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The "Ultimate Issue" Problem in the Canadian Criminal Justice System

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Abstract

Expert testimony in criminal cases remains controversial. Some of this controversy appears legitimately attributable to clinicians who violate professional boundaries by speaking directly to ultimate legal issues. In this paper, the "ultimate issue" problem that is a salient controversy in American forensic psychology is discussed from a Canadian perspective. Relevant legal, ethical and professional considerations for expert testimony in Canada are reviewed. In the end, it is argued that psychologists who offer opinions on matters of law are violating professional boundaries and unwittingly fuelling the controversy that surrounds expert psychological testimony in the Canadian criminal justice system.

The "Ultimate Issue" Problem in the Canadian Criminal Justice System

Testimony by mental heath experts in criminal cases has long been the subject of public, legal and academic scrutiny. In 2001, *Canadian Psychology* ran a special section devoted to this topic (Ogloff & Cronshaw, 2001, Saunders, 2001, Peters, 2001, Yarmey, 2001). In this series of articles, the issue of eyewitness testimony was examined (Yarmey, 2001), a "View From the Bench" was offered (Saunders, 2001), a number of relevant legal cases were reviewed (Peters, 2001), and guidelines for expert testimony were proposed (Ogloff & Cronshaw, 2001). Although differing in their specific focus, these articles shared the common goal of providing information that would assist expert witnesses in structuring their testimony so as to maximize its value to the Courts and overall acceptance in the broader legal community.

In spite of the valuable contributions made by these papers, this series of articles is noteworthy for its failure to directly address longstanding concerns about expert testimony that either intentionally or unwittingly violates professional boundaries by directly speaking to matters that are properly viewed as the exclusive domain of legal fact finders and decision makers. In more succinct terms, I am referring to the "Ultimate Issue" problem that has been a salient and longstanding concern among American forensic clinicians and scholars (e.g., Heilbrun, 2001; Hess, 1999; Melton et al., 1997; Morse, 1978; Rogers & Ewing, 1989; Rogers & Shuman, 2000; Schopp, 2001; Slobogin, 1989. Briefly, the specific concern is that by addressing ultimate legal issues (e.g., whether an individual is criminally responsible), clinicians are violating professional boundaries by: a) offering opinions on matters that lie outside their ken of professional expertise; and b) usurping the role of judge or jury. Ultimate issue testimony is particularly misleading in that it is offered within the context of a legal designation of "expert" that may falsely endow essentially lay opinions with an aura of scientific objectivity. To be sure, Saunders (2001) mentions "the Ultimate Issue" problem (p. 111). However, the issue is given only passing mention en route to discussion of cases concerned more specifically with the general admissibility of expert testimony. Unfortunately, both the first Canadian text book on Law and Psychology (Schuller & Ogloff, 2001) and a recent introductory text on forensic psychology (Pozzulo, Bennell, & Forth, 2006) are similarly silent on this important issue.

The goal of this paper is to review the ultimate issue problem within the context of the Canadian criminal justice system. To this end, legal parameters for expert testimony in Canadian criminal cases will be reviewed, along with professional and ethical issues of relevance. In the end, it will be argued that the ultimate issue concerns that permeate American forensic psychology are also relevant to the work of Canadian forensic psychologists and that increased sensitivity to the underlying professional boundary issues would reduce the controversy that continues to swirl around mental health testimony in criminal cases. Parenthetically, though the arguments in this paper are relevant to other common law jurisdictions, I will intentionally restrict my focus to the Canadian criminal justice system for two reasons: 1) though relevant Canadian case law exists, this problem has thus far been ignored by Canadian scholars and forensic clinicians, and 2) to adequately examine this issue on an international level is simply beyond the scope of a journal article.

Legal Parameters

In 1993, in the matter of R. v. *Marquard* the Supreme Court of Canada ordered a new trial on the basis that expert testimony that spoke directly to the credibility of another witness was inappropriately admitted at the original trial (Peters, 2001). The principle underlying this opinion was that the proper role of an expert is that of providing assistance to the trier of fact without encroaching on areas that are the exclusive purview of legal decision-makers.

