

The Skills and Credibility of Botswana Mental Health Expert Witnesses: Opinions from the Botswana Legal Bench

Morekwe Selemogwe
University of Botswana
Psychology Department
P/ bag 00705, Gaborone, Botswana
E-mail: selemogwe@mopipi.ub.bw

Abstract

The credibility of mental health expert witnesses is one of the topical issues within the legal community as a result of questionable ethical conduct of some mental health professionals. To address this issue, the current study examined criminal lawyers', magistrates' and judges' opinions about the skills and the credibility of mental health expert witnesses. The study used a convenience sample of 35 participants. The majority of the respondents opined that mental health experts demonstrate their mental health expertise however the participants reported that expert witnesses lack knowledge of the legal criteria relevant to the evaluations that they conduct. Furthermore, the results suggest that the credibility of some expert witnesses is questioned by some members of the legal community. The findings of the current study underscore the need for formal forensic mental health training for expert witnesses and call for further research on forensic mental health practice in Botswana.

Keywords: skills, mental health, expert witness, lawyers, credibility, Botswana

Introduction

The legal community has expressed concerns regarding the credibility of some mental health expert witnesses and some have even questioned the role of mental health expert testimony in judicial proceedings (Edens, Smith, Magyar, Mullen, Pitta, & Petrila, 2012; Mossman & Kapp, 1998; Otto, 1989). There are several reasons why mental health experts' conduct can raise ethical questions (Swanepoel, 2010) and expert bias has been cited as one of the major factors that contribute to the legal community's doubts and questions about mental health expert testimony (Dattilio, Commons, Adams, Gutheil, & Sadoff, 2006). Moreover, mental health professionals have also acknowledged professionals' expert bias as a major ethical challenge in forensic mental health practice (Commons, Miller & Gutheil, 2004). Ethical conduct of some mental health expert witnesses has resulted in these experts being viewed as "court whores" or "hired guns" (Mossman, 1999). Consequently, several commentators have illuminated on different factors that contribute to some of the ethical challenges within forensic mental health practice and have highlighted ways to address these challenges (e.g. Greenberg & Shuman, 1997; Shuman & Greenberg, 2003; Roger, 1987; Woody, 2009).

Ethical dilemmas can arise when mental health professionals accept referrals that are not within their scope of practice (Rogers, 1987) and when they engage in multiple roles (Shuman & Greenberg, 2003). In order to avoid role conflict, mental health professionals should be cognizant of the roles that they can play in legal proceedings and clearly define their roles when working in the legal arena (Woody, 2009) which according to Greenberg & Shuman (1997) is either a treating expert witness or forensic expert witness role. Furthermore, another factor that contributes to mental health evaluators' ethical dilemmas is the evaluator's emotional investment in the legal outcome (Murrie & Warren, 2005). The authors explain that the evaluator's proclivity to align themselves with the retaining attorney's cause contributes to the evaluator's emotional investment in the legal process although this process might be unconscious. In addition, the evaluator's moral values can contribute to one being emotionally invested in the legal outcome of the case (Shuman and Greenberg, 2003) given that a person's moral theoretical framework guides how one evaluates alternatives when presented with an ambiguous situation that calls for ethical decision-making (Fisher, 2003).

Contrary to what many commentators have highlighted as problems that arise when forensic mental health expert witnesses become vested in the retaining attorney's advance, Lolyd (1990) believes that the role of mental health professionals evaluators encompasses advocating for the client and as such evaluator's objective has to be aligned with the objective of the retaining attorney. Furthermore, Lloyd states that psychologists misunderstand their role in the adversarial arena and hence are unwilling to accept the fact that most lawyers hire them solely to help them build a strong case against the opposing side. Similar to opinions expressed by Lody, Heltzel (2007) highlights that the adversarial system does not expect neutrality or independence from expert witnesses but requires evaluators to be honest. Heltzel exemplifies his point by stating that two expert witnesses in the same field can have different opinions, which he states can be attributed to the different sources that the evaluators utilize and not necessarily the independence that the court gives to the expert witnesses. Noteworthy is that Gooden and Walton (2006) point out that opposing expert testimonies have negative impact in assisting the trier of fact because the trial might shift its focus to the battle of the two offered testimonies.

To address ethical and moral dilemmas that mental health expert witnesses encounter in forensic mental health practice, Greenberg and Shuman (1997) suggest that evaluators should question themselves if they could have reached the same conclusion if the legal system did not exist. Furthermore, specialty guidelines have been developed to guide the practice of forensic mental health and address the challenges that may practitioners encounter (Committee on Ethical Guidelines for Forensic Psychologist, 1991). Of significance is that Knapp, Gottlieb, Berman & Handelsman (2007) note that laws that govern mental health practice and the teaching of psychology come from a variety of sources and the uniformity between ethical and legal requirements make it possible for psychologists to execute their function with much ease.

