



**Judging Psycholegal Reporting in Civil Court Proceedings in the Eastern Cape**

by

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### **Abstract**

*Purpose:* The primary purpose for this research was to evaluate the quality of psycholegal reports, and the qualification of the authors. Previous research had revealed generalised poor practices in psycholegal report writing and the authors seemed unqualified as expert witness. This negatively influenced the impression and usefulness of expert psychological opinion in South African courts. The secondary purpose was to compare the results to those determined by Ireland (2012), which was a useful benchmark study in the UK as her findings corresponded with the literature. *Method:* This archival research analysed a hand-search sample of 20 reports written by 20 psychologists based nationally. These reports were submitted as expert opinion in civil proceedings in the Grahamstown Division of the Eastern Cape High Court between 2011 and 2016. Ireland and Pinschof's (2009) measure 'Quality Rating Scale' was adapted for a South African context and used to evaluate quantitatively the reports. Focus was on the reports' contents (fact and opinion), methods, process and overall rating, and the qualification of the authors. *Results:* Overall, two-thirds of the reports were rated as 'good' and 'very good'. The results were generally more positive than Ireland's (2012) findings. However, there were practices in the report writing that were deemed detrimental to the quality of the expert's opinion. This included vague referral questions and unclear basis for concluding opinions and diagnosis. There was also a lack of discussions surrounding the scientific trustworthiness of testing methods and absent ethical considerations. Lastly, the specialised expertise of the experts was not adequately documented. *Conclusion:* The findings painted a more positive picture of psycholegal reporting in South Africa than illustrated in previous research, which seemingly relied on anecdotes and subjective surveys. This study used a systematic and objective measure. The findings of this study, previous research and ethical Rules of Conduct were used to consider recommendations for psycholegal report writing, and the improvement of the field of

psycholegal work. Lastly, the focus of future research was discussed.

*Key words:* evaluative quantitative measure; expert witness; forensic psychology; psycholegal activities; psycholegal assessments; psycholegal reports; psychological expert opinion; Quality Rating Scale (QRS)

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*What is not started, will never get finished – Johann Wolfgang van Goethe*

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## **Judging Psycholegal Reporting in Civil Court Proceedings in the Eastern Cape**

*Indeed, it may be asserted that the Courts are ready to learn and to use, whenever the psychologists produce it, any method which the latter themselves are agreed is sound, accurate and practical. If there is any reproach, it does not belong to the Courts or the law... There must first be proof of general scientific recognition that they are valid and feasible... Whenever the psychologist is ready for the Courts, the Courts are ready for him – JH Wigmore ‘Evidence in Trials in Common Law’ (1940) (cited in Allan, Louw, & Verschoor, 1995b, p. 681).*

### **Overview of the Chapter**

This chapter provides an overview of the current study. It aims to discuss the context in which the study occurs, provide the aims of the research, and outline the methodology. Thereafter, an overview of the chapters is noted to orientate the reader to the process and outcomes of the research.

### **Context of the Research**

German Professor Karl Marbe is the first known psychologist to testify in court. He testified on the phenomenon of reaction time on behalf of an engine driver, who had been charged with not stopping his train in time to prevent a disastrous accident (Allan, Louw, & Verschoor, 1995a). This initial interaction between psychology and law started in the late 19<sup>th</sup> century, and psychology has since become a common participant in the legal system (Allan & Louw, 1995; Ireland, 2008; D. A. Louw & Allan, 1998). In South Africa, the concept of psychologists in court seems to have been pioneered in the late 1940s (Allan & Louw, 1995). However, not much has developed in the last 70 years and the acceptance, scope and practical aspects of psychology in the South African legal setting is and remains unclear (Allan & Louw, 2001). The field of forensic psychology is neither defined, standardised or formalised (D. A. Louw & Allan, 1998). Rather, the current professional guidelines refer to psycholegal activities, which can be performed by any registered psychologist (Republic of South Africa, 2006a, 2006b).

Currently, psycholegal assessments for the legal system allow psychologists *to assist the courts* on a wide spectrum of psychological, cognitive and behavioural issues as an expert witness (Cohen & Malcolm, 2005) [emphasis added]. Unfortunately, besides this assistance to courts, the current legal requirements for expert opinions and/or evidence are unclear, and are dependent on the unique facts before the court. Concisely, South African case law denotes that an expert witness should be objective, independent and unbiased, providing an opinion that is logical and based on scientific knowledge within his or her area of training and expertise (*Schneider NO and Others v. Aspeling and Another* 2010 (5) SA 203 (WCC)). It is argued that a lack of clear designation, formalisation and regulation within the South African psycholegal context has had, and continues to have, negative consequences.

Such consequences include the reputation of psychologists as generally being unprofessional in the courts, and being perceived to be incompetent by the courts, the media, and the public (Jackson, 2006; D. A. Louw & Allan, 1998). Official complaints of incompetence have been made to the Health Professions Council of South Africa (HPCSA) and the Professional Board of Psychology (PBP). There are many anecdotes and accounts where psychologists exceed the boundaries of their expertise, mandated role, and ethical code; and as such, fail as expert witnesses (Cohen & Malcolm, 2005; Jackson, 2006).

These damaging practices fail to show psychologists' true ability as forensic or psycholegal specialists, and its true value in assisting the decision-making of legal issues (Allan & Louw, 1995, 2001; Jackson, 2006). There has been minimal global and local literature and research on identifying and recognising the dynamics that make this expert role of psychologists so controversial (D. A. Louw & Allan, 1998). The possible reasons for this unprofessionalism are multifaceted, and beyond the scope of this research. However, it seems likely that one of the reasons is that psychologists receive minimal formal training in the area of psycholegal work, and therefore, are not sufficiently knowledgeable of the specific

requirements of expert testimony. As such, there has been a strong emphasis on the need for the regulation and advancement of expert witness evidence (Ireland, 2008).

Furthermore, and more importantly for this research, there is limited South African legal and literary sources that set out the requirements for psycholegal reports, which could be used as the basis for expert witness evidence. Ordinary psychological reports are possibly insufficient for court purposes, and there are differing opinions on the most effective way to write a report and address legal issues. This is concerning with the important role that the reports play in court cases.

In the context of South Africa, and the advent of the *Constitution of the Republic of South Africa* (Republic of South Africa, 1996), with a focus on human rights, there has been an increase in the need for psychological expert opinion in civil litigation and disability claims. More claims are being attributed to psychiatric illnesses and psychological trauma, rather than physical illnesses (Erlacher & Reid, 2006; Ewart-Smith, 2006; Gudjonsson & Haward, 1998). Furthermore, with eleven official languages, an assortment of cultures and ethnicities, vague scopes of practice and/or designated duties, a lack of psychologists ofay with psycholegal work, and predominantly Westernised psychological theories and psychometric tests, it is vital that there is improved standardisation, regulation and formalised training for forensic assessments and psycholegal reporting.