Later, in a landmark decision (R. v. *Mohan*, 1994), Mr. Justice Sopinka, writing for the Supreme Court of Canada, set forth clearly articulated admissibility rules for expert testimony in Canada. This so called "Mohan Test" requires that expert testimony be a) relevant, b) necessary to assist the trier of fact, c) not violate any exclusionary evidentiary rule, and d) provided by an appropriately qualified expert. Mention of the need to carefully scrutinize novel theories was also included in this document.

Briefly, under the *Mohan* test, relevancy is primarily defined as legal relevancy. Logically relevant evidence may be excluded if it carries a potential prejudicial effect. Necessity, in this context, is defined narrowly so that only information that lies outside the usual range of expertise and knowledge of the trier of fact is deemed necessary and therefore appropriate content for expert testimony. Thus, expert testimony on matters for which a judge or jury can form its own opinion should not be allowed under Mohan. The need to comply with existing rules of evidence that exclude specific types of testimony is obvious, as is the need to for experts to be properly qualified. Cautions regarding the need to guard against the potentially prejudicial effects of testimony offered under the "mystique of science" and experts either willingly or unwillingly inclined to assume legal decision-making duties are also scattered throughout this judgment. Parenthetically, although obvious in the usual sense of having achieved appropriate educational and licensing requirements, the need for appropriate qualifications is also important in that it logically limits expert testimony by any particular individual to matters that legitimately fall within his or her expertise. Thus, for example, a brilliant psychologist should not offer opinions on matters of structural engineering – irrespective of her personal interest in the area or awe inspiring professional standing in psychology. Testimony that falls outside of one's professional knowledge base is, by definition, no longer "expert" testimony. In this sense, the Ogloff and Cronshaw (2001) recommendation that psychologists carefully work within the legitimate boundaries of their knowledge is consistent with *Mohan* and indirectly supports proscriptions against ultimate issue testimony.

Concerns regarding experts who cross professional boundaries and directly testify on ultimate legal issues are subsumed under the necessity and relevance requirements of the *Mohan* test. Recall that these criteria require that expert testimony be legally relevant and concern itself only with matters that lie outside the expertise of judge or jury. Under these criteria, experts are not allowed to offer opinions regarding the credibility of witnesses or, presumably, other exclusively legal issues such as fitness for trial, criminal responsibility, intent, or dangerousness. In the *Mohan* matter, the Court explained the application of these criteria in the following manner:

> There is also concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding in which expert to accept.
>
> These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue. (pp. 24-25).

More recently, these concerns were reaffirmed in R. v. *Reid* (2003) and R. v. *Rogers* (2005). A broader and more detailed review of legal cases that speak directly to the matter of expert testimony is provided by Peters (2001). Following a review of then available legal cases, Peters (2001) concludes that "Judges fear that the trial process is susceptible to high jacking by psychologists – and other experts – …" (p. 107).

Ethical Considerations

In addition to legal criteria intended to corral expert testimony, specific ethical considerations also argue against ultimate issue testimony by mental health experts. In the third edition of Canadian Psychological Association (CPA) Code of Ethics (2000), these considerations are primarily linked to Principle III. Briefly, Principle III of the CPA Code of Ethics deals directly with the discipline's fiduciary responsibility for integrity in relationships and specifically requires that psychologists avoid misrepresentation and openly acknowledge the limits of their expertise. In a court room setting the social contract that exists between the relatively autonomous discipline of psychology and society is reinforced when a judge, after careful review of a practitioner's credentials, formally endows him or her with the status of "expert". From that point on, the "expert" is expected to provide only professional opinions derived from his or her professional knowledge base. More bluntly, an expert witness is expected to provide professional not personal opinions. Insofar as personal opinions per force reflect personal biases, this legal expectation is mirrored in professional practice guidelines that urge forensic psychologists to guard against the influence of personal biases on their work (*Specialty Guidelines for Forensic Psychologists*, 1991). The Guidelines for forensic psychologists also include an explicit reminder that the appropriate role of a forensic psychologist is one of providing assistance to the trier of fact and Principle III, B. urges forensic psychologists to make clear the boundaries of their professional expertise. Thus, both legally (i.e., *Mohan*) and ethically, expert witnesses are expected to restrict their testimony to "expert" opinions on matters that legitimately lie within their ken of knowledge. Opinions that stray beyond the boundaries of professional knowledge are, by definition, lay opinions.

