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A HISTORICAL OVERVIEW OF THE MENTAL HEALTH EXPERT IN ENGLAND UNTIL THE NINETEENTH CENTURY[1]

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ABSTRACT

Throughout history, the use of mental health professionals as expert witnesses has elicited criticism. The criticism stemmed from the alleged lack of scientific rigour in mental health sciences and the accompanying bias of expert witnesses. As the use of mental health professionals in court increased, so did the associated problems, with bias remaining at the forefront. The same challenges plague the South African courts today and despite various evidentiary and procedural rules[2] aimed at addressing the problems, these have not achieved

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1 This research is based on one of the chapters of the author's doctoral thesis published in 2021, titled *A Regularity Framework for Psycho-Legal Assessments in South Africa* (LLD thesis, University of Pretoria).

2 Cross-examination is seen as the most effective way to uncover inconsistencies and inaccuracies in oral testimony, including the testimony of an expert witness. Cross-examination is, however, not a particularly good vehicle or safeguard to ensure the validity and reliability of expert evidence. For example, a confident expert witness with previous courtroom experience

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much success. The contribution traces the origins of the expert witness, in particular the mental health expert, in the English legal system until the nineteenth century. By examining the shift in the position of the expert witness from a neutral informant in the eighteenth century to a partisan witness in the nineteenth century, a parallel is drawn between the historical position in England and the current position in South Africa. Drawing on the past failures and successes of the English legal system in this regard, and briefly considering the current position in England, recommendations are made to address the problem of partisan mental health experts within the South African context.

Keywords: Expert evidence; mental health expert; medical witnesses; partisan experts; ethics code

1 Introduction

Expert witnesses have long been criticised as they are considered by many to be merely hired champions for bolstering crafted arguments. Mental health professionals in particular are popular targets of such criticism, with bias being the *bête-noire* of psycho-legal work.[3] This is often referred to as the hired-gun phenomenon, illustrated perfectly in the oft-cited United States case of *Ladner v Higgens*,[4] where the mental health professional, Dr Herbert Unsworth, had been called to act as an expert witness.[5] Dr Unsworth testified that the plaintiff was not suffering from any mental illness. When asked to confirm the conclusion that the plaintiff was a malingerer, Dr Unsworth replied: "I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post-traumatic condition."[6]

The expert witness, previously an "infrequent visitor"[7] to the court, has now become somewhat of a daily occurrence, with an entire industry created for them to be able to sell their skills, knowledge and experience to the highest bidder.[8] Unethical testimony by an expert witness results in irrelevant, unreliable and misleading

may simply deny any validity or reliability issues put to them during cross-examination. See Smith 1989: 164.

3 Gutheil, Simon & Hilliard 2005: 433.

4 *Ladner v Higgens, Inc* 71 So 2d 242 (1954, La App).

5 *Ibid.*

6 Smith 1989: 167.

7 *Twine v Naidoo* 2018 (1) All SA 297 (GJ) para 18.

8 *Ibid.* See, also, *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ) para 113.

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expert evidence that damages the profession of that witness and impedes the rendering of justice. Reviewing South African case law, it appears that the criticism levelled by the courts against mental health professionals' testimony is often that the experts' testimonies are biased.[9] For example, in the recent case of *S v Rohde*, 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 client's version of the events.[10] The court commented that the collateral information gathered by the psychiatrist was taken out of context to "fit the mould" of what she had set out to establish.[11] The court, and correctly so, heavily criticised the psychiatrist and held that the evaluation was not only an attempt to usurp the role and function of the court, but also "amounted to a modern-day version of an 'oath-helper'. ... Such expert testimony is to be rejected without exception".[12]

Nevertheless, mental health experts can be of invaluable assistance to the courts. For example, in *Van den Berg v Le Roux*,[13] Kgomo JP said in respect of the two psychologists who had testified that "[i]t is impossible to do justice to their helpful evidence in court".[14]

In order to ensure that mental health experts continue to provide invaluable assistance, the so-called hired-gun phenomenon (see above) needs to be addressed. Various proposals for reform have been made, but almost all attempts have failed or were only partly successful.[15] This contribution endeavours to draw on the past failures and successes of the English legal system to propose future reform for the regulation of testimony by mental health experts in South Africa. Since the South African law of evidence has its roots in English law, this study focuses on developments in this

9 See, eg, *Schneider NO v AA* 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); *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* 2016 JDR 0589 (SCA); *Jonathan v General Accident Insurance Co of South Africa Ltd* 1992 (4) SA 618 (C).

10 *S v Rohde* 2019 (1) All SA 740 (WCC) at 823H–I.

11 *Idem* at 824H–I.

12 *Idem* at 826A.

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

14 *Idem* para 29.

15 Golan 2008: 937.

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regard within the English legal system from the early Middle Ages until the nineteenth century; it also briefly considers the current position in England.[16] The first part of the contribution gives an overview of the development of the system of proof in England and the role played by the expert witness. The second part of the contribution takes a closer look at the expert witness, in particular the medical witness, that provided testimony on the mental state of persons. In conclusion, the contribution analyses the changes and developments discussed here to better understand the rise of the partisan expert and ultimately to provide recommendations to address the problem.

2 The origins of the expert witness in England

During the early Middle Ages, the modern-day trial as we know it did not exist in England. Instead, feuds or disputes were resolved by a trial by ordeal.[17] In the case of such a 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).[18] A bishop or priest administered the trial, with no place for testimony by witnesses.[19] Various forms of the trial by ordeal existed, including ordeal by means of a duel,[20] ordeal by fire[21] and water[22], as well as

16 The focus of this contribution 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.

17 Robertson 1926: 70; Landsman 1995: 133; Schwikkard & Van der Merwe 2016: 3; Meintjes-Van der Walt 2001: 24–25, 30–31; Gee 1993: 13.

18 See the references in the previous footnote.

19 Robertson 1926: 71; Landsman 1995: 133; Gee 1993: 13.

20 A trial by means of duel settled a dispute between two parties by means of a duel or battle. See Robertson 1926: 78–79; Landsman 1995: 133; Schwikkard & Van der Merwe 2016: 5–6; Meintjes-Van der Walt 2001: 24–25, 30–31; Watson 2011: 11.

21 In the ordeal by fire, a bar of iron was placed in the fire. After the iron was removed from the fire and placed on a stone pillar, the accused had to grab the iron and hold it while taking three steps along the line drawn by the priest next to the pillar. The hand of the accused was then bound by the priest and left untouched for three days. On the third day, the priest would inspect the hand; if the burn had healed, the accused would be pronounced innocent. See Robertson 1926: 73; Meintjes-Van der Walt 2001: 24–25, 30–31; Watson 2011: 11.

