5 Interdisciplinary in Medical and Psychological Forensic Expertise:

Problems and Solutions

Harald Merckelbach and Eric Rassin

Abstract

When psychotherapists or other health care professionals act as expert witnesses, there is a serious possibility that their testimony is contaminated by therapeutic influences. Therapeutic and forensic decision-making differ in some fundamental ways and this makes a combination of these two roles highly problematic. As things stand, expert testimony by psychotherapists poses a serious threat to courtroom decisions. Therapists should be educated on forensic issues so they become well-informed about the rules that govern the courtroom arena. In cases where therapists are willing to act as forensic experts on behalf of their own patients, their testimonies should be considered inadmissible. In the long run, judicial decision-making may benefit from independent experts who are exclusively dedicated to forensic psychology.

1 Introduction

This contribution highlights the fundamental differences between therapeutic (e.g., psychological, medical) and judicial reasoning. These differences are relevant to situations in which therapists and other health care professionals without formal legal training act as expert witnesses on, for example, credibility of testimonies.¹ Since therapeutic and forensic evaluations of credibility differ immensely, there is an urgent need to keep them strictly separated. Therefore, therapists should be reluctant to prepare expert opinions on credibility of testimonies. However, at least in Dutch courts, therapists regularly enter the legal arena as expert witnesses without having been trained in the forensic psychology. The main purpose of this contribution is to elucidate the differences between therapeutic and judicial reasoning. Furthermore, the consequences of these differences for

¹ See also: Peter J. van Koppen and Willem-Albert Wagenaar in this volume.
the psychological expert witness are discussed. Finally, we focus on possible solutions for the problem of conflicting therapeutic and judicial roles.

2 Therapeutic and judicial priorities

Therapeutic activity, medical or psychological, is aimed at promoting the well-being of patients. In fact, cure and palliation are the primary goals of therapeutic activity. Given the obligation to act in the best interest of their patients, therapists would rather diagnose an illness that is absent or administer an unnecessary treatment than fail to diagnose a disease. Subjecting a patient to an unnecessary treatment regime is not a big mistake as long as the treatment has no serious side effects. In the therapeutic context, the failure to detect a potentially threatening symptom is regarded as a serious error. In other words, therapists put sensitivity above selectivity when diagnosing and treating symptoms. That is, they act to maximise the detection of pathology. The risk that some positively diagnosed patients are, in fact, healthy ('false positives') is considered a necessary evil. If clinicians decide to be more conservative in their diagnoses, the number of false positive diagnoses will decrease, but the number of false negatives (i.e. the frequency of undiagnosed diseases) will increase. Consequently, in the therapeutic context, false negatives are considered to be worse than false positives. A good example is provided by Faraone and Tsuang who conclude in their discussion about the diagnostic accuracy of psychiatric screening instruments: "many children who receive positive ratings according to a highly sensitive screen for developmental disorders may not truly have these disorders (because screening procedures often attain high sensitivity by compromising specificity). This is usually acceptable because the screening procedure is inexpensive." 3

In a criminal justice setting, the central actors are suspects rather than patients. The prevailing doctrine here is that the suspect is innocent until proven guilty. Furthermore, one of the cornerstones of contemporary western criminal justice is that conviction of innocent people should be avoided. Indeed, criminal law contains an elaborate set of rules aimed at reducing the risk of such false positive errors. Basically, the possibility of convicting an innocent person is considered worse than discharging a guilty suspect. In other words, legal decision-makers follow a rather conservative strategy. In the judicial setting, then, selectivity of convictions is important, perhaps even more important than sensitivity.

Formulated this way, therapeutic and judicial heuristics are difficult to reconcile. In the therapeutic domain a false positive error is acceptable, whereas in the legal domain such an error is unacceptable. Meanwhile,


different ways of appraising false positives may coexist and this is not problematic as long as the domains remain separate.

3 Different approaches to the credibility of statements

Therapists and jurists not only rely on divergent heuristics, they also seem to rely on different concepts of truth. Clearly, in court factual evidence is important. Eventually court decisions should be based on objective truth (or approximations of it). Fair trial principles (such as the principle of equality of arms, the principle of undue delay et cetera, article 6 ECHR) dictate that statements and other evidence – especially against the suspect – be carefully weighed in order to establish historical truth.