The current lack of requirements and/or standardisation for psycholegal reports leaves the opportunity for inferior reporting practices causing inferior expert opinions and evidence, particularly seen in the psycholegal reports written for court. The obligation then falls to the judge or magistrate<sup>1</sup> to evaluate the quality of a report, which falls outside their legal understanding of psychological content and opinion (Ireland, 2012). However, it has been

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<sup>1</sup> Hereafter, the title of judge will be used to refer to all presiding officers of courts.

found that due to a lack of this knowledge, judges shy away from fully engaging with expert reports, and they accept the flawed opinions (Meintjes–Van der Walt, 2003; Nicholas, 2000). This emphasises the need for research into the content and ultimate quality of current psycholegal assessments and reporting in more depth (Ireland, 2012).

Guidance for this study was taken from the research conducted by Ireland (2012). Ireland (2012) evaluated expert psycholegal reports submitted in Family Courts in the United Kingdom (UK), in terms of the quality of the report and the level of qualification of the expert. Ireland and Pinschof (2009) developed a systematic scale that determined that two-thirds of the analysed UK reports were rated as ‘poor’ or ‘very poor’, and only three-quarters of the authors were suitably qualified (Ireland, 2012).

These results are comparable to the previous research conducted in South Africa, which uncovered generalised and pervasive damaging practices in psycholegal work and in the report writing. Moreover, there was seemingly a lack of suitably qualified and trained psychologists performing psycholegal work (Allan & Louw, 2001; Brandt, Dawes, Africa, & Swartz, 2004; Genis, 2008; D. A. Louw & Allan, 1998; Nicholas, 2000; Nicholas & Coleridge, 2000). This previous research paints a grim picture of this field, and is the background to the present study

### **Research Objectives**

The primary purpose for this research is to evaluate the quality of psycholegal reports, and the qualification of the authors. This should assist in uncovering trends in psycholegal reporting, in order to understand what is occurring in reality. The secondary purpose is to compare the results to those determined by Ireland (2012), which is a useful benchmark study.

This research also hopes to assist the scarcity of literature on forensic psychology in South Africa (Kaliski, 2006). It is also hoped that this research will contribute to the

development and legitimacy of psycholegal practice in the Eastern Cape, and elsewhere. Although the data is specific to an Eastern Cape court, the report authors are from various provinces of South Africa – thus, it is believed that the findings are likely to have wider relevance.

### **Methodology**

This archival research uses a sample of 20 psycholegal reports submitted in personal injury civil claims heard in the Grahamstown Division of the Eastern Cape High Court. These reports are written by 20 psychologists based across South African, with varying years of independent psychological practice.

To analyse these reports, Ireland's (2012) research method was followed. The 'Quality Rating Scale' (QRS) (Ireland & Pinschof, 2009) was developed in the UK to assess the reports' quality of fact and opinion, method, process, qualification, and overall quality.

It was established that the criteria of the QRS is similar to the South African law on expert opinion evidence. Moreover, the criteria was comparable to the practical 'rules' for psychological expert testimony as clarified by Allan, Louw and Meintjes-Van der Walt (Allan, 2005a; Allan & Louw, 2001; Allan & Meintjes-Van der Walt, 2006). These rules are represented in the QRS and are discussed in conjunction with the corresponding legal precedents from South African courts. Briefly, these rules examine the relevancy and basis of the opinion; the competency of the expert to validate the quality of his or her opinion; whether the legal issues have been commented upon; the trustworthiness of the assessment methods; the comprehensibility and objectivity of the opinion; the qualification and expertise of the expert; and whether the psychologist remains in his or her scope of psychological practice.

The QRS was further adapted for the South African context by removing the criterion relating to English Civil Procedure Rules. Thereafter, the ethical considerations as per South

Africa's guidelines were inserted, as per the *Ethical Rules of Conduct for Practitioners* registered under the *Health Professions Act* (Republic of South Africa, 1974, 2006b) (hereafter referred to as the 'Rules of Conduct') and the *Rules of Conduct Pertaining Specifically to Psychology* (Annexure 12) (Republic of South Africa, 2006a) (hereafter referred to as 'Annexure 12'). This included the importance of objectivity and impartiality, and the issues surrounding informed consent and limitations to confidentiality.

The reports were analysed using the adapted QRS, while noting any aspects in the content that may be of interest. Thereafter, the findings will be presented, with a description of such aspects that affected the ratings and emerged during the analysis.

It is important to inform the reader that the researcher has a legal background. Pursuant to her Masters in clinical psychology, she qualified with an LLB and worked as a Public Prosecutor in the magistrate court for a number of years. It is believed that this background equipped the researcher to engage with the relevant legal principles and psycholegal concepts.

### **Ethical Considerations**

The main ethical issue surrounded access to the psycholegal reports. Even though the reports are public documents as per the *Uniform Rules of Court as per the Supreme Court Act* (Republic of South Africa, 1999), steps were taken to protect the authors and clients by removing identifying details and keeping data anonymous.

Permission was sought from Ireland (2012, 2016; Ireland & Pinschof, 2009) to use and adapt the QRS.

During the research process, it was discovered that Ireland (2012) defended charges of misconduct related to her study (Smith, 2016a, 2016b). While her defence was successful, the charges highlight that psycholegal work is fraught with ethical dilemmas. Therefore, to protect this research against similar accusations, the format of sharing the results was



approached conservatively. Originally, excerpts from the reports were going to be quoted to illustrate instances of poor practice – however, after further reflection, this was abandoned to prevent the possibility of the professional identity of the authors being discovered and tainted.

### **Chapter Outline**

The context, process and outcomes of this research will be discussed in the following chapters.

Chapter 2 will place the study within the literature and discuss the findings of the relevant previous research conducted in South Africa (Allan & Louw, 2001; Brandt et al., 2004; Genis, 2008; D. A. Louw & Allan, 1998; Nicholas, 2000; Nicholas & Coleridge, 2000). This will give background for the need for this current research. Thereafter, the chapter will familiarise the reader with the concepts within forensic psychology, psycholegal activities and report writing, and discuss the requirements of expert witness opinion and/or evidence.

Chapter 3 outlines the research methodology used in performing this study, and the steps taken to maintain the integrity of the research.

Chapter 4 details the results from the quantitative evaluation of the reports by the QRS. Thereafter, aspects of the content of the reports that emerged during the analysis and affected the reports' ratings are highlighted.

Chapter 5 is the discussion of the results. Overall, the results indicated that two-thirds of the sampled South Africa reports were rated as being 'good' and 'very good'. However, it also emerged that there were a number of practices that detracted from the quality of the report. This included vague referral questions and unclear basis for concluding opinions and diagnosis. There was also a lack of documented discussions surrounding the scientific trustworthiness of testing methods and absent ethical considerations. Lastly, the specialised expertise of the experts was not adequately documented. The discussion also gives possible

reasons for why the overall positive results of the current study differ from Ireland (2012) and previous research.

