FORENSIC PSYCHOLOGY: PRINCIPLES, PRACTICE AND TRAINING

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As the subject matter of psychology expands and its practitioners gain professional recognition, they will be unable to avoid contentious issues in relation to the criminal and civil law. In this article the writer sets out the gleanings of his own experience both as a guide for younger colleagues and as a seminar paper for clinical students on postgraduate training courses. It deals with the legal concepts of fitness to plead, insanity, and *mens rea* among other topics, describes court procedures and offers advice in the presentation of expert evidence to the courts.

The changing role of clinical psychologists and the growing recognition of their skills by the medical and legal professions has brought them new opportunities and responsibilities for professional practice. Not the least of these is that relating to forensic psychology—the application of the principles and procedures from general psychology to the resolution of problems in criminal and civil proceedings. The matter has recently become so important in the United Kingdom (cf. Haward, 1961, 1964, 1969; Memorandum of Evidence, 1973) that a new division of 'Criminological and Legal Psychologists' has been formed by the British Psychological Society. The purpose of the present article is not to suggest that we in New Zealand should follow suit, but to set out some of the issues that will face the novice who may be called upon to work in this area, and to share some thoughts about ways in which academically and professionally he may be trained.

In the criminal courts forensic psychology can be divided into two distinct parts. One relates to the determination of legal guilt, and the other to the disposal and management of offenders. Much has been written about the latter in New Zealand (e.g., Taylor, 1961; Department of Justice, 1964, 1968; Taylor and Black, in press), but little about the former, apart from Wiley and Stallworthy (1962). The paucity of material on the topic of guilt reflects a lack of professional involvement by psychologists in legal procedures, as suggested above, and that neglect is somewhat surprising in view of the psychologist's traditional preoccupation with emotional guilt (cf. Reik, 1959; Taylor, 1964). While Haward in the United Kingdom would confine the scope of forensic psychology to courtroom practice (personal communication, 15.4.75), the present writer shares Tapp's (1976) view that the field of application is much wider than that. Yet for the purpose of the *present* article the focus will be upon psychology and law in the courtroom. The topic can be divided into three parts—principles, practice and training—each of which psychologists need to consider.

PRINCIPLES

Psychology is the scientific study of human behaviour. Law is the set of statutes and case rules by which human beings order their obligations and relationships. The one accumulates knowledge from observational, clinical and experimental methods. The other does so from the consistency of decisions made by the Magistracy and the Judiciary within the limitations of statutes about cases before them. Psychologists appearing as expert witnesses in the courts, whether criminal or civil, must first recognise that the courts follow legal rather than psychological procedures (cf. Toch, 1961). Psychologists must, therefore, conform to the procedures of the adversary system that allows for the orderly presentation of the case for and against any person. The presentation must be made with despatch, for "Justice delayed is Justice denied", and a case cannot be set aside while hypotheses are tested and fresh evidence gathered for the resolution of any doubts. Once begun, a case must proceed, except for extraordinary circumstances concerning the illness of the participants.

Criminal cases

The first questions to be resolved concerning psychologists in criminal cases are those relating to (a) fitness to plead, (b) insanity, and (c) *mens rea* (the guilty mind), but in civil cases they may range from those relating to testimentary capacity, the custody of children, and the breakdown of marriage.

(a) 'Fitness to plead' is a matter decided 'on the balance of probabilities' (see below) by a Magistrate or Judge, and the evidence is brought at the beginning of a hearing. If the plea is successful, the accused will be detained as a special patient under the *Mental Health Act 1969,* and should he regain his functional capacity he may be brought to stand trial for the offence for which he was originally charged.

The Law relating to such disability is found in Section 39C of the *Criminal Justice Act 1954* as amended; the definition of which (Section 39A) reads:

> " 'Under disability' means mentally disordered to such an extent as to be unable to plead, or unable to conduct a defence or instruct a solicitor for that purpose, or unable to comprehend the course of proceedings.".