22 In the ordeal by water, a stone or piece of iron was immersed in boiling water. The accused had to plunge their hand into the boiling water and remove the piece of iron or stone. The priest would then bound up the burnt hand and arm

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purgation by oath.[23] Of these, trial by means of a duel was the most adversarial in nature.[24] For some scholars, the adversarial system symbolises the sophisticated continuation of the trial by battle, with both parties in court metaphorically fighting each other while the judge referees the fight.[25]

However, the trial by battle was not as commonly used as purgation by oath, also known as compurgation,[26] which required the accused to take a formal oath of innocence.[27] The accused would then enlist several oath-helpers to support his/her oath by swearing to their belief in the trustworthiness of the accused's oath.[28] Purgation by oath continued in England until the seventeenth century.[29]

In 1215, the Fourth Lateran Council prohibited priests from participating in and from supervising the ordeals. This resulted in the decline and eventual disuse of such trials.[30] Trial by ordeal was formally abolished in 1262.[31] As a result, there developed a need within the legal system for an alternative mode of proof.[32]

Previously, an early jury system had existed. Although it had not been a feature of the legal system at that stage, a jury had been used to confirm the accuracy of the Domesday survey in 1086.[33] Generally, a jury had been selected from a group of people representing the community; it had used a process known as an

of the accused. The hand/arm was left untouched for three days whereafter the priest would examine the hand/arm. If the burn had healed, the accused was considered to be innocent. See Robertson 1926: 72–73; Meintjes-Van der Walt 2001: 24–25, 30–31; Watson 2011: 11.

23 In purgation by oath, the accused would state their innocence under oath and produce oath-helpers who would swear that they believed that the accused was telling the truth. See Robertson 1926: 71; Landsman 1995: 133; Schwikkard & Van der Merwe 2016: 6; Meintjes-Van der Walt 2001: 24–25, 30–31; Watson 2011: 11.

24 Gee 1993: 14.

25 *Idem* at 16.

26 Watson 2011: 12.

27 *Ibid.*

28 *Ibid.*

29 *Idem* at 13.

30 Robertson 1926: 78; Landsman 1995: 134; Schwikkard & Van der Merwe 2016: 4; Meintjes-Van der Walt 2001: 31; Milroy 2017: 517.

31 The trial by ordeal was abolished by an Order-in-Council of King Henry III. Robertson 1926: 78; Meintjes-Van der Walt 2001: 31.

32 Meintjies-Van der Walt 2001: 36.

33 Watson 2011: 16.

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inquest to reach a verdict regarding the veracity of the survey.[34] To address the vacuum left by the abolishment of the trial by ordeal, this crude form of a trial by jury was then reimagined.[35] The jury comprised of either persons from the area in which the case arose or was summoned because they were acquainted with the accused.[36] The early jury did not rely on any outside witnesses.[37] In fact, members of juries in medieval England were not selected for their independence, but because of their local knowledge.[38]

Prior to the fifteenth century, expert evidence either took the form of assessors who could assist in giving the jury instructions, or of a special jury comprised of persons with specialist knowledge.[39] The exact origin of this latter kind of jury is unclear, but, by the second half of the fourteenth century, one such jury was comprised of cooks and fishmongers who had to determine whether or not the accused had sold rotten food.[40] By 1645, the King's Bench made use of juries comprised of merchants to settle trading disputes.[41] In addition, special juries, consisting of female jurors who had given birth, were asked to confirm or deny the pregnancy of an accused.[42] A special jury could either deliver a verdict or provide advice to the judges, as in the case of *Pickering v Barkley*, where "a certificate of merchants was read in court".[43] The use of special juries eventually declined and was formally abolished in England in 1971.[44]

By the fourteenth century, the English courts made use of specialist court advisors or assessors who were summoned to court to testify or to give advice where the courts lacked specific knowledge.[45] For example, in 1493, so-called masters of grammar

34 *Ibid.*
35 Schwikkard & Van der Merwe 2016: 4; Meintjes-Van der Walt 2001: 31; Landsman 1995: 134; Milroy 2017: 517.
36 Meintjes-Van der Walt 2001: 32; Landsman 1995: 134; Milroy 2017: 517.
37 See the references in the previous footnote.
38 Milroy 2017: 517.
39 Hodgkinson & James 2007: 8; Meintjes-Van der Walt 2001: 32; Landsman 1995: 134; Buchanan 2006: 15; Learned Hand 1901: 40; Rosenthal 1935: 407; Milroy 2017: 517.
40 Dwyer 2007: 101.
41 Learned Hand 1901: 42; Dwyer 2007: 101.
42 Milroy 2017: 517; Dwyer 2007: 101.
43 *Pickering v Barkley* (1648) Sty 132, 82 ER 587.
44 Section 40 of the Courts Act, 1971 (c 23) formally abolished special juries.
45 Hodgkinson & James 2007: 8; Buchanan 2006: 15; Meintjes-Van der Walt 2001: 33; Harno 1938: 156; Milroy 2017: 517.

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were called to decipher some Latin phrases in a statute.[46] Most of the specialist advice and expert evidence at the time were given as written depositions.[47] By the 1600s, the use of oral evidence by experts had become increasingly popular and an accepted practice. For example, in the *Witches Trial*[48] of 1665, Sir Thomas Brown, a physician, testified on the scientific explanation of bewitchment.[49] The court had to determine whether two local women had bewitched six young girls and an infant boy.[50] Dr Brown's opinion was based on eyewitness accounts of the incidents and on reports of similar occurrences in Denmark.[51] Shortly after that case, the courts began distinguishing between evidence based on fact, opinion or inference.[52] In the 1671 *Bushell*'s case, the court stated that—[53]

> 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.

