

The Prostitution of Psychiatry: Some are shameless, others are just easy

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Most psychiatrists are consistently ethical and professional. But there are some who are known to be 'hired guns', that is, they will produce assessments and reports according to the desires of those who engage their services. They usually operate in those areas of practice that are relatively free from regulation and accountability, such as the psycholegal and drug research arenas. This must be distinguished from our usual (and ethical) advocacy role (to get the best care for our patients) that the fiduciary relationship demands. 'Hired guns' cynically manipulate psychiatric diagnoses and assessments, and in effect prostitute the values of our profession. They appear to be acting as advocates for the best interests of their clients, but actually cleverly exploit the ambiguities and weaknesses that do bedevil our discipline, in order to achieve outcomes that most of their colleagues would consider an abuse of psychiatry. An obvious example that springs to mind is the psychiatrist who supported his client's claim against McDonalds on the grounds that she had suffered PTSD when a waiter spilt hot coffee in her lap (she lost the case).

Psychiatrists have always been involved in juridical matters. In the past this was usually an adjunct to their general practice. In the latter half of the 20th century the numbers of those exclusively or predominantly orientating their practices to the more lucrative forensic arena has increased dramatically.¹ The American Academy of Psychiatry and the Law was formed in 1969 as a small interest group, and is now a very large influential organisation with more than 1500 members. The number of lawyers has also increased greatly, and lawyers (and the courts) have become progressively more dependent on the assessments and opinions of mental health professionals.

There are no data on how many psychiatrists in South Africa predominantly perform psycholegal work. Probably virtually all psychiatrists have had to submit reports to employers, insurance companies and the courts at some time, and are frequently relieved when another colleague is requested to conduct an independent assessment. But, informally, there is a small cohort of psychiatrists who have become notorious for the inordinate number of cases they assess and support for disbursements and dispute resolutions. One such practitioner has reportedly referred to himself as a 'boardiologist', as he has supported such

huge numbers of employees applying for medical boarding.

As there are no local surveys of the quality of psychiatrists' contributions in medicolegal cases it is not known how prevalent the problem actually is. Even in the UK, despite a similar dearth of data, the Woolf Report complained that the escalating costs of litigation was because experts had become 'partisan advocates rather than neutral givers of opinions'.² About 15 years ago a survey of lawyers' perceptions of psychologists who do forensic work in this country concluded that most did not believe that psychologists' testimony was of much value, but several did comment on their lack of objectivity³:

"A magistrate commented that 'generally they (psychologists) provide invaluable evidence. However they are inclined to be extremely defensive of their point of view, which detracts from their objectivity. Some 'gunslingers' unfortunately taint the very ethical image of your profession'. Another respondent, a judge with more than 30 years' experience, said about psychologists in court that 'with one notable exception I have found them to be biased in favour of the party which employs them, to the extent that their objectivity and integrity become suspect.' (p.23)

Presumably similar sentiments could be directed at psychiatrists too, as have been in the USA.⁴ There are numerous instances where psychiatrists hawk their expertise, but this article will focus on 3 prominent areas in forensic practice, namely litigation, disability assessments and child custody disputes.

Litigation

Almost 50 years ago Bernard Diamond declared that no expert was capable of being truly objective, especially if he or she depended on forensic work to pay the mortgage, school fees and other expenses.⁵ He believed that the nature of the adversarial system, nevertheless, was inherently capable of exposing those who were more than just biased. He compounded his optimism by asserting that private practitioners had more resources and time than their state-employed counterparts, and therefore could be expected to conduct more thorough evaluations.⁵ His views have been refuted, and nowadays juries in the USA generally perceive privately hired experts, especially if they appear to be highly paid (which is usually elicited by opposing counsel), as being just 'hired guns'.⁶

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The recent trial of Dr Conrad Murray, who was accused of killing Michael Jackson, neatly illustrated this. One of the experts for the prosecution announced upfront that he was testifying for no fee, which, in addition to his impeccable academic credentials, probably sank the testimony of the defendant's more mercenary-looking expert.

