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THE ATTITUDES OF ADVOCATES TO PSYCHOLOGICAL TESTIMONY IN COURT

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A dissertation submitted to the faculty of Arts, University of the Witwatersrand, Johannesburg for the Degree of Master of Art (Clinical Psychology).

Johannesburg

June 1991

DECLARATION

I hereby declare that this research report is my own work. It is being submitted for the degree of Master of Arts (Clinical Psychology) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at any other university.

JP Annecke

9/7/91
Date

DEDICATION

To my dear long-suffering mother who has somehow retained her faith in me.

ACKNOWLEDGEMENTS

Every single word of this has been like blood from a stone. Unfortunately, not only my blood has been spilled and I owe thanks to a number of people.

Firstly to Gill Eagle for her tireless efforts to keep the show on track. The clarity of her quiet, firm supervision kept the show moving despite my best efforts to derail it. In this regard Lloyd Vogelman also deserves many thanks and much appreciation.

Then there are countless other walking wounded who threw themselves into the fray apparently heedless of the cost. These include Jane Newcombe, Mark and Karen Forshaw, as well as Jan Vermeulen and Terry Annecke. Also, thanks are due to Antony Mouleman for setting the example which showed me that everything does in fact come to an end.

In addition, it is customary at this point to tell a pack of lies about how supportive and encouraging one's partner has been, and how much s/he helped. I can only say that I don't know what Guizelle did, but, despite provocation, she did not kill me.

Finally, it must be noted that this research was made possible by financial assistance from the Human Sciences Research Council.

Notwithstanding the considerable help acknowledged, opinions expressed and conclusions reached are those of the author and are not the responsibility of any person or organization mentioned above.

ABSTRACT

The literature in this area suggests that the legal profession has inconsistent, contradictory and essentially ambivalent attitudes towards psychological testimony in court. This study seeks to begin to an exploration and description of the attitudes of a subsection of that profession, viz advocates, to psychological testimony in court. Survey sampling techniques were appropriate and a questionnaire was developed by the researcher. This was distributed to all the advocates in Innes and Schreiner Chambers. The responses were analyzed using descriptive statistics including a content analysis of open questions. Results show that advocates attitudes to psychological testimony in court were also inconsistent, contradictory and essentially ambivalent. Suggestions for future research are made.

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CHAPTER 1

INTRODUCTION

The relationship between law and psychology has received considerable speculative and theoretical attention from both sides of the interface. There has, however, been little empirical work in this field. The present study constitutes an attempt to empirically investigate an aspect of this relationship, viz the attitudes of advocates to psychological testimony in court. As such, it forms part of the ongoing work which seeks to address the areas in which law and psychology do not engage each other effectively.

Following Appelbaum (1984), this may be productive for at least two reasons;

i) psychologists may come to understand more clearly the nature of the forces that effect their forensic practice;

and ii) as a result of this increased awareness, they may be better equipped to serve both their own and their clients' interests.

The forces acting upon psychologists in court are such that many "have returned from a first, ten dive foray, sworn never to return" (Ewing, cited in PSI Monitor, 1990, p7). Psychologists generally do not fare well in court and are often embarrassed, ridiculed, and contemptuously ignored (Lambert, 1981). These difficulties are greatly aggravated by the fact that psychologists often get poor publicity as a result of their court appearances. This is a serious problem since "there are few areas in psychology where the activities ... of the psychologist are subjected to as much limelight as that of forensic psychology" (Louw cited in PSI Monitor, 1990, p7).

Bersoff (1966) as well as Monahan and Loftus (1982) note that such ramifications are often the result of whether the courts are approving or

disparaging of psychological testimony. More significantly, Monahan and Walker (1988) suggest that the attitudes of advocates toward psychological testimony are particularly important to investigate. This is because advocates have a crucial role not only in regulating what testimony reaches the court, but also the tone in which it is heard.

Expanding Appelbaum's second point, DeLeon, O'Keefe, Vandenbos and Kraut (1982) contend that to serve its interests in the future, psychology must become an agency that contributes to society and social change. They contend that psychology must reach out beyond the limits of academia and engage constructively and productively in the arena of public policy. In clear agreement, the Task Force on Psychology and Public Policy (1988) suggests that the "psychology for its own sake" approach has cost the profession considerable support amongst legislators, clients, and the general public.

Since the courts are an important instrument of public policy, they may serve as a conduit for psychological influence on public policy decisions. Tremper (1987) suggests that the significance of psychology's impact on public policy via the courts is influenced to a considerable extent by the reception that psychological evidence receives in court. Indeed, Snyderman and Rotham (1987) confirm that "Public opinion and policy are influenced by the perception of expert opinion" (p137).

In addition, Tremper (1987) argues that the reception of psychological evidence in court also has important implications for the psychological profession. Insofar as it is positively received psychological evidence may be a powerful means of promoting public policies that are consonant with the goals of psychology as a discipline. This may occur, for example, by shaping the courts' rulings on the definition of standards of professional care.

Further, White and White (1981) give the example of the courts' upholding of patients' constitutional right to refuse psychotropic medication. It is pointed out that this has important implications for the practice of psychology since psychologists are increasingly involved in the treatment of such patients.

In these terms then, it is apparent that the reception of psychological evidence in the legal process is of great importance. If psychological evidence is well received, the outcome may well be a self-reinforcing cycle of greater judicial reliance on research, more satisfaction amongst psychologists with the increased social utility of their findings, as well as improvements in the research itself (Tremper, 1987).

This being the motivation and rationale for the study, the present research was undertaken within the following framework:

Chapter 2 consists of a review of the literature which addresses the relationship between law and psychology. Since literature which focuses specifically on the attitudes of advocates to psychological testimony in court is virtually non-existent, the attitudes of legal professionals generally are discussed. This provides a context and framework for the present study.

Chapters 3 and 4 present the method and findings of the study. A statement of the methodological procedures involved is made, as well as of the results.

Chapter 5 consists of a discussion of the results of the present study. This is done in terms of the relationship of the results to other work in the field. In addition, the limitations of this study are addressed and suggestions for future research made.

CHAPTER 2

LITERATURE REVIEW

2.1 Historical Overview

2.1.1 The initial contact between Law and Psychology

The relationship between law and psychology emerged in the early 1900s. Psychologists made several tentative efforts to demonstrate the valid, reliable and practical use to which psychology could be put in the courtroom. Lloyd-Bostock (1981) suggests however, that it was the publication of Hugo Munsterberg's On The Witness Stand in 1908 that made the first dramatic impact on the emerging relationship between law and psychology. Munsterberg claimed that psychology could be as useful to the courts as the other forensic sciences and he berated the courts for their slow appreciation of this. He further accused them of using "the most unscientific and haphazard methods of common prejudice and ignorance when a mental product, especially the memory report of a witness, is to be examined" (cited in Lloyd-Bostock, 1981, p5).

Legal professionals reacted sharply in the person of John Wigmore who began a libel action against Munsterberg on behalf of the legal profession. Wigmore showed that Munsterberg's claims for psychology were greatly exaggerated, and he criticized Munsterberg for unjustly admonishing and accusing the legal profession. Wigmore argued that not only was psychological evidence of questionable relevance to the courts, but that it was a new field that had not stood any test of time as yet (Lipsitt, 1984). That Wigmore's adversarial reaction represented a victory and vindication for law is captured by Cairns's comment on Wigmore's repudiation of Munsterberg and his claims for psychology: "(Wigmore) destroyed Professor Munsterberg's rash and presumptuous little book mercilessly, effectively completely" (cited in Lloyd-Bostock, 1981, p15).

As will be seen below, the interaction between law and psychology from this point became a process of rapprochement with peace-making overtures being made from either side.

2.1.2 The 1920s - 1960s

Unable to overcome Wigmore's criticisms, and intimidated by the reaction to Munsterberg, psychologists' withdrew from the courtroom and their efforts in the area became largely expository in nature (Lipsitt, 1984; Lloyd-Bostock, 1981; Tapp, 1969). The decades up to the 1960s can be seen essentially as a period of stagnation as far as psychology's contribution to the relationship with law is concerned (Tapp, 1969).

The total collapse of the relationship between law and psychology was averted by the advent of legal realism. Legal realists called for social scientific data which would inform legal decision-makers of moral and social assumptions underlying their decisions, the implications of their decisions, and the best means of achieving public policy goals. (Melton, 1987c; Melton, Monahan & Saks, 1987; Task Force on Psychology and Public Policy, 1986). However, they seriously underestimated the complexity, cost and duration of psychological research, and by the 1950s collaboration with anthropology, sociology and political science was found to be more productive than with psychology (Melton, Monahan & Saks, 1987; Tapp, 1969; 1976).

It is apparent that Munsterberg's claims gave rise to greatly raised expectations of psychology within the legal community despite Wigmore's decimation of those claims (Lloyd-Bostock, 1981). The result was that when psychology failed to deliver on its promises, the legal profession became dissatisfied and disillusioned. Further, implicit in Munsterberg's assertions, is the notion that the successful application of psychology in law was a

simple exercise which could be readily undertaken. The legal realists soon found that this was untrue and so felt that their optimism was betrayed (Lloyd-Bostock, 1981). In addition, legal professionals were also disappointed, resentful and angry at psychologists' retreat from the legal arena, and their consequent failure to fulfill their role in the relationship between law and psychology (Tapp, 1969; 1976).

The disappointment and dissatisfaction with psychology as a result of these unfulfilled promises is important because it is here that much sceptism towards psychology may originate. It is possible that legal professionals have adopted a "once bitten, twice shy" position and become resistant to any new advances by psychology into the legal field. Lloyd-Bostock (1981) points out that the result of the unfulfilled promises and exaggerated claims by psychologists has been that the legal fraternity tends to perceive psychology in terms of extreme, dismissive and misleading stereotypes.**

2.1.3 The current situation

Since the 1960s there has been a remarkable shift and the two disciplines have become inextricably entwined. This is demonstrated by the formation of many joint associations (eg, the American Psychology-Law Society) and by the increasing number of interdisciplinary conferences (Lloyd-Bostock, 1981; Tapp, 1976). The closer involvement is also seen in the profusion of journal articles aimed at the interface of the two professions, as well as in the greatly increased demand for forensic psychological services during the last 20 years (Melton, Monahan and Saks, 1987; PSI MONITOR, 1990).

**This tendency is reproduced in the present study since the intention is to accurately reflect the attitudes of advocates to psychological testimony in court. The literature's use of "psychology" and "psychologists" without qualification as though they are homogeneous categories is therefore followed.

The forces motivating this change are not clear. Increased private and state support of behavioural scientists' research into law, as well as the development of centers for the study of law and society, have been cited as important influences (Tapp, 1969). In addition, Melton, Monahan and Saks (1987) argue that an important factor was a movement away from the legal realists' position which employed social science as part of a theory of social change. By the 1980s psychology came to be seen "as an analytic tool in the law, familiarity with which may enhance the practicing lawyer's effectiveness and sharpen the legal scholar's insights" (Melton, Monahan & Saks, 1987, p502). This is a deliberately applied approach that asks that psychologists investigate the assumptions about human behaviour that underlie the law, and examine whether and how the psychologist's data might be incorporated into legal decision-making (Melton, Monahan and Saks, 1987; Saks, 1989).

A wide range of psychological expertise is currently at the courts' disposal. Those most frequently involved are clinical, educational, cognitive, social, and neuro- psychologists. More recently, occupational psychology has become important in discrimination cases. There are three general, and possibly overlapping categories within which a psychologist can give evidence in court. These are, firstly, in situations where data are specifically generated for the case concerned via experiments or other investigative procedures. Secondly, the psychologist may act in a clinical role either independently or in conjunction with a psychiatrist or medical doctor. And thirdly, the psychologist may present evidence on an aspect of a particular case based on the existing psychological literature. (Lloyd-Bostock, 1981.)

Within these three categories there are two types of fact that can be addressed by the psychologist as an expert witness (Monahan and Walker, 1986). Firstly, there is "adjudicative fact" which refers to facts that are relevant only to the immediate parties to a lawsuit, such as whether a

particular traffic light was red or green. Secondly, there is "legislative fact" which refers to facts that were used by courts to help decide questions of law or policy, such as the rights of adolescents to abortion. Monahan and Loftus (1982) refer to these as "case facts" and "social facts" respectively, and suggest that legal professionals are becoming as receptive to psychologists as purveyors of social fact as they have been to their testimony on case facts.

However, "receptive" is not an uncontested term: the actual impact of psychological testimony on legal decision-making may be impossible to gauge. Loftus and Monahan (1980) graphically demonstrate this problem: in a unanimous US Supreme Court decision several justices said that they based their decision on social psychological research, several others dismissed the research as "numerology", while the remainder did not address the scientific issue at all.

In the face of this kind of inconsistency, it is difficult to know what to make of legal professionals' repeated calls for increased psychological involvement in the legal process. As Tapp (1969) bluntly asks, "Is the call for more and better social research a verbal ploy? An intellectual nod? A grudging acknowledgement of need?" (p19).

2.2 Factors That Confound The Reception Of Psychological Testimony

2.2.1 The courts' agenda

The question of the receptivity of psychological testimony can be usefully addressed using Appelbaum's (1984) analysis of the US Supreme Court's attitudes towards psychiatry. Although the focus is on psychiatry and psychiatric evidence, important themes apply to the present study. This is because "the professions are probably interchangeable from the Court's perspective (and) the Court's opinions about psychiatry will undoubtedly

influence its future decisions about other professions as well" (Appelbaum, 1984, p834).

Appelbaum (1984) demonstrates that the Court, and individual members thereof, display a profound ambivalence towards psychiatric evidence. They vacillate from being deriding and sceptical, to being warmly embracing. He argues that this variability indicates that the attitudes expressed in Court opinions are simply epiphenomena reflective of more basic issues, and that the Court's inconsistency is explicable in terms of serving a transcendent ideological goal. Appelbaum (1984) concludes that:

> Although the Court in general exhibits an underlying skepticism about psychiatry, that skepticism is magnified when to do so provides a justification for the Court to restrict judicial activity in the mental health area. Conversely, when the purposes of judicial restraint are better served by extolling psychiatric abilities, the Court, and especially the Chief Justice, display few qualms about changing their tune (p831).

Campbell (1981) implicitly agrees with Appelbaum's interpretation, but he suggests an alternative goal that the courts may be pursuing. He shows that on the one hand the courts are willing to discount or devalue psychiatric pre-sentence recommendations for lenience or lenience-related dispositions (specifically, non-custodial dispositions). On the other hand, however, the courts seldom hesitate to accept recommendations for long custodial dispositions or treatment recommendations that entail close security. It is thus implied that the courts' attitude to the evidence of mental health experts is regulated by its conservative stance on the issue of lenience.

It is probable that the court has many different goals. But important for the purposes of this study is that this kind of analysis suggests that psychiatric

action in court is irrelevant because there are larger issues at stake. Not only does the court's agenda transcend psychiatry, but the court is willing to tailor its image of psychiatry in whatever way is useful in fulfilling its own goals. As a result it makes little sense to hope, as many psychiatrists do, that, "if psychiatrists could persuade the justices of their noble intent, their moral probity, and the scientific and medical bases of psychiatric care, the Court would find itself compelled to rule favorably on psychiatric claims" (Appelbaum, 1984, p834). By extrapolating from this argument it is possible to conclude that an important factor mediating the reception of psychological testimony is the extent to which it conflicts with the goals of the court.

The problem with Appelbaum's and Campell's analyses, is that in reducing the vacillating attitudes of the justices to epiphenomena, they are rendered null and void as though they have no foundation in reality. It is possible that the justices' inconsistency and ambivalence are due not only to a wish to limit judicial involvement in the mental health field, but also to the inconsistent quality of the evidence per se. In expressing the hope as stated above, it may be that psychiatrists are avoiding taking responsibility for deficiencies in their evidence. This they achieve by locating the responsibility for the ambivalent reception of that evidence in a process purely of law's making and in which they have no role.

2.2.2 Psychologists' perceived arrogance

In a similar fashion to psychiatrists, psychologists also blame legal professionals for the poor reception that they are given in the legal arena. Psychologists are reluctant to engage in the embarrassing process of self-evaluation (Tapp, 1969) which leaves legal professionals frustrated and exasperated. Lloyd-Bostock (1981) expresses this in her complaint that psychologists seldom mention, for example, the substance of Wigmore's criticism of Munsterberg. Rather they just lament Wigmore's hostility which is

attributed to legal professionals' resistance to new ideas. The substance of the criticism is not addressed or taken seriously.

This problem may partly be caused by the tendency amongst psychologists to regard forensic psychology as a unitary entity of uniform relevance and value to legal matters. The reality, in fact, is that it is inconsistent and variable and so warrants criticism from legal professionals (Meehl, 1971). Psychologists have great difficulty in accepting this. Although they have toned down their claims from those made by Munsterberg, they continue "to expect their findings to be regarded as virtual saviours of the integrity of the legal system" (Greer, 1971, p142).