In light of the above discussions, the current study examined the opinions of lawyers, magistrates and judges in regarding the skills and credibility of mental health expert witnesses who they have worked with in criminal cases in Botswana. The study was undertaken to address the scarcity of forensic mental health research in the country. Even though the judiciary has always sought expertise of mental health professionals dating back to the 1960's, no systematic investigation has been undertaken yet to establish the credibility of mental health professionals and their skills and knowledge of the legal criteria relevant to the evaluations they conduct. The current study which was exploratory in nature was guided by the following research questions:

1. What are the opinions of the legal community regarding mental health expert witnesses' knowledge of legal criteria relevant to mental health evaluations?
2. Do judges, magistrates and lawyers find mental health expert witnesses credible?
3. What are the views of the legal community with regards to the characteristics of a proficient forensic mental health expert?

Methodology

Subjects

The study utilized a convenience sample and the participants were drawn from the Botswana Law Society, Department of Public Prosecution and the Administration of Justice Department. The sample consisted of 35 participants some of who were lawyers, magistrates and judges.

Instrument

Data was collected using a questionnaire that was developed by the researcher which was informed by literature review on forensic mental health practice and a survey about expert witnesses in criminal cases developed by Leslie, Young, Valentine and Gudjonsson (2007). The questionnaire consisted of demographic questions and statements relating to participants' opinions about the credibility of mental expert witnesses, characteristics of an excellent mental expert witness and their opinions about experts' knowledge of the legal criterions relevant to the different forensic mental health evaluations. The participants were required to indicate their level of agreement with the statements using a 5 point Likert scale (1= being strongly agree, 2 = agree, 3= neither agree nor disagree, 4= disagree and 5 = strongly disagree). The results of the study yielded a Cronbach's Alpha of .846, which indicates that the questionnaire had good internal consistency.

Data analysis

Descriptive statistics and Mann-Whitney U test were used to analyze the data. Mann-Whitney U test was used to examine if there were any gender differences among participants with regards to their opinion about mental health expert witnesses' skills, knowledge and credibility.

Results

Participants

The sample consisted of 20 (82.2%) prosecutors, 9 defense attorneys (25.7%) and 3 judges and 3 magistrates (17.2 %). Of the 35 participants, 68.6% were males and 31.4% were females. 46% of the participants indicated that they have been in practice for more than ten years. In addition the results showed that more than half of the participants (51.4%) reported to having used more than 20 mental health evaluation reports in their practice.

Participants' Opinions

Skills and Experts' Knowledge of Legal Criteria

A majority of the participants (74.3%) indicated that all mental health expert witnesses they have consulted with demonstrated their mental health expertise. However, the judges' responses were uniform as compared to magistrates and lawyers opinions regarding which mental health evaluations were valuable. All the judges indicated that all mental health evaluation reports were valuable regardless of whether the reports were written by psychiatrists or other mental health professionals. When asked if mental health evaluators always demonstrate knowledge of the legal criteria relevant to the evaluations that they conduct, only 48.6% of the participants reported that evaluators do show their understanding of the different legal criterions applicable to their evaluations. Of interest is that the same number of participants also opined that mental health expert witnesses should always answer the ultimate legal questions. With regards to opinions of the trier of facts (judges and magistrates), 1 out of the 3 judges in the study was of the opinion that witnesses should answer the ultimate legal question. As for the 3 magistrates, their responses were varied; 1 opined that mental health experts should address the ultimate legal question, 1 neither agreed nor disagreed with the statement and the other one disagreed with the statement. The attorney's opinions on the issue was also not uniform; half of the prosecutors and the defense attorneys believe that mental health expert witnesses should address the ultimate legal question to help the trier of facts and the half either indicated reported that they neither agreed or disagreed with the statement.

Credibility of Expert Witnesses

Of the 35 participants, 16 (45.7%) either agreed or strongly agreed that all the mental health expert witnesses who testify in Botswana courts are credible. 37.1% of the respondents neither agreed nor disagreed with the statement and 17.1% disagreed with the statement. Furthermore, slightly more than half of the respondents (54.3%) agreed that being court appointed or being retained by an attorney do not influence the evaluators' objectivity. Additionally, there was significant difference between males and females opinions with regards to the objectivity of court vs. lawyer appointed mental health expert witnesses ($z = -2.223$; $p = .30$). Only 2(18%) of the females agreed that both court and attorney retained experts are impartial as compared to 12 (50%) of the men who agreed with the statement. Along the same theme of expert witnesses' objectivity, the majority of the respondents (82.8%) either disagreed or strongly disagreed with the statement that said mental health witnesses should take the side of whoever retained them when offering their opinions or testimony. When asked if they preferred certain mental professionals as expert witnesses over others, the majority of the respondents (80%) indicated that they have no preference and this finding is consistent with 80% of the participants' responses that illustrated that both psychiatrists' and psychologists' reports are valuable to the legal community.

