

**THE ROLE OF EXPERT EVIDENCE IN SUPPORT
OF THE DEFENCE OF CRIMINAL INCAPACITY**

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“Some psychiatrists say that psychiatry and the law should never get into bed together and that the psychiatrist should keep completely away from the legal process. However, psychiatry, like other branches of medicine, has a great deal to offer in service of the administration of justice. Ensuring that it is a proper professional relationship and avoiding the risk of abuse, or accusations of prostitution, depend on the two professions learning each other’s language, paying attention to their respective codes of ethics, discovering their histories and customs and speaking to and listening to each other as a matter of course and not just when difficulties arise. The reward will be a mutually beneficial, fulfilling and lasting relationship between the medical and the legal profession and the delivery of justice.” (Rix, KJB “Psychiatry and Law: Uneasy Bedfellows” (2006) *Medico-Legal Journal* 158)

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“May this dream be an inspiration to all those dreaming to achieve a dream!”

MODE OF CITATION AND REFERENCE TO SOURCES

In order to make the current thesis more user-friendly, the author has elected to abide by the following mode of citation and reference to sources relied upon in support of this study:

- Footnotes will be used throughout the course of this study in order to provide the requisite recognition to the various authorities used and also to ensure that the various sources are more accessible to other authors;
- In every chapter the footnotes will resume from footnote 1 with the implicit aim of making the reading of the respective chapters easier and more user-friendly;
- A complete list of authorities used during the course of this study is supplied at the end of this thesis by means of a bibliography. The latter will assist in rendering the sources more accessible to the reader, especially where more than one source of the same author is utilised (e.g Reddi, M);
- In the event of a specific source being utilised in a subsequent chapter, the full reference of such source will again be provided within the context of the subsequent chapter in order to render the source easier accessible to the reader.

SUMMARY

THE ROLE OF EXPERT EVIDENCE IN SUPPORT OF THE DEFENCE OF CRIMINAL INCAPACITY

by

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DEPARTMENT: PUBLIC LAW

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The current study addresses the fundamental role of expert evidence advanced in support of the defence of criminal incapacity. It was endeavoured to illustrate that the scientific entities of forensic psychiatry and psychology fulfil an essential and pivotal role in establishing and assessing the defence of criminal incapacity. The study proposed to illustrate the interaction between the professions of law and medicine on the backdrop of the defence of criminal incapacity. Recommendations were provided with the aim of enhancing the dialogue between the professions of law and medicine when the defence of criminal incapacity falls to be assessed. The study was approached from a dual dimensional perspective illustrating both the need for mental health experts as well as the need for adequately trained and experienced mental health experts to provide expert testimony as to an accused's mental state when the defence of criminal incapacity is raised. The motivation for the current study is enumerated and the concepts of "criminal capacity", "non-pathological criminal incapacity", "pathological criminal incapacity" and "expert evidence" are, amongst others, conceptualized. It is indicated that expert evidence plays an essential role not only in cases where pathological criminal incapacity, or put differently, criminal incapacity attributable to mental illness or mental defect is raised, but also in instances where non-pathological criminal incapacity is raised as a defence. The role of the mental health expert is addressed with reference to battered woman syndrome evidence advanced in support of the defence of non-pathological criminal incapacity. It is illustrated that the defence of non-pathological criminal incapacity is in need of reform. It is in addition illustrated that legislative reform is essential to establish the defence of non-pathological criminal incapacity and to create legal certainty. The inconsistent approach in the application of expert evidence to the defence of criminal incapacity is emphasized

with specific focus on the semantic distinction between the defences of non-pathological criminal incapacity and pathological criminal incapacity. The role and application of the DSM-IV in the definition and assessment of mental disorders is addressed in conjunction with the various obstacles associated with the application of the DSM-IV to the defence of criminal incapacity. The nature and scope of the basic rules of expert evidence as they would apply to mental health professionals acting as expert witnesses in support of the defence of criminal incapacity are addressed. The assessment of the probative value of expert evidence is addressed and the complexities associated therewith are espoused. The numerous ethical dilemmas faced by mental health experts are illustrated and recommendations are provided aimed at eliminating these dilemmas. A comparative study of selected principles pertaining to expert evidence in the United States of America is embarked upon to illustrate the need for a codification of the rules of expert evidence as well as effective guidelines aimed at enhancing the scientific reliability and validity of expert evidence advanced in support of the defence of criminal incapacity. Finally, conclusions are drawn and motivated recommendations are made. Law reform is proposed in the form of draft proposals for legislative reform in respect of the defence of criminal incapacity as well as a draft ethical code of conduct for mental health experts providing expert testimony in cases where the defence of criminal incapacity is raised.

