supreme Court which consist of the

25 Calvi and Coleman (2017) *American law and legal systems* 47.
26 *Ibid.*
27 *Idem* 48.
28 *Ibid.*
29 Section 1 of Article III of the Constitution of the United States of America.
30 Calvi and Coleman (2017) 48.
31 Section 2 of Article III of the Constitution of the United States of America.
32 Section 2 of Article III of the Constitution of the United States of America.
33 Calvi and Coleman (2017) 49.
34 *Ibid.*
35 *Idem* 50.
36 *Ibid.*

Chief Justice and eight associate justices.[37] The opinions or decisions by the U.S. Supreme Court are binding on all courts.[38]

In the state of California, the state Constitution vests the judicial power of California in the Supreme Court, Courts of Appeal, and superior courts.[39] The superior courts are the trial courts in California and have jurisdiction over all criminal and civil cases.[40] Prior to June 1998 the California trial courts consisted of superior courts and municipal courts each with their own jurisdiction.[41] On 2 June 1998 a constitutional amendment was approved and the superior courts and municipal courts were unified into a single superior court with jurisdiction over all case types.[42] The number of judges in each county of California is determined by the California Government Code.[43] The Courts of Appeal in California can hear appeals from the superior courts or cases prescribed by statute.[44] The cases in the Courts of Appeal are heard before three judges.[45]

The Supreme Court of California is the highest court in the state and consists of the Chief Justice of California and six associate justices.[46] The decisions of the Supreme Court of California are binding on all other Californian courts.[47] The Supreme Court can review decisions of the state Courts of Appeal and all cases where the death penalty was imposed.[48] The Supreme Court also has original jurisdiction in *habeas corpus* proceedings, and proceedings for extraordinary relief in the nature of *mandamus*, *certiorari*, and prohibition.[49] Included in the section of original jurisdiction the Constitution of the State of California confirms that all courts may "make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause".[50]

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37 *Idem* 51.
38 Buchanan and Norko (2011) *The psychiatric report: Principles and practice of forensic writing* 187.
39 Section 1 of Article VI of the Constitution of the State of California 1879.
40 Judicial Council of California "California judicial branch" (2019) available online at https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf (last accessed 23 June 2020).
41 *Ibid.*
42 *Ibid.*
43 Article 3 of Chapter 5 in Title 8 of the California Government Code.
44 Judicial Council of California "California judicial branch" (2019) available online.
45 *Ibid.*
46 Section 2 of Article VI of the Constitution of the State of California 1879.
47 Judicial Council of California "California judicial branch" (2019) available online.
48 Section 11(a) of Article VI of the Constitution of the State of California 1879.
49 Section 10 of Article VI of the Constitution of the State of California 1879.
50 *Ibid.*

6.4 Regulation within the legal system

6.4.1 Evidentiary rules for expert evidence

6.4.1.1 Field of expertise rule

In the United States experts must also possess the required expertise before their testimony is admissible. The criteria for admissibility, especially regarding novel theories and techniques, has evoked much attention in the United States over the years. Since 1923, the predominant standard to determine the admissibility of expert evidence was derived from the case of *Frye v. United States*, known as the *Frye* standard.[51] The court in *Frye* held that for scientific evidence to be admissible the method "must be sufficiently established to have gained general acceptance in the particular field in which it belongs".[52] Expert testimony regarding experimental, novel, or theoretical procedures was considered unreliable and inadmissible.[53] The *Frye* standard remained the test for more than 50 years until in 1975 the Federal Rules of Evidence were introduced.[54] Article VII of the Federal Rules of Evidence governs the admissibility of expert and opinion testimony and Rule 702 originally provided that:[55]

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to 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.

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51 *Frye v. United States* 293 F.1013 (D.C. Cir. 1923). For discussion on the *Frye* standard see generally Youngstrom and Busch "Expert testimony in psychology: Ramifications of Supreme Court Decision in *Kumho Tire Co., Ltd. V. Carmichael*" (2000) 10 *Ethics and Behavior* 185; Groscup *et al*. "The effects of Daubert on the admissibility of expert testimony in state and federal criminal cases" (2002) 8 *Psychology, Public Policy, and Law* 339 and Dixon and Gill "Changes in the standards for admitting expert evidence in federal civil cases since the Daubert decision" (2002) 8 *Psychology, Public Policy, and Law* 251.

52 *Frye v. United States* at 1014.

53 Youngstrom and Busch (2000) *Ethics and Behavior* 186.

54 Groscup *et al*. (2002) *Psychology, Public Policy, and Law* 340; Youngstrom and Busch (2000) *Ethics and Behavior* 186.

55 See generally for a discussion on Rule 702 of the Federal Rules of Evidence, Buchanan "Psychiatric evidence on the ultimate issue" (2006) 34 *The Journal of the American Academy of Psychiatry and the Law* 14.

Despite the Federal Rules of Evidence being introduced courts continued to apply the *Frye* standard. The *Frye* standard was, however, criticised as it could deny courts the benefits of new developments in science.[56] In the seminal case of *Daubert v. Merrel Dow Pharmaceuticals Inc.*, the Supreme Court held that the Federal Rules superseded the *Frye* general acceptance test and the *Frye* standard should not be applied in federal trials.[57] In accordance with *Daubert* the judge must act as a "gatekeeper" to ensure that scientific evidence is only admitted if both relevant and reliable.[58] The justices in *Daubert* offered four guidelines for judges to use in assessing the evidentiary reliability of the proffered evidence, but emphasising that the inquiry was a "flexible one".[59] The guidelines are:

(i) whether a theory has been or can be tested (falsifiability).[60]

(ii) whether the theory or technique has been subjected to peer review and publication to increase the likelihood that substantive flaws in methodology will be detected.[61]

(iii) whether the known or potential rate of error and the existence and maintenance of standards controlling technique's operation have been established.[62]

(iv) whether a technique has gained general acceptance within the scientific community.[63]

The court in providing the guidelines did not consider it as an exhaustive list nor did the court assign specific weight to the different factors.[64] Chief Justice Rehnquist and Justice Stevens dissented in part and indicated in their judgment that although Rule 702 does confide to a judge "some gatekeeping responsibility" they expressed concern that the judgment would now require federal judges to become "amateur scientists".[65] Dennis agrees with this submission arguing that not only are judges required to

56 Dennis (2017) *The law of evidence* 896.
57 *Daubert v. Merrell Dow Pharmaceuticals Inc*., 509 U.S. 579 (1993) at 589.
58 *Ibid*
59 *Idem* 594.
60 *Idem* 593. The court referred to the work of Karl Popper, a British philosopher of science, who used the term falsifiability to indicate that "statements constituting a scientific explanation must be capable of empirical test".
61 *Daubert v. Merrell Dow Pharmaceuticals Inc*. 593.
62 *Idem* 594.
63 *Ibid*.
64 *Ibid*
65 *Idem* 601.

become amateur scientists but the criteria is not appropriate for non-scientific specialised knowledge based on study and experience.[66]

Goodman-Delahunty and Foote argue that practically the outcome of the *Frye* standard and the *Daubert* standard will in many circumstances be similar but the *Daubert* formulation is more technically stringent than a general acceptance test.[67] Many scholars argue that despite the *Daubert* criteria which is considered more stringent the "let-it-all-in" approach is still alive and well.[68] Bernstein is of the opinion that the: [69]

> implicit rationale for the reliability test is to preserve the perceived advantages of the adversarial system while mitigating the harms to the courts' truth-seeking function by the inevitable and strong biases that accompany adversarial expert testimony.

Bernstein argues that the *Daubert* guidelines do not succeed in achieving this goal because in attempting to discern the underlying reliability judges do not focus on whether the testimony reflects "unbiased, nonpartisan opinion within the expert witness's legitimate field of expertise".[70] This results in the only option to challenge experts on the basis of bias by using cross-examination.[71]

Despite the concerns and the criticism *Daubert* remains the leading case and has been followed and expanded on in many subsequent cases. In particular the *Daubert* case was followed by *General Electric Co. v. Joiner*[72] and *Kumho Tire Co. v Carmichael*[73] which became known as the *Daubert* trilogy. In *Daubert* the court held that in an inquiry into the relevance and reliability of evidence the focus must be on the "principles and methodology" and not on the conclusions.[74] In *Joiner* the court interpreted it broader

66 Dennis (2017) 897.
67 Goodman-Delahunty and Foote "Compensation for pain, suffering and other psychological injuries: The impact of *Daubert* on employment discrimination claims" (1995) 13 *Behavioral Science and the Law* 198.
68 Binder "Liability for the psychiatrist expert witness" (2002) 159 *American Journal of Psychiatry* 1821.
69 Bernstein as quoted in Stockdale and Jackson "Expert evidence in criminal proceedings: current challenges and opportunities" (2016) *Journal of Criminal Law* 360.
70 *Ibid*.
71 Stockdale and Jackson "Expert evidence in criminal proceedings: current challenges and opportunities" (2016) 80 *Journal of Criminal Law* 361.
72 *General Electric Co v. Joiner*, 118 S.Ct 512 (1997).
73 *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999).
74 *Daubert v. Merrell Dow Pharmaceuticals Inc*. 595.

and held that "conclusions and methodology are not entirely distinct from one another".[75] The *Joiner* case further clarified the review process indicating that the court of appeal must only intervene with the admission or exclusion of expert evidence if the trial court abused their discretion.[76] In the concurring opinion of *Joiner* Justice Breyer dealt with a crucial matter: since judges are not scientists how do they determine whether the expert's opinion is supported by the data in the field if they cannot rely on the expert? Justice Beyer remarks that the Rules of Evidence and Civil Procedure have been used by many judges to overcome the "inherent difficulty" of making determinations about complicated scientific evidence.[77] The techniques that are of assistance is the use of pretrial conferences and the appointment of special masters and specially trained law clerks.[78] Justice Beyer further suggested based on the *amici* brief filed by the New England Journal of Medicine that courts should make more use of court appointed experts in terms of Federal Rule 706 which will be elaborated on in 6.4.7 below.

In *Kumho Tire Co.* the application of *Daubert* was also broadened when the court held that Federal Rule 702 does not only apply to expert evidence in so-called hard sciences but extends to all expert evidence.[79] The decision of *Kumho Tire Co.* therefore confirmed that psychological evidence is also subject to the criteria set out in *Daubert*. Both *General Electric Co*. and *Kumho Tire Co*. confirmed that the *Daubert* factors are not exhaustive nor mandatory in all cases.[80]

Federal Rule 702 was amended in 2000 in response to *Daubert* and other cases applying *Daubert* including *Kumho Tire*. Rule 702 now reads as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;

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75 *General Electric Co. v. Joiner* 146.
76 *Idem* 136.
77 *Idem* 149.
78 *Ibid.*
79 *Kumho Tire Co. v. Carmichael* 1169.
80 Dixon and Gill (2002) *Psychology, Public Policy, and Law* 253.

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 has not changed the fact that that experience alone or in conjunction with knowledge, skill and training is enough for an expert to be considered as sufficiently qualified.[81] The accompanying Advisory Committee Note to Rule 702 indicates that should a witness rely solely on experience they must be able to explain how the experience led to the conclusion, why the experience is a sufficient basis for the opinion and how this experience has been reliably applied to the set of facts.

There exists a legion of debates and scholarship on the approach of *Daubert* including empirical studies regarding the use of expert evidence in the wake of *Daubert*.[82] Although an extensive study on the use of *Daubert* is beyond the scope of this study it should be mentioned that common myth of *Daubert* has been dispelled in the 2000 Advisory Committee Notes of Rule 702. The Note indicates that review of the case law after *Daubert* illustrates that the "rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law".[83]

Federal Judicial Center in their report on *Expert testimony in federal civil trials* found that medical and mental health experts were the most frequently presented category of experts in civil cases.[84] Although often used, Bonnie indicates that expert testimony

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81 Advisory Committee Note to Rule 702 of the Federal Rules of Evidence.

82 See in general a discussion on *Daubert* case: Binder (2002) *American Journal of Psychiatry* 1821; Buchanan (2006) *The Journal of the American Academy of Psychiatry and the Law* 14; Conroy "Report writing and testimony" (2006) 2 *Applied Psychology in Criminal Justice* 237; Dahir *et al*. "Judicial application of Daubert to psychological syndrome and profile evidence: A research note" (2005) 11 *Psychology, Public Policy, and Law* 62; Dixon and Gill (2002) *Psychology, Public Policy, and Law* 251; Gatowski *et al*. "Asking the gatekeepers: A national survey of judges on judging expert evidence in a post-*Daubert* world" (2001) 25 *Law and Human Behavior* 433; Groscup *et al*. (2002) *Psychology, Public Policy, and Law* 339; Goodman-Delahunty and Foote (1995) *Behavioral Science and the Law* 197; Grove and Barden "Protecting the integrity of the legal system: The admissibility of testimony from mental health experts under Daubert/Kumho analyses" (1999) 5 *Psychology, Public Policy, and Law* 224; Gutheil and Bursztajn "Avoiding *ipse dixit* mislabelling: Post-Daubert approaches to expert clinical opinions" (2003) 31 *The Journal of the American Academy for Psychiatry and Law* 205; Marlowe "A hybrid decision framework for evaluating psychometric evidence" (1995) 13 *Behavioral Sciences and the Law* 207; Renaker "Evidentiary Legerdemain: Deciding when Daubert should apply to social science evidence" (1996) 84 *California Law Review* 1657; Scott "Believing doesn't make it so: Forensic education and the search for truth" (2013) 41 *The Journal of American Academy of Psychiatry and the Law* 18; Slovenko "The Daubert sequelae" (1998) 2 *The International Journal of Evidence and Proof* 190 and Youngstrom and Busch (2000) *Ethics and Behavior* 185.

83 Advisory Committee Notes to Rule 702 of the Federal Rules of Evidence.

84 Johnson *et al*. (2000) 1.

by psychiatrists and other mental health professionals are rarely challenged based on *Daubert* grounds.[85] *Daubert*, as Bonnie indicates does not really assist in determining the reliability of opinions that are based on the usual "tools of clinical assessment".[86] Gionis and Zita has also remarked that state courts rarely preclude the admission of mental health expert.[87]

The federal provisions and the California Evidence Code are similar in many respects when it comes to the field of expertise rule. Section 720 of the California Evidence Code, like Federal Rule 702, provides that a person is qualified to testify as an expert if they have special knowledge, skill, experience, training, or education sufficient to qualify them as an expert on the subject.[88] Section 720 further provides that the special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including the witness's testimony.[89]

There are, however, differences, in California the courts do not follow the *Daubert* standard of admissibility but follow the *Kelly* test or rule,[90] previously known as the *Kelly-Frye* test.[91] *Kelly* test requires that a preliminary hearing be held on whether the proffered evidence has "general acceptance of the new technique in the relevant scientific community".[92] Almost 20 years after the *Kelly* case the California Supreme Court in *People v. Leahy*[93] declined to adopt *Daubert* as the standard and instead chose to adhere to the *Kelly* test. *Leahy* clarified that general acceptance is defined as "a consensus drawn from a typical cross-section of the relevant, qualified scientific community".[94]

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85 Bonnie "Howard Zonana and the transformation of forensic psychiatry" (2010) 38 *The Journal of the American Academy of Psychiatry and the Law* 572.

86 *Ibid*.

87 Gionis and Zito "A call for the adoption of Federal Rule of Evidence 702 for the admissibility of mental-health professional expert testimony in Illinois child-custody cases" (2002) 27(1) *Southern Illinois University Law Journal* 4.

88 Section 720(a) of the California Evidence Code.

89 Section 720(b) of the California Evidence Code.

90 *People v. Boden*, 58 P.3d 931 (Cal.2002) the Supreme Court of California held that: "… and our state law rule is now referred to simply as the *Kelly* test or rule".

91 *People v. Kelly*, 549 P.2d 1240 (1976) and *Frye v. United States*. For a discussion on the Kelly/Frye test see Polizzi "How long do we keep Fryeing?: The future of expert scientific evidence in California" (2017) 20 *Chapman Law Review* 394 and Goodman-Delahunty and Foote (1995) *Behavioral Science and the Law* 198.

92 *People v. Kelly* at par.3.

93 *People v. Leahy*, 34 Cal.Rptr.2d 663 (1994).

94 *Idem* 337.

In *People v. Venegas* the California Supreme Court explained the three prongs of the *Kelly* test.[95] The first prong requires that the new scientific technique has gained general acceptance in the particular field to which it belongs.[96] The second prongs requires that the expert witness be properly qualified as an expert and the third prong requires that the proponent of the evidence demonstrate that the correct scientific procedures were used.[97] When expert evidence is challenged on other grounds two of the prongs are still applicable as it must be shown that the expert is properly qualified and that the expert followed accepted methodologies or protocols in reaching their opinion.[98] Expert evidence may still be inadmissible, even if it satisfies the *Kelly* test, if the testimony is considered too speculative or conjectural.[99] The purpose of the *Kelly* test has been described as "…salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods".[100]

Unlike the *Daubert* test the *Kelly* test is limited to cases where the admissibility of an expert's opinion is challenged on the ground that it is based on novel scientific method or theories which has not yet been accepted in the respective fields.[101] The application of *Kelly* test differs vastly from the *Daubert* test as the judge in California only needs to determine whether the relevant scientific community has accepted the theory or technique and need not determine the reliability of the evidence as a scientific matter.[102] The key challenges with the *Kelly* test is deciding whether the scientific theory or method at issue is novel and therefore subject to the test and defining the nature and the extent of the scientific community implicated.[103] Notably in the case of *People v. McDonald* the Supreme Court of California held that *Kelly* test has never been applied to expert medical testimony, including testimony by psychiatrists.[104] In

95 *People v. Venegas*, 954 P.2d 525 (Cal.1998).
96 *Idem* 545.
97 *Ibid*.
98 Mendez (2016) *Evidence-A concise comparison of the Federal Rules with the California Evidence Code* 197.
99 *In re Johnson & Johnson Talcum Powder Case, Prod. Liab. Rep*. (CCH) P 20190, 2017 WL 4780572 (Cal. Super. Ct. Trial Div. 2017).
100 *People v. Shirley*, 723 P.2d 1354 (Cal.1982) at 1357.
101 Mendez (2016) *Evidence-A concise comparison of the Federal Rules with the California Evidence Code* 197.
102 *Ibid*.
103 Polizzi (2017) *Chapman Law Review* 398.
104 *People v. McDonald*, 690 P.2d 709 (Cal.1984).

the *McDonald* case the defendant wanted to introduce the evidence of a psychologist on the psychological factors that may affect the accuracy of eye witness testimony.[105] The court held that:[106]

> …even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association… We see no reason to require a greater foundation when the witness is a qualified psychologist who will simply explain to the jury how certain aspects of everyday experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification testimony. Indeed, it would be ironic to exclude such testimony on *Kelly-Frye* grounds on the theory that jurors tend to be unduly impressed by it, when jurors are far more likely to be unduly impressed by the eyewitness testimony itself.

The Court of Appeal in *People v. Ward* confirmed that expert psychiatric or psychological testimony is not subject to the *Kelly* test, only cases involving novel devices or processes are subject to the *Kelly* test.[107] In the *Ward* case a psychologist and psychiatrist testified at trial that the defendant was a sexually violent predator.[108] Ward argued that the expert evidence did not meet the *Kelly* standards for admissibility because there is no scientifically accepted way of predicting whether a person is likely to engage in acts of sexual violence.[109] In determining whether the expert evidence should be subject to the *Kelly* test, the court examined various cases, including *McDonald* and *Stoll*. In support of their argument the court quoted from *People v. Stoll* remarking that a psychological evaluation is a "learned professional *art*, rather than the purported exact 'science' with which Kelly/Frye is concerned…"[110] The court further remarked "No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behaviour".[111]

105 *Idem* 715.
106 *Ibid.*
107 *People v. Ward*, 71 Call. App. 4th 368 (1999) at 373.
108 *Idem* 371.
109 *Idem* 372.
110 *People v. Stoll* 49 Cal.3d 1136 (1989) at 1159 as quoted in *People v. Ward* at 373.
111 *People v. Stoll* 49 Cal.3d 1136 (1989) at 1154 as quoted in *People v. Ward* at 373.

Mention needs to be made of the Supreme Court decision of *Sargon Enterprises, Inc. v. University of Southern California*[112] which is considered by many scholars as the "most important expert testimony decision"[113] in the last two decades in California. Sargon Enterprises Inc., a dental implant manufacturer, instituted a claim against the university for breach of contract. To prove their claim for the loss of profits Sargon wanted to introduce the testimony of an expert, a certified public accountant, who developed a "market drivers" hypothesis.[114] The court held that the trial court had not erred in excluding the expert evidence that was improperly supported. The case is considered important as it marks a "major stride" toward adopting *Daubert* standards.[115] The court in a footnote in *Sargon* confirmed that the *Kelly* test still applied in California courts[116] but as Faigman and Imwinkelreid remark the decision was framed around *Daubert*. In *Sargon* Justice Chin used the *Daubert* terminology indicating that trial courts have a "substantial gatekeeping responsibility"[117] and adopted similar reasoning as used in the *Daubert* trilogy cases.[118] Despite the homage to *Daubert* California remains a *Kelly* jurisdiction and it remains to be seen whether the state will adopt a *Daubert* approach.

In the state of California, the Evidence Code also provides for the admission of expert testimony regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behaviour of victims of domestic violence.[119] Section 1107(b) provides that the proponent must establish relevancy and the proper qualifications of the experts witness and explicitly states that:

> Expert opinion testimony on intimate partner battering shall not be considered a new scientific technique whose reliability is unproven.

112 *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747 (2012).
113 Faigman and Imwinkelreid "Wading into the *Daubert* tide*: Sargon Enterprises, Inc. v. University of Southern California*" (2013) 64(6) *Hastings Law Journal* 1665.
114 *Sargon Enterprises, Inc. v. University of Southern California* at 756.
115 Faigman and Imwinkelreid (2013) *Hastings Law Journal* 1667 and Polizzi (2017) *Chapman Law Review* 411.
116 *Sargon Enterprises, Inc. v. University of Southern California* at footnote 6.
117 *Idem* 769.
118 Faigman and Imwinkelreid (2013) *Hastings Law Journal* 1685.
119 Section 1107 of the California Evidence Code.

The section is designed to bring an end to the controversy regarding admissibility of evidence regarding battered spouse syndrome or as referred to in the section intimate partner battering.[120] The section makes it clear that it is intended as a rule of evidence only and that it remains subject to section 29 of the California Penal Code which places a restriction on expert testimony which will be discussed under 6.4.1.4 below. In *People v. Erickson* the court noted that the syndrome evidence has been admitted solely to "disabuse jurors of 'common sense' misconceptions about the behavior of persons… and not to prove a fact in issue".[121] The admission of syndrome evidence by mental health experts in criminal cases, therefore, does not give them *carte blanche* to testify on all aspects, the expert testimony is still limited but need not be subjected to *Kelly* test of admissibility. From the Evidence Code and the examination of the *Kelly* test in California it appears that expert evidence from mental health professionals is generally admissible if the mental health professional is qualified and will assist the trier of fact.

6.4.1.2 Common knowledge rule

Rule 702(b) of the Federal Rules of Evidence determines that the expert's scientific, technical, or other specialised knowledge must help the trier of fact confirming that expert evidence should not "invade the field of common knowledge"[122] as it will be of no assistance to the courts. Unlike the South African and English jurisdictions, the evidence regarding human behaviour does not present difficulties in federal courts when it comes to the common knowledge. The federal courts have rarely excluded psychiatric or psychological evidence because it is considered within the common knowledge of the trier of fact. Instances were psychiatric and psychological evidence are excluded will be discussed in 6.4.1.4 below.

In California section 801(a) of Evidence Code also recognises that expert opinion must assist the trier of fact and determines that an expert witness may testify if the expert opinion is:

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120 Mendez (2016) 194.
121 *People v. Erickson*, 57 Cal. App. 4th 1391 (1997) at 1401.
122 *U.S. v. Brown*, 7 F.3d 648 (1993).

> Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

Section 801(a) codifies the existing rule as enunciated in *People v. Cole*[123] that an expert opinion is limited to subjects that are beyond the competence of persons of common experience, training, and education and is similar to the *Turner* rule applied in South Africa.[124] The court in *People v. McDonald* confirmed that in terms of section 801(a) a jury need not be "wholly ignorant"[125] of the subject matter but, quoting from *Cole*, evidence will be excluded if "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness".[126]

Although expert evidence by mental health professionals is generally admissible based on the field of expertise it appears that the common knowledge rule hampers the admission in the state courts. In the recent California Supreme Court case of *People v. Stevens* the court held that a mental health expert's opinion may not be used to prove the underlying facts or elements of an offense to show that a defendant's crime qualifies as an Mentally Disordered Offenders Act commitment offence.[127] The Mentally Disordered Offender Act (MDO Act) authorises the civil commitment of a state prisoner during parole if the prisoner after being evaluated by a mental health expert meets the criteria as set out in the act.[128] The MDO Act, amongst others, requires that the underlying qualifying offense involve one of the offenses specified in section 2962, which in the case of *Stevens* meant that the a crime in which the "perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm".[129] The court held that although expert evidence is necessary to prove some of the factors, the evidence by the mental health expert regarding the use of force and violence overstepped the boundaries as it was not

123 *People v. Cole*, 47 Cal 2d 99 (1956) at 103.
124 See 4.2.1.1.
125 *People v. McDonald* at 720.
126 *People v. Cole* at 103 as quoted in *People v. McDonald* at 720.
127 *People v. Stevens*, 362 P.3d 408 (Cal. 2015) at 417.
128 California Penal Code §2960. The provisions are now contained in California Penal Code § 2962.
129 Section 2962(e)(2)(Q) of the Mentally Disordered Offender Act. *People v. Stevens* 765.

beyond common experience.[130] Frazier and Chien argue that the cases limiting expert evidence highlights the ambivalence of courts towards expert witnesses.[131]

6.4.1.3 Basis rule

Rule 703 of the Federal Rules of Evidence determines that:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

In *Cella v. U.S.* the court observed that under Rule 703 expert evidence must be rejected if it lacks an adequate basis in fact as an expert witness "cannot simply guess or base an opinion on surmise or conjecture".[132] There is no specific basis upon which mental health professionals must base their expert opinion provided that the facts or data in the particular case would reasonably be relied on by other mental health professionals in the field. Take for example *U.S. v. Philips* where the court held that the forensic psychiatrist appointed by the government could rely on hospital records, the other consulting psychiatrist's report and a team diagnosis made by the staff of a mental hospital to base his opinion on.[133] In accordance with the Federal Rules of Evidence a mental health expert would be able to rely on hearsay to formulate an opinion about an individual's mental state.[134] For example, in *U.S. v. Farley* the court held that hearsay statements made by the victim, a five-year-old girl who was sexually abused, was admissible for purposes of laying a foundation for the psychologist's

130 *People v. Stevens* at 415. See also the discussion in Frazier and Chien "California Supreme Court limits scope of expert testimony in postprison civil commitment trials" (2016) 44 *The Journal of the American Academy of Psychiatry and the Law* 390.

131 Frazier and Chien "California Supreme Court limits scope of expert testimony in postprison civil commitment trials" (2016) 44 *The Journal of the American Academy of Psychiatry and the Law* 391.

132 *Cella v. U.S.*, 998 F.2d 418 (7th Cir. 1993).

133 *U.S. v. Phillips*, 515 F.Supp.758 (1981).

134 Bonnie and Slobogin "The role of mental health professionals in the criminal process: The case for informed speculation" (1980) 66 *Virginia Law Review* 510.

expert opinion.[135] If an expert relies on inadmissible facts or data, such as hearsay evidence, Rule 703 prohibits the disclosure of the facts or data to the jurors unless their probative value outweighs the prejudicial effect.

The relationship between Rule 702 and Rule 703 is explained in the accompanying Advisory Committee Notes to Rules 702. Rule 702(b) determines that the testimony must be based on sufficient facts or data. Rules 702 provides the overarching requirement of reliability and the sufficiency of the expert's basis must be decided under Rule 702.[136] Rule 703 is a narrow inquiry and requires that the court determine whether the expert may rely on inadmissible information.[137]

Rule 703 should be read with Rule 705 which determines that an expert may state an opinion, and give reasons for it, without first testifying to the underlying facts or data. This places a heavy burden on a cross-examiner who must have sufficient knowledge about the subject matter to be able to expose any inherent weaknesses in the expert's opinion.[138] The court has a discretion in terms of Rule 705 to require the expert to disclose those facts or data on cross-examination.[139]

Section 801(b) of the California Code of Evidence is similar to the Federal Rule 703 and also permits the use of an expert opinion that is based on inadmissible evidence. Section 801(b) reads as follows:

> Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

135 *U.S. v. Farley*, 992 F.2d 1122 (10th Cir. 1993) at 1125.
136 Advisory Committee Notes to Rule 702 of the Federal Rules of Evidence.
137 Advisory Committee Notes to Rule 702 of the Federal Rules of Evidence.
138 Askowitz and Graham "The reliability of expert psychological testimony in child sexual abuse prosecutions" (1994) 15 *Cardozo Law Review* 2074.
139 Rule 705 of the Federal Rules of Evidence.

Section 801(b) must be read with section 802 of the California Evidence Code which provides that an expert witness may state the basis or reasons for their opinion unless precluded by law. As in federal courts section 802 also provides that the court has the discretion to require a witness to state the facts upon which their opinion is based before stating their opinion.

The basis that the expert may rely upon will depend on the nature of the matter and the particular field of expertise.[140] In cases dealing with psychological or psychiatric opinion evidence there is no general requirement that the opinion must be based on, for example, personal interviews or examinations or particular psychological tests.[141] In *People v. Brekke* the psychiatric evidence was admissible even though the court-appointed psychiatrist based his opinion on the report of another psychiatrist and other data, without having been able to interview the defendant save for obtaining his personal details such as age and place of birth.[142] The expert must still provide reasoning to link the cause and effect, as an opinion which is "untethered to its foundation" will be excluded.[143] In *People v. Gardeley*, the California Supreme Court explained that:[144]

> any material that forms the basis of an expert's opinion testimony must be reliable…For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.

Although mental health professionals will be able to base their opinions on hearsay, they may not relate the out-of-court statement of another as independent proof of the facts asserted in the out-of-court statement.[145] As the court confirmed in *People v. Baker* sources that form the basis of an expert's witness's opinion does not transform inadmissible evidence into independent proof of any facts.[146] Trial courts usually instruct juries that out-of-court statements used as the basis of an expert's opinion

140 Law Revision Commission Comments to Section 801(b) of the California Code of Evidence.
141 *People v. Cruz*, Cal. 605 P.2d 830 at 837 the court held that "No rule requires that an expert psychiatric opinion be based in particular tests".
142 *People v. Brekke*, 233 Cal. App. 2d 196 (1965).
143 Crooke and Depew "Expert judgment" (2012) 32 *Los Angeles Lawyer* 24 at 25.
144 *People v. Gardeley*, 927 P.2d 713 (Cal. 1996).
145 *People v. Baker*, 204 Cal. App. 4th 1234 (2012) at 1246.
146 *Ibid*.

may not be considered as the truth of the matter but only for purpose of evaluating the expert's opinion.[147]

Evident from above, Rule 703 and section 801(b) are identical in many respects but differs in the disclosure of the inadmissible evidence. Section 801(b) read with section 352 determines that a judge must allow disclosure of inadmissible matter unless the probative value is substantially outweighed by the prejudicial effect. The balancing provision in the California Evidence Code is therefore reversed.[148] In *People v. Miller* the Court of Appeal precluded the defendant's expert witness, a psychologist, from disclosing certain out-of-court statements.[149] In *Miller* the court explained that probative value refers to the "relative reliability of inadmissible evidence and its necessity to the jury's understanding of the credibility and [basis] for the expert opinion".[150] The probative value must be weighed against the risk that the jury will use the inadmissible evidence as substantive evidence against the defendant.[151] In *Miller* the hearsay evidence upon which the psychologist based his opinion was excluded because it was "a self-serving substitute for trial testimony tested in crucible of cross-examination".[152]

The California Evidence Code also has further provisions relating to the basis of the opinion not mirrored in the Federal Rules of Evidence. Section 803 addresses opinions based on improper matter. The court may exclude any opinion evidence if the opinion is based in or whole or in significant part on matter that is not a proper basis for such an opinion.[153] The case of *Bennett v. Superior Court* provides an example of an expert opinion that was inadmissible because it was based on improper matter.[154] Bennet challenged the trial court's finding of probable cause and argued that expert testimony was inadmissible. The People filed a petition to commit Bennet as a sexually violent predator and in support of this submitted expert reports by two psychologists.[155] The

147 *People v. Miller*, 231 Cal. App. 4th 1301 (2014) at 1310.
148 Mendez (2016) 194.
149 *People v. Miller*, 231 Cal. App. 4th 1301 (2014).
150 *Idem* 1311.
151 *Ibid*.
152 *Idem* 1312.
153 Section 803 of the California Evidence Code.
154 *Bennet v. Superior Court*, 39 Cal. App. 5th 862 (2019).
155 *Idem* 868.

psychologists supported their finding of a paraphilia diagnosis on an incident that occurred in 2012.[156] No documentary evidence or other evidence was used to prove the details of the 2012 incident save for being introduced by the experts' testimony.[157] The court held that the trial court erred in admitting the expert testimony.

