

MENTAL ILLNESS AND EXPERT WITNESSES

One in five Australians has a mental illness. Instructing expert witnesses for hearings involving people with disorders is a delicate business. **By Rachael Freland**

In 2007, 45 per cent of Australians aged 16 to 85 years indicated they had, at some point in their life, experienced a mental health disorder.¹

Mental health can be defined in a myriad of ways, but essentially it refers to an individual's state of cognitive, emotional and social wellbeing, influencing how they cope with the normal stresses of life and the impact of symptoms on their home management, social life, ability to work, relationships, and the choices they go on to make.² A mental disorder or illness then, is a clinically recognisable set of symptoms or behaviours associated both with distress and with an interference with personal functions.

This has immediate ramifications in a legal context, whether for testamentary capacity (pertaining to the *Mental Health Act 1986* (Vic) or *Guardianship and Administration Act 1986*

(Vic)), criminal, family, immigration or personal injury matters. This article seeks first to explain how to recognise if a client might have a mental illness, to decide if an expert witness report would assist when representing that client, what type of expert witness will be most appropriate and then clarifies some points for consideration in briefing expert witnesses.

IDENTIFYING A MENTAL ILLNESS

The mental status examination (MSE) is a widely used tool in the clinical assessment process of psychological and psychiatric practice. It provides a structured way of observing and describing an individual's behaviour and state of mind.³ It focuses on the following aspects: appearance, engagement, speech,











thought process, thought content, perception, emotional state, cognitive function, biology, judgement and level of insight.

The purpose of this article is to help lawyers identify and validate their own hypotheses about a client's mental state should it be relevant to the matter at hand, and then determine what, if any, action to take for further assessment.

A BRIEF MENTAL STATE EXAMINATION

The following is a list of areas that can be observed quickly and easily during a meeting with a client.

Note: This does not comprise a psychological or psychiatric assessment and should be used only as a guide to ascertain whether further assessment may be warranted.

	BEHAVIOURS	POSSIBLE CAUSES
	<p>Appearance</p> <p>How was their physical appearance, grooming and hygiene?</p>	<ul style="list-style-type: none"> ■ May be indicative of overall state of wellbeing and level of coping.
	<p>Engagement</p> <p>To what degree did they cooperate? Was there regular eye contact? Were they guarded or distracted?</p>	<ul style="list-style-type: none"> ■ May be indicative of overall state of wellbeing and level of coping.
	<p>Speech</p> <p>How was the rate and volume of speech? Did their conversation make sense or did they repeat themselves?</p>	<ul style="list-style-type: none"> ■ May be indicative of anxiety or other mood disorder. ■ May be indicative of level of coping, of cognitive disorders or acquired brain injury (ABI) if there is a history of head trauma or unconsciousness.
	<p>Thought content</p> <p>Was there evidence of logical reasoning? Paranoia? Anxiety? Suicidal thinking?</p>	<ul style="list-style-type: none"> ■ May be indicative of thought disorders or anxiety.
	<p>Perception</p> <p>Are their stories outside the realm of possibility to you (i.e. illusions, hallucinations)?</p>	<ul style="list-style-type: none"> ■ May be indicative of thought or sensory disorders.
	<p>Emotional state</p> <p>What did the client report about their mood?</p>	<ul style="list-style-type: none"> ■ May be indicative of mood disorders (depression, anxiety, mania)
	<p>Cognitive function</p> <p>Did they have difficulty remembering details, appointments, instructions etc.? Were they able to pay attention throughout the meeting?</p>	<ul style="list-style-type: none"> ■ May be indicative of cognitive disorders or ABI.
	<p>Biology</p> <p>Has the client reported any changes in their:</p> <ul style="list-style-type: none"> • Sleep • Appetite • Energy levels? 	<ul style="list-style-type: none"> ■ Increased or decreased behaviours may be indicative of depression, anxiety or other mood disorder.
	<p>Judgement</p> <p>Does the client understand their actions have consequences? Do they care? Do they appear to know how to get to appointments, organise their time?</p>	<ul style="list-style-type: none"> ■ May be indicative of attention, personality or cognitive disorder or an ABI.
	<p>Level of insight</p> <p>To what degree does the client appear self-aware? How compliant are they with medical or legal requirements?</p>	<ul style="list-style-type: none"> ■ May be indicative of thought or cognitive disorder or even an ABI.

