What You Tell the Psychologist

Brendan Lloyd PhD, January 2016

A psychologist's court report is only as good as the information that it's based upon. There's an old saying in the computer world which is *rubbish in rubbish out*. The same applies to the psychologist's report. The problem will arise if there is a discrepancy between what the client says in court and what is written in the report. So what you tell the psychologist makes all the difference to the quality of the report.

The court is prone to test the evidence. There is a desire in the court to get to the truth, not so much in the moral sense but in the practical sense as well. In law this is the *actus reus*, the *what actually happened* aspect. The court has a tendency to test the evidence under cross-examination.

When it comes to sentencing, the accused person has been found guilty or pleaded guilty, the magistrate or judge then goes through a rigorous process to decide on the sentence. There are many options and many variables. There is the statistical manual to consult. There are countervailing and mitigating factors; there are special circumstances to balance off against aggravations. A psychologist's report can really help you if you're in this position, particularly if you're open to cross-examination on the content of the psychologist's report.

But here is an example where it went wrong. This example comes directly from Case Law from the Court of Criminal Appeal (Hay v R [2013] NSWCCA 22). The outline of the crime is as follows. A man was found guilty by a jury in the District Court on two counts. The first count was of conspiracy to import a marketable quantity of cocaine; the second count was the possession of a marketable quantity of cocaine. He was sentenced to seven years with a non-parole period of four years.

The offender took possession of the cocaine at Sydney Airport in September 2009. The offender is described as a member of a syndicate of criminals who conspired with each other for about 11 month leading up to the importation of the cocaine into Australia.

The offender and at least some of his syndicate worked for an airline catering service near the airport. One syndicate member flew in from Los Angeles with 250 grams of cocaine. The accused and his colleagues boarded the empty plane to load the galley with food; and whilst they were there, they collected the cocaine from a rubbish bag in the rear end toilet cubical.

The enterprise was well and truly within the view of the police who had been intercepting phone calls and text messages between the syndicate members during the 11 month lead-up. The offender, on the other hand says that he and his colleagues were all about pilfering from the planes and selling the goods to market stall holders. The accused was saying that he had pilfered the cocaine and was not part of an importation enterprise.

There were some interesting facts that must have influenced the jury. The offender had gone to a lot of trouble to be rostered-on the night of the particular flight from Los Angeles. The particular airline gave evidence that such pilfering had not occurred on their plains at Sydney airport since 2007 because of stringent anti-pilfering measures that were installed in 2006.

After the offender was found guilty a psychological assessment was called for and presented to the judge to assist in the sentencing process. The man was sentenced and then came the appeal. The main complaint is that he was sentenced for the wrong crime. The psychologist's report was presented as containing "fresh evidence" to support the pilfering proposal.

The appeal judges comment extensively on the psychologist's report and quoted paragraphs from it. Remember that the psychologist's report was for sentencing after the trial. The psychologist's report notes that the offender continues to maintain that he was pilfering and not importing the cocaine. The psychologist says, "*Attendant to this* [the offender] *further describes a tendency towards compulsive and impulsive stealing (Kleptomania)*". The psychologist reported what the offender said about being sexually abused from the age of five by an uncle-in-law; and that now he is emotionally unstable and prone to impulsive stealing and that he has always been so, and that the job at the airport offered him too much temptation.

The appeal judges were not happy with the offender using the psychologist's report in this way. They say, for one thing, the psychologist did not diagnose Kleptomania. There is such a diagnosis available in the DSM-IV (international

version, p.630). The diagnosis is usually applied to people who steal things of incidental or little value, and not for profit. And nor does the psychologist make any connection between the reports of sexual abuse and the compulsion to steal. The appeal judges go further by saying that it wouldn't matter if the psychologist had made a connection between the sexual abuse and the compulsive stealing, because they couldn't see past the evidence that he was in fact importing the cocaine in any case.

The appeal judges went one step further again. They note that in the psychologist's report the offender's stealing is characterised as a solo venture that is opportunistic. Yet the evidence he gave at his trial characterised the pilfering as organised and in cooperation with other pilfering employees. His evidence to the court also suggests that he was drawn into the pilfering when he began his employment at the catering company; this is not at all consistent with what he told the psychologist, that he possessed a compulsion from the outset.

The competence of the psychologist was not the question; it was understood by the appeal judges that the psychologist was working with what he was given. It is not up to the psychologist to cross-examine the client. When a psychologist interviews a client it is not like a police interview. Also, the psychologist would not have attended the trial and heard the evidence. The psychologist was engaged once the verdict of guilty came down.

It seems that the offender did not notice that he was characterising his "pilfering" in contradictory ways from when he gave evidence in court to when he spoke to the psychologist after the trail. Nor did the psychologist have any way of knowing about the discrepancy. There were four other grounds for appeal. None of the grounds were upheld. The offender had lost credibility from the outset particularly in the light that his testimony did not match what he had told the psychologist.

Court of Criminal Appeal (Hay v R [2013] NSWCCA 22)