Section 804 of California Evidence Code addresses opinions based on the opinion or statement of another and determines that an expert opinion can be based in whole or in part upon the opinion or statement of another person who is unavailable for examination.[158] The section also allows the author of the opinions and statements relied on to be called and cross-examined.[159] Whether the expert will be able to rely on opinions of others will initially depend on whether those opinions are of the type reasonably relied upon by experts in the field.

6.4.1.4 Ultimate issue rule

The vexed question of the ultimate issue rule, as in most other jurisdictions, led to many debates in the United States of America. The ultimate issue rule was followed in American courts and stemmed from the concern that jurors will merely follow the opinion of expert witnesses instead of coming to their own conclusions.[160] Rule 704 of the Federal Rules of Evidence abolished the ultimate issue rule in federal courts and originally made provision for expert witnesses to address the ultimate issue before the court.[161] Rule 704 was amended in 1984 after the trial of John Hinckley resulted in an outcry by the public against expert testimony, especially psychiatric testimony.[162] Hinckley was found "not guilty by reason of insanity" after attempting to assassinate the President at the time, Ronald Reagan.[163] Congress responded by passing the

156 *Idem* 881.
157 *Idem* 880.
158 Section 804(d) of the California Evidence Code.
159 Section 804(a) of the California Evidence Code.
160 Braswell "Resurrection of the ultimate issue rule: Federal Rule of Evidence 704(b) and the insanity defense" (1987) 72 *Cornell Law Review* 621-622.
161 Buchanan (2006) *The Journal of the American Academy of Psychiatry and the Law* 14.
162 Gutheil and Bursztajn (2003) *The Journal of the American Academy for Psychiatry and Law* 206.
163 *U.S. v. Hinckley*, 525 F. Supp. 1342 (1981).

Insanity Defence Reform Act of 1984 which amended Rule 704 by adding Rule 704(b).[164] Rule 704 now provides that:

> (a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
>
> (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

In support of the amendment of Rule 704 the Senate Judiciary Committee referred to the argument put forward by the American Psychiatric Association.[165] The American Psychiatric Association opined that once an expert witness makes a conclusion as to the ultimate issue they are required to "make a leap in logic" because they no longer address a medical concept but gives an opinion on the "probable relationship between medical concepts and legal or moral constructs".[166] These leaps in logic may in turn confuse the jury.[167] This was echoed in the case of *U.S. v. Lipscomb* where the court held that Rule 704(b) was designed to avoid the "confusion and illogical translating of the medical concepts relied upon by psychiatrists and other mental health experts n into legal conclusions".[168]

In applying Rule 704(b) the court in *U.S. v. Morales* held that the rule is not only limited to psychiatric evidence and other mental health experts but applies to all expert witnesses testifying to the defendant's mental state or condition.[169] The appellate courts have indicated that Rule 704(b) is not always applied consistently[170] and often the rule is interpreted in such a way as to admit the evidence.[171] Buchanan argues that the introduction of Rule 704(b) is a reflection of the longstanding and widespread

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164 Buchanan (2006) *The Journal of the American Academy of Psychiatry and the Law* 16 and Lipsitt in Goldstein (ed.) (2007) *Forensic psychology: Emerging topics and expanding roles* 185.

165 Braswell (1987) *Cornell Law Review* 624-625. See also Buchanan (2006) *The Journal of the American Academy of Psychiatry and the Law* 16.

166 Braswell (1987) *Cornell Law Review* 624-625.

167 *Ibid*.

168 *U.S. v. Lipscomb*, 14 F.3d 1236 (1994) at 1241.

169 *U.S. v. Morales*, 108 F.3d 1031 (9th Cir. 1997) at par.5.

170 *U.S. v. Meader*, 914 F.Supp. 656 (1996) at 659.

171 Buchanan (2006) *The Journal of the American Academy of Psychiatry and the Law* 18.

concern that psychiatric evidence will intrude into the jury's realm.[172] Slovenko argues that Rule 704(b) is unnecessary as similar to the common law ultimate issue rule, the federal rule makes expert witnesses less useful as it promotes indirect and incomplete testimony.[173] Slovenko opines that Rule 704(b) ignores the principle that the purpose of expert evidence is to assist the courts and the rule rather promotes form of expression over substance.[174]

In the state of California section 805 of the California Evidence Code is similar to the provision of Rule 704(a) and provides that an opinion on the ultimate issue is not merely objectionable because it embraces the ultimate issue. The California Evidence Code has a separate provision regarding opinions as to sanity which provides that:[175]

> A witness may state his opinion as to the sanity of a person when:
> (a) The witness is an intimate acquaintance of the person whose sanity is in question;
> (b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or
> (c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.

Although section 870 provides for expert evidence on the sanity of a person this must be read with the California Penal Code. Similar to the Federal Rule 704(b) section 29 of the California Penal Code prohibits an expert witness from testifying about whether the defendant's mental illness, mental disorder, or mental defect precluded the defendant from forming the required mental state for the crime charged, in other words the ultimate issue. Section 29 of the Penal Code is applicable in the "guilt phase" of the criminal action.[176] Section 28 of the Penal Code also restricts psychiatric or psychological evidence in criminal cases as evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state.[177] Mental state is described as including but not limited to the

172 *Idem* 19.
173 Slovenko "Commentary: Deceptions to the rule on ultimate issue testimony" (2006) 34 *The Journal of the American Academy of Psychiatry and the Law* 25.
174 *Ibid*.
175 Section 870 of the California Evidence Code.
176 Section 29 of the California Penal Code.
177 Section 28(a) of the California Penal Code.

purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.[178] In contrast to the South African position the California Penal Code prohibits the use of the defence of diminished capacity, diminished responsibility, or irresistible impulse in criminal cases.[179]

Similar to the circumstances surrounding the case of *Hinckley* the section 28 and 29 was added to the Penal Code in response to public outcry.[180] Harvey White shot and killed two politicians after he heard that he would not be reappointed as supervisor for the city and county of San Francisco.[181] At trial White relied on a diminished capacity defence and proffered expert evidence by psychiatrists that he was suffering from depression. White was successful in avoiding a conviction of murder and convicted of two counts of voluntary manslaughter.[182] The goal of the introduction of the amendments was to eliminate or severely limit the use of mental state evidence in criminal trials.[183]

As with Rule 704(b) the effort to exclude psychiatric or psychological evidence in the guilt phase of criminal trial has not been completely successful.[184] One of the reasons the common law ultimate issue rule was abolished was the inconsistency of application and the problem has resurfaced with the application of section 29.[185] Gordan indicates that in practice the Californian courts follow two different approaches with the application of section 29: the first excluding opinion couched in the statutory language and the second approach is broader and focuses on the intent of section 29.[186] There is a great judicial discretion with regards to the application of section 29 which turns on the approach of the judge.[187] As a result mental state evidence is still introduced.

178 *Ibid.*
179 Section 28(b) of the California Penal Code.
180 Gordan "Old wine in old bottles: California mental defenses at the dawn if the 21st century" (2013) 32 *Southwestern University Law Review* 89.
181 *People v. White*, 172 Cal. Rptr. 612 (Ct. App. 1981).
182 *Ibid.*
183 Gordan (2013) *Southwestern University Law Review* 90.
184 *Ibid.*
185 *Ibid.*
186 *Idem* 93.
187 *Idem* 94.

6.4.2 Disclosure of expert evidence and pretrial case management

6.4.2.1 Civil proceedings

Rules 26 to 37 of the Federal Rules of Civil Procedure regulate the disclosure and discovery in civil proceedings. In 1958 the Supreme Court in *United States v. Procter & Gamble Company* remarked on the importance of the Rules stating that:[188]

> Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor*… They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.

Before the introduction of the rules relating to discovery and disclosure the parties were to a large extent protected against disclosure of their case because the judicial proceedings were seen as a "battle of the wits".[189] Rules 26-37, together with pre-trial hearings under Rule 16, provides the means to obtain the information necessary to prepare for the trial. Rule 26(2)(A) of the Federal Rules of Civil Procedure determines that a party must disclose to the other party any expert witness that they may use at trial. The disclosure of the expert witness must be accompanied by a written report that has been prepared and signed by the witness in cases where the witness is retained or specially employed to provide expert testimony [190] The report of the expert witness must contain the following:[191]

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

188 *U.S. v. Procter & Gamble* 78 S.Ct. 983 (1958) at 986.
189 Wright and Miller (2020) *Federal practice and procedure* §2001.
190 Rule 26(2)(B) of the Federal Rules of Civil Procedure.
191 *Ibid*.

(vi) a statement of the compensation to be paid for the study and testimony in the case.

The purpose behind the report required in Rule 26 is to give the opposing party information to be able to properly prepare for trial or to make an informed decision about settlement or whether to depose a witness and/or whether to retain another witness to rebut the expert's testimony.[192] The rule does not define when a witness is considered retained or specially employed but it can be assumed that a mental health professional hired with the purpose of conducting a psycho-legal evaluation will need to compile a report. Retained expert witnesses are met with scepticism, as clearly illustrated throughout history and in case law, because they are often considered mere hired guns. Rule 26(2)(B) attempts to address potential bias of the expert witness, although the requirements of the contents of the expert report will not prevent bias it does give the opposing party the opportunity to cross-examine the expert witness on the potential bias.

In cases where the expert is not retained or specially employed to provide expert testimony the witness need not provide a report unless otherwise stipulated or ordered by the court[193] but the party calling the is required to disclose the subject matter of their testimony[194] and provide a summary of the facts or opinions to which the witness is expected to testify.[195] This requirement is less stringent and is intended to assist the non-retained expert to testify without the need of preparing a comprehensive report.[196] The party calling an expert witness must usually, unless otherwise directed by the court, disclose the information at least 90 days before the trial date[197] and the disclosure of evidence that is intended to contradict or rebut evidence on the same subject matter must be disclosed 30 days after the other party's disclosure.[198]

192 Advisory Committee Notes (1993 Amendment) to Rule 26 of the Federal Rules of Civil Procedure.
193 Rule 26(2)(C) of the Federal Rules of Civil Procedure.
194 Rule 26(2)(C)(i) of the Federal Rules of Civil Procedure.
195 Rule 26(2)(C)(ii) of the Federal Rules of Civil Procedure.
196 Lynch "Doctoring the testimony: Treating physicians, rule 26, and the challenges of causation testimony" (2014) 33 *Review of Litigation* 263.
197 Rule 26(2)(D)(i) of the Federal Rules of Civil Procedure.
198 Rule 26(2)(D)(ii) of the Federal Rules of Civil Procedure.

Rule 16 serves as a mechanism for fostering better trials by providing for pretrial conferences. In any action the court may order the parties to appear for one or more pretrial conference with the object to improve the quality of the trial,[199] facilitate settlement,[200] expedite the disposition of the action,[201] establish early control of the case so that the case will not be protracted,[202] and to discourage wasteful pretrial activities.[203] Rule 16(c)(2) provides for matters that the court may consider and take appropriate action on which includes avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Rule 702 of the Federal Rules of Evidence.[204] After the pretrial conference has been held the court must issue an order reciting the action taken.[205] The courts may also hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence.[206] The Advisory Committee Notes accompanying Rule 16 indicates that the purpose of including the final pretrial conference is to recognise the possibility of needing more than one pretrial order in a single case.[207] Similar to the position in South Africa, the question of whether the pretrial conference will succeed in its objectives is largely dependent on the willingness of the parties to engage with the process. Statistics compiled under the rule does, however, suggest that Rule 16 has been successful in encouraging settlements and to reduce the pressure on an overburdened court system.[208]

The Federal Rules of Civil Procedure also provides for specific trial preparation of experts.[209] The Rules require that an expert witness must be available for a deposition,[210] and if an expert report is required the deposition may only take place after the report was provided.[211] A deposition is used to preserve testimony, make

199 Rule 16(a)(4) of the Federal Rules of Civil Procedure.
200 Rule 16(a)(5) of the Federal Rules of Civil Procedure.
201 Rule 16(a)(1) of the Federal Rules of Civil Procedure.
202 Rule 16(a)(2) of the Federal Rules of Civil Procedure.
203 Rule 16(a)(3) of the Federal Rules of Civil Procedure.
204 Rule 16(c)(2)(D) of the Federal Rules of Civil Procedure.
205 Rule 16(d) of the Federal Rules of Civil Procedure.
206 Rule 16(e) of the Federal Rules of Civil Procedure.
207 Advisory Committee Notes (1983 Amendment) to Rule 16 of the Federal Rules of Civil Procedure.
208 Wright and Miller (eds.) (2020) *Federal practice and procedure (Civil)* §1522.
209 Rule 26(b)(4) of the Federal Rules of Civil Procedure.
210 Rule 26(b)(4)(A) of the Federal Rules of Civil Procedure.
211 *Ibid*.

discovery and for cross-examination.[212] Depositions are regulated by Rules 27, 28, and 30 to 32 of the Federal Rules of Civil Procedure. During the deposition communication between the party's attorney and the expert witness is protected except communications which relate to the compensation of the expert witness;[213] identifies the facts or data that the party's attorney provided and the expert considered in forming an opinion;[214] and the assumptions that the party's attorneys provided and that the expert relied on to form an opinion.[215] It is evident that the payment or fees of the expert witness is a key factor that is often used during cross-examination. Depositions are not utilised in South and whether depositions would enhance the trial process goes beyond the scope of this study. It is submitted that the depositions although it provides an opportunity for trial preparation does not play a key role in regulating expert evidence.

The last rule to be discussed regarding discovery and disclosure is Rule 35 of the Federal Rules of Civil Procedure whereby a party may be ordered to submit to a physical or mental examination if the physical or mental condition of the person is in controversy.[216] Rule 35 contains no limitations on the type of action in which it can be used. The licensed or certified examiner who conducts the examination must include the details of their findings, including diagnoses, conclusions, and the results of any tests in a written report.[217] The party who requested the examination must provide a copy of the report, together with like reports of all earlier examination of the same condition, to the any person requesting the report.[218] Any reports of examination may also be obtained from the other party if no order was made for an examination under Rules 35(a), for example where the parties by agreement arranged for an examination.[219] In contrast to the position in South Africa the proceedings are more formal as the party seeking an order for an examination must bring a motion for good cause before the order will be granted.[220]

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212 Slovenko "The lawyer and the forensic expert: Boundaries of ethical practice" (1987) 5 *Behavioral Sciences and the Law* 140.
213 Rule 26(b)(4)(C)(i) of the Federal Rules of Civil Procedure.
214 Rule 26(b)(4)(C)(ii) of the Federal Rules of Civil Procedure.
215 Rule 26(b)(4)(C)(iii) of the Federal Rules of Civil Procedure.
216 Rule 35(a) of the Federal Rules of Civil Procedure.
217 Rule 35(b)(2) of the Federal Rules of Civil Procedure.
218 Rule 35(b)(1) of the Federal Rules of Civil Procedure.
219 Rule 35(b)(3) of the Federal Rules of Civil Procedure.
220 Rule 35(a)(2) of the Federal Rules of Civil Procedure.

Many of the states, including California, either adopted or adapted the Federal Rules of Civil Procedure to allow for discovery procedures.[221] California adapted the Federal Rules of Civil Procedure and enacted legislation, the Civil Discovery Act of California that regulates the disclosure and discovery in civil proceedings.[222] The purpose of the act is to bring Californian law closer to the discovery provisions of the Federal Rules of Civil Procedure resulting in only a few differing procedures. With regards to the disclosure of expert witnesses there are, however, a few notable differences. Article 2 of the Civil Discovery Act specifically provides for the exchange of expert witness information. The provisions in the Civil Discovery Act differ from the Federal Rules as the parties may demand simultaneous exchange of information as opposed to the discovery being a requirement without demand.[223] The exchange of expert witness information not only includes the names and addresses of expert witnesses who will offer evidence in the trial but can also include a statement that the party does not intend to offer the testimony of an expert witness.[224]

If a party will be relying on an expert witness the exchange of information shall also include an expert witness declaration signed by the attorney or the party if they are representing themselves.[225] The declaration must include a the qualifications of each expert,[226] the general substance of the testimony that the expert is expected to give,[227] a representation of that the expert has agreed to testify at trial,[228] a representation that that the expert will be sufficiently familiar with the pending action in order to submit a meaningful oral deposition,[229] and a statement of the expert's hourly and daily fee for providing testimony and consulting.[230] In accordance with the provision the declaration shall be under "penalty of perjury".[231] The declaration places a duty on the attorney to ensure that the expert witness is properly prepared for trial and is familiar with the facts

221 Witkin (2020) *California Evidence* B.§2.
222 Section 2016.010 of the California Code of Civil Procedure.
223 Section 2034.210 of the California Code of Civil Procedure.
224 Section 2034.260 of the California Code of Civil Procedure.
225 *Ibid*.
226 Section 2034.260(c)(1) of the California Code of Civil Procedure.
227 Section 2034.260(c)(2) of the California Code of Civil Procedure.
228 Section 2034.260(c)(3) of the California Code of Civil Procedure.
229 Section 2034.260(c)(4) of the California Code of Civil Procedure.
230 Section 2034.260(c)(5) of the California Code of Civil Procedure.
231 Section 2034.260(c) of the California Code of Civil Procedure.

of the case. Like the provisions of the Federal Rules of Civil Procedure the section places an emphasis on the disclosure of the fees paid to expert witnesses.

The California Civil Discovery Act also provides for the deposition of the expert witnesses, all persons contained on the provided list of expert witnesses must avail themselves for a deposition.[232] In the State of California the presiding judge of each superior court can prepare local rules designed to "expedite and facilitate the business of court".[233] The rules are adopted by the Judicial Council and can include rules relating to pretrial conferences.[234] The California Rules of Court do not prescribe pretrial conferences but does make provision for case management in civil cases.[235] Similar to the position in South Africa, specific civil cases that are subject to case management[236] must arrange for a case management conference to the review case.[237] The purpose of the case management conference is to try and reduce the number of issues and resolve any discovery disputes.[238] The issues relating to expert witnesses must also be discussed during the case management conferences.[239] The local rules of a court in the different counties will determine the exact procedure of case management and when a case management order will be issued.[240]

The last matter is to compare the provisions for physical and mental examinations in California with the federal position. Chapter 15 of the Civil Discovery Act regulates physical and mental examinations. The provisions in the Civil Discovery Act mirror the basic procedure contained in the Federal Rules of Civil Procedure but are much more extensive. For example, the Federal Rules only specifies that the examination must be conducted by a licenced or certified examiner but in California the act provides, for example, that a mental examination must be conducted by a licensed physician or by

232 Section 2034.410 of the California Code of Civil Procedure. Section 2034.410 determines that:
> On receipt of an expert witness list from a party, any other party may take the deposition of any person on the list. The procedures for taking oral and written depositions set forth in Chapters 9 (commencing with Section 2025.010), 10 (commencing with Section 2026.010), and 11 (commencing with Section 2028.010) apply to a deposition of a listed trial expert witness except as provided in this article.

233 Section 575.1(a) of the California Code of Civil Procedure.
234 Section 575.1(b) of the California Code of Civil Procedure.
235 Division 7 of the California Rules of Court.
236 Rule 3.712 of the California Rules of Court.
237 Rule 3.722 of the California Rules of Court.
238 Rule 3.724 of the California Rules of Court.
239 Rule 3.724 of the California Rules of Court.
240 Rule 3.728 of the California Rules of Court.

a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders.[241] By specifying who can conduct the mental examinations it assists the court in ensuring the person is properly qualified to conduct the examination. The examiner, as in the federal trials, must provide a detailed written report of the examination which sets out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner.[242] The copy of report can be requested and must be produced within a specific time after demand.[243]

The position with regards to disclosure and discovery in civil proceedings in federal courts and in the state of California is similar to that of South Africa. In contrast there is no specific provision in the South African civil procedure rules that requires an expert witness or the party calling the expert witness to disclose the fees paid for the services rendered. It is submitted that the inclusion of such a provision is not necessary, indeed not sensible as the payment of an expert witness does not indicate that the expert witness is biased or a hired gun. In America the disclosure of the fees paid to expert witnesses plays a key role and may be considered by the jury. For example, in the trial against Dr Conrad Murray, who was accused of killing Michael Jackson, one of the experts announced that he was testifying for no fee. Kaliski argues that this together with impeccable academic credentials "probably sank the testimony of the defendant's more mercenary-looking expert".[244] Disclosing the fees is not meritless but by placing focus on the payment of the expert witness can result in the search for the truth being muddled by the trying to discredit the expert witness based on financial bias instead of focusing on the content of the testimony.

241 Section 2032.020(c)(1) of the California Code of Civil Procedure.
242 Section 2032.610(a)(1) of the California Code of Civil Procedure.
243 Section 2032.610(a)(2)(b) of the California Code of Civil Procedure.
244 Kaliski "The prostitution of psychiatry: Some are shameless, others are just easy" (2012) 15 *South African Journal of Psychiatry* 318.

6.4.2.2 Criminal proceedings

Discovery in criminal proceedings is much more of a debated topic than discovery in civil proceedings with several arguments for and against a system of freer disclosure. Before the adoption of Rule 16 of the Federal Rules of Criminal Procedure the Advisory Committee noted that "whether under existing law discovery may be permitted in criminal cases is doubtful".[245] Opponents of a discovery process in criminal trials opines that discovery is fraught with the risk of perjury and intimidation of witnesses.[246] Many courts have commented in favour of disclosure in criminal proceedings indicating the advantages outweighed and possible disadvantage, including the court in *Williams v. Florida* that noted:[247]

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, …, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Rule 16 was adopted in 1946 and has been amended several times to allow for a more liberal approach and to clarify uncertainties. For purposes of this study only the subdivision of the Rule relating to expert witnesses and reports of examinations and tests will be discussed. Rule 16(a)(1)(F) determines that the government must permit a defendant to inspect and copy the results or reports of any physical or mental examination and of any scientific test or experiment if that item will be used in preparing the defence or the government intends to use the item and is within the governments possession, custody or control. No motion is needed for the discovery of the reports or tests.

Rule 16(a)(1)(G) provides that on request of the defendant, the government must provide the defendant with a written summary of testimony of expert witnesses the government expects to use in its case-in-chief at trial. The summary must describe the

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245 Advisory Committee Notes (1944 Adoption) to Rule 16 of the Federal Rules of Criminal Procedure.
246 Wright and Miller (2020) *Federal Practice and Procedure (Criminal)* §251.
247 *Williams v. Florida*, 90 S.Ct. 1893 (1970).

qualifications of the witness, it must describe the opinions the witness will give, and it must state the bases of the expert's opinion.[248] If the defendant requests disclosure under Rule 16(a)(1)(G), the government is given a reciprocal right under Rule 16(b)(1)(C) to obtain a summary of expert testimony the defendant intends to use at trial.

In addition to the discovery process the Federal Rules of Criminal Procedure also provides for pretrial conferences. In terms of Rule 17.1 the parties can hold one or more pretrial conference to promote a fair and expeditious trial. The pretrial conference can be arranged between the parties or on a party's motion.[249] The rule does not determine the form or what must be discussed at the pretrial conference but leaves it to the courts and the parties to decide. At the conclusion of the pretrial conference the court must prepare and file a memorandum of any matters agreed during the conference.[250] The pretrial can, therefore, be used to resolve questions relating to discovery of reports or expert witnesses. Unlike civil cases the rule is silent on any sanctions should parties not attend the court ordered pretrial conference. The rule further expressly provides that no admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and their attorney.[251]

The Federal Rules of Criminal Procedure has recently been amended to provide for a pretrial discovery conference. Rule 16.1, that came into effect on 1 December 2019, requires that:

> (a) Discovery Conference. No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.
> (b) Request for Court Action. After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

248 Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure.
249 Rule 17.1 of the Federal Rules of Criminal Procedure.
250 *Ibid.*
251 *Ibid.*

The Advisory Committee Notes indicates that the Rule is flexible with regard to the procedure and depending on the complexity of the case a brief informal conversation to settle the timing and procedure for discovery could suffice.[252] The introduction of the pretrial discovery conference is of particular importance in complex discovery cases and will assist greatly in preparing timeously for trial.

Rules for depositions differ vastly in civil cases compared to criminal cases. In criminal cases depositions may only be taken upon a court order and the court will allow depositions in exceptional circumstances and in the interest of justice.[253] In contrast to civil proceedings depositions in criminal matters are not for discovery purposes but only to preserve evidence.[254] A further limitation of the taking of a deposition is that defendants may not be deposed without the defendants' consent to reflect the protection afforded by the self-incrimination clause contained in the United States Constitution.[255] Depositions can assist in preserving evidence that would otherwise be lost but in general live testimony is preferred.[256]

In criminal proceedings if a defendant intends to assert a defence of insanity[257] at the time of the alleged offence the defendant must notify the attorney of the government in writing.[258] A defendant who does not file the notice within the prescribed time cannot rely on the defence.[259] The defendant must also notify the attorney of the government, in writing, of any expert evidence of a mental condition that they wish to introduce.[260] The evidence must have bearing on the issue of guilt or the issue of punishment in a capital case.[261] The purpose of the rule is to ensure that the government has time to prepare its response and also acquire expert witnesses, avoiding delays in the trial. The rule does not, however, specify what exactly must be contained in the notice. Failure to give notice can result in the court excluding any expert evidence on the issue

252 Advisory Committee Notes (2019 Adoption) to Rule 16.1 of the Federal Rules of Criminal Procedure.
253 Rule 15(a)(1) of the Federal Rules of Criminal Procedure.
254 *Ibid.*
255 Rule 15(e)(1) of the Federal Rules of Criminal Procedure.
256 Wright and Miller (2020) *Federal Practice and Procedure (Criminal)* §242.
257 In South Africa an accused does not rely on an insanity defence but rather relies on the defence of pathological criminal incapacity.
258 Rule 12.2(a) of the Federal Rules of Criminal Procedure.
259 *Ibid.*
260 Rule 12.2(b) of the Federal Rules of Criminal Procedure.
261 *Ibid.*

of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or issue of punishment.[262]

The California Penal Code makes provision for discovery in criminal proceedings and emphasises that discovery promotes the ascertainment of truth[263] and saves court time.[264] The California Penal Code requires the parties to first make an informal request for discovery and if the opposing party fails to provide the information or materials the court can be approached.[265] With respect to the disclosure of expert witnesses both the prosecuting attorney and the defendants (or their attorneys) must disclose to the other party the names of the experts[266] and the relevant reports or statements, including physical or mental examinations, scientific tests, or experiments.[267] The discovery is wider than a prepared expert report as illustrated in *People v. Lamb* where the accident reconstruction expert had not prepared a written report but had made notes of interviews and calculations which in terms of statute had to be discovered.[268] The section was specifically formulated to include more than prepared reports as the court in *Lamb* remarked, written reports are sometimes not prepared in order to avoid discovery.[269]

Ensuring adequate exchange of expert information can be viewed, as Meintjies-Van Der Walt indicates, as a means of achieving "equality of arms".[270] Reciprocal disclosure will be in the interests of justice, especially with regard to expert evidence information to ensure that both parties are thoroughly prepared. It is submitted that South Africa should consider codifying similar provisions to that of California to allow for discovery of information relating to expert evidence.

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262 Rule 12.2(d)(1) and (2) of the Federal Rules of Criminal Procedure.
263 Section 1054(a) of the California Penal Code.
264 Section 1054(b) of the California Penal Code.
265 Section 1054.5(b) of the California Penal Code.
266 Section 1054.1(a) and 1054.3(a)(1) of the California Penal Code.
267 Section 1054.1(f) and 1054.3(a)(1) of the California Penal Code.
268 *People v. Lamb*, 40 Cal. Rptr. 3d 609 (2006) at 611.
269 *Ibid.*
270 Meintjies-Van Der Walt (2001) *Expert evidence in the criminal justice process: A comparative perspective* 115.

6.4.3 Presentation of expert evidence at trial

> The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.[271]

The Advisory Committee Note reminds us that the American legal system, as most adversarial systems, prides themselves in the adversarial tradition and considers *viva voce* evidence as crucial to the trial. In civil trials Rule 43 of the Federal Rules of Civil Procedure determines that a witnesses' testimony must be taken in open court unless Federal Rules or other rules adopted by the Supreme Court provide otherwise.[272] Under exceptional and compelling circumstances the court may permit testimony by contemporaneous transmission from a different location.[273] A similar provision is contained in the Federal Rules of Criminal Procedure determining that testimony of witnesses must be taken in open court.[274] In civil proceedings further provision is made for evidence on motion where the court may hear the matter on affidavits or may hear wholly or partly on oral testimony or on depositions.[275]

An expert witness when testifying is allowed to refresh their recollection by making use of notes, records, sketches or any other writings.[276] As in South African law, a witness may not simply read into evidence the contents of the writings.[277] If a witness relies on writings to refresh their memory while testifying the an adverse party is entitled to have the writing produced to inspect it, to cross-examine the witness about it and to introduce in evidence any portion that relates to the testimony.[278] An expert report can therefore not simply be read into the record to be admitted as evidence.

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271 Advisory Committee Notes (1996 Amendment) to Rule 46 of the Federal Rules of Civil Procedure.
272 Rule 43(a) of the Federal Rules of Civil Procedure.
273 *Ibid.*
274 Rule 26 of the Federal Rules of Criminal Procedure. Rule 26 provides that: "In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-2077".
275 Rule 43(c) of the Federal Rules of Civil Procedure.
276 *U.S. v. Ricks*, 475 F.2d 1326 (1973) at 1328.
277 *U.S. v. Holden*, 557 F.3d 689 (2009) at 703.
278 Rule 612 of the Federal Rules of Evidence.

The Federal Rules of Evidence gives the trial court the power to call a witness on its own or a party's request in both civil and criminal cases.[279] The court may further examine a witness regardless of whether the court or any other party called the witness.[280] When examining the judge is not permitted to appear to be an advocate for a party or a prosecutor.[281] The rule moves away from strict adversarial control of evidence by the parties and can be properly invoked in cases where the parties have omitted important evidence or if the presentation of evidence needs clarification.[282] Although the rule as mentioned can be invoked in both civil and criminal trials it is more frequently used in criminal trials.[283] Parties may object to the court calling or examining a witness.[284]

The power and obligation of the judge to control the mode and order of examining witnesses and presenting evidence is set out in Rule 611.[285] Judges must consider whether the mode and order is more effective for determining the truth,[286] avoids wasting time,[287] and protects witnesses from harassment or undue embarrassment.[288] This can include limiting the number of witnesses that will be permitted to testify to ensure time is not wasted.[289] Although the Federal Rules of Evidence do not expressly provide for the process of concurrent expert evidence the framework does allow for the use tacitly.[290] As can be seen from Rule 611 the Federal Rules provide much latitude for judges in controlling the presentation of evidence and Rule 614 provides judges with the power to call and examine witnesses.