In a therapeutic context, such strict demands are unnecessary and might even be counterproductive. As clinicians are more anxious about failing to detect diseases than about treating nonexisting ones, they will readily accept a patient’s narrative. If a patient claims to have been sexually abused by his/her parents, the therapist will start by believing that the alleged abuse did take place. Some therapists go even further and argue that the question of whether or not the abuse took place is not really important. The fact that the patient thinks he or she was abused is in itself reason enough to talk about the traumatic event, considering that the patient will in some way benefit from such therapy sessions. It is not the therapist’s task to evaluate the credibility of statements made by the patient. In Greenberg and Shuman’s words: “The basis of the relationship is the therapeutic alliance and critical judgment is likely to impair that alliance.” Shuman, Greenberg, Heilbrun, and Foote likewise concluded “that it is unnecessary and potentially harmful for the therapist to attempt to validate the historical accuracy of the patient’s disclosures in therapy”. And formulated in somewhat more provocative terms: “assuming and communicating to the patient that the report cannot be believed unless one can prove it, is somewhat troublesome because it implies a basic lack of respect for the client’s account and is also the same message that perpetrators of abuse generally communicate to those they abuse”.

Chapter II: Interdisciplinarity

4 Conflicting therapeutic and forensic interests

Greenberg and Shuman discuss a number of other differences between therapeutic and judicial roles, differences that should be acknowledged when therapists act as expert witnesses. Table 1 lists the most important differences. They involve goals, attitudes, type of expertise required, and patients’ privacy.

Table 1 Differences between therapeutic and forensic roles (for an extensive discussion, see Greenberg and Shuman, 1997)

<table>
<thead>
<tr>
<th>therapeutic role</th>
<th>forensic role</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. client</td>
<td>the patient</td>
</tr>
<tr>
<td>2. goal</td>
<td>to promote well-being</td>
</tr>
<tr>
<td>3. attitude</td>
<td>supportive, accepting, empathic</td>
</tr>
<tr>
<td>4. expertise</td>
<td>diagnosis and treatment</td>
</tr>
<tr>
<td>5. scrutiny</td>
<td>little or none</td>
</tr>
<tr>
<td>6. privacy</td>
<td>patient’s privacy is essential</td>
</tr>
</tbody>
</table>

The differences between therapeutic and forensic psychology, then, are substantial. One could argue that to a large extent, the ideal forensic psychologist shares more characteristics with a lawyer than with a clinician. For example, a forensic psychological expert is expected to evaluate critically the credibility of statements. As discussed above, a therapist should not evaluate the historical accuracy of a patient’s narrative, since this undermines the therapeutic relationship. Also, the expert-witness is thought to contribute to the process of fact finding, while the therapist is primarily interested in promoting the patient’s well-being. In some cases, these differences may be so fundamental that it becomes hard to imagine how a single psychologist could combine the role of therapist and that of forensic expert.

5 Therapists as expert witnesses

The differences between clinical and forensic psychology may give rise to problems when therapists enter the courtroom as expert witnesses. That is, a therapist who occasionally acts as a forensic psychologist may not be able to completely replace the usual therapeutic stance by a forensic approach. Therapeutic concerns may in this way contaminate the psychologist’s forensic evaluations and this can lead to flawed judicial decisions. Apart from the fact that therapists may be unaware of, or underestimate the differences between the courtroom arena and the therapeutic
setting in which they usually operate, they clearly lack skills that are crucial to forensic activity. For example, therapists are unlikely to be familiar with specific forensic tools such as the Gudjonsson Suggestibility Scale or the Criteria-Based Content Analysis.\textsuperscript{8} Not only does the use of such tools require extensive training, but the interpretation of their results is also not without problems.\textsuperscript{9} Furthermore, expert-witnesses are expected to ground their opinions on evidence-based consensus. One may reason that given their daily clinical concerns and duties, therapists are not in the position to familiarize themselves with scientific literature, especially forensic literature. On a related note, expert witnesses should be willing and able to emphasize the scientific limitations of their own opinions. As Boeschen, Sales, and Koss put it: "Psychologists have a moral responsibility, one that often goes beyond requirements of the law, to stay within the limits of their knowledge".\textsuperscript{10} Unlike scientists, therapists do not fit the profile of the forensic expert. Greenberg and Shuman summarise this issue as follows: "Therapists are not typically trained to know that the rules of procedure, rules of evidence, and the standard of proof is different for court room testimony than for clinical practice".\textsuperscript{11}

