Hearsay or Evidence

Brendan Lloyd PhD, January 2016

When a psychologist writes a court report, how much is hearsay and how much is evidence; and how does the magistrate or judge tell the difference? In other words, the psychologist interviews the client and creates content for the report based on what the psychologist is told. Isn't that just hearsay? Should the report be given any weight in a court of law as evidence?

To understand the acceptability or otherwise of psychologist's reports the Case Law is the place to look. Here is an example from the NSW Court of Criminal Appeal (Devaney v R [2012] NSWCCA 285).

In Devaney a man is sentenced to 14 years and 11 month with a non-parole period of 11 years and seven months for the attempted murder of his ex-girlfriend. The man shot his ex-girlfriend twice through the gut with a .45 calibre semiautomatic pistol. A third shot missed her and shattered a window.

In Devaney the focus is on the reports and oral evidence of three psychiatrists. There are some important differences between what courts expect from psychiatrists as opposed to what the court wants from psychologists, but what is said here about evidence applies to both professions equally.

Here is some background to the case at hand. The offender in Devaney had gone to a great deal of trouble to shoot his ex-girlfriend. He had gathered three hand guns, ammunition, a police badge, a police warrant card, a disguise, and swipe-cards to get access to the gym where the woman worked; and he had a taxi waiting outside the building that housed the gym.

The offender entered the gym, produced the gun. The woman turned and ran. Three shots were fired. The woman sustained two entry wounds and two exit wounds to her abdomen. Her colon was perforated. One bullet missed an iliac artery by two centimetres. Although she was out of hospital within a week, she had a long road to recovery with help from a physiotherapist and a psychologist.

The original sentencing judge had before her seven psychiatric reports from three psychiatrists. All three psychiatrists unanimously agreed that the offender was psychotic at the time of the attack and that the psychosis was due to paranoid schizophrenia.

The psychiatrist's reports span a time of at least two years. From the outset, February 2009, the offender was still under the influence of the psychosis. He was blaming the victim, denying that he was shooting to kill. He was expressing anger toward his ex-girlfriend and her family. He refused to discuss the circumstance of an old AVO that his ex-girlfriend had taken out on him.

Almost two years later, January 2011, the psychiatrist reports an improvement. The right medication had been found. The offender had settled down to a point of being declared well and of no danger to anyone. The offender acknowledged for the first time that he has a mental illness. The psychiatrist also reported the offender's expression of regret. The defence team say that here we have an expression of contrition and remorse to match his plea of guilty.

The sentencing judge took the view that the offender was manipulating the three psychiatrists. The psychiatrists all agreed that if the offender is free of psychosis then he is of no danger. The sentencing judge said that she couldn't trust the psychiatrist's report as evidence of contrition and remorse because the offender did not make himself available for cross-examination on the evidence; and for that matter she didn't believe that the offender could be trusted to stay on the medication.

There are at least four ways in which an offender's mental health problems may be relevant to sentencing. Firstly, mental illness might reduce moral culpability, thus reducing a concern for denunciation and punishment. Secondly, the mental illness might mean that the offender is not suitable for general deterrence. Thirdly, a custodial sentence might weigh more heavily on a person with a mental illness. Fourthly, a countervailing consideration is the danger the mentally ill person poses to the community whilst mentally ill.

The sentencing judge said that while the mental illness might reduce moral culpability and likewise make him unsuitable for general deterrence, the countervailing consideration of his danger to the community took priority. The sentencing judge had the offender's criminal record in front of her and concluded that he hasn't learnt any lessons of

moderating his behaviour so far, so why should she believe him now?

The Court of Criminal Appeal upheld the appeal and reduced the overall sentence to 12 years and a non-parole period of 8 years. The appeal judges focused on the "unanimous medical evidence" that the offender was psychotic at the time of the offending; and importantly there is a connection between the "illness" and the crime. In other words the man was acting on his paranoid delusions. The mental illness, therefore, should certainly rule out notions of individual and general deterrence and should likewise take the focus off denunciation. The mental illness, according to the appeal judges, was a consideration that should have "permeated" the whole of the sentencing task.

The appeal judges agreed that the sentencing judge had every right to dismiss those parts of the psychiatrist's reports that simply repeated what the offender said about his regret for the offending. Such evidence may or may not be given any weight by a court if the offender does not give evidence and is not available for cross-examination in the open court.

On the other hand, the appeal judges did not agree that the sentencing judge was entitled to dismiss the evidence in the psychiatrist reports that is based on the taking of history. The appeal judges said that the "professional skill of the psychiatrist is the assessment of the history - how it accords with hypothesised and formed views of the professional". If the sentencing judge has an issue with an expert opinion, then the evidence cannot be dismissed without cross-examining the expert on the evidence.

The sentencing judge had issue with the offender's potential danger to the community. The psychiatrists said that the man was no longer ill whist on suitable medication. What is more the offender, prior to this offence, did not know that he has a mental illness that requires treatment. The psychiatrists said that now he is aware of his mental illness and he is safe whilst medicated. This was the psychiatrist's expert opinion and should not have been dismissed by the sentencing judge.

So what does this mean for psychologist's who write reports for the court? There are two considerations here. One consideration is in relation to reporting what the psychologist is told about the circumstance of the offence; and the other is in relation to the psychologist as an expert. In other words the psychologist will take history then assess "it for how it accords with hypothesised and formed views". In both cases the magistrate or judge has every right to test the evidence under cross-examination.

In relation to the circumstances of the offence, the client's solicitor might want to use the psychologist's report to establish contrition and remorse, or special circumstances, or mitigating factors. Any one of these points of interest could come out of a psychologist's report. It could be that much of the information on these points could be pure hearsay. It could be said that a psychologist or psychiatrist is not extracting information from a client in any kind of rigorous manner say like a police interview. So it could be said that psychologists and psychiatrists are prone to just accept what they are told. So then in the report you write, "Mr Smith told me of his regret for committing…" So is that now evidence of Ms Smith's regret? Well it might be or it might not be, but if Mr Smith then puts himself under cross-examination and he holds up on his expressions of regret, then it is far more compelling evidence of contrition and remorse.

So what makes a psychologist an expert witness? What do courts want from psychologists? What the courts don't want from any expert is the kind of stuff you get on the internet or from your hair dresser. For starters, taking history and testing of hypotheses is basic training for any psychologist. Psychologists can certainly map out the subjective circumstances from a psychological perspective. The domain of psychology is mental processes and behaviour. Psychologists also use assessment tools for mental illness and for cognitive functioning and capacity.

If a psychologist is to produce a report, then providing the expert opinion is within the limits of *specialised knowledge* for a psychologist, there shouldn't be a problem; but all the same, the psychologist might be expected to defend his/her claim to the area of *specialised knowledge.* In other words, the psychologist could be asked to submit to cross-examination on the report.

NSW Court of Criminal Appeal (Devaney v R [2012] NSWCCA 285)