279 Rule 614(a) of the Federal Rules of Evidence.
280 Rule 614(b) of the Federal Rules of Evidence.
281 Wright and Miller (2020) *Federal practice and procedure (Evidence)* §6232.
282 *Ibid.*
283 Advisory Committee Notes (1972 Proposed Rules) to Rule 614 of the Federal Rules of Evidence.
284 Rule 614(c) of the Federal Rules of Evidence.
285 Rule 611(a) of the Federal Rules of Evidence.
286 Rule 611(a)(1) of the Federal Rules of Evidence.
287 Rule 611(a)(2) of the Federal Rules of Evidence.
288 Rule 611(a)(3) of the Federal Rules of Evidence.
289 Wright and Miller (2020) *Federal practice and procedure (Evidence*) §6164.
290 McGrath "Expert Hot Tubbing: An opportunity for U.S. Disputes or Australian Folly?" (2017) 16 *Mass Torts* 14 and Butt "Concurrent expert evidence in U.S. toxic harms cases and civil cases more generally: Is there a proper role for "hot tubbing"?" (2017) 40 *Houston Journal of International Law* 50.

In the United States of America save for a few isolated cases[291] there is a resistance amongst legal representatives and judges to use the concurrent expert evidence model to present evidence.[292] In fact, the process of concurrent expert evidence is rare in the United States.[293] Butt argues that in the American legal system the use of concurrent expert evidence will be challenging as the American system tolerates, and some authors argue even encourages, the allegiance of an expert to the party that retains them.[294] Another reason for the resistance is ascribed to the judges concern about the acceptability of using concurrent evidence in jury trials.[295]

The provisions regulating the presentation of expert evidence in the state courts in California and the federal courts are virtually identical with both placing an emphasis on oral testimony. Both federal and state courts also allow for the use of writing to refresh memory, allowing the adverse party to inspect the writing.[296] But the expert witness, as in federal courts, cannot simply read their expert report into the record.

As with the federal courts the state courts in California have codified various rules regarding the presentation of evidence to assist in expeditious trials that are effective in the ascertainment of truth. First, the courts may limit the number of expert witnesses to be called by a party.[297] The presentation of evidence at trial is also regulated by the court. Section 320 of the California Evidence Code determines that: "[e]xcept as otherwise provided by law, the court in its discretion shall regulate the order of proof".

The California Penal Code in respect of criminal trials, further determines that it is the duty of the judge to control the proceedings of the court, which includes limiting the introduction of evidence and the argument of counsel to relevant and material

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291 The first reported case using concurrent expert evidence was in 2003, *Black Political Task Force v. Galvin*, 300 F.Supp. 2d 291 (2004). Concurrent expert evidence has also been used in the U.S Tax Court, for example, in the case of *Green Gas Delaware Statutory Trust v. Commissioner*, 147 T.C. No.1 (2016) the court remarked that the use of concurrent expert evidence expeditated the "decision making process by more easily separating the reliable portions of the expert reports from the unreliable".

292 Butt (2017) *Houston Journal of International Law* 41.

293 *Idem* 64.

294 *Idem* 41.

295 *Idem* 44-45.

296 Section 771 of the California Evidence Code.

297 Section 723 of the California Evidence Code.

matters.[298] The court must ensure that the proceedings are expeditious and effective in the ascertainment of truth.[299] Section 765 of the Evidence Code places a duty on the court to exercise reasonable control over the mode of interrogation of a witness. The regulation pertaining to the presentation of evidence is the same as federal courts and therefore it can also be said that the state courts in California have a framework in place to allow for concurrent expert evidence. Concurrent expert evidence will, however, not be discussed as the situation is exactly the same in California where the use of concurrent evidence is a rarity.

6.4.4 The right to challenge expert witnesses

Volumes can be written on the emphasis that American courts place on cross-examination, especially in criminal cases. The words of Justice Black in *Pointer v. Texas* provide an apt summation on the emphasis placed:[300]

> …no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case…[T]he decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in *Kirby v. United States*…,referred to the right of confrontation as '(o)ne of the fundamental guaranties of life and liberty,' and 'a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States…'

In *Daubert* the court commented that the traditional and appropriate means of attacking "shaky but admissible evidence" is by way of vigorous cross-examination.[301] Cross-examination of an expert witness differs from that of a lay witness. As Justice Lillie indicated in the case of *Hope v. Arrowhead & Puritas Waters, Inc*., once an expert witness offers their opinion they can be cross-examined on the "extent of his knowledge" which includes being "subjected to the most rigid cross-examination' concerning his qualifications, and his opinion and its sources".[302] Usually a witness

298 Section 1044 of the California Penal Code.
299 *Ibid*.
300 *Pointer v. Texas*, 85 S.Ct. 1065 (1965) at 1068.
301 *Daubert v. Merrell Dow Pharmaceuticals Inc*. at 596.
302 *Hope v. Arrowhead & Puritas Waters, Inc.*, 344 P.2d 428 (1959) at 433.

may only be cross-examined on the subject matter of direct examination and credibility[303] but the scope is wider in the case of expert witnesses as Rule 803(18) allows the expert witness to be cross-examined about the content of published treaties, periodicals or pamphlets irrespective of whether the expert relied on them or considers them authoritative.[304] Rule 803(18) is designed to avoid "the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness".[305] The expert's credibility may be attacked under cross-examination based on the compensation that the expert received or will receive and can influence weight to be given to the testimony.[306]

In California the Evidence Code has a number of provisions that regulate the cross-examination of expert witnesses. Section 721(a) determines that an expert witness may be cross-examined to the same extent as any other witness but in addition they may be fully cross-examined as to:[307]

1) their qualifications,
2) the subject to which their expert testimony relates, and
3) the matter upon which their opinion is based and the reasons for their opinion.

Unlike the Federal Rules of Evidence cross-examination is prohibited in regard to the "content or tenor of any scientific, technical or professional text, treatise, journal or similar publication" unless certain requirements are met.[308] The requirements being the expert witness referred to, considered or relied on the publication to form their opinion,[309] or the publication was admitted into evidence,[310] or the publication has been established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice.[311]

303 Rule 611(b) of the Federal Rules of Evidence.
304 Advisory Committee Notes (1972 Proposed Rules) to Rule 803 of the Federal Rules of Evidence.
305 *Ibid.*
306 *U.S. v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390 (4th Cir. 1993) at 1405-1406.
307 Section 721(a) of the California Evidence Code.
308 Rule 721(b) of the California Evidence Code.
309 Rule 721(b)(1) of the California Evidence Code.
310 Rule 721(b)(2) of the California Evidence Code.
311 Rule 721(b)(3) of the California Evidence Code.

Section 722(b) of the California Evidence Code allows the opposing party to question an expert about the compensation and expenses paid to them by the party calling them as the is considered relevant to the "credibility of the witness and the weight of the testimony".[312] The section further provides that the fact that an expert was appointed by the court may be revealed to the jury.[313] The Law Revision Commission Comments accompanying section 722 advises that the rule enunciated in section 722 is a "desirable rule" because the jury is placed in a better position to "appraise the extent to which bias may have influenced an expert's opinion if it is informed of the amount of his fee". It is argued that an expert being paid for their services is not indicative of bias, and too much reliance should not be placed on the payment of fees to determine whether an expert is biased.

6.4.5 Duties of the expert witness

The expert witness in the United States of America is considered by scholars not to be a functionary of the court.[314] In the United States partisan preparation of witnesses is the traditional feature of the adversarial system and attorneys are excepted to present evidence that is favourable.[315] Expert witnesses do not have definitive duties set out through case law or rules of court in the United States and will need to turn to professional organisations to provide for guidance in their fields.[316] It is argued that within the American legal system the regulatory framework relies solely on the rules of admissibility and cross-examination but this is not sufficient to prevent biased, partisan and unobjective testimony by expert witnesses.

6.4.6 Evaluating expert evidence

In evaluating expert evidence, the principles enunciated in federal cases and the Californian state cases are almost exactly the same and will, therefore, be discussed

312 Section 722(b) of the California Evidence Code.
313 Section 722(a) of the California Evidence Code.
314 Butt (2017) *Houston Journal of International Law* 42.
315 Sonenshein and Fitzpatrick "The problem of partisan experts and the potential for reform through concurrent evidence" (2013) 32 *Review of Litigation* 11.
316 *Idem* 18-19.

together. The weight to be given to the expert evidence is for the trier of fact to decide. In trials by jury the juries can be given instructions regarding the evaluation of expert evidence. The function of jury instructions is to ensure that issues are clarified and to educate jurors about what factors are probative.[317] In California the court must instruct the jury that the duly qualified experts may give their opinions and the jury may consider the opinion but is not bound to accept it and should give weight to the opinion or disregard the opinion.[318] In federal courts, upon request, the juries may also be instructed about the weight to be given to the expert opinion.[319]

The trier of fact may reject the expert testimony even if the testimony is uncontradicted.[320] The only exception where the trier of fact must accept uncontradicted expert testimony as conclusive is in cases of professional negligence where the standard of care must be established by expert testimony.[321] In *Howard v. Owens Corning* the court explained that this entails that "the plaintiff must prove by members of the defendant's profession the standard of care or skill ordinarily used in the practice of that profession at a particular place".[322] The federal court has also emphasised the importance of expert evidence in malpractices cases dealing with standard of care as describing a malpractice case without expert testimony as "legal malpractice".[323] If there is a conflict between the opinions of different expert witnesses the evidence must be weighed and considered like any other evidence in the case.[324]

In evaluating the expert evidence the trier of fact must take into consideration whether the expert proved the foundational fact or some fact upon which the opinion is based or whether the foundational fact has been disproved by the opposing party.[325] As per the court in *Howard* the opinion of the expert witness is "only as good as the facts and

317 Jones *et al*. (2020) *The Rutter Group practice guide: Federal civil trials and evidence* §15:2.
318 Section 1127b of the California Penal Code.
319 Jones *et al*. (2020) §11:220.
320 *Powers v. Bayliner Marine Corp*., 83 F.3d (6th Cir. 1996) at 798 and *Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership*, 238 Cal. App 4th 370 at 392.
321 *Howard v. Owens Corning*, 72 Cal. App. 4th 621 (1999) at 632.
322 *Ibid*.
323 *American International Adjustment Co. v. Galvin*, 86 F.3d 1455 (1996) at 1461.
324 *Knapp v. Leonardo*, 46 F.3d 170 (2nd Cir. 1995) at 179 and *Southern California Edison Co. v. Gemmill*, 30 Cal. App. 2d 23 (1938) at 27.
325 *Howard v. Owens Corning* at 633.

reasons on which it is based".[326] This was reiterated by the *People v. Coogler* in which the court also emphasised the reasoning by an expert stating that the value of an expert's testimony "rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his materials to his conclusion".[327] In *People v. Coogler* a psychiatrist Dr Suarez, testified that at the defendant had endured a disassociation at the time of the murder, furthermore, that the defendant was suffering from organic brain damage and that he (the defendant) can at times become acutely psychotic.[328] Dr Suarez based his opinion on the history related to him by the defendant, the observations made during the interview with the defendant and on the psychologist's report.[329] Dr Suarez conceded that he had not taken into consideration or examined any police reports, or the transcripts of the preliminary hearings.[330] Basis of the psychiatrist's opinion was the self-serving descriptions and history provided by the defendant and was rejected by the court.

Despite many of the principles in evaluating expert evidence corresponding, the position in South Africa compared to the United States does differ. The presence of a jury influences the evaluation of expert evidence since the instructions to a jury can be crucial to ensure that juries understand the factors that are probative. Without a jury the evaluation and the weight attached to expert evidence rests solely on the presiding officer, whether a judge or magistrate. American position regarding evaluating expert evidence does not assist South African courts in approaching difficulties such as conflicting expert evidence.

6.4.7 Court assessors and court appointed experts

Rule 706 of the Federal Rules of Evidence makes provision for the court to appoint their own expert witness. This can be done either on a party's motion or the court's own motion.[331] The court can ask parties to submit nominations and may appoint an

326 *Ibid*.
327 *People v. Coogler*, 71 Cal. 2d 153 (1969) at 166.
328 *Idem* 163.
329 *Idem* 166.
330 *Idem* 167.
331 Rule 706(a) of the Federal Rules of Evidence.

agreed upon expert or an expert of their own choosing.[332] If the court on their own motion appoints an expert this does not limit a party to call their own expert.[333] If the chosen expert witness consents to act as an expert the court must inform them of their duties[334] which include advising the parties of any findings;[335] being available for a deposition by any party;[336] testifying at court[337] and being subjected to cross-examination.[338] The expert may be called to testify by the court or any party.[339] Any of the parties can cross-examine the expert witness including the party that called the witness.[340] Rule 706(d) determines that the court may disclose to the jury that the expert has been appointed by the court.

Rule 706 does not govern or limit the appointed of a non-testifying expert as the court has an inherent power to appoint an expert to act as a technical advisor or consultant.[341] A technical advisor or consultant need not file an expert report and is not subject to cross-examination[342] and does not "contribute evidence" to the matter.[343] To ensure that the role of the court as independent decisionmaker is not compromised it is suggested that the courts should:[344]

- utilize a fair and open procedure for appointing a neutral technical advisor;
- address any allegations of bias, partiality or lack of qualification;
- clearly define and limit the technical advisor's duties;
- make clear to the technical advisor that any advice he or she gives to the court cannot be based on any extra-record information;
- make explicit, either through an expert's report or a record of *ex parte* communications, the nature and content of the technical advisor's advice.

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332 Rule 706(a) of the Federal Rules of Evidence.
333 Rule 706(e) of the Federal Rules of Evidence.
334 Rule 706(b) of the Federal Rules of Evidence. The Rule provides that this can be done in writing with a copy filed at the court clerk or it can be done orally at a conference in which the parties have an opportunity to participate.
335 Rule 706(b)(1) of the Federal Rules of Evidence.
336 Rule 706(b)(2) of the Federal Rules of Evidence.
337 Rule 706(b)(3) of the Federal Rules of Evidence.
338 Rule 706(b)(4) of the Federal Rules of Evidence.
339 Rule 706(b)(3) of the Federal Rules of Evidence.
340 Rule 706(b)(4) of the Federal Rules of Evidence.
341 *Association of Mexican-American Educators and others v. State of California*, 231 F.3d 572 (2009) at 590.
342 *Ibid.*
343 *Ibid.*
344 Jones *et al*. (2020) §8:1736.

An innovative way of using expert as advisors is illustrated in the case of *Hall v. Baxter Healthcare Corp*. in which the recipients of silicone breast implants brought a products liability claims against the manufacturer of the implants.[345] Judge Jones invoked his inherent authority to appoint a panel of experts within the fields of epidemiology, toxicology , and chemistry to assist as technical advisors.[346] At the pre-trial the parties' experts made presentations and were then questioned by the judge and the advisors. With the assistance of the panel of experts the judge decided whether the evidence was reliable and relevant.[347]

In California the California Evidence Code also provides for the appointment of an expert by court and in essence adopted Rule 706.[348] Similar to the provisions of Rule 706 the court can appoint an expert witness on its own motion of on motion of any party.[349] The court can appoint one or more experts and specifies that the expert can investigate, render a report and testify at trial relevant fact or matter as to which expert evidence is required.[350] Section 732, similar to Rule 706, determines that the expert witness may be called and examined by the court or any party. Both the parties may cross-examine the expert witness.[351] In the state of California the court may also reveal to the trier of fact, which includes the jury,[352] that the expert was appointed by the court.[353] Nothing prohibits the parties to produce other expert evidence on the same fact or matter as the court has appointed an expert.[354]

Despite the provision it appears that courts do not readily make use of court appointed experts[355] and the different states as Slovenko indicates are also "lukewarm to the concept".[356] Some of the reasons for the lack of use of court appointed experts is that

345 *Hall v. Baxter Healthcare Corp.*, 947 F.Supp. 1387 (D.Or. 1996).
346 *Idem* 1392-1393.
347 *Idem* 1394.
348 Section 730 of the California Evidence Code.
349 *Ibid.*
350 *Ibid.*
351 Section 732 of the California Evidence Code.
352 Section 235 of the California Evidence Code defines trier of fact as "(a) the jury and (b) the court when the court is trying an issue of fact other than one relating to the admissibility of evidence".
353 Section 722 of the California Evidence Code.
354 Section 733 of the California Evidence Code.
355 Gross "Expert evidence" (1991) 6 *Wisconsin Law Review* 1118-1119.
356 Slovenko "Commentary: Holding the expert accountable" (2001) 29 *The Journal of Psychiatry and Law* 574.

the provisions do not help judges locate and select appropriate experts, and finding experts can be problematic, furthermore, opponents argue that the court appointed expert will have too much power.[357] Gross argues that the true reason for the failure to use court-appointed experts in the United States is the "steadfast hostility of trial lawyers"[358] which is rooted in the in the belief that court appointed experts do not belong in an adversarial trial. It is submitted that much of the same criticism against court appointed experts has emerged in South Africa. Court appointed experts can be used with great success, as in the case of *Hall*, but will not be always be plausible in country such as South Africa where experts in specific areas are limited.

6.4.8 Immunity

The American courts consider witness immunity so crucial that it has been maintained even in cases of possible negligence by the witness.[359] In *Briscoe v. LaHue* the plaintiffs brought a damages claim against local police officer who allegedly gave perjured testimony against them at their criminal trial.[360] The court in *Briscoe* examined the history of the immunity of witnesses against civil claims and remarked that the reason for the immunity as held in the 1860 case of *Calkins v. Sumner*[361] is "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible".[362] The main reasons for witness immunity the court continued is that witnesses might be reluctant to testify otherwise and if they still testify the testimony might be distorted because of fear for liability.[363] In *Mitchell v Forsyth* the court added to the reasons of witness immunity and noted that:[364]

> The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict.

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357 Gross (1991) *Wisconsin Law Review* 1191-1192.
358 *Idem* 1197.
359 Binder (2002) *American Journal of Psychiatry* 1820.
360 *Briscoe v. LaHue*, 460 U.S. 325 (1983).
361 *Calkins v. Sumner*, 13 Wis. 193 (1860) at 197.
362 *Briscoe v. LaHue* at 332-333.
363 *Idem* 333.
364 *Mitchell v. Forsyth*, 472 U.S. 511 (1985) at 521-522.

In *Bruce v. Byrne-Stevens & Associates Engineers, Inc*. action was brought against an engineer who testified as expert witness who allegedly negligently rendered an opinion on damages.[365] This was first case to address the issue of the so-called "friendly expert" immunity, immunity which is granted to an expert witness against an action brought by the party that retained them.[366] The court in *Bruce* granted immunity to the engineer on the same reasoning used in *Briscoe*. The court in *Bruce* also held that there are already other safeguards in place to protect against false or inaccurate testimony, namely the witness' oath, cross-examination and the threat of perjury.[367] The court in Bruce considered civil liability a "weak tool to ascertain an expert's truthfulness".[368] Since the *Briscoe* and *Bruce* cases many courts (including federal and various state courts) have extended the witness immunity to expert witnesses.[369] In the federal case of *Kahn v. Burman* the immunity was extended to an adverse expert witness to cover the expert report and the deposition.[370]

In California, under Civil Code section 47(b), statements made during judicial proceedings are generally privileged and nonactionable, except in a malicious prosecution claim.[371] The Supreme Court of California in the case of *Silberg v. Anderson* held that the application of the "interest of justice" test applied by some courts is inconsistent with the litigation privilege afforded by section 47.[372] Justice Kaufman in *Silberg* held that:[373]

> However, the evils inherent in permitting derivative tort actions based on communications during the trial of a previous action are,…, far more destructive to the administration of justice than an occasional "unfair" result. Accordingly, we disapprove the decisions announcing or employing the "interest of justice" rule to the extent they are inconsistent with this opinion.

365 *Bruce v. Byrne-Stevens & Associates Engineers, Inc*., 776 P.2d 666 (1989).
366 Jurs "The rational for expert immunity or liability exposure and case law since Briscoe: Reasserting immunity protecting for friendly expert witnesses" (2007) 38 *University of Memphis Law Review* 52.
367 *Bruce v. Byrne-Stevens & Associates Engineers, Inc*., 776 P.2d 666 (1989) at 667.
368 Jurs (2007) *University of Memphis Law Review* 66.
369 *Idem* 57.
370 *Kahn v. Burman,* 673 F.Supp. 210 (E.D. Mich.1987) at 212-213.
371 Section 147(b) California Civil Code.
372 *Silberg v. Anderson,* 786 P.2d 365 (Cal.1990).
373 *Idem* at 369.

California Court of Appeals was, however, the first court to reject the *Bruce* approach in *Mattco Forge Inc. v Arthur Young & Co*.[374] In *Mattco Forge* the court allowed a claim against expert witnesses for negligence indicating an erosion of the immunity doctrine. In this case Mattco Forge had hired Arthur Young, an accounting firm, as damage consultant and expert witness.[375] According to the plaintiff Arthur Young had fraudulently represented the firm's expertise as stating that the support professionals were specially trained in legal procedures in California.[376] It was further alleged that an inexperienced accountant, who had no training or experience in litigation services, was used by the firm at the trial. In the trial court dismissed the claim based on the "litigation privilege" of the expert witness. The Court of Appeal found that the immunity of a witness is not absolute allowing the claim against the expert witness.[377] The case allowed a retaining party to institute an action against their own expert witness after misrepresenting expertise and where their work was below the standards of practice.[378] The court, however, distinguished between pretrial work during discovery and testimony at court, this case relating to pretrial work.

There is, however, no immunity against any disciplinary proceedings by a professional society against a member based on improper testimony. In *Austin v American Association of Neurological Surgeons* a neurosurgeon brought action against the voluntary professional association of neurological surgeons.[379] Dr Austin argued that it was against public policy for a professional association to discipline a member based on trial testimony unless it was intentionally false.[380] In support of this argument Dr Austin argued that the threat of sanctions would act as a deterrent to professionals acting as expert witnesses leading to what he described as a disservice and "interference with the cause of civil justice".[381] The court disagreed with this arguments and stated that the self-regulation by a professional association furthers the cause of justice.[382]

374 *Mattco Forge Inc v Arthur Young & Co.*, 5 Cal. App. 4th 392 (1992).
375 *Idem* 402.
376 *Ibid*.
377 *Idem* 407.
378 See discussion in Binder (2002) *American Journal of Psychiatry* 1822.
379 *Austin v. American Association of Neurological Surgeons* 253 F.3d 967 (7th Cir. 2001).
380 *Austin v. American Association of Neurological Surgeons* at 969.
381 *Idem* 972.
382 *Ibid*.

Judge Posner made a crucial observation that "judges are not experts in any field except law".[383] That being said, much can escape judges in highly technical fields such as neurosurgery and the courts need the help of professional organisations in screening experts.[384] Judge Posner continued by stating that even if a judge rules that expert testimony is admissible this is not indication that it is responsible testimony.[385] The court in *Austin* held that there was little doubt that Austin's testimony was irresponsible and violated the Association's ethical codes.[386] The procedure of the association did not violate public policy.[387] The case underscores the importance of ethical codes of organisations and associations that will be discussed below.

6.5 Regulation within the statutory bodies and professional organisations

Professional organisations and associations in the United States play a crucial part in regulating the profession as courts and legislatures are often influenced by their codes of conduct.[388] Bonnie argues that the quality of psycho-legal assessments and psychiatric evidence can only be assured if the developed standards of practice are, where necessary, enforced by the profession itself.[389] Within California and throughout the United States there are numerous associations that have been established to promote, develop and guide the professions of psychiatry and psychology. This chapter will only focus on the most prominent national associations in the psychiatry and psychology that have also been influential globally, being the American Medical Association, American Psychiatric Association, American Academy of Psychiatry and Law and the America Psychological Association.

383 *Ibid.*
384 *Idem* 973.
385 *Ibid.*
386 *Idem* 971.
387 Judge Williams did not agree with the judgment of Judge Posner and held that the court need not have proceeded to decide on whether the procedure was a violation of public policy as a federal court should be hesitant to make determinations on state law unnecessarily. *Austin v. American Association of Neurological Surgeons* at 975.
388 Simon and Sadoff (1992) *Psychiatric malpractice: Cases and comments for clinicians* 14.
389 Bonnie (2010) *The Journal of the American Academy of Psychiatry and the Law* 572.

Licensing and registration of the psychiatrists and psychologists in a particular state is not the responsibility of associations but the different state boards. In the United States psychiatrists and psychologists must have a licence to practice in a particular state as the state law requirements to practice can differ.[390] In California the Board of Psychology, a regulatory entity under the Department of Consumer Affairs, regulates licensed and registered psychologists in the state including taking disciplinary steps against psychologists.[391] The Medical Board of California, also a regulatory entity under the Department of Consumer Affairs, licenses and disciplines physicians, including specialists such as psychiatrists.[392] The California Business and Professions Code contains the relevant statutes and rules that govern both the Board of Psychology and the Medical Board. The Medical Board follows the American Medical Association's *Code of Medical Ethics* and in terms of section 2936 of the Business and Professions Code the California Board of Psychology shall apply the standards of the American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* as the "accepted standard of care in all licensing examination development and in all board enforcement policies and disciplinary case evaluations". The American Medical Association's *Code of Medical Ethics* and the American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* will be discussed at length under the sections dealing with the respective associations below. As such the medical and psychological boards in California will be not be dealt with in further detail.

6.5.1 American Medical Association (AMA)

The American Medical Association (AMA) is the largest association of physicians and medical students in the United States of America.[393] The goals of the AMA include

390 The Association of State and Provincial Psychology Boards (ASPPB) is an alliance of state, provincial, and territorial agencies that are responsible for licensure of psychologists throughout the United States and Canada with the purpose of enhancing mobility between states for psychologists. See ASPPB "What is ASPPB?" (2020) available online at https://www.asppb.net/page/What_is_ASPPB (last accessed on 27 May 2020).

391 Department of Consumer Affairs "What is the California Board of Psychology?" (2016) available online at https://www.psychology.ca.gov/about_us/whatis.shtml (last accessed on 27 May 2020).

392 Department of Consumer Affairs "Role of the Medical Board of California" (2020) available online at https://www.mbc.ca.gov/About_Us/Role.aspx (last accessed on 27 May 2020).

393 American Medical Association "AMA History" (2020) available online at https://www.ama-assn.org/about/ama-history/ama-history (last accessed on 26 May 2020).

scientific advancement, to ensure high standards for medical education, and improving public health.[394] AMA was also founded in part to establish the first national codification of medical ethics,[395] which was codified in 1847. The national organisation consists of a board of trustees, house of delegates, various councils, and member groups. Of particular importance for purposes of this study is the Council on Ethical and Juridical Affairs (CEJA) who has two primary responsibilities: to develop, maintain and update the AMA *Code of Medical Ethics* and secondly to promote adherence to the Code's professional ethical standards.[396]

6.5.1.1 Ethical guidance

The AMA *Code of Medical Ethics* is comprised of the principles of medical ethics together with the opinions of the AMA's Council in Ethical and Judicial Affairs.[397] The *Code of Medical Ethics* contains nine principles of medical ethics that are considered the core ethical principles of the medical profession.[398] As Beauchamp and Childress note most medical codes incorporate or presuppose the four clusters of moral principles, namely respect for autonomy, nonmaleficence, beneficence and justice,[399] and the AMA *Code of Medical Ethics* is no exception. Although justice and respect for autonomy were neglected in the first code of ethics of the AMA in 1847, the code has since then undergone some major changes.[400]

The opinions of the AMA that form part of the *Code of Medical Ethics* (AMA Code) has been divided into ten chapters with a selected few that contain opinions that provide guidance for physicians who act as expert witnesses.[401] For purposes of this study

394 Article II of the Constitution of the American Medical Association.
395 American Medical Association "Ethics" (2020) available online at https://www.ama-assn.org/delivering-care/ethics (last accessed on 26 May 2020).
396 American Medical Association "Council on Ethical and Judicial Affairs (CEJA)" (2020) available online at https://www.ama-assn.org/councils/council-ethical-judicial-affairs (last accessed on 26 May 2020). See also the Bylaw 1.1.1.3 of the American Medical Association (January 2020).
397 AMA "Code of Medical Ethics overview" (2020) available online at https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-overview (last accessed om 26 May 2020).
398 *Ibid.*
399 Beauchamp and Childress (2019) *Principles of biomedical ethics* 13.
400 *Ibid.*
401 The ten chapters are ethics of patient-physician relationship; ethics of consent, communications and decision making; ethics of privacy, confidentiality and medical records; ethics of genetics and reproductive medicine; ethics of caring for patients at the end of life; ethics of organ procurement and transplantation; ethics of

only the opinions relevant to physicians acting as expert witnesses will be examined. Opinion 9.7.1. specifically pertains to medical testimony.[402] The opinion starts by explaining that medical evidence is critical in various legal proceedings and physicians must assist the administration of justice.[403] Opinion 9.7.1 places a duty on physicians that act as witnesses to:

> (a) Accurately represent their qualifications.
> (b) Testify honestly.
> (c) Not allow their testimony to be influence by financial compensation. Physicians must not accept compensation that is contingent on the outcome of litigation.

As per the rules of court there is a strong emphasis on the fees paid to expert witnesses to prevent financial bias. The duties mentioned above are for physicians irrespective of whether they act as fact witnesses or expert witnesses. Within the rest of the opinion the duties of the fact witness are distinguished from the duties of the expert witness. The duties of the fact witnesses are written from the position that a physician must at all times ensure that the patient's medical interests are paramount.[404] The difference between a fact witness and an expert witness is not described explicitly but from the opinion and the wording used it is clear that a fact witness has a physician-patient relationship. This distinction is pertinent as it stresses that physicians who act as experts have a different type of relationship with the person being evaluated.

In accordance with the AMA Code a physician who testifies as expert witness must:[405]

> (h) Testify only in areas in which they have appropriate training and recent, substantive experience and knowledge.
> (i) Evaluate cases objectively and provide an independent opinion.
> (j) Ensure that their testimony:

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medical research and innovation; ethics for physicians and the health of the community; ethics of professional self-regulation; and ethics of interprofessional relationships. See AMA "Code of Medical Ethics overview" (2020) available online.

402 AMA "Medical testimony" (2020) available online at https://www.ama-assn.org/delivering-care/ethics/medical-testimony (last accessed on 27 May 2020).

403 *Ibid.*

404 *Ibid.*

405 *Ibid.*

1. Reflects current scientific thought and standards of care that have gained acceptance among peers in the relevant field.
2. Appropriately characterizes the theory on which testimony is based if the theory is not widely accepted in the profession.
3. Considers standards that prevailed at the time the event under review occurred when testifying about a standard of care.

The duties contained in the AMA Code has incorporated the requirements of the rules of evidence but also ensures that physicians know that as an expert they must act objectively and independently. Paragraph (h) of opinion 9.7.1 reflects the legal requirement of admissibility, the field of expertise rule, and paragraph (j) has incorporated some of the *Daubert* requirements and the requirements of Federal Rules of Evidence Rule 702. By including the legal requirements within the AMA Code, it ensures that physicians know what is expected of them and importantly, can be held responsible if they do not comply with the standards as set out in the AMA Code. Opinion 9.7.1 warns physicians that that societies and licensing boards assesses claims of false or misleading testimony and can issue disciplinary sanctions as they deem appropriate.[406]

The opinion does not only incorporate the legal requirements but also provides the physician with a reference to the AMA Principles that have been used to formulate the opinion. Of the nine core principles the following principles have been indicated as applicable to medical testimony:[407]

ii. A physician shall uphold the standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities.

iv. A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.

v. A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information

406 *Ibid.*

407 American Medical Association "Principles of medical ethics" (2020) available online at https://www.ama-assn.org/about/publications-newsletters/ama-principles-medical-ethics (last accessed on 27 May 2020).

available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.

vii. A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health.