Psychologists suggest that their work ought immediately to be incorporated into the legal system and imply that a "scientifically enlightened court" (Saks and Hastie in Lloyd-Bostock, 1981, p14) would necessarily be a more functional enterprise. Psychologists assume that law, grounded in long-standing traditions, is a non-scientific and therefore sub-standard practice in need of an overhaul. The legal profession perceives this kind of assumption as critical, patronizing and arrogant, and its response is one of frustration, resentment and hostility (Lloyd-Bostock, 1981; Meehl, 1971). This kind of highly charged interchange can clearly be seen as an important factor which confounds the positive reception of psychological testimony.

2.2.3 Psychologists' perceived ignorance

As implied above, psychologists are perceived of as uncritical of their own work, and of naively leaping too quickly to conclusions about the legal relevance of their work (Tapp, 1976). Cottrell decries "the abysmal illiteracy and irresponsible neglect on the part of most social scientists concerning the legal system" (cited in Tapp, 1969, p22). Greer (1971) also argues that a limited view of legal objectives is an important reason why attempts to apply

psychology in the legal arena have generally not been welcomed. Much of the psychological research into law is seriously criticized by legal professionals for either taking legal rhetoric at face value, or for adopting a naively rationalist view of the law. Little attempt is made by psychologists to appreciate the intricacies and complexities of legal procedures in, for example, eliciting testimony (Lloyd-Bostock, 1981).

A good example of psychologists overvaluing their work and making uninformed assumptions about the legal system is provided by the research on eyewitness testimony. A recent upsurge of interest in this area has confirmed Munsterberg's findings concerning the dubious accuracy of eyewitness reports. Based on this research the inference is made that the courts place too much confidence in eyewitness evidence, and pressure is brought to bear on law to rectify the situation (Webster, 1984).

This is a clear example of the legal system being discredited by psychologists through irresponsible ignorance: the complex legal procedures for checking and cross-checking testimony are disregarded in making this inference. As McCloskey and Egeth (1983) point out, "there is virtually no empirical evidence that people are unaware of the problems of eyewitness testimony" (p551) and no reason to suppose that too much weight is placed on such evidence. Indeed, quite the contrary appears to be the case: in England the 11th Report of the Criminal Law Revision Committee recommended that judges be required to warn juries of the dangers of eyewitness testimony since mistaken identification is "by far the greatest cause of actual or possible wrongful convictions" (cited in St Q Skeen, 1987, p297). In addition, Tredoux and Tredoux (1988) quote a South African case in which the "court made it clear that it was extremely sceptical of the reliability of eyewitness testimony" (p108). Small wonder then, that legal professionals feel unjustly accused. Again it can be seen that the action of psychologists provokes a

response from legal professionals that is unlikely to assist in the positive reception of psychological testimony.

2.2.4 Psychologists' perceived moralism

2.2.4.1 Psychologists' Explicit Judgements

Another area in which legal professionals feel themselves inappropriately under pressure from psychology is around the issue of values in the formulation of public policy. Hatch (1982) voices serious doubts about the motivation and scientific basis of psychological input in questions of public policy. For example, Hatch (1982) notes the Humanist Movement's declaration that traditional theism, and especially faith in a prayer-answering God, is an unproved and outmoded faith. Here, he argues, psychologists are not acting in terms of their scientific framework, but are rather bolstering value-laden pronouncements with the gloss of science.

Hatch (1982) is categorical in his view that public policy decision-makers look to the social sciences for unbiased and objective information, and not for political opinion. Bazelon (1982) and Brahams (1982) also argue that psychology should restrict itself to providing the legal system with information that can inform the legal decision-making process. Hatch (1982) goes on to argue that in not upholding this practice, psychology has cost itself considerable credibility. Some decision-makers consider the findings of psychological research to be predictable from the researcher's political views and so are not at all receptive to psychology in the process of legal decision-making (Hatch, 1982).

The result is that psychology as a whole is discredited and that the attitude of legislators towards psychology becomes increasingly sceptical and wary (Hatch, 1982). Legal professionals are not receptive to law being used as a vehicle for the propagation of psychology's social projects. Meehl (1971) also

concludes that it is not surprising that attempts to pass moralism off as science are regarded with contempt by the legal fraternity.

2.2.4.2 Psychologists' Implicit Judgements: I

Bazelon (1982), a US Federal Judge, argues that the main problem that psychologists in the public arena must address is their failure to be truly open with their audience. He contends that psychologists omit any real discussion of, for example, preliminary observations or methods of inference, and leave the court with a bald assertion of (supposed) fact that cannot be digested by the legal process. This process is multi-dimensional and has to balance scientific, social and moral judgements. Psychologists tend to by-pass the legal decision-making process by relying on conclusory pronouncements.

Bazelon's (1982) implication that this provokes resistance towards psychological testimony from legal professionals is perfectly clear. South African judges are equally fearful of the "danger" of experts usurping the function of the court, and are concerned that relying on the recommendations of mental health professionals is equivalent to "letting advocacy creep into evidence" (Cumes and Lambiase, 1987, p124). Brahams (1982) a practicing barrister in London, is also concerned to protect the autonomy of the court and cautions against the "unnecessary proliferation of expert witnesses" (p122). Brahams (1982) argues that the legal process has within it the mechanisms necessary to gauge the reliability of testimony given in court, for example. Psychological testimony which contains a conclusion tends to be seen as passing judgement where psychologists have no jurisdiction, and as encroaching upon the jurisdiction of the courts.

However, it is important to note a strong opposing tendency in court which traps the forensic psychologist in an impossible situation. Bazelon (1982) concedes that "Public decisions are often so close to impossible that those

charged with making them are more than anxious to pass their burden to unwitting experts" (p118). According to Lambert (1981) this burden is all the more likely to be accepted since to refuse it exposes the expert to the embarrassment of ridicule, contempt, or of being ignored.

2.2.4.3 Psychologists' Implicit Judgements: II

Bazelon (1982) also complains that even in cases where psychologists do expose the facts underlying their conclusions, they tend not to expose the values underlying their choice of facts. He argues that in so doing psychologists again usurp the court of its full decision-making power since it is not being given all the relevant information. Further, he claims that psychologists are reluctant to admit to uncertainties, limitations and divisions of opinion that may exist concerning their research findings, and continually try to present their particular results as the sole version of the truth. Meehl (1971) quotes the example of the Coleman Report which flatly states that intelligence tests do not measure more stable and more general mental abilities than achievement tests. No hint is given of the complex, controversial, obscure and highly technical issues that surround this statement. Again, this usurps the court's decision-making position since it is prevented from having all the required information at its disposal.

As Meehl (1971) points out, "the powerful forces of the lawyer's adversary system will, sooner or later, ferret out the secret" (p83) at which point it should come as no surprise that the testimony is treated with little respect. It is far more productive to hear the full debate being aired so that a fully informed decision can be made (Bazelon, 1974, 1982).

It is apparent that the receptivity of psychological testimony is reduced if that testimony is seen to be usurping the function of the court. As shown by Brahams' (1982) comments, it is not only judicial officers that respond in

this way, but counsel as well. This is so whether the process occurs via psychologists being morally prescriptive, or if it occurs via psychologists curtailing the courts' capacity to make fully informed decisions.

This discussion begs the question as to what the appropriate role in court for a psychologist, or any expert witness, is. The problem is especially acute when the expert is giving his/her opinion on a particular matter. This is bound to occur frequently as there are few issues in science that are established as fact from which only one inference can be drawn (Klatzow, 1985).

2.3 The Expert's Position In Court

In general opinion evidence is not relevant in court since it lacks probative value. An expert witness, however, is recognized by the court as being particularly knowledgeable in particular areas, and so able to give reliable evidence within those areas. On the basis of this expertise s/he is also permitted to give his/her opinion on matters within those areas (Gothard, 1989). The proper function of an expert witness "... is to guide the court to a correct decision on questions falling within the (expert's) specialized field" (van der Merwe, Morkel, Paizes and St Q Skeen, 1983, p100). This "guiding" of the court is, however, not a simple matter and it relates to the usurping of the court's decision-making function.

Van der Merwe et al (1983) suggest "...that there is in principle no rule that a witness cannot give his opinion on an issue that the court has ultimately to decide" (p99). The expert may express an opinion on an ultimate issue if this evidence would be of material assistance to the court. The court is, however, not bound by such an opinion and may over-ride it in its ruling. Thus, as far as van der Merwe et al (1983) are concerned, there is no necessary tension between the expert giving an opinion and the formulation of the

court's ruling: the court may be guided entirely at its own discretion. In these terms the problem of the expert witness usurping the court's role does not raise itself significantly.

Paizes (1989), however, argues that whilst this may be accurate ideally and theoretically, the issue is considerably clouded by the two rules that govern the real and practical operation of expert opinion evidence. The first rule is that a witness cannot usurp the function of the court by passing an opinion on the question that the court has to decide upon. The second rule is that a witness may pass an opinion on a matter if s/he is better qualified than the court to form that opinion. Paizes (1989) claims that "...in effect, if not in theory, (t)hese 'rules' tend to propel one in opposite directions" (p473). The rules have a conflictual relationship insofar as the more technical and obscure the subject of a witness's testimony, the more necessary and helpful his/her opinion will be. However as this occurs, the court is simultaneously being forced to depend on the expert's opinion more and more, so the likelihood of the witness usurping the court's authority and autonomy increases.

It is important to note that there are areas in which this tension does not operate significantly. The most obvious of these are with regard to competence to stand trial and commitment proceedings. Studies have repeatedly shown that in these areas legal professionals have given over their authority to psychologists (and other mental health professionals) and for all practical purposes encourage their conclusory pronouncements. Judges tend to rubber-stamp the decisions that psychologists have reached somewhat uncritically, while counsel tends not to contest these decisions in court (Dershowitz, 1969; Hicay, 1983; Monahan and Loftus, 1982). Poythress (1978) shows that even training attorneys in techniques for challenging mental health professionals does not increase the likelihood that they will do so.

Generally though, experts in court are in an invidious position which is built into the very structure of court procedure and rules of evidence. Experts are invited to give their opinion but this can be very threatening to the court's authority and autonomy. To protect itself, the court reserves the right to ignore such opinion if it wishes.

That this issue can degenerate into a struggle around authority is demonstrated by the US Supreme Court's unambiguous insistence that judges are free to rest their decisions on an understanding of the world gleaned from "the pages of human experience" (Tremper, 1987, p497). In addition, the courts insist that they are able to predict dangerous behaviour no matter what the relevant research says (Melton, 1987c). At best, the courts' use of psychological data is highly selective (Melton, 1984; 1987b) and in passing judgement the courts typically do not take notice of relevant psychological research if it conflicts with legal precedent (Lewis, 1987; Melton and Russo, 1987). The courts tend to refer to legal opinion to justify decisions based on "the pages of human experience" (ie commonsense) as if legal precedent establishes the truth of an empirical proposition (Perry and Melton, 1984).

An important supplementary point is that whilst knowledge and expertise in these areas is the domain of psychologists (and other mental health professionals), the legal criteria on these matters are generally formulated by legal professionals (Cumes and Lamblase, 1987). Melton (1987c) as well as Perry and Melton (1984) suggest that this may not be a simple omission on the part of legal professionals, but may rather be an active exclusion of psychological expertise. It is argued that since they believe that legal precedent and "the pages of human experience" provide sufficient basis for legal decisions, legal professionals perceive little need for psychological expertise and so do not welcome it. In addition, the increasing tendency in

psychological research to question and challenge the assumptions underlying legal practices is especially unwelcome (Melton, 1987c).

This state of affairs suggests serious resistance to psychological expertise in court. But it also begs the question as to whether the courts' needs and purposes regarding the establishment of empirical propositions are better served by psychological testimony or by standard legal procedures such as the use of legal precedent. For what reasons would scientific psychology be disregarded in favour of legal precedent based on commonsense? As this is a large area of debate only a few key areas which illuminate this study can be touched on here. A framework for this is provided by the three general categories within which psychologists give evidence in court.

2.4 Does Psychological Testimony Actually Assist The Court?

2.4.1 Unsatisfactory experimentation

On the first category, that of gathering data for specific court cases, the four methods most commonly used are case studies, correlational studies, quasi-experimental research, and true experiments (Monahan and Walker, 1988). It is the last, the use of the experimental method, which distinguishes psychological research from that of the other social sciences and enables psychologists to make a distinctive contribution in the legal arena (Farrington, 1981). It shall therefore be the focus of this discussion.

The experimental method surpasses the other research methods in its capacity to avoid factors that compromise research validity - the extent to which conclusions based on the data can be justified (Monahan and Walker, 1988). This is achieved by the rigorous structure of the research design which tests hypotheses by the manipulation of an independent variable, the control of

extraneous variables, and the measurement of change in the dependent variable (Farrington, 1981; Keppel and Saufley, 1980).

But whilst extraneous variables may be effectively controlled within the confines of an experimental design, they cannot be partialled out of real-life situations. This problem, the external validity of laboratory simulations, can be regarded as "the bedrock methodological issue" (Monahan and Loftus, 1982, p459) confronting psychology's application to law. As Lloyd-Bostock (1981) complains, what is being tested under laboratory conditions "... is likely to be a specific hypothesis about a narrow and peculiar aspect of human behaviour (and) several large leaps are usually necessary if inferences about behaviour in legal contexts are to be drawn" (p21). In short then, the experimental method, psychology's most powerful methodological tool, is hamstrung by its own requirement that extraneous variables be effectively controlled.

More problematic as far as this study is concerned, is that psychologists appear unwilling to be fettered by this difficulty and frequently extrapolate beyond their data. The study of jury behaviour discussed below, has been the focus of much of the debate around psychology's contribution to law, and serves to illustrate the more general issue.

Most jury-researchers conclude that their work has either great practical value in predicting actual jury behaviour, or theoretical value in testing conceptual frameworks important for psychology and/or law (Monahan and Loftus, 1982). Critical reviews by, for example, Vidmar (1979) as well as Welton and Diamond (1979) are less optimistic. Vidmar (1979) concludes that because of the failure to replicate the structure and functioning of actual juries in any meaningful way, the entire area of jury research "can be fairly described as marked by (a) legal naivete, (b) sloppy scholarship, and (c) overgeneralization combined with inappropriate value judgements" (p96).

A good example of this is that many jury studies have omitted jury deliberation time from their design. As such they do not qualify as investigations of jury behaviour, but are rather studies of juror behaviour (Monahan and Loftus, 1982). As Meehl (1971) points out, the fact that legal professionals, untrained in scientific practice, are able to expose this kind of glaring methodological error, is particularly damaging to psychology's credibility.

In considering some of the experimental work on the effects of punishment, Andenaes (1971) makes several similar points. He notes the basic error of overlooking the distinction between actual and threatened punishment, and suggests that while the researchers' "statements about the effects of punishment may or may not be correct in themselves ... they certainly cannot be deduced from the animal experiments upon which they are based " (p28). He concludes that "it is doubtful whether there is any similarity at all, apart from the word 'punishment' to the situation of a human undergoing punishment because he has committed an offense" (Andenaes, 1971, p29).

Clearly there are good reasons for legal professionals to be deeply suspicious of psychology's most important and distinctive tool, the experimental method. The limits of experiments and their abuse are the legal profession's most serious complaints. These problems are not easily overcome: if the limits are adhered to, the results are often of little practical use in court; if they are not, the results are also frequently of dubious value (Andenaes, 1971; Lloyd-Bostock, 1981).

This greatly proscribes the experimental method's range of application and places great limits on its value in the legal arena. Lloyd-Bostock (1981) clearly indicates that if this is the best that psychology's methodological flagship can do, legal professionals are not impressed.

In addition, many legal professionals fail to see any good reason to replace standard legal procedures (such as the use of legal precedent) with a practice as seriously flawed as the experimental method. In fact the reverse occurs: these flaws bring forensic psychology into disrepute and contribute greatly to it being poorly regarded within legal circles. They make legal professionals even more resistant to psychological testimony in court.

These problems are compounded by the fact that psychologists experiment in a very limited area of law. Lloyd-Bostock (1981) points out that for all the effort spent in studying juries, jury trials constitute only a small fraction of legal practice. Monahan and Loftus (1982) postulate that the reason for this may be that the only exposure that many psychologists have to law is via the popular media which emphasizes criminal cases and jury drama. This in itself may be enough to engender antipathy from legal professionals who may well consider it naive, simplistic, or ignorant to ignore the vast and complex areas of law such as tax, torts, and contracts. Changes in tax law, for example, which may redistribute society's resources are likely to have greater social impact than a change in jury size, and so surely warrant considerably more attention from psychologists (Monahan and Loftus, 1982). The legal fraternity is thus likely to further question the real usefulness of psychological experimentation and be dismissive of the trivia that it engages in.

2.4.2 Clinical errors

In their second area of forensic practice, as clinicians, an important role for psychologists is in the administration of psychometric tests (Lombaard, 1988). Whilst the results of psychological tests are generally well received in court (Shapiro, 1984), difficulties arise on at least two counts. Firstly, too much is expected of the tests by legal professionals who do not understand the limits of the tests' objectivity, validity and reliability. The result is

that they get frustrated by psychologists' inability to give definite, exact answers on the basis of the tests (Lombaard, 1988). Secondly, even if the limits of the tests are understood, the psychologist is often placed on the defensive having to defend these limits against attempts to discredit the efficacy of psychological testing entirely (Lambert, 1981).

