

# CHAPTER THIRTEEN

## EXPERT TESTIMONY

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### INTRODUCTION

Section 18 of the proposed Sexual Offences Bill draws extensively from the Namibian Combating of Rape Act<sup>2</sup> and provides for evidence of the psycho-social effects of a sexual offence to be adduced during criminal proceedings to show the sexual offence against a complainant is likely to have been committed, under coercive circumstances. It also provides that such evidence may be adduced for the purposes of imposing an appropriate sentence. The emphasis on providing for such evidence at the trial and sentencing stages within the proposed Bill is commendable and fully endorsed by this submission.

The Bill also provides that in determining the weight to be attached to evidence relating to the psycho-social effects of a sexual offence, the court should have due regard for the qualifications and practical experience of the person giving such evidence as well as regard for all other evidence given at the proceedings.

The formulation of section 18 is useful in that it does not make any reference to the “expert witness” in providing evidence relating to psycho-social issues. The force of this section will go beyond providing evidence surrounding the period of delay between the commission of the offence and laying the complaint of sexual assault and provide for evidence of rape trauma syndrome, symptoms post-traumatic stress

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<sup>1</sup> The author would like to acknowledge Dr. L.J. Martin for her assistance in the development of guidelines for use of medical experts in rape cases contained in this chapter.

<sup>2</sup> Act No. 8 of 2000

and other psychological trauma. It should also provide the court with context to issues contained in s. 33.6.2. of the discussion paper<sup>3</sup>.

Section 33.5.1 of the discussion document reflects very real concerns by service-providing organizations that prosecutors are reluctant to use them as experts and the use of experts in general. That written reports, in addition to providing oral evidence, is used more frequently in sexual assault cases, is a useful recommendation and should be inserted into the Bill.

Accordingly, the Bill should read -

**18 (1) Evidence of the psycho-social effects of any sexual offence upon a complainant may be adduced *by way of affidavit, expert report or oral evidence* at criminal proceedings where such offence is tried in order to – ...**

### **33.6.1 The Purpose of Expert Testimony**

The author fully endorses section 33.6.1 of the discussion document in which the Commission recommends that “the purpose of expert testimony should not only be to assist the court in understanding the ‘common’ experiences of sexual offence complainants, but to explain *the context in which an individual sexual assault complainant acted and thus to explain the possible reasons for this action.*

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<sup>3</sup> (1) short and long term psychological effects; (2) (in)consistent statements; (3) reluctance of complainants to testify; (4) the ‘disintegration’ of the complainant while testifying; (5) requests to withdraw charges; (6) intimidation; (7) risk assessment; (8) rehabilitation of the offender; (9) memory lapses.

### **33.6.8 – 33.6.13 From Lay Witnesses to Expert Witness**

The Commission refers to the use of social workers as expert witnesses in relation to the sexual abuse of children. It is recommended that the SAPS continue their programme of training social workers as forensic social workers to assess children and provide expert testimony in court, not only because of the issue of cost to the state, but because the standardized methods use by the SAPS to train forensic social workers should be seen as “sufficient” qualification to assist the court in understanding the evidence presented before it. The probative value of such evidence will be established by the court.

This issue of the “neutrality of the forensic social worker as a witness” is raised and a recommendation is made that the objectivity of the forensic social worker’s assessment is established or that the leading of such evidence should be agreed to by the defence counsel. The assessment and testimony provided by the (accredited) forensic social worker should not be seen as any less objective than the evidence provided by a state medical practitioner. As the Commission points out, the benefit of such witnesses, unlike paid expert witnesses, is that the witness has no real incentive in biasing his or her testimony in favour of one side or another.

There is merit, however, in the argument in Chapter 3, section 3.3.2.22, that clinics may be staffed by junior or recently graduated personnel with limited experience in medico-legal services and that these clinics may have high turnover. This, in addition to the possibility that nurses may also be expected to conduct similar forensic examination, affect the quality of the evidence adduced in rape cases. It is therefore recommended that both junior doctors and nurses, who have not received the necessary training and skills to conduct a forensic examination and provide the relevant forensic testimony, should not by definition necessarily constitute expert witnesses.

**Holtzhausen v Roodt**<sup>4</sup> provides sufficient criteria to ensure that lay counsellors qualify as experts and should be recognized by the courts as such. The criteria for

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<sup>4</sup> 1997 (4) SA 766

the admissibility of lay counsellor's evidence, set out in section 33.6.13 of the discussion document, should satisfy the admission of such evidence.