An example of how therapists' expert opinions can be harmful is the circular Post Traumatic Stress Disorder (PTSD) argument. Consider a psychotherapist who is treating a patient for PTSD. The diagnosis of PTSD was reached on the basis of what the patient told the therapist about his/her involvement in a serious car accident. Concurrently the patient has initiated a civil lawsuit against the person who allegedly caused the accident. If the therapist in this case testifies that, given the consequences of the accident (i.e. the PTSD) the patient's account of the accident must be truthful, this testimony would be highly problematic. Note that in order to be diagnosed as suffering from PTSD, one must have been exposed to a traumatic event that involved actual or threatened death or serious injury.\textsuperscript{12} Consequently, the therapist who treats the patient for PTSD implicitly accepts the trauma narrative of the patient. The therapist's assumption that a trauma took place is, however, based on clinical concerns. It does not meet the requirements that are necessary for legal decision-making. If the therapist testifies that the patient's account provides an accurate description of the


\textsuperscript{11} Greenberg, S.A and D.W. Shuman, p. 51, op. cit.

accident, the therapist increases the risk that others (involved in the accidents) will be held responsible for damages. For Faust and Ziskin: "A determination that the clinical criteria have been met does not establish satisfaction of the legal criteria".

Boeschen et al.\(^{13}\) discuss this topic in some depth and conclude that the opinions of clinical expert witnesses can operate at several levels; some of these levels are firmly grounded in facts or scientific consensus, whereas other levels go beyond these elements, and are consequently problematic. At the lowest level, a psychologist may testify, for example, that an alleged trauma victim's behaviour is somewhat unusual. This level is closely related to a fact-witness testimony. At the second level, a psychologist can inform the Court about the general diagnostic criteria of PTSD. At this level opinions address scientific consensus. One level higher, the psychologist may testify that the alleged victim's behaviour is consistent with the symptoms of PTSD. Actually claiming that the victim suffers from PTSD constitutes a fourth level. Boeschen et al. emphasise that a PTSD diagnosis as such provide no insight into the type of trauma that the victim experienced: "in stating that a woman suffers from PTSD, an expert is not declaring that the woman was raped, but only suggesting that she has survived one of many different types of life-threatening traumas". The fifth and highest level pertains to opinions that go beyond diagnosis and imply that the victim is telling the truth. Boeschen et al. note that in most states in the U.S., courts do not allow expert witnesses at this level because such opinions clearly and directly touch on the credibility of the victim. Under Dutch law things are quite different. Here a therapist's opinion about the credibility of a witness is acceptable and together with the witness' statement may constitute sufficient evidence for an alleged perpetrator to be convicted.\(^{15}\) So, to a certain extent, Dutch law encourages clinicians to give opinions at the most problematic level.

6 Should therapists be allowed to act as expert witnesses?

Given the potential threat that therapists' opinions may pose to the judicial decision-making process, some authors have advocated rejection of these opinions by the Court. Here, a distinction between two situations is in order. First, there are cases in which therapists act as expert-witnesses on behalf of their own patients. Second, therapists may testify in cases in which they do not simultaneously act as therapists. With respect to the first situation there are, indeed, good reasons for therapists not to act as forensic experts. As was stressed in the previous paragraphs, the roles of therapist and forensic psychologist are difficult to combine. Shuman et al.