The fact that psychologists do go beyond the limits of their tests [eg by doing the tests on people for whom they have not been standardized (Lambert, 1981)] brings the clinical skills of psychologists into disrepute, thus making it less likely that legal precedent will be overridden on the basis of this kind of testimony.

Another important clinical function of the psychologist is the assessment and diagnosis of an individual by means of a clinical interview (Lombaard, 1988). A serious problem arises immediately with the not uncommon practice of doing the assessment and diagnosis without the interview. Brahams (1982) quotes the example of a clinical psychologist who diagnosed the accused as psychopathic simply on the basis of observing him in court. This kind of poor practice reflects badly on all of psychology and clearly is deserving of law's contempt. It is unlikely to persuade legal professionals of the reliability and validity of the clinical interview, and makes psychological testimony vulnerable to charges of charlatanism and wizardry (cf Bazelon, 1974).

Interesting to note in this clinical category is that Perlin (1977) suggests that clinical psychologists, because of their non-medical training, are seen as less valuable witnesses than those with a medical background. Later studies, however, have suggested that relevant training and experience are more salient factors in determining the value of a witness (Petrella and Poythress, 1983; Poythress, 1983; Yarney and Popiel, 1988). Yarney and Popiel (1988), for example, report that while legal professionals prefer the

testimony of psychiatrists to that of psychologists on issues of fitness to stand trial, the two are seen as equally valuable on the issue of dangerousness.

This may represent an important shift in law's perception of psychological testimony if only insofar as it may be that legal professionals are learning more about the nature and capacity of clinical psychology, and are becoming less inclined to dismiss it simply because it is non-medical. That this is by no means a uniform trend, however, is demonstrated by the British Court of Appeal unceremoniously dismissing a clinical psychologist's diagnosis simply because it was not medically grounded (Brahams, 1982).

It would seem then that the attitude of legal professionals to psychological testimony based on clinical skills depends on the specific circumstances in which those skills are applied. A properly executed psychometric assessment or clinical interview would generally be well regarded by legal professionals if it were conducted by a psychologist with the relevant experience and training.

2.4.3 Unreliable literature analyses

Finally, when called to summarize, analyze and explicate psychological literature in relation to a particular case, psychologists soon run into trouble. Lloyd-Bostock (1981) articulates three particular difficulties. Firstly, in summarizing research on many subjects psychologists frequently become moral arbitrators as well. For example, with regard to the effects of pornography, psychologists persistently defined pornography itself. In Britain this type of evidence was excluded because in judging what constituted pornographic material, psychologists were acting outside their role and usurping the jury's function.

Secondly, it is arguable that this kind of evidence is not 'expert' in the sense that it requires a psychologist to present it. In many cases a layman

could probably review the literature just as well. This being the perception in legal circles, legal professionals quickly come to regard psychology as uncomplicated, trivial and simplistic.

Thirdly, an important problem is that this kind of evidence is essentially hearsay and so is potentially fraught with error. Tredoux and Tredoux (1988) show how far this can go in their account of how a researcher published an inaccurate account of someone else's experiment. The published account had very different legal implications to the real version. The unwitting expert witness reviewing the literature would be unaware of this, and his/her testimony would be significantly distorted. This kind of 'sloppy scholarship' reflects poorly on the psychological literature. Testimony based on literature that is deemed invalid and unreliable is unlikely to ever compete with legal precedent as a basis for making decisions in court.

It is apparent from the above detailing of significant flaws within each category of psychological evidence, that there are certain clear and valid reasons for legal professionals to be wary of replacing commonsense-based legal practice with psychological testimony. The reasons detailed are perhaps sufficient to account for a large proportion of legal professionals' negative attitudes towards psychological testimony. However, the situation is more complex. The likelihood of psychological evidence being granted the same or higher status as, for example, legal precedent, may be remote for other, very different reasons as well.

2.5 Psychological Testimony Disregarded

These reasons involve the process whereby psychological knowledge does not remain the property of psychology, but rather percolates through to become public knowledge and an integral part of received common sense wisdom (Webster, 1984). The result is that the less disputed a piece of psychological

fact becomes, the less likely it is that psychology will be credited for it (Lloyd-Bostock, 1981). Thus psychologists continually remain vulnerable to law's dismissive complaint that their work is a restatement of common knowledge.

Since psychological knowledge is perceived as being of little more value than commonsense, legal professionals are disparaging of it as having nothing to offer (Lloyd-Bostock, 1981; Webster, 1984). Melton (1986) suggests that psychological testimony will only be positively received by legal professionals if it confirms, or at least does not dispute, their pre-existing commonsense views.

Meehl (1971) refers to "what everybody knows", or "those commonsense empirical generalizations about human behavior which we accept on culture's authority plus introspection plus anecdotal evidence from everyday life" (p66), as fireside inductions. He notes that legal theory and practice rely heavily upon fireside inductions and tend to overlook or ignore relevant psychological evidence and research that conflicts with these inductions. In similar vein, Lambiase and Cumes (1987a) speak of a "functional deafness" (p1340) amongst legal professionals. They claim that if the recommendations of mental health professionals conflict with legal professionals' preconceived ideas, these recommendations would tend to be ignored.

Thus if psychological testimony contradicts a fireside induction it is very likely be disbelieved and dismissed, and if it accords with a fireside induction it is likely to be seen as self-evident and dismissed as nonconsequential. Forensic psychologists therefore are faced with an impossible task in that their contributions to the legal process are bound to be regarded, at best with scepticism, and at worst, as pointless. As a result psychologists have difficulty in accruing to themselves the credibility and respect that would make legal professionals take their testimony seriously.

There is ample evidence to support the claim that psychological testimony is disregarded in favour of commonsense-based legal opinion. For example, Lewis (1987) reports that psychological research does not support the Supreme Court's assumption that adolescents' right to abortion should be restricted on the grounds that they are not competent to make such a decision. This makes age-graded policies on abortion rather dubious (Interdivisional Committee on Adolescent Abortion, 1987). Further, the Supreme Court also assumes incorrectly that adolescents are especially vulnerable to psychological trauma (Melton and Russo, 1987) and that parental involvement is necessarily desirable in decisions about abortion (Melton,1987a). Additional examples include legal professionals' mythical views of childhood and family life (Cumes and Lambiase, 1987; Melton, 1987b, 1987c). Falk (1989), for example, expresses her concern at the courts' unsupported assumption that lesbian women are emotionally unstable or unable to parent children effectively. Finally, Lloyd-Bostock (1981) admits that some of the cruder hydraulic theories of aggression are still current in legal circles.

In this light it is hard to escape the conclusion that psychological evidence does not make a great impact on legal practice in court. This is further confirmed by the frequently occurring circumstance where, for example, the lawyer does not care what the psychologist says, as long as it benefits the lawyer's case in court. Following Selzer and Benedek (1965) as well as Benedek and Selzer (1977), it is likely that a lawyer will not be functionally deaf to evidence that conflicts with his/her preconceived ideas if that evidence serves his/her case well. Monahan and [illegible] (1980) support this claim arguing that many lawyers select amongst psychological opinion and research until they find some that will assist their case. A common example of psychological concerns being raised as part of a legal strategy is the question of competence to stand trial. Defense counsel raise the issue to assist in plea bargaining or to test the court's receptivity to an insanity plea. Prosecutors raise the issue to lengthen the defendant's period of institutionalization (Monahan and Loftus, 1982).

Despite these practices legal professionals are very disparaging of psychologists (and other experts) who actively assist a case by taking on the role of 'hired-gun' - the expert who is at the service of the party that calls him/her to court (Kruger, 1989). Even if the psychologist is not a 'hired-gun' it frequently occurs that s/he is swayed toward opinions that favour his/her "own" side (Kruger, 1989; Melton, 1987c). This kind of bias is grist for the adversarial mill and will be seized upon to discredit the witness (Coiman, 1973).

Thus the question concerning the implications of the adversarial system for the role of the psychologist in court is raised. This question shall be built upon to embrace a consideration of the potentially irreconcilable differences between law and psychology. The full discussion of this area is beyond the limits of this study, and only a few salient points can be made here.

2.6 Irreconcilable Differences?

2.6.1 The adversary process

At the heart of the legal system is the adversary process. This may be considered as the decisional mechanism set up to resolve a dispute between two parties. The process allows witnesses' veracity, accuracy and bias to be tested by both sides and this is done in the name of finding the most equitable solution to the parties' dispute. Since an expert's evidence will almost invariably favour one side, his/her evidence must be open to cross-examination by the other side. (Bazelon, 1974.)

The legal priority is with settling the dispute: the pragmatic context forces the legal professional to make a decision (Lloyd-Bostock, 1981; Meehl, 1971) and witnesses are called to facilitate this. The courts prefer witnesses to make a few clear and decisive points that are relevant to the specific case at

hand (Lombaard, 1988). Unfortunately, psychologists frequently list endless qualifications, caveats and limitations to their responses in court (Lloyd-Bostock, 1981; Tapp, 1969). This is because the proper psychological answer to many legal questions is, "It depends" (Webster, 1984, p411). But an expert who is unwilling to give simple and direct answers in court is likely to be seen as unconfident and therefore inadequate (Webster, 1984).

Expanding on this issue, Lambert (1981) argues that "The adversary process of the courtroom is poorly suited to the careful, scholarly examination of the theoretical and empirical evidence produced by psychologists..." (p950). Rather it encourages the psychologist to resort to simplistic, absolute assertions of fact (Curran, 1984). The goal in court often becomes to win the case and the intricacies and subtleties of the evidence are lost, or even become irrelevant in the pressure to elicit testimony that wins cases. Indeed, cross-examination is often not aimed at exploring weaknesses in the basis for an expert's opinion, but rather is aimed at obfuscating his/her testimony and questioning his/her credibility (Melton, 1987c). This practice is encouraged since judges often evaluate either the witness him/herself or the general field of inquiry rather than the substance of his/her testimony (Monahan and Loftus, 1982).

Small wonder then that psychologists feel that their work is disregarded or misconstrued (Monahan and Walker, 1988), or that they are just "a tool or cog enmeshed in the process of litigation" (Rosen and Abramovitz, 1975, p74). Certainly psychologists feel that their testimony is not granted due respect within the adversary process. Many psychologists attempt to redress this by not engaging in an adversarial role - they refuse to testify on behalf of either side but rather direct their testimony to the court itself (Lombaard, 1988; Rosen and Abramowitz, 1975).

Whether or not this is successful or results in more ethical practice is not relevant here. More important is that the reluctance of psychologists to engage in the adversary process is reflective of other issues. These in turn, shed light on the nature of difficulties legal professionals and psychologists have in working together.

2.6.1.1 Incongruent Philosophical Positions

Lloyd-Bostock (1981) suggests that psychology and law may diverge at least partly because of different "habits" (p19). Lawyers and judges tend to use terms like 'criminality', 'responsibility', and 'punishability', while psychologists tend to look for less evaluative means of explaining behaviour and for more supportive means of modifying it. Some legal professionals exaggerate this and depict psychologists as ineffectual do-gooders who are out of touch with the realities of the courtroom (Lloyd-Bostock, 1981; Meehl, 1971). As with most caricatures there may be an element of truth to this, but the point here is that legal professionals and psychologists approach the same issues from very divergent positions.

An even more problematic source of incongruence is that while the concept of the conscious mind freely controlling behaviour is fundamental to legal theory and practice, most psychological approaches usually embody some degree of determinism and allow for unconscious motivation (Lloyd-Bostock, 1981). This causes significant tension between the disciplines with psychology again being the object of ridicule. This time the caricature is one of there being no such thing as individual responsibility and that society is to blame for everything (Meehl,1971).

In this light it seems that value judgements made by legal professionals and psychologists are reflected in the fact that law and psychology are predicated upon very different notions of humankind. This being the case, compromise between law and psychology may always be contested and unsatisfactory.

Common ground between the two that is shared at a deep level is likely to be hard to find, so cooperation between them may remain superficial.

2.6.1.2 Incongruent Personality Styles

The incongruence of legal and psychological views and values plays itself out in subtle but significant ways. Tapp (1969) suggests "that the patois and method of the psychologist jar the lawyer because of their private and neologistic qualities" (p21). Lawyers get frustrated at psychologists who are unable to impart information in comprehensible, albeit technical, terms (Bazelon, 1982; Tapp, 1969). But the issue is not just one of vocabulary. It is crucially one of style - of personality and technique of persuasion (Tapp, 1969). Psychologists frustrate legal professionals with their apparent passivity, lack of definitiveness, lack of conviction, and hesitance in committing themselves.

If this suggests that psychologists are more cautious personalities than their legal colleagues, a strange paradox is evident which again speaks of incongruent views, values and concepts. This paradox appears in the fact that psychologists are remarkably quick to discard old research in favour of new: "The psychology of only a few years ago is likely to to regarded as hopelessly out of date today" (Lloyd-Bostock, 1981, p17). This is to be expected to some extent, but the problem is that the "image of psychology as a science has ... been somewhat eroded by the rate at which psychologists appear to change their minds" (Lloyd-Bostock, 1981, p17). Legal professionals feel they cannot depend upon the stability and consistency of psychological knowledge, and are reluctant to base legal considerations upon a shifting baseline. In addition, if research is not well regarded for any length of time, it does perhaps beg the question as to its value in the first place.

In contrast, the legal establishment is suspicious of recent events and looks to the past for a solid precedential foundation for present decisions

(Webster, 1984). Trends and fashions do not come and go quickly in law, and because this is the case in much of science, "Law walks a respectful distance behind science" (Haward cited in Webster, 1984, p413).

2.6.1.3 Incongruent Moral Inclinations

This raises the question as to whether the law is an inherently conservative profession which cautiously guards against the liberalizing influences of psychology. Hatch (1982) certainly implies that this is the case in many instances. Tapp (1969) also affirms that legal professionals are indeed fearful of psychological knowledge and are defensive towards it. Confirming this, Melton (1987c) claims "that Supreme Court decisions were predictable from knowledge of attitudes and beliefs prevailing among older affluent Americans" (p492). Thus law can be regarded as having a conservative basis relative to psychology, and as being unwilling to shift this basis.

Why this should be so is not discussed in the literature, but it is arguable that an incongruence between 'conservative' and 'liberal' is a question of moral inclination. That the law has a strong moral function is clear. It is contended, for example, "that judges always give decisions that are equitable or just according to their own moral lights" (Dyzenhaus, 1985, p295), and that "the central role of judges ... is that of moral arbiter" (Melton, 1986, p348).

Psychologists, on the other hand are increasingly becoming concerned to investigate the assumptions underlying legal practice (Melton, Monahan and Saks, 1987; Saks, 1989) and it is clear that many of these assumptions are morally loaded (Dyzenhaus, 1985; Hatch, 1982; Melton, 1986). Questioning these moral premises is thus very likely, for instance, to make many judges feel that their moral foundations are being undercut by psychology, and cause them to be fearful and defensive toward psychological input in court.

2.6.1.4 Incongruent Concepts and Meanings

Significant sources of incompatibility are found even in areas where there appears to be great commonality. For example, in neither law nor psychology can one realistically talk in terms of absolutes, and both disciplines deal in predictive probabilities (Meehl, 1971; Tapp, 1969). However, "probability" means different things in each field:

> Scientific probability is based on statistical probability or replication, but legal probability is a subjective conclusion based on experience and intuition that one set of events is more likely to have occurred than another (Yarmey cited in Webster, 1984, p413).

Legal and psychological "truth" are thus not equivalent. Rather, they have different derivations as well as implications. Legal professionals are, for example, not convinced that base-rate probabilities should affect the single instance in court (Webster, 1984). They tend to dismiss testimony given on this basis as "numerology" (Loftus and Monahan, 1980; Melton, 1987c) and are unable to deal effectively with generalities and averages in the legal decision-making process (St Q Skeen, 1987).

An additional example is in the case of child custody settlements. Lambiase and Cumes (1987a, b) show that whilst both groups agree that the best interests of the child are paramount, they have different ways of achieving this. Legal professionals are significantly less child oriented than mental health professionals. This means, for example, that mental health experts rate the feelings of the child towards his/her parent as more important than do legal professionals. This has obvious implications for serving the child's best interest. Clearly the term 'the best interest of the child' has very different meanings and implications for the two disciplines.

Lambiase and Cumes (1987a, b) suggest that this is due to different orientation in training: the legal professional is active in a world of adult

litigation, whilst the mental health professional's training is focussed on the child. This is of significance since it demonstrates again how the two professions can approach the same problem and set of circumstances from diametrically opposing points of view.