Against this backdrop, it seems reasonable to argue that psychologists who express opinions on matters that are appropriately the exclusive domain of legal decision-makers are flirting with unethical practice by engaging in an implicit misrepresentation of professional expertise. This misrepresentation inevitably occurs whenever a mental health practitioner offers a legal conclusion after formally receiving the designation of expert because he or she is expected to offer only professional opinions. By directly testifying that a defendant is or is not fit for trial, or criminally responsible, or a dangerous offender, forensic mental health practitioners are implicitly claiming expertise in the Law. This misrepresentation of expertise and violation of professional boundaries is particularly egregious when it includes appeal to non-existent scientific or clinical criteria such as "medical criteria for fitness to stand trial".

Simply stated, medical or, for that matter, psychological criteria for fitness to stand trial do not exist because fitness for trial is an exclusively legal construct without even remote analogue in medicine or psychology. A similar statement applies to all legal constructs, including dangerousness and insanity.

Along with awareness of relevant ethical issues, sound professional practice in forensic mental health requires some understanding of the legal system and the various roles of its constituents (Heilbrun, 2001). In fact, Principle II. C. of the *Specialty Guidelines for Forensic Psychologists* requires understanding of the legal standards that govern participation in legal proceedings. Ideally, in addition to an appreciation of the Mohan standard, this understanding should include appreciation of the paradigm conflict that is inevitable when scientific/clinical constructs are applied to legal questions. This "imperfect fit" (DSM-IV-TR, 2000; p. xxxiii) between the behavioural sciences and the law is seen to reflect inherently different philosophical underpinnings (Melton, et al., 1997; Schopp, 2001; Slobogin, 1989) that leave the behavioural sciences inclined toward deterministic, nomothetic explanations of human behaviour, while the courts seek answers from the perspective of free will and the individual. Notions of causality also predictably differ between the two disciplines, with science favouring probabilistic conclusions and the courts seeking a 'beyond reasonable doubt' level of certainty that is rarely achieved even in the presence of obvious organic impairment (Melton et al., 1997). It is also widely acknowledged that legal decision-making is heavily influenced by shifting social policies and political agendas that are immune to scientific analysis (Morse, 1978; Melton et al., 1997; Schopp, 2001). Legal decisions also invariably involve consideration of ambiguous concepts such as reasonable doubt, fairness, and justice. Even ostensibly clinical constructs such as "mental disorder" take on purely legal definitions that vary between court rooms and ultimately become the exclusive domain of judge or jury (Schopp, 2001).

The social policies and ambiguous concepts that underpin the practice of criminal law are foreign to the professional work of mental health practitioners and thus cannot reasonably be claimed as legitimate areas of expertise for psychology or psychiatry. Moreover, Canadian society has not entrusted psychologists to formally work with these concepts or to directly engage matters of social policy as they relate to legal notions of culpability and responsibility. In Canada, mental health practitioners are expected to restrict their professional activities to matters of mental health. While these activities may include consultation services to various consumer groups, the definition of mental health services cannot reasonably be expanded to include, for example, adjudication of culpability issues under the *Criminal Code of Canada* anymore than a lawyer or judge can claim diagnostic expertise after perusing the DSM. Genuine appreciation of these interdisciplinary differences is ethically required and should act as an effective barrier that prevents forensic psychologists and psychiatrists from offering opinions on purely legal matters.