These principles give the moral authority for the specifications in Opinion 9.7.1. By providing the principles upon which the opinion is based the AMA Code provides the physician with the ethical framework to make ethical decision that are not covered by the opinion. Principle II, to be honest in all professional interactions, refers to the obligation of veracity.[408] Beauchamp and Childress submit that rules that express the obligation of veracity is a specification of general principles, veracity being connected to respect for autonomy.[409] Veracity in health care is not only being honest but also refers to "timely, accurate, objective, and comprehensive transmission of information and to the way the professional fosters the patient's or the subject's understanding".[410] Principle V, can, therefore, also refer to the obligation of veracity. Principle IV, to safeguard the confidences and privacy, is also a specification of the general principle of respect for autonomy. The last principle, principle VII concerning the contribution to the betterment of public health, is connected to the general principle of justice. As Beauchamp and Childress indicate there are several general theories of justice including the well-being theory, which describes the "job of justice" as being concerned with the achievement of well-being for its members.[411] From the examination it appears that two general principles are applicable in medical testimony: respect for autonomy and justice.

Another AMA opinion that is relevant to expert witnesses is Opinion 1.2.6 pertaining to work-related and independent medical examinations. Opinion 1.2.6 explains that a physician that conducts a medical examination as independent contractor or as an industry-employed physician faces a conflict of duties.[412] The physician must take into consideration that only a limited patient-physician relationship has been established

408 Beauchamp and Childress (2019 327.
409 *Idem* 328.
410 *Ibid*.
411 *Idem* 280.
412 American Medical Association "Code of Medical Ethics Opinion 1.2.6" (2020) available online at https://www.ama-assn.org/delivering-care/ethics/work-related-independent-medical-examinations (last accessed 27 May 2020).

as they do not carry out many of the duties which form part of the traditional fiduciary role.[413] An industry-employed physician or independent medical examiners must disclose the nature of the relationship to the examinee before they gather information.[414] In doing so the physician must explain their role and how it differs from the traditional fiduciary role. Although the physician cannot treat the examinee they can when appropriate suggest that the person seek care from another qualified physician.[415]

In addition to the opinions of AMA, AMA has issued policies in respect of expert witness testimony. In 1997 AMA was called upon to adopt a policy regarding expert testimony to consider the act as a practice of medicine subject to peer review.[416] In response to the call the Board of Trustees compiled a report and stressed that although the determination of admissibility and credibility of expert witnesses is the function of the courts, "maintaining the integrity and quality of the profession and physicians,…, is well within the purview of both organized medicine and licensing boards".[417] The report indicates that very few state medical boards and medical societies have taken a strong position towards physicians who act as expert witnesses and this stems from difficulties of conducting peer review of expert witness testimony.[418] Some of the obstacles to effective peer review including the composition of a peer review panel; ascertaining the relevant facts; defining the standards of acceptable testimony; and the imposition of meaningful sanctions.[419]

AMA proposed in their report that to overcome the difficulties medical organisations should work together with state licensing boards to determine an effective disciplinary mechanism within their state law framework.[420] To achieve this AMA adopted Policy H-265.992 which encourages state medical societies to work with state licensing boards to develop the framework and to continue to educate physicians about ethical

413 *Ibid.*
414 *Ibid.*
415 *Ibid.*
416 American Medical Association "Report 18 of the Board of Trustees of the American Medical Association (1-98): Expert witness testimony" (1998) available online at https://www.aapl.org/expert-witness-testimony (last accessed on 28 May 2020).
417 *Ibid.*
418 *Ibid.*
419 *Ibid.*
420 *Ibid.*

guidelines and professional responsibility regarding the provision of expert testimony.[421] AMA also adopted Policy H-265.993 stating that: "(1) the giving of medico-legal testimony by a physician expert witness be considered the practice of medicine, and (2) all medico-legal expert witness testimony given by a physician should be subject to peer review".[422] The policy ensures that licensing boards and medical organisations will be able to take the necessary disciplinary steps against physicians acting as expert witnesses who have acted in contravention of the ethical code. To ensure that physicians, specifically in medical liability litigation, adhere to AMA's principles guiding expert witness testimony AMA's policy is that physician must sign an expert witness affirmation confirming that the physician will adhere to the principles.[423]

AMA also adopted Policy H-265.994 regarding expert witnesses in clinical matters confirming that AMA encourages members to service as impartial witnesses.[424] The policy further confirms that AMA does not tolerate false testimony by physicians and will report their findings to the appropriate licensing authority.[425] Furthermore, AMA opposes any contingency fee agreements and supports the right to cross-examine physicians on the following aspects:[426]

(i) the amount of compensation received for the expert's consultation and testimony;
(ii) the frequency of the physician's expert witness activities;
(iii) the proportion of the physician's professional time devoted to and income derived from such activities; and
(iv) the frequency with which he or she testified for either plaintiffs or defendants.

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421 American Medical Association "Expert witness testimony H-265.992" (2014) available online at https://policysearch.ama-assn.org/policyfinder/detail/testimony?uri=%2FAMADoc%2FHOD.xml-0-1841.xml (last accessed on 28 May 2020).

422 American Medical Association "Policy H-265.993" (2020) available online at https://policysearch.ama-assn.org/policyfinder/detail/testimony?uri=%2FAMADoc%2FHOD.xml-0-1842.xml (last accessed on 28 May 2020).

423 American Medical Association "Expert witness affirmation H-265.990" (2014) available online at https://policysearch.ama-assn.org/policyfinder/detail/testimony?uri=%2FAMADoc%2FHOD.xml-0-1839.xml (last accessed on 28 May 2020).

424 American Medical Association "Policy H-265.994" (2015) available online at https://policysearch.ama-assn.org/policyfinder/detail/testimony?uri=%2FAMADoc%2FHOD.xml-0-1843.xml (last accessed on 28 May 2020).

425 *Ibid.*

426 *Ibid.*

6.5.1.2 Disciplinary procedures of AMA

The Bylaws of AMA gives authority to the Council on Ethical and Judicial Affairs (CEJA) to request the president of the association to appoint investigating juries to which CEJA may refer complaints or any other evidence of unethical conduct.[427] If the investigating jury finds that there is a probable cause for action a statement of charges will be submitted to the president. The president in turn submits the statement to the CEJA who will continue to prosecute the person on behalf of the AMA.[428] AMA can only consider complaints against current members.

The statement of charges must allege an infraction of the AMA's constitution or bylaws or a violation of the principles of medical ethics of the AMA.[429] The respondent physician then has an opportunity to file a written answer to the statement of charges.[430] Thereafter a hearing shall be scheduled and at the conclusion of the hearing the hearing officer will provide a report with findings, conclusions, and recommendations.[431] The Bylaws provide that CEJA has the authority to acquit, admonish, censure, place on probation or expel the accused physician from AMA membership.[432]

6.5.2 American Psychiatric Association

The American Psychiatric Association is a leading psychiatric organisation worldwide with members practicing in more than 100 countries in world.[433] The American Psychiatric Association's goals include to improve the access to and quality of psychiatric services, to improve research into all aspects of mental illness, to improve psychiatric education and training, to foster collaboration among all who are concerned

427 Section 6.5.2.5 of the Bylaws of the American Medical Association (January 2020).
428 *Ibid*
429 American Medical Association "CEJA rules in cases of original jurisdiction" (2020) available online at https://www.ama-assn.org/councils/council-ethical-judicial-affairs/ceja-rules-cases-original-jurisdiction (last accessed on 27 May 2020).
430 The respondent physician has 30 days after delivery to file the response. American Medical Association "CEJA rules in cases of original jurisdiction" (2020) available online.
431 *Ibid.*
432 Section 6.5.2.5 of the Bylaws of the American Medical Association (January 2020).
433 American Psychiatric Association "About APA" (2020) available online at https://www.psychiatry.org/about-apa (last accessed on 27 May 2020).

aspects (whether medical or legal) regarding mental health and illness.[434] The American Psychiatric Association is governed by the Board of Trustees, Assembly and Components.[435] The main function of the Board of Trustees is to manage the affairs of the American Psychiatric Association and to formulate and implement policies.[436] The Assembly is a deliberative body that recommends action to the Board of Trustees and serves the needs of district branches.[437] To ensure that the American Psychiatric Association achieves their goals the Assembly and Board are supported by thirteen councils and eight standing committees, together known as the Components.[438]

Of importance for this study is the Ethics Committee that ensures that ethical complaints are handled in accordance with the Bylaws and with the *Principles of Medical Ethics with Annotations especially Applicable to Psychiatry*.[439] Mention also needs to be made of the Council on Psychiatry and Law which has the principle responsibility to evaluate legal developments focussing on legislation, regulations, and case law that has the potential to influence and aspect relating mental health care.[440] The principles together with the disciplinary procedures of the American Psychiatric Association will be dealt with below.

6.5.2.1 Ethical guidance

The members of the American Psychiatric Association are bound by ethical principles contained in the *Principles of Medical Ethics with Annotations especially Applicable to Psychiatry* (APA Principles). The American Psychiatric Association adheres to the American Medical Association's principles of medical ethics contained in AMA's *Code of Medical Ethics*. American Psychiatric Association has provided further annotations to AMA's general principles to provide for special ethical problems in psychiatric

434 Section 1.2 of the Bylaws of the American Psychiatric Association (May 2020).
435 American Psychiatric Association (April 2020) *Operations manual of the Board of Trustees and Assembly of the American Psychiatric Association* 1.
436 *Ibid*.
437 *Idem* 7.
438 *Idem* 1.
439 *Idem* 10-11.
440 American Psychiatric Association "Council on Psychiatry and Law" (2020) available online at https://www.psychiatry.org/about-apa/meet-our-organization/councils/psychiatry-and-law (last accessed 27 May 2020).

practice.[441] The annotations provide specifications of the general principles in context of a psychiatric practice and focuses on the treating relationship that exists between psychiatrist and patient. Only the annotations related to psycho-legal work will be examined.

Principle IV, as discussed above,[442] determines that, "a physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law". The American Psychiatric Association's annotations for principle IV considers the situation where psychiatrists examine individuals for security purposes or to determine legal competence, in those case the psychiatrist has a duty to describe the nature and the purpose and lack of confidentiality to the examinee at the beginning of the examination.[443]

The annotation to principle VII, also discussed above,[444] relates to giving statements or opinions about individuals who are in the light of public attention.[445] The American Psychiatric Association advises that under those circumstances psychiatrists may share with the public their expertise about psychiatric issues in general but prohibits psychiatrists from offering a professional opinion about a person unless they have conducted an examination.[446] These are the only to annotations that relate to psycho-legal work and it is notable that both AMA principles are again connected to the general principle of respect for autonomy.

In addition to the APA Principles the American Psychiatric Association also provides practical guidance to their members in the *APA Commentary on Ethics in Practice* (APA Commentary).[447] APA Commentary is intended to help psychiatrists understand

441 American Psychiatric Association (2013) *The principles of medical ethics with annotations especially applicable to psychiatry* 1.
442 See 6.5.1.1.
443 American Psychiatric Association (2013) *The principles of medical ethics with annotations especially applicable to psychiatry* 7.
444 See 6.5.1.1.
445 American Psychiatric Association (2013) *The principles of medical ethics with annotations especially applicable to psychiatry* 9.
446 *Ibid*.
447 American Psychiatric Association (2015) *APA commentary on ethics and practice*.

some of the ethical complexities, but as stated in the document "it is not intended for the resolution of courtroom disputes, which apply legal rather than clinical standards and values" and furthermore, it will never be able to address all circumstances including novel ethical situations.[448] For psycho-legal assessments topic 3.1.3, dual agency and overlapping roles, is of importance. The APA Commentary advises that psychiatrists should, as far as possible, try to avoid any dual roles where the psychiatrist acts in both a treating and forensic role.[449] The psychiatrist must ensure that before a psycho-legal assessment takes place that the evaluee is informed of the limits of confidentiality and the parameters of the relationship.[450] A psychiatrist that is treating a patient and is asked to act as an expert witness must carefully consider the competing duties and if they intend to act as an expert witness they must discuss the potential risks of unintended outcomes and the potential for an adverse decision with the patient.[451] APA Commentary does not contain any other guidelines relating to specifically to psycho-legal work.

The *Opinions of the Ethics Committee on the Principles of Medical Ethics* (Ethics Committee's Opinions)[452] also provides guidance for members on questions related to the principles of medical ethics. The Ethics Committee's Opinions are a compilation of questions that psychiatrists have directed to the Ethics Committee. The opinions, however, do not represent the official position of the American Psychiatric Association and are opinions of the Ethics Committee only[453] and will, therefore, not be discussed in detail.

6.5.2.2 Disciplinary procedure of the American Psychiatric Association

Any complaints of unethical behaviour or practices by members are investigated by the American Psychiatric Association in accordance with the procedure that are congruent with the minimum requirements under the Health Care Quality Improvement

448 *Idem* 1.
449 *Idem* 3.
450 *Ibid.*
451 *Ibid.*
452 American Psychiatric Association (2020) *Opinions of the ethics committee on the principles of medical ethics*.
453 See the foreword of the American Psychiatric Association (2020) *Opinions of the ethics committee on the principles of medical ethics*.

Act.[454] The District Branches of the American Psychiatric Association may also adopt additional requirements to comply with the particular state law.[455] If a complaint of unethical behaviour is made against a member (accused member) the District Branch will first review the complaint to determine whether the District Branch has jurisdiction over the matter.[456] The complaint must be against a member of the American Psychiatric Association, that is a member of that specific district and the complaint must be in relation to conduct that violates the APA Principles.[457]

After the initial review the District Branch Ethics Committee (DBEC) will then review the merits of the case.[458] The DBEC can within its discretion decide whether to contact the accused at that stage to seek additional information.[459] If the DBEC find that there was no ethics violation they shall notify the complainant in writing of the outcome.[460] If there is a basis to proceed the DBEC will notify the American Psychiatric Association Secretary, the complainant and the accused member.[461] The next phase of the proceedings is known as the exchange of information phase.[462] The accused member will receive a notice containing a copy of the complaint, all the documents attached to the complaint or obtained during the review phase; copy of the principles and the procedures for handling complaints and the ethical principle(s) that the accused member is accused of violating.[463] The accused member must then provide a written response with all the evidence they intend to use including documents and a list of witnesses.[464] Based on the information presented the DBEC can at this stage decide to dismiss the case or proceed with a hearing.[465]

A feature that is different from many organisations' disciplinary proceedings is the "educational option".[466] A complaint may be resolved by using the educational option

454 American Psychiatric Association (2013) *Procedures for handling complaints of unethical behaviour* 11.
455 *Ibid.*
456 *Idem* 12.
457 *Ibid.*
458 *Idem* 14.
459 *Ibid.*
460 *Ibid.*
461 *Ibid.*
462 *Idem* 15.
463 *Ibid.*
464 *Idem* 16.
465 *Ibid.*
466 *Idem* 17.

any time before a final determination by the hearing panel.[467] In deciding whether to use this option the DBEC must consider factors such as the nature and seriousness of the alleged misconduct and any prior findings or allegations of unethical conduct.[468] The educational option entails that the DBEC identifies a specific educational program for the accused member to complete within a specified period.[469] The DBEC will monitor the accused member's compliance with the requirements and can reopen the disciplinary proceedings if the accused member fails to comply.[470] Once the education option requirements are met the disciplinary proceedings shall be terminated.[471]

If a hearing is held the DBEC will make a decision based on the information presented which will consist of a determination of whether the accused member violated the ethical standards and if so the appropriate sanction.[472] The sanctions include reprimand, suspension and expulsion.[473] The name of a member who is suspended will be reported to the District Branch to include the newsletter; to the medical licensing authority in the state(s) that the member is licensed and the National Practitioner Data Bank.[474] Expulsion is the most serious sanction and must be affirmed by the American Psychiatric Association's Board of Trustees.[475] Once affirmed the name of the member that has been expelled will also be sent to District Branch to include the newsletter; to the medical licensing authority in the state(s) that the member is licensed and the National Practitioner Data Bank.[476]

Concurrent with the sanctions mentioned additional conditions can be imposed.[477] The conditions are designed to "reinforce and facilitate ethical behaviour".[478] The additional conditions include supervision, education requirement and personal treatment.[479]

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467 *Ibid.*
468 *Ibid.*
469 *Idem* 18.
470 *Ibid.*
471 *Ibid.*
472 *Idem* 19.
473 *Idem* 21-22.
474 *Idem* 22.
475 American Psychiatric Association (2013) *Procedures for handling complaints of unethical behaviour* at 22.
476 *Idem* 23.
477 *Ibid.*
478 *Ibid.*
479 *Idem* 23-24.

Confirmed decisions are forwarded to the American Psychiatric Association's Ethics Committee for review.[480] The review shall assure:[481]

(a) The complaint received a comprehensive and fair review;
(b) That the review was in accordance with the applicable procedures; and
(c) The sanction imposed was appropriate.

The complainant and the accused member are not notified of any decision until the review process is completed.[482] The procedures also allows for the accused member to request an appeal which will be heard by the American Psychiatric Association's Ethics Committee Appeal Panel.[483] The appeal panel can affirm the decision; affirm the decision but alter the sanction; reverse the decision or remand the case to the District Branch with specific instructions as to what further information or action is necessary.[484]

6.5.3 American Academy of Psychiatry and Law (AAPL)

The American Academy of Psychiatry and Law (AAPL) is an organisation established to promote scientific and educational activities in forensic psychiatry.[485] The goals of AAPL include, amongst others, stimulating research in forensic psychiatry and developing ethical guidelines for forensic psychiatry.[486] AAPL is a voluntary organisation with an executive council together with various committees responsible for the governance of the organisation.[487] The committees are divided into standing committees, special committees and administrative and member services committees.[488]

480 *Idem* 25.
481 *Ibid.*
482 *Ibid.*
483 *Idem* 27.
484 *Ibid.*
485 American Academy of Psychiatry and Law "About the organization" (2014) available online at https://www.aapl.org/organization (last accessed on 28 May 2020).
486 *Ibid.*
487 American Academy of Psychiatry and Law "About AAPL" (2014) available online at https://www.aapl.org/committees (last accessed on 28 May 2020).
488 *Ibid.*

In May 2005 the AAPL's *Ethics Guidelines for the Practice of Forensic Psychiatry* was adopted. As Appelbaum remarked AAPL recognised that there was a need for ethical guidelines as the American Psychiatric Association's principles, examined above, do not address psycho-legal work in much detail, as Appelbaum stated "a spottier set of guidelines for forensic practice cannot be imagined".[489]

AAPL does not, however, adjudicate any complaints regarding alleged unethical conduct by its members or non-members.[490] AAPL will refer any complaints to the American Psychiatric Association, the state licensing board, or any appropriate national psychiatric organisation.[491] Should a member be expelled or suspended by the American Psychiatric Association AAPL will also expel or suspend the member upon notification.[492] As such the section on AAPL does not contain a reference to any disciplinary procedures, only the AAPL's Ethics Guidelines together with guidelines on specific topics will be discussed below.

6.5.3.1 Ethical guidance

The AAPL *Ethics Guidelines for the Practice of Forensic Psychiatry* (AAPL Guidelines) is described as a supplement to the American Psychiatric Association's *Principles of Medical Ethics with Annotations especially Applicable to Psychiatry* and the AMA *Code of Medical Ethics*.[493] The AAPL Guidelines addresses the following aspects: confidentiality, consent, honesty and striving for objectivity and qualifications.[494] With reference to qualifications, the AAPL Guidelines emphasises that psychiatrists who provide expert opinions must present their qualifications accurately and only practice in areas of actual expertise. Certain specialist areas may require further training, for example the evaluation of children, and psychiatrist should ensure the possess the necessary knowledge skill, training and/ or experience before an evaluation.[495]

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489 Appelbaum "Forensic psychiatry: The need for self-regulation" (1992) 20 *Bulletin of the American Academy of Psychiatry and Law* 158.
490 American Academy of Psychiatry and Law "Ethics guidelines for the practice of forensic psychiatry" (2005) available online at https://www.aapl.org/docs/pdf/ETHICSGDLNS.pdf (last accessed 28 May 2020).
491 *Idem* 4.
492 *Ibid.*
493 *Idem* 1.
494 *Idem* 1-4.
495 *Idem* 4.

Confidentiality can be problematic in the forensic setting and the AAPL Guidelines advises that psychiatrists should as far as possible, to the extent that the law permits, maintain confidentiality.[496] The psychiatrist has a duty to disclose to the evaluee and any other relevant party the limitations on confidentiality in the forensic setting as reports and other information may be disclosed.[497] When informing the evaluee of the limitations the psychiatrists must also inform them why they are conducting the evaluation and on behalf of whom are the conducting it.[498] Before the evaluation the psychiatrist also has a duty to explain to the evaluee that the relationship is not a normal physician-patient relationship and that the psychiatrist is not the evaluee's "doctor".[499]

In medicine one of the core values of an ethical practice is informed consent.[500] Consent in psycho-legal assessments, however, differs from consent during normal treatment of a patient. In court ordered psycho-legal assessments or involuntary commitment a psychiatrist does not require informed consent to conduct the assessment.[501] The psychiatrists must inform the evaluee under those circumstances that if they refuse to participate in the evaluation the fact will be included in the report or testimony.[502] The AAPL Guidelines advises against conducting a psycho-legal assessment that is not court ordered if the person has not consulted with legal counsel and is charged with criminal acts or is under investigation for criminal acts.[503] Although informed consent is not always necessary or feasible, where possible the psychiatrist must always obtain informed consent.[504]

A psychiatrist who conducts forensic or psycho-legal work, irrespective if they have been retained by a party, must always be honest and strive for objectivity.[505] The AAPL acknowledges that the adversarial system is not always conducive to objectivity but

496 *Idem* 1-2.
497 *Idem* 1.
498 *Idem* 1-2.
499 *Idem* 2.
500 *Ibid.*
501 *Ibid.*
502 *Ibid.*
503 *Ibid.*
504 *Ibid.*
505 *Idem* 3.

emphasise that it is the responsibility of psychiatrists to ensure they remain impartial and provide an objective opinion.[506] To ensure honesty and objectivity a psychiatrist must base their opinion on all available data and as far as possible distinguish in their opinion between verified and unverified information as well as between facts, inferences and impressions.[507] AAPL Guidelines advises that psychiatrist should as far as possible provide an opinion only after a personal examination. If the examination is not possible the psychiatrist must clearly indicate this in their report and indicate how this limits their opinion.[508] In custody cases the psychiatrist must interview all relevant parties before rendering an opinion and if this is not possible it should also be clearly indicated.[509] AAPL Guidelines prohibits contingency fee agreements as it undermines honesty and efforts to attain objectivity.[510] In the commentary to the aspect of honesty and objectivity the AAPL also touches on the subject of dual roles. According to the AAPL Guidelines psychiatrists should avoid acting in both a treating and forensic role as this can undermine the credibility of the psychiatrist.[511]

It is submitted that an analysis of the guidelines demonstrates that the general principles that provide the authority to the specifications is the same as the principles that underpin AMA's Opinion 9.7.1. namely respect for autonomy and justice. The commentary to the preamble of the AAPL Guidelines confirms that the underlying ethical principles that a psychiatrist in a forensic role is bound to are respect for persons, honesty, justice, and social responsibility.[512] Honesty, as discussed above, forms part of the general principle of respect for autonomy whereas social responsibility forms part of the general principle of justice. Beauchamp and Childress throughout their work refers to respect for autonomy of persons as opposed to respect for persons. Beauchamp and Childress argue that the obligation to respect autonomy does not extend to non-autonomous persons, for example infants.[513] This does not

506 *Idem* 3-4.
507 *Ibid*.
508 *Ibid*.
509 *Idem* 3.
510 *Idem* 3.
511 *Idem* 3-4.
512 *Idem* 1.
513 Beauchamp and Childress (2019) 105.

mean that non-autonomous persons are not owed moral respect, but this Beauchamp and Childress refer to as "respect for persons".[514]

According to Lysaught three distinct meanings have emerged over the years for the term respect within the field of bioethics.[515] One is of course the definition of Beauchamp and Childress in terms of which the principle of respect of persons is redefined as a sub-category of the principle of autonomy.[516] The definition of Beauchamp and Childress non-autonomous and autonomous are decoupled.[517] The second is found in the Department of Health, Education, and Welfare, Ethics Advisory Board report, *Research on In Vitro Fertilization*.[518] In that report respect is decoupled from a person and becomes a free-floating term, and as Lysaught opines essentially meaningless.[519] The last meaning of respect is found in the *Belmont Report* in which notion of respect is articulated as the respect for persons, which includes "autonomous persons" and "persons with diminished autonomy" or the vulnerable.[520] Lysaught remarks the definition provided by Beauchamp and Childress has shaped the field of bioethics often only reference to respect for autonomy is found.[521] Respect in AAPL Guidelines refers to the meaning as found in the *Belmont Report*.

Together with the AAPL Guidelines the AAPL has published practice guidelines for forensic assessments,[522] evaluations of competence to stand trial,[523] evaluations of psychiatric disability,[524] insanity defence,[525] video recording of forensic psychiatric

514 *Idem* 106.
515 Lysaught "Respect: Or, how respect for persons became respect for autonomy" (2004) 29(6) *Journal of Medicine and Philosophy* 678.
516 *Idem* 675.
517 *Idem* 678.
518 *Idem* 676.
519 *Idem* 678.
520 *Idem* 668.
521 *Idem* 678.
522 American Academy of Psychiatry and Law "AAPL practice guidelines for the forensic assessment" (2015) 43(2) *The Journal of the American Academy of Psychiatry and Law* S3.
523 American Academy of Psychiatry and Law "AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial" (2007) 35(4) *The Journal of the American Academy of Psychiatry and the Law* S3.
524 American Academy of Psychiatry and Law "Forensic evaluation of psychiatric disability" (2018) 46(1) *The Journal of the American Academy of Psychiatry and Law* S1.
525 American Academy of Psychiatry and Law "AAPL practice guideline for forensic psychiatric evaluation of defendants raising the insanity defence" (2014) 42(2) *The Journal of the American Academy of Psychiatry and Law* S3.

evaluations,[526] and prescribing in corrections.[527] All of the guidelines are intended to provide practical guidance to psychiatrists on a specific topic and is intended to complement and not replace the existing AAPL Guidelines. All of the specific guidelines were developed by a task force of forensic psychiatrists that routinely conduct evaluations within that specific area and have the expertise the in the area. The process for the development of all the guidelines were similar which integrated the feedback and revisions of the experts in the field. The specific guidelines therefore reflect the consensus among experts about the principles and practise applicable to the specific area, for example psychiatric disability evaluations. The specific guidelines will not be examined in detail as it goes beyond the scope of the study. It is, however, submitted that further research needs to be conducted in South Africa to determine the specific areas that need specific practice guidelines as these guidelines can prove to be a valuable tool for professionals and assist in regulating psycho-legal work.

Appelbaum opines that the AAPL guidelines suffers a serious flaw and that is that the guidelines are unenforceable.[528] As mentioned above, AAPL does not undertake any adjudications concerning unethical behaviour of members, therefore, there is no mechanism to ensure that the standards and guidelines are enforced.[529]

6.5.4 American Psychological Association

The American Psychological Association is the largest scientific and professional organisation for psychology in the United States.[530] The mission of the American Psychological Association is to "promote the advancement, communication, and application of psychological science and knowledge to benefit society and improve lives".[531] The Bylaws of the American Psychological Association determine that the

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526 American Academy of Psychiatry and Law "Video recording guideline" (2013) available online at https://www.aapl.org/docs/pdf/VIDEO%20RECORDING%20GUIDELINE%202013.pdf (lase accessed on 28 May 2020).

527 American Academy of Psychiatry and Law "AAPL practice resource for prescribing in corrections" (2018) 46(2) *The Journal of the American Academy of Psychiatry and Law* S1.

528 Appelbaum (1992) *Bulletin of the American Academy of Psychiatry and Law* 158.

529 *Ibid*.

530 American Psychological Association "APA History" (2008) available online at https://www.apa.org/about/apa/archives/apa-history# (last accessed on 23 January 2020).

531 American Psychological Association "About APA" (2020) available online at https://www.apa.org/about# (last accessed 25 May 2020).

objects of the association include, amongst others, the establishment and maintenance of the highest standards of professional ethics and conduct of members.[532] To ensure that the American Psychological Association achieve their mission and objects the Bylaws set out the structure of the different bodies within the organisation and the role that each plays.

Within the governing structure of the American Psychological Association the Council of Representatives is the legislative and oversight body and has full power and authority over the affairs and funds of the association.[533] The Board of Directors is the administrative agent of the Council and exercises the general supervision over the affairs of the association.[534] There are numerous standing boards and committees that report to the Board of Directors and Council to assist the American Psychological Association.[535] For purposes of this study the focus will be on the Ethics Committee which has the power to receive, initiate, and investigate complaints of unethical conduct of members.[536] The Ethics Committee is also responsible for the formulation of rules and procedures governing the conduct of the ethics and disciplinary process.[537] The disciplinary procedure and the ethics code of the American Psychological Association will be discussed in detail below.[538]

The American Psychological Association is further divided into 54 divisions which are interest groups organised by the members.[539] Of note is the American Psychological Association Division 41 known as the American Psychology-Law Society (AP-LS).[540] The AP-LS aims are to advance contributions of psychology to the understanding of law; to promote education of psychologists in matters of law and the education of legal personnel in the matters of psychology; and to enhance research in the field of psychology and law.[541] The AP-LS together with the American Academy of Forensic

532 Article I of the Bylaws of the American Psychological Association (2008).
533 American Psychological Association (2020) *Council of Representatives handbook* 3.
534 Article VII (6) of the Bylaws of the American Psychological Association (2008).
535 Article XI (1) of the Bylaws of the American Psychological Association (2008).
536 Article XI (5) of the Bylaws of the American Psychological Association (2008).
537 Article II(16) of the Bylaws of the American Psychological Association (2008).
538 See 6.5.4.1 and 6.5.4.2.
539 Article VI(1) of the Bylaws of the American Psychological Association (2008).
540 American Psychological Association "Divisions of APA" (2008) available only at https://www.apa.org/about/division/join# (last accessed on 25 May 2020).
541 American Psychology-Law Society "About" (2020) available online at https://ap-ls.org/about (last accessed 25 May 2020).

Psychology was responsible for the development of the *Specialty Guidelines for Forensic Psychology* that will be discussed below.[542]

6.5.4.1 Ethical guidance

The American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* (Ethics Code) was adopted in 2002 and has been reviewed several times with the latest amendment in 2016.[543] The introduction of the Ethics Code states that the code applies to psychologists' activities that forms part of their scientific, educational, or professional roles as psychologists and lists, which is not an exhaustive list, areas to which the code applies including forensic activities.[544] The Ethics Code contains two sections: the aspirational principles and the enforceable rules that sets the minimum standard of conduct.[545]

The general principles are to guide psychologist to the "highest ideals of psychology" and to assist psychologists in ethical decision-making.[546] The general principles are, therefore, not meant to form the basis for imposing sanctions for unethical behaviour.[547] There are five general principles: beneficence and nonmaleficence; fidelity and responsibility; integrity; justice and respect for people's rights and dignity.[548] Three of the four principles contained in Beauchamp and Childress's approach to biomedical ethics, namely beneficence, nonmaleficence and justice is expressly included in the Ethics Code.[549] The explanations of the three principles are the similar to the broad definitions of Beauchamp and Childress.[550] Beneficence and nonmaleficence are grouped together and is explained in the Ethics Code as safeguarding of the welfare and rights of others.[551] Justice is described as recognising

542 See 6.5.4.1.
543 The American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* with the 2016 amendment became effective on 1 January 2017.
544 The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 2.
545 *Ibid*.
546 *Ibid*.
547 *Idem* 3.
548 *Idem* 3-4.
549 Beauchamp and Childress (2019) 13.
550 See 1.1. Beauchamp and Childress (2019) 13.
551 The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 3.

that all persons are entitled to access and benefit from the contributions of psychology.[552] Justice is further explained in context of what constitutes unjust practices and the Ethics Code indicates that:[553]

> Psychologists exercise reasonable judgment and take precaution to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices.

