

# The Soft Science Expert: a contradiction in terms?

## The use and abuse of psychological evidence<sup>1</sup>

**T**here is no escape from the soft side of science in the courtroom. However tangible and violent the event, such as a bridge collapse, much of the litigation will involve the human component - the psychological suffering of the victim. No amount of precision in describing the physical event, such as back trauma, can compensate for our inability to feel another person's pain.

Forensic psychological evidence is often portrayed as a 'horror story' - ie someone gets off a murder charge because of a defence of childhood abuse, or huge payouts are given for pain and suffering following a fall from a bicycle. The press less frequently reports how very similar lines of evidence can be used *against* a plaintiff's case.

A real issue here is the extent to which a practitioner called upon as an expert witness is offering an interpretation of factual evidence which would be too technical for the court or creating their own personal theory. Psychologists usually claim the former on the basis that they employ formal tests which have to be interpreted in statistical terms such as reliability, base rates, factor structure, and norms. Psychiatrists make the claim on the basis that mental illness is a medical disorder and has to be gauged in the context of a total medical history and the interaction of psychological and physical factors.

Both approaches are open to abuse. History on the basis of interview data is notoriously unreliable at best, and has infinite potential for branching into

emphasis on almost any aspect of the patient's life. Testing has the benefit of standardisation but will be limited by the availability and suitability of tests that have been developed in detailed studies, often overseas. Both approaches are limited by the same mathematical laws. It is impossible to detect infrequent events without introducing 'noise' which misclassifies many non-offenders. Making the technique more superficially sophisticated by more in-depth questioning cannot resolve this problem - it will only continue to throw up spurious diagnoses within which will be embedded some accurate ones. Indeed, the American Psychiatric Association took pains in the case of *Tarasoff v Regents of University of California*<sup>2</sup> to establish that they should not be held up as able to predict dangerousness of individuals, even on the basis of an interview in which the client states they will perform a violent act. The same logic applies to psychologists' methods.

The problem for the courts is one of social perceptions of science. We are increasingly bombarded with breakthroughs in detection of faint phenomena. The public has become conditioned to the notion that it will some day be possible to do what is now impossible. It is dangerous to substitute a mere expectation for actual improvements in methodology. Lengthier reports filled with more detailed histories, do not resolve the fundamental detection problems.

Finally, I have so far ignored the issue of temptation to deliberately distort expert evidence. The NSW Police Royal Commissioner Wood stated in

1996 that his faith in the judicial system had been "somewhat shattered" after reviewing a psychologist's evidence and being told "how it was easy to manipulate the criminal trials" with "biased expert reports". Science has no more hope of resolving this than it has of ending war.

Courts must, therefore, rely on their traditional strengths to best use soft scientific evidence. Forcing social scientists into making pronouncements as professional 'opinions' does not really harden their evidence. It merely adds professionals as another layer of bureaucratic law. As Lord Gordon Hewart pointed out in 1928 "... the decision of a Court is in every important respect sharply contrasted with the edict, however benevolent, of some hidden authority, however capable, depending on a process of reasoning which is not stated and the enforcement of a scheme which is not explained." **PL**

### Footnotes:

<sup>1</sup> This article was originally written for the Client Brief Newsletter.

<sup>2</sup> (1976), Cal Cup Crt SF 23042 551P2D 334

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