Chapter 6 concludes the research, and emphasises the importance of these findings determined by the QRS, which is a systematic and objective measure. The limitations of this study are acknowledged. Recommendations for psycholegal report writing, the improvement of the field of psycholegal work, and the focus of future research are identified.

### **Conclusion**

As highlighted, there are no formalised or standardised requirements for psycholegal reports in South Africa. Consequently, the quality of expert opinion, psycholegal assessments and reports often goes amiss. As such, this research will analyse a sample of psycholegal reports to establish if such unprofessionalism is reflective of current local practice at the Grahamstown division of the Eastern Cape High Court. It must be noted that these claims of poor and unprofessional practice seem anecdotal, and, thus, it is important that this issue be addressed empirically to determine whether these claims are true. Overall, the current findings suggest that the quality of psycholegal reports is not as poor as those determined by Ireland (2012) or as described in previous South African research. Importantly, the use of the systematic QRS measure, make these findings unique in their usefulness and objectivity.

## Chapter 2: Literature Review

*In South Africa the acceptance of psychology in the courts has been neither spectacular, nor sustained, and even today, forensic psychology as a field remains poorly defined* (Allan & Louw, 2001, p. 12).

### Overview of the Chapter

This chapter will establish the current context of the research. To help orientate the reader with the need for this present study, the chapter will start with a review of the previous research conducted in the field of forensic psychology and psycholegal work. Thereafter, for the reader to gain a richer understanding of this field, the definition and scope of forensic psychology and psycholegal activities will be explored. This involves a discussion on the current professional guidelines and standards in South Africa, including the unique ethics found in such *non*-fiduciary relationships.<sup>2</sup> The concept of psycholegal assessments and report writing are then expanded upon. Lastly, the current requirements for expert opinion and/or evidence are explored. Such exploration will orientate the reader with the criteria that will be used in the QRS measure to evaluate the sampled reports.

### Previous Research Findings

*No systematic research has been conducted into the quality of expert psychological reports and oral evidence in court. The general quality of expert psychological reports therefore remains unknown. It is likely that the more the clinical decision-making practice is based in interpretations and opinions, rather than on factual data, the greater the disparity between experts* (Gudjonsson & Haward, 1998, p. 183).

The Professional Board of Psychology (PBP) has received complaints against psychologists who perform psycholegal work, including accusations of biased reports, incompetence, misrepresentation of facts, unsubstantiated inferences, confusion of the professional relationship, inappropriate disclosure of information, over-servicing and inflated

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<sup>2</sup> A fiduciary relationship is one where the client entrusts his or her welfare to the clinician, who offers a professional service based on privilege and privacy (Zabow & Kaliski, 2006).

fees (Cohen & Malcolm, 2005).

As noted, guidance for this research is from the study completed by Ireland (2012). Ireland (2012) determined that, in the UK, there have also been concerns and complaints raised by practicing psychologists, judges and the public about the questionable quality of psychological reports. She further confirmed that there had not been previous, specific research on the quality of expert psychological reports that have been presented to courts.

Ireland's (2012) research was conducted by the School of Psychology at the University of Central Lancashire, and funded by the Family Justice Council (an independent body financed by the Ministry of Justice). The results were discussed in an unpublished summary report, "Evaluating Expert Witness Psychological Reports: Exploring Quality," and presented to the Family Justice Council. Ireland (2012) focused on 126 expert psycholegal reports located across 180 court bundles, which had been submitted in Family Courts in the United Kingdom. Ireland and Pinschof, a fellow rater (2009), developed a quality scale as a tool to assess the reports, the 'Quality Criterion – Assessment of Expert Psychological Reports' (the Quality Rating Scale). This scale considers the quality of the reports, and the qualification of the author.

Ireland (2012) highlighted that the widespread criticisms of psychological reporting included reporting allegations as fact, poorly sourced facts and weak basis for opinions including the lack of psychological theory, giving opinions that did not assist the court or was common knowledge, use of non-scientific methods, irrelevant and/or excessive testing, questionable objectivity, and informal writing styles. It is conceded that this British study has limited bearing in a South African context and the findings are unpublished. Nevertheless, this study stresses the fraught nature of this field of applied psychology, and the need for standardisation and regulations to prevent such situations. Moreover, it calls for more research that is systematic and objective.

There has been limited research in South Africa on the quality of psycholegal work performed by psychologists, and less research on the quality of psychological reports written. Therefore, based on the similarity of Ireland's (2012) study to this current research and the usefulness of Ireland and Pinschof's (2009) scale as a systematic tool of analysis, these findings were believed to be pertinent. This scale, and its applicability for a South African study, is discussed further in the methodology chapter. As will be seen from Ireland's (2012) findings and the available South African research (Allan & Louw, 2001; Brandt et al., 2004; Genis, 2008; D. A. Louw & Allan, 1998; Nicholas, 2000; Nicholas & Coleridge, 2000), the abovementioned complaints to the PBP appear to be a general trend in South Africa rather than rare occurrences.

#### **Qualification and training.**

Ireland (2012) determined that 20% of the psychologists were unqualified to provide such psychological opinion, even with the most basic background criteria. To determine the level of qualification of South African psychologists, Louw and Allan (1998) created a profile on South African psychologists performing the same psycholegal work. The research participants included members of the former Forensic Division of the Psychological Association of South Africa (FDPASA), and renowned local forensic psychologists who were not members of FDPASA. Louw and Allan (1998) analysed the responses of 75 self-reported questionnaires, with the results published in the South African Journal of Psychology (SAJP), and titled "A profile of forensic psychologists in South Africa." The study did not refer to the reports of these psychologists, but it gave an overview of the profession, which is useful in contextualising expert evidence. Based on this profile, it seems that the number of psychologists who are in fact interested in psycholegal work was low. Louw and Allan (1998) also found that in their sample, most of the psychologists who performed forensic work were reasonably experienced. However, this experience was usually less than 5 years

and involved informal training (workshops and courses). The lack of training has been lamented by the psychologists themselves. It was found that, generally, they believed that their training in forensics was insufficient (D. A. Louw & Allan, 1998).

Louw and Allan (1998) emphasised that a lack of knowledge, training and confidence explains why psychologists were not prepared to cope with psycholegal work – the ethical considerations and pressures are unique, especially in light of the uncertainties of evidentiary law. This lack of training was a sentiment held by all of the above-mentioned researchers. Louw and Allan (1998, p. unknown) expressed that,

Many psychologists do not appreciate that to succeed in the forensic field they must adjust to the demands of the situations. This requires, inter alia, that they must change the paradigms they use, the methods they use to gather information and make decisions, and how they express themselves in reports.

It is only through this adjustment that psychologists would realise their potential to contribute to forensic psychology and the legal system.