The courts are obliged to obtain evidence about 'disability' from two registered medical practitioners but they may also include evidence from other people. In two recent cases in the Supreme Court in Wellington (*Queen v. L. A. Genet,* Wellington Supreme Court, T68/76, Beattie, J., Rape, unreported; *Queen v. U. Soi,* Wellington Supreme Court, T126/76, Quilliam, J., Murder, unreported) a psychologist was among those who gave evidence concerning the accused's fitness to plead. In his oral judgment in the Genet case, Beattie J. summarised the observational, psychometric and psychiatric evidence and decided

that the accused was under disability. Elements of the Beattie judgment were referred to subsequently in the Soi hearing, and, as they might become central in the determination of future cases of such disability, they are repeated here:

After reviewing the psychometric evidence (page 2 of oral judgment) Beattie J. said:

> "I was told by the (psychologist) that in his opinion the accused would be unable to give instructions for a valid will, enter into a contract affecting property, understand what electoral voting was about, or appreciate the consequences and responsibilities of marriage. In essence, the learned (psychologist) was of opinion that he did not consider this accused would be able to make a rational decision to plead guilty or not guilty or to conduct a defence or instruct counsel within the definition of disability as used in Section 39A of the Criminal Justice Act 1954. He did not consider he would be able to make an effective challenge of a juror or understand why generally the lawyers would be asking the questions they did."

(b) Insanity is a matter that judges place before juries in the Supreme Court or that magistrates decide when relatively minor criminal charges have been laid in their courts. Like fitness to plead, insanity is decided 'on the balance of probabilities' from the facts and opinions presented in the court (cf. Smith and Hogan, 1965, p. 108). In general, the law presumes that everyone intends the natural consequences of his actions, and that those who have not that intention from mental disturbance at the time of the offence, from whatever cause, might be insane. The courts first hear evidence from the defence, and then contrary evidence in rebuttal from the Crown. If the defence is upheld the accused will be committed to a mental hospital under the *Mental Health Act 1969,* and the trial might only proceed if and when he recovers. If the defence of insanity is rejected the trial will proceed in the normal way.

Disputes have waged for years over the adequacy of the law relating to insanity because of the difficulty courts have in making allowance for irrational factors in criminal behaviour (cf. Biggs, 1955), but with the abolition of capital punishment the issue, although still important, is somewhat less critical than before. Usually, there is no dispute about the insanity of people who are in florid psychotic states to which the former Lord Bracton's 'wild beast' test of 1265 (Biggs, 1955, p. 82) would apply. Disputes invariably arise when the disordered thoughts and feelings of the accused cannot so readily be related to his manifest behaviour. The present law actually originated with the judge's decision in the celebrated M'Naghten case in 1843 (10 Cl and F) in Britain (cf. Clare, 1976, p. 340). M'Naghten, an illiterate Irish labourer who spelt his name in several different ways, was a paranoid schizophrenic who set out to kill Sir Robert Peel as a way of countering the Tories and the Catholic Church whom he believed to be persecuting him. He lay in wait in Downing Street, and killed the first to emerge from

No. 10—one Edward Drummond, Peel's secretary. M'Naghten was acquitted on the grounds of insanity, but the public outcry was such that a Commission of Judges was set up to answer specific questions about the law of insanity. The judge's answers were built into subsequent court decisions, and they were embodied in successive criminal statutes in New Zealand (cf. R. v. MacMillan, 1966, N.Z.L.R. 616). The pertinent section of New Zealand law is set out in Section 23 (2) of the Crimes Act 1961, as follows:

"No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable—
(a) of understanding the nature and quality of the act or omission; or
(b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong."