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14 Boeschen op.cit.
speak of "an irreconcilable professional conflict of interest between the therapeutic and forensic roles that precludes mental health professionals from simultaneously performing both roles competently". The huge differences between therapeutic and forensic roles discussed above lead to the conclusion that therapists should not be allowed to give opinions about their own patients. In such situations, therapists are far too likely to lack the neutral and detached attitude that is necessary for a thorough forensic evaluation. Legislation preventing psychologists from acting as forensic experts in cases in which they are also involved as therapists seems to be an easy solution for these situations and, indeed, some authors have strongly advocated rules imposing a straightforward boundary between therapeutic and forensic roles.\textsuperscript{16}

Should such a set of rules be so radically formulated that therapists are never permitted to serve as forensic experts, regardless of whether or not their patients are involved?\textsuperscript{17} In our view, the answer depends on the nature of the expert opinion. Therapists may be very good experts on certain topics (e.g., diagnoses, prevalence of disorders, treatment options for conditions), while they are less capable with respect to other, more scientific issues such as credibility assessment, reliability of eyewitness identification, or the interpretation of neuroimaging evidence that is used to buttress certain diagnoses.\textsuperscript{18} Scientific topics should be exclusively handled by experts with a scientific background. But how should courts recruit this type of expert? Clearly, they would need to develop criteria to be met by psychologists so that their testimony can be admitted as evidence. Such criteria may pertain to scientific publications or other public records that imply scientific expertise.

A subtle way of keeping therapeutic and judicial settings separated is presented by Vogeltanz and Drabman.\textsuperscript{19} These authors argue that forensic evaluations should be carried out by two co-operating psychologists. For example, if a young child is to be interviewed about having been sexually abused, one psychologist should conduct the intake interview. The second psychologist should then conduct the actual interview, without having been fully informed about the suspicions. This enables the psychologist to begin the interview unbiased and more objectively. This proposal not only recognises that a therapeutic alliance (starting at the intake) may undermine an objective interview style, but also provides an elegant solution for this possible problem.

\textsuperscript{16} For example, D.W. Shuman, op. cit.
Chapter II: Interdisciplinarity

7 Increasing awareness

Apart from courts not permitting therapists to prepare expert opinions about their own patients, it is important to increase therapists' sensitivity to the differences between therapeutic and forensic roles. In this context, it is relevant to ask to what extent therapists acknowledge the uniqueness of forensic decision-making heuristics. So far, no systematic research has addressed this issue. From earlier studies, we know that under ambiguous conditions (i.e. conditions in which a single decision has impact on conflicting clinical and judicial interests), therapists tend to put clinical interests before judicial consequences. To explore therapists' receptivity to judicial information, we conducted a preliminary study on the flexibility of therapists' decision-making heuristics. More specifically, we investigated whether therapists are able to change their perspectives once they come to understand that their actions will be of relevance to judicial decisions. In our study, 31 undergraduate students in Health Sciences (2 men; M = 22.1 years, SD = 2.6, range: 20-33 years) were asked to read the following case vignette. "Under Dutch civil law, it is possible for citizens to change their family name. A request stating the reasons for the desired change must be addressed to the Ministry of Justice. One good reason might be that the mental well-being of the individual who is applying for the change of his or her name is at stake. Imagine that someone (Ms. Custer) approaches you with a variety of complaints including depressive symptoms, dissociative symptoms, and decreased libido. Ms. Custer (38 years) says she was abused by her parents during her childhood. As a result, her family name continually reminds her of her aversive childhood experiences. She would like you to write a psychological evaluation explaining her current distress. She intends to submit your evaluation with her request. It is obvious that Ms. Custer is suffering and that she attributes this suffering to her family name. Her parents, however, deny having ever abused her. So far, this hypothetical case resembles what psychotherapists might encounter in health care practice. From this point onwards, however, different written instructions were given to the participants. Part of the participants (n = 18) were immediately warned that this case has legal implications. The instructions to these participants were as follows. "Ms. Custer started civil proceedings against her parents, claiming financial compensation for the alleged abuse. If you decide to write a psychological evaluation stating that a change of name will be beneficial to Ms. Custer's well-being, she will use that evaluation as supportive evidence of the alleged abuse. Furthermore, this civil lawsuit may give rise to a criminal investigation, in which the psychological report may

20 Rassin, E. and H. Merckelbach 1999 (see note 9).
21 M=Mean, SD=Standard Deviation.
22 In fact, the case vignette was based on a real case in which one of us acted as an expert witness for the lawyers of the parents.
23 n=number.
again be presented as evidence that the abuse took place. All in all, if you decide to grant Ms. Custer’s request and write a psychological report, this may not only have consequences for her personal well-being, but it might also influence the outcome of the civil and criminal proceedings. Would you, in this case, be willing to write a psychological evaluation? Participants had to choose by ticking a Visual Analogue Scale (VAS) ranging from 0 ("certainly not") to 100 ("certainly yes").