Forensic psychology has become an “applied and speciality field in psychology, and must be managed and promoted as such” (D. A. Louw & Allan, 1998, p. 238). This management and promotion of the field includes the investment by individual psychologists to obtain the necessary expertise, and the development of this field by the profession as a whole. Allan and Louw (2001) expanded on their research and created a survey to determine the perception of 252 lawyers on the expert testimony of psychologists. The research was published in the SAJP, titled “Lawyer’s perception of psychologists who do forensic work,” and included responses from prosecutors, advocates, judges and magistrates from around the country. The lawyers commented on the value of the psychologists’ expert evidence, and the psychologists’ knowledge, conduct and adherence to the rules of expert testimony. This study did not consider the psychological reports but the usefulness for the current research is the

discussion on similar aspects of psycholegal work. Allan and Louw (2001, p. 17) noted that, “[e]xpert knowledge, legal knowledge and forensic skills are of limited value to psychologists who offer expert testimony if they lack the sound foundation of general psychological knowledge, and where appropriate, clinical skills.” In other words, both psychological *and* legal training is vital. However, only a small number of psychologists can afford the time, effort and money needed to obtain the necessary forensic expertise and/or undertaking relevant research (D. A. Louw & Allan, 1998).

Moreover, the findings included an emphasis on psychologists practicing within their relevant specialisations. This concept was explored by Genis (2008), who confirmed that there is a dearth of research on the quality of the work presented by psychologists as expert witnesses. As such, this was the focus of her unpublished Masters’ thesis completed at the University of Pretoria, titled “A content analysis of forensic psychological reports written for sentencing proceedings in criminal court cases in South Africa” (Genis, 2008). She analysed a sample of 20 psychological reports written by clinical, counselling, educational and industrial psychologists for the sentencing of an accused in criminal courts, written for both the prosecution and the defence. This research focused on the psychologist’s qualifications and experience, how the assessments were conducted, how the reports were completed, and whether the reports complied with professional standards and HPCSA and PBP guidelines. These guidelines were as per the *Rules of Conduct* and Annexure 12 (Republic of South Africa, 2006a, 2006b). The unpublished nature of this study is recognized; however, it is highly relevant and useful for this current research.

To determine scope of practice, Genis (2008) had referred to the HPCSA and PBP’s scope of practices that were issued before the promulgation in 2011. The cited reference from 2007 is no longer available on the internet, but as per her citations, these scopes of practice were short and basic descriptions of each of the categories. She subsequently argued that 25%

of the psychologists had used test results to diagnose outside of their scope of practice. Genis (2008) also determined that HPCSA guidelines and/or professional standards were not upheld. Such as the psychologist not indicating their category of registration on the report; not appropriately citing the basis for their argument; not documenting whether ethical considerations were discussed with the client; and the use of non-standardised tests and tests not included in the earlier version of the HPCSA's *List of Tests Classified as being Psychological Tests* (Psychometrics Committee of the Professional Board for Psychology, 2010). Her recommendations then spoke to these regulatory bodies, including specific accreditation with the PBP, and the drafting of guidelines and standards for this field (Genis, 2008). She emphasised that "... psychologists in forensic contexts must not overextend the limits of their training by rendering services in areas where they have not been specifically trained" (Genis, 2008, p. 123).

In relation to scope of practice, Nicholas (2000) evaluated psychological reports of five perpetrators used for amnesty applications at the Truth and Reconciliation Commission (TRC). Nicholas' (2000) findings were published in the SAJP titled "An evaluation of psychological reports considered in the Amnesty Process of the Truth and Reconciliation Commission." The main expert consultant was both a psychiatrist and psychologist, but the expert had concentrated on psychological opinions in his reports, rather than a biomedical modality. All the applicants were granted amnesty for their offences based on the reports and expert evidence, in spite of committing, as Nicholas (2000, p. 50) described, "human rights violations." His findings exemplified the impact of expert witness evidence within the legal system on the public image of psychology. This was also a limited sample, but the study draws attention to the unfortunate practice of the courts seemingly overlooking important aspects of expert evidence. Consequently, Nicholas (2000) emphasises that the PBP and the Psychological Society of South Africa (PsySSA) need to be more involved in preventing



further oversight of the quality of psycholegal work. This seems vital for the standardisation and management of psycholegal work, especially since the psychologists' believe that they receive minimal assistance from the profession at large (D. A. Louw & Allan, 1998).

#### **Assessments and report writing.**

After analysing psycholegal reports, Genis (2008) established that forensic assessments and the reports were done in an 'idiosyncratic way'. Nicholas (2000, p. 52) determined that the reports were "uniformly poor and reflect[ed] badly on our profession." This was confirmed in the study by Brandt, Dawes, Africa and Swartz (2004) who analysed the content of 39 psycholegal reports in child custody matters. Eight different, prominent psychologists from the Cape Town area wrote the reports. The results were published in the SAJP and titled "A thematic content analysis of psychologists' reports in child custody evaluations." These researchers focused on the substantive issues and theoretical frameworks that informed the concluding decisions. However, the discussion on the findings on the psycholegal report writing was beneficial to the current study. Brandt et al. (2004) also established that the usefulness of most reports was unclear, and the reports were poorly written.

This was echoed in the UK, as Ireland's research (2012) rated 66% of the analysed reports as 'poor' or 'very poor', and confirmed 75% of the reports did not adhere to the British legal rules for report content and presentation. Ireland (2012) further commented on a number of aspects of the 'very poor' or 'poor' reports. This included an absence of support for opinions; making uninformed psychological statements; failure to address the instructing questions; misrepresentation of information in Curriculum Vitae (CVs); misunderstanding their role, boundaries and ethical issues; inappropriate and/or irrelevant comments by the expert; poor use of language and/or poor style of the reports; and unusual writing style and observations.

There was also an overreliance on psychometric testing, and the use of outdated, invalid or inappropriate assessment methods (Ireland, 2012). As emphasised by Brandt et al. (2004), the report was the only source of the psychologist's decision, and subsequently the only representation of the quality of the psychologist's assessment and reasoning. Brandt et al. (2004) further revealed that the reports reflected general, unspecific referral questions; and non-scientific foundations for psychological assumptions and opinions, with weak relationships between the assessment methods, and the conclusions and recommendations. The trend of unclear referral questions was also found by Genis (2008). Nicholas (2000) highlighted that his analysis of the reports illustrated weak relationships made between the self-reports by the client, and the diagnoses made by the expert consultant. Moreover, psychological theory and/or published reference books were quoted which contradicted the expert consultant's inferences and recommendations (Nicholas, 2000). Genis (2008) discovered further that the majority of reports did not include academic references, or the references were inadequately cited.