These experts, such as Dr Brown, were appointed, summoned and controlled by the court, which conferred a large degree of impartiality upon these experts.[54] By the end of the seventeenth century, the number of cases increased in which experts gave evidence,[55] including some of the first party-instructed experts. However, the expert witness, as understood in the modern sense, only truly developed during the eighteenth century.[56] This coincided

46 Hodgkinson & James 2007: 8; Rosenthal 1935: 408; Meintjes-Van der Walt 2001: 33.
47 Dwyer 2007: 102.
48 *R v Cullender and Duny* (1665) 6 How St Tr 687 published in *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours from the Earliest Period to the Present Time with Notes and Illustrations*.
49 Rosenthal 1935: 409; Learned Hand 1901: 46; Rosner 2003: 17–18.
50 Landsman 1998: 447.
51 *Ibid.*
52 Hodgkinson & James 2007: 9; Meintjes-Van der Walt 2001: 34.
53 *Bushell* (1670) 6 St Tr 999 as quoted in Hodgkinson & James 2007: 9.
54 Golan 2008: 885.
55 Hodgkinson & James 2007: 9. For examples of such cases, see Rosenthal 1935: 409–411.
56 Hodgkinson & James 2007: 10; Rosenthal 1935: 411–412; Meintjes-Van der Walt 2001: 34; Watson 2011: 47.

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with major changes to the English legal system during that time, and which came to be known as the Adversarial Revolution.[57]

The Adversarial Revolution changed the role of all the parties involved in the litigation process, from the judges, attorneys and juries to the witnesses.[58] Previously, counsel was not allowed to represent a defendant in a criminal case, but merely advise them before a trial.[59] The introduction of defence counsel is considered as one of the most remarkable changes in English criminal procedure.[60] It meant that, whereas before, judges had viewed their role as the "guarantor of the defendant's rights" – with wide discretionary powers to direct the trial, including summoning expert witnesses[61] – their role now changed to that of the impartial referee who ruled on evidentiary issues placed before them.[62] Nevertheless, as is evident from the trial narratives, judges did not abandon their role as protector.[63] In addition, the role of the jury now also changed from being experts or advisors (as they were chosen based on their local or specialist knowledge) to being informed by the testimony of witnesses.[64] As a result, litigants now had the burden of proof, resulting in the need for party-instructed experts and lay witnesses.[65] These developments redefined the role of expert witnesses, changing their position from neutral court-appointed advisors to witnesses, chosen and remunerated by the parties.[66] Despite, or perhaps due to these changes, it is apparent from the Old Bailey Session Papers[67] that it was common at eighteenth century trials for expert witnesses to openly assert their independence and to reject any notion of being a partisan witness during their testimony.[68] Their defensiveness was a result of the contempt that counsel showed towards expert

57 Golan 2008: 879.
58 Freemon 2001: 352–353.
59 Milroy 2017: 518; Freemon 2001: 353.
60 Eigen 2016: 11.
61 *Idem* at 143.
62 Freemon 2001: 353.
63 Eigen 2016: 153.
64 Freemon 2001: 353; Watson 211: 17; Eigen 2016: 13.
65 Golan 2008: 885; Eigen 2016: 13.
66 Golan 2008: 882. See, also, Eigen 2016: 15.
67 Before regular court reporting, tabloids reported on the criminal trials that took place at the Old Bailey. These reports are known as the Old Bailey Session Papers or the Old Bailey Proceedings. In some instances, the accounts contained *verbatim* testimonies of the trials.
68 Eigen 2016: 97.

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witnesses; rarely did judges comment on the partisan nature of the expert witness or remark in a dismissive or discourteous manner.[69]

Together with the changes to the English legal system, the 1782 case of *Folkes v Chadd*,[70] also known as the *Wells Harbour Case*,[71] was considered a major contributor to the shift in the position of the expert witness.[72] In that case, Lord Mansfield stated that evidence of "men of science"[73] in the form of opinion evidence as to a "matter of science" was proper testimony.[74] This statement resulted in the case often being quoted as the leading authority on the admissibility of expert evidence. The exact significance of the case, however, has been much debated amongst scholars. Wigmore was of the opinion that the significance of the case lay in the fact that experts could proffer their opinion without being personally familiar with the facts of the case.[75] This argument, however, proved to be incorrect as the expert witness in the *Wells Harbour Case*, Mr Smeaton, had made a detailed factual study after visiting the disputed embankment in question.[76] Another scholar argues that the *Wells Harbour Case* was significant because "Mansfield placed the court's seal of approval on the whole adversarial apparatus including contending experts, hypothetical questions, and jury evaluation".[77] A third view holds that this latter approach is not wholly satisfactory as there were other cases prior to the *Wells Harbour Case* that had also introduced expert evidence in a similar fashion, approving the "adversarial apparatus".[78]

Dwyer considers the case to be noteworthy due to the expert witness giving a causation opinion, which required the expert to

69 *Idem* at 152.

70 *Folkes v Chadd* (1782) 3 Doug KB 157, 99 ER 589.

71 The court in that 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, gave opinion evidence. His evidence was initially considered inadmissible, but on appeal, Lord Mansfield considered it to be "proper evidence" (*idem* at 159).

72 Watson 2011: 49.

73 *Folkes v Chadd* (1782) 3 Doug 157, 99 ER 589 at 589.

74 Hodgkinson & James 2007: 10; Rosenthal 1935: 413; Meintjes-Van der Walt 2001: 34.

75 Dwyer 2007: 111.

76 *Ibid*; Golan 2008: 900.

77 Landsman 1995: 141.

78 Dwyer 2007: 109; Golan 2008: 887–888.

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reconstruct a past event based on external evidence.[79] Usually, expert witnesses described the current state of affairs, but Dwyer argues that the *Wells Harbour Case* was the first in which a party-instructed witness drew inferences that went beyond describing the current state of affairs.[80] Golan ascribes the importance of the case to it giving legal status to proto-scientists, the court having accepted as a matter of science the opinion of a noted Newtonian. In the case, Lord Mansfield had declared that the opinions of men of science were an exception to the opinion doctrine, but he did not distinguish between the sciences.[81] Instead, the professional reputation of an expert witness was based on whether he was known as an expert on the matter before the court; only then would his opinion be considered to constitute proper evidence.[82]

However, these views on the *Wells Harbour Case* all agree on the case indicating a major shift in the role of the expert witness. The expert witness was now part of the machinery of the adversarial system with the ability to draw further inferences since their opinions were no longer only limited to the facts of the case. The only requirement for being approved of as an expert witness was the professional reputation of the individual in question, meaning that they had to be suitably qualified to express an opinion on the matter at hand.

The expert witnesses in the *Wells Harbour Case* were party-instructed and critical in providing the necessary proof for the particular party. Yet, despite this change from the usual court-appointed expert, bias was not seen as being on the rise at the time. One scholar argues that despite the expert witness in the *Wells Harbour Case* possibly being a partisan witness, this aspect was disregarded, as was typical in eighteenth and early-nineteenth century cases.[83] The lack of judicial angst about partisan experts was rooted in the gentlemanly code of honour adopted by the scientific community.[84] This code ensured the credibility of such men of science, as their gentlemanly status could quickly be ruined

79 Dwyer 2007: 111.
80 *Ibid.*
81 Golan 2008: 902.
82 *Ibid.*
83 *Idem* at 903. See, also, Eigen 2016: 152.
84 Golan 2008: 903.