Often in ethical guidelines or codes justice is only defined in context of treating all individuals equally, ensuring distributive justice. By describing justice in context of unjust practices it is submitted that it provides a better ethical framework for psycho-legal or forensic work. The principle read together with the standards, more specifically the standards regarding boundaries of competences, guides psychologists to understand what is expected of them when conducting psycho-legal work.

The fourth principle of Beauchamp and Childress' approach, respect for autonomy is not expressly contained but instead the Ethics Code included respect for people's rights and dignity which includes respect for autonomy. Within the description of respect for people's rights and dignity the Ethics Code refers to the protection of vulnerable people who are not able to make autonomous decisions. This accords with definition of respect that emerged originally from the *Belmont Report*, discussed above,[554] which promotes autonomy and simultaneously protects the vulnerable.[555] Respect within the Ethics Code is, therefore, a wider concept and includes respect for individuals' right to privacy, confidentiality and self-determination[556] as well as respecting cultural, individual and role differences.[557]

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552 *Idem* 4.
553 *Ibid*.
554 See 6.5.3.1
555 Lysaught (2004) *Journal of Medicine and Philosophy* 678.
556 The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 4.
557 Role differences are described as including "those based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status. The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 4.

Fidelity, a general principle in the Ethics Code, is described by Beauchamp and Childress as a moral norm or rule with the corresponding virtue of faithfulness[558] that arises when a significant fiduciary relationship has been established.[559] Professional fidelity, as Beauchamp and Childress explain, is traditionally considered as prioritising the patient's interests.[560] In a forensic setting this can result in divided loyalties between the patient and the third party.[561] The Ethics Code emphasis that a psychologist establishes a relationship of trust with those with whom they work and this fiduciary relationship encompasses the management of conflicts of interest that "could lead to exploitation or harm".[562] The psychologist must also ensure they clarify their professional role and obligations.[563] The Ethics Code in its description does not, however, only focus on patients but stresses that psychologists must also be aware of their professional responsibilities to society and specific communities.[564] It is argued that the Ethics Code requires a psychologist to contextualise any ethical dilemma in terms of patient interests versus community interests. This must be done with due regard of their professional role and obligations. This principle read with the standards provide a strong foundation for psychologists working in forensic settings to resolve any ethical quandaries.

Integrity, discussed in chapter 4, is one of the most important virtues for health professionals.[565] The Ethics Code emphasis the promotion of accuracy, honesty, and truthfulness in the teaching and practice of psychology.[566] Acting with integrity includes not intentionally misrepresenting facts.[567] The Ethical Guidelines of the Health Professions Council contains 13 core values or standards[568] which on face value appears that there is a significant difference between those guidelines and the Ethics Code of American Psychological Association. The differences in number seem to be

558 Beauchamp and Childress (2019) 414.
559 *Idem* 353.
560 *Ibid.*
561 *Ibid.*
562 The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 3.
563 *Ibid.*
564 *Ibid.*
565 See 4.3.3.1.1.
566 The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 3-4.
567 *Idem* 4.
568 See 4.3.3.1.1.

related to the different ways in which fundamental principles and values can be structured and not necessarily disagreements between the basic principles that underlie the ethical practice.[569] It is submitted that despite the resemblance between the core values and standards HPCSA Ethical Guidelines and the general principles of the American Psychological Association's Ethics Code there are differences.

The ethical standards consist of ten different areas: resolving ethical issues; competence; human relations; privacy and confidentiality; advertising and other public statements; record keeping and fees; education and training; research and publication; assessment and therapy.[570] Not all of the standards contained in the Ethics Code will be analysed, the focus will solely be on standards that more specifically relate to psycho-legal activities.

Standard 2.01 of the Ethics Code is akin to the evidentiary rule that an expert must only practice in areas within the boundaries of their competence. Psychologist, across the spectrum of all psychologists' activities, must only act within the boundaries of their competence that is based on their education, training, supervised experiences, consultation, study, or professional experience.[571] Save for the general boundaries of competence standard 2.01 also addresses psycho-legal work indicating that when psychologists assume a forensic role a duty is placed on them to become reasonably familiar with the judicial or administrative rules governing their roles.[572] The area of competence also requires in standard 2.04 a bases for scientific and professional judgments. Standard 2.04 can be compared with the basis rule in law of evidence, as the standard requires that the psychologists' work must be based upon established scientific knowledge of the discipline.[573] The word established in standard 2.04 relates to the factor in *Daubert* and *Frye* standards of general acceptance.

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569 Similar argument is made by Allan and Grisso regarding the ethical principles within psychology and psychiatry. See Allan and Grisso "Ethical principles and the communication of forensic mental health assessments" (2014) 24 *Ethics and Behavior* 468.

570 The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 1.

571 Standard 2.01(a) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 5.

572 Standard 2.01(f) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 5.

573 Standard 2.04 of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 5.

Standard 3.05 advises that multiple relationships, when a psychologist assumes a dual role, is not necessarily unethical.[574] Psychologists need only to refrain from entering into a multiple relationship if it would "impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists".[575] The dual role of treater and evaluator is not expressly mentioned but implied if read with standard 3.05(c) that advises that should a psychologist be required by law or other extraordinary circumstances to serve in judicial proceedings they must from the onset clarify their role expectations and discuss the aspects of confidentiality.[576] Standard 10.02, regarding therapy involving couples and family, specifies that should it became apparent the psychologist may be called on to perform conflicting roles such as family therapist and a witness in divorce proceedings psychologists must, taking standard 3.05 into consideration, take reasonable steps to either clarify or modify or withdraw from a role.[577]

Standard 3.05 should also be read with standard 3.06, concerning conflict of interest, and standard 3.07, concerning third-party request of services. Similar to the standard relating to multiple relationships standard 3.05 advises that a psychologist should refrain from taken on a professional role which could result in a conflict of interest that impairs their objectivity, competence, or effectiveness or expose the person or organisation with whom the professional relationship exist to harm or exploitation.[578] Psychologists who provide services at the request of a third party must ensure that the following aspects regarding the nature of the relationship is clarified (i) role of the psychologist; (ii) identification of the client; (iii) probable uses of the services provided and the (iii) limits to confidentiality.

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574 Standard 3.05(a) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 6.

575 *Ibid*.

576 Standard 3.05(c) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 6.

577 Standard 10.2(b) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 14.

578 Standard 3.06 of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 6.

Informed consent is central to the practice of psychology and psychiatry, but in psycho-legal work informed consent takes on a different dimension. Standard 3.10 provides that when psychological services, which can include psycho-legal assessments, are mandated or court ordered the psychologist has the duty to inform the individual before proceeding with the assessment that the assessment is court ordered or mandated and explain the limits of confidentiality.[579] Standard 3.10 must also be read together with standard 4.02 regarding discussing the limits of confidentiality.

Discussing the limits of confidentiality also entails discussing the foreseeable uses of the information that is generated through the psychological activities.[580] The discussing is not limited to the person being evaluated but also organisations with whom the psychologist establishes a scientific or professional relationship.[581] Together with confidentiality the Ethics Code addresses the privacy of individuals. Standard 4.04 states that in order to minimise intrusions of privacy psychologists must only include information relevant to the purpose for which the communication is made in the written and/or oral report.[582] In addition psychologists may only disclose information with proper consent[583] or as mandated by law.[584]

Public statements in the Ethics Code includes any statements made in or during legal proceedings.[585] Psychologists may not knowingly make and public statements that are "false, deceptive, or fraudulent concerning their research, practice, or other work activities".[586] Standard 5.01(b) further, amongst others, provides that psychologist may

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579 Standard 3.10(c) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 7.
580 Standard 4.02(a) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 7.
581 *Ibid.*
582 Standard 4.04(a) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 8.
583 Standard 4.05(a) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 8.
584 Standard 4.05(b) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 8.
585 Standard 5.01(a) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 8.
586 *Ibid.*

not make false, or deceptive, or fraudulent statements regarding their training, experience, competence, qualification or services.[587]

The last group of standards to be discussed relates to assessments. Standard 9.01 states that the opinions of psychologists contained in recommendations, reports, evaluative statements, including forensic testimony must be based on information and techniques sufficient to substantiate their findings.[588] The standard further stresses that opinion regarding psychological characteristics of an individual should only be provided after a psychologist conducted an examination.[589] If this is not reasonably possible the psychologist must indicate this in their opinion and clarify the impact this has on the reliability and validity of their opinions.[590] When using assessments psychologists must ensure the chosen assessment is appropriate for the purpose[591] and are not obsolete or outdated.[592]

The standards in the Ethics Code have been written in broad terms to enable psychologists in varying roles to apply them[593] but in the 1992 code of ethics the American Psychological Association included a section devoted to forensic activities.[594] The section was removed during the 2002 revisions because the American Psychological Association decided that the ethics of speciality practice such as forensic activities could not be appropriately addressed as standards within the Ethics Code needed to be a generic as possible.[595] Because the practice of forensic

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587 Standard 5.01(b) reads as follows:
> Psychologists do not make false, deceptive, or fraudulent statements concerning (1) their training, experience, or competence; (2) their academic degrees; (3) their credentials; (4) their institutional or association affiliations; (5) their services; (6) the scientific or clinical basis for, or results or degree of success of, their services; (7) their fees; or (8) their publications or research findings.

588 Standard 9.01(a) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 12-13.

589 Standard 9.01(b) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 13.

590 *Ibid*.

591 Standard 9.02(a) of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 13.

592 Standard 9.08 of American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 14.

593 The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 2.

594 Austin *et al*. "The ethics of forensic psychiatry: moving beyond principles to a relational ethics approach" (2009) 20 *The Journal of Forensic Psychiatry and Psychology* 840 and Behnke and Jones in Knapp (ed.) (2012) *APA handbook of ethics in psychology, Volume 1: Moral foundations and common themes* 59.

595 Austin *et al*. (2009) *The Journal of Forensic Psychiatry and Psychology* 840.

psychology differs in many ways from traditional clinical practice the *Speciality Guidelines for Forensic Psychology* (Specialty Guidelines) was developed and adopted.[596] The goals of the Speciality Guidelines are to:[597]

- improve the quality of forensic psychological services;
- enhance the practice and facilitate the systematic development of forensic psychology;
- encourage a high level of quality in professional practice; and
- encourage forensic practitioners to acknowledge and respect the rights of those they serve.

The application of the Speciality Guidelines depends on the service provided and not on the area of practice of the psychologist.[598] In other words the psychologist can work in any subdiscipline of psychology but the service provided is to assist in addressing a legal question.[599] The Speciality Guidelines, as the name suggests, are guidelines and not standards, they are therefore merely aspirational in nature.[600] The Speciality Guidelines, like all ethical guidelines, are not and can never be exhaustive and address every professional situation.[601] The Speciality Guidelines are also not a standalone document but is informed by the American Psychological Association's Ethics Code.[602]

The Specialty Guidelines, unlike the Ethics Code, do not separate underlying principles from the specifications of the principle. The Speciality Guidelines provides guidelines on eleven areas being responsibilities; competence; diligence; relationships; fees; informed consent, notification and assent; conflicts in practice; privacy, confidentiality and privilege; methods and procedures; assessments and professional and other public communications. Within each area several specific

596 American Psychological Association "Speciality guidelines for forensic psychology" (2013) 68 *American Psychologist* 7 (For ease of reference hereinafter referred to as APA *Speciality guidelines for forensic psychology*). The latest version of the Speciality Guidelines was adopted by the American Psychological Association's Council of Representatives on 3 August 2011.
597 APA *Speciality guidelines for forensic psychology* 7.
598 *Ibid.*
599 *Ibid.*
600 *Idem* 8.
601 *Ibid.*
602 *Ibid.*

guidelines are provided. To avoid merely repeating every guideline the sets of guidelines within each of the ten areas will be discussed holistically.

The first set of guidelines concerns the responsibilities of psychologists providing guidelines on integrity;[603] impartiality and fairness;[604] and conflict of interest.[605] In essence the responsibilities of psychologists are to ensure that they remain impartial, unbiased, fair, independent and resist and any partisan pressures.[606] Psychologists must ensure that they act with accuracy, honesty and truthfulness at all times.[607] The second set of guidelines regarding competence are consistent with and expands on the standards for competence provided for the American Psychological Association's Ethics Code. The guidelines reiterate that psychologists should only provide services in areas which they are competent based on their relevant training, knowledge and experience.[608] Psychologists should also consider the boundaries of their expertise in relation to individual and group difference such as cultural differences and if need be make an appropriate referral.[609] Competence is not only determining competence but also acquiring and maintaining the necessary competence in psycho-legal work.[610] This includes ensuring that psychologists who conduct psycho-legal activities gain the necessary knowledge of the legal system and keep up to date with any changes.[611] The opinions and testimony of psychologist must be sufficiently based upon an adequate scientific foundation, applying reliable and valid principles and methods to the facts of the case.[612] Guideline 2.05 regarding the knowledge of the scientific foundations for opinions and testimony requires that should a psychologist base their opinion or testimony on novel or emerging principles and methods, the psychologist must include the status and limitations of these principles and methods in their opinion.[613] Guideline 2.05 takes into consideration the legal position regarding novel

603 Guideline 1.01 in APA *Speciality guidelines for forensic psychology*.
604 Guideline 1.02 in APA *Speciality guidelines for forensic psychology*.
605 Guideline 1.03 in APA *Speciality guidelines for forensic psychology*.
606 APA *Speciality guidelines for forensic psychology* 9.
607 Guideline 1.01 in APA *Speciality guidelines for forensic psychology*.
608 Guideline 2.01 in APA *Speciality guidelines for forensic psychology*.
609 Guideline 2.08 in APA *Speciality guidelines for forensic psychology*.
610 Guideline 2.02 in APA *Speciality guidelines for forensic psychology*.
611 Guideline 2.04 in APA *Speciality guidelines for forensic psychology*.
612 Guideline 2.05 in. APA *Speciality guidelines for forensic psychology*.
613 *Ibid*.

methods or principles ensuring that psychologists comply with what is required of them.

The third set of guidelines relates to diligence and advises that psychologists render psycho-legal services have an agreement in place that sets out the scope of the work as wells as the timeframe and compensation.[614] Psychologists should also act with reasonable promptness which is facilitated by having an agreement that reflects what is expected of the psychologist.[615] Communication with clients is also a key aspect to ensure diligence, clients should be kept informed, within reason, of the status of the services.[616]

The fourth set of guidelines acknowledges the different relationships that are established in psycho-legal work, the relationship with the person that retained the psychologist, and the relationship with the examinee.[617] The associated obligations and duties will vary depending on the nature of the relationship.[618] Guideline 4.01 reiterates the standards in the Ethics Code requiring that a psychologist clarify the nature of a relationship, for example whether they will act as expert witness or consultant, before embarking on the work. Clarifying the nature of the relationship entails clarifying the role of the psychologist, who the client is, what the probable uses of the services are and limitations to privacy and confidentiality.[619] The Speciality Guidelines advises against acting in both a therapeutic and forensic role as it may impair objectivity or may cause exploitation or harm.[620] A forensic role does not merely mean that the court is involved. For example, the fact that a psychologist acts as a witness and provides testimony does not necessarily mean that a psychologist acts in a forensic role.[621] If the psychologist merely provides testimony on a patient's history and is not rendering opinions and testimony on a psycho-legal issue this is not

614 Guideline 3.01 in APA *Speciality guidelines for forensic psychology*.
615 Guideline 3.02 in APA *Speciality guidelines for forensic psychology*.
616 Guideline 3.03 APA *Speciality guidelines for forensic psychology*.
617 APA *Speciality guidelines for forensic psychology* 10-11.
618 *Ibid.*
619 Guideline 4.01 in APA *Speciality guidelines for forensic psychology*.
620 Guideline 4.02.01 in APA *Speciality guidelines for forensic psychology*.
621 Guideline 4.02.02 in APA *Speciality guidelines for forensic psychology*.

considered the practice of forensic psychology.[622] Likewise, therapeutic services that are court ordered are not necessarily the practice of forensic psychology.[623]

Fees are dealt with in the fifth set of guidelines.[624] Psychologists are advised to clearly indicate the costs of their services to clients but that psychologists should avoid providing their services on the basis of contingent fees as it threatens impartiality.[625] Psychologists should avoid undue influence that might result from financial compensation.[626] Where possible psychologists should also contribute a portion of their professional time for *pro bono* service to assist persons who have limited access to the services.[627]

The sixth set of guidelines concerns informed consent, notification and assent in the practice of forensic psychology. As soon as possible, and preferably before conducting an assessment, the psychologist must inform their client, the evaluee or examinee and other persons, such as individuals who are contacted to provide collateral sources, about the nature and extent of the anticipated forensic services.[628] A psychologist must seek the informed consent of any person that has not been ordered by the court or mandated otherwise to undergo a psycho-legal assessment.[629] In the case of persons who lack the capacity to provide informed consent the psychologist must still provide an appropriate explanation to seek the examinee or evaluee's assent and ensure that appropriate permission is obtained from a legally authorised person.[630] The Speciality Guidelines also advises that psychologists carefully consider before evaluating a person who is not represented by counsel because significant rights may be at issue.[631]

622 *Ibid.*
623 Guideline 4.02.03 in APA *Speciality guidelines for forensic psychology*.
624 APA *Speciality guidelines for forensic psychology* 12.
625 Guideline 5.02 in APA *Speciality guidelines for forensic psychology*.
626 *Ibid.*
627 Guideline 5.03 in APA *Speciality guidelines for forensic psychology*.
628 Guideline 6.01 and Guidelines 6.03 in APA *Speciality guidelines for forensic psychology*.
629 Guideline 6.03.01 in APA *Speciality guidelines for forensic psychology*.
630 Guideline 6.03.03 in APA *Speciality guidelines for forensic psychology*.
631 Guideline 6.03.04 in APA *Speciality guidelines for forensic psychology*.

The seventh set of guidelines deals with the various conflicts in practice: conflict with legal authority,[632] conflict with organisational demands[633] and conflict with fellow professionals.[634] The Speciality Guidelines advises that psychologists who find themselves in a conflict situation should make the conflict known to the relevant parties, and consider the rights and the interests of the parties in their attempts to resolve the conflict.[635] Any attempt to resolve conflict should be made in accordance with the American Psychological Association's Ethics Code.[636]

The eight set of guidelines recognised the ethical obligations to maintain the confidentiality of information and to protect an individual's right to privacy as far as possible. Access to records of psycho-legal assessments cannot be given to anyone without the proper consent of the retaining party [637] unless by legal process, for example the psychologist is subpoenaed or the court orders access.[638] If a psychologist requires access to collateral sources, they should acquire the consent from the relevant attorney or relevant party.[639]

The ninth set of guidelines relate to the appropriate use of methods when conducting psycho-legal assessments or performing any other work. Psychologists should always strive to use the appropriate methods and procedures[640] and avoid relying on only one source of data.[641] The use of multiple sources of information in forensic activities is important to corroborate data, if the data is not corroborated the psychologist must make this known and indicate the limitations and strengths of the data and the reasons for relying upon it.[642] As per the standards the American Psychological Association's Ethics Code a psychologist should avoid offering an opinion on persons they have not examined, but if the examination is not possible despite all efforts the psychologist

632 Guideline 7.01 in APA *Speciality guidelines for forensic psychology*.
633 Guideline 7.02 in APA *Speciality guidelines for forensic psychology*.
634 Guideline 7.03 in APA *Speciality guidelines for forensic psychology*.
635 APA *Speciality guidelines for forensic psychology* 13.
636 Guideline 7.01 in APA *Speciality guidelines for forensic psychology*.
637 Guideline 8.02 in APA *Speciality guidelines for forensic psychology*.
638 *Ibid*.
639 Guideline 8.03 in APA *Speciality guidelines for forensic psychology*.
640 Guideline 9.01 in APA *Speciality guidelines for forensic psychology*.
641 Guideline 9.02 in APA *Speciality guidelines for forensic psychology*.
642 *Ibid*.

must indicate the impact and the limitations on the reliability and validity of their opinion.[643]

The second last set of guidelines provides guidance on conducting psycho-legal assessments. In conducting assessments psychologist should keep in mind that the forensic context differs from the therapeutic context and influences the choice in the assessment methods used.[644] The psychologist, bearing this in mind, should carefully select the assessment procedure considering the strengths and limitations[645] whilst also appreciating individual differences, such as a disability, that could influence the procedure and interpretation of the results.[646] The psychologist should also consider the assessment settings and try to conduct the evaluation in a setting that is comfortable, safe and private.[647] In conducting the assessment psychologists must keep in mind that the purpose is usually to assist the trier of fact and they should, therefore focus on legally relevant factor. Because a clinical diagnosis can cause problems because of different meanings of psychological terms and legal terms psychologists are encouraged to consider whether it is necessary to include the clinical diagnosis and consider and qualify their opinion appropriately.[648] Psychologists should include all data or information which they have taken into consideration.[649] After the assessment the psychologist must take reasonable steps to explain the results or findings to the examinee, or if this is precluded warn the examinee in advance that they cannot discuss the results with them.[650]

The last set of guidelines examines the professional communications, such as psycho-legal reports, and out of court and other public statements. In providing reports or sworn statements the conclusions, evidence, and opinions must be presented in an understandable manner that is accurate and fair and void of any deception.[651] The reports or sworn statement should distinguish between observations, inferences, and

643 Guideline 9.03 in APA *Speciality guidelines for forensic psychology*.
644 Guideline 10.02 in APA *Speciality guidelines for forensic psychology*.
645 *Ibid*.
646 Guideline 10.03 in APA *Speciality guidelines for forensic psychology*.
647 Guideline 10.04 in APA *Speciality guidelines for forensic psychology*.
648 Guideline 10.01 in APA *Speciality guidelines for forensic psychology*.
649 Guideline 10.06 in APA *Speciality guidelines for forensic psychology*.
650 Guideline 10.05 in APA *Speciality guidelines for forensic psychology*.
651 Guideline 11.01 in APA *Speciality guidelines for forensic psychology*.

conclusions.[652] Psychologist should disclose all sources of information considered and relied upon[653] and include the basis and reasoning underlying their opinions.[654] In line with legal requirements the report or statement must be comprehensive and complete and contain any opposing views.[655] When evaluating or commenting on opposing views any disagreements must be communicated in a respectful and professional tone. Psychologist should explain based on data, theories, and standards why they are in disagreement.[656] In general psychologists should avoid making out-of-court statements about legal proceedings in which they are involved.[657] Should out-of-court statements be made psychologists should refrain from releasing private, confidential, or privileged information.[658] In matters where psychologists have no direct knowledge of or involvement in the case they should only provide comments or public statement if sufficient information is available as part of the public record, or make clear the limitations of their opinions.

The Speciality Guidelines are quite comprehensive and not only provides practical guidance for psychologists working in a forensic setting but throughout were necessary explains the basis with reference to the differences between forensic role and therapeutic role. By including this, psychologists who are accustomed to only working in a therapeutic setting can better understand the key differences between the work without only being given "rules" to apply. It is submitted that within the South African context there is a dire need for similar guidance for psychologists that work in a forensic setting and much can be learnt from the Speciality Guidelines.

6.5.4.2 Disciplinary procedure of the American Psychological Association

Members of the American Psychological Association commit to comply with the standards set out in the Ethics Code as well as the rules and procedures used to enforce them.[659] The Ethics Committee is responsible to ensure that ethical conduct

652 Guideline 11.02 in APA *Speciality guidelines for forensic psychology*.
653 Guideline 11.03 in APA *Speciality guidelines for forensic psychology*.
654 Guideline 11.04 in APA *Speciality guidelines for forensic psychology*.
655 Guideline 11.04 and 11.05 in APA *Speciality guidelines for forensic psychology*.
656 Guideline 11.05 in APA *Speciality guidelines for forensic psychology*.
657 Guideline 11.06 in APA *Speciality guidelines for forensic psychology*.
658 *Ibid*.
659 American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 2.

is maintained by members and will investigate any unethical behaviour.[660] The Ethics Committee has jurisdiction over members, associate members and affiliates and will not investigate any matter if there is another body with jurisdiction which can take action with respect to a member's licence or registration.[661] The investigations are handled under two different pathways: actions based on complaints filed against members or show cause proceedings based upon other recognised tribunals.[662]

There are three grounds for show cause procedures: conviction of felony or equivalent offence;[663] expulsion, suspension, revocation of license, decertification, or other actions;[664] and disciplinary actions by other entities based on unethical or illegal conduct.[665] If the grounds are met the member will be notified that they have been barred from resigning and will be expelled 30 days after receipt of the notice.[666] The member (respondent) will have an opportunity to respond to show good cause why they should not be expelled.[667] The rules further provide for a procedure of investigation, subsequent review and recommendation and further opportunities for the respondent to respond.[668] After receipt of the final response of the respondent the Ethics Committee will make a recommendation and the Board of Directors shall vote whether to accept the sanction, issue a different sanction or to dismiss the case.[669]

The second pathway based on complaints can be initiated by the filing of a complaint or *sua sponte*, where the Ethics Committee proceeds on its own initiative.[670] When filing a complaint it must include a completed ethics complaint form together with any releases required by the Ethics Committee and a waiver by the complainant of any right to subpoena the American Psychological Association for purposes of private civil

660 Ethics Committee of the American Psychological Association (2018) *Rules and Procedures* 3.
661 Rule B.4.1 and Rule B4.2 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
662 Ethics Committee of the American Psychological Association (2018) *Rules and Procedures* 3.
663 Rule D.1.1 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
664 Rule D.1.2 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
665 Rule D.1.3 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
666 Rule D.2 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
667 *Ibid*.
668 The process is set out in Rules D.4 until D.9 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
669 Rule D.10 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
670 Rule E.1 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.

litigation for documents or information concerning the case.[671] The waiver has been included to prevent complainants using the ethics process to gain an advantage in litigation.

Similar to the process by most professional and statutory bodies a preliminary investigation is conducted first to determine whether jurisdictional criteria have been met and whether any other body such as state or local board has jurisdiction.[672] If the jurisdictional criteria is not met the matter shall be closed and the complainant notified.[673]

Cases that are not closed based on lack of jurisdiction will then be evaluated to determine whether there is a cause of action[674] and whether there is sufficient information to open a case.[675] Cause of action exists if the alleged unethical behaviour would constitute a breach of the Ethics Code.[676] If there is a lack of information to support a case being opened the case may be closed or in some instances a preliminary investigation may be initiated.[677] If a case is opened the Director will inform the respondent by issuing a charge letter which sets out the alleged behaviours at issue and identifies the sections of the Ethics Code that has been allegedly violated.[678] The charge letter must be accompanied by the complaint and any materials submitted together with the complaint.[679]

After receipt of the charge letter the respondent will have 30 days to reply.[680] The matter will then be reviewed by the Ethics Committee after which the Committee will decide either to remand, dismiss the charges or impose a sanction.[681] There is no formal hearing. The available sanctions that can be imposed are reprimand, censure,

671 Rule E.3 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
672 Rule E.4 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
673 Rule E.4 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
674 Rule E.5.1 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
675 Rule E.5.3 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
676 Rule E.5.1 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
677 Rule E.5.4 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
678 Rule E.6.1.1 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
679 *Ibid*.
680 Rule E.6.1.2 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
681 Rule E.7 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.

expulsion or voiding membership, stipulate resignation, and probation.[682] The sanction imposed is determined based on the evidence taking into consideration aggravating and mitigating factors.[683] Probation can be accompanied with another sanction such as reprimand or censure.[684] If the respondent is placed under probation they are usually required to comply with conditions set by the Ethics Committee which include, but is not limited to, supervision, education, training or tutorial requirements.[685]

The procedures followed after the recommendations of the Ethics Committee is dependent on the sanction recommended. Should the respondent not accept the recommendation of reprimand, censure, or probation they can request independent adjudication.[686] The decision made by an independent adjudication panel is unappealable and binding on the Committee.[687] Respondents who do not accept the recommendation of expulsion may request a formal hearing.[688] The respondent may at their own expense be represented by an attorney at the hearing.[689] The Hearing Committee will, in writing, inform, the Board of Directors whether they have adopted the Ethics Committee's recommendation, recommend a lesser sanction or dismiss the charges.[690] The disciplinary procedure differs from the Health Professions Council in South Africa in that there is no formal hearing and also with respects to the sanctions, as there are no sanctions of paying a fine.

6.6 Conclusion

An analysis of the approach of the American legal system in regulating expert evidence reveals that the belief in the adversarial system, the presence of the jury and public opinion has heavily impacted the approach. The South African legal system can benefit from some of the rules implemented in the United States but given the three factors mentioned, it is submitted that the benefit is limited. Many of the rules have

682 Rule B.9 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
683 *Ibid*.
684 Rule B.9.5 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
685 *Ibid*.
686 Rule E.8.2.1 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
687 Rule E.8.2.8. in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
688 Rule E.9.2. in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
689 Rule E.9.2.5.2 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.
690 Rule E.9.2.9 in Ethics Committee of the American Psychological Association (2018) *Rules and Procedures*.

been adopted to avoid a prejudicial effect because of the presence of a jury which is not a factor in South Africa. Although South Africa also has an adversarial system, which tends to promote partisan expert witnesses, the South African legal system in many respects has more inquisitorial traits than the American system.

The analysis further revealed that in America, whether in federal court or the Californian state courts, the "weapons" used during the court battle to ensure that expert evidence is reliable and unbiased is the admissibility rules, the disclosure of fees paid to expert witnesses and cross-examination. Much emphasis is placed on the influential case of *Daubert* expressing the gatekeeping function of judges. Undoubtedly *Daubert* has greatly influenced the admissibility rules of expert opinion evidence, not only in the United States but also in many other jurisdictions, such as England, that have started adopting similar admissibility requirements to ensure the reliability of expert evidence.[691] Despite the *Daubert* standards being in place, it is apparent from the literature that psychological and psychiatric evidence is rarely challenged on *Daubert* grounds. It is submitted that the *Daubert* factors can be of more assistance in evaluating expert evidence. Heeding to the warning provided in the dissenting judgment in *Daubert* the test can also result in judges becoming amateur scientists. In agreement with Bernstein's submission, as the *Daubert* factors are unsuccessful in reaching its goals, it leaves only cross-examination to attack any biased, partisan, or otherwise unreliable expert evidence.[692]

The main difference between the federal position and Californian position is the application of the *Daubert* factors. In California, there is a shift towards using the *Daubert* factors, but the general acceptance test (*Kelly* test) is still the test that must be used if expert evidence regarding a new technique or method is challenged. The courts have expressly stated that the *Kelly* test is not applicable to medical and psychological expert testimony. The party submitting the evidence must still indicate that expert is properly qualified and that the expert followed accepted methodologies or protocols in reaching their opinion. This approach is similar to the South African approach.

691 See 5.4.1.1.
692 Bernstein as quoted in Stockdale and Jackson (2016) *Journal of Criminal Law* 360.

The basis rule in federal and California courts is similar to the South African position- expert witnesses must have a sufficient basis for their opinion. The expert witness can rely on evidence such as hearsay evidence that would normally be inadmissible but the underlying facts or evidence, such as the hearsay evidence, cannot be disclosed to the jury if inadmissible. The Federal Rules of Evidence further provides that an expert witness can state their opinion without first testifying to the underlying facts or data. The position differs from South Africa, as again the presence of the jury influences the way the trial is conducted. Secondly, the rule also places a heavy burden on the cross-examiner to be able to identify any weaknesses in the testimony of the expert.

The ultimate issue rule has been partly abolished in both federal and California courts with the exceptions being in criminal cases where experts are not allowed to state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defence. The exception in both jurisdictions was as a result of public outcry. It is submitted that South African courts can benefit from the codification of the abolishment of the ultimate issue rule but that there should be no exceptions. The application of the exception is artificial and inconsistent. It is submitted that in agreement with the argument put forward by Slovenko the expert testimony would be less useful, and the ultimate issue rule promotes incomplete testimony. Furthermore, the main reason for the implementation exception is the presence of the jury and to ensure that the jury is not unduly influenced by the expert opinion. Again, this is not a factor that needs to be considered in South Africa.