Professional Practice Considerations

Melton et al. (1997) offer a compelling argument that evidentiary rules in the American legal system are intended to limit forensic clinicians to testimony that provides incremental (i.e. assistance to the trier of fact) rather than absolute validity (i.e., assume the role of trier of fact). Review of the *Mohan* criteria indicates that the Canadian criminal justice system has similar expectations. From this perspective then, forensic clinicians are encouraged to limit their analyses and subsequent opinions to matters that are the substance of common clinical discourse. Thus, for example, forensic assessment of a psychotic patient within the context of a fitness for trial hearing would confirm the presence of a psychotic spectrum illness (or conversely, empirically establish the patient is malingering) and describe how the illness impacts the patient's functional abilities (e.g. ability to sustain a coherent conversation). Paranoid delusions, for instance, would be evaluated for the degree that they encompass the legal system in general and, more specifically, the pending trial process and its various participants. Behavioural disorganization would be evaluated with an eye toward the patient's ability to behave appropriately in court and reality contact would be reviewed with specific focus on the individual's appreciation that he or she is the subject of legal proceedings. Assuming this information is well received by the trier of fact, it would then become a component in a larger decision-making process that includes consideration of the various socio-political issues that underpin legal decisions. This process of offering clinical input to legal decision-makers *without* directly addressing legal issues is recommended by the American Bar Association (1989), the American Psychological Association (1980), and the American Psychiatric Association (1982).

In spite of these multidisciplinary recommendations urging forensic mental health experts to avoid speaking directly to the ultimate legal issue, arguments have been offered in support of clinicians who testify directly to legal conclusions (e.g., Hess, 1999; Rogers & Ewing, 1989; Rogers & Shuman, 2000). From this perspective, a forensic clinician can and should make judgments regarding, for example, the need for incarceration or a defendant's criminal responsibility. In fact, it has been argued that failure to directly address the legal issue in question undermines the integrity of a forensic assessment (Rogers & Ewing, 1989). In essence then, from this perspective, a forensic clinician should assume the functions of a trier of legal facts in order to provide coherent and helpful input to the legal system.

In significant measure, arguments in favour of ultimate opinion testimony revolve around the observation that individual judges expect and value opinions that encompass ultimate legal issues. Both personal experience and some data (Borum & Grisso, 1996) support this contention. Nonetheless, to argue that members of a self regulating discipline such as psychology should routinely violate professional boundaries and misrepresent their expertise in response to the desire of a consumer group seems misguided at best. A more ethically sound course of action would involve education of relevant consumer groups regarding the limits of the profession's knowledge base and, more generally, the "imperfect fit" between clinical/scientific knowledge and the law.

In a frequently cited paper that has come to provide the foundation for arguments against ultimate issue proscriptions, Rogers and Ewing (1989) make an argument that directly touches the core of the ultimate issue debate. Specifically, while acknowledging that broad agreement among psychologists and legal scholars exists that legal opinions involve consideration of complex political and moral issues, Rogers and Ewing argue that judgmental and dispositional conclusions in any given case involve simple

"psycholegal" questions that can effectively be divorced from the underlying moral issues and are, therefore, a legitimate area of practice for forensic clinicians. More recently, Rogers and Shuman (2000) have reiterated this position without substantial change: "While the law expresses moral ideas, clinical data related to specific standards does not address the law's morality." (p. 47). To my mind, this statement is categorically correct providing that clinical data remain clinical data. Once the data are translated into legal terms they become infused with sociopolitical ideologies that are inconsistent with the stated goal of scientific objectivity. Consider, for example, that substance induced psychotic disorders are often, at a functional level, clinically indistinguishable from a primary psychotic condition (e.g. cocaine induced psychosis and paranoid schizophrenia). Yet, voluntary intoxication precludes an exculpatory defence under the Canadian Criminal Code while a primary psychotic disorder provides a strong starting point for a criminal responsibility hearing. In this example, two virtually identical clinical databases are assigned different legal status based on a moral decision not to allow an exculpatory defence to an individual who is directly responsible for his or her compromised state of mind. Thus, the ultimate legal decision – i.e., whether to hold an individual responsible for a criminal act – is a number of steps removed from the ostensibly objective clinical data that informs it. Clinical testimony in either case would be virtually identical. The most significant difference would occur when the data are subjected to legal analysis. It is precisely this step of assigning legal significance to clinical data that produces an ultimate legal conclusion, and it is this final step of data interpretation that lies outside the legitimate knowledge base of forensic psychologists and psychiatrists.