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if they were found to be dishonest.[85] The judges, therefore, trusted their opinions based on the social contract that existed.

The criteria for the admission of expert testimony remained relatively unchanged between 1850 and 1920, merely demanding an inquiry into whether the proffered expert was appropriately qualified to render an opinion on the issue before the court.[86] Although the eighteenth and early-nineteenth century judges were not concerned about the possibility of bias, this changed when problems with expert testimony arose, and by the late-nineteenth century, the use of expert witnesses was heavily criticised by the judiciary, who expressed serious concerns that experts were being used as "weapons of combat".[87] For example, in 1843, Lord Campbell stated that "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".[88]

In the 1873 case of *Lord Abinger v Ashton,* concerns regarding the bias of expert witnesses were raised and they were described as "paid agents".[89] Three years later, in *Thorn v Worthing Skating Rink*, the court commented that it was almost impossible to find an unbiased witness.[90] In 1901, Justice Billings Learned Hand, an American judge argued that the use of expert witnesses in court is objectionable for several reasons.[91] First, due to the weakness of human nature, an expert witness cannot *not* be biased and they will naturally become a "hired champion" of a side.[92] Secondly, experts are bound to be contradicted by another expert; this confuses juries as they don't know which expert to trust.[93]

The criticism levelled against expert witnesses elicited heated debate within the Victorian scientific community.[94] For many, the difficulty with expert testimony attested to the problem that the "scientific ethical code of gentlemanly voluntarism" had eroded

85 *Ibid.*
86 Landsman 1995: 150.
87 Dwyer 2007: 118.
88 *Tracy Peerage Claim* (1843) 10 Cl & Fin 154, 8 ER 700 at 191.
89 *Lord Abinger v Ashton* (1873) 17 LR Eq 358 at 358.
90 *Thorn v Worthing Skating Rink Co* (1876) 6 ChD 415.
91 Learned Hand 1901: 53. See, also, the discussion in Buchanan 2006: 15.
92 Buchanan 2006: 15.
93 *Ibid.*
94 Golan 2004: 109.

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due to the rising culture of professionalism.[95] Other commentators blamed the adversarial procedures of the court, calling for reform of legal procedures.[96] However, the nineteenth-century criticism and debates did not deter courts from relying on expert witnesses. In fact, the use of such experts increased exponentially as the scientific and technical knowledge of the natural, physical, social and commercial world seemed to grow.

3 The development of the medical expert in England

As already pointed out above, with justice in early medieval England being a local matter decided by the local people acquainted with a case, the testimony of a medical expert too was unknown or a rare occurrence.[97] According to the translations of medieval court records for the early-thirteenth century, opinions on a wound or on a person's medical condition were provided by laymen of some official standing.[98] This continued well into the eighteenth century as is evident from the Old Bailey Session Papers, from which it is apparent that laypeople at that time were seen as sufficiently competent to provide a medical opinion, including on the cause of death.[99]

Nevertheless, there were a few exceptions to the general rule, and where the opinion of a medical practitioner was required. As far back as 1209, legislation had been introduced, requiring medical evidence in cases of suspected murder before the ecclesiastical courts.[100] Also, around 1353, in an appeal of a so-called mayhem case, the court had summoned surgeons from London to assist it in deciding on whether a wound had rendered the victim defenceless or not.[101] In the 1554 case of *Buckley v Rice*, a civil case dealing with the interpretation of a Latin phrase, the court commented

95 *Idem* at 123.
96 *Idem* at 134.
97 Gee & Mason 1990: 17.
98 *Idem* at 18.
99 Dwyer 2007: 115; Gee & Mason 1990: 17.
100 Allan, Louw & Verschoor 1995a: 674.
101 In English law referred to as "whether the wound was mayhem or not". See Hodgkinson & James 2007: 8; Rosenthal 1935: 407; Learned Hand 1901: 42–43; Eigen & Andoll 1986: 159.

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that the use of men of science – including medical experts, such as surgeons in mayhem cases – was an "honorable and commendable thing".[102] However, despite these exceptions, it seemed that until the early 1800s, expert medical evidence was largely confined to injuries and diseases of a physical nature, and that even then, such evidence was rare.[103]

In 1511, the Physicians and Surgeons Act was enacted to regulate the physicians' profession, ensuring that only licensed physicians could practice.[104] Although this Act resulted in the establishment of the Royal College of Physicians in 1518, it did not assist in unifying the medical profession in its entirety as it only applied to medical professionals who had qualified as physicians.[105] Neither did this Act improve the medical profession's role in the courts; medical experts only started appearing in the courts by the seventeenth century.[106] The growing authority of expert testimony became apparent during the eighteenth and nineteenth centuries, with the courts moving towards the current-day practice.[107] An example of where a medical professional was recognised as providing an authoritative opinion is the 1807 case of *R v Godfry*, where a lay witness wished to discuss the nature of the victim's wounds, but was prevented from doing so by the court with the instructions: "The surgeon will tell us."[108]

During the seventeenth and eighteenth centuries, four categories of classical medical expertise were recognised, namely those of the specialities of physician, surgeon, apothecary and midwife.[109] One of the earliest recorded cases in which a medical expert testified, was the 1619 case of *Alsop v Bowtrell*,[110] where expert evidence was given by a physician regarding the length of human gestation.[111] A noteworthy case in the eighteenth century was that of Mary Blandy, who was convicted in 1752 of poisoning her father with

102 *Buckley v Rice* (1554) 1 Plowd 118, 75 ER 182 at 192.
103 Eigen & Andoll 1986: 159.
104 Gee & Mason 1990: 19; Clark 1965: 79.
105 Eigen 2016: 52.
106 Gee & Mason 1990: 14; Watson 2011: 9.
107 Landsman 1998: 454.
108 *R v Godfry* Old Bailey Session Papers (Feb, 1807) at 147 available at *https://www.oldbaileyonline.org/browse.jsp?name=18070218* (accessed 2 Aug 2021) (see n 67 *supra*). See, also, Landsman 1998: 455.
109 Landsman 1998: 449. Eigen & Andoll 1986: 165 only refer to three specialities, and exclude midwifery.
110 *Alsop v Bowtrell* (1619) Cro Jac 541, 79 ER 464.
111 Dwyer 2007: 98.