Disclosure is one of the areas which has seen quite an extensive change throughout the years in America. Both civil and criminal procedure rules in federal and California courts now provide for the disclosure of expert witnesses that will be used during the trial as well as pretrial conferences. As per Justice Beyer in *Joiner,* these procedural rules are vital to assist in cases with complicated expert evidence. Disclosure is also important to ensure proper preparation for a case, and the South African legal system can benefit from codifying disclosure rules for criminal cases. In civil matters, the

retained expert must file an expert report that, amongst others, lists the cases where they have acted as expert witnesses in, and the compensation paid or to be paid. During a deposition in civil matters, the expert witness can also be cross-examined on the payment of fees. The rules rely on the disclosure of the payment of fees to show the possible extent of financial bias. As argued throughout the chapter, the payment of fees does not necessarily indicate bias; there are many other forms of bias that could also influence the testimony of the expert witness.

As in all adversarial systems, the focus is on oral presentation. In federal and California courts, the legal framework allows for concurrent evidence. Despite the proven benefits, concurrent expert evidence is rarely used. In American courts the emphasis is on cross-examination, having been described as "fundamental guarantees of life and liberty"[693] indicates the absolute faith and importance placed in cross-examination. Again, an emphasis has been placed on the fees paid to expert witnesses and the rules specifically allow for cross-examination on the fees as it is considered to go to the credibility of the expert witness and assist the jury in understanding the extent of bias. The focus on the fees detracts from focussing on the content of the testimony and whether this is reliable and unbiased.

The Federal Rules of Evidence and California Evidence Code allow for court-appointed experts, which are rarely used. Court-appointed experts can also be appointed as advisors to the court and not in a role whereby they contribute evidence. The Hall case is a great example where court advisors, similar to court assessors in South Africa, have been used with success. It is submitted that courts should make more use of court advisors in cases with complicated expert evidence. The guidelines provided for the use of court advisors can be useful in the South African context.

The last aspect examined was the immunity of expert witness. With the strong belief in the safeguards provided by the adversarial system such as cross-examination and taking the oath, the federal courts have resisted abolishing witness immunity against civil claims. In California, there has been somewhat of an erosion of the immunity

[693] *Pointer v. Texas* at 1068.

doctrine but within an extremely limited scope. The *Austin* case confirmed that expert witnesses are, however, not immune against disciplinary proceedings by a professional society against a member. The self-regulation of professions is, therefore, crucial in the United States.

Both AAPL and the American Psychiatric Association adheres to the *Code of Medical Ethics* provided by AMA but has only supplemented the code to provide for more specific guidance for psychiatrists. AMA's Code is comprised of nine principles and opinions, and from the analysis of the opinions relevant to expert medical testimony, the principles of respect for autonomy and justice provide the moral authority for the opinion. It is submitted that the Health Professions Council of South Africa should also indicate the general principles that the specifications rely on to provide the members with the understanding of the ethical framework.

The AMA Code and APA Principles do not provide much guidance for psychiatrists who conduct psycho-legal work. The specialist guidelines are provided by AAPL, which must be read together with the AMA Code. AAPL confirms that the underlying ethical principles that a psychiatrist in a forensic role is bound to are respect for persons, honesty, justice, and social responsibility. AAPL has also provided further guidelines for the specific area of psycho-legal work, and it is submitted that the professional boards in South Africa must also undertake a similar task to provide guidelines.

In addition to the ethical framework, the American Medical Association has also through its policies implemented further practical requirements to maintain the integrity and quality of the profession. The policy on medical testimony provides that expert testimony should be subjected to peer review and furthermore the policy regarding expert testimony provides that an expert witness must sign an affirmation that they will comply with the rules of the American Medical Association. It is submitted that consideration should be given to peer review and a possible affirmation by the Health Professions Council of South Africa.

The American Psychological Association's ethical code also contains the general principles that provide the authority and the standards of conduct. In addition, the American Psychological Association has adopted S*peciality Guidelines for Forensic Psychology*. It is submitted that similar guidelines must be developed in South Africa to provide guidance for psychologists that conduct psycho-legal work. The Speciality Guidelines are informed by the general principles contained in the American Psychological Associations ethics code which are beneficence and nonmaleficence; fidelity and responsibility; integrity; justice and respect for people's rights and dignity. Examining the Speciality Guidelines, it is clear that fidelity and responsibility; integrity; justice and respect for people's rights and dignity are the key principles underlying psycho-legal work.

The disciplinary procedures of the American Medical Association, the American Psychiatric Association and American Psychological Association are remarkably similar. All three associations will conduct a preliminary investigation to determine whether the association has jurisdiction and whether there is a cause of action. After an official case has been opened, the relevant information is exchanged, and a hearing is held. The American Psychological Association differs in that no formal hearing is held and the matter is reviewed based on the statements and material provided by the respondent and complainant. The American Psychiatric Association also varies slightly as a complaint may be resolved by using the educational option any time before a final determination by the hearing panel. The associations do not have the power to revoke the licences of the psychiatrists or psychologists but can refer a matter to a state board. The sanctions that can be imposed by all three associations are reprimand, suspension or probation, and expulsion. Suspension or probation is usually accompanied by other conditions such as training or supervision. Notable is that there is no option by members to pay a fine.

Considering that the ethical guidance provided for psychologists and psychiatrists in South Africa is based on the ethical codes of the professional associations discussed it is submitted that the Health Professions Council of South Africa and other professional organisations will benefit from revisiting these organisations' ethical codes and considering the development and changes that have taken place. Self-

regulation is imperative to maintain the quality and integrity of a profession and South African professional bodies, and organisations can learn a lesson or two from America.

CHAPTER 7
RECOMMENDATIONS AND CONCLUSION

7.1 Introduction

> When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours, but that to which all the parties before us belong, spelt out moreover in convincing language and reasoning, we should be unwise not to take the benefit of it.[1]

This study, of course, is not about the litigation between the same parties in two countries, but the principle remains the same. England and the United States of America's "fabric" are already woven in our legal doctrine and is part of the South African legal narrative, it would be unwise for South Africa not to take benefit from the judicial approach of the comparator countries who have experienced similar problems with expert witnesses in general, and more specifically mental health experts. This chapter will endeavour to provide recommendations for the problems experienced with mental health experts in South Africa drawing from the approaches in the United States of America and England.

As indicated at the start of the study, the study embodies the narrative of mental health professionals acting as expert witnesses. Throughout the study, the historical origins and the existing law were examined to provide a new product: a comprehensive regulatory framework for psycho-legal assessments. Throughout the study, each chapter was comprehensively concluded but to properly contextualise the recommendations, a synopsis of preceding chapters needs to be provided. The synopsis will, amongst others, outline the problems with the current regulatory framework in South Africa whilst indicating the major differences between the regulatory framework in South Africa and the two comparator countries, England, and the United States of America.

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1 *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888 at 936–937.

The recommendations will be discussed separately but should be considered part of the comprehensive regulatory framework for psycho-legal assessments. As stated in chapter 1, the solution lies not in the legal system's endeavours or the mental health profession alone but the combined effort.

7.2 Synopsis of the chapters

In chapter 3 of the study, an analysis of the case law and legislation demonstrated that mental health professionals' knowledge and skills are called on in various cases, ranging from criminal cases, family law matters to personal injury claims.[2] Many courts have unequivocally indicated the need for expertise to assist in answering psycho-legal questions. The growth in the use of mental health professionals as experts in court is evident when comparing the historical overview in chapter 2 with the need analysis in chapter 3.

Nevertheless, as determined in chapter 2 of the study, the use of mental health professionals as expert witnesses have throughout history elicited criticism.[3] The criticism stemmed from the alleged lack of scientific rigour in mental health sciences and expert witnesses' accompanying bias.[4] As the use of mental health professionals in the court grew, so did the associated problems, with bias remaining at the forefront. In chapter 3 the typical problems associated with psycho-legal work were examined considering case law, various studies and the disciplinary proceedings against registered health practitioners, specifically psychologists, made available by the Health Professions Council of South Africa (HPCSA).

From the studies done by Scherrer, Louw and Möller[5] and Nortje and Hoffman,[6] as well as an analysis of the HPCSA's published lists of guilty verdicts against registered psychologists the most complaints and disciplinary actions emanated from psycho-

2 See 3.6.
3 See 2.5.
4 See 2.2.
5 Scherrer *et al*. "Ethical complaints and disciplinary action against South African psychologists" (2002) 32(1) *South African Journal of Psychology* 54.
6 Nortje and Hoffman "Ethical misconduct by registered psychologists in South Africa during the period 2007-2013" (2015) 45 *South African Journal of Psychology* 260.

legal work.[7] The specific transgressions relating to psycho-legal work contained in the HPCSA's published guilty verdicts of 2014 until 2019 includes making recommendations without consulting all of the relevant parties; failing to conduct proper investigations; unsubstantiated allegations that were not confirmed by collateral sources; aspersions regarding the psychological state of a party who was not evaluated or interviewed; failing to include the limitations or potential bias in the findings; entering of multiple relationships and failing to include the focus or purpose of the report.[8] In reviewing case law, the problems raised by the courts regarding psycho-legal work are identical to those contained in the HPCSA's verdicts, with additional problems being highlighted by the courts.[9] Case law revealed several problems concerning psycho-legal reports which included, using too much technical jargon; rendering opinions without sufficient explanation; opinions being incomplete or vague and not addressing the legal question; not including all sources that were used to inform their opinion; not distinguishing between facts, inferences, and opinions; including grossly exaggerated statements; compiling reports without interviewing all the relevant parties and not acknowledging limits of expertise or opinions.[10] Other problems indicated were bias, partisan, unobjective testimony; expert witnesses who were unwilling to make concessions; and mental health professionals who acted in dual roles.[11]

The South African legal system does have safeguards in place to help ensure that the expert testimony relied on is unbiased, objective, nonpartisan, valid, and reliable, addressing some of the problems mentioned above. In chapter 4, the importance of cross-examination,[12] joint minutes by expert witnesses,[13] pre-trial conferences and case management,[14] and disclosure of expert evidence[15] were discussed. Although the mechanisms do not directly address the problems above, they are indispensable in regulating expert evidence and forming part of the regulatory framework as a whole. The legal mechanisms assist in narrowing down the issues, limiting costs and

7 See 3.7.1.
8 See 3.7.1.
9 See 3.7.2.
10 See 3.7.2.2.
11 See 3.7.2.1.
12 See 4.2.3.
13 See 4.2.2.
14 See 4.2.2.
15 See 4.2.2.

durations of trials, assisting parties to prepare for trial properly, and in the case of cross-examination, it can uncover inconsistencies and inaccuracies in oral testimony.[16] England and the United States of America, as discussed in chapter 5 and 6, respectively, have the same mechanisms in place, with varying degrees of emphasis placed on the mechanisms in the different jurisdictions. However, the success of the mechanisms varies and is often dependant on the parties. For example, as discussed in chapter 4, the effectiveness of cross-examination is based on the skills, sophistication, and resources available to the opposing legal representative.[17] The mechanisms on their own are not enough to ensure proper regulation of expert evidence and to address the problems expounded in chapter 3.

The mechanisms alone are not enough, but the analysis of the South African legal system compared with England and the United States of America also revealed that there are mechanisms within the regulatory framework that are underutilised and other areas that need to be developed. For example, despite the procedural rules allowing for court assessors and court-appointed expert witnesses in South Africa[18] , they are rarely used and need to be reconsidered. Recommendations pertaining to court assessors will be discussed below. As to the areas of development, one of the main differences between South Africa and the comparator countries is the rules of admissibility. Both England and the United States have codified rules of admissibility and moved away from the common law rules,[19] which begs the question of whether South Africa needs to revisit its evidentiary rules. In England, the rules relating to expert evidence have been extensively amended, and new rules adopted resulted in a more rigorous approach to handling expert evidence.[20] Recommendations pertaining to areas that require development will be discussed below.

Crucial to the recommendations is the fact that the selection, admission, and evaluation of expert evidence cannot occur in a vacuum but occurs with the cognisance of the scientific, methodological, and professional standards relevant to

16 See 4.2.4.
17 See 4.2.4. Appelbaum "Forensic psychiatry: The need for self-regulation" (1992) 20 *Bulletin of the American Academy of Psychiatry and Law* 153 156. See 4.2.4.
18 See 4.2.6.
19 See 5.4.1. and 6.4.1.
20 See 5.4.

the particular discipline.[21] Throughout the study, an emphasis was placed on the fact that a regulatory framework cannot consist of legal mechanisms only, but the self-regulation within the professions itself is vital. Appelbaum, Bonnie, and Slobogin all argue that the "most promising avenue" to ensure that the psychiatric or psychological evidence is objective, nonpartisan, valid, and reliable is if the mental health professions themselves regulate their members.[22] The regulation of the mental health professions, psychology, and psychiatry was examined in each comparator country.[23]

In South Africa, the professions of psychiatry and psychology are regulated by the HPCSA to ensure the professionals uphold a high standard.[24] To ensure that the high ethical standards are upheld, the HPCSA will investigate complaints of unprofessional conduct of registered practitioners[25] and institute disciplinary proceedings against registered practitioners who have acted in an improper or disgraceful manner.[26] In chapter 4, the two-stage disciplinary process of the HPCSA was explained,[27] the process being similar to most of the professional organisations or bodies discussed in the comparator countries, including the General Medical Council,[28] Health and Care Professions Council,[29] American Medical Association[30] and the American Psychiatric Association.[31] The analysis of the disciplinary proceedings of the HPCSA indicated that the process itself was not problematic, but the sanctions imposed by the HPCSA needs to be reconsidered. In chapter 4, the studies of Scherrer, Louw and Möller[32] and Nortje and Hoffman[33] together with an analysis of the penalties imposed by the HPCSA from 2014 until 2019 indicated that not much emphasis was placed on the ethics and integrity of the matter.[34] The studies indicated that the financial penalties

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21 See 4.1. Meintjies-Van Der Walt (2001) *Expert evidence in the criminal justice process: A comparative perspective* 72.
22 Bonnie and Slobogin "The role of mental health professionals in the criminal process: The case for informed speculation" (1980) 66 *Virginia Law Review* 461 and Appelbaum "Forensic psychiatry: The need for self-regulation" (1992) 20 *Bulletin of the American Academy of Psychiatry and Law* 153.
23 See 4.3, 5.5 and 6.5.
24 See 4.3.1. Section 3(m) of the Health Professions Act 56 of 1974.
25 See 4.3.3. Section 41(1) of the Health Professions Act 56 of 1974.
26 See 4.3.3. Section 42 of the Health Professions Act 56 of 1947.
27 See 4.3.3.2.
28 See 5.5.1.1.2.
29 See 5.5.2.1.1.
30 See 6.5.2.1.
31 See 6.5.2.2.
32 Scherrer *et al*. (2002) *South African Journal of Psychology* 54.
33 Nortje and Hoffman (2015) *South African Journal of Psychology* 260.
34 See 4.3.3.2.

imposed by the HPCSA result in practitioners regarding ethical misconduct as merely a "business/financial risk".[35] Reviewing the penalties or sanctions imposed by the different organisations and associations, including voluntary and statutory organisations, in England[36] and the United States[37] revealed that none of the organisations or associations impose financial penalties and often combine the imposed sanctions with training. Considering the approach in England and the United States, recommendations pertaining to sanctions or penalties will be discussed in more detail below.

Integral to the disciplinary procedures is the Ethical Rules of Conduct of the HPCSA as it determines whether disciplinary steps will be taken.[38] The primary purpose of the ethical rules of conduct is to provide a measure of self-regulation for the profession and protect the public from unethical and incompetent practitioners.[39] As to the legal status, Ethical Rules together with prevailing practices of medicine, do not bind the courts but are taken into consideration when ascertaining what constitutes medical malpractice.[40] The HPCSA, similar to the professional organisations and statutory bodies examined in the comparator countries,[41] follows principlism, building the ethical framework for health professionals on the thirteen core ethical values and standards of the HPCSA.[42] In chapter 4, the core ethical values and standards of the HPCSA were examined.[43] As explained in chapter 4, the connection between the general norm in the form of a principle, rule or obligation gives the moral authority to the specification.[44] Specification is merely the process of reducing the indeterminacy of abstract norms.[45] Therefore, close attention must be paid to the definitions or descriptions attached to each of the general norms.

35 Nortje and Hoffman (2015) *South African Journal of Psychology* 269.
36 See 5.5.1.1.2; 5.5.1.2.2; 5.5.2.1.2; and 5.5.2.2.2.
37 See 6.5.1.2; 6.5.2.2; and 6.5.4.2.
38 See 4.3.3.1.3. Rule 2(1) of Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (GNR 717) in the Government Gazette No. 29079 of 4 August 2006 (as amended). See also Carstens and Pearmain (2007) *Foundational principles of South African medical law* 267.
39 See 4.3.3.1.1. Louw "Regulating professional conduct: Part 2: The Professional Board for Psychology in South Africa" (1997) 27 *South African Journal of Psychology* 191.
40 Carstens and Pearmain (2007) 264.
41 See 5.5 and 6.5.
42 See 4.3.3.1.1. Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 5.
43 See 4.3.3.1.1.
44 See 4.3.3.1.1. Beauchamp and Childress (2019) *Principles of biomedical ethics* 17.
45 Beauchamp and Childress (2019) 17.

In addition to the rules of the HPCSA, there are annexures that deal with the specific health professions.[46] The Ethical Rules of Conduct for medical and dental professions does not provide specific guidance for psychiatrists conducting psycho-legal work, but the Ethical Rules of Conduct for psychologists specifically makes provision in chapter 7 for psycho-legal activities.[47] In chapter 4 of the study, the specific rules were examined, and it was criticised as it does not sufficiently guide psychologists who conduct psycho-legal assessments[48] not to mention that there are no guidelines for psychiatrists. Chapter 4 also examined the guidance provided by voluntary organisations in South Africa, namely the South African Society of Psychiatrists[49] and the Psychological Society of South Africa.[50] The voluntary organisations do not provide further ethical guidance for psychologists or psychiatrists who conduct psycho-legal work.

In chapter 5 of the study, the ethical guidance provided by the General Medical Council,[51] the Royal College of Psychiatrists,[52] Health and Care Professions Council[53] and the British Psychological Society[54] were examined specifically to determine the ethical guidance provided for psychiatrists and psychologists conducting psycho-legal work. From the analysis, it was clear that the statutory and the voluntary organisations worked together to ensure that the ethical guidelines were integrated. The different bodies all ensured that the rules of court were contained in the guidance and provided practical examples and guidance for psychologists or psychiatrists who act as expert witnesses. In comparing the different bodies and organisations, the CR193 report of the Royal College of Psychiatrists contained the best integration between legal principles and ethical standards ensuring that the ethical principles upon which the rules are based were incorporated.[55] The organisations and bodies all provide general

46 See 4.3.3.1.
47 See 4.3.3.1.4.
48 See 4.3.3.1.4. Burke *et al*. "Moving beyond statutory ethical codes: Practitioner ethics as a contextual, character-based enterprise" (2007) 37 *South African Journal of Psychology* 114.
49 See 4.3.5.1.
50 See 4.3.5.2.
51 See 5.5.1.1.1.
52 See 5.5.1.2.1.
53 See 5.5.2.1.1.
54 See 5.5.2.2.1.
55 See 5.5.1.2.1.

ethical guidelines for their members. In addition, the General Medical Council,[56] the Royal College of Psychiatrists[57] and the British Psychological Society[58] all provide specified guidelines for psychiatrists and psychologists who act as expert witnesses. The separate guidance in all instances refers to the general norms and principles in the general ethical guidelines.

Chapter 6 of the study the ethical guidance of organisations in the United States of America was examined, namely the American Medical Association (AMA),[59] American Psychiatric Association,[60] American Academy of Psychiatry and Law (AAPL)[61] and the American Psychological Association.[62] In the United States of America, the procedural and evidentiary rules governing expert witnesses are not as extensive as in England. Professional organisations and associations focus more on the ethical standards and norms, although references to procedural and evidentiary rules are also contained in the ethical codes. AMA provides its members with a *Code of Medical Ethics* and based on the code AMA provides opinions on specific matters such as giving expert testimony.[63] The American Psychiatric Association also follows AMA's *Code of Medical Ethics* and provides specific annotations for psychiatrists applicable to the psychiatric profession, but does not provide much guidance for psycho-legal work.[64] The AAPL *Ethics Guidelines for the Practice of Forensic Psychiatry* supplements the American Psychiatric Association's *Principles of Medical Ethics with Annotations especially Applicable to Psychiatry* and the AMA *Code of Medical Ethics*.[65] The American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* provides the general principles and rules for the profession, and in addition,

56 See 5.5.1.1.1. General Medical Council (2013) *Acting as a witness in legal proceedings*.
57 See 5.5.1.2.1. Rix e*t al*. (2015) *Responsibilities of psychiatrists who provide expert opinion to courts and tribunals (College Report CR193.*
58 See 5.5.2.2.1. The British Psychological Society (2017) *Psychologists as expert witnesses: Guidelines and procedure*.
59 See 6.5.1.1.
60 See 6.5.2.1.
61 See 6.5.3.1.
62 See 6.5.4.1.
63 See 6.5.1.1.
64 See 6.5.2.1.
65 See 6.5.3.1. American Academy of Psychiatry and Law "Ethics guidelines for the practice of forensic psychiatry" (2005) available online at https://www.aapl.org/docs/pdf/ETHICSGDLNS.pdf (last accessed 28 May 2020).

Speciality Guidelines for Forensic Psychology were explicitly developed and adopted for psycho-legal work.[66]

Analysing the ethical guidance provided by the different organisations in England and the United States of America, in both jurisdictions a general ethical code or set of guidelines are provided for the mental health professionals, but speciality guidelines concerning psycho-legal work are usually provided for separately. As indicated in chapter 6 in the discussion regarding the ethical code of the American Psychological Association,[67] specialist areas cannot be adequately addressed within a generic ethics code. Also evident from the analysis is that the general ethical guidelines or code is not seen as a separate document but provides the framework upon which the speciality guidelines are built. In the recommendations below on the ethical guidelines for psycho-legal work in South Africa, consideration will be given to the manner in which the organisations in the comparator countries formulated their guidelines and the specific aspects included.

The last concern regarding the regulation by the HPCSA examined during the study is the aspect of continuing professional development (CPD).[68] The Health Professions Act determines that registered health practitioners in South Africa must undergo compulsory continuing education and training.[69] A key aspect to better expert evidence and psycho-legal assessments is better-trained professionals, but the current CPD programme is not effective in reaching the goals it set out to achieve.[70] Like the HPCSA, many professional bodies have questioned whether the units accumulated or time spent is a real indication of genuine learning and whether it will bring about improvement and changes in the health practitioner's practice.[71] The General Medical Council in the United Kingdom is one of the professional bodies that have moved away from the traditional approach to a framework of outcome-based CPD, as discussed in chapter 5.[72] The HPCSA has resolved to change the model of

66 See 6.5.4.1. American Psychological Association "Speciality guidelines for forensic psychology" (2013) 68 *American Psychologist* 7.
67 See 6.5.4.1.
68 See 4.3.4.
69 Section 26 of the Health Professions Act 56 of 1974.
70 See 4.3.4. Wallace and May "Assessing and enhancing quality through outcomes-based continuing professional development (CPD): a review of current practice" (2016) 179 *Veterinary Record* 515.
71 Wallace and May (2016) *Veterinary Record* 515.
72 See 5.5.1.1.

assessing CPD to a system that will help the practitioner demonstrate competence linked to patient outcomes.[73] Within the recommendations pertaining to continuing professional development, the outcome-based CPD in context of psycho-legal work will be considered.

Chapter 4 also examined the possibility of establishing an Independent Multidisciplinary Medico-Legal Regulatory Authority in South Africa.[74] The South African Medico-Legal Association (SAMLA) is an independent organisation established in 2000 with the primary goal of advancing the inter-relationship between medicine and law and to promote excellence in medico-legal practice by promoting dialogue and mutual understanding between members of the involved professions.[75] SAMLA calls for the establishment of Independent Multidisciplinary Medico-Legal Regulatory Authority to address the current vacuum in the medico-legal field which is not adequately regulated.[76]

SAMLA's proposal states that the core functions of the regulatory authority would be the publication of entry qualifications as well as training standards; accreditation of an educational institution(s) to train medico-legal practitioners; publications of a code of conduct for medico-legal practitioners; effective disciplinary procedures for medico-legal practitioners who violate the code; and the collaborations with stakeholders on any and all medico-legal matters.[77] The proposal is similar to functions performed by the existing professional society and qualifying body, the Academy of Experts (TAE) in the United Kingdom.[78] The TAE was founded in 1987 and provided valuable training and guidance to members. Despite the TAE's valuable role, in England the main

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73 See Health Professions Council of South Africa "Events: Maintenance of licensure" (2020) Health Professions Council of South Africa available online at https://www.hpcsa.co.za/?contentId=521 (last accessed on 23 July 2020).

74 See 4.3.5.3.

75 See 4.3.5.3. South African Medico-Legal Association "Our objectives" 2016 available online at https://medicolegal.org.za/index.php (last accessed 8 June 2020).

76 See 4.3.5.3. South African Medico-Legal Association "Medico-legal crisis presentation to the President" (2019) available online at https://medicolegal.org.za/SubmissionToThePresident/Medico-legal-Crisis-Presentation-to-the-President.html (last accessed on 8 June 2020).

77 See 4.3.5.3. South African Medico-Legal Association "The establishment of an Independent Multidisciplinary Medico-Legal Regulatory Authority" (2019) at 5-6 available online at https://medicolegal.org.za/SubmissionToThePresident/0.2-HJE-SAMLA%20-%20Letter%20to%20President%20-%20Regulatory%20Body-HJE-NC-BB-RM-M.pdf (last accessed on 8 June 2020).

78 See 5.5.3.1.

reform regarding expert witnesses was as a result of the amendment of the civil and procedural rules that were subsequently incorporated in the ethical guidance provided by the professional organisations. As submitted in chapter 4 and chapter 5, SAMLA and TAE play a valuable role and provide much-needed guidance to professionals, but an independent body will not provide the best solution to the problems discussed above. It is submitted that self-regulation within the specific profession itself would provide the best solution for addressing unethical behaviour.

7.3 Recommendations

7.3.1 Recommendation pertaining to a statutory test for the admissibility of expert evidence

In the United States of America, the test for admissibility of expert evidence includes a reliability test emphasising the gatekeeping function of the triers of fact. The purpose of the reliability test is to, amongst others, keep "junk science" out of the courtroom. The guidelines in *Daubert v. Merrell Dow Pharmaceuticals Inc.*[79] used to assess the evidentiary reliability of proffered evidence was initially in response to novel scientific techniques or theory but as indicated in *Kumho Tire Co. v Carmichael*[80] it applies to all expert evidence. Federal Rules of Evidence Rule 702 was amended in response to *Daubert* codifying the reliability test. The admissibility test for novel scientific techniques or methods in California is the *Kelly* test consisting of three prongs, namely the general acceptance of the new technique, proper qualification of the expert witness, and the correct scientific procedures.[81] Although the *Kelly* test is utilised in the State of California, the case of *Sargon Enterprises, Inc. v. University of Southern California*[82] has started to pave the way in adopting *Daubert* standards.[83]

In England, there is also a movement towards incorporating a reliability test in criminal proceedings. A statutory test of admissibility in criminal proceedings, namely, whether the expert evidence was "sufficiently reliable to be admitted" was recommended by

79 *Daubert v. Merrell Dow Pharmaceuticals Inc.* 509 U.S. 579 (1993).
80 *Kumho Tire Co. v. Carmichael,* 119 S.Ct. 1167 (1999).
81 *People v. Venegas,* 954 P.2d 525 (Cal.1998) at 545. See 6.4.1.1.
82 *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747 (2012).
83 See 6.4.1.1.

the Law Commission.[84] The admissibility test was not legislated but is referred to in the Criminal Practice Directions indicating that nothing at common law "precludes assessment by the court of the reliability of an expert opinion…and courts are encouraged actively to enquire into such factors".[85] The Criminal Practice Directions list eight factors that the courts may take into account in determining the reliability of expert opinion.[86] As submitted the factors in the Criminal Practice Directions incorporate the factors of *Daubert,* namely the testability, reliability, validity and known or potential error rate.[87]

In South Africa, there is no general reliability limb or test similar to the abovementioned statutory tests, and there is also no unambiguous test for an enquiry into the admissibility of novel theories and techniques. *Daubert* factors have been referred to in case law but have not been incorporated into South African law.[88] In *S v Ramavhale* the court held it is the courts' duty to "keep inadmissible evidence out, not to listen passively as the record is turned into a papery sump of 'evidence.'"[89] The question arises whether South African courts too readily admit expert evidence ignoring the duty as enunciated in *Ramavhale*. Reliability tests are considered imperative to regulating expert evidence in the other two jurisdictions, but should it be incorporated in South Africa?

An analysis of the application of the reliability tests in both the United States of America and England reveal similar problems. In England, scholars warn that the term "sufficiently reliable" is not defined and is vacuous in the absence of determinate criterion.[90] The American experience is similar to England, as the criteria are also considered difficult to define.[91] In England, the "reliability limb" is only suggested in criminal proceedings, with the common law test applicable in civil cases. Other rules have been set to ensure that reliable and unbiased expert evidence is admitted in civil

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84 The Law Commission (2011) *Expert evidence in criminal proceedings in England and Wales (com. 325)* par.7.21.
85 Par.19A.4 of Criminal Practice Directions (2015) as amended Division V.
86 Par. 19A.5 of Criminal Practice Directions (2015) as amended Division V.
87 See 5.4.1.1.
88 See 4.2.1.1.
89 *S v Ramavhale* 1996 (1) SACR 639 (A) at 651B-C.
90 Ward "A new and more rigorous approach to expert evidence in England and Wales?" (2015) 19(4) *The International Journal of Evidence and Proof* 229. See the discussion in 5.4.1.1.
91 Meintjies-Van Der Walt (2001) 157.

cases. The concern is further that the reliability test now requires judges to become amateur scientists.[92] Bernstein argued that judges often do not reflect on whether the testimony is unbiased, nonpartisan, and within the expert witness's legitimate field of expertise by solely focusing on the Daubert factors.[93] Furthermore, *Daubert* factors have not appeared to assist in determining the reliability of psychiatric and psychological evidence.[94] In the State of California, the *Kelly* test is also not applied to expert psychiatric and psychological evidence, as the court in *People v. Stoll* indicated "[n]o precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about is behaviour".[95] Considering the experience in the two comparator countries, it is submitted that a statutory reliability test will not assist the South African courts and that the position should remain as is.

It is submitted that the South African Law Reform Commission should investigate the development of a statutory test for admissibility of expert evidence based on novel scientific techniques or methods. It is recommended that a test similar to the three-prong *Kelly* test in the State of California should be developed in cases where the admissibility of evidence is challenged based on novelty. In general, the South African courts are already applying Frye's general acceptance test [96] , and a statutory test could assist. Despite the *Frye* standard being criticised as it could deny courts the benefits of new developments in science,[97] it is submitted that if the court rules and professional organisations' guidelines are aligned a similar test to that of *Kelly* will assist the triers of fact.

Take, for example, the admissibility of psychological autopsies in a criminal case such as *S v Rohde*.[98] The court in *Rohde* reviewed academic literature regarding psychological autopsies and found that it is mostly considered more of an investigative

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92 *Daubert v. Merrell Dow Pharmaceuticals Inc*. at 601 and Dennis (2017) *The law of evidence* 897. See 6.4.1.1.

93 Bernstein as quoted in Stockdale and Jackson "Expert evidence in criminal proceedings: current challenges and opportunities" (2016) 80 *Journal of Criminal Law* 360. See 6.4.1.1.

94 Bonnie "Howard Zonana and the transformation of forensic psychiatry" (2010) 38 *The Journal of the American Academy of Psychiatry and the Law* 572. See 6.4.1.1.