2.7 Conclusion

The foregoing literature review covers a number of important themes which shape the attitudes of legal professionals to psychological testimony. A deep-rooted problem is that psychologists entered the legal arena in a highly combative, prescriptive manner. The legal profession perceived the presumption that psychological input was necessary to the effective operation of the legal process as an insult. This greatly influenced the reception of psychology in the legal arena since the response of many legal professionals was immediately antagonistic. From the outset then, acrimony was embedded in the relationship which was engaged in reactively rather than proactively.

This attitude may give additional force to legal professionals' reservations concerning the role of psychologists as expert witnesses. The literature suggests that in subjecting the presumed value of psychological expertise to the rigors of the legal process, many legal professionals have found it deficient and not significantly more valuable than commonsense. Many are sceptical as to the practical value and relevance of psychological testimony, and dismiss claims of its importance as overstated. Contrasting with this attitude, there are important instances, such as civil commitment, where the word of mental health professionals, including psychologists, is assumed to be of significance.

This question of the status of psychological testimony in court is a crucial one for it magnifies the issues of the courts' autonomy and authority. Legal professionals are highly resistant and resentful towards psychologists'

attempts to prescribe on either individual cases or on social issues. On this basis they severely criticize psychologists' bias and lack of objectivity. They do, however, also welcome testimony that actively helps win cases.

In these terms it appears that in general legal professionals have a disjointed approach to psychological testimony which is characterized by ambivalence and inconsistency regarding the efficacy and role of psychological evidence (Malmquist, 1984). Confirming this, Bazelon (1982) reports that in 30 years as a US federal judge, he has "developed a passionate ambivalence towards the behavioral sciences" (p115). This is clearly derived, on the one hand, from the belief that psychologists are able give valuable and effective expert testimony, and on the other hand, from the continual frustration and disappointment that they fail to do so.

Thus the attitudes of legal professionals towards psychological testimony in court cannot be categorized as simply 'positive' or 'negative'. They are not unitary or of a uniform character but are variable and multi-faceted. Nonetheless, a review of the relevant literature certainly reveals an undertone of reservation and scepticism amongst legal professionals towards psychology, psychological testimony, and psychologists themselves.

The preceding discussion has explored these issues in terms of the legal profession as a whole in an attempt to place the present investigation in a relevant framework and context. The specifics of the present study will now be developed.

CHAPTER 3

METHODOLOGY

3.1 Rationale

As noted above, it is remarkable that little or no empirical research into the relationship between law and psychology has been done, and that the contributions to the field remain primarily expository in nature. The works of Bazelon (1974, 1982), Lloyd-Bostock (1981), Meehl (1971), and Tapp (1969, 1972) for example, constitute personalized, experientially based accounts of law and psychology's interaction. As such they may, despite their richness and complexity, not accurately reflect the general reality of psychology in the courtroom. This problem may be exacerbated by the probability that contributors to the literature are a biased sample insofar as they are likely to represent a group with special interests in the field.

The problem then is that while the literature plumbs some of the depths of the law/psychology interface, its breadth is unexplored. How generally do these issues apply in the legal and psychological communities? This study attempts to obtain a representative account of an aspect of the relationship between law and psychology, viz the attitudes of advocates to psychological testimony in court. Following Lewin (1979) and Bailey (1978) this calls for the use of survey sampling techniques and an instrument which could give valid and reliable indications of the advocates' attitudes to such testimony in court.

3.2 Aim Of The Study

To determine the attitudes of advocates to psychological testimony in court.

3.3 Method

3.3.1 Subjects

3.3.1.1 The Sample

Advocates in Innes and Schreiner Chambers were chosen as the sample frame. The study sample thus consists of defence counsel who work in private practice. These advocates constitute the majority of advocates in Johannesburg and their concentration in two buildings facilitated the distribution and collection of the research instrument.

This being a pilot study no pre-test was done and the only qualifying condition for subjects was that they be advocates based either in Innes or Schreiner chambers in Johannesburg. In the absence of evidence to the contrary, it was assumed that there was no biased ordering within the frame. This enables one to construct a systematic sample by selecting a fraction, say 1/n th, of items within the frame as the study sample (where n is any constant) (Bailey, p78). In this study n was chosen as 1 to maximize the number of subjects. Whilst simple random sampling is preferable to systematic sampling for purposes of accurate generalization, systematic sampling is a practical approximation that "provides more information per dollar" (Bailey, 1978, p77).

3.3.1.2 The Respondents

Data for the research were obtained from 104 advocates who returned questionnaires to the researcher. The return rate was 22,7% as 458 questionnaires were originally handed out. 75 (72%) of respondents answered the questionnaire in English and the remaining 29 (28%) in Afrikaans.

3.3.2 Research instrument

3.3.2.1 Definition Of Terms

Since there is no single accepted definition of an attitude, it was first

necessary to define the concept so that an appropriate research instrument could be constructed. Drawing on Jaspars' (1978) review of attitude theory, an attitude was defined as a residue of past experience which functions as an intervening variable to produce relatively consistent responses to (sets of) social objects or stimuli. Further, attitudes are neither unitary or static but rather involve a variable, dynamic interaction along two dimensions: expectations (a cognitive dimension) and values (an affective or evaluative dimension).

Expectations involve: i) the perceived usefulness of the attitude object to the individual;

and/or ii) the individual's perception that the attitude object has certain attributes.

Values then involve the individual's positive or negative evaluation of these two points and give them their emotional weight.

The individual's attitude toward a particular attitude object is a product of the interaction between the expectations and values associated with that object. There is not necessarily a simple one-to-one relationship between them. For example, an attitude object may be perceived as being useful in attaining certain goals, but may simultaneously be negatively regarded. In this study the attitude object was psychological testimony in court.

3.3.2.2 The Questionnaire

Following Bailey (1978) the reasons for using a questionnaire in this study include:

i) increased anonymity for subjects;

ii) minimal interference in the subject's working schedule;

iii) quicker and simpler access to the large number of

subjects;

iv) decreased cost to both subjects and researcher;

v) comparison of respondents' answers being facilitated since the questionnaire is standard for all subjects;

and vi) there being no opportunity for interviewer bias.

These reasons were fully endorsed by the Johannesburg Bar Council which strongly recommended the use of a self-administered questionnaire (as opposed, for example, to an interview). The Council suggested that this may be the only method of obtaining a response from advocates who would find any other method too disruptive and time consuming. Even so a negligible return rate was predicted by several Council members.

In an attempt to capture the complexity of the above definition, the research instrument was not constructed as a simple attitude scale, but rather to elicit information on the various aspects of the issue. As there is no existing questionnaire that measures the attitudes of advocates to psychological testimony in court, the instrument had to be developed by the researcher.

The questionnaire was constructed according to the guidelines laid down by Lewin (1979) and Bailey (1978). These guidelines attempt to maximize the questionnaire's validity and reliability, as well as the response rate. A few important points that affect these issues will be discussed here.

Of considerable importance is the covering letter. According to Lewin (1979) and Bailey (1978) the covering letter should constitute an attempt to make the questionnaire appear relevant to the prospective respondents so that they would be more motivated to respond. For the present study it was hoped that an inducement to reply would be provided by stating the purpose of the

research and the benefits that might result from it for law and psychology. (See Appendix A.)

In addition, the advice of colleagues, legal associates and the Bar Council was followed and the questionnaire kept as short and simple as possible. Lewin (1979) and Bailey (1978) confirm that a short, simple questionnaire is more likely to be returned than a long, complex one. Towards this end few open-ended questions were asked, and most responses required a simple tick or cross. Further, the format of the questionnaire was made as "user-friendly" as possible since this has a distinct effect on response rates (Bailey, 1978). (See Appendix B.)

Finally, a crucial part of questionnaire construction is pretesting. Lewin (1979) recommends that systematic pretesting of the entire questionnaire (the items, the format, and the covering letter) be done on a preliminary sample in the form of a pilot study. Feedback from this is used to refine the questionnaire by, for example, removing ambiguities and simplifying the layout. It is especially important that feedback be used to improve the validity and reliability of questionnaire items. If, as was the case in the present study, systematic pretesting procedures are beyond the researcher's scope and resources, informal pretesting is essential. This was done on friends, colleagues and legal associates: "people similar to your intended subjects" (Lewin, 1979, p150).

3.3.2.3 Validity

Notwithstanding the above, it is apparent from Bailey (1978) that formally establishing questionnaire's is frequently not possible. Pretesting procedures eliminated questions without face validity to the satisfaction of the researcher and a co-scorer. But criterion validity, for example, was impossible to establish. This was for two reasons. Firstly, it was beyond the scope and resources of the study to compare the responses received with interview

responses. Secondly, the researcher is not aware of any other studies of this kind, so no direct comparison with other responses could be made.

3.3.2.4 Reliability

In similar fashion, the reliability of the mailed questionnaire is very difficult to quantify. For example, split-half reliability procedures are practically impossible to administer for a whole questionnaire, and test-retest procedures were beyond the scope of this study. Again, pretesting procedures were especially important because they eliminated factors such as ambiguity in the items as far as possible. Ambiguous items could easily be the cause of variable responses in the event of retesting. The reliability of the questionnaire was thus established to the satisfaction of the researcher and a co-scorer.

3.3.3 Procedure

Before beginning the study, the approval of the Johannesburg Bar Council was sought in order that it would not hamper the research at a later stage. The use of its members as subjects was sanctioned by the Johannesburg Bar Council on condition that:

i) the Council did not guarantee any response from its members;

and ii) that it did not divulge the names of any of its members to the researcher.

These were felt to be acceptable conditions that would not significantly effect the research.

458 questionnaires, printed in both English and Afrikaans, were hand-delivered to the advocates' chambers. Without exception the procedure was standard: envelopes addressed to 'The advocate/Die advokaat' which contained the questionnaire and covering letter were placed in the advocates' pigeon-holes. All respondents would thus have received the questionnaires in

their mail. In accordance with the evidence that response rates are adversely affected if the respondent is required to supply his/her own return envelope (Bailey, 1978), a stamped, self-addressed envelope was also enclosed by the researcher.

Finally, if an adequate response rate was not received within a month of the questionnaires' delivery, standard follow-up procedures were to be implemented. This did not prove to be necessary.

3.4 Data Analysis

Descriptive statistics were used to "describe, organize and summarize" (Reber, 1985, p727) the data gathered. Descriptive statistics suited the purposes of this study especially insofar as they allow data to be easily accessible for future research. Further, descriptive statistics usually facilitate the generation of research hypotheses for future research (Keppel and Saufley, 1980). Closed and open questions demanded different techniques of analysis.

3.4.1 Closed questions

Responses to closed questions were precoded so that each response alternative had a numerical code attached. This code was then placed in the appropriate cell of a data matrix. (Oppenheim, 1966; Williamson, Karp, Dalphin and Gray, 1982). A standard personal computer programme was used to process the data and generate the descriptive statistics.

3.4.2 Open questions

3.4.2.1 Two Step Quantification

To facilitate the description, organization and summary of data, a method of analysis was selected whereby qualitative data could be numerically coded and

Table 5: Perceived basis of psychological testimony (% of respondents).

Testimony's basis	%	Personal influence	%
a) Subjective	34,6	a) Considerable	38,5
b) Objective	32,6	b) Moderate	44,2
c) Both	26,9	c) Slight	12,3

Of great importance to respondents was the extent to which psychology can be classified as an objective practice. Similarly, of great importance and concern was the degree to which psychological testimony is suffused with the personal beliefs, opinions, and attitudes of the individual witness. Table 5 summarizes the respondents' perceptions on these points.

Table 6: Response rate (%) on items 9b, 10b, and 11b: The influence of respondents' attitude towards psychological testimony on calling a psychologist to the stand (% of respondents).

	Experience 0-5 yrs	Experience 5+ yrs
9b Evidence's reliability does affect calling witness	32,6	25,9
Evidence's reliability does not necessarily affect this	56,5	50,0
Evidence's reliability does not affect calling witness	4,3	13,7
10b Evidence's validity does affect calling witness	39,1	43,1
Evidence's validity does not necessarily affect this	32,6	27,6
Evidence's validity does not affect calling witness	26,1	15,5
11b Evidence's objectivity does affect calling witness	56,5	32,8
Evidence's objectivity does not necessarily affect this	15,2	44,8
Evidence's objectivity does not affect calling witness	32,8	12,1

An important aspect to consider is the degree to which respondents' attitudes to psychological testimony would influence their calling a psychological expert to the stand. Table 5 shows the response rate by which less experienced (0-5 yrs group) and more experienced (5+ yrs group) indicated whether or not they would let their opinion of psychological testimony influence calling a psychological expert to the stand. The responses suggest that, for the most part, the reliability, validity and objectivity of psychological testimony would either "not necessarily" influence respondents' decision to use it, or would not influence this decision at all.

4.2.2 Theme 2

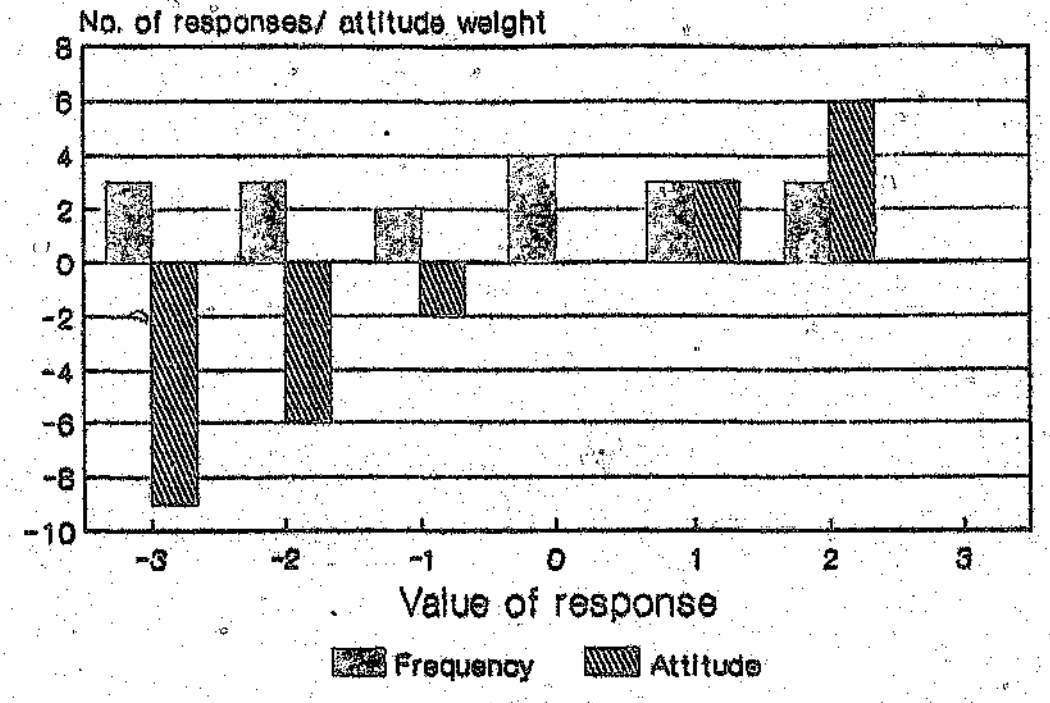


Figure 4: Responses concerning psychologists' knowledge of the legal process.

The response rate on this theme was 17,3 % (18 respondents) and Figure 4 shows the skewed distribution of these responses. In commenting on the questionnaire's construction most respondents suggested that it reflected psychologists' lack of knowledge of the legal process. Few responses were complimentary of psychologists' knowledge of the legal process, and the attitudinal tone on this theme was primarily negative. Respondents were patronizing of psychologists generally, and this varied from condescension to disdain and contempt.

Most respondents complained that the yes/no nature of the questionnaire showed a lack of understanding of the complexity of response required. This represented a specific example of a general ignorance amongst psychologists of intricacies of the legal process. Examples of responses include:

> Your questions show that you don't understand the legal process. It is not possible to answer them with an either/or option;
>
> Bad questionnaire - lacks insight into the legal process. I only return

hence expressed quantitatively. Responses to open questions cannot be precoded and coding can only occur after the data have been collected (Williamson et al, 1982). This was done employing the techniques of a systematic document-analysis as described by Lewin (1979) and Bailey (1978). This is a type of content analysis whereby verbal, non-quantitative material is converted into numerical, quantitative data. In this study the attitudes expressed in written responses to open questions were quantified.

This was done in two separate steps. In each step a content analysis was done. Step 1 involved the extraction and classification of the central themes that emerged from the raw data (ie the written responses). Step 2 involved the extraction and classification of attitudes expressed by advocates when addressing each of the central themes.

The reason for doing the quantification of attitudes in two steps is that it allows the advocates' attitudes on particular issues (themes) to be explored. This would not be possible if the central themes were not elicited first.

See Appendix C for a detailed explication of the content analyses. In addition, see Appendix D for a summary of the content analysis processes as undertaken in this study.

3.4.2.2 Validity

The validity of a content analysis is affected by the validity of the documents upon which the analysis is carried out. In this study, the documents concerned were the completed questionnaires.

Holsti (1969) argues that if the purpose of the research is simply descriptive, then the establishment of the documents' face validity is sufficient. Face validity "is usually established through the informed judgement of the

investigator" (p143) and this was the procedure in the present study. Bailey (1978), however, recommends that criterion validity should also be established if possible.