Once again, the statutory defence must be supported by the evidence of two registered medical practitioners, and the court may be influenced by the evidence of a psychologist in support of them. That evidence must be related to the behaviour of the accused at the time of the offence, together with such evidence of his cognitive, emotional and social dysfunctioning as are considered relevant to the argument. Essentially, the courts will want to know whether the accused was under such a state of mental incapacity at the time of the commission of the offence that he did not know what he was doing, or if what he did was wrong. The judgment 'wrong' in that context is interpreted as morally wrong if ". . . he could not think rationally of the reasons which to ordinary people make that act right or wrong" (R. v. MacMillan, *op. cit.*). In that particular case, MacMillan was successful in his appeal against a conviction for attempting by force to break out of Mount Eden Prison during the 1965 riots there. He was a paranoid schizophrenic whom the jury had earlier held to be sane against the weight of psychiatric testimony and in the absence of evidence for the prosecution in the matter, but on appeal he was acquitted on the grounds of insanity.

(c) *Mens rea,* or guilty mind, is the third question that the psychologist as an expert witness may be obliged to consider, and it is a matter that counsel will discuss with him in some detail before the trial because of its subjective complexity (cf. Adams, 1971, p. 104, *et. seq.*). It is a fundamental of criminal law that no person shall be found guilty unless he had the intention of committing the unlawful act or of so avoiding his responsibilities by failing to act in a way that he should. There are some exceptions to that rule, such as in the determination, by a man over the age of 21, of the age of a girl under 16 with whom he has had sexual intercourse, in which matter the law considers offenders to have absolute liability.

The lack of intent is in no way to be confused either with unfitness to plead, or with insanity, because a person who is able to comprehend the proceedings and knew what he was about might still lack the necessary intention that forms the legal ingredient of a criminal action.

The onus of proving intent lies with the prosecution, and the proof must be made beyond reasonable doubt. The proof is usually inferred from the *prima facie* evidence of what transpired at the time of the alleged offence and from the statement the accused may have made to the police soon afterwards. The case to the contrary lies with the defence when "it point(s) to or adduces sufficient evidence on which a finding of absence of *mens rea* could reasonably be based." (*ibid* para. 366). If the defence is successful the accused will be acquitted.

The defence of *mens rea* is rarely raised in the Supreme Court and the Magistrate's Court except in connection with evidence about the excessive use of alcohol and drugs, but it is a matter that is of particular concern to the Children and Young Person's Court. The law makes the presumption that any child under the age of fourteen cannot be considered sufficiently mature in moral judgment to be able to form criminal intent, and the Children and Young Person's Court must satisfy itself that any young person between the ages of fourteen and seventeen (unless he is, or has been, married) is sufficiently aware of what he has done to have formed criminal intent before proceeding to hear the case against him (*Children and Young Persons Act 1976,* 40).

Whatever the particular court in which a hearing is to take place, counsel has to decide whether or not the case is sufficiently strong for him to advance a defence of unfitness to plead, insanity or lack of *mens rea,* and he will brief his expert witnesses to confine themselves precisely to the particular defence he adopts. If he decides to advance none of those three special pleas, or if those which he advances are not accepted by the court, he might still require the psychologist to offer evidence in mitigation of the offence if his client is subsequently found guilty. In those circumstances the psychologist will be expected to report his observations and test findings from which the defence will argue a case for a lesser penalty than that which the court might otherwise be inclined to give from the range that the relevant statutes permit.

The courts accept, and experienced psychologists cannot but agree, that the matters referred to above are to be determined on the grounds of probability rather than of certainty. For their part, lawyers are more accustomed than psychologists to make judgments on various 'balances of probabilities'. For example, the degree of probability required to sustain a defence of unfitness to plead and of insanity simply involves the 'balance of probabilities', but that to *mens rea* involves the more stringent judgment of 'beyond reasonable doubt'. It might be argued that psychometric results in specific instances might be sufficiently reliable, valid and consistent to help a psychologist to determine the relevant degree of probability that obtains in any particular defence, but there are instances in which test results either cannot be presented with a high level of confidence, or else their acceptability has to be reduced when compared with conflicting data from other more reliable sources such as social action effects, observer ratings, life histories, and introspective reports.