Another approach to ensuring that the evidence of counsellors and other individuals who work with rape survivors is adduced in rape trials, is to bring the counsellor in as a 'lay witness' to support the testimony of someone considered an "expert" by the court. The lay witness could testify to matters about which he/she has personal knowledge, but remains within the realm of 'common experience'. If the counsellor or service provider has been deemed 'unqualified' to be an expert (i.e. not competent to testify on conclusions about a person's psychological state), he/she can still describe the complainant's behaviour patterns if he/she has the requisite (i.e. counselling) knowledge about the complainant. The expert testimony combined with the lay testimony has the potential for great probative value and should be admitted absent a significant showing of prejudice.<sup>5</sup>

In light of the Commission's discussion on the use of expert witnesses and Hoffman and Zeffert's general framework for the admissibility of expert testimony<sup>6</sup>, the following criteria should be sufficient to allow the use of expert witnesses in sexual assault cases. The expert must:

- Be able to furnish the court with information falling outside the knowledge and expertise of any reasonable court (s. 33.2.1);
- Have some qualifications, but not necessarily "formal" or "professional" ones (i.e. a course of study coupled with practical experience) (s.33.2.2);
- Must be able to state his or her opinion either as an inference from facts within his or her personal knowledge, or upon the facts provided by others;
- Be able to guide the court to a correct decision on questions falling within the expert's field (33.2.3).

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<sup>5</sup> Comment. The use of rape trauma syndrome as evidence in a rape trial: valid or invalid? **Wake Forest Law Review** 21 at 102.

<sup>6</sup> Hoffman & Zeffertt **The South African Law of Evidence** fourth edition Johannesburg: Butterworths 1989 at 100-101.

As it currently stands, the admissibility of expert evidence hinges on fairly simple rules of evidence that affords the presiding judge broad discretionary powers. The international case law and legislative frameworks set out in the discussion document largely require that the expert testimony is helpful to the trier of fact and that the court should adjudicate the expert's qualifications on the basis of the factors of the case and related experience of the expert. These rules of evidence do not need further prescription – it is the “law in action” that needs bolstering.

In section 33.6.11 the Commission recommends that *the use of experts in the fields of social work, psychology and psychiatry in sexual offence trials should be limited to matters relating to specialized clinical judgement, unless the expert has some specialization in the area of sexual offences, such as Sexual Assault Syndrome*. The recommendation should instead read that:

***“Only experts from the fields of social work, psychology and psychiatry should testify to matters relating to specialized clinical judgement in sexual offence trials. If the expert has some specialization in the area of sexual offences, such as Sexual Assault Syndrome, that evidence may also be adduced by the court.*”**

### **33.6.15.2 – 33.6.15.11 The Battle of the Experts**

The problem of the “battle of the experts” is unlikely to occur in a socio-legal context where ‘experts’ are limited and where the court is in a position to call on an expert independent of the experts provided by the prosecution and the defence council. Where experts are called to lead conflicting evidence, it is recommended that section 145 of the Criminal Procedure Act – the appointment of an expert assessor – is employed by the presiding officer.

### **Medico-Legal Evidence**

The author endorses the recommendations for expert testimony set out at the end of chapter 33 in the discussion paper. A major omission in both the aforesaid recommendations and in section 18 of the Bill is the lack of reference to experts testifying in regard to medico-legal evidence. Medico-legal evidence includes the findings produced through specialized forensic examinations, which is primarily evidence of physical and sexual trauma.(Chapter 3) of this submission by Martin, L.J. & Artz, L., recommends the inclusion of medico-legal services in the body of the Bill. This inclusion will have implications for the use of medico-legal testimony in sexual assault cases.

**It is therefore submitted that section 18 of the Bill should cover evidence relating to both psycho-social effects of rape as well as medico-legal evidence.**

### **Recommendations for Prosecutors**

Beyond the substantive legal arguments for the admissibility of expert witnesses, it should be borne in mind that prosecutors require additional guidelines relating to the use of such witnesses. These guidelines should be contained in the Regulations of the new Sexual Offences Act. Martin, L.J.<sup>7</sup> suggests that in order the expert to be effective in assisting the court, the prosecutor must:

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1. Consult thoroughly with the expert at least one week prior to the trial date;
2. Establish the “expertise” of the witness. There is often an assumption that doctors and mental health professionals are ‘experts’. The prosecutor needs to determine how many cases the expert has seen, how many times the expert has testified and in what form (written or oral) the expert has assisted the court as well as assessing the level of academic or experience-based qualifications the expert brings to the matter in question;
3. Ensure that the expert is familiar with court procedure, if the expert has not assisted the court as an expert before. This should include addressing comments to the bench, the need to take the oath and be sworn in, how to address the court and the process of cross-examination;
4. Be clear as to what evidence may be adduced from the expert;
5. Explain that there will be evidence in chief, and that the main evidence in chief will be the written report;
6. Ensure that the expert can explain the contents of the report in plain language;
7. Ensure that the expert make use of sketches, photographs or other exhibits in court;
8. Inform the expert that cross-examination may happen by the defence attorney or the accused;
9. Inform the expert of the legal arguments presented by the prosecution as well as the assumptions the prosecution has made on the basis of the report;
10. Clarify the assumptions made on the basis of the report and allow the expert to clarify any misinterpretations of the report. Where the inferences drawn from the report are incorrect, the expert should advise the prosecutor of the correct interpretation of the evidence;
11. Advise the expert not to offer opinions in the written report/affidavit.