The documents' face validity was established to the researcher's satisfaction using criteria as outlined by Bailey (1978). Firstly, it was assumed that the questionnaires were completed by the advocates themselves (and not, for example, by their secretaries) and as such constitute first-person accounts of the authors' own opinions and experience. In addition, the authenticity of the documents was checked by examining variability of the word patterns, language, writing style, or composition of paper and ink. The variability was not quantified, but the face validity of the documents was judged to be beyond reproach.

Concerning the validity of content analyses, Bailey (1978) points out that relevant, authentic and adequate (ie valid) categories are threatened by attempting to attain too high a level of reliability. In the present study a satisfactory compromise with reliability was arrived at in conjunction with a co-scorer. Categories were deemed to be relevant to the data, authentically representative of it, and adequately descriptive of it.

3.4.2.3 Reliability

The most important type of reliability in a content analysis is interscorer reliability where the consistency of two or more scorers is compared (Anastasi, 1982). This was done using the procedure recommended by Lewin (1979). Two scorers coded the data independently and the degree to which their results concurred was taken to be a measure of interscorer reliability (Lewin, 1979). A high interscorer reliability can compromise the relevance and adequacy of categories used (Holsti, 1969). Nonetheless, Lewin's (1979) recommendation of an interscorer reliability of at least 90% was followed.

In the present study, interscorer reliability was found to be 87%. Thus, a highly acceptable level of relevance and adequacy was achieved in developing the various categories. The subjectivity that Bailey (1978) argues is endemic to content analyses was thus eliminated to a satisfactory degree.

In these terms the validity and reliability of the content analysis were judged to be acceptable. The limitations of each would not significantly impact upon the accuracy or generalizability of the results of the study. It is to these results that we now turn.

CHAPTER 4

RESULTS

The presentation of results is divided into two general sections for the sake of clarity. Firstly the results of the closed questions from the questionnaire are presented, followed by those of the open ended questions. Results are presented in the form of overall frequencies and percentages and in tabular form.

4.1 Closed Questions

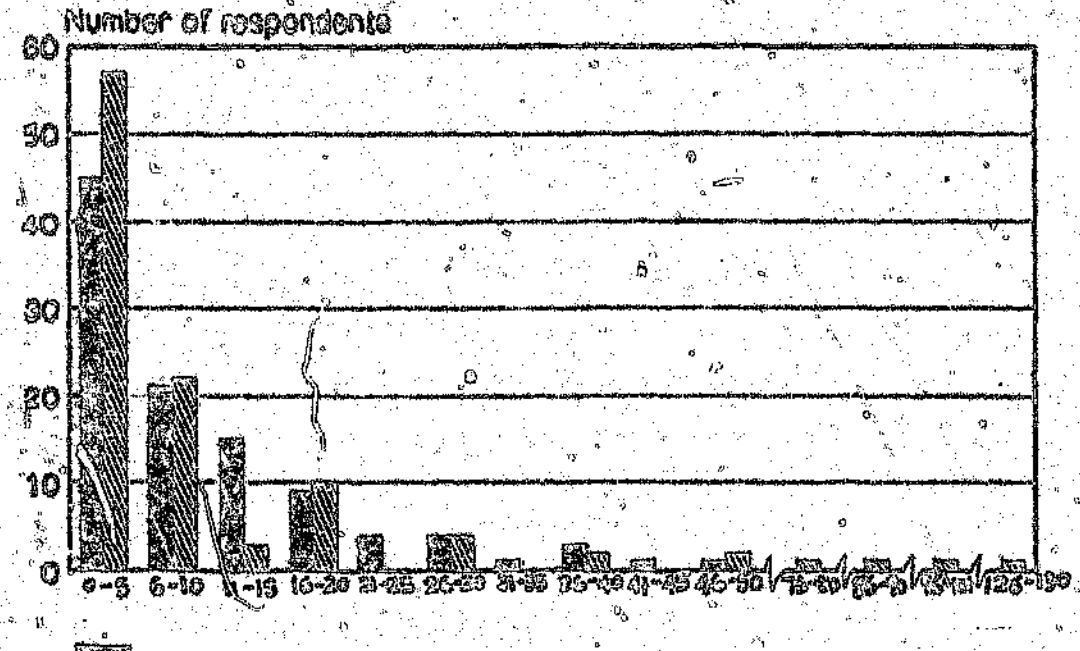


Fig 1: The number of respondents in relation to experience, ie i) years at the Bar, and ii) no. of trials conducted where psychological evidence was led

Respondents experience as an advocate ranged from three weeks to 50 years (mean = 9,5yrs). The number of trials respondents had been involved in that included psychological testimony ranged from zero to 130 (mean = 12,4). Figure 1 represents the range of experience in both years at the Bar and

number of trials in which respondents were involved that used psychological testimony.

Table 1: Response rate (%) on Questions 2, 9a, and 10a: Respondents' knowledge of psychology in law

Advocates with 0-5 yrs Experience		Advocates with 5+ yrs Experience	
2 Psychologists used more	71,0	2 Psychologists used more	63,5
No change	29,0	No change	36,5
9a Predict violence reliably	54,8	9a Predict violence reliably	32,1
Not reliable	33,3	Not reliable	35,7
Don't know	11,9	Don't know	35,7
10a Explains crowd violence	76,4	10a Explains crowd violence	61,8
Explanation invalid	11,8	Explanation invalid	16,4
Don't know	11,8	Don't know	21,8

The respondents' knowledge of psychology in law was tested via Questions 2, 9a, and 10a. Further, the knowledge of those respondents with little experience was compared against those with more experience. Since approximately 50% of respondents fall into the 0-5 years range, 5 years experience served as as a cut-off point. Table 1 summarizes the responses on these questions.

From Table 1 it can be seen that in both inexperienced and experienced groups there is a high level of awareness regarding the fact that psychologists are being used more in court. Importantly however, a higher proportion of the 0-5 yrs group were correct in this than the 5+ yrs group (71,0% as opposed to 63,5%). In addition, more of the 5+ yrs group thought there had been no change in how much psychologists were used in court (36,5% as opposed to 29,0% in the 0-5 yrs group).

Further it can be seen that only 33,3% of the 0-5 yrs group, and 35,7% of the 5+ yrs group were aware that psychology is not a reliable predictor of violent

behaviour. The 0-5 yrs group was especially positive on this point with 54,8% being incorrect. Only 32,1% of the 5+ yrs group was incorrect, but 35,7% of this group was unsure of the correct answer as opposed to only 11,9% of the 0-5 yrs group.

Respondents made an even more positive appraisal of these validity of psychological explanations of crowd violence. Again the 0-5 yrs group was especially positive with a 76,4% affirmative response rate, as opposed to the considerably lower 61,8% of the 5+ yrs group. Many more of the 5+ yrs group did not know if the explanation was valid or not (21,8% as opposed to 11,8% in the 0-5 yrs group).

Turning to calculations made directly from the questionnaire responses 73,1% of respondents passed a general comment that training in psychology would be useful to advocates. The only reason that was given for this was, as one respondent put it, that "it is useful in chatting with the accused". More specifically, however, only 58,7% of respondents rated themselves as having a positive attitude to psychological testimony in court. 26,0% characterized their attitudes as negative, while 15,3% said they were neutral. Important here is that a large majority, 72,1%, of respondents said that their attitudes to psychological testimony in court had not changed with increased experience. Of those 24,0% whose attitudes had changed with experience, 11 indicated the direction of this change: 5 had changed from positive to negative in their attitude, and 6 had changed from negative to positive.

Table 2: Areas where psychological testimony was seen as relevant to the courts' decision-making process (% of respondents).

Area of Law	Relevant	Not relevant
a) Mitigating factors	95,2	4,8
b) Nature of sentence	93,3	6,7
c) Capacity to stand trial	92,3	7,7
d) Custody settlements	90,4	8,7
e) Compensation and damages	71,4	28,8
f) Guilt or innocence	54,8	45,2

93,3% of respondents said that they thought that psychological testimony was of value to the courts' decision-making process. Table 2 lists the areas in which respondents saw psychological testimony as particularly important.

Table 3: Assessment of psychologists as effective witnesses in court (% of respondents).

Type of testimony	Yes	No	Depends**
a) In their evidence in chief	62,5	8,6	25,9
b) Under cross-examination	36,5	31,7	28,8

** on the particular psychologist

81,3% of respondents felt that psychologists do not have sufficient knowledge of the legal process, and most respondents were doubtful about psychologists' efficacy as witnesses in court. This was especially true with respect to being under cross-examination. Table 3 shows the extent to which respondents felt that psychologists are effective witnesses.

Table 4: Opinions on psychologists' recommendations in court (% of respondents).

	Yes	No
a) Should psychologists make recommendations?	76,9	23,1
b) Do recommendations usurp the courts' role?	20,2	79,8

A central issue in this study was the autonomy of the courts. This was reflected in the question of whether the recommendations given by psychologists in their capacity as expert witness, usurp the court as decision-maker. Table 4 summarizes respondents' views on this area of debate and indicates a general tendency to require of psychologists to put forward recommendations.

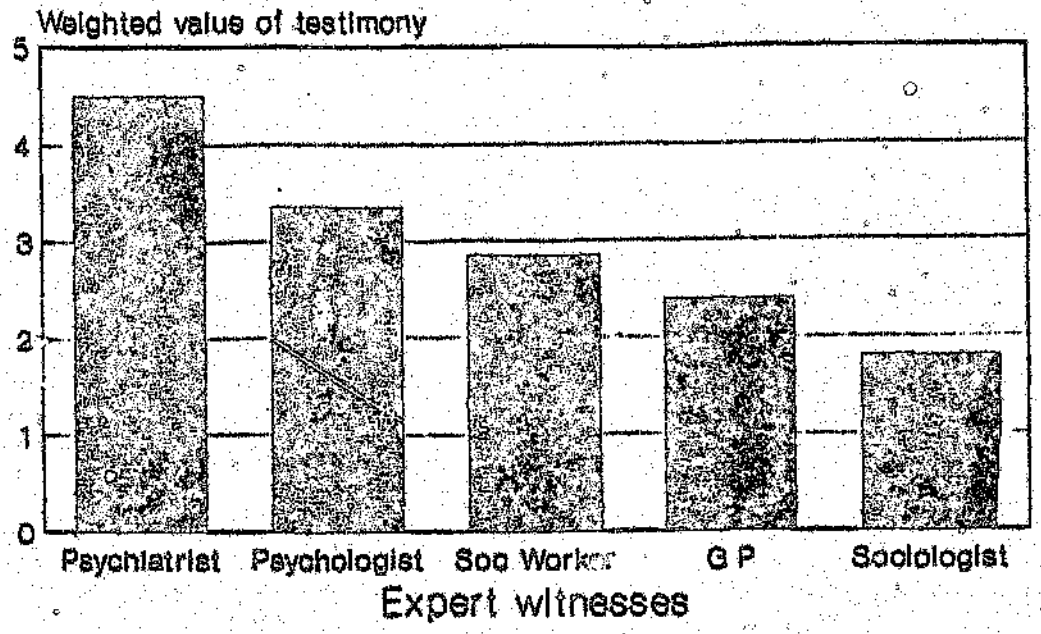


Figure 2: The value of experts' testimony to the courts as perceived by respondents.

A final point to note in the analysis of the closed questions is the degree to which respondents perceived one kind of profession as having greater weight with the courts than another. Figure 2 shows how respondents perceived the courts as giving most weight to psychiatric testimony and least to sociological testimony. 24% of respondents qualified their answer saying that it would depend on the specific circumstances of the case as well as who the judicial officer was.

4.2 Open Questions

Open questions were analyzed in two parts. Firstly, in terms of the frequency with which respondents raised and commented upon particular themes. Secondly, in terms of the intensity of the attitudinal tone with which this was done. Frequency gives an indication of how pressing an issue was for respondents, and intensity gives a weighted measure of respondents attitudes on the themes. As explicated in Appendices C and D, six themes were considered in this study. This section should be read in conjunction with Appendix D.

4.2.1 Theme 1

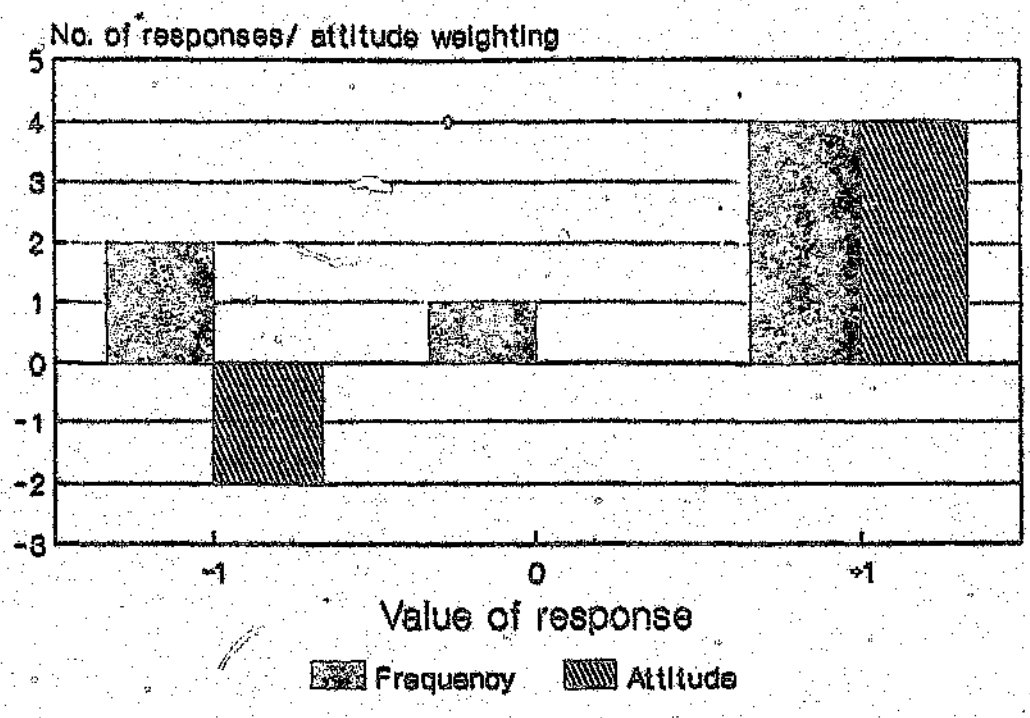


Figure 3: Responses concerning the contribution of psychologists to the courts' decision-making process.

The response rate on this theme was 6,7% (7 respondents) and Figure 3 represents the variation in these responses. On average the respondents were affirming of the contribution of psychologists to the courts' decision-making process. However, nearly half of the respondents said it either disrupted the decision-making process or contributed positively only under certain circumstances. An example of a response given is:

> Depending on the nature of the enquiry psychological evidence does have value, if only to the extent that it may indicate a line to be pursued. The profession has, however, not established itself, in the eyes of lawyers, as generally reliable.

Thus, as a group the attitudes of respondents to the contribution of psychologists to the courts' decision-making process was neither unanimous nor uncritical. On this theme, the attitudes of respondents may best be characterized as ambivalent.

it because you've spent money on a stamp.

4.2.3 Theme 3

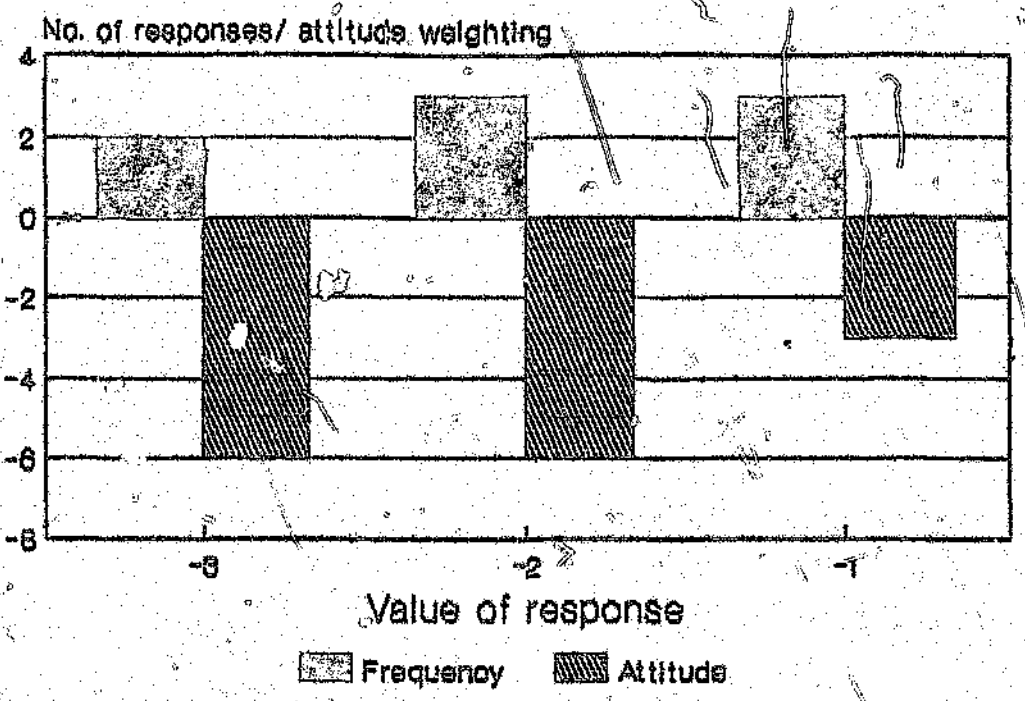


Figure 5: Responses concerning the style, presentation and personality of psychologists in court.