Note: All these behaviours exist on a continuum, so ensure that your observations take into consideration the context. For example, a client who presents as anxious, talks quickly and loses track of what they are saying may simply be anxious meeting a legal professional rather than it being indicative of a larger issue.

EXPERT WITNESS REPORTS

Where evidence exists supporting the hypothesis that a client has a possible mental health disorder, the question naturally arises whether an expert witness report will be of benefit not only to the court, but to the client and the legal practitioner.

The court

Where disputes, conflicting evidence or legal codes apply, the presence of an expert witness report helps the court to determine the most appropriate course of action. For example:

Immigration: where, since being granted a visitor visa with a no further stay condition, "compelling and compassionate circumstances have developed over which the person had no control, and which has resulted in a major change to the person's circumstances".⁴

Motor vehicle accidents: where the assessment of permanent impairment must be provided by a recognised expert in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th edn).

At common law: The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s9.1 states:

"At any time after an indictment has been filed, if it appears to the court before which the accused is to be tried that there is a real and substantial question as to the fitness of the accused to stand trial, the court must reserve the question of the fitness of the accused to stand trial for investigation under this Part".

Further to that, where a client is fit to plead, the *Criminal Code Act 1995* (Cth), s7.3.1 states:⁵

"A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

- (a) the person did not know the nature and quality of the conduct; or
- (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or
- (c) the person was unable to control the conduct".

Family law: Where difficult and/or conflicting evidence arises, the court is obliged to consider an expert's opinion when trying to determine what is in the best interests of the child. Section 60CC of the *Family Law Act 1975* states that when "determining a child's best interests . . . the court must consider . . .

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence".

The court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, their responsibilities as a parent.

For matters pertaining to testamentary capacity, where questions arise as to an individual's capacity and the need for involuntary treatment or substitute decision making, the Guardianship and Administration Act 1986 (Vic) s22 provides:

- "(1) If the Tribunal is satisfied that the person in respect of whom an application for an order appointing a guardian is made -
- (a) is a person with a disability; and

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- (b) is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances; and
- (c) is in need of a guardian – the Tribunal may make an order appointing a plenary guardian or a limited guardian in respect of that person”.

While qualified expert witness reports assist magistrates by providing additional specialised evidence in court, in some cases an expert assessment may have the potential to produce an unwanted outcome for the client. That being said, reports are regularly associated with better outcomes for clients (including reduced severity of sentencing, increased compensation, and in some cases the client may be more likely to be granted legal aid because of their circumstances), determining the best interests for children where there is a dispute between parents/guardians, and being granted a visa to remain in Australia (where such applications may have been disputed). However, it is important to explore the pros and cons with clients in detail.

Last, the recommendations offered by experts help clients (and often families) to understand and access specialised treatment options to help manage their particular mental illness more effectively. For some clients, however, the suggestion that they have a mental illness may be unwelcome.

WHICH EXPERT TO INSTRUCT AND WHEN

Broadly speaking, there are three types of mental health expert: clinical psychologists, psychiatrists and neuropsychologists. Outside the mental health industry there is much confusion about the difference.

Psychologists

Fundamentally, psychologists are experts in human behaviour. They have studied the brain, memory, learning, development and the processes underpinning how people think, feel, behave and react.⁶ Psychologists do not have a medical degree. These are the experts most valuable in cases in which clients require a mental health assessment to determine (1) their mental health status; (2) whether a mental disorder has developed or was pre-existing; and (3) the impact of an individual's mental health on the area of law in question.

Psychiatrists

Psychiatrists complete a medical degree and then specialise in the diagnosis and treatment of mental illness. They can make clinical mental health assessments inclusive of medication reviews and/or medical treatment recommendations, but they typically include only a brief psychosocial history. These assessments are most pertinent when the presence of a mental disorder may require medical intervention/treatment for effective management. It is this medical expertise that has led to the opinion of psychiatrists becoming highly valued by courts and tribunals.

Neuropsychologists

So where do neuropsychologists fit in? Neuropsychologists are trained in psychology and then specialise in brain dysfunction. People are referred to these clinicians when they have a history that includes long-term substance use (10+ years of regular use), head trauma (motor vehicle accidents, assault, stroke or other trauma) and/or significant periods of unconsciousness (associated with accidents, assaults, overdoses and unsuccessful suicide attempts). These clinicians are also engaged when clients present with symptoms of dementia or intellectual disability.