The remaining participants (n = 13) were not informed at the outset about the judicial implications of the psychological evaluation. The judicial aspect was introduced to them in three steps. They were first asked whether they would be willing to write a psychological evaluation on the basis of the background information described above (T1). Next, they were given additional information about the judicial implications (cf. supra) and were asked for a second time whether, under these circumstances, they would be willing to write an evaluation (T2). They were then informed that Ms. Custer is taking legal actions against the parents and that the psychological evaluation will be presented as supporting evidence for the abuse. Participants were now asked whether they would be willing to testify that Ms. Custer’s complaints indicate that the abuse took place and that her narrative deserves serious consideration (T3). All questions were answered according to the same VAS-format.

Two analyses were carried out. First, the effect of immediate feedback about judicial implications was tested by comparing the willingness of the first group (participants instructed about the judicial implications) to write an evaluation at T1, with that of the second group (participants initially unaware of the judicial implications). There were, indeed, differences between groups. Naive participants (78.8, SD = 23.1) were more willing to grant Ms. Custer’s wish than were informed participants (61.3, SD = 20.4): t(29) = 2.2, p = .03). Second, intra-subject changes in group 2 were tested to explore whether the willingness to help Ms. Custer decreased as a function of therapists becoming gradually aware of the consequences of their actions outside the therapeutic context. This, indeed, seemed to be the case. The average VAS scores on T1, T2, and T3 were 78.8 (SD = 23.1), 62.0 (SD = 28.0), and 28.4 (SD = 20.8) respectively:

24 It should be noted that these statistical analyses test whether the observed group differences in mean VAS-scores are, indeed, statistically significant, or attributable to coincidence. To do so the statistical software compares the variance between groups with the variance within groups. The latter variance is expressed in terms of standard deviation (SD), which indicates the mean distance of individual scores to the group mean. Thus, the analyses test whether the between-group differences can be accounted for by the within-group variance. If so, the between-group differences are concluded to be nonsignificant. The software output contains several indices. Most important is the p-value, which indicates the probability that the group differences are merely the result of individual differences (i.e., within-group variance). If the p-value is smaller than .05, the between-group differences can not be explained by within-group differences. Then, the differences are labelled statistically significant and must be attributed to an external factor (in this case the increased insight in judicial implications).
Chapter II: Interdisciplinarity

E_{mn} = 35.0, p < .000. Figure 1 nicely illustrates this dramatic drop in therapists' readiness to write a psychological evaluation as the insight that such evaluation may have external consequences increased.

Work by Oskamp in the clinical setting found that therapists tend to stick with their decisions and disregard additional information.25 In contrast, the present results depict a more optimistic picture, suggesting that therapists become more conservative in their judgements once they realise that their statements may have consequences that reach beyond the therapeutic interests of their patients. Although the VAS scores remained relatively high even after information about judicial consequences was provided (i.e., approximately 62; there was even a tendency to regard Ms. Custer's current problems as evidence of the alleged abuse: mean VAS score being 28.4), the significant differences between naive and informed participants seem to indicate that, in principle, therapists can be made sensitive to the far-reaching consequences of their actions.