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white arsenic.[112] The medical expert in that case, Dr Addington, investigated the powder alleged to have been used in the crime and, using crude tests, performed control studies using a known sample of arsenic.[113] The results of the two tests were identical, providing Dr Addington with proof that the powder was indeed arsenic.[114] This case was one of the first attempts by a medical witness to sustain his opinion by way of scientific proof.[115]

Before 1825, most medical witnesses did not testify in the capacity of an independent expert witness, but rather as a friend, family member or (previously) treating physician.[116] The capacity of such a witness has been described as "an extension of their role as neighbour or friend".[117] One scholar, and rightly so, argued that, for the physician to become a necessity in the courtroom, they had to claim privileged knowledge and become true professionals.[118] In 1858, the Medical Act was promulgated, establishing the General Medical Council, the statutory body that to date still regulates the medical profession.[119] Around the same time, medical experts began testifying in their professional capacity. By then, it was expected that physicians give testimony as medical experts, as is illustrated by various cases.[120]

The study done by Landsman on medical experts in the criminal trial proceedings in the Old Bailey between 1717 and 1817, revealed the striking feature of most medical testimony during the period in question, as being its nonpartisan character.[121] Landsman found that medical witnesses took a modest and constrained approach in their courtroom appearance.[122] Considering that most medical witnesses were not hired after the litigation had started, but were involved because they had either treated the accused as a patient

112 Gee & Mason 1990: 21.
113 *Idem* at 22.
114 *Ibid.*
115 *Ibid.*
116 Eigen & Andoll 1986: 161; Ferguson & Ogloff 2011: 81.
117 Eigen & Andoll 1986: 161.
118 Eigen 2016: 52.
119 Clark 1965: 81.
120 For a discussion of these cases, see Smith 1981: 6–7.
121 Landsman 1998: 461.
122 *Idem* at 484.

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or had conducted the post-mortem, this partly explained the nonpartisan characteristic.[123]

Landsman further argues that the main reason behind the nonpartisan character was the nature of the development of the medical profession during the eighteenth century.[124] The members of the profession shared certain attitudes, values and social circumstances, which influenced the in-court behaviour of those testifying in court as medical experts.[125] Before the establishment of the General Medical Council in 1858,[126] there was no regulatory body that effectively policed the practice and regulated the profession.[127] As a result, medical care during the eighteenth century was the province of the individual practitioner who had to compete for work in a highly competitive open market.[128] To be successful, such a practitioner had to have an "unblemished reputation and reassuring manner".[129] Furthermore, the restraint and rectitude of the medical expert was a logical consequence of these pressures to ensure that they maintained unblemished reputations.[130] Landsman's findings reiterate those of Golan, emphasising that part of the English practitioner's professional identity was their civility of discourse and gentlemanly demeanour, creating a relationship of trust between the court and the expert witness. Although the eighteenth century can be described as a golden age for the expert medical witness,[131] the dual role of the expert as an informative witness and partisan litigant soon resulted in tension.[132]

Similar to criticism against the expert witness in general, the testimony of medical experts was also heavily criticised during the nineteenth century, despite the growing professional status of the medical profession.[133] When medical experts abandoned the neutrality for which they were known and became partisan, their

123 *Idem* at 461.
124 *Idem* at 484.
125 *Ibid.*
126 General Medical Council "Who we are" available at *https://www.gmc-uk.org/about/who-we-are* (accessed 25 Mar 2020). Section 1 of the Medical Act, 1983 (c 54) sets out the objectives of the General Medical Council.
127 Landsman 1998: 484.
128 *Ibid.*
129 *Idem* at 486.
130 *Ibid.*
131 Dwyer 2007: 118.
132 Landsman 1998: 489.
133 Watson 2011: 52.

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testimony was challenged, received with hostility and generally rejected.[134] An example of such criticism can be found in an 1863 edition of the *British Medical Journal*, where one commentator observed as follows:[135]

> 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.

The two main areas of controversy regarding the nineteenth century medico-legal practice were poisoning crimes (due to the rudimentary medical technology available in that field at the time) and cases where a defendant's sanity was in question.[136] In the paragraph below, the emergence of the so-called mad doctor as an expert witness, in particular in the context of insanity cases, is discussed in more detail.

4 From mad doctor to expert witness: The interface of psychiatry and law

"Madmen", "the insane" or "lunatics" are all terms that have been used in the past to refer to people who suffer from mental illnesses or disorders.[137] This is because mental disorders were believed to be caused by supernatural phenomena and were not considered to be part of the medical discipline.[138] It was only towards the end of the eighteenth century that the concept of mental illness and the psychiatric diagnosis, as we know it today, would evolve.[139]

Until the modern age, the mentally ill formed part of a larger group that consisted of the poor, the morally disreputable, the disabled, the elderly and children; these persons were considered to be dependant, and were seen as a burden and incapable of

134 Landsman 1998: 480.
135 Anonymous 1836: 456.
136 Watson 2011: 52; Landsman 1998: 463.
137 Gillis 2012: 78.
138 Scull 2015: 16–26; Allan, Louw & Verschoor 1995a: 674; Swanepoel 2009: 129.
139 Gillis 2012: 78.

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productive labour.[140] The Romans recognised that the mentally ill were capable of causing harm to themselves or others, and to prevent this, such persons were placed in the care of their relatives.[141] Given that the cause of madness was viewed as being supernatural, treatment did not exist. The only available remedy was religious in nature and had to be obtained from clergymen or practitioners of temple medicine.[142] Such religious healers used spells, charms and purification rites to induce divine intervention.[143] The usual official treatment for the mentally ill was exorcism.[144]

Influenced by the Hippocratic Corpus, the supernatural causes of "madness" were challenged by physicians who supported a more naturalistic explanation.[145] According to one modern scholar, "[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".[146] As a result, during the Middle Ages, both physicians and priests started treating the mentally ill in differing ways.[147] Yet, despite this movement towards a naturalistic explanation of mental illness, the change was slow and the old beliefs and traditions still retained power,[148] as was reflected in the law at the time. For example, in England, various laws, such as the *Praerogativa Regis*,[149] dealt with the mentally ill and addressed issues regarding not only whether the mentally ill could be held responsible for their actions, but also the guardianship of the mentally ill.[150] In order to determine whether the *Praerogativa Regis* applied, an inquisition was required that involved a diagnosis by a commissioner – often a public official or presiding bishop – in consultation with a jury of local people. However, a physician

140 Scull 2015: 122.
141 Swanepoel 2009: 144; Scull 2015: 31, 121; Smith 1981: 5; Gillis 2012: 78.
142 Scull 2015: 31, 85; Allan, Louw & Verschoor 1995a: 674.
143 Scull 2015: 31.
144 Allan, Louw & Verschoor 1995a: 674.
145 The Hippocratic Corpus was a collection of medical works associated with the physician Hippocrates and his teachings. Hippocrates (460–357 BC), a Greek physician, rejected the notion that diseases, including mental illnesses, were caused by magic or any other supernatural phenomenon. Scull 2015: 26–33; Rosner 2003: 15; Swanepoel 2009: 143.
146 Scull 2015: 35.
147 *Ibid.*
148 *Idem* at 121.
149 *Ibid.*
150 Roffe & Roffe 1995: 1709.