95 *People v. Stoll* 49 Cal.3d 1136 (1989) at 1154 as quoted in *People v. Ward*, 71 Call. App. 4th 368 (1999) at 373.

96 *S v Van As* 1991 (2) SACR 74 (W) at 106A. See 4.2.1.1.

97 Dennis (2017) 896.

98 *S v Rohde* (2019) 1 All SA 740 (WCC).

tool to be used outside the court as opposed to expert evidence inside the court.[99] In essence, the court applied a general acceptance standard. Assume the ethical standards or guidelines of a professional organisation requires a psychologist or psychiatrist to indicate the status and limitations of the novel or emerging principles and methods in their opinion. The court will then be in a better position to determine whether to admit the expert evidence or not by considering all the relevant information.

7.3.2 Recommendation pertaining to the ultimate issue rule

In England, the ultimate issue rule has been relaxed for civil proceedings by section 3 of the Civil Evidence Act 1972.[100] In criminal proceedings cases such as *R v Stockwell* also indicate a move away from the ultimate issue rule as long as the jury is reminded that they are not bound by the expert's opinion.[101] In the United States of America, the ultimate issue rule has been abolished in federal courts by Rule 704 of the Federal Rules of Evidence.[102] The only exception is in criminal cases where an expert witness may not state an opinion about the mental state or condition of a defendant in cases where the state or condition is an element of the crime.[103] The California Evidence Code contains similar provisions abolishing the ultimate issue rule[104] , but the Penal Code, like Rule 704(b), prohibits evidence regarding defendants' mental state in criminal trials.[105] Despite the exception in both federal and California courts, the provisions have not always been applied consistently[106] and often the rule is interpreted in such a way as to admit the evidence.[107] The efforts to exclude psychiatric or psychological evidence, as it considered to usurp the role of the court, have not been successful.

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99 *S v Rohde* at 823C. See 3.6.3.
100 Civil Evidence Act 1972 (c.30). See 5.4.1.4.
101 *R v Stockwell* (1993) 97 Cr. App. R 260 at 265. See 5.4.1.4.
102 See 6.4.1.4.
103 Rule 704(b) of the Federal Rules of Evidence.
104 Section 805 of the California Evidence Code. See 6.4.1.4.
105 See 6.4.1.1.
106 *U.S. v. Meader, 914 F.Supp.* 656 (1996) at 659 and Gordan "Old wine in old bottles: California mental defenses at the dawn if the 21st century" (2013) 32 *Southwestern University Law Review* 90. See 6.4.1.4.
107 Buchanan "Psychiatric evidence on the ultimate issue" (2006) 34 *The Journal of the American Academy of Psychiatry and the Law* 18 and Gordan (2013) *Southwestern University Law Review* 90. See 6.4.1.4.

The aim of a psycho-legal assessment is to reach a conclusion and for the mental health expert to form an opinion. Therefore, an ultimate opinion is seen as an "inevitable and inescapable result" of psycho-legal assessments.[108] Bonnie and Slobogin opine that the ultimate issue rule erects an artificial barrier to relevant expert opinion, often depriving the trier of fact of the most useful information the mental health professional can offer.[109] Zeffert and Paizes argue the correct approach by the court is that there should be no general rule that witnesses can never state their opinion on the ultimate issue save for certain matters where it will always be superfluous and inadmissible.[110] Meintjies-Van der Walt has also weighed in on the debate contending that since there is no jury in South Africa the judges decide what weight is attached to the expert opinion and there is, therefore, no need to continue to use the ultimate issue rule as an exclusionary rule.[111]

Taking into consideration that South African courts do not have juries, the general abolishment of the ultimate issue rule in the comparator countries, the failed attempts to exclude psychological and psychiatric evidence on the ultimate issue in the United States and that the purpose of expert opinion evidence is to assist the courts it is submitted that the ultimate issue rule must be abolished. It is submitted that it will be beneficial if the abolishment of the rule is codified similar to section 3 of the Civil Evidence Act in England and Rule 704(a) of the Federal Rules of Evidence in the United States.

7.3.3 Recommendation pertaining to the disclosure of expert evidence in criminal proceedings

In South Africa, as discussed in chapter 4, civil proceedings are governed by codified rules that mandate the disclosure of expert evidence.[112] Ensuring adequate exchange of expert information can be viewed, as Meintjies-Van Der Walt indicates, as a means of achieving "equality of arms".[113] Reciprocal disclosure will be in the interests of

108 Rogers and Ewing "Ultimate opinion proscriptions: A cosmetic fix and a plea for empiricism" (1989) 13(4) *Law and Human Behavior* 365.
109 Bonnie and Slobogin (1980) *Virginia Law Review* 456.
110 Zeffertt and Paizes (2010) *Essential evidence* 103.
111 Meintjies-Van Der Walt (2001) 166.
112 See 4.2.2.
113 See 4.2.2. Meintjies-Van Der Walt (2001) 115.

justice, especially concerning expert evidence information to ensure that both parties are thoroughly prepared. This includes being thoroughly prepared to cross-examine the expert witness to uncover any inconsistencies or biased testimony. The disclosure is, therefore, also crucial to the regulatory framework.

As a consequence of *Shabalala and Others v Attorney-General of Transvaal and Another*[114] disclosure of expert evidence in criminal cases should be granted, but there are no codified criminal procedure rules that require an expert's report to be filed and the expert witness to be revealed before the parties can rely on the evidence.[115] The only exception is the report in section 77 to 79 of the Criminal Procedure Act 51 of 1977.[116] Disclosure of expert evidence in criminal proceedings in the comparator countries have drastically changed over the years and differs from the South African position.

In England, the Criminal Procedure Rules determine that if a party in criminal proceedings wishes to introduce expert evidence that party must serve a summary of the expert's conclusion or the expert's report on the court officer and each party.[117] The expert's report must be served with a notice setting out if the party is aware of anything which might reasonably be thought capable of undermining the reliability of the expert's opinion or detracting from the credibility or impartiality of the expert.[118] In the United States of America the Federal Rules of Criminal Procedure, Rule 16(a)(1)(G) provides that on request of the defendant, the government must provide the defendant with a written summary of the testimony of expert witnesses the government expects to use in its case-in-chief at trial. The summary must describe the qualifications of the witness, it must describe the opinions the witness will give, and it must state the bases of the expert's opinion.[119] If the defendant requests disclosure under Rule 16(a)(1)(G), the government is given a reciprocal right under Rule 16(b)(1)(C) to obtain a summary of expert testimony the defendant intends to use at trial.

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114 *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC).
115 See 4.2.2.
116 See 4.2.2.
117 See 5.4.2.2. Rule 19.3 of the Criminal Procedure Rules 2015 (as amended).
118 See 5.4.2.2. Rule 19.3(3)(c) of the Criminal Procedure Rules 2015 (as amended).
119 See 6.4.2.2. Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure.

The California Penal Code also makes provision for discovery in criminal proceedings and emphasises that discovery promotes the ascertainment of truth[120] and saves court time.[121] The California Penal Code requires the parties first to make an informal discovery request, and if the opposing party fails to provide the information or materials, the court can be approached.[122] With respect to the disclosure of expert witnesses, both the prosecuting attorney and the defendants (or their attorneys) must disclose to the other party the names of the experts[123] and the relevant reports or statements, including physical or mental examinations, scientific tests, or experiments.[124]

It is recommended that South Africa should consider codifying similar provisions to that of California to allow for discovery of information relating to expert evidence in criminal proceedings. Providing the reports beforehand ensures that the parties can better prepare and better ascertain the truth. The disclosure will ensure that the accused right to a fair trial provided for the in the Constitution of the Republic of South Africa is protected.

7.3.4 Recommendation pertaining to the contents of expert reports

Psycho-legal reports are crucial to proceedings and are often not only relied on during the trial but during the pretrial to try and settle the matter. As indicated in chapter 1, great significance is attached to expert reports; the reports have been referred to as "immortal and influential document" that may "save or destroy a life".[125] In South Africa, the civil and criminal procedure rules, in general, do not determine the format or content of the psycho-legal or expert report. Some guidance is provided in section 79(1A) of the Criminal Procedure Act 51 of 1977 that indicates the general requirements of the psycho-legal report in cases where the capacity of the accused is

120 See 6.4.2.2. Section 1054(a) of the California Penal Code.
121 *Ibid*.
122 See 6.4.2.2. Section 1054.5(b) of the California Penal Code.
123 See 6.4.2.2. Section 1054.1(a) and section 1054.3(a)(1) of the California Penal Code.
124 See 6.4.2.2. Section 1054.1(f) and section 1054.3(a)(1) of the California Penal Code.
125 See 1.1. Davidson as quoted in Genis (2008) *A content analysis of forensic psychological reports written for sentencing proceedings in criminal court cases in South Africa* (dissertation for MA Clinical Psychology, University of Pretoria) 128.

in question[126] and civil matters, specifically category Y cases, the Practice Directive 2 of 2019 determines that expert reports must be drafted in a format designed for lucidity, brevity, and convenient cross-referencing, and must be in numbered paragraphs, and when referring to other expert reports, refer to the numbered paragraphs therein. [127]

In the United States of America, the Federal Rules of Civil Procedure and the California Code of Civil Procedure stipulates the basic requirements that an expert report must comply with.[128] In England, the Civil Procedure Rules and the Criminal Procedure Rules read with their respective Practice Directions deals extensively with the requirements of the expert's reports.[129] In England, the expert report must also be verified with a statement of truth and must contain a declaration that confirms that the expert understands their duty to the court, complied with the duty and is aware of the requirements set out in the specific rules and practice directions.[130]

It is recommended that the basic requirements and format of an expert report must be set out in the South African civil and criminal procedural rules and relevant practice directives. Similar to the position in England, not only should the requirements be stipulated in the procedural rules and practice directives, but the relevant professional organisations should incorporate the requirements in their guidelines. The professional organisation can further specify the requirements in the context of the specific profession. As discussed above the examination of case law indicated the main problems that the courts experienced with psycho-legal reports.[131] Drawing from the problems elucidated in case law,[132] and the rules and legislation in the United States of America and England, the following is recommended regarding the form and content of an expert's report:

i An expert's report must be addressed to the court and not to the instructing party.

126 See 3.6.1.
127 See 4.2.2. Part A, section 7.4.1.4. of the Practice Directive 2 of 2019.
128 See 6.4.2.1. See Rule 26(2)(B) of the Federal Rules of Civil Procedure and Section 2034.260(c) of the California Code of Civil Procedure.
129 See 5.4.3.
130 See 5.4.3.
131 See 7.2 and 3.7.2.
132 See 3.7.2.

ii An expert's report must be drafted in clear and concise language, and any necessary technical jargon must be explained.

iii The paragraphs in the expert's report must be numbered to ensure convenient cross-referencing.

iv An expert's report must set out the following:

a. The expert's qualifications, skills and experience.
b. The instructions and collateral sources received from the instructing party.
c. All the sources that the expert relied on formulating the opinion.
d. If psychological tests were used, the expert must indicate why the particular test(s) were used, and any tests' limitation.
e. The expert must distinguish between facts, inferences and opinions and indicate whether sources have corroborated the facts.
f. Where there are different opinions on a matter, the report must summarise the differing opinions and provide reasons for their own opinion.
g. If an opinion is qualified, the expert must state and explain the qualification.
h. If more than one person was involved, the report must set out who carried out the examinations and tests and the qualifications of all the persons involved.

v At the end of an expert's report, the expert must attach and sign a declaration indicating that the expert understands their duty to the court, has complied with the duty and is aware of the requirements as set out in the specific rules and practice directions similar to the Academy of Expert's Declaration attached to the study as Annexure A.

vi The declaration should contain a statement of truth in which the expert confirms that their opinions represent their true and complete professional opinions.

In the United States of America, the Federal Rules of Civil Procedure and the California Code of Civil Procedure require that the reports or declarations contain a statement

regarding the compensation paid.[133] It is submitted that the expert witness does not need to include a statement regarding compensation or fees. As argued throughout chapter 6, the expert witness's fees are not always indicative of bias, and the focus should instead be on the content of the expert report.

7.3.5 Recommendation pertaining to concurrent expert evidence

Concurrent expert evidence, the process by which expert witnesses from the same discipline or related discipline give evidence during a joint session,[134] has been used in other jurisdictions with great success. The legal framework in the United States of America allows for concurrent expert evidence, but because of the resistance from legal representatives and judges to use the model to present evidence, it is rarely used.[135] Therefore, the United States of America does not provide much insight into the use of concurrent expert evidence. On the other hand, in England, the practice of concurrent expert evidence was considered in Lord Justice Jackson's *Review of civil litigation costs: Final report*[136] and subsequently, a pilot project was launched in Manchester.[137]

The interim report of the pilot project revealed that the use of concurrent expert evidence showed reduced trial time, and the quality of the evidence was better.[138] The pilot study and recommendations resulted in the use of concurrent expert evidence being included in the Civil Practice Direction.[139] A further project was undertaken by the Civil Justice Council after the amendment of the Practice Direction 35 to determine the effect of the amendments and understand in what areas of the litigation the processes of concurrent evidence were (or were not) being used.[140] The study found

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133 See 6.4.2.1. See Rule 26(2)(B) of the Federal Rules of Civil Procedure and Section 2034.260(c) of the California Code of Civil Procedure.

134 See 4.2.3. Butt "Concurrent expert evidence in U.S. toxic harms cases and civil cases more generally: Is there a proper role for "hot tubbing"?" (2017) 40 *Houston Journal of International Law* 3; Quilliam "Piloting a discord of experts in a hot-tub" (2018) June *Without Prejudice* 14 and Barrie and De Villiers "Revisiting the adversarial approach of dealing with expert evidence: The treatment of expert witnesses by the State Administrative Tribunal of Western Australia" (2017) 1 *Journal of South African Law* 65.

135 See 6.4.3.

136 See 5.4.4. Jackson (2010) *Review of civil litigation costs: Final report*.

137 See 5.4.4. Genn (2012) *Manchester concurrent evidence pilot: Interim report*.

138 See 5.4.4. Genn (2012) *Manchester concurrent evidence pilot: Interim report* par. 34.

139 See 5.4.4. Par.11.1 of the Civil Practice Direction 35.

140 Civil Justice Council (2016) *Concurrent expert evidence and 'hot-tubbing' in English litigation since the 'Jackson reforms: A legal and empirical study* 4.

that despite the impression that concurrent evidence was only appropriate in specialists courts it has been used in various areas of the law with success including the medical negligence, motor vehicle accidents and family disputes.[141] The project indicated that the process saved time improved the quality of expert evidence, and assisted judges in determining the disputed issues.

In South Africa, the civil and criminal procedure rules do not allow for the process of concurrent expert evidence.[142] Concurrent expert evidence has only been used in a specialist tribunal, the Competition Tribunal.[143] By using the process of concurrent expert evidence problems such as the perceived battle of the experts that purportedly indicates bias[144] or the questioning of an expert witness that may elicit distorted testimony[145] can be overcome in addition to the other benefits that it holds. Concurrent expert evidence is not the solution for all cases, but it can be well suited in family law matters with many mental health professionals involved. It is recommended that South Africa also consider launching a pilot project to investigate the use of concurrent expert evidence in civil proceedings. Concurrent evidence could potentially be used in criminal proceedings, but considering the more adversarial nature of the criminal trial, it will most likely be regarded as inappropriate.[146]

7.3.6 Recommendations pertaining to evaluating expert evidence

It is trite that the courts are not bound by expert evidence.[147] In evaluating the expert evidence, the court must do so "in the contextual matrix of the case"[148] , but there is no hard and fast rule to determine the probative value of the expert evidence.[149] Given the nature of expert evidence, it is not always an easy task to determine whether the expert evidence is reliable and valid. It is recommended that guidelines are developed to assist the triers of fact in evaluating expert evidence. Meintjies-Van der Walt argues

141 *Idem* 10-11.
142 See 4.2.3.
143 For example, *Timrite (Pty) Ltd and The Mining Bag Division of Tufbag (Pty) Ltd* (IM100Jul17). See 4.2.3.
144 See 3.7.2.1.
145 Gutheil and Bursztajn "Avoiding *ipse dixit* mislabelling: Post-Daubert approaches to expert clinical opinions" (2003) 31 *The Journal of the American Academy for Psychiatry and Law* 207.
146 See 5.4.4. Glover (2017) *Murphy on evidence* 633.
147 See 5.4.7.
148 *S v M* 1991 (1) SACR 91 (T) at 100A. See 4.2.5.
149 See 4.2.5. Meintjies-Van Der Walt (2001) 213.

that the *Daubert* factors can be utilised by courts to assess and evaluate expert evidence.[150] As argued above the factors listed in the Criminal Practice Direction in England, together with the *Daubert* factors, can be used to formulate guidelines for assessing expert evidence.[151]

As Meintjies-Van der Walt submits, the factors in itself do not purport to constitute an adequate basis for resolving the challenge of adjudicating expert evidence, but the factors can assist as a guideline to understand how scientists go about doing their work and how they evaluate their work (for example peer review).[152] This helps the triers of fact to evaluate the probative value of expert evidence. Based on the *Daubert* factors and Criminal Practice Directions in England, it is recommended that in developing guidelines for assessing expert evidence, the following factors should be included:

i The extent to which the information available to the expert was complete and whether the expert considered all the information in formulating an opinion.

ii Whether the expert's theory or technique has gained general acceptance in the specific field and if not whether a proper reason for the divergence has been given.

iii Whether the expert's technique or theory has been subjected to peer review and publication and to what extent has it been reviewed by others.

iv If there are diverging opinions on the subject that forms the basis of the expert opinion whether the expert has properly explained their preference for the specific opinion.

v If the expert relies on tests or surveys, for example, psychological tests, to formulate their opinion whether proper consideration has been given to factors affecting the accuracy or reliability of the test results and whether any limitations have been explained.

vi Whether the expert's opinion is based on material falling outside their field of expertise and to what extent.

150 Meintjies-Van Der Walt (2001) 202-211.
151 See 7.3.1 and 5.4.7.
152 Meintjies-Van Der Walt (2001) 203.

The factors are only guidelines and will not necessarily be considered in every matter where expert evidence is relied on. To what extent courts will consider the relevant factors in assessing the expert evidence will depend on the case.

7.3.7 Recommendations pertaining to limiting expert witnesses: Single joint experts and court-appointed experts

The appointment of a single joint expert has the potential to not only assist in curbing costs and curtailing the duration of trials but may also reduce bias or potential bias.[153] In civil matters in South Africa, the Uniform Rules of Court provides that parties must endeavour to as far as possible appoint a single joint expert on any or all the issues in the case.[154] However, the rules and the practice directives do not prohibit any one of the parties in appointing their own experts.[155] If parties do not appoint a single joint expert, they must simply provide a reason for not doing so to the court.[156] Despite the inclusion of a single joint expert in the Uniform Rules and the Practice Directives, it is submitted that this will not prohibit parties from continuing to do "expert shopping".[157] In all probability should a single joint expert's report not be favourable to one party that party is likely to appoint their own expert with an opposing view. Without further amendments to the rules, the courts will unlikely be able to prohibit this.

The report of Lord Woolf indicated that the uncontrolled discovery and excessive use of expert witnesses and the additional problem of partisan experts caused major concerns in the civil justice system in England.[158] In response, the Civil Procedure Rules read with the Civil Practice Directions now limit expert witnesses; usually, a single joint expert is appointed, and no party is allowed to call an expert or submit the expert's report into evidence without the court's permission.[159] In a soft tissue injury claims the court usually only permits one expert medical report.[160] The courts in England have expressly indicated that expert shopping is not allowed, and only under

153 See 5.4.2.1.
154 See 4.2.2. Rule 36(9A)(a) of the Uniform Rules of Court.
155 See 4.2.2.
156 See 4.2.2. Part A, section 15.2.5. of the Practice Directive 2 of 2019.
157 See 4.2.2.
158 Woolf (2006) *Access to justice- Final Report* par. 2, chapter 13. See 5.4.2.1.
159 See 5.4.2.1. Rule 35.4(1) of the Civil Procedure Rules 1998 (as amended).
160 See 5.4.2.1. Rule 35.4(3B) of the Civil Procedure Rules 1998 (as amended).

exceptional circumstances will the courts allow a party to appoint a different expert witness after one has already been appointed.[161]

It is not recommended that as strict an approach be followed in South Africa, but expert shopping and excessive use of expert witnesses to bolster a case must be addressed. The problem with expert shopping is that it promotes bias and partisan expert evidence. It is recommended that the Practice Directive be amended to provide for matters where the court can direct that a single joint expert be appointed. In considering whether the court must direct that the parties appoint a single joint expert, factors that the court can consider is the claimed amount, complexity of the case and whether expert evidence is to be given on the merits or quantum of the case. Furthermore, it is recommended that once parties appoint a single joint expert, they must apply to the court to appoint a different expert witness to prevent expert shopping. Only under exceptional circumstances should the court allow parties to appoint additional expert witnesses. The recommendations do not extend to criminal cases. It is submitted that limiting the right of an accused to appoint expert witnesses could potentially violate an accused constitutional right to a fair trial.

The courts can also appoint their own expert,[162] but the use of court-appointed experts have not been met with much success in England[163] or the United States of America.[164] Some of the reasons for the lack of use of court-appointed experts is that the despite the provisions that allow courts to appoint experts the provisions do not help courts locate and select appropriate experts, and finding experts can be problematic, furthermore, opponents argue that the court-appointed expert will have too much power.[165] Although the appointment of court experts can be of assistance and can minimise bias, it is recommended that in cases with problematic or highly technical expert evidence courts should rather appoint assessors or panels of experts as recommended in 7.3.8 below.

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161 See 5.4.2.1.
162 See 4.2.6.
163 See 5.4.2.2.
164 See 6.4.7.
165 See 6.4.7. Gross "Expert evidence" (1991) 6 *Wisconsin Law Review* 1191-1192.

7.3.8 Recommendations pertaining to court assessors

The relevant statutes in South Africa already make provision for a judge or magistrate to be assisted by an assessor in both criminal and civil cases.[166] The mechanism is, however, underutilised. The use of court assessors can help evaluate expert evidence, including in determinations regarding the validity and reliability of the evidence. It is recommended that courts make more use of court assessors in complex cases involving expert evidence. Despite section 34 of the Magistrates' Courts Act indicating that a "lay" assessor can be appointed who need not have any specific skill and experience in the matter, in a matter dealing with complex expert evidence the value of the assessor lies in the specialist's knowledge of the field. In this regard, professional organisations and bodies such as SAMLA can assist by providing a register of members and their specialities willing to assist the courts.

When appointing an assessor, the impartiality of the assessor is crucial, and the court should ensure that a fair and open procedure is used in appointing the assessor, address any allegations of impartiality of the assessor and ensure that the when the assessor takes the oath, they are fully aware of their duties.

7.3.9 Recommendations pertaining to the duties of expert witnesses

Beyond the evidentiary rules and guidelines, the courts in England and South Africa have emphasised the duties and the role of expert witnesses.[167] The main duties of the expert witness have been set out in the well-known English case, *Ikarian Reefer,*[168] which has been incorporated in South African law in the case of *Schneider NO and others v AA and another.*[169] In England, the duties of an expert witness have now been codified and are contained in the Civil, and Criminal Procedure Rules read with the specific Practice Directions.[170] The professional organisations in England, such as the Royal College of Psychiatrists and the British Psychological Society have also

166 See 4.2.6. Section 93*ter* of the Magistrates' Court Act 32 of 1994 and section 145(1)(b) of the Criminal Procedure Act 51 of 1977.
167 See 4.2.7. and 5.4.6.
168 *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd ("The Ikarian Reefer")* [1993] Lloyd's Law Reports (2) (Q.B. (Com. Ct.) 68. See 5.4.6.
169 *Schneider NO and others v AA and another* 2010 (5) SA 203 (WCC). See 4.2.7.
170 See 5.4.6.

included the duties of an expert witness as required by the Civil and Criminal Procedure Rules in their ethical guidelines.[171]

The duties of expert witnesses have been articulated in case law, and it could be argued that there is no further need to include or codify the duties in the civil and criminal procedure rules in South Africa. Reiterating the point made by Judge Valley in *Twine and another v Naidoo and another*[172] is that many of the challenges faced by courts are owing to the fundamental principles about the role, relevance and value of an expert's testimony often being ignored by the expert witnesses and the parties calling them.[173] It is submitted that it is often not because the principles are ignored but because of the ignorance of expert witnesses. It is submitted that by clearly setting out the role and duties of the expert witness in the criminal and civil procedure rules and professional organisations including (and providing practical guidance on) the duties in their ethical guidelines expert witnesses and legal representatives will be better informed of what is expected of an expert witness. Combined with the declaration contained in the expert report discussed in 7.3.4, expert witnesses will not only better understand their role and duties, but it will be easier to hold them accountable. The failure to adhere to the duties can influence the weight of the evidence but should also hold consequences for the expert witness whether in the form of disciplinary proceedings by the professional or statutory body that regulates the profession or a cost order as will be discussed below in 7.3.10.

Reference has been made to Annexure B of the study that sets out the list of expert's duties contained in the Royal College of Psychiatrists' College Report CR193.[174] The CR193 report clearly and succinctly sets out the duties as per the *Ikarian Reefer* case as well as additional duties that have been expressed in case law. Therefore, it is recommended that the criminal and civil procedure rules in South Africa be amended to include the list of expert's duties contained in Annexure B of the study. It is further recommended that the list of duties be incorporated in ethical guidelines pertaining to psycho-legal work which will be discussed in 7.3.13 below.

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171 See 5.5.1.2.1. and 5.5.2.2.1.
172 *Twine and another v Naidoo and another* (2018) 1 All SA 297 (GJ).
173 See 4.1. *Twine and another v Naidoo and another* at par. 18.
174 Rix et *al*. (2015) *Responsibilities of psychiatrists who provide expert opinion to courts and tribunals (College Report CR193)*. See 5.5.1.2.1.

7.3.10 Recommendations pertaining to cost orders

As remarked on in *Ndlovu v Road Accident Fund,* it is time that an expert's lack of care, skill and diligence should be met with adverse cost consequences.[175] In England, the 2004 case of *Phillips v Symes* was the first case to examine and develop the law to allow the court to award a cost order against an expert witness due to the flagrant disregard of their duties.[176] The specific remedy of a cost order was sought on the basis that the other consequences of an expert witness flagrantly disregarding their duties does not provide a sanction that is "effective to compensate the true victim of any such action, namely the parties".[177] It was argued that a cost order against an expert witness is analogous to advocates who have been subject to sanctions for costs because they owe a duty to the court.[178]

In South Africa, a non-party to proceedings, such as an attorney or counsel, can be ordered to pay costs *de bonis propriis*.[179] In the alternative or adjunct to an order of *costs de bonis propriis* courts can disallow all or part of the fees recoverable by the offending legal practitioners.[180] It is submitted that similar to the argument put forward in the English case of *Phillips v Symes* expert witnesses like legal representatives owe a duty to the court and are therefore not immune against cost orders. It is recommended that in instances where expert witnesses disregard their duties, as set out in 7.3.9, and do not act with the necessary diligence and care, the court should consider awarding a cost order. The cost order can include limiting the amount that an expert can recover from the instructing party or in severe cases; it should even result in a cost order *de bonis propriis*.

175 *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ) at par. 122.
176 *Phillips v Symes (A Bankrupt) (Expert witness: Costs)* (2004) EWHC 2330 (Ch), 204 WL 2355788 at par. 12. See 5.4.9.
177 *Ibid.*
178 *Ibid.*
179 Cilliers (2020) *Law of costs* par.2.02. See 4.2.8.
180 Cilliers (2020) *Law of costs* par.10.25. See 4.2.8.

7.3.11 Recommendations pertaining to an integrated model of professional development and maintenance of licensure

As discussed above, the HPCSA has started investigating the possibility of moving away from a traditional approach in regulating health professions to an integrated model of professional development and maintenance of licensure.[181] The HPCSA is still in the developmental phase of the new model[182] , but as the model is premised on the revalidation process of the General Medical Council, the review of the implementation in England can be insightful.[183]

As explained in chapter 5, the process of revalidation, in brief, entails that the healthcare practitioner needs to collect and reflect on supporting information which will demonstrate continuing professional development, quality improvement activities, significant events, feedback from patients, feedback from colleagues and any complaints or compliments.[184] To continue to practice the annual appraisal must indicate that based on the information supplied, it is recommended that the practitioner is fit to practice.[185] Failure to comply with the process can result in the refusal to restore a practitioner's licence.[186] Psychiatrists who act as expert witnesses must include, as part of their appraisal feedback from instructing legal representatives, the opposing party's expert(s) and the individual assessed by the psychiatrist and any comments by counsel and the judge on the quality of oral evidence given.[187]

In the context of mental health professionals who conduct psycho-legal work, the process will enable them to identify problems and bring changes in their practice. In chapter 3 of the study, the statistical analysis indicated that a low percentage of psychologists are found guilty of ethical misconduct.[188] Kaliski opines that the rarity in

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181 See 7.2 and 4.3.4.
182 See 4.3.4.
183 See 5.5.1.1.
184 General Medical Council (2019) *Guidance for doctors: requirements for revalidation and maintain your licence* 14.
185 See 5.5.1.1. General Medical Council (2019) *Guidance for doctors: requirements for revalidation and maintain your licence* 14.
186 *Ibid.*
187 Rix et *al*. (2015) *Responsibilities of psychiatrists who provide expert opinion to courts and tribunals (College Report CR193)* 25.
188 See 3.7.1.

complaints could be attributed to lack of regulation.[189] A further investigation in chapter 3 exposed that many mental health professionals may not be subjected to disciplinary proceedings by the HPCSA, but case law clearly indicates several problems with psycho-legal work.[190] By implementing a similar process to that of revalidation the regulatory body, the HPCSA, will be placed in a better position to determine the extent of the problem with potentially more complaints being made. The purpose of the model will not be to promote complaints or act as a complaints process or sanction the practitioners but to enable the HPCSA to better assist and train practitioners to drive change in healthcare professions. In addition, as indicated in the CR193 report, the process of revalidation and appraisal can also assist courts as it can establish the expertise of a practitioner.[191]

It is recommended that in the developmental phase of the integrated model of professional development and maintenance of licensure, the HPCSA must consider that healthcare practitioners may act as expert witnesses. The healthcare practitioner might only act as an expert witness once or twice, but this must form part of the appraisal. Furthermore, it is recommended that once the model is in place that the various Professional Boards must ensure that the voluntary organisations such as the South African Society of Psychologists and the Psychological Society of South Africa are “on-board” and will assist their members with the process.

7.3.12 Recommendations pertaining to sanctions for improper or disgraceful conduct

The HPCSA is a value-driven regulatory body, and one of the main objectives is to serve and protect the public and uphold and maintain professional and ethical standards within the health professions.[192] The penalties imposed by the HPCSA for improper or disgraceful conduct must also reflect this. As discussed above, the penalties imposed by the HPCSA between 2014-2019, were mostly a caution or

189 Kaliski “The prostitution of psychiatry: Some are shameless, others are just easy” (2012) 15 *South African Journal of Psychiatry* 321.
190 See 3.7.2.
191 Rix et *al*. (2015) *Responsibilities of psychiatrists who provide expert opinion to courts and tribunals (College Report CR193)* 25. See 5.5.1.2.1.
192 See 4.3.1.

caution and reprimand and a fine.[193] Fines were imposed in cases where the psychologist failed to interview both parents in care and custody evaluations and made aspersions regarding the psychological state of the party who was not evaluated; failing to obtain informed consent before filing a report and preparing a report without conducting proper investigations; entering multiple relationships with a patient; failure to obtain sufficient collateral information to compile a psycho-legal report, and failing to include the limitations or potential bias in the findings of a psycho-legal report.[194] The list and imposed fines were discussed in detail in chapter 4, but it is important to reiterate that what is clear from the list of misconduct is that it includes many of the recurring problems pertaining to psycho-legal work, it is submitted that part of the problem is the penalty imposed. Mental health professionals pay a fine, but the ethics and the integrity of the matter are never addressed nor the potential lack of training.