The response rate on this theme was 7,7% (8 respondents) and Figure 5 illustrates the degree of negative response. In commenting on psychologists' styles of thought, presentation, and personality, respondents were overwhelmingly negative. Not a single respondent commented positively. Comments were largely critical and condemnatory although there were less hostile appeals for psychologists to change their style.

All respondents wished psychologists to change their style in court. This was repeatedly linked to the complaint that psychologists do not make sufficient "categorical statements of psychological fact". One respondent expanded further on this issue:

> All too often they went off on wild flights of fancy. Some don't seem to believe in personal responsibility for conduct. Everything can be explained and the fault always lies elsewhere.

4.2.4 Theme 4

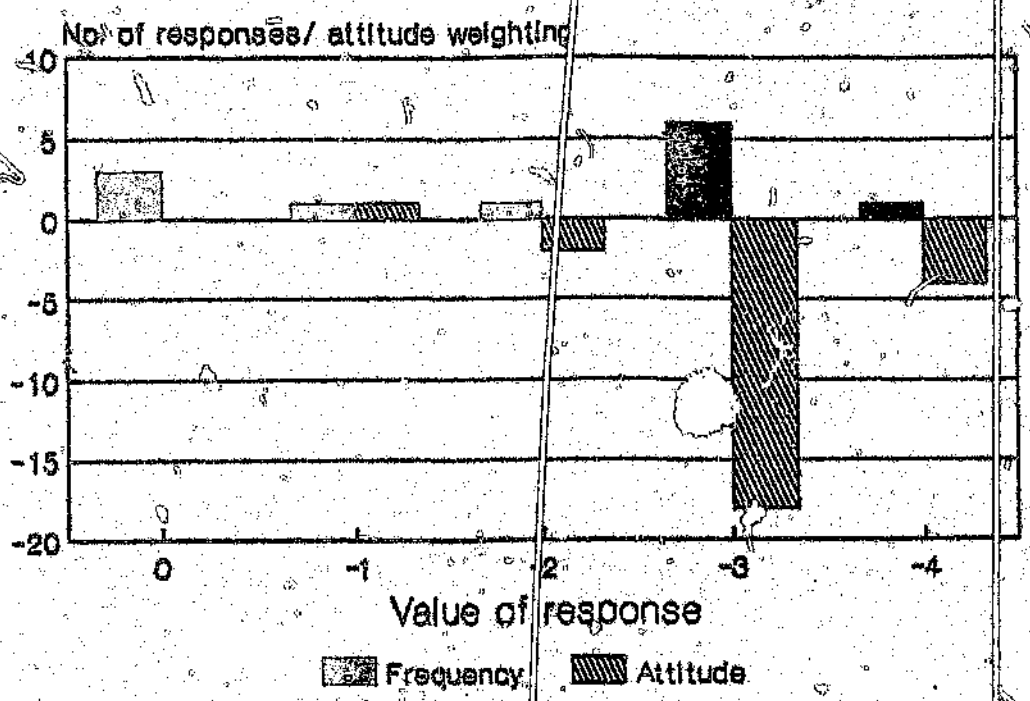


Figure 6: Responses concerning the shortage of psychologists competent to give evidence in court.

The response rate on this theme was 11,5% (12 respondents) and Figure 6 illustrates the variation of these responses. All respondents regarded the shortage in a negative light and implied that psychologists should become competent in giving testimony in court. Most respondents were disapproving of psychologists because of their reluctance to get involved in litigation. Typically, respondents perceived psychologists as abrogating their moral and social responsibility and the attitudinal tone was largely disapproving. Important to note here is that this theme addresses respondents' attitudes towards psychologists, not psychological testimony. Implicit in the majority of responses was that properly trained psychologists, equipped with an adequate social conscience, would be valuable in court.

Examples of responses are:

> It is very difficult to find psychologists who are willing to become involved in criminal trials particularly if (as is usually the case) when

the advocate is acting PRO DEO, and the psychologist would have to be satisfied with almost no remuneration. I can only say that they belong to the school of PINKO-LIBERALS. It does not help to tell them that your client's life is at stake;

Psychologists should specialize in specific criminological fields such as crowd violence, or community service, or gang psycosis, or 'township stress' - all typically South African fields which are often elucidated by overseas experts;

It is very difficult to obtain psychological advice from specialists capable of giving expert evidence in court. I've only seldom dealt with psychologists who were sensible, practical and really impressive.

4.2.5 Theme 5

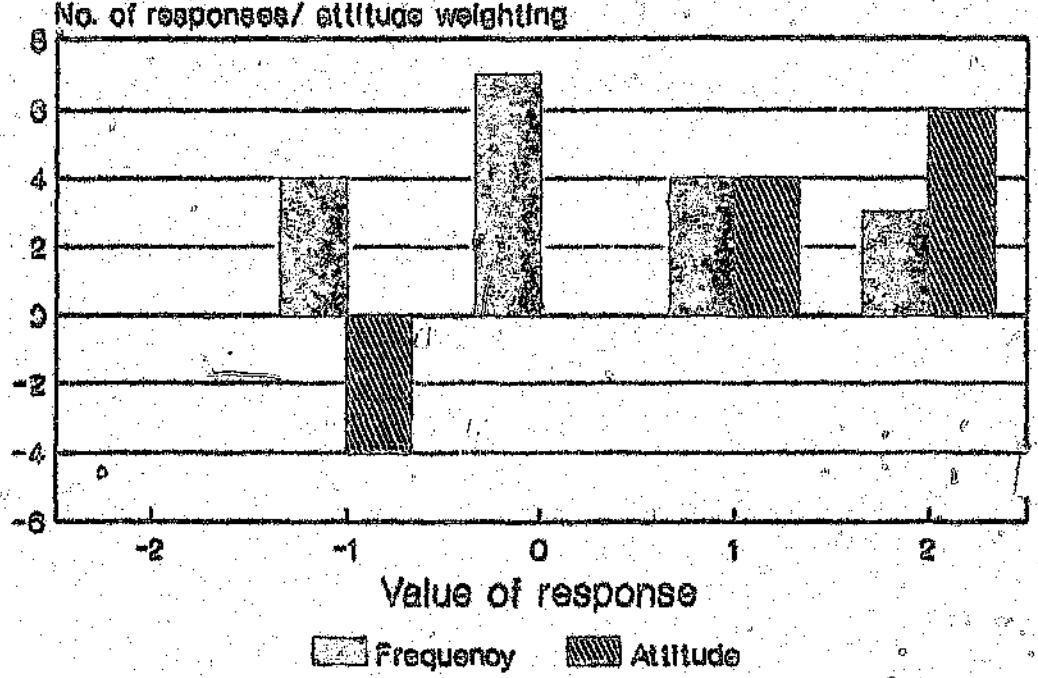


Figure 7: Responses concerning the bias of judicial officers against psychological testimony.

The response rate on this theme was 17,3% (18 respondents) and Figure 7 illustrates the range of responses. In commenting on a bias they perceive

from judicial officers against psychological testimony, respondents were largely supportive of psychology. However, a considerable number (7 of the 18) were neutral, and 4 respondents said the judicial officers' bias was justified.

4.2.6 Theme 6

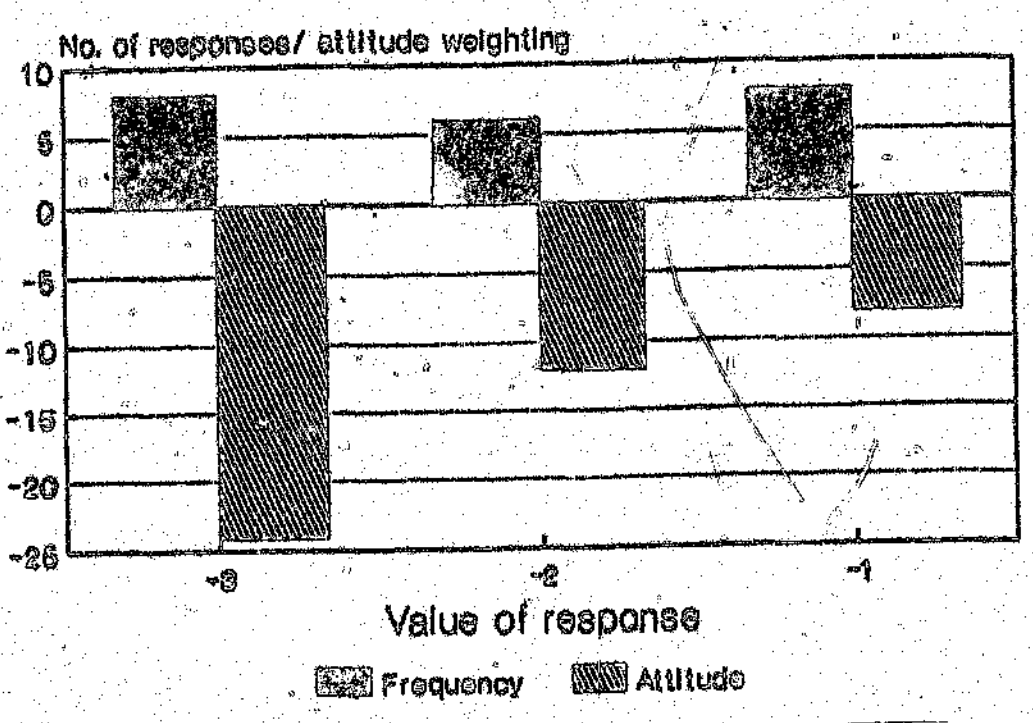


Figure 8: The distribution of responses concerning the objectivity and impartiality of witnesses

The response rate on this theme was 21,2% (22 respondents) and Figure 8 illustrates the range of responses. As can be seen from the figure, respondents perceived psychological witnesses as being biased and were exclusively negative about this. Not a single respondent said that bias was justified at all. Expressing their negative attitudes, respondents ranged from a hostile demand that psychological testimony become more objective, to an arrogant disregard of such testimony because it is not objective.

Responses on this theme include:

Too many (psychologists) start with a conclusion and work backwards.

Eg in personal injury cases you tend to get those who regularly act for plaintiffs, and those who regularly act for the insurance companies;

They (psychologists) will talk any rubbish to favour the patient... It depends on who is paying them - according to this they will proclaim any rubbish. As mad as their clients.

A more comprehensive discussion of all the results presented follows in the next chapter.

CHAPTER 5

DISCUSSION

5.1 The Results

5.1.1 Prominent issues

5.1.1.1 The Respondents

It is apparent that most respondents had relatively little experience both in terms of years at the Bar and in terms of exposure to psychological testimony. It is also apparent that of those respondents who had been involved in trials where psychological testimony was led, most had 0-10 years experience. Relatively speaking then, respondents with fewer years of experience were exposed to more psychological testimony than those with more. This is to be expected given that the upsurge in the use of psychologists in court is recent.

Why fewer of the older, more experienced advocates should have responded to the questionnaire is unclear. As suggested by a member of the Bar Council, it is possible that they were busier and more pressured for time than their younger colleagues and so felt that they had no time to fill in the questionnaire. It is likely that they would feel similarly regarding any questionnaire. Thus, for the purposes of this study, little can be inferred from this behaviour.

5.1.1.2 Awareness And Knowledge Of Psychology

Most respondents (71,0%) concur with the literature in saying that psychologists are used more in court now than in the past. That older, more experienced respondents were less aware of this is perhaps attributable to their having established fixed areas of practice that are not significantly impacted upon by increased use of psychologists in court. Nonetheless, the

overall high awareness of the increased role of psychologists in court may have positive implications for the law-psychology relationship. This is because the increased role and significance of psychology is being acknowledged, and may thus be expanded upon.

Further, on the questions of the reliability of psychology as a predictor of violent behaviour, as well as its validity in explaining crowd behaviour, it is apparent that respondents' perceptions of psychological testimony were very positive. This despite the fact that it is well established that psychology has little to offer in the prediction of violent behaviour (Dershowitz, 1969), and that its explanations of crowd behaviour are incomplete and controversial (Moscovici, 1985). Fewer of the more experienced respondents were incorrect on these questions but the fact that more of them answered "don't know" suggests that they were more cautious rather than better informed.

Thus on the three questions that tested respondents' knowledge of psychology in law, the responses suggested favourable, if somewhat realistic, attitudes towards psychological testimony. In addition, an overwhelming number of respondents (93,3%) felt that psychological testimony is of value in the courts' decision-making processes. Respondents' were overwhelmingly affirming of the relevance of psychological testimony in areas such as mitigation and custody. Over 90% of respondents supported the use of psychological testimony in these (and other) areas. It can reasonably be inferred that this reflects significant positive regard for psychological testimony.

5.1.1.3 Conflicting Aspects

However, it is important to note that this positive regard was not consistent across all questionnaire items. For example, respondents' support dropped dramatically (to 54,6%) with respect to the relevance of psychological testimony in determining guilt or innocence. In addition, when asked directly

to rate their own attitudes to psychological testimony, only 58,7% of respondents reported a positive evaluation. These lower rates were also found in responses on the open questions where respondents' attitudes were by no means unanimous or uncritical.

In one instance the drop in support from respondents may be easy to understand. In light of the debate around experts usurping the courts' role, it is likely that respondents would not be receptive to recommendations in areas that are the courts' exclusive preserve - such as questions of guilt and innocence. More generally however, the ambivalence shown above is difficult to account for.

On the one hand respondents say that psychological testimony is valuable in court, yet on the other hand relatively few of them rate themselves as having a positive regard for it. This suggests that in their personal capacity respondents do not have a high regard for psychological testimony, but do perceive it to be professionally useful. This suggestion is bolstered by the concern expressed in the literature that legal professionals are not concerned with what psychologists say, but rather with whether their testimony assists the case or not (Benedek and Selzer, 1977; Selzer and Benedek, 1973; Monahan and Walker, 1988).

Interesting to note is that most respondents (72,1%) claimed that their attitudes to psychological testimony in court are fixed regardless of increased exposure to psychological testimony. Further, in the group of respondents (24,0%) who said their attitudes had changed with experience, no distinct patterns of change were evident. Thus psychological testimony has at best, an unpredictable impact, or, at worst, makes no impression at all. It is in fact possible that respondents' attitudes are independent of the testimony itself. Indeed, Tapp (1969) suggests that legal professionals' negative attitudes towards psychology are determined by their anxiety and fearfulness

of psychology. As argued in Chapter 1 however, it is important to guard against arguing that these negative attitudes are epiphenomena with no foundation in reality. As noted, this results in responsibility being deflected whereas the situation may be profitably learned from.

5.1.1.4 Shortage Of Competent Psychologists

One important factor that definitely influenced respondents' attitudes towards psychological testimony was the shortage of psychologists that are competent in delivering testimony in court. Even respondents favourably disposed to psychological testimony were patently antagonistic towards psychologists because of their unwillingness to get involved in litigation. Respondents clearly felt that it was psychologists' moral and social duty to become trained and experienced in giving testimony in court. This, together with the fact that most respondents disapproved of psychologists in this regard, suggests that respondents have an attitude of moral superiority towards psychologists.

Clearly then, this study confirms that psychologists' reluctance to go beyond the "psychology for its own sake" paradigm has cost them considerable support (Task Force on Psychology and Public Policy, 1986). The shortage of psychologists that are able to give testimony in court counteracts the perception that psychological testimony is valuable. Instead it causes anger, resentment and moral one-upmanship.

The implication of all the responses that condemn psychologists for not being involved in litigation, is that there is important court-work that needs to be done by a psychologist. Thus, despite their disapproval and accusations, respondents recognized that psychologists have a valuable role to play in court, and they want that role fulfilled (by adequately trained psychologists). A significant point to note, however, is that few (2) respondents raised this issue as an opportunity to invite greater participation from psychologists. The majority used it as a vehicle for complaint and attack. This suggests a

significant ambivalence in their attitudes: they want more from psychologists but do not facilitate this. Instead they are aggressive and attacking.

A circular process thus appears to be in operation. Respondents act harshly towards psychologists' inexperience, and this is likely to make psychologists become more fearful of the legal arena. Thus fewer psychologists are likely to become involved in litigation, and respondents find their criticisms borne out and justified. There was no indication in this study that respondents were aware of their part in this process. This is consistent with the literature in the area which implies that neither party in the debate is at all self-critical but rather blames the other in dismissive, stereotyped terms (Lloyd-Bostock, 1981; Tapp, 1969).