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did not form part of such an inquisition.[151] Therefore, the question whether a person suffered from a mental illness or not was generally considered to be a community judgement that rarely involved physicians.[152]

Eventually, the increase in knowledge of mental illness, the growing need for special homes or institutions for those unable to look after themselves, and the hope of a cure, would ignite the need for physicians with special knowledge of mental disorders or illness.[153] Before the specialised field of psychiatry was established, psychiatrists – or the physicians who specialised in the mental state of patients – were referred to as alienists and were popularly known as "mad doctors".[154] Until the late 1700s, physicians without a recognised speciality were not considered as members of a recognised profession.[155] So-called 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 defending an accused is evident from being referred to as such.[156]

The medical speciality of psychiatry probably had its origin in the late 1700s or early 1800s.[157] In one study on the evolution of court psychiatry, the 1801 case of John Lawrence[158] is mentioned as a clear indication that psychiatry had indeed arrived as a new speciality field.[159] In that case, Lawrence was accused of stealing three silver teaspoons and a silver salt-spoon.[160] Dr Louis Leo, a physician, appeared on Lawrence's behalf in support of his insanity plea. During the trial, Dr Leo testified that he was well versed in the "disorder of the human mind", upon which the court indicated that "[t]hen you are what is called a mad doctor".[161]

151 *Idem* at 1710.
152 Rosner 2003: 17.
153 Freemon 2001: 355.
154 Smith 1981: 3.
155 Eigen 2016: 25.
156 Smith 1981: 7.
157 Rosner 2003: 14; Greig 2002: 19.
158 *R v Lawrence* Old Bailey Session Papers (May, 1801) available at *https://www.oldbaileyonline.org/browse.jsp?name=18070218* (accessed 2 Aug 2021) (see n 67 *supra*). See, also, Eigen & Andoll 1986: 163.
159 Eigen & Andoll 1986: 168; however, they did warn against placing too much emphasis on a single case.
160 *R v Lawrence* (n 158 *supra*).
161 *Ibid.* See, also, Eigen & Andoll 1986: 163.

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Although a rare occurrence at first, expert medical witnesses testifying regarding mental illness or the mental state of a person steadily increased in the English criminal courts.[162] Nevertheless, between 1760 and 1845, medical witnesses were called to testify in fewer than a quarter of cases involving claims of insanity.[163] It is clear that physicians were considered to occupy the role of treating the mentally ill, even when testifying.[164] As mentioned above, this only changed during the late-nineteenth century, when the independent medical witness began to replace the healer as a witness.[165]

The abovementioned lack of physicians testifying in insanity trials can also be attributed to the fact that their testimony was considered to be unremarkable and similar to that of a layman.[166] From the Old Bailey Session Papers, it appears that in many of the cases, a physician simply declared that "I have looked upon him as a man insane".[167] In most cases, when asked to explain his expert opinion regarding the insanity of the accused, the physician merely referred to the accused's flighty speech, an incoherent conversation or the inability of the accused to answer a question logically.[168] Such an answer obviously required no medical training.[169] In fact, the relatives or friends who also testified were often in a better position to give examples of how an accused had acted out of the ordinary.[170]

The distinction between a lay witness and an expert witness became apparent in the two prominent cases of *R v Oxford* and *R v M'Naghten*.[171] In the 1840 *Oxford* case, the accused, one Edward Oxford, had attempted to assassinate Queen Victoria and Prince

162 Clark & Crawford 1994: 171; Smith 1981: 3.

163 Eigen 2016: 68. An example was the case of Lord Ferrers, who was tried for murder in 1760 and who 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 Rosner 2003: 19; Rosenthal 1935: 415; Learned Hand 1901: 47; Clark & Crawford 1994: 169.

164 Eigen & Andoll 1986: 161.

165 Gutheil 2005: 260.

166 Clark & Crawford 1994: 17; Eigen 2016: 52.

167 Clark & Crawford 1994: 171.

168 *Ibid.*

169 Eigen 1991: 29.

170 *Ibid.*

171 Eigen & Andoll 1986: 167.

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Albert.[172] Oxford suffered from a hereditary mental illness and he pleaded innocent due to insanity. At his trial, Dr John Davis, one of four medical witnesses, testified that in his view Oxford suffered from a mental illness when he attempted to murder the queen. During cross-examination, Dr Davis was asked in which capacity he had answered the questions;[173] he promptly responded that "I answer as a physician".[174] It therefore appears that physicians testifying in court were beginning to view themselves as professionals.[175] Although there were other cases in which physicians were asked to testify on their diagnosis of a person, the *Oxford* case explicitly distinguished between a lay witness and a medical expert witness.[176]

The *Oxford* case symbolised a triumph for the expert witness because the medical witnesses could give their opinions on the ultimate issue without any objections.[177] Furthermore, the case was noteworthy based on the fact that the medical witnesses wanted to participate in the reform of the legal system; they did not testify for money or personal prestige.[178] This supports the argument by Landsman that the medical experts had a typical nonpartisan character.[179]

The second important decision was that of the 1843 *M'Naghten* case,[180] which is considered a milestone in the development of forensic psychiatry.[181] 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

172 *R v Oxford* Old Bailey Session Papers (July, 1840) available at *https://www.oldbaileyonline.org/browse.jsp?name=18070218* (accessed 2 Aug 2021) (see n 67 *supra*).

173 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 *R v Oxford* (n 172 *supra*). See, also, Eigen & Andoll 1986: 167.

174 *Ibid.*

175 Eigen & Andoll 1986: 167.

176 *Ibid.*

177 Freemon 2001: 368.

178 *Idem* at 373.

179 Landsman 1998: 484.

180 *R v M'Naghten* (1843) 10 CL & F 200, 8 ER 718.

