

Psychiatric Assessment and the Legal Process

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For the twenty two years that I've been in private practice and practising forensic psychiatry there has been an increasing feeling of unease amongst psychiatrists concerning a handful of our colleagues who have adopted practices better suited to police interrogation, or the court room, certainly not the behaviour of a doctor when alone with a 'patient'. The patients tell the same stories that I and other psychiatrists have heard many times. They tell of being yelled at, of being told that they are lying, of having the psychiatrist walk around behind them all the time firing questions at them and generally having whatever they say being interpreted as evidence that they are unreliable and untrustworthy people.

One has to remember that these people, who, generally speaking, have been diagnosed by other psychiatrists as disturbed and, often in need of psychiatric treatment, are a very vulnerable group of people who usually have a low self esteem. To have a person with the authority of a specialist doctor tell them by implication, if not by blunt accusation, that they are liars and do not deserve compensation or any sympathy whatever is a devastating experience. This is especially so when they and their families are, more often than not, in financial difficulties and hoping that they will get some assistance from the legal process. It is no wonder that many become suicidal.

The role of psychiatry as an agent of the court or of government is a well documented and problematic one but it is one that is not well recognised especially by psychiatrists or lawyers. It has been seen as problematic by philosophers such as Michael Foucault. In a published dialogue he was reported as saying:

"It's true we seem to be seeing two very different functions (of psychiatry) - the medical function of psychiatry, on the one hand, and the strictly repressive function of the police, on the other - coming together at a given moment, in the system we're talking about. But in fact the two functions were only one, from the outset. You must have read Castel's book on the birth

of the psychiatric order: he shows very well how psychiatry, as it developed in the nineteenth century was not at all localised within the asylum, with a medical function, and then became generalised and extended to the entire social body, right up to the confusion that we see today - somewhat discreet in France, but much more evident in the Soviet Union. But from the outset, psychiatry has had as its project to be a function of the social order (Originally published as "Entertainment. psychiatry. Prison" this dialogue appeared in a special issue of *Change* 32-33 (1977), 76-110 on "La Folia encerciee". This transaction is by Alan Sheridann)

The dialogue goes on to draw attention to the role of psychiatry in social control in Italy, USSR and Argentina. So there are those academics who see psychiatry as having a dark side and we have certainly seen this in Australia in recent times with Chelmsford "Deep Sleep", Ward 21 in Townsville and recent problems surfacing in psycho-therapeutic relationships with patients.

There must be a degree of suspicion when it comes to use of psychiatry in evidentiary support and who is working for who, as well as, who is paying the fee. It is so easy to become emeshed in the pre-trial process and court process itself that it is a small step to using ones skill to support a particular view that one feels is right and just. It takes training in forensic psychiatry and a certain amount of insight about yourself to maintain that separation to do an impartial assessment.

Accreditation of forensic psychiatrists has been the way that US has dealt with this problem and the Institute of Australasian Psychiatrists is to discuss this matter at their AGM in September. I think it would help lawyers also to have an accreditation of psychiatrists available. Until then some indication in the CV of a psychiatrist attempting Legal Studies is a good guide as to how serious the psychiatrist is about being trained in this sub-specialty.

At present, word of mouth seems to be the only way for legal practitioners to know what they are getting and this is not very reliable in my experience as the few psychiatrists who are questionable hired guns are very busy! Perhaps this is what the legal profession wants?



Listening to your clients may be some guide to unethical treatment of them by psychiatrists but one really has to use instinct to pick it from the simply disgruntled litigant. When reading the report keep your eyes peeled for the unbalanced opinion crafted to suit one side or the other. Psychiatrists who do any volume of work in this area are aware of who is who.

The Australian Medical Association is considering bringing out guide lines for conducting medico-legal examinations and a handout to be given to 'patient/clients' to assist them cope with such stressful experiences but not surprisingly, the Royal College of Australian and New Zealand Psychiatrists have found fault with this idea. If it does eventually see the light of day it will hopefully curb the enthusiasm that some psychiatrists demonstrate in conducting these examinations.

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Damages in non-serendipitous pregnancy cases

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Where as a result of medical negligence a woman becomes pregnant, interesting and sometimes difficult policy questions, arise in relation to causation and damages. The recent decision of Newman J. (*CES & Anor. v. Superclinics Australia Pty. limited & Ors* delivered 18 April 1994) in which His Honour dismissed a claim for damages on the ground that to allow recovery would amount to the countenancing of a breach of the criminal law, raised an important issue which some practitioners in the field may have been surprised by. (See case note by Catherine Henry in Practice Updates Section for further detail.)

The plaintiff argued that, had she known at the relevant time she was pregnant, she would have had the pregnancy terminated. A number of arguments raised by the parties on questions of damages were not dealt with by the trial judge, because of his dismissal of the claim. The claim has gone on appeal and an application for expedition may be expected soon. Regardless of the outcome of the appeal, a number of issues raised in that and related cases continue to be open for consideration by Australian courts.

On the assumption there is an abortion and there is no question about the lawfulness of it, one would expect the assessment of damages to be relatively easy; a sum for general damages for pain and suffering involved in the (usually) relatively short term pregnancy, the undergoing of the abortion operation and attendant local or general anaesthetic, and psychological factors which might, especially in the case of a woman with a background of religious teaching opposing abortion, be expected to be significantly greater than in women who have not had that background.

One would expect there would usually not be significant wage loss or out-of-pocket expenses.

The more difficult assessment is likely in the case of a woman who has the child. In a theoretical