Certainly it is time that psychometrists were encouraged to design and standardise tests that would deal specifically with matters of intent and of legal guilt. At present, such matters arise from the Pd. scale of the M.M.P.I., and certain items on the W.A.I.S. that often evoke valuable, if spontaneous, comments from an accused person; (e.g., Comprehension 4, Why should we keep away from bad company?; Vocabulary 13, What is the meaning of the word "sentence"?; and Picture Arrangement 3, the card series "Hold Up"). A measure of criminal association might also be obtained from the C.A.T.S. (Taylor, 1968), given that the subject is honest with his responses.

Civil cases

Psychologists might also be involved in the Civil Courts or tribunals in cases that are fought between litigants on matters that range from the demotion of a Police Sergeant because of his inability to cope with a law enforcement/social welfare role conflict to cases that involve the custody of children (Taylor, 1967; Jackson, 1977). The latter is particularly difficult because the psychologist is bound to be caught between both parties when he expresses an opinion about the suitability of one parent over the other for the care of their children. In such cases his evidence may touch on research relating to child development and family relationships that traditionally evolved from two-parent families, and it may be quite unwarranted for him to extend conclusions from such families to predict dire consequence for children who are reared by only one parent . . . particularly now that solo parenthood is becoming an optional family structure. The matter of custody and access may be made even more complex if, for example, as in a recent Wellington case, one of the parents was homosexual and the other wished to deny him parental rights for fear of his influencing the child. On that occasion a psychologist was obliged to give evidence about the aetiology of homosexuality and the probability of it occurring in the young child before the court. It is not inconceivable that matters might arise in the near future pertaining to the adoption of children by adults who live alone or are in homosexual partnership, and psychologists might begin to think on those issues.

Psychologists might also be invited to give evidence in Civil Courts on the extent and consequence of mental deficiency, brain damage, and senility on the testamentary capacity of any given individual, and to help the courts to determine the amount of impairment by way of compensation after injury from road accidents. One such invitation recently was settled out of court because the professional witness for the plaintiff reached the conclusion that he was a malingerer rather than a genuine case!

The examples quoted above give some idea of the variety of requests that might be made of a psychologist by lawyers. Those requests are by no means exclusive, but they are certain to increase in variety and volume as the discipline expands. A few years ago not many people

would have thought that psychologists could be involved in the preparation of a case against a property developer who wanted to build a funeral parlour in a retirement village of old people, but with the growing emphasis on environmental psychology (Proshansky *et al.*, 1967) that recently has been the case. Nor could it have easily been envisaged that psychologists would be asked for opinions on the suitability of publications either for general distribution or for the information of 'psychopathologists' as distinct from being peremptorily classified as indecent.

PRACTICE

The defence lawyer, or a psychiatrist who is already working on a case, may ask a psychologist to join forces with him, but in either event the lawyer will confirm the arrangements and make access to the client, whether in prison/police cells, hospital or on bail. The lawyer is in charge of the conduct of a case, and among his responsibilities are those for authorising payment either from his client for professional services rendered or from the Registrar of the Court in cases that are covered by legal aid.

Once the psychologist accepts an invitation to be involved in a case he is given access to all the relevant documents and he is bound by ethical rules not to divulge the nature of the case to any other interested party. However, he would be wise to discuss his findings with an experienced colleague who might both give an independent critique of his work and prepare him for cross-examination later in court. Counsel will give him some idea of the legal points under examination, and will set the time limits within which he will be expected to interview, test, search the journals and provide him with a succinct report that will not raise more complications than it is intended to solve. The psychologist might then be required to join the defence team to discuss the final presentation of the case. During those discussions he will be briefed by the lawyer on the detailed nature of the evidence he might give in the event of his being required to appear in court. At that stage it is important for him not to overstate his findings, because to do so would be to mislead the lawyer and subsequently expose the weakness to cross-examination by the other side in court. He will remember that there is often room for legitimate differences of opinion on the same set of facts, and the other side might consider it necessary to call another psychologist to present a contrary opinion. The open display of such differences might not be welcome, but it could be seen as a measure of the growing maturity of the profession of psychology that, like other professions, on occasion its members might feel it necessary to confront each other on important issues in court.