181 Greig 2002: 19; Appelbaum 1994: 166–172; Ferguson & Ogloff 2011: 80–81; Bazelon 1974: 20–21; Gold 2012: 247.

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guilty by reason of insanity. During his trial, nine expert medical witnesses testified.[182] In its judgment, the court formulated what would later be referred to as the *M'Naghten* rules,[183] which still comprise the standard test for determining insanity in England.[184] The *M'Naghten* case was seen as a recognition of psychiatric evidence by physicians in cases dealing with insanity.[185] The case further clarified the role that medical experts could play in future trials.[186]

The *Oxford* and *M'Naghten* cases both indicate a shift from the physician or so-called mad doctor providing information about a known patient or friend, to expert testimony regarding an unknown accused.[187] The so-called mad doctor was therefore transformed into an expert witness that, in their testimony, relied on clinical experience, scientific knowledge and other professional skills.[188] Furthermore, this transformation was also due to the witness' insights into mental illness; these insights became more advanced and were seen as "fast becoming an important element for the 'Counsel for the Defence'".[189]

Coinciding with the *Oxford* and *M'Naghten* cases, another important milestone was reached by the growing psychiatric profession in 1841, with the founding of the Association of Medical Officers of Asylums and Hospitals for the Insane.[190] This also contributed to the changing view of the so-called mad doctor to being a recognised and respected specialist. Previously, the eighteenth and nineteenth centuries in England had been marked

182 Smith 1989: 147.

183 In *R v M'Naghten* (1843) 10 CL & F 200, 8 ER 718 at 719, the court 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 of this rule laid down in the *M'Naghten* case, see Greig 2002: 19; Appelbaum 1994: 166–172; Ferguson & Ogloff 2011: 80–81; Bazelon 1974: 20–21; Smith 1981: 14–18; Ladikos 1996: 106–107.

184 Gutheil 2005: 262; White 1985: 43; Bartlett 2001: 110.

185 Rosner 2003: 20.

186 Greig 2002: 19.

187 Gold 2012: 247.

188 *Ibid*; Eigen & Andoll 1986: 167.

189 Clark & Crawford 1994: 193.

190 Bewley 2008: 8; Smith 1981: 13; Rollin 1991: 238.

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by an increase in asylums, or "madhouses" as they were known.[191] Unfortunately, abuse in the asylums came to light, and this called for greater intervention in the care of the mentally ill.[192] Under both the 1828 County Asylum Act and the 1845 Lunacy Act, provision was made for a resident medical officer (physician superintendent) at each asylum to help prevent any abuse.[193] These physician superintendents played an important role in the founding of the Association of Medical Officers of Asylums and Hospitals for the Insane, which would later be renamed as the Medico-Psychological Association in 1865.[194] This change of name indicated a move towards a more professional organisation outside the confines of the asylums.[195] The Medico-Psychological Association only received a Royal Charter of Incorporation in 1926, and in 1971 it became known as the Royal College of Psychiatrists.[196] The Royal College of Psychiatrists is today still responsible for setting the standards of care and for providing guidance for members practising in the field of psychiatry.[197]

It is clear from the above discussion that psychiatrists or so-called mad doctors were met in court with similar antagonism to that of medical experts. However, due to the nature of their expertise, and the controversy and uncertainty regarding mental illness, so-called mad doctors met with even more scepticism. The fact that physicians used commonly available criteria meant that many laymen assumed that they, as laymen, could also diagnose a person with a mental illness.[198] A prime example is that of Bramwell J, who insisted that juries should make the decisions regarding insanity as it was considered to be a matter of common sense.[199] In the 1856 case of *William Dove*, the same judge appeared to be annoyed by the "experts in madness" and in no uncertain terms expressed his disapproval of the evidence.[200]

191 Bewley 2008: 4.
192 *Idem* at 6–7.
193 *Idem* at 8.
194 *Ibid*; Smith 1981: 13; Rollin 1991: 238.
195 Bewley 2008: 23.
196 Rollin 199: 239.
197 Royal College of Psychiatrists "What we do and how" available at *https://www.rcpsych.ac.uk/about-us/what-we-do-and-how* (accessed 23 Jul 2020).
198 Smith 1981: 62.
199 *Ibid.*
200 As cited by Eigen 2016: 101.

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5 The intersection of the past and present of mental health experts

At the beginning of the eighteenth century, the medical profession was still in its infancy, with no proper regulation by statutory bodies or professional associations in place. Despite the initial lack of regulation, the gentlemanly code of honour adopted by mental health professionals provided the assurance to the courts that the mental health experts' opinions could be trusted.[201]

With the establishment of regulatory bodies and associations, the gentlemanly code of honour was no longer considered necessary and largely fell into disuse. The professionalisation and regulation of psychiatry did, however, have the benefit of prompting the legal community to start using expert psychiatric evidence more.[202] However, as more mental health experts entered the courtroom, the courts were faced with the escalating problem of partisan experts.[203] It is clear from the development of the English legal system that the accusatorial system was a breeding ground for this bias. As one scholar describes it, the medical and mental health professional could be "seduced and assaulted by the power of the adversarial system".[204]

The adversarial system was not the only factor that contributed to the rise of the partisan expert. Although professionalisation of the mental health field provided the golden ticket to its entrance in the courtroom, the lack of proper regulation resulted in the potential for abuse of the exclusive autonomy of such specialist work. Yet, the development of ethical codes or guidelines for these regulatory bodies and associations did not happen overnight, but mostly took place well after the founding of an association and, furthermore, did not always address psycho-legal or forensic work in particular.[205] As a result, those members of the profession who

201 Golan 2008: 903.

202 Eigen & Andoll 1986: 167.

203 Dwyer 2007: 118.

204 Mossman 1999: 415.

205 The General Medical Council published the first edition on the standard of care for patients, *Good Medical Practice*, in 1995, more than 100 years after the establishment of the body. See General Medical Council "Our history" available at *https://www.gmc-uk.org/about/who-we-are/our-history* (accessed 26 Mar 2020). It was only in 2000 that the Royal College of Psychiatrists published the first edition of the *Good Psychiatric Practice*, which sets

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testified as experts were left with no ethical guidance. Furthermore, the regulatory body cannot take disciplinary steps against a member who acted as partisan expert if the ethical code does not address psycho-legal work.