Neuropsychologists use a range of standardised tests to determine the presence and nature of brain dysfunction, including intelligence, memory difficulties, concentration or attention deficits, and logical thinking/problem-solving difficulties. These types of assessment are most common in personal injury and criminal matters, but they can be of benefit in many other legal areas, particularly where an assessment of a person's cognitive level of functioning (for example, ability to parent, to work, to live independently, to manage finances etc.) is concerned.

In many instances, clients may already have a treating mental health professional and it is important to consider whether evidence from the treating expert or an independent expert will be preferable. In such instances it is worth considering the following:

- What can be gained by having the opinion of someone with a long-standing treating relationship?
- Does the treating clinician have any expertise in providing evidence, written or oral, for the court?
- What is the particular expertise of the assessor and report writer, given the nature of the legal matter?
- What are the particular costs associated with accessing different sources?

MAKING REFERRALS A SUCCESS: LETTERS OF INSTRUCTION

The medico-legal opinion provides important evidence during proceedings and in many cases is of decisive significance.

That being said, psychiatrists, psychologists and neuropsychologists are not immune to bias or error.

There is an inherent bias when expert witnesses represent only one side of any legal matter. However, ensuring experts are: (1) trained in providing evidence to the court with a comprehensive understanding of both the *Health Professions Registration Act 2005* (Vic) and Form 44A of the Supreme Court Expert Witness Code of Conduct; and (2) provided with comprehensive contextual information in a letter of instruction will increase the likelihood that the expert engaged will write a report detailing what is required by the court, minimising bias and error.

The letter of instruction should include:

The psychological, psychiatric or neuropsychological context: note the client's presentation, including any symptoms (using the MSE) or reports they may have made about their mental health, their substance use, any reported history of head trauma and any prior assessments. For young offenders, note whether there are copies of school reports available to ascertain the presence of anti-social conduct at school.

The legal context: what is the area of law the expert is addressing and what type of matter is it. (for example, a bail application, hearing, personal injury matter, immigration matter)? And which jurisdiction applies (VCAT, Supreme Court etc.)? Note specifically what area of law the expert needs their comments to relate to, and consider whether there are related laws or precedent cases that it may be prudent for the clinician to be aware of.

The required expert recommendations: this is an area which regularly causes confusion and frustration between the legal professionals and expert witnesses. A full exploration of this topic is beyond the scope of this article. In brief, consider what level of detail you would like from the expert when you instruct them. For example:

- in personal injury matters, will the injury preclude or restrict the client in any way – socially, domestically, recreationally, educationally/vocationally?
- in criminal matters, will the issues affect a client's ability to carry out their sentence or is it possible the issues affected the client's moral culpability?

- in immigration/visa matters, will the psychological/psychiatric issue affect a client on leaving the country?
- in family law matters, will the issue affect a parent's ability to care for their child?

CONCLUSION

Individuals with a mental illness have significantly more difficulty participating effectively in the legal system.⁷ And given that one in five Australians has a mental illness⁸ and as such often experiences legal issues reflecting their disadvantaged position in the community, the presence of expert witness reports can potentially help legal representatives not only to more effectively understand their clients but also represent them more advantageously.

The MSE is a tool designed for two purposes: (1) to provide a quick means of assessing an individual's mental status and (2) to assist psychiatrists and psychologists when assessing clients to determine assessment formulations and make treatment recommendations. The outcome of the MSE when used in the latter instance, combined with a comprehensive exploration of a

client's history, forms the basis of a medico-legal report. This article proposes that this tool can provide lawyers with a similar means of determining whether a client may benefit from an assessment, either by a psychiatrist (where a medical intervention may be warranted), a psychologist (for a comprehensive mental health evaluation) or a neuropsychologist (to determine a client's functional cognitive capacity where there is a history of head trauma).

Of course, marrying the legal field with that of psychology and psychiatry will always be fraught with potential conflict as the objectives of the two fields are necessarily distinct. The attorney "is given the charge of representing his or her client and their side of the case, with all of the resources they can bring to bear with the purpose to prevail for their client and [their] side of the legal argument".⁹ The expert witness's purpose is to "determine the examinee's status as accurately as possible, whether or not the conclusions advance or compromise the examinee's interests".¹⁰ And while the reliability of psychiatric and psychological diagnoses can vary in reports, the key to minimising bias comes in the way the expert is instructed. ●

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