Ideally the psychologist's report will be a concise, jargon-free statement of facts and opinion elicited from interviews and tests, and related to past and present performance. Either explicitly or implicitly the report will have been prepared with stages of clinical inference in mind

at which the psychologist makes and checks hypotheses about the individual before him (cf. Goldenberg, 1973, Ch. 4). He will need to be on his guard against sources of error that not only arise from the unreliability of any spoken or test response, but also from his own bias and prejudice. Some offenders are not the most congenial of people and their offences are not always those that readily elicit fellow feeling. However, if the circumstances are such as to evoke empathy, the psychologist would do well to identify with the offender without becoming so absorbed that he loses his own identity and professional distance. It might help the psychologist to retain the latter if he were to remember that experienced criminals are among the most plausible of people, and they have much to gain from deceiving the expert witness and the court. In general, psychologists have little experience with liars. It is not inconceivable that the psychologist's evidence will not be accepted by the judge or jury, in which case his client might lose, and an emotionally committed psychologist would find it difficult to accept such a decision. It may be some consolation for the psychologist to know that even if his side were not to succeed in their arguments, his evidence could still be taken into account by the court when it moves to the stage of imposing a penalty.

The physical circumstances in which a psychologist has to conduct his investigations in police cells or in prison may be far removed from the comfortable, private and conveniently situated rooms in which at other times he might practice. He might also need to go beyond the accused to interview other people to check either the truth of any statements he is given, or the accuracy of any opinion he develops. Before pursuing such other enquiries, it were advisable for him to seek the approval of the lawyer. No matter whom, and no matter where, the psychologist might interview, he will need to declare his purpose, and use his skills to establish rapport before proceeding further. Information from life histories, observations or psychological tests is notoriously unreliable if given by fundamentally unwilling subjects.

Finally, the appearance of the psychologist as an expert witness can be an ordeal, even if he were experienced in court work. He may have to wait around on call before taking the stand, having to control his mounting anxiety and tension because the court cannot keep to a firm timetable and its business has to be given priority over all other. When called into the court the witness is 'sworn in' by the court orderly, either on oath or by affirmation if preferred, as a declaration of honest intent, the failure to observe which might bring a charge of perjury. Then there follows a recital of personal details of name, designation, qualifications and experience, after which the judge may confer the status of 'expert' on the witness if he considers that he could bring sufficient professional expertise to the case before the court (cf. Cross, 1974, p. 384/5). Fortunately, few judges would accept Webb's dismissal of such experts (Webb, 1977; cf. H v. H, Auckland Supreme Court, 22 August, 1977).

The benefit of being declared an expert witness is that the person concerned will thereby be permitted, and indeed expected, to express an opinion on matters before the court, as distinct from being confined to giving a report of the facts either as he will have observed them directly, or as he personally will have obtained them from the use of psychological tests or from the key figures in the case. Unless he is declared an expert witness he will not, for example, be able to report on what anybody has said to him about a particular matter, much less combine a number of such observations from a number of different people before incorporating them into his overall assessment of the behaviour of anyone who is charged with a criminal offence. When he is actually in the witness box he will not be expected to remember all of the precise details he might like to present in his evidence, but on request may be permitted to refer to any notes he may have made around the time that he made his interviews.

The expert will then give his evidence-in-chief in response to a series of questions from a robed and bewigged counsel, if in the Supreme Court. He must give the evidence loudly enough to be heard by everyone in the court, and slowly enough for the judge's associate to prepare typewritten notes of the proceedings. He has to allow extra time, at regular intervals, for the typewriter paper to be changed, and that short break in the proceedings can provide a welcome respite in which to collect his thoughts before returning to the previous question. Both during any break in his evidence, and afterwards while the trial is still in progress, the expert witness is not permitted to discuss the case with any other person.