Unlike the USA, where strict rules have evolved, especially in the wake of their recent *Daubert v Merrell Dow Pharmaceuticals* case, that require experts to provide testimony that meets the standards of reliability and relevance (which also means it must be 'evidence based') South African courts will allow any testimony, all too frequently from those who obviously lack the requisite expertise to provide the required assessment and opinion.^{3,7} I have personally witnessed an industrial psychologist pronouncing on a murder accused's personality which he had determined solely by use of the PF-16 scale, and a psychiatrist who willingly provided his opinion on the strength of a blow to the head based on the depth of an impression found on a door frame.

Essentially the problem is differentiating the venal experts from those who simply are unable to transcend their own biases. Take a recent example from our experience. A university student was referred for an assessment as he had meticulously planned (over a 6 month period) the murder of a woman who had rejected his advances. He had subdued, murdered and sexually assaulted her over a protracted period, then carefully tied her up, wrapped her up in black garbage bags, smuggled her out of her apartment complex, and took her body to his flat, where he again tried to have sex with her. He hid her body, and allowed the police to search his flat. Eventually he buried her in a deserted area many kilometres away, and travelled to many distant destinations to systematically dispose of all the evidence. At his bail hearing the defence advocate produced a psychiatrist's report that stated he suffered from Aspergers syndrome, obsessive compulsive disorder and major depressive disorder, and therefore was not really able to control himself. The possibility that he was just a sadistic psychopath evidently did not occur to their expert.

The defence of non-pathological incapacity that has been used frequently as a defence in murder cases possibly has produced the most egregious examples of biased bought testimony. Invariably the accused has murdered an intimate partner in a fit of rage, and, with the assistance of the expert, seeks exoneration on the basis of an altered mental state (not a mental illness, as they do not wish to be certified as state patients). Their experts usually resort to using terms that have either been excavated from antique textbooks, such as 'catathymic crisis', use opaque psychodynamic explanations, such as 'ego disintegration', use accepted psychiatric diagnoses carelessly, such as dissociative disorder (which is sometimes honed down to dissociative amnesia, depersonalisation, derealisation or psychogenic automatism), or just declare that the accused 'snapped'.⁸ Do these experts truly believe their pseudoscientific explanations, or are they just exploiting a lucrative niche market?

Although one can seldom prove that a particular colleague in these cases is really a 'hired gun' several indicators may be clues. These practitioners seem to base much of their practices on providing forensic assessments that often result in overlong verbose reports with poorly motivated diagnoses (that are

idiosyncratically used to excuse their client, who often has no history of psychiatric illness), and they typically document the very long hours that they spent interviewing the accused (which is in itself a reasonably good indicator that the expert has earned a hefty sum for the report). They sometimes sit next to legal counsel during the court case to provide ongoing assistance, especially during the cross-examination of witnesses. All too often the pretence of objectivity is abandoned and replaced with the earnest attitude of trying to do the best for their patient-client.

Impairment and disability assessments

The workplace in this country has changed dramatically since the inception of democracy, including a revamp of our labour legislation. It has become more difficult to fire underperforming workers, and consequently achieving a discharge through medical boarding, with its attendant financial benefits, has become a popular solution. Large numbers of employees, mostly state employed, have gone off on sick leave, clutching certificates from treating psychiatrists with diagnoses such as depression, PTSD, and chronic adjustment disorder (i.e. the job is so awful that whenever they go to work they get depressed. When not at work they are well). Many remain on sick leave for long periods, some for longer than 5 years, on full pay. Their treating psychiatrists dutifully issue certificates at regular intervals, stating emphatically that a further 3-6 months is required. During this period applications for a medical boarding are submitted, which invariably proceed through a bureaucratic morass over a protracted period, before even an independent opinion is sought. As Ewart Smith has pointed out most of these applicants have a 'work phobia' (they simply hate their jobs), and that ironically the Employment Equity Act actually requires employers to accommodate these people (if truly disabled), yet the longer they remain on sick leave the more resistant they become to returning to the workplace, aided and abetted by their treating psychiatrists.⁹ Almost never are attempts, with the aid of an occupational therapist (OT), made to reintegrate them into the workplace. When advised to engage the service of an OT the treating psychiatrist sometimes submits an indignant letter that OT cannot be entertained while his patient has his diagnosis, which presumably is forever.

Most psychiatrists issue sick certificates appropriately, and support disability applications for deserving patients. But there is a small number who are known to promote medical boarding for a very large number of applicants. Insurers, assessors and state employers have noted this, and for some time have routinely referred applications from these psychiatrists for independent assessments, much to the surprising chagrin of these clinicians.