5.1.1.5 Knowledge Of The Legal Process

Expanding on the issue of competence, it is apparent that most (81,3%) respondents perceive of psychologists as having insufficient knowledge of the legal process. Their attitude towards this state of affairs was distinctly superior with contempt thinly disguised. They haughtily complained that the construction of the questionnaire reflected this problem in that it did not allow the true complexity of questions to be addressed.

On the other hand, the complaints about the questionnaire's construction also imply that had there been an opportunity, respondents would have expanded upon complex issues. The complaints indicate, therefore, that respondents believe that the questionnaire was not capable of representing their views accurately. They argued that this was because it was constructed by a psychologist with insufficient knowledge of the legal process. Thus this study may have had the unfortunate result of confirming respondents' perception of psychologists as ignorant of legal matters.

This is not to say that respondents' criticisms or perceptions of the questionnaire construction were accurate. Only 21,2% of respondents had any training at all in psychology. This would suggest that they are not the best qualified to judge such matters. The criticisms of the questionnaire may have more to do with respondents feeling that they did not get a chance to say what they particularly wanted to.

Drawing on the literature (Lloyd-Bostock, 1981; Meehl, 1971; Tapp, 1969), it is likely that respondents felt themselves to be unjustly treated: they see themselves as being prepared to engage with the complexities of the questions, but were thwarted by a researcher who was apparently too ignorant to construct a questionnaire that facilitated this. As noted in the literature (Greer, 1971; Lloyd-Bostock, 1981; Meehl, 1971), perceptions of this kind cause great animosity and rancour towards psychologists and make their work (including testimony) unwelcome in the legal arena.

5.1.1.6 Psychology As A Tool Of The Law

Implicit here is the notion suggested in the literature that respondents may be welcoming of psychologists that are well versed in legal process. However, it is clear that psychologists must enter the legal arena on terms set by the legal profession. Law is not sufficiently flexible to easily accommodate non-legal experts. It cannot easily adapt itself to make the best use of their expertise, and the experts have to adapt if they are to be heard. On the one hand this has considerable implications for a puritan or scholarly practice of psychology since, as noted by Lambert (1981), the subtleties of the science are easily lost in the heat of a legal battle. On the other hand, adapting to the constraints of the legal arena may force psychology out of its ivory tower and contribute towards making psychology more accessible to its social context. This important step can be achieved in small ways such as phrasing psychological jargon in everyday language (Bazelon, 1982; Tapp, 1969).

A small but significant example of respondents' perception that psychology is there to serve the purposes of the legal profession can be given. The candid observation that training in psychology is valuable to legal professionals because "it is useful in chatting with the accused" is of great importance. It illustrates how psychology is explicitly seen and reduced to a tool of the law. It illustrates the issue covered in Chapter 2 concerning the complete shift away from the legal realists' views of psychology in law, to the pragmatic, applied approach that gained momentum in the 1980s.

5.1.1.7 The Style Of Psychologists

Turning to a consideration of psychologists who give evidence in court, their efficacy as witnesses was not highly regarded by respondents. Given that their evidence in chief is known and can be prepared in advance, it is remarkable that only 62,5% of respondents regarded them as effective in giving this testimony. This figure dropped dramatically to 36,5% with respect to evidence given under cross-examination. Surprisingly though, only one third of respondents (31,7%) categorically stated that psychologists were ineffective under cross-examination.

A clue to reasons for this situation may lie in the fact that over 25% of respondents refused to generalize. They said that the effectiveness of psychologists varies considerably: "it depends on the particular psychologist". Thus, two psychologists giving the same evidence may be regarded very differently. The variable factor is therefore the psychologist him/herself.

Regarding the psychologist him/herself, it has been noted that not a single respondent commented favourably on psychologists' styles of thought, presentation and personality. The biggest problem was that it is very difficult to find a psychologist who will make a "categorical statement of psychological

fact". In saying this respondents are implying two things. Firstly that this is what they want, and secondly that such psychologists are in fact available. This contributes to a negative attitude towards psychologists because respondents feel frustrated by, and resentful towards the many psychologists who refuse to be categorical.

Following the literature (Bazelon, 1982; Lambert, 1981), it seems probable that those psychologists who are prepared to make such statements are those who will be best regarded by the courts. However, as also discussed in the literature, these same psychologists then run the considerable risk of being accused of usurping the courts' decision-making function. The dilemma that respondents place psychologists in thus closely resembles that discussed in the literature.

5.1.1.8 Usurping Of The Court

On the question concerning the possibility that psychologists' recommendations usurp the courts' decision-making function, it is interesting to note that most respondents adhered to the text-book position articulated by van der Merwe et al (1983). Approximately 75% of respondents agreed that while psychologists should make recommendations regarding their evidence, these recommendations do not usurp the courts' decision-making power. However, a large number (approximately 20%) of respondents adopted the position that psychologists should not make recommendations because these did usurp the court's decision-making function.

Both groups are obviously concerned to protect the autonomy and authority of the court from the intrusion of experts. On this point respondents' attitude can be characterized as defensive. There was no indication that the less suspicious possibilities presented by Faizes (1989) were seriously considered by respondents. Certainly no respondents said that experts should make

recommendations to court and that these recommendations should take precedence in decision-making. In fact, a small minority (3%) was openly hostile and rejecting in that they said that psychologists should not make recommendations even though this would not usurp the courts' role in any way.

Thus this study appears to confirm that when the authority of the court is threatened, legal professionals retreat into an invulnerable position: recommendations can be ignored at the courts' will.

5.1.1.9 Bias In Psychological Testimony

The making of recommendations in court by an expert raises the question of bias in testimony. From the literature it is clear that legal professionals value and appreciate unbiased, impartial testimony. Biased evidence, and especially that which furthers the psychologist's personal political or financial purposes, is regarded very disparagingly. Less than one third of respondents in this study were of the opinion that psychological testimony is objective. Similarly, it is clear that respondents felt that the personal values and attitudes of psychologists influence their testimony to a significant degree. This was highly problematic for respondents and they confirmed the literature's trend in being unequivocally negative in their attitude towards this. Respondents' attitudes were specifically harsh towards and contemptuous of the hired-gun syndrome which brings psychological testimony into serious disrepute.

5.1.1.10 Selecting A Witness

As pointed out by Jaspars (1978) a recurrent question in attitude research is the extent to which an individual's behaviour is influenced by his/her attitude toward a particular attitude object. To what extent would respondents allow, for example, their contempt for a "hired-gun" to influence whether or not they called such a witness to the stand. The results of this study show that

respondents will "not necessarily" allow the perceived reliability, validity or objectivity of testimony to influence whether or not they called a psychologist to the stand. Indeed many respondents would not let these factors influence them at all. Thus the decision to call a psychologist to the stand is likely to depend neither on his/her testimony as such, nor on the respondents' attitude to the testimony, but on factors beyond this.

The literature suggests that a crucially important factor which influences whether a witness is called or not, is whether s/he will assist the case. This is so because the primary goal of each side in court is to win the case. Thus a psychologist is less likely to be called to the stand if his/her testimony will not improve the possibility of winning the case. For example, an important influence here are respondents' views that the courts would give psychiatric evidence greater weight than that of other expert witnesses. This perception concurs with less recent literature (Petrella and Poythress, 1983; Poythress, 1983) which suggests that medical evidence is valued highest by legal professionals simply by virtue of its medical status. Thus, the recent trend wherein this simplistic view no longer holds is not evident in the views of this study's respondents.

What is evident, however, is that a significant number of respondents (24,0%) select who they call to the stand not only depending on the profession of the witness, but also on the circumstances of the case, as well as on who the judicial officer is. Thus the question of which profession is best regarded in court is often subsumed by other considerations since it is only relevant who is best under particular circumstances. The advocate will evaluate these circumstances and make his/her decision accordingly. That little definite can be said without knowing the particular circumstances of the case was repeated by respondents in many different ways. This tends to support their complaint that the yes/no questions did not take into account the complexity and

variability of legal matters. On the other hand it is ironic that respondents should find it so difficult to be definite on a question when this is precisely what frustrates them about psychologists.

5.1.1.11 Bias Of Judicial Officers

Selecting who is called to the stand according to who the judicial officer is raises the issue of the bias of judicial officers against psychological testimony. Respondents perceived such bias, but it is important to note that they were not unambiguously negative in their attitude towards it. Over half of the respondents who addressed this issue were either neutral or supportive of the judicial officers' bias. This is highly surprising given that these respondents were insistent on psychologists being impartial and objective. This manifest inconsistency suggests considerable animosity in the attitudes of many respondents toward psychological testimony.

5.1.2 Summary of findings

It is immediately apparent that one is faced with a number of contradictions and inconsistencies. Respondents overwhelmingly agreed that psychological testimony is valuable in a range of significant legal areas. They deplored the lack of involvement of psychologists in litigation, and wanted to engage the topic more deeply than the questionnaire permitted. In these terms respondents may be said to have a positive, engaging and inviting attitude to psychological testimony. The generally appreciate it's value, wish it would contribute more, and wish to get more involved themselves in understanding psychological knowledge.

Simultaneously respondents evinced highly negative attitudes on other issue raised. At a personal level the regard of respondents for psychological testimony was relatively low, and they were largely critical, condemnatory, and attacking of psychologists themselves. Respondents were negative on

every score regarding psychologists: their style in court, their bias, and their ignorance. Even in noting the shortage of psychologists in the legal arena, respondents were attacking and acrimonious. They were defensive of the courts' autonomy and failed to unreservedly reprove the courts' bias against psychological testimony.

The attitudes of respondents towards psychological testimony in court can now be characterized in terms of the definition of attitudes employed in this study. This involves:

i) an evaluation of the perceived usefulness of psychological testimony to the individual;

and ii) an evaluation of the attributes that psychological testimony is perceived by respondents to have.

Firstly, respondents clearly perceive psychological testimony to be valuable in certain circumstances (eg where the psychologist is unequivocal). Respondents are encouraging and supportive in their attitudes towards this. However, it is clear that respondents also perceive psychological testimony as considerably less useful under other circumstances (eg on issues of guilt and innocence). Here they are not as supportive and some are defensive or aggressive in their attitude.

Importantly though, respondents perceive psychological testimony as potentially far more valuable than it is at present (eg if more psychologists would be more definite). This latter perception may be unrealistic given that psychologists show no signs of changing, but it is nevertheless invested with considerable energy. That this expectation is repeatedly unfulfilled contributes greatly towards respondents' attitudes of disappointment, frustration, anger and resentment.

Secondly, respondents clearly perceive psychological testimony as having certain attributes (eg perspectives on custody) that are valuable. They are affirming and supportive of these. But it is evident that respondents also perceive psychological testimony as having attributes of which they are disparaging and critical (eg lack of objectivity).

Furthermore, it is evident that respondents perceive psychological testimony as potentially having even more valuable attributes (eg better informed of the legal process). Again, this perception may be unrealistic given its long history of being unrealized. Nevertheless, the repeated failure of psychologists to fulfill this expectation contributes towards considerable disappointment, acrimony, contempt and disillusionment in respondents' attitudes.

Thus respondents want psychological testimony, but they want it delivered in a different way. They want psychological testimony as long as it helps them win cases. They want psychologists' recommendations but must be free to ignore them. They want psychology in court as long as it is a tool of the law and demands no independence of its own. In sum then, respondents' attitudes can be seen to be strongly reminiscent of those expressed by Bazelon (1982). That is to say, they are characterized by a considerable ambivalence, and are in many senses contradictory.

5.2 Limitations Of The Study

5.2.1 The respondents

Their are two interlocking problems relating to the respondents that limit the generalizability of this study to the broader population of advocates. These are the bias in the subjects that responded to the questionnaire, and the uncertainty regarding non-respondents.

It is evident that the respondents in this study do not represent an evenly distributed cross-section of the target population. There is a strong bias towards younger, less experienced advocates. This consistent bias in one direction constitutes a systematic error in the sampling method and may distort the results (Lewin, 1979).

The source of this error lies in the researcher's failure to elicit responses from more experienced members of the sample. This may have been due to the fact that no follow-up procedures were used. Lewin (1979) points out that when resistant members of a sample do not respond, the researcher is left with responses from only cooperative subjects. These groups may differ radically from one another.

That these groups did not differ radically from one another in this study is suggested by three factors. Firstly, as Tajfel (1978a) points out, attitudes are generally resistant to change and so remain stable over time. Secondly, most of those subjects who did respond confirmed that increased exposure and experience had not changed their attitudes to psychological testimony. Thirdly, it is unlikely that the respondents constitute an especially interested group since, as argued above, non-respondents would probably not respond to any questionnaire. In this light, the danger that the experienced non-respondents would have differed radically from the inexperienced respondents is offset to a considerable degree.

This lessened danger combined with three other factors to make the use of follow-up procedures unwarranted in the researcher's opinion. In the first instance, follow-up procedures were beyond the scope and resources of this study. Secondly, the researcher was warned by legal associates and the Bar Council that if subjects did not respond immediately, they would not respond at all. Thirdly, and most importantly, the initial response rate of 22,7% was

higher than the most optimistic prediction (20%) so this target was reached without follow-up procedures being necessary.

Nonetheless, it must be noted that Bailey (1978) suggests that a response rate of lower than 50% or 60% is of dubious value. This is so because at lower response rates what is not said by subjects becomes more important than what is said. However, as Babbie (1973) points out, any figures of this kind "...are only rough guides, they have no statistical basis..." (p165). Further, as argued above, those subjects that did not respond are unlikely to have said anything very different from those who did, so this problem decreases in magnitude.

Taking the considerations specified into account, the constraints that the respondents place upon the generalizability of this study are deemed to be tolerable. The sample, therefore, can probably be said to be representative of the broader population of South African advocates.

5.2.2 The research instrument

5.2.2.1 The Questionnaire Construction

Given the considerable complaint about the questionnaire's yes/no format, as well as the unexpectedly high response rate, it would appear that the researcher's attempts to simplify the questionnaire were overdone. The yes/no option seemed attractive because it was simple and would therefore increase the response rate. It would also simplify the quantification of data. It did, however, apparently result in considerable data being lost. For example, respondents complained that the yes/no nature of many of the questions did not allow them to express the full range of their views adequately. Against this is weighed the fact that there were relatively few responses to open questions which suggests that they were too time consuming or troublesome to respond to.

Thus given the complaints about the yes/no format as well as the low response rate on the open questions, the questionnaire may not have been a comprehensive measure of their attitudes to psychological testimony in court.

5.2.2.2 Validity

The face validity of the questionnaire as a whole as well as its individual items was established to the researcher's satisfaction with informal pretesting. More problematic is to establish the validity of the responses, ie whether the questionnaire measured what it was supposed to.

The questionnaire's internal validity was judged to be satisfactory since very few respondents appeared to misunderstand any items. Thus the items fulfilled their intended role in the questionnaire. A serious limitation on the validity of the responses was the difficulty in establishing criterion validity. Anastasi (1982) argues that criterion validity should be established because "in the absence of data external to the test itself, little can be learned about what a test measures" (p147). In this study the only information available on which to base a measure of criterion validity was the literature on the subject. This does not qualify as "known facts" (Bailey, 1978, p165) against which results can be compared.

However, nothing that the questionnaire elicited was significantly at variance with the literature. Indeed the contrary is true. This points towards the criterion validity of the questionnaire being acceptable. Even though it is not conclusive, it is an indicator which bodes well for the validity of the study.

5.2.2.3 Reliability

As discussed previously, the reliability of the questionnaire was established as well as informal pretesting procedures permitted. The fact that few respondents complained of ambiguous wording, or answered as if the items

addressed different issues, suggests that the reliability of the questionnaire was adequate for the purposes of this study.

In these terms the validity and reliability of the questionnaire were established to the satisfaction of the researcher. It was judged that the limitations on each would not significantly impact upon the accuracy or generalizability of the results of the study.

5.2.3 Summary

The ultimate question in considering the limitations of the study is whether or not they seriously interfere with the study's generalizability. Clearly it would be unrealistic to expect that an exploratory or pilot study of this kind would be fully representative of the attitudes of all advocates to psychological testimony in court. Nevertheless, the constraints on this as discussed above are not debilitating. In addition, Anastasi (1982) asserts that an instrument's validity is not absolute, but rather "must be established with reference to the particular use for which it is being considered" (p131). It was therefore concluded that, pending confirmation from future research, this study comprised an illustrative account of the attitudes of South African advocates to psychological testimony in court.

5.3 Conclusion

5.3.1 Closing statement

This study has attempted to explore and describe the attitudes of advocates to psychological testimony in court. This was deemed to be important because it would assist psychologists in understanding some of the forces that affect their forensic practice. This in turn would help psychologists to serve better their own and their clients' interests. The attitudes of advocates in particular were seen to be important to explore because advocates regulate the evidence

which gets to court, as well as the tone in which it is heard.

Much of the literature in the area describes the deficiencies of psychological testimony and expands upon the consequent negative responses of legal professionals. In many respects the shortcomings and difficulties articulated in the literature were voiced by respondents in the present study. Of particular importance is the ambivalence that advocates feel towards psychological testimony.