From Louw and Allan's (1998) profile of psychologists who perform forensic work, it was crudely estimated that psychologists be called to testify for every second report that they submit. This confirms the importance of psycholegal reports as standalone evidence, without oral testimony and the opportunity to explain further in court. Consequently, good quality and objective reports are essential to uphold the usefulness of psychological expert evidence.

Brandt et al. (2004) found in their sample of reports, the opinions and recommendations were framed to the preference of the judge. Moreover, the comprehensive nature of the reports was based on whether the psychologist wanted to testify in court, or if they perceived their role as "simply report writing, rather than as serving as a potential expert witness" (Brandt et al., 2004, pp. 275–276). In other words, the psychologists were aware that "their reports are received by a legal and judicial audience rather than remaining solely with

their clients within a psychological realm” (Brandt et al., 2004, p. 276). It is believed that this practice hampers the value of the psychological opinion. As such, Brandt et al. (2004) consequently emphasised that training should focus on how to modify psychological report writing for the legal context. Furthermore, this training should include emphasis on scientific trustworthiness and empirically supported theories and assessment practices. A quarter of the psychologists surveyed by Louw and Allan (1998) believed that their training on psycholegal report writing was extremely inadequate.

### **Professional identity of psychologists.**

One of the most positive aspects was Louw and Allan’s (1998) discovery that psychologists were acknowledged as ‘experts’ in the forensic setting and ‘independent psycholegal practitioners’ by legal professionals. However, Allan and Louw’s (2001) later research, determined that this perceived value and/or contribution of psychological testimony to legal decision making was moderate to low. However, Nicholas (2000) found that the court would still follow the recommendation of the expert consultant in spite of the unjustified diagnoses, or the expert’s discouragement of the court from hearing testimony from the applicants. In light of contradictory opinions and usurping the role of the court, he argued, “greater oversight over expert consultations was urged” (Nicholas, 2000, p. 50).

An interesting aspect of professional identity was the range of the psychologist’s professional practice. Ireland (2012, p. 30) determined that 90% of the sampled British psychologists had abandoned clinical practice to become “full time ‘professional’ expert witnesses.” Ireland (2012) argued against this practice, as she believed that remaining in general practice enables psychologists to know current treatments, assessments and the best practice. This number was lower in South Africa as per Louw and Allan’s (1998) study. Their research found that 21% of the profiled psychologists primarily perform forensic work on a full-time basis, and the psychologists felt there were limited opportunities available to local

psychologists. One reason put forth was that most psychologists were inaccessible to the public as they were in private practice and their fees were high (D. A. Louw & Allan, 1998). However, this is generally not a barrier to the attorneys that seek these services.

**Expert evidence and/or opinion.**

Of concern from Louw and Allan's (1998) profile was that 47% of the sampled psychologists considered themselves as forensic psychology experts, and not experts in any other field of specialisation. This seems to negate the core reason for a psychologist called as an expert to assist on the particular issues before the court. As emphasised by Louw and Allan (1998, p. unknown), "[t]he first rule-of-opinion evidence by experts is that the witness is a specialist." This deficiency was confirmed in their later research, where it was found that lawyers rated the psychologists' knowledge as being lower than what they would have expected from an expert (Allan & Louw, 2001). The scope of this expected knowledge included general and specialist psychological knowledge, court procedures and etiquette, and the relevant legal issues and principles. There was also a concern about the value of the expert's evidence, where particular reference was made to the concessions that psychologists make under cross-examination that rendered their evidence useless. Examples of such concessions were not given by Allan and Louw (2001) but it was understood that upon questioning the psychologist's evidence, significant problems in the validity would be uncovered.

Furthermore, Allan and Louw (2001) determined that the conduct of psychologists as experts during court proceedings was rated as only satisfactory. This included queries on the verification of the facts that form the basis of his or her opinion, preparation for expert testimony, professionalism during testimony, charging reasonable fees and the adherence to the rules of expert evidence. Overall, the objectivity and impartiality of psychological expert witnesses was emphasised as being a crucial feature of psychological expert testimony, but it

was found that the psychologists' objectivity was moderate (Allan & Louw, 2001).

Further bad practices were determined by Nicholas and Coleridge (2000). Nicholas and Coleridge (2000) analysed the expert witnesses' testimonies and reports in the Eugene de Kock court case. Their results were published in the SAJP titled "Expert witness testimony in the criminal trial of Eugene de Kock: A critique of the Posttraumatic Stress Disorder (PTSD) defence." The discussion highlighted conduct of diagnosing of PTSD in a legal context, including malingering,<sup>3</sup> objectivity, testifying with one's area of expertise, using accepted methods of assessment and writing accurate reports. The experts were a criminologist, two psychologists and a psychiatrist. This is a small sample but emphasises the significant impact of psycholegal opinion and reports, and the significant reach of psychological evidence beyond the courtroom. In this study, the psychologists would give opinions in areas where his or her expertise was limited; and even when admitting to this lack of specialised expertise, he or she would not exclude the corresponding opinion from the report.

Nicholas and Coleridge (2000) also believed that there was a lack of objectivity, and the psychologist relied too heavily on psychological theory, and would not update his or her opinion in light of changing circumstances or when the factual basis for the opinion was proved incorrect. This included not considering whether the client is malingering, and/or relying on instinct to distinguish false accounts. Nicholas (2000, p. 51) further revealed that the expert consultant would give very personal explanations for the client's behaviour and refute malingering, but also claim, "he did not get to know the applicant and does not know who he is." Furthermore, the psychologists would not validate the client's self-reports, and did not obtain collateral information or believed family members too easily (Nicholas, 2000).

During the assessment, unethical testing practices were discovered, including over- or

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<sup>3</sup> The DSM-5 describes malingering as the intentional production of false or grossly exaggerated physical or psychological problems, motivated by external incentives (American Psychiatric Association, 2013).

under-testing, results not taken holistically, and using tests with minimal value for forensic assessments (Nicholas, 2000; Nicholas & Coleridge, 2000). The psychologists also used diagnostic criteria from an outdated version of the Diagnostic and Statistical Manual (DSM) or would incorrectly cite DSM criteria (American Psychiatric Association, 2013; Brandt et al., 2004; Genis, 2008). Nicholas (2000) noted that there were “jumbled diagnoses” and “psychiatric diagnosis... presented in a report when it could not be psychiatrically confirmed” (Nicholas, 2000, p. 51). For example, the expert consultant would base his PTSD diagnosis on the storing and recall memory of the traumatic event, to the exclusion of the other 18 DSM-IV diagnostic criteria (American Psychiatric Association, 1994).

Brandt et al. (2004) further uncovered that poor and unfinished reports were presented to the court, with the assumption that legal professionals would understand psychological terminology. In court, the psychologists struggled to explain to the judge the link between the facts and the opinion, leaving the court with unclear and contradictory evidence. The psychologists would testify on aspects that were not the core issues for the court, and were ill prepared to defend his or her opinion and the basis for the opinion under cross-examination. Furthermore, Nicholas and Coleridge (2000) found that these psychologists would give evidence that was not included in the report, and under cross-examination give the unprofessional explanation that it ‘just had not been typed up.’ This painted a less than satisfactory account of professional court conduct.