In some cases the circumstantial evidence appears to support the notion that a colleague has cynically sold his services. For example, a 42 year old teacher travels from a small town on the border of Namibia to consult with a psychiatrist in Cape Town. After a brief admission in a clinic, during which he is prescribed an SSRI, tranquilliser and hypnotic, he drives back to his town with a certificate that asserts he is permanently impaired as he suffers from depression (and that no further treatment will be effective). After his medical boarding and award of a disability pension, he opens a shop and starts a construction company, which are

successful for some years. He receives no further treatment. But about 8 years later he begins working at a local school on a contract, and wishes to apply for a permanent post. He then travels back to Cape Town to consult with the same psychiatrist, who this time issues a certificate stating that he has now recovered and can resume his career in teaching. Hosts of employees while on psychiatric sick leave are running businesses, spending a great deal of time in gyms, or working for others etc. What is this abuse of psychiatry costing the economy?

Child custody disputes

A significant proportion of divorces become protracted wars of attrition that involve issues concerning the custody, post divorce access and maintenance of minor children. A well known tactic is for one party to accuse that the other of having sexually or physically abused their child, of displaying a psychiatric disorder or parenting failure (eg. due to substance abuse or unacceptable lifestyle choices) that somehow disqualifies him/her from not only gaining custody but also from enjoying much ongoing contact with the child. The plaintiff's lawyer then assembles a panel of experts usually consisting of clinical psychologists, perhaps a social worker, and a child or general psychiatrist. They somehow get the defendant to agree to this, usually with the implicit threat that lack of cooperation will enable the court to peremptorily make a decision against him/her. They descend on the family, and divide amongst themselves the various tasks of assessing separately the children, each parent and then the family together. One of the team, a clinical psychologist, may insist on spending evenings, or other periods (such as weekends) with the family at home over an extended period, which may add up to at least 30 hours of professional time. Ultimately long reports are produced that commonly make specious findings of fact (for example, whether it is likely that the father has been sexually abusing his daughter) or include gratuitous information (such as details of the sexual relationship the couple had enjoyed while courting), and then confidently offer long term predictions about one parent's suitability.^{10,11} This is offered despite the dearth of good longitudinal research on what actually does militate against good parenting in the long term, and the general failure of experts to provide any long term predictions in all areas of mental health. Presumably now everyone with a personality or psychiatric disorder should actually be prevented from having children?

If one examines the criteria laid down in Section 6(1) of the *Divorce Act (Act 70 of 1979)* and enunciated in *McCall v McCall 1994 (3) SA 201 (C)* it seems clear that the court is supposed to apply common sense to deciding on these ultimate issues. Yet somehow this has been subverted by the false belief that verbose, often jargonised, assessments somehow are better than that. Worse still, these experts generally plunder these emotionally vulnerable families' financial resources with their exorbitant fees. It is not unusual to hear that parties have had to spend amounts up to R1 million in trying to exclude the other from his/her parenting role, or in order to defend against such an action. In the USA about 10% of ethics complaints to mental health boards are in consequence of custody disputes.¹² But in South Africa the HPC(SA) rarely receives such complaints, probably because this area is so unregulated.

Recommendations

The most obvious problem is the lack of regulation in psycholegal practice. The HPC(SA) has, in principle, agreed to register forensic psychiatry as a sub-specialty. Consequently it will be imperative that in order to assess forensic cases psychiatrists will have to undergo training, and be certified as bona fide experts. It will also be possible to introduce ethical rules that can be used to adjudicate whether experts have acted appropriately. This implies that a complaints mechanism would have to be set up, such that formal peer review can occur. A subsidiary gain would be that, at last, data will be collected, and then the full extent and characteristics of the problem can be analysed.

As recommended in the Woolf Report in the UK some consideration could be given to creating panels of experts from which the courts appoint experts to assess and report on specific cases, almost analogous to that already used for referrals for psychiatric observations in criminal cases.² Consequently the courts will decide, and not the parties themselves, whether expert opinion is required, and if so, only neutral experts will be used. It may then be possible to control fees, which will benefit all (except the venal). There will be resistance to this, as this will modify our system from being primarily adversarial (and too often unfair, as it favours the wealthy) to an inquisitorial (and hopefully fairer) system. This will improve the standing of our profession.

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