In England, the General Medical Council, Health and Care Professions Council, Royal College of Psychiatrists and British Psychological Society all have similar sanctions that can be imposed in cases of misconduct which include a warning, suspension, suspension with conditions and in the case of the General Medical Council and Health and Care Professions Council erasure from the register.[195] In the United States of America, the situation is similar. The American Medical Association, American Psychiatric Association and the American Psychological Association have as available sanctions for misconduct, reprimand, expulsion or voiding of membership, and probation with or without conditions.[196] The American Psychiatric Association also has an education option, a specific educational programme is identified, and the accused member must complete it within a specified time.[197] Furthermore, the American Psychiatric Association can impose additional conditions to the sanctions to "reinforce and facilitate ethical behaviour".[198] None of the professional organisations imposed a penalty of a prescribed fine, and all of the organisations aim to promote and uphold ethical standards.

193 See 4.3.3.2.
194 See 4.3.3.2.
195 See 5.5.1.1.2; 5.5.1.2.2; 5.5.2.1.2; and 5.5.2.2.2.
196 See 6.5.1.2.; 6.5.2.2. and 6.5.4.2.
197 See 6.5.2.2. American Psychiatric Association (2013) *Procedures for handling complaints of unethical behaviour* 18.
198 American Psychiatric Association (2013) *Procedures for handling complaints of unethical behaviour* 23.

It is recommended that the HPCSA does not impose the penalty of a prescribed fee in cases of an ethics violation. The HPCSA should consider imposing required training and consider an educational option similar to that of the American Psychiatric Association. It is submitted that sanctions regarding fees should remain with the courts in the form of a cost order to ensure that the injured parties are compensated. In the alternative, it is recommended that if a prescribed fee is imposed in cases of an ethics violation, an additional penalty must be imposed, such as attending an ethics course. The penalties must not be construed as a mere business or financial risk. The HPCSA must ensure that it achieves its objective of promoting and upholding ethics by imposing penalties that reinforce ethical behaviour.

7.3.13 Recommendations pertaining to ethical guidelines for psycho-legal work

In civilized life, law floats in a sea of ethics.[199]

Ethics is seen as the very essence of professional practice and underpins the law. As professions developed, professional morality was formally codified through ethical codes, ethical guidelines or standards of practice.[200] The two major purposes of an ethical code are described as promoting optimal behaviour by providing aspirational principles and regulating professional behaviour through disciplinary action against any professional who violates the enforceable standards of conduct.[201] Sales and Simon submit that ethical principles and standards provide the impetus for potential expert witnesses to consider how they will go about acting as experts and how they will prepare and if they will act as an expert witness at all.[202] Throughout the study, it is evident that there is a need for self-regulation within a profession and a regulatory framework for psycho-legal assessment will not be successful without the self-regulation of mental health professions.

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199 Warren as quoted in Cook "The corrupt society: A journalist's guide to the profit ethic" (1963) 196 *The Nation* 454.

200 Beauchamp and Childress (2019) 6-7. See 1.2.9.

201 Pettifor "Professional ethics across national boundaries" (2004) 9 *European Psychologist* 264.

202 Sales and Simon "Institutional constraints on the ethics of expert testimony" (1993) 3 *Ethics and Behavior* 245.

HPCSA provides general ethical guidelines that express the aspirational principles to which members of the healthcare professions should subscribe to.[203] The ethical guidelines are in place, so why can mental professionals conducting psycho-legal work not merely follow the guidelines? Appelbaum argues that different ethical principles are applicable in conducting psycho-legal work compared to when a clinical function is performed.[204] As a result, the general ethical guidelines, such as the guidelines provided for by the HPCSA, are not always applicable.[205] Appelbaum argues that the underlying premise differs because general medical ethics are rooted in a physician-patient relationship that aims to promote health whereas psycho-legal work is rooted in advancing the interests of justice.[206] If the same principles are applied, there is a failure to distinguish between forensic and therapeutic roles.[207] On the premise of Appelbaum's theory, the principles that inform the ethical framework of psycho-legal work needs to be determined. Therefore, creating an ethical code for a profession must begin with identifying the common moral norms and moral virtues that society desires the particular profession must promote.[208] As Appelbaum argues in psycho-legal work, it is the pursuit of justice.

Appelbaum identified two principles on which the ethical framework rests: truth-telling, which is characterised by subjective and objective components, and respect for persons, which Appelbaum argued should be based primarily on making sure that evaluees understand that a normal physician-patient relationship has not been established.[209] In addition, Appelbaum argues that justice must be pursued.[210] Truth-telling can be seen as a specification of general principles, being connected to respect for autonomy.[211] The ethical guidelines provided by the Royal College for Psychiatrists for psychiatrists acting as expert witnesses focus on the ethical principles of respect

203 See 4.3.3.1.1.
204 Appelbaum (1997) *Journal of the American Academy of Psychiatry and the Law* 237.
205 *Ibid*.
206 *Idem* 239.
207 *Idem* 243.
208 Appelbaum (1997) *Journal of the American Academy of Psychiatry and the Law* 236 and Beauchamp and Childress (2019) 3-4.
209 Appelbaum (1997) *Journal of the American Academy of Psychiatry and the Law* 240 and Griffith "Ethics in forensic psychiatry: A cultural response to Stone and Appelbaum" (1998) 26 *Journal of American Academy of Psychiatry and the Law* 179.
210 Griffith (1998) *Journal of American Academy of Psychiatry and the Law* 179.
211 Beauchamp and Childress (2019) 328.

for autonomy, beneficence, nonmaleficence, confidentiality and justice.[212] To safeguard the confidences and privacy is also a specification of the general principle of respect for autonomy.[213] In the American Medical Association's Code, the principles underpinning medical testimony are respect for autonomy and justice.[214] An analysis of the American Academy of Psychiatry and Law guidelines demonstrates that the general principles that provide the authority to the specifications for psycho-legal work are the same as the principles that underpin AMA's Opinion 9.7.1. namely respect for autonomy and justice.[215] In the *Specialty Guidelines for Forensic Psychology* by the American Psychological Association fidelity and responsibility; integrity; justice and respect for people's rights and dignity are the key principles underlying psycho-legal work.[216]

Examining the principles in the different ethical guidelines discussed above, all are in agreement that respect for autonomy should inform the ethical framework of psycho-legal work. The American Psychological Association and Appelbaum refer to respect for persons or people and not respect for autonomy. As discussed in chapter 6, different meanings for respect has emerged over the years, and respect for autonomy does not extend to non-autonomous persons[217] whereas respect for persons includes autonomous persons and persons with diminished autonomy or the vulnerable.[218] Given the scope of psycho-legal work persons with diminished autonomy and vulnerable groups are often evaluees, it is therefore submitted that the first principle underlying psycho-legal work should be respect for people which is inclusive of respect for autonomy.

The second ethical principle that underlies psycho-legal work in all the organisations mentioned above is justice. It is submitted that justice should inform the ethical framework for psycho-legal work. Integrity, discussed in chapter 4, is one of the most

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212 Rix et *al*. (2015) *Responsibilities of psychiatrists who provide expert opinion to courts and tribunals (College Report CR193)* 15-17.
213 See 6.5.1.1.
214 See 6.5.1.1.
215 See 6.5.3.1.
216 See 6.5.4.1.
217 Beauchamp and Childress (2019) 105. See 6.5.3.1.
218 Lysaught "Respect: Or, how respect for persons became respect for autonomy" (2004) 29(6) *Journal of Medicine and Philosophy* 668. See 6.5.3.1.

important virtues for health professionals.[219] Acting with integrity includes not intentionally misrepresenting facts[220] , and it is submitted is that it should be included as one of the principles for the ethical framework as it is crucial to psycho-legal work. The last remaining principles included in the ethical framework of some organisations are fidelity, beneficence, and nonmaleficence. Some scholars argue that within the ethical framework, some measure of obligation to the principles of beneficence and nonmaleficence that underlie clinical ethics must be retained.[221] Appelbaum in his argument against a framework with mixed ethical principles quotes the medical philosopher Edmund Pellegrino who noted that "[tlhe subject-physician relationship [i.e., in the forensic evaluation context] does not carry the implication or promise of primacy for the patient's welfare that [is] intrinsic to a true medical relationship".[222] As such, the principles of beneficence and nonmaleficence should not form part of the ethical framework for psycho-legal work. The argument put forward by Appelbaum is supported because allowing therapeutic principles to underlie the framework for psycho-legal work can easily confuse the mental health professionals' role.[223] As Beauchamp and Childress explain, professional fidelity is traditionally considered as prioritising the patient's interests with regards to fidelity.[224] It is submitted that fidelity should not form part of the ethical principles that inform psycho-legal work because similar to beneficence, it can cause confusion with regard to the mental health professionals' role.

The principles that should form the ethical framework of psycho-legal work should therefore be respect for persons, including respect for autonomy; justice; and integrity. The core ethical values and standards of the HPCSA does contain the principles of respect for persons, autonomy, justice, and integrity.[225] Respect for persons is described as:[226]

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219 See 4.3.3.1.1.
220 The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 4.
221 Appelbaum (1997) *Journal of the American Academy of Psychiatry and the Law* 243.
222 *Ibid.*
223 *Idem* 245.
224 Beauchamp and Childress (2019) 353. See 6.5.4.1.
225 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* 2.
226 *Idem* par.2.3.1.

> Health care practitioners should respect patients as persons, and acknowledge their intrinsic worth, dignity, and sense of value.

Whereas autonomy is described as:[227]

> Health care practitioners should honour the right of patients to self-determination or to make their own informed choices, and to live their lives by their own beliefs, values and preferences.

The definitions of respect for person and autonomy are suited for an ethical framework for psycho-legal work and can be specified to address specific problems in psycho-legal work. The only problem with the definitions is the use of the word patients. As explained in chapter 1, a person undergoing a psycho-legal assessment can no longer appropriately be termed a patient and should rather be referred to as an examinee or evaluee.[228] For the core ethical values of the HPCSA to be used in both clinical and forensic settings, it is recommended that the definitions also include evaluee, referring to the patient or evaluee. In the alternative, the description should read the patient or person subjected to a psycho-legal assessment.

Truthfulness, discussed above, is connected to respect for autonomy but the HPCSA's Ethical Guidelines also describes truthfulness.[229] According to the HPCSA's Ethical Guidelines, truthfulness and truth should be regarded as "the basis of trust in their professional relationship with the patient".[230] Subjective truth-telling for Appelbaum implies that the professional believes what they say is true and the objective aspect is when the professional, as far as possible and to the best of their abilities, acknowledges the limitation of their testimony.[231] According to Beauchamp and Childress, veracity or truthfulness in health care is not only being honest but also refers to "timely, accurate, objective, and comprehensive transmission of information and to the way the professional fosters the patient's or the subject's understanding".[232] Respect for autonomy includes providing the timely and accurate information, and for

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227 *Idem* par.2.3.5.
228 See 1.2.9. Gutheil and Appelbaum (2000) *Clinical handbook of psychiatry and the law* 286.
229 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* par.2.3.5.
230 *Idem* par.2.3.7.
231 Appelbaum (1997) *Journal of the American Academy of Psychiatry and the Law* 240. See 4.3.3.1.1.
232 Beauchamp and Childress (2019) 328.

purposes of the ethical framework for psycho-legal work, it is not necessary to change the description of "truthfulness" in the HPCSA's Ethical Guidelines to accord with the definition provided by Appelbaum. Nevertheless, for clarity and to provide even better guidance to mental health professionals, it is suggested that the definition of truthfulness be amended to include Beauchamp and Childress's definition.

Integrity is described in the HPCSA's Ethical Guidelines as:[233]

> Health care practitioners should incorporate these core ethical values and standards as the foundation for their character and practice as responsible health care professionals.

The British Psychological Society's *Code of Ethics and Conduct* indicates that acting with integrity includes:[234]

> being honest, truthful, accurate and consistent in one's actions, words, decisions, methods and outcomes. It requires setting self-interest to one side and being objective and open to challenge in one's behaviour in a professional context.

It is recommended that the description of integrity be amended to include a similar description provided in the British Psychological Society's *Code of Ethics and Conduct*. The description will better guide healthcare practitioners and also provide a foundational basis for psycho-legal work.

The last principle for the purpose of the ethical framework for psycho-legal work is justice which is described in the HPCSA's Ethical Guidelines as:[235]

> Health care practitioners should treat all individuals and groups in an impartial, fair and just manner.

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233 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* par.2.3.7.

234 The British Psychological Society (2018) *Code of Ethics and Conduct* par. 3.4. See 5.5.2.2.1.

235 Health Professions Council of South Africa (2016) *General ethical guidelines for health care professions: booklet 1* par.2.3.11.

It is submitted that the current description should be amended to include a similar description of what constitutes unjust practices as contained the American Psychological Association's Ethics Code which reads as follows:[236]

> Psychologists exercise reasonable judgment and take precaution to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices.

The American Psychological Association's description provides an excellent general norm that can be specified for psycho-legal work.

Abstract ethical principles are not enough to guide professionals in ethical decision-making because they are typically broadly drawn.[237] Ethical codes, therefore, provide specifications of the abstract norms and within the structure of the HPCSA, the Ethical Rules of Conduct provides the specification and comprises the general rules and annexures that contain specific rules of conduct for the different healthcare professions.[238] Only the Ethical Rules for psychologists make provision for psycho-legal work. Given the extent of psycho-legal work and the major difference between psycho-legal work and clinical work, it is recommended that the HPCSA take the same approach as the American Psychological Association and remove chapter 7 regarding psycho-legal work and draft speciality guidelines.

The ethical standards can still address basic aspects regarding psycho-legal activities but should be kept as generic as possible to apply to all the different types of psychologists. Because of the specialisation and major differences, all the professional organisations examined in this study provide ethical guidelines for psycho-legal work in a separate document. The separate guidelines must be based on ethical principles. It is recommended that separate guidelines be drafted, similar to the Code of Medical Ethics of AMA. The guidelines should include a reference to the ethical principles in the HPCSA's guidelines that have been used to formulate the specific guideline. The purpose is twofold: to confirm the guidelines' moral authority and assist the

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236 The American Psychological Association (2017) *Ethical Principles of Psychologists and Code of Conduct* 4.

237 Sales and Simon (1993) *Ethics and Behavior* 245.

238 See 4.3.3.1.3.

professional in ethical decision-making. Ethical standards and guidelines can never be exhaustive, and professionals need to be able to make judgment calls based on the principles or moral norms and values that the specific profession must promote. The differing roles in a forensic and therapeutic setting can create an ethical dilemma for a mental health professional, but the professionals will be better guided to resolve it by providing ethical principles.

Unlike the speciality guidelines of the American Psychological Association and the American Academy of Psychiatry and Law, the guidelines will not be guidelines for forensic psychology or forensic psychiatry but for psycho-legal work whether conducted by a psychologist or psychiatrist. There are differences between forensic psychiatry and forensic psychology, and for purposes of psycho-legal work, the major differences are the methods applied and the area of expertise.[239] The two professions do, however, complement each other and, in many respects, overlaps. Reviewing the literature and the guidelines of the different professional organisations in England and the United States, there are no significant differences between the guidelines provided for psychologists and psychiatrists conducting psycho-legal work. One of the differences is the administering of psychological tests and the use of test data which is usually done by psychologists. The HPCSA has clearly set out who may or may not conduct psychometric or psychological tests, and the aspect should not create a problem in the guidelines. It is submitted that despite the differences between the professions, the speciality guidelines can provide much-needed guidance for both psychologists and psychiatrists.

Drawing from the various ethical codes and guidelines, several areas will need to be addressed in the speciality guidelines for psycho-legal work. It is recommended that the speciality guidelines be divided into the following parts:

- Part 1: Introduction
- Part 2: The expert's duties
- Part 3: Guidelines
- Part 4: References and recommended reading

[239] See the discussion on the difference 1.2.7.

- Appendix A: Expert's declaration
- Appendix B: Definitions and Terminology

In part 1, the introduction, it is recommended that the speciality guidelines explain the nature of expert testimony by explaining the difference between an expert witness and a lay witness. The introduction should also briefly outline the requirements for admissibility of expert evidence which is based on the assistance that the expert can provide to the court as a result of their specialised knowledge, skills, or training. Within the introduction, reference should be made to the HPCSA's Ethical Guidelines, which provides the moral authority and guidelines on ethical decision-making. It should be clear from the introduction that the speciality guidelines do not intend to replace the HPCSA's general Ethical Guidelines but are an expansion.

In part 2 of the speciality guidelines, the expert duties as per the recommendation in 7.3.9 must be included. It is recommended that the list of expert duties mirror the list of duties contained in the (amended) procedural rules and the practical guidance is only contained in part 3.

Part 3 of the speciality guidelines is the crux of the matter and will provide practical guidance for mental health professionals conducting psycho-legal work. It is recommended that the guidelines, similar to the American Psychological Association's *Speciality Guidelines for Forensic Psychology*, be grouped with regards to the different areas that need to be addressed. As mentioned above the guidelines should also include a reference to the ethical principle on which it is based. In examining the guidelines from the General Medical Council, Royal Colleges of Psychiatrists, British Psychological Society, American Medical Association, American Psychological Association and the American Academy of Psychiatry and Law the following areas or topics were identified as pertinent in guiding psycho-legal work and included:

i Overarching duty and responsibilities
ii Competence
iii Taking of instructions
iv Methods used
v Psycho-legal report

vi Conflict of interests
vii Informed consent
viii Confidentiality and privacy
ix Relationships and multiple roles
x Fees

In part 2, the duties are listed, but the overarching duty of assisting the court should be reiterated in part 3 with reference to the ethical principles that the profession seeks to promote. By doing so, the duties are seen in context of what the courts require and how the duties align with the ethical principles of the profession. The second area that should be included in the speciality guidelines, competence, will have numerous guidelines including determining competence and ensuring that the professional only acts in areas where they have necessary skills and knowledge; guidance on gaining and maintaining competence and ensuring that the basis of the psycho-legal opinions is sufficient and properly based. An essential aspect of competence is to remind the professional that they must be competent in both content, in other words, they must be experts in their fields, and in process, meaning they must also have the skills to present the evidence as an expert witness.

The third area, the taking of instructions, will provide necessary practical guidance for the mental health professional and ties in with many other guidelines. This section must remind the mental health professional that before they accept instructions to consider the guidelines regarding conflict of interest and multiple roles, whether they have the necessary competence as required, and whether they will be able to complete the psycho-legal assessment and draft the psycho-legal report in the time required. Furthermore, the section must remind the mental health professional to ensure that the instructions are clear and all additional information has been provided, if not, the mental health professional should not accept the instructions until proper clarification has been provided. The instructions must clearly indicate the mental health professional's role, for example, whether they will be appointed in an advisory capacity only or whether they need to conduct a psycho-legal assessment. If the mental health professional is appointed as a single joint expert, the mental health professional must ensure they are aware of this and correspond with the correct person or persons.

The fourth area, methods used will provide guidance on using appropriate methods during psycho-legal assessments and will consider the importance of using multiple sources of information. Mental health professionals will need to be able to clearly state the methodology used. Furthermore, the section will need to address the issue of using established tests or using novel tests and ensuring that viable and reliable tests are used.

The fifth area, psycho-legal reports, must be drafted, considering the recommended amendments of the civil and criminal procedure rules that will set out the contents of the psycho-legal reports as discussed in 7.3.4. It is recommended that the expert's declaration that is referred to be attached as appendix A to the guidelines. In addition to the content of the psycho-legal report recommended in 7.3.4. the guidelines should also address the writing of a report without assessing or evaluating a person. The guidelines must emphasise that the mental health professional must state why the person was not assessed and the limitation placed on their opinion as a result. The guidelines can also include a recommended structure for psycho-legal reports.

The section of conflict of interest needs to address the different conflicting responsibilities and roles of the mental health professional. The guidelines should remind the mental health professional of their duty to divulge any potential conflict of interest and to decline taking instructions if the conflict will, in any way hamper the process. This section should be read with the section dealing with relationships and multiple roles. One example of conflict of interest that has been discussed at length in the study is a mental health professional that assumes multiple roles, acting in a treating and forensic role.[240] The speciality guidelines should advise mental health professionals to as far as possible avoid multiple roles, but if it is unavoidable due to lack of resources or court order, the mental health professional must ensure that the parties are informed of the possible conflict and that the forensic role differs. The mental health professional must ensure that the evaluee is aware of the difference in roles and their impact.

[240] See 3.7.2.

The sections dealing with informed consent and confidentiality are critical to the guidelines because it differs vastly from the usual clinical setting. The mental health professional should inform the evaluees of the nature and the scope of a psycho-legal assessment and the way in which it limits confidentiality. In explaining the limitations, it will be good practice to provide an information sheet to the evaluee to reiterate what has been explained. In court-ordered psycho-legal assessments or involuntary commitment, a mental health professional does not require informed consent to conduct the assessment. The mental health professional must inform the evaluee under those circumstances that if they refuse to participate in the evaluation, the fact will be included in the report or testimony. Although informed consent is not always necessary or feasible in psycho-legal assessments, mental health professionals should be advised to where possible, always obtain informed consent.

The last section that should be included in the speciality guidelines is fees. The guidelines can provide practical guidance on invoicing and payments, but the most crucial aspect is to provide guidance with respect to contingency fees. It is recommended that the guidelines prohibit or advise against any form of contingency fee agreement as it undermines honesty and efforts to attain objectivity.

To ensure that the mental health professional is informed and knows where to seek additional guidance, it is recommended that in part 4 of the guidelines, a list of recommended reading be provided. Lastly, because the guidelines are written for mental health professionals, it is recommended that a list of commonly used legal terminology be included.

Although it is recommended that the speciality guidelines for psycho-legal work address the abovementioned aspects, merely adapting existing guidelines from England or the United States would amount to formulating guidelines based on an armchair approach which is not sufficient. The insights gained from other organisations' ethical codes and guidelines are valuable but ethical codes are living documents that evolve and should cater to the specific needs of the professionals in that country. There are shared universal ethical principles and ideals, but history, culture and needs of the society and organisation must be taken into account in developing ethical codes and guidelines.

Turning to the American Psychological Association's ethics code, which significantly impacted many psychological organisations, the success is often ascribed to the fact that the code of ethics was developed based on empirical research.[241] The committee charged with the task of drafting the American Psychological Associations' code collected descriptions of incidents that required ethical choices from the members and thereafter by examining the incidents formulated the ethics code.[242] The same process was followed in developing the *Speciality Guidelines for Forensic Psychology*. This process ensured that the code addressed the needs of psychologists in the United States. This study emphasized universal problems, such as bias, but mental health professionals practising in South Africa also face unique challenges that must be considered. It is recommended that the areas mentioned above are used as a basis for the development of the speciality guidelines, but further empirical research needs to be conducted to understand the ethical dilemmas that South African mental health professionals are faced with when conducting psycho-legal work. By drawing from other organisations and the experiences of professionals conducting psycho-legal assessments in South Africa the speciality guidelines will be comprehensive and address the unique South African context.

7.4 Concluding remarks

> Of all Discourse, governed by desire of Knowledge, there is at last an End, either by attaining, or by giving over. And in the chain of Discourse, wheresoever it be interrupted, there is an End for that time… No Discourse whatsoever, can End in absolute knowledge of Fact, past, or to come.[243]

And so, the discourse, or narrative, of mental health professionals and the law must also come to an end. The end is, however, only the beginning of a new chapter, a collaboration between the law and the mental health professions. Borne out from the study is that the problems with psycho-legal work should be addressed by collaborative efforts of the two disciplines to develop a comprehensive regulatory

241 Sinclair "Developing and revising the Canadian Code of Ethics for Psychologists: key differences from the American Psychological Association code" (2020) 30 *Ethics and Behavior* 251.
242 *Ibid*.
243 Hobbes (2018) *Leviathan* [1651] 54.

framework. By consulting the historical origins and the existing law, the study illustrated that the failure to address the problems with mental health professionals acting as expert witnesses is due to a lack of regulation that properly considers the interface between the two disciplines.

The recommendations made cannot eradicate all misleading, biased, nonpartisan, or unobjective testimony or all problems with psycho-legal work but will help improve the relationship between law and the mental health professions and improve the probative value of the expert evidence. As Hobbes stated no discourse can end in absolute knowledge, but hopefully the study will provide the start to a promising new chapter.

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1 EXPLANATORY NOTES ON MODE OF CITATION AND FORMATTING OF SOURCES

- The footnotes in every chapter will resume with footnote 1 for ease of reference and ensure that the study is more user-friendly.
- No table of abbreviated journal titles has been provided as the journals' full titles are used throughout the references.
- No initials of authors are used to refer to sources except if the omission may cause confusion.

1.1 BOOKS, REPORTS AND MANUALS

- Where there are more than two authors, only the surname of the first author is used, and the remainder of the authors are referred to as "*et al*."
- Editions of books are not mentioned, except if more than one edition was published during a specific year.

1.1.1 Books by single or multiple authors

Footnote:	Author(s) Surname (year) *Title* relevant page.
Subsequent references to the same source:	Author(s) Surname (year) relevant page.
Bibliography:	Author(s) Surname (year) *Title* Place of Publication: Publisher

1.1.2 Books compiled by an editor

Footnote:	Author(s) Surname in Editor(s) Surname (ed.) (year) *Title* relevant page.
Subsequent references to the same source:	Author(s) Surname in Editor(s) (ed.) Surname (year) relevant page.
Bibliography:	Editor(s) Surname (ed.) (year) *Title* Place of Publication: Publisher

Reference to Law of South Africa (LAWSA) will be made as follows:

Footnote:	Author(s) Surname Law of South Africa (Editor(s) Surname) Volume number relevant paragraph.
Subsequent references to the same source:	Author(s) Surname Law of South Africa relevant paragraph.
Bibliography:	Author(s) Surname Law of South Africa (Editor(s) Surname) Volume number Publisher: Place of Publication

1.1.3 Reports, guidelines, or manuals authored by institutions

- If no page number is available, the relevant paragraph will be referred to.
- If more than one publication appeared in the same year, the title will be included in subsequent references.

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1.2 CASE LAW

- The mode of citation for case law will reflect the citation used in the particular jurisdiction. South African and English case law "v" will be used, whereas American case law "v." will be used. For South African and English case law, the full name of the case will be followed by the reported citation without a comma. For American case law, the full name of the case and the reported citation will be separated by a comma.

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1.3 JOURNAL ARTICLES

- If an author published more than one article in the same year, the title of the article will be included in subsequent references.

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Subsequent references to the same source:	Author(s) Surname (year) *Name of Journal* relevant page.
Bibliography:	Author(s) Surname "Title" (year) volume *Name of Journal* first page of the article

1.4 LEGISLATION AND STATUTORY INSTRUMENTS

- In the United Kingdom, Public General Acts are usually cited by type, year, and the chapter number. Throughout the study, the chapter number will only be indicated in the footnote and bibliography and not in the main text.
- The title and, where applicable the number of the act, will be used in the footnotes and bibliography but the year of the act will be omitted in subsequent references in the main body of the text.

1.5 THESES AND DISSERTATIONS

Footnote:	Author(s) Surname (year) *Title* (degree, University where it was obtained) relevant page.
Subsequent references to the same source:	Author(s) Surname (year) relevant page.
Bibliography:	Author(s) Surname (year) *Title* (degree, University where it was obtained)

1.6 ONLINE SOURCES

Footnote:	Author(s) Surname or Institution “Title” (year) available online at full URL (last accessed on date).
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Choice on Termination of Pregnancy Act 92 of 1996

Civil Proceedings Evidence Act 25 of 1965

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Competition Act 89 of 1998

Constitution of the Republic of South Africa, 1996

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Criminal Matters Amendment Act 68 of 1998

Criminal Procedure Act 51 of 1977

Criminal Procedure Act 92 of 1963

Criminal Procedure Amendment Act 4 of 2017

Criminal Procedure Amendment Bill B2-2017

Criminal Procedure and Evidence Act 31 of 1917

Dental Technicians Act 19 of 1979

Divorce Act 70 of 1979

Employment Equity Act 55 of 1998

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Health Professions Act 56 of 1974

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Mediation in Certain Divorce Matters Act 24 of 1987

Medical, Dental and Pharmacy Act 13 of 1928

Mental Health Act 18 of 1973

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National Health Act 61 of 2003

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Nursing Act 50 of 1978

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Promotion of Administrative Justice Act 3 of 2000

Road Accident Fund Act 56 of 1996

Sterilisation Act 44 of 1998

Superior Courts Act 10 of 2013

Traditional Health Practitioners Act 22 of 2007

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Annexure A: The Academy of Experts- Expert's Declaration

EXPERT'S DECLARATION (Civil Cases)

This Declaration should be inserted between the end of The Report and the Expert's signature.

For arbitration and tribunal proceedings you should use the appropriate declaration.

I [Insert Full Name] DECLARE THAT:

1 I understand that my duty in providing written reports and giving evidence is to help the Court, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.

2 I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

3 I know of no conflict of interest of any kind, other than any which I have disclosed in my report.

4 I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.

5 I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.

6 I have shown the sources of all information I have used.

7 I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.

8 I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.

9 I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including my instructing lawyers.

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

11 I understand that:

11.1 my report will form the evidence to be given under oath or affirmation;

11.2 questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;

11.3 the court may at any stage direct a discussion to take place between experts for the purpose of identifying and discussing the expert issues in the proceedings, where possible reaching an agreed opinion on those issues and identifying what action, if any, may be taken to resolve any of the outstanding issues between the parties;

11.4 the court may direct that following a discussion between the experts that a statement should be prepared showing those issues which are agreed, and those issues which are not agreed, together with a summary of the reasons for disagreeing;

11.5 I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert;

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

12 I have read Part 35 of the Civil Procedure Rules, the accompanying practice direction and the Guidance for the instruction of experts in civil claims and I have complied with their requirements.

13 I am aware of the practice direction on pre-action conduct. I have acted in accordance with the Code of Practice for Experts.

STATEMENT OF TRUTH I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Signature……..Date……

Discussions Between Experts

Joint Statement Declaration

For all civil cases in England & Wales under CPR in accordance with the Guidance for the instruction of experts in civil claims issued by the Civil Justice Council this Declaration should be inserted into the Joint Statement issued following the discussion(s) of experts immediately before the experts' signatures.

1 We the undersigned experts individually here re-state the Expert's Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue so to do.

2 We further confirm that we have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid or otherwise defer from reaching agreement on any matter within our competence.

Experts' Signatures

……Date……

Annexure B: College Report (CR193) List of expert's duties

The expert's duties to the court include:

- a duty to assist the process of justice
- a duty to act impartially, objectively and honestly
- a duty to reveal any actual or potential conflict of interest
- a duty to make clear the limits of their knowledge or competence
- a duty to give testimony only in their area or field of expertise
- a duty to state the substance of all facts and instructions given to them which are material to the opinions expressed in their report or on which their opinions are based
- a duty to indicate the source of factual information, including where they have no personal knowledge
- a duty to be accurate and complete
- a duty to mention all matters that they regard as relevant to the opinions they have expressed
- a duty to draw to the attention of the court all matters that might adversely affect their opinion
- a duty not to include in their evidence anything that has been suggested to them by anyone, including the lawyers instructing them, without forming their own independent view of the matter
- a duty to provide the court with evidence about the range of opinion, or reasonable opinion, in that area or field, including in regard to the case at hand
- a duty to make it clear if their opinion is in is any way qualified or provisional
- a duty promptly to communicate any change of opinion and the reasons for such change
- a duty not to enter into any arrangement where the amount or payment of their fees is in any way dependent on the opinion they have given or the outcome of the case.

Under the recently amended Criminal Procedure Rules (Ministry of Justice, 2014), additional duties are imposed on experts specifically in regard to criminal cases, such that the expert should:

- disclose any information capable of substantially detracting from their credibility
- define their area, or areas, of expertise
- include in their report such information as the court may need in order to decide whether their opinion is sufficiently reliable to be admissible.