Consider another example: In one case, a person with paranoid schizophrenia is not compliant with his medication and decompensates to the point that he assaults a stranger on the street. In a parallel case, a cocaine addict relapses and embarks on a cocaine binge that ultimately produces a psychotic state, during which he assaults a stranger on the street. In both cases, the individual directly contributed to the psychosis by either refusing to take medication or using cocaine and the resulting the mental illness is virtually identical at the functional level (i.e., paranoid psychosis, agitation, aggression). In the case of the schizophrenic person, a criminal responsibility defence is a viable option. In the case of the addict, it is unlikely that such a defence would even be considered. Yet, the clinical datasets are identical and both conditions are formally diagnosable mental illnesses under the DSM. The decision to accept one state of mind as legally compromised but not the other reflects a prevailing zeitgeist which identifies schizophrenia but not a substance abuse disorder as potentially exculpatory. Moral reasoning and prevailing political thought underpin this decision not the objective clinical data as Rogers et al argue. It is conceivable that this legal opinion would change as a function of shifting social policy while the clinical datasets of relevance would remain constant. This disconnect between "the data" and the ultimate legal decision occurs precisely because legal decision-making is a moral rather than clinical or scientific endeavour. More generally, all judicial decision-making involves, to varying degrees, considerations regarding social retribution and punishment that are undeniably moral, vary across time and jurisdictions, and cannot be handled by forensic clinicians without explicitly adopting a social control function.

Conclusion

According to Schopp (2001), mental health law (i.e. legal decisions that involve mental health issues) involve two components: A clinical component and a normative one. The former includes the legitimate subject matter of psychology, psychiatry, and any other mental health discipline with relevant knowledge. The normative component of mental health law is a legal judgment that incorporates the clinical component but primarily reflects prevailing political morality. The clinical component will vary minimally and (ideally) only in response to legitimate clinical and scientific advances. The normative component, on the other hand, will shift in response to shifting social mores and the prevailing political winds. The disconnect between these two components is significant, with similar clinical datasets potentially leading to different legal conclusions.

Legal decision-making, then, is qualitatively distinct from clinical or scientific inquiry at least by virtue of being based heavily on a protean moral landscape. Legal decision-makers also enjoy public endorsement and trust in their roles as agents of social control and visible representatives of the state's police powers. Conversely, clinicians have a much more humble social role: We are simply expected to help alleviate discomfort and, occasionally, answer questions from the perspective of our highly specialized and occult knowledge base. We are not expected to assume the role of legal fact-finder or decision-maker and our contract with society does not include provision for the assumption of a social control function or dispensation of "justice" in a criminal court room.

When a psychologist, or any other clinician, is formally granted the status of "expert" in a criminal court, he or she is expected to provide expert opinions in a manner consistent with the legal parameters that govern expert testimony. In this country, *Mohan* provides the legal template for appropriate expert testimony. Even cursory review of this judgment reveals that concerns regarding inappropriate testimony by "experts" permeate this ruling. Beyond these general concerns, Mohan specifically requires that expert testimony comply with existing rules of evidence, be legally relevant, necessary, and provided by an appropriately qualified expert. Though legal relevance and necessity are matters that are appropriately decided at trial by a judge, the "properly qualified" requirement of Mohan dovetails with the professional responsibility of all psychologists to avoid misrepresentation of their expertise. Thus, the Mohan criteria and the CPA code of Ethics can be seen to converge in a manner intended to prevent excursions by psychologists into areas that lie outside of their legitimate range of expertise. Insofar as psychologists cannot claim expertise in legal decision-making or moral reasoning, they are required by existing legal and ethical considerations to avoid offering ostensibly professional opinions on purely legal matters. Forensic clinicians who ignore this proscription are offering essentially lay opinions in the guise of professional knowledge and, in so doing, are misleading a consumer group who expects exclusively professional opinions. More directly, unless the legal system formally forfeits judicial responsibility to clinicians, ultimate issue opinions remain the exclusive purview of judge or jury. To ignore this simple truth will continue to invite controversy regarding expert mental health testimony in criminal trials.

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