Similar to the historical development in England in this regard, the recognition of mental health professionals only gained momentum in South Africa after the discipline was established.[206] In 1928, the South African Medical and Dental Council was established in terms of the Medical, Dental and Pharmacy Act 13 of 1928 in order to regulate the medical and dental professions.[207] That Act was later repealed by the Health Professions Act 56 of 1974,[208] and the Council was renamed as the Health Professions Council of South Africa.[209] The latter Council is still the statutory body responsible for regulating the health professions, including that of psychiatry. The first code of ethical rules was, however, only published in 1976,[210] later to be repealed by the Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (hereafter referred to as the "Code of Ethical Rules") in August 2006.[211] Although this Code of Ethical Rules (as amended) still applies today, it does not provide much guidance with regard to psycho-legal work. In fact, no specific ethical code or set of guidelines relating to psycho-legal work has been formulated for psychiatrists yet.

The South African mental health experts today share the problem of their counterparts in nineteenth century England, in that there is no codification available regarding the profession's morality standards relating to psycho-legal work. As with the gentlemanly code of honour in nineteenth century England, such modern-day ethical codes are important as they guide the members of the

out the standards of practice for psychiatrists. See Royal College of Psychiatrists 2009.

206 Allan, Louw & Verschoor 1995(b): 679.

207 Van Niekerk 2009: 203.

208 Section 64 of the Health Professions Act 56 of 1974.

209 *Idem* s 2.

210 Rules Specifying the Acts or Omissions in Respect of which Disciplinary Steps may be Taken by a Professional Board and the Council, published as GNR 2278 in *GG* 5349 of 3 Dec 1976. These Rules have been repealed.

211 Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 (as amended), published as GNR 717 in *GG* 29079 of 4 Aug 2006 available at *http://www.saflii.org/za/legis/consol_reg/erocfpruthpa1974803/* (accessed 15 Jun 2021).

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profession in making consistent ethical choices without replacing the higher moral reasoning of a person.[212] Ethical principles and standards provide the impetus for potential expert witnesses to not only consider how they should go about acting as experts, but also how they should prepare, or even *if* they should act as expert witness at all.[213] It is submitted that without ethical guidance and proper sanctioning by regulating bodies, the hired-gun phenomenon will continue to blemish the reputation of members of the mental health profession.

6 The future of mental health experts: Recommendations for South Africa

The criticism levelled against expert witnesses in historical England has continued well into the twenty-first century with expert opinion evidence generating considerable negative publicity, especially in criminal proceedings.[214] A case that received major public attention was that of *R v Ward*.[215] Judith Ward was convicted of murdering twelve people by planting a bomb that exploded at a London railway station. Scientific evidence formed an important part of the trial, with a total of six such expert witnesses testifying.[216] The court found that an injustice was caused by the experts who "regarded their task as being to help the police. They became partisan".[217] As a result of this judgment, the Law Commission published a report in March 2011 regarding expert evidence in criminal proceedings in England and Wales.[218] The report raised several concerns about expert evidence, and eventually led to the reform of the Criminal Procedure Rules.[219] These latter Rules now extensively provide for the regulation of expert testimony and were designed to ensure that an expert opinion is not only unbiased, but also relevant.

212 Burke *et al* 2007: 111.
213 Sales & Simon 1993: 245.
214 Choo 2018: 295; Ormerod 2006: 6.
215 *R v Ward* [1993] 2 All ER 577 (Cr App R).
216 *Idem* at 593.
217 *Idem* at 628.
218 The Law Commission 2011: *passim*.
219 See the Criminal Procedure Rules, 2015 (as amended) available at *https://www.legislation.gov.uk/uksi/2015/1490/contents/made* (accessed 3 Aug 2021).

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Similarly, expert evidence in civil cases in England has also come under the spotlight. In the 2006 report by Lord Woolf,[220] it was mentioned that some of the criticism levelled against expert evidence included that it had become an industry "generating a multi-million-pound fee income"[221] and that the way that the expert evidence was used lead to experts taking on the role of partisan advocates.[222] The recommendations proposed in the Woolf Report were subsequently implemented in part 35 of the Civil Procedure Rules as supplemented by the Practice Direction.[223]

The focus of the abovementioned reform was not only to address the challenges of the adversarial system, but also to involve the statutory bodies (including the General Medical Council) and professional organisations (such as the Royal College of Psychiatrists). All the organisations involved in these reforms accordingly have revised their ethical codes and guidelines to ensure, first, that the rules of court are now fully integrated within the values, principles and standards of the relevant organisations[224] and, secondly, that professionals who do not adhere to the standards are sanctioned. The involvement of these organisations emphasises the importance and the need for self-regulation of the professions. As Lord Philips remarked in the case of *Jones v Kaney*, the sanctions of professional or statutory bodies, such as the General Medical Council, are crucial to the regulation of a profession because–[225]

> [t]he potential effects of a sanction by a professional body are more serious than the effects of civil proceedings by a dissatisfied client ... . An expert may lose his livelihood and entire reputation as a result of an adverse ruling by a professional disciplinary body.

The most promising avenue to ensure that psychiatric evidence is objective, nonpartisan, valid and reliable is for the mental health professions to regulate the conduct of their own members.[226] Self-

220 Woolf 2006: *passim*.
221 *Idem* ch 13, para 2.
222 *Idem* para 5.
223 See the Civil Procedure Rules, 1998 (as amended) available at *https://www.legislation.gov.uk/uksi/1998/3132/contents/made* (accessed 3 Aug 2021).
224 See, eg, Royal College of Psychiatrists College 2009: *passim*, which expresses the College's view on how psychiatrists should act when giving an expert opinion. See, also, Rix, Eastman & Adshead 2015: *passim*.
225 *Jones v Kaney* [2011] 2 WLR 823, UKSC 13 para 84.
226 Slobogin & Richard 1980: 461; Appelbaum 1992: 153.

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regulation is usually achieved by ethical codes that guide the member in making consistent ethical choices;[227] after all, ethics is seen as the very essence of professional practice.[228] It is recommended that South Africa follow the example set by England in revising and developing speciality guidelines or an ethical code for mental health experts who testify as expert witnesses.

7 Concluding remarks

The historical perspective in this contribution provides good insights from which a regulatory framework for psycho-legal work may be developed. History has taught us certain lessons in this regard, including that the key to success in the proper regulation of expert witnesses lies not only in the hands of the law, but also within the profession itself. The profession itself must set the boundaries to which its members must conform.[229] Lest we forget the words of Justice Earl Warren: "In civilized life, law floats in a sea of ethics".[230]

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227 Burke *et al* 2007: 111.
228 Allan & Grisso 2014: 473.
229 Carstens & Pearmain 2007: 607.
230 As quoted by Cook 1963: 454.

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