### **The role of legal professionals.**

Brandt et al. (2004, p. 276) reasoned that such unprofessional practices may “be related to psychologists’ attempt to negotiate the tension between the different worlds that they inhabit – the psychological world and the legal or judicial one.” Lawyers promote their clients’ immediate legal interest, whereas the psychologist upholds the continuous psychological welfare of the client. Brandt et al. (2004) highlighted that working within this

legal world has important consequences for applied psychology and the form taken in psychological reports.

This raised a thought-provoking discussion about the legal professionals. Allan and Louw (2001) suggested that lawyers are ignorant on the exact scope of psycholegal knowledge and the limits of psychology within the legal field. The quality of the information given to psychologists in the attorney's mandate was also questioned, with a response that it is the duty of the psychologist to obtain all necessary information. As Brandt et al. (2004) had noted with vague referral questions, which would be understood from the attorney's mandate. Hence why Genis (2008) recommended basic psychological training for legal professionals – to assist with the selection and cross-examination of expert witnesses. She suggested that the consequences would be forensic psychology performed to a consistent and higher quality in the courts. Currently, the expectations of the lawyers differ with the actual work of psychologists due to a lack of knowledge and ignorance of psychology's role in the courts.

#### **Summary of trends.**

In conclusion, the previous research uncovered the following trends:

1. Psychological expert witnesses are unqualified due to a lack of experience, training and expertise in the relevant psychological fields;
2. Ignorance of psycholegal work, including the fundamental legal principles of expert evidence and the legal context of the presenting problem/referral;
3. Exceeding the scope of psychological practice, including testifying on aspects and/or issues that the court must decide upon;
4. Lack of awareness and due application of the ethical considerations in this particular context of a non-fiduciary relationship;
5. Insufficiencies in the assessment methods, including over- or under-testing, use of outdated/invalid tests and unethical testing practices;

6. Inadequate information given to the expert by the attorney resulting in vague referral questions;
7. Limited evaluation of the quality of evidence used for the basis of the opinion, including relying only on the client's self report and limited exploration of malingering;
8. Making opinions, conclusions and recommendations based on non-scientific foundations and inadequate arguments;
9. Incorrect use of diagnostic criteria from the DSM (American Psychiatric Association, 2013) and weak links between facts and diagnosis;
10. Deficits and idiosyncrasy in the structure, format and style of report writing;
11. Inability to show the court the usefulness of a psychological opinion and/or the relevance to the legal question through unclear, contradictory and/or incomplete opinions and reports; and
12. Demonstrating only satisfactory conduct during testimony and a moderate sense of objectivity, despite fulfilling the esteemed role of an expert witness.

In spite of the limitations of the generalisation of the above research, these results are still concerning and highlight the unclear nature of forensic psychology and psycholegal work.

### **Forensic Psychology and Psycholegal Activities**

*[P]sychology as a discipline [has] not been very circumspect in its attempts to bridge the gap between itself and law (Allan et al., 1995a, p. 681).*

The debate on the meaning of 'forensic psychology' continues on a global scale.

Briefly, the consensus seems to be that defining this field is dependent on whether a narrow/restrictive or broad/inclusive viewpoint is taken. The narrow definition of forensic psychology involves applied psychology in criminal courts, and in particular, a clinical psychologist determining an accused's criminal responsibility at the time of the offence, and his or her capacity to understand the trial (Rogers & Soothill, 2008; Wrightsman & Fulero,



2005). On the other hand, a broad definition of forensic psychology involves any psychological activity used to solve a legal issue, including assessment, research, applied theory, professional practice and expert testimony (Gudjonsson & Haward, 1998; Heilbrun, 2001; Wrightsman & Fulero, 2005).

This global debate and uncertainty resonates in South Africa. At the time of this research, the term ‘forensic psychology’ is a tentative professional title, with no formal registration or training programme. This tentative nature is surprising with the rate that this field is emerging (Allan et al., 1995b), with an increasing demand for psychological opinion on a wide range of matters, in both civil and criminal courts. Proposing resolution to the debate on ‘forensic psychology’ is not within the scope of this research. This research focuses on the legal work performed by all psychologists, rather than the work performed by those titled as being a ‘forensic psychologist’. Therefore, the researcher need only to concentrate on the *current* standing of the field as it pertains to reports handed into South African courts.

In 2008, the *Regulations Defining the Scope of the Profession of Psychology* were registered under the *Health Professions Act* (Republic of South Africa, 1974, 2008) (hereafter referred as ‘the Regulations’). These *Regulations* set out the acts specifically pertaining to the profession of psychology. Thereafter, in 2011, the Annexures to the *Regulations* were published, which set out the scopes of practice for the individual categories of psychology (Republic of South Africa, 2011). In the scopes of practice for each of the current categories of psychologists, it includes the act of ‘providing expert evidence and/or opinions’ (Republic of South Africa, 2011). This embraces the different fields of clinical, counselling, educational, research, and industrial psychology. It is in this capacity that registered psychologists practice in South African courts.

Annexure 9 of the *Regulations* formally introduced the field of ‘forensic psychology’ in South Africa and listed the scopes of practice (Republic of South Africa, 2011) (hereafter

referred to as “Annexure 9”). For interest to the reader, the scope of practice of forensic psychology includes:

- (a) Conducting psychological assessments, diagnoses, and interventions, referring clients to appropriate professionals for further assessment or intervention;
- (b) Providing therapeutic interventions;
- (c) Advising on the development of policies, based on forensic psychological theory and research;
- (d) Designing, managing, and evaluating forensic psychology-based programmes, and interventions; designing, managing, and conducting research; reporting on, and supervising research, in forensic psychology;
- (e) Training, supervising students, interns, and other registered psychology practitioners in forensic psychology;
- (f) Conducting psychological practice and research in accordance with the Ethical Rules of Conduct for Practitioners registered under the Health Professions Act, 1974, adhering to the scope of practice of forensic psychologists; and
- (g) Providing expert evidence and/or opinions.

The wide and unclear nature of these duties is evident. Nevertheless, it is emphasised that ‘forensic psychology’ is not a registrable category or formalised title in South Africa, and most psychologists perform psycholegal work in addition to their other professional activities (Cohen & Malcolm, 2005).

Notably, the Western Cape High Court declared the *Regulations* and the corresponding scopes of practice invalid on 14 November 2016.<sup>4</sup> The invalidity was

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<sup>4</sup> During 2014, an action was brought by the Recognition of Life Long Learning in Psychology Action Group Alliance (ReLPAG) and the Justice Alliance of South Africa (JASA) to challenge the validity of the Regulations. The Minister of Health, the Health Professions Council of South Africa (HPCSA), the Professional

suspended for 24 months to allow the Minister of Health, the HPCSA and PBP the chance to make appropriate corrections. However, the practical consequences are that psychologists still remained bound by the *Regulations* until new scopes of practice are published - “[p]sychologists registered to practise in particular registration categories... are obliged to regulate their conduct and practices in accordance with the scopes of practice of their respective registration categories, as defined in the *Regulations*” (Chuma, 2017a, p. 2). The debate on the *Regulations* falls outside the focus of this research. Although, it is well known that the current scopes of practice are highly controversial, and widely criticised (Chuma, 2017b; Jackson, 2006).

It is of interest to peruse the *Rules of Conduct* (Republic of South Africa, 2006b). These *Rules of Conduct* are still in force, and give guidelines for best practice, particularly in Annexure 12 (Republic of South Africa, 2006a). Chapter 7 of Annexure 12 refers to ‘Psycho-legal activities’. The first rule of the Chapter asserts,

67(1). A psychologist who performs psycho-legal (including forensic) functions, such as assessments, interviews, consultations, reports or expert testimony, shall comply with all the provisions of these rules to the extent that they apply to such activities.

As mentioned above, this would be applicable to *any* psychologist ‘providing expert evidence and/or opinions’ in the legal system (Republic of South Africa, 2011), which is the focus of this research.

In conclusion, this overview, briefly, drew attention to the ongoing debate on the scope of forensic psychology and applied psychology in the legal system, which will hopefully be resolved in the near future. The hypothesis of this research is that the uncertainty of applied psychology allows for situations of poorly trained, unprofessional, and non-

regulated misconduct in our courts. Consequently, the researcher will follow the lead of Annexure 12 of the *Rules of Conduct* (Republic of South Africa, 2006a) and refer to ‘psycholegal’ as an encompassing term for applied psychological practice in the legal setting. Furthermore, the use of ‘forensic’ from the literature would be a functional, interchangeable term.

### **Psycholegal Assessments**

*The purpose of the evaluation is to address the legal question. Evaluation consists of understanding the past and present behaviour, and the mental state of the person before the court in relation to the legal question* (Allnutt & Chaplow, 2000, p. 983).

It was first suggested in 1908 that psychologist’s specialised knowledge was of “probable benefit”, which was initially rejected by the courts for a lack of “legal instinct” (Ireland, 2008, p. 117). Thereafter, psychologists changed from being ‘helpers’ to the court, which had concentrated on the use of medical professionals, to experts in their own right. Allan, Louw and Verschoor (1995a, p. 680) enlighten that “[t]he ability of psychologists to think in scientific terms and to conceptualize problems encountered in a rigorous scientific way [gives] them, as behavioural scientists, a unique role in law.”

Psychologists can assist the court on a wide spectrum of emotional, behavioural and cognitive issues (Cohen & Malcolm, 2005; Republic of South Africa, 2008). For this research, the focus is on the professional opinions and assessments for personal injury (delictual) claims in civil cases.<sup>5</sup> Civil law is concerned with protecting personal and private rights, and can regulate how people treat each other. In personal injury cases, the injured party (plaintiff) will institute a claim against another (the defendant) for compensation for the wrongful loss suffered from injury to their persons (Meintjes-Van der Walt, 2006). Injury can be both psychological and physical in nature (Ackerman, 1999). Psychologists are one of the

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<sup>5</sup> For a discussion of litigation within civil law please see Chapter 2 in Kaliski’s book *Psycholegal Assessments in South Africa* (2006) written by Meintjes-Van der Walt (2006).

mental health professionals that are requested to write reports and testify on issues that require a mental health assessment and expert opinion on the extent of the injury (Meintjes-Van der Walt, 2006). In other words, psychologists will assess the nature, extent and severity of the injury and recommend forms of compensation for the cognitive, behavioural or psychological sequelae sustained.

Allan and Louw (1995; 1998) found that most psychologists perform civil litigation assessments, with personal injury evaluations being the second most popular type of civil assessment. These evaluations usually arise from the emotional trauma of a motor vehicle accident and/or the behavioural and cognitive fallouts from the brain injury sustained in the accident (Ewart-Smith, 2006). The psycholegal assessments for this research involve such personal injury claims against the Road Accident Fund (RAF). Other civil assessments include the determination of psychiatric impairment, chronic pain, and traumatic brain injury for disability claims; child custody and access; family, matrimonial and juvenile proceedings; and contractual and testamentary capacity and curatorship (Brandt et al., 2004; Cohen & Malcolm, 2005; Meintjes-Van der Walt, 2006). For interest to the reader, psychological assessments in criminal cases include the determination of criminal responsibility and capacity to stand trial; the extent that mental illness could be a lawful defence; and mental health factors that impact sentencing, including pre-sentence reports of the accused and victim-impact reports (Genis, 2008; R. Louw, 2006).

Despite the extensive scope of psychology's possible role in the legal field, the understanding of '*psycholegal* assessments' appears unclear. In Annexure 12, the definition of 'psychological services' includes 'psychological assessments, diagnoses and interventions' (Republic of South Africa, 2006a). Under Chapter 7 of Psycholegal Activities, there is a reference to the examination of 'psychological characteristics' (Republic of South Africa, 2006a). The understanding of 'assessment' could be read from the *Regulations* (Republic of

South Africa, 2008), which describes the following acts which fall under the profession of psychology [emphasis added],

2(c). The *evaluation* of emotional, behavioural and cognitive processes or adjustment of personality of individuals... by the usage and interpretation of psychological questionnaires, tests, projections, or other techniques or any apparatus, whether of South African origin or imported, for the determination of intellectual abilities, aptitude, personality make-up, personality functioning psychophysiological functioning or psychopathology.

As such, the psychological assessment, or evaluation, will depend on the nature of the legal issues, context of the assessment, assessment methods used, and the scope of practice and experience of the assessing psychologist. Heilbrun's (2001, p. 3) definition of a 'forensic mental health' assessment is further helpful, "[an] evaluation that is performed by mental health professionals as part of the legal decision-making process, for the purpose of assisting the decision-maker or helping one of the litigants in using relevant clinical and scientific data." In other words, the psychologist will complete an assessment and offer his or her concluding professional opinion to the court, to assist the judge in making a decision on the emotional, behavioural and cognitive issues in the case.

### **Ethical Considerations in Psycholegal Assessments**

*The conduct of forensic psychologists should be ethically immaculate for at least two reasons... [Firstly,] the acceptance of forensic psychologists... depends as much on their integrity as their ability to provide legally relevant information. [Secondly,] forensic psychology is the public showcase of psychology. However, in certain respects it is also different from the other fields of psychology... The lay public can therefore easily get the wrong perception of psychology in general through the activities of forensic psychologists (Allan & Louw, 1995, p. 690).*

A psychologist's assessment and professional opinion can affect the outcome of a court case. Moreover, it can directly and indirectly affect the individuals in the case, and also affect society on a wider scale (Cohen & Malcolm, 2005). As succinctly explained by

Nicholas (2000, p. 52), “[e]xpert witness consultation within the legal system is probably the most public work of psychologists and therefore the most likely to bring psychology into disrepute or show its worth to society.” Therefore, the conduct of the psychologist during the assessment is crucial.

### **Rules of conduct for psychologists performing psycholegal assessments.**

Annexure 12 of the *Rules of Conduct* formalises ethical behaviours for psychologists (Republic of South Africa, 2006a, 2006b). Ethical behaviours during psychological assessments include assessing in a professional relationship and context; the relevant use and appropriate administration of assessment methods; obtaining informed consent and maintaining confidentiality; due consideration of cultural diversity, and the corresponding standardisation of tests; holistic interpretation of assessment results; giving understandable explanations of assessment results; not using obsolete or irrelevant tests and outdated test results; and appropriate use of interpreters (Rules 44- 46, 48,51-52, 55, and 9) (Republic of South Africa, 2006a). However, these rules of conduct can be challenging to apply in the forensic setting (Ackerman, 1999; Allnutt & Chaplow, 2000; Republic of South Africa, 2006a; Zabow & Kaliski, 2006). As such, in Annexure 12, special provisions are made for psycholegal activities – both in text as exceptions to the general rules of conduct, and in the dedicated Chapter 7 for psycholegal activities (Republic of South Africa, 2006a).

It is important to highlight these ethical challenges as the psycholegal report can demonstrate the psychologist’s role and practical application of the ethical considerations during the assessment (Allnutt & Chaplow, 2000). These considerations can impact on the quality and reliability of the psycholegal assessment, and should be explicitly reflected in the report (Ackerman, 1999; Allnutt & Chaplow, 2000; Meintjes–Van der Walt, 2003). It is believed that unethical assessment processes would be brought into the light during testimony, which will negatively impress on the value of the psychologist’s expert evidence.

Unfortunately, this usually only occurs if there is a competent, attorney and/or opposing expert, and without another psychologist to comment on the quality of the assessment, such unethical flaws are not necessarily revealed. This strengthens the need for improved regulations that the court could use as a reliable benchmark to maintain a high standard of ethical psycholegal work.

***The expert witness role.***

In Annexure 12 (Republic of South Africa, 2006a), when maintaining the role of expert-witness, the rules of conduct indicate,

72. A psychologist shall be aware of the conflicting demands made on him or her by the code and the requirements of the court system, and shall attempt to resolve such conflict by making known his or her commitment to these rules and by taking steps to resolve such conflict in a responsible manner.

Furthermore, during any conflicts between ethics and the law, Annexure 12 (Republic of South Africa, 2006a) directs,

103(2). If the conflict... cannot be resolved, the psychologist concerned shall comply with the requirements of the law.

As declared by Sadock, Sadock and Ruiz (2015, p. 1381), “[t]he word ‘forensic’ means belonging to the courts of law.” This accentuates the atypical, non-fiduciary relationship found within the forensic setting where the usual values of upholding the clients’ autonomy, beneficence and non-maleficence do not apply (Allnutt & Chaplow, 2000; Zabow & Kaliski, 2006).

***Duty to third parties.***

Most psycho-legal assessments are third party requests by the attorneys or court (van der Berg & van der Merwe, 2016; Zabow & Kaliski, 2006). As such, the psycholegal psychologist’s duty is to third parties – the court, the attorneys, legal requirements, and the



interests of the community (Bellengere et al., 2013). Consequently, the interests of the third party can outweigh the interests of the client. Annexure 12 indicates that from the outset, the psychologist shall clarify and define the professional nature of the relationship with each party involved (Rule 71(2)) (Republic of South Africa, 2006a). This includes not being bullied by or solely reliant on the attorneys, and obtaining clear instructions and all the relevant information for the assessment (Allan & Louw, 2001; Ireland, 2008). Moreover, Annexure 12 highlights that it is particularly important for the client to know and understand the psychologist's role of performing an assessment for the legal matter (Rule 17(1) and 44(1)) (Republic of South Africa, 2006a).

***Dual relationships.***

Annexure 12 refers to two roles in psycholegal activities – the expert-witness and the witness on the facts (Rule 72 and 74) (Republic of South Africa, 2006a). This latter role is also described as ‘treatment experts’ –

[P]ractitioners who are called to testify about patients or clients who they dealt with in their ordinary professional practice. While these witnesses are primarily called to testify as factual witnesses, they are often invited to express opinions and interpretations within the limits of their expertise and experience (Allan & Meintjes-Van der Walt, 2006, p. 343).

It has happened that expert witnesses are used after a therapeutic relationship has commenced, or as a therapist after testifying (Allan, 2005a; Cohen & Malcolm, 2005; Genis, 2008). However, entering into such a multiple relationship has obvious ethical and professional concerns. Annexure 12 indicates that the psychologist shall perform assessments only in a defined professional relationship (Rule 44(1)) (Republic of South Africa, 2006a). The professional roles should be clarified from the outset (Allnutt & Chaplow, 2000).

Furthermore, Annexure 12 directs that the psychologist will refrain from assuming a

professional role with a conflict of interests or entering into multiple relationships, that could impair his or her objectivity, competence or effectiveness in performance (Rule 16(a), 17(3), 18(2)) (Republic of South Africa, 2006a). If such situations cannot be avoided, Annexure 12 dictates that the psychologist shall clarify the nature of his or her responsibilities, be aware how the prior relationship can affect his or her professional opinion, keep all the parties fully informed, and resolve the situation in accordance with the *Rules of Conduct* (Rule 71 and 73) (Republic of South Africa, 2006a, 2006b).

***Objectivity and impartiality.***

Annexure 12 upholds this professional identity of objectivity and impartiality in the legal setting (Republic of South Africa, 2006a),

70. In psycho-legal testimony and reports, a psychologist shall –

- (a) Testify truthfully, honestly and candidly and in a manner consistent with the applicable legal procedures; and
- (b) Describe fairly the basis for his or her testimony and conclusions.

Furthermore,

75(2)(f). A psychologist shall not make false, deceptive or fraudulent statements concerning the clinical or scientific basis for or the results or degree of success of his or her psychological services .

This rule prohibits being a ‘hired gun’ – experts that purposely write biased reports and give partisan evidence to the advantage of the paying party (Mossman, 1999). This prohibition also encompasses psychologists amending their opinions and/or reports at the request of the lawyers (Allan, 2005a; Allan & Meintjes-Van der Walt, 2006; Zabow & Kaliski, 2006). As Weiner (2006, p. 639) substantiates, “[m]eeting the client’s needs [is] providing the desired services, not the desired