Characteristics of an Excellent Mental Health Expert Witness

91.4 % of the respondents opined that being impartial makes one an excellent mental health expert witness. In addition, 88.6% of the respondents considered mental health experts who use simple language with less clinical jargon when giving evidence as excellent witnesses. Finally, all of the participants consider mental health experts' ability to provide evidence that supports their findings and recommendations as a key trait of an excellent mental health expert witness.

Discussions

Findings show that the majority of the participants opined that mental health expert witnesses in Botswana demonstrate their expertise in mental health however the opposite is true with regards to their competency to address the legal criteria relevant to the evaluations that they conduct. Less than half of the participants reported that the experts' evaluation reports do not show the evaluators' knowledge of the legal criteria relevant to the evaluations. These findings point to the fact that some mental health evaluators do not normally address legal standards in their reports, which according to practitioners (e.g. Melton et al., 2007; Nicholson & Norwood, 2000) is critical in forensic mental health evaluation process. Important to point out, is that the above noted finding might be attributable to the fact that most mental health expert witnesses in Botswana are psychiatrists who are general practitioners (Sidandi, Opondo & Tidimane, 2011) and practitioners who have Masters in Clinical Psychology who may lack some of the skills required of forensic mental health practitioners such as revealed by the participants responses. However, mental health evaluators' negligence to address the legal standards is not foreign among trained forensic mental health evaluators. This negligence has also been noted in Heilbrun & Collins (1995) study that revealed that some of the evaluators were not consistent in applying the mental state at the time of offense legal standard in their evaluation reports.

In Zapf et al., (2004) study, almost all mental health examiners failed to address some components of the competency legal standard. Of interest is that almost half (48.6%) of the respondents in the current study opined that mental health experts should address the ultimate legal question contrary to Botswana law. Similarly, in Redding, Floyd & Hawk (2001) study, judges, prosecutors and criminal defense attorneys in Virginia also were interested in the experts' opinions on the ultimate legal issue. The same observation was also noted in Allan & Louw (1997) study, which revealed that majority of South African jurists expect psychologists to express their opinion on the ultimate issue in criminal responsibility and child custody evaluations. However, according to Allan & Louw, in South Africa the ultimate opinion rule does apply and so this expectation is warranted unlike in Botswana. Furthermore, findings of the current study also speak to the existing controversy about mental health evaluators addressing the ultimate legal question. Some experts believe that it is outside the scope of forensic mental health practitioners to address legal matters (e.g. Grisso, 1986). One issue that appears to fuel this debate within forensic mental health field is that in the United States of America, some jurisdictions such as Florida as noted by Christy, Douglas, Otto, & Petrila (2004) and some countries such as Australia (Large, Neilssen & Elliott, 2009) and South Africa (Allan & Louw, 1997) do require or expect mental health professions to address the ultimate legal questions.

As for the credibility of mental health expert witnesses, less than half of the respondents opined that all witnesses are credible and some of the respondents viewed some of the evaluators as not credible. In addition, half the respondents' responses illustrate that court appointed and experts privately retained by lawyers are equally objective in rendering their opinion to the courts. However, only 2 of the female participants agreed that all experts are all objective regardless of whether they are court appointed or retained by a private lawyer. The majority of the respondents also agreed that mental health expert should be objective and should not align their testimony to fit the objective of their retaining attorney. South African jurist have also expressed similar sentiments (Allan & Louw, 2001). The opinions expressed by the majority respondents of this study, refutes Lolyd (1990)'s claims that most attorneys expect psychologists they engage to align their psycholegal opinion with their position to help them obtain the best legal outcome. Furthermore, being impartial was reported by the majority of the participants as one of the factors that make one an adept mental health expert witness.

The majority participants also reported that using simple language when giving evidence and providing data that supports the findings articulated in the report are elements that define an excellent mental health expert witness. Respondents' opinions of what makes an excellent expert witness are consistent with criminal barristers' opinions in Leslie, Young, Valentine & Gudjonsson (2007) study.

Conclusions and Recommendations

From the discussions above, it is clear that respondents view mental health experts as knowledgeable in mental health issues but not conversant in forensic mental health evaluation process. Similar to assertions made by Mossman & Kapp (1998), the credibility of mental health experts is doubted by some members of the legal community in Botswana.

Furthermore, consistent with what scholars in forensic mental health profession have expressed, participants opined that mental health expert witness should be objective and impartial regardless who has hired them. Additionally, the use of plain language and providing evidence that supports evaluators' opinions were deemed essential to proficient forensic mental health expertise.

The findings of the current study also show that despite the fact that the legal community is cognizant of the legal standards regarding expert testimony, they expect mental health expert witnesses to address the ultimate legal questions. This finding warrants future studies to investigate how expectations such as expressed by the participants in this study impact mental health expert professionals' ethical conduct given that answering the ultimate legal question is outside their scope of practice. In sum, the results of the study do speak to the need to provide forensic mental health training for mental health expert witnesses in Botswana and to conduct more research on forensic mental health practice.

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