Cross-examination by opposing counsel will follow the evidence-in-chief, and it may include questions prepared by expert witnesses from the other side to challenge the adequacy of the methods, the accuracy of the interpretations and the conclusions the psychologist may have reached. For full measure, the opposing counsel may try to intimidate and denigrate the expert witness by demanding instant replies to complicated questions, and by minimising any university training and subsequent experience he may have had that is not exclusively medical. However, cross-examination is not unwelcome if it (a) makes clear the limits of confidence with which the evidence may be accepted, and (b) leads the expert to improve the quality of his professional practice by culling dead wood tests (cf. Jeffery, 1964). The cross-examination will be followed by re-examination from the first counsel if he wishes to clear up any remaining issues. The judge might then put questions himself before allowing the witness to leave the stand and, if requested, leave the court to attend to his professional work.

The court procedure will be much the same whether the expert evidence be given as a preliminary to the trial on fitness to plead, during the trial on the defence of insanity or matters of intent, or at the conclusion of the trial in mitigation of penalty if the accused is convicted.

At the latter stage, the court might then ask the psychologist directly to recommend a course of action to remedy any behavioural maladaptation.

The psychologist is released from his certain obligations of confidentiality once he has presented his evidence publicly. But, he must still retain in confidence any details of the case that for various reasons might not have been brought out in the court. The court can demand information from a psychologist, under fear of contempt of court, because there is no professional privilege he can claim that would enable him to retain rather than to divulge information that has been disclosed to him (M. D. Malloy, personal communication, 9.10.74; Moodie and McKelvey, 1974). The lack of privilege could be of vital concern to all people for whom the psychologist might appear, and it should be explained to clients early in the piece. The matter will be of particular concern in matrimonial relationships if a psychologist has previously been involved in joint counselling sessions, and is required subsequently to give evidence as to what transpired between the parties. As it stands, psychologists cannot withhold information from the courts, but in practice judges might not press them if they consider that more harm might be done to their function as conciliators if they were required to impart the information than if they were not.

TRAINING

The courtroom is an arena in which psychologists are put through their paces, academically, intellectually, and professionally. Academically, practising psychologists need to acquire a working knowledge of criminology, the criminal law and the criminal courts (the recently published Report of the Canadian Law Reform Commission, 1976, provides a convenient guide to law enforcement and sentencing). Academics, themselves, need to examine the concept of intention that is central to legal practice but that is totally ignored by general psychology, except perhaps when it is either subsumed under such topics as goal attraction, cognitive loading, or emotional tension. Intellectually, psychologists need to develop the capacity to think quickly and to respond to critical questions in plain language in circumstances that are not always free from anxiety. Professionally, they need sufficient acumen and experience to make observations, elicit responses and to present and defend conclusions. They can develop acumen and experience as post-graduate students from exposure to a series of psycho-legal cases of graded complexity, preferably *in vivo,* in which they can share the working problems of their clinical supervisors and compare their reports on the cases with his. They will also benefit by attending many sessions of the Magistrate's and Supreme Court to follow the intricacies of legal argument in relevant cases as it unwinds through court procedure.

The purpose of training is to equip students with skills for seeking reliable data from such clinical, observational, psychometric and experimental sources as will enable them to contribute to the truth as psychol-

ogists on any matter before the court. As yet the contribution from experimental psychology has not been substantial, but with growing interest in the solution of applied problems, e.g. in perception and psychophysiology, it should increase.

Psychologists cannot afford the intellectual luxury or the emotional defence of waiting until they can make a perfect contribution to the solution of a problem. No contribution will ever be perfect, for in the words of Judge Stephens:

> "The one talent which is worth all the other talents put together in all human affairs is the talent of judging right upon imperfect materials. It is a talent which no rule will ever teach, and which even experience does not always give. All really important matters are decided, not by a process of argument worked out from adequate premises to a necessary conclusion, but by making a wise choice between several possible." (*Medico-Legal J.*, 1975, 43, 4, Editorial).

Summary

Psychologists who enter the market place will be expected to make a contribution to the process of law as it touches upon their area of knowledge. The contribution will do much for the status of the subject and of the profession if it is seen to reflect a competence and a concern for the truth. To ensure the latter will require the acquisition of training in complex matters concerning both psychology and law.

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