Key terms: criminal capacity; non-pathological criminal incapacity; pathological criminal incapacity; expert evidence; psychiatry; forensic psychiatry; psychology; forensic psychology.

SAMEVATTING

DIE ROL VAN DESKUNDIGE GETUIENIS TER ONDERSTEUNING VAN DIE VERWEER VAN ONTOEREKENINGSVATBAARHEID

deur

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DEPARTEMENT: PUBLIEKREG

GRAAD: *DOCTOR LEGUM*

Die onderhawige studie ondersoek die fundamentele rol wat deskundige getuienis vervul ter ondersteuning van die verweer van ontoerekeningsvatbaarheid. Daar is gepoog om aan te toon dat die wetenskaplike entiteite van forensiese psigiatrie en sielkunde 'n wesentlike rol vervul ten einde die verweer van ontoerekeningsvatbaarheid te bewerkstellig. Die studie illustreer die wisselwerking tussen die reg en die medici teen die agtergrond van die verweer van ontoerekeningsvatbaarheid. Aanbevelings word verskaf met die oogmerk om die dialoog tussen die regslui en die mediese wetenskappe te bevorder in gevalle waar die verweer van ontoerekeningsvatbaarheid beoordeel moet word. Die studie is vanuit 'n tweeledig-dimensionele perspektief benader ten einde beide die behoefte aan geestesdeskundiges sowel as die behoefte aan genoegsaam gekwalifiseerde geestesdeskundiges te illustreer ten einde deskundige getuienis te lewer aangaande die geestestoestand van 'n beskuldigde in gevalle waar die verweer van ontoerekeningsvatbaarheid geopper word. Die motivering vir die onderhawige studie word uiteengesit en die begrippe "toerekeningsvatbaarheid"; "nie-patologiese ontoerekeningsvatbaarheid" en "deskundige getuienis" word, onder meer, gekonseptualiseer. Daar is aangetoon dat deskundige getuienis nie alleenlik 'n onmisbare funksie vervul in gevalle waar patologiese ontoerekeningsvatbaarheid, oftewel ontoerekeningsvatbaarheid wat toegeskryf word aan 'n geestesversteuring, geopper word nie, maar ook in gevalle waar die verweer van nie-patologiese ontoerekeningsvatbaarheid geopper word. Die rol van die geestesdeskundige word aangespreek ook met verwysing na mishandelde vrou sindroom-getuienis wat aangevoer word ter ondersteuning van die verweer van nie-patologiese ontoerekeningsvatbaarheid. Dit word geïllustreer dat die verweer van nie-patologiese ontoerekeningsvatbaarheid hervorming benodig. Dit

word aangetoon dat wets-hervorming noodsaaklik is ten einde die verweer van nie-patologiese ontoerekeningsvatbaarheid te bewerkstellig en regsekerheid te skep. Die teenstrydige benaderings tot die toepassing van deskundige getuienis tot die verweer van ontoerekeningsvatbaarheid word toegelig met spesifieke klem op die semantiese onderskeid wat getref word tussen die verweere van nie-patologiese – en patologiese ontoerekeningsvatbaarheid. Die rol en toepassing van die DSM-IV in die omskrywing en beoordeling van geestesversteurings word bespreek tesame met 'n toeligting van die verskeie struikelblokke verwant aan die toepassing van die DSM-IV ten aansien van die verweer van ontoerekeningsvatbaarheid. Die aard en omvang van die basiese reëls van deskundige getuienis word toegelig met spesifieke verwysing na die toepassing daarvan op geestesdeskundiges wat deskundige getuienis aflê ter ondersteuning van die verweer van ontoerekeningsvatbaarheid. Die beoordeling van die bewyswaarde van deskundige getuienis word toegelig en die problematiek daaraan verbonde word bespreek. Die onderskeie etiese vraagstukke wat geestesdeskundiges in die gesig staar word toegelig tesame met aanbevelings wat daarop gemik is om hierdie vraagstukke op te los. 'n Regsvergelykende studie ten aansien van geselekteerde beginsels rakende deskundige getuienis in die Verenigde State van Amerika word onderneem ten einde die waarde van 'n gekodifiseerde stel reëls van deskundige getuienis toe te lig asook om riglyne voor te stel wat daarop gemik is om die wetenskaplike betroubaarheid en geldigheid van deskundige getuienis te bevorder. Ten slotte is daar tot enkele gevolgtrekkings gekom en gemotiveerde aanbevelings is gemaak. Regshervorming word voorgestel in die vorm van konsepwets-hervormings rakende die verweer van ontoerekeningsvatbaarheid, asook 'n konsep etiese kode vir geestesdeskundiges wat deskundige getuienis lewer ter ondersteuning van die verweer van ontoerekeningsvatbaarheid.