This ambivalence, the co-existence of opposite feelings towards one object, manifests itself as follows. On the one hand advocates welcome, appreciate and value psychological testimony because it is plays an important role. On the other hand, advocates are rejecting, deprecating and contemptuous of psychological testimony because it plays that role so badly.

It would appear that the relationship between law and psychology is deadlocked around certain issues. For example, psychologists are clearly not happy to engage in the adversarial process. This process is such that the delicate detail of their subject matter gets lost in the battle of absolute rights and wrongs. Psychologists may then perceive their expertise as being mishandled. Further, they may feel negated and offended. The point for advocates, however, is very different. They are not concerned with the sensitivities of psychologists and have a host of other priorities. Preserving the esoteric science of psychology does not rate very highly in everyday court life.

Advocates obviously still think that psychologists should be prepared to come to court on terms set by legal professionals. If they would do this, then they would be in a better position to serve the law. This issue dates back to the early 1900s when psychologists promised that they could be of considerable

service to the law, but then were perceived to have reneged on this promise. (Lloyd-Bostock, 1981; Tapp, 1969).

As is typical in a deadlocked situation many self-repeating cycles are operating. A clear example of this is that the negative attitudes that advocates have towards psychological testimony contributes towards psychologists reluctance to become involved in litigation. But then this shortage causes even more bad feeling from advocates. The viscous cycle is difficult to break with neither party able to change its position.

Clearly, to break out of this deadlock, attitudes on both sides need to change. However, it was noted that regardless of exposure to psychological testimony most respondents attitudes towards it did not change. Indeed, attitude change is extraordinarily difficult to accomplish (Jaspars, 1978). Access into this difficult area is facilitated by the definition of attitudes used in this study. In very simple terms, if the expectations that advocates have of psychological testimony can be adjusted so that they were more realistic, the disappointment, anger and resentment would be lessened. This is a matter for future research.

5.3.2 Recommendations For Future Research

As noted, an important consideration in doing this research was to generate questions and issues for future research to pursue. The goal is to generate a body of knowledge which can be used to bridge the interface between law and psychology.

As mentioned, an important area would be the articulation of the expectations that legal professionals have of psychological testimony. This can then be compared with what psychologists actually have to offer. This could create a dialogue between the two professions instead of the present deadlock.

Importantly though, future research may do well to adopt a theoretical framework from within which it can address certain issues. It was not within the scope of the present descriptive study to undertake this, but an analysis in terms of Tajfel's (1978b) Social Identity Theory may be fruitful. As developed by Turner (1987), Social Identity Theory allows, for example, the dislocation between the respondents' personal and professional attitudes to be addressed and accounted for. In short, if the present study has established that advocates have ambivalent attitudes towards psychological testimony, Social Identity Theory can assist the explication of that ambivalence.

Any future research should also certainly address the law-psychology relationship from the point of view of psychologists. In this way the real influence of the legal profession's attitudes can be unpacked. On this note, the present study exposes many problematic issues for psychologists which need to be considered by forensic psychology as a whole. For example, it may be said that advocates manipulate the information that reaches the court for their own purposes (such as winning the case). Are psychologists to collude in this manipulation or to find other ways of presenting their testimony than in the adversarial process? Melton (1987c) begins an exploration of this issue.

In addition valuable research may be conducted in attempting to articulate what makes particular psychologists better than others in giving evidence in court. Areas to explore include personal manner, style, confidence, appearance, knowledge, adherence to the medical model, amongst others. This is important in exploring the nature of psychological work in the legal arena, and is part of an understanding of the forces that affect the practice of psychology.

Lastly, as far as the mechanics of future research is concerned, the limitations addressed above should be borne in mind. Any survey research

should consider including more open questions in a questionnaire. At the very least the questionnaire should have a Likert scale response system built into it. In addition, extensive (and expensive) follow-up procedures should be built into the research design. Alternatively, future research in the area may consider conducting interviews with subjects. This would allow the subtleties and nuances of the issues to be explicated in a more comprehensive manner.

Nonetheless the present study does appear to have gone a considerable way in establishing a basis for understanding the views of South African advocates to psychological testimony in court. In addition, it has generated several courses which can be pursued in elaborating upon this basis.



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APPENDIX A

THE COVERING LETTER

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

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2050, SOUTH AFRICA

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References:

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Date:
6 August 1990

Dear Advocate

Please find, attached, a copy of a questionnaire which forms part of a study designed to gauge the attitudes of advocates to psychological testimony in court. This study constitutes part of the MA (Clinical Psychology) degree that I am presently doing through Wits, and is one aspect of an ongoing attempt to address the links between Law and Psychology. The end-goal of such work will hopefully be a more effective working relationship between the two disciplines.

Please note that experience with psychological testimony in court is in no way necessary to fill in the questionnaire, since it is the attitudes of advocates as a group with which I am concerned. I am acutely aware that advocates have little time at their disposal for questionnaires, but I would ask you please to take the few minutes required, pop it in the envelope provided, and toss it in your mail - within the week, if at all possible.

Finally, please note that the questionnaire is to be completed anonymously, and that all information will be treated in professional manner. If you have any queries, please do not hesitate to contact me.

Thanking you in advance for your co-operation.

PAUL ANNECKE

VIR AFRIKAANS, SIEN KEERSY

The University of the Witwatersrand rejects racism and racial segregation. It is committed to non-discrimination particularly in the constitution of its student body, in the selection and promotion of its staff, and in its administration.

APPENDIX 'B'

THE QUESTIONNAIRE

1. a) How many years have you been at the bar? _____

b) Do you specialise in any particular field(s) of law?

yes ____ no ____

If 'yes', please state which:

_____

_____

c) Do you have any training in psychology?

yes ____ no ____

If 'yes', please specify:

_____

d) Do you think training in psychology is (or would be) useful to advocates?

yes ____ no ____

e) Please estimate how many trials you have been involved in where a psychologist was called as an expert witness: ____

2. Are psychologists currently being used as expert witnesses more or less than in the past?

more ____ less ____ no change ____

3. a) How would you, in general, catergorise your attitude to psychological evidence in court? (multi-responses possible)

impressed	____	sceptical	____
undecided	____	hostile	____
dismissive	____	inquisitive	____
satisfied	____	indifferent	____

b) In the course of your experience, has your attitude to psychological evidence changed?

yes ____ no ____

If 'yes', in what ways:

_____

_____

_____

4. a) Is psychological evidence ever of value in the Court's decision making processes?

yes ____ no ____

b) If 'yes', in which specific areas?

_____

_____

5. a) When giving evidence should psychologists make recommendations concerning that evidence?

yes ____ no ____

b) Assuming that they do make recommendations, does this usurp the Court's decision-making role?

yes ____ no ____

6. Is psychological evidence relevant in determining:

a) capacity to stand trial yes ____ no ____

b) guilt or innocence yes ____ no ____

c) the nature of sentence yes ____ no ____

d) mitigating factors yes ____ no ____

e) custody settlements yes ____ no ____

f) compensation and damages yes ____ no ____

7. a) Do psychologists have sufficient knowledge of the legal process?

yes ____ no ____

b) Do you regard psychologists as effective witnesses:

i) in their evidence in chief? yes ____ no ____

ii) under cross-examination? yes ____ no ____

8. To what extent do psychologists' personal values or attitudes influence the evidence that they give?

considerably ___ moderately ___ slightly ___

9. a) Is psychological evidence reliable in predicting violent behaviour?

yes ____ no ____

b) Does / would your answer influence you in whether or not you called a psychologist as an expert witness?

yes ____ not necessarily ____ no ____

10. a) Is psychological evidence valid with regard to it's explanation of crowd violence?

yes ____ no ____

b) Does / would your answer influence you in whether or not you called a psychologist as an expert witness?

yes ____ not necessarily ____ no ____

11. a) Does psychological evidence rest ultimately on subjective (moral or social) or objective (scientific) principles?

subjective ____ objective ____

b) Does this facilitate or obstruct the Court's decision making process?

facilitate ____ obstruct ____

c) Does / would your answer in 11.a) influence you in whether or not you use a psychologist as an expert witness?

yes ____ not necessarily ____ no ____

12. Which of the following expert's evidence carries the greatest weight with the Courts: a social worker, a psychiatrist, a psychologist, a sociologist, or a general practitioner? Please list in descending order:

greatest weight

i) _____

ii) _____

iii) _____

iv) _____

v) _____

13. If you have any additional comments you wish to make, these would be appreciated:

_____

_____

_____

_____

_____

_____

_____

_____

THANK YOU VERY MUCH FOR YOUR HELP AND TIME

APPENDIX C

THE CONTENT ANALYSIS

As suggested by Lewin (1979) and Bailey (1978), the initial step of the content analysis was to divide responses into categories, ie into groupings of data on specific criteria (Reber, 1985). As required these categories were exhaustive, mutually exclusive, and independent (Holsti, 1969). This means that the value and content of one category was not determined or influenced by the value or content of another category (Bailey, 1978). To facilitate this, it was essential that category definitions be as distinctly formulated and accurately expressed as possible. As Lewin (1979) warns, several revisions of definitions were necessary before satisfactory levels of validity and reliability were attained.

In addition to this, the researcher followed Bailey's (1978) recommendation that while categories should be constructed to suit the purposes of the study, they should not be imposed from an external theoretical perspective. If they are it is certain that important categories will be excluded, and superfluous ones included. The goals of mutual exclusiveness and exhaustiveness may not be achieved. In the present study categories were derived from the subjects' responses to ascertain what common elements they contained, and were not, for example, determined by the themes evident in the literature review.

After categories had been defined, the appropriate unit of analysis that would constitute the categories was determined. In Step 1 of the analysis particular issues or themes that the respondents addressed were selected as appropriate units to use. In Step 2 the unit of analysis was the attitudinal tone used by respondents when addressing particular issues or themes derived in Step 1.

Finally, the data in the categories were quantified in two ways:

i) by the frequency with which the category appeared in the document (the incidence was indicated numerically);

and ii) by the strength or intensity with which the category was represented (the intensity was indicated on a suitable Likert scale constructed by the researcher).

Step 1: Extraction and classification of central themes

Responses on the open questions over-lapped considerably. It was therefore decided to group all these responses and analyse them together. Most of the responses came from Question 13, but some from 3b), 4b), 8a), 9b), 10, 11 and 12.

Following Lewin (1979) and Bailey (1978) these grouped responses were divided into categories. The categories were each defined by an issue that the respondents commented upon. If the frequency of response was less than 6% of all respondents, the issue was excluded since significance at this level is dubious. Six categories were derived, and were defined as follows:

1. all comment on the contribution of psychologists to the courts' decision-making process;
2. all comment on the questionnaire's construction insofar as this demonstrated or reflected psychologists' knowledge of the legal process;
3. all comment on the styles of thought, presentation, and personality of psychologists as reflected in their testimony in court;
4. all comment concerning the shortage of psychologists competent (ie trained and experienced) to give evidence in court;

5. all comment on the perceived bias of judicial officers against psychological testimony in favour of other expert witnesses (eg psychiatrists);
6. all comment on the objectivity and impartiality of witnesses.

These six categories encapsulate the main issues commented upon by the respondents in the open questions. They may therefore be referred to as the central themes of the respondents' responses.

Step 2: Extraction and classification of attitudes

The attitudes expressed by the respondents in addressing each central theme were also derived following the steps laid down by Lewin (1979) and Bailey (1978). These steps will be spelled out in relation to Theme 2 (above) as an illustrative example.

Theme 2: all comment on the questionnaire's construction insofar as this demonstrated or reflected psychologists' knowledge of the legal process.

Sequence followed:

i) all comments on the questionnaire's construction were written down;
ii) those comments that did not relate to psychologists and the legal process were excluded;
iii) the comments were categorized on a scale ranging from highly positive to highly negative;
iv) 7 categories were defined each of which corresponded to a position on a 7-point Likert scale;
v) the frequency with which each category was represented was noted.

The seven categories were defined as containing:

1. only positive comment re psychologists' knowledge of the legal process (this scored +3 on the Likert scale);
2. positive comment and constructive criticism (+2);
3. positive comment and negative criticism (+1);
4. a neutral statement on the issue (0);
5. a patronizing but tolerant and educative tone (-1);
6. a patronizing and superior and disdainful tone (-2);
7. and a patronizing rejection because of lack of knowledge of the legal process (-3).

For example, the response "Bad questionnaire - lacks insight into the legal process, I only return it because you've spent money on a stamp" fell into category 7 and scored -3.

Appendix D summarizes this process for each of the 6 central themes.

APPENDIX D

ANALYSIS OF THE CENTRAL THEMES

THEME 1: all comment on the contribution of psychologists to the courts' decision-making process.

3 categories of attitude were elicited on this theme.

Category Definition	Frequency	Value	Intensity
1. Affirming of psychological input - has a positive role.	4	+1	+4
2. Qualified affirmation - can be positive under certain circumstances.	1	0	0
3. Negating - disrupts the courts' decision-making process.	2	-1	-2

The response rate on this theme was 6,7% (7 respondents).

THEME 2: all comment on the questionnaire's construction insofar as this demonstrated or reflected psychologists' knowledge of the legal process.

7 categories of attitude were elicited on this theme.

Category Definition	Frequency	Value	Intensity
1. Only positive comment re psychologists' knowledge of the legal process.	0	+3	0
2. Positive comment and constructive criticism.	3	+2	6
3. Positive comment and negative criticism	3	+1	3
4. A neutral statement on the issue.	4	0	0
5. Patronizing but tolerant and educative.	2	-1	-2
6. Patronizing, superior and disdainful.	3	-2	-6
7. Patronizing and rejecting.	3	-3	-9

The response rate on this theme was 17,3% (18 respondents).

THEME 3: all comment on the styles of thought, presentation, and personality of psychologists as reflected in their testimony in court.

3 categories of attitude were elicited on this theme.

Category Definition	Frequency	Value	Intensity
1. Appeal to psychologists to alter their style.	3	-1	-3
2. Critical of psychologists' style.	3	-2	-6
3. Attacking and condemnatory of psychologists' style.	2	-3	-6

The response rate on this theme was 7,7% (8 respondents).

THEME 4: all comment concerning the shortage of psychologists competent (ie trained and experienced) to give evidence in court.

5 categories of attitude were elicited on this theme.

Category Definition	Frequency	Value	Intensity
1. Regret tempered by notion that are not so valuable anyway.	3	0	0
2. Disappointment because useful on occasion.	1	-1	-1
3. Anger and disappointment at shortage because are valuable.	1	-2	-2
4. Disapproving of unwillingness to get involved in litigation.	6	-3	-18
5. Accusing and questioning psychologists' moral integrity.	1	-4	-4

The response rate on this theme was 11,5% (12 respondents).

THEME 5: all comment on the perceived bias of judicial officers against psychological testimony in favour of other expert witnesses (eg psychiatrists).

5 categories of attitude were elicited on this theme.

Category Definition	Frequency	Value	Intensity
1. Overt affirmation of psychological testimony (ie bias unjustified).	3	+2	6
2. Statement of support for psychological testimony.	4	+1	4
3. Neutral statement.	7	0	0
4. Statement of support for judicial officers (ie their bias justified).	4	-1	-4
5. Blaming and condemnatory of psychological testimony.	0	-2	0

The response rate on this theme was 17,3% (18 respondents).

THEME 6: all comment on the objectivity and impartiality of witnesses.

3 categories of attitude were elicited on this theme.

Category Definition	Frequency	Value	Intensity
1. Demanding that psychologists become more objective.	8	-1	-8
2. Disapproving and judgmental of psychologists' partiality.	6	-2	-12
3. Hostile and arrogant towards partiality in psychological testimony.	8	-3	-24

The response rate on this theme was 21,2% (22 respondents).

The histograms in Chapter 4 (Section 4.2) are a graphic representation of the above tables.





hence expressed quantitatively. Responses to open questions cannot be precoded and coding can only occur after the data have been collected (Williamson et al., 1982). This was done employing the techniques of a systematic document-analysis as described by Lewin (1979) and Bailey (1978). This is a type of content analysis whereby verbal, non-quantitative material is converted into numerical, quantitative data. In this study the attitudes expressed in written responses to open questions were quantified.

This was done in two separate steps. In each step a content analysis was done. Step 1 involved the extraction and classification of the central themes that emerged from the raw data (ie the written responses). Step 2 involved the extraction and classification of attitudes expressed by advocates when addressing each of the central themes.

The reason for doing the quantification of attitudes in two steps is that it allows the advocates' attitudes on particular issues (themes) to be explored. This would not be possible if the central themes were not elicited first.

See Appendix C for a detailed explication of the content analyses. In addition, see Appendix D for a summary of the content analysis processes as undertaken in this study.

3.4.2.2 Validity

The validity of a content analysis is affected by the validity of the documents upon which the analysis is carried out. In this study, the documents concerned were the completed questionnaires.

Holsti (1969) argues that if the purpose of the research is simply descriptive, then the establishment of the documents' face validity is sufficient. Face validity "is usually established through the informed judgement of the

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