Figure 1  Mean VAS scores indicating therapists' (n = 13) willingness to write a psychological evaluation without insight into judicial implications (T1), with increased insight (T2; the evaluation may be used as evidence in court), and with thorough insight (T3; the evaluation is interpreted as supportive evidence for legal claims)

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8 Educating forensic psychologists

Since forensic psychology is a relatively new field of expertise, there is a lack of forensic psychological expertise, at least in the Netherlands. Ger-
mane to this issue is the fact that none of the Departments of Psychology
in the Netherlands offers a graduate program in forensic psychology. This
state of affairs may be one of the reasons why clinical psychologists often
act as expert-witnesses in this country. This is an undesirable situation that
can only be changed when the academic community recognises the
uniqueness of forensic psychological expertise. Given the self-evident
importance of expert witnessing, the absence of forensic psychology in Dutch
academic programs represents a serious lacuna in psychological education.
Forensic psychology courses that deal with specific forensic techniques, as
well as with the forensic attitude are urgently needed. Such courses may
help broaden the perspective of psychology students, providing them with
a better background for the courtroom. Apart from forensic courses for
undergraduate students, universities might consider offering special gradu-
ate courses designed to give psychologists an opportunity to further de-
velop their forensic skills. Although the introduction of forensic courses
may not solve acute problems with psychological expert testimony, this
approach is likely to turn out to be a fruitful investment in the long run.

9 Conclusion

Judicial decision-making can benefit from scientific expertise. This is the
reason why nonjudicial professionals are invited to give their expert op-
inion in court. Judicial reasoning follows highly specific rules and forensic
experts must be familiar with these rules in order to prepare their expert
opinions in a format that is compatible with that of the judicial decision-
makers (i.e., judges). Differences between judicial and clinical profession-
als in the calibration of false positives and false negatives are easily under-
estimated. Especially when health care practitioners (e.g., medical or psy-
chological therapists) act as forensic experts, differences between therapeu-
tic and forensic heuristics need to be clarified, since these two types of
heuristics differ fundamentally. The expert is expected to adapt his or her
contribution to judicial standards. It is not the judges’ duty to translate
expert opinions into a format compatible with judicial reasoning. The idea
that expert opinions have to meet certain standards is codified (e.g., in the
Netherlands, in Article 343 of the Code of Criminal Procedure; in the
U.K., in the Turner rule, and in the U.S., in the form of the General
Acceptance, Frye, and Daubert rules). These standards still do not guar-
antee that only qualified expert witnesses will enter the courtroom. In par-

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Chapter II: Interdisciplinarity

ticular, therapists who base their expert opinion on therapeutic rather than forensic heuristics pose a serious threat to the validity of judicial decisions.

The problem of flawed psychological expert opinions may be approached in several ways. To begin with, therapists could be banned from the courtroom. This solution is drastic, but seems necessary to prevent therapists from acting as forensic experts on behalf of their own patients. Second, if a therapist’s expert opinion does not concern one of the therapist’s patients, this testimony may be admitted as evidence provided the therapist is truly an expert on the topic at hand. Courts should develop criteria for evaluation of claimed expertise. In addition, the therapist should be aware of the specificity of courtroom procedures and standards. This can be achieved by educating the therapist. Apart from educating and informing psychologists (including therapists) about the courtroom arena, forensic psychology needs to be recognized as a distinct field of psychology. Departments of Psychology should include forensic topics and programs in their curriculum.

It is important to note that various western judicial systems seem to differ in the scrutiny applied to (psychological and medical) expert evidence. For instance, in the U.S. demands are fairly high, while in the Netherlands they are low. Increasing the quality of expert opinions throughout western justice systems would not only benefit judicial proceedings, but would also have the fortunate side-effect of calibrating legal demands. This would smoothen the exchange of evidence between countries. Meanwhile, the importance of improving the quality of psychological expert opinion is underscored by the following two quotations. Faust and Ziskin note that unqualified expert witnessing may cause judges and juries to distrust all psychological (and medical) expert opinions: “The courts, having learned to distrust clinicians’ claims, may refuse to admit testimony based on truly useful knowledge and methods despite more than adequate supportive studies”. A decade later, Shapiro emphasizes a similar point: “We’re starting to see a lot of cases that specify the restrictions that will be placed on psychological evidence. And the trend is rather disturbing. It looks like admissibility of psychological testimony is going to be extremely narrow”.

References


27 Faust, D. and J. Ziskin, op. cit., p. 35.
Medical and Psychological Forensic Expertise – H. Merckelbach and E. Rassin

Hoge Raad (Supreme Court) November 17* 1995, 15804, Nederlandse Jurisprudentie, 1996, 666.