Sleutelbegrippe: toerekeningsvatbaarheid; nie-patologiese ontoerekeningsvatbaarheid; patologiese ontoerekeningsvatbaarheid; deskundige getuienis; psigiatrie; forensiese psigiatrie; sielkunde; forensiese sielkunde.

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LIST OF ABBREVIATIONS

A.2d	Atlantic 2 nd series
AAPL	American Academy of Psychiatry and the Law
All ER	All England Reports
Am Psychiatr Assoc. J	American Psychiatric Association Journal
Aust NZ J Psychiatry	Australia/New Zealand Journal of Psychiatry
B	Botswana Supreme Court
BCLR	Butterworths Constitutional Law Reports
Bot	Botswana (Appeal Court)
Bull Am Acad Psychiatry	Bulletin of the American Academy for Psychiatry
Calif. L. Rev	California Law Review
CC	Constitutional Court
CCC	Canadian Criminal Cases
CILSA	Comparative and International Law Journal of South Africa
Columbia L Rev.	Columbia Law Review
CPD	Cape Provincial Division

Crim. L. Bull.	Criminal Law Bulletin
CRR	Criminal Record Report
DSM-IV	Diagnostic and Statistical Manual of Mental Disorders 4 th ed.
EDLD	Eastern District Local Division
EPD	Eastern Provincial Division
ER	English Reports
F. 2d	Federal 2 nd series
F. Supp	Federal Supplement
GNR	Government notice regulation
HPCSA	Health Professions Council of South Africa
LAWSA	(Joubert) The Law of South Africa
Louisiana L. Rev.	Louisiana Law Review
LRQ	Law Review Quarterly
Med Sci Law	Medicine, Science and the Law
Merc. L. Rev.	Mercer Law Review
Nm	Namibia High Court
NPD	Natal Provincial Division

P.2d	Pacific 2 nd series
PH H	Prentice-Hall Reports section H
POWA	People Opposing Women Abuse
R	Rhodesia
RA	Rhodesia, Appellate Division
RAU	Rand Afrikaans University (now called University of Johannesburg (UJ))
Rutgers L. Rev.	Rutgers Law Review
SA	South African Law Reports
SACC	South African Journal of Criminal Law and Criminology
SACJ	South African Journal of Criminal Justice
SACR	South African Criminal Reports
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPM	South African Practice Management
SC	Supreme Court
SCA	Supreme Court of Appeal

SCC	Supreme Court of Canada
SCR	Supreme Court Reports (of Canada)
SE	South Eastern Cape Local Division
SMU Law Review	Southern Methodist University Law Review
So.2d	Southern Reporter
Stell LR	Stellenbosch Law Review
S.W.	South Western
SWA	South West Africa
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TPD	Transvaal Provincial Division
TRW	Tydskrif vir Regswetenskap
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UC Davis L. Rev	University College of Davis Law Review
U. Chi. L. Rev.	University of Chicago Law Review
U. Chi. L. Sch.	University of Chicago Law School
Unisa	University of South Africa
UP	University of Pretoria

US	United States
VA L. Rev	Virginia Law Review
WITS	University of the Witwatersrand
WLD	Witwatersrand Local Division
W. Res. L. Rev.	Western Reserve Law Review
Yale LR	Yale Law Review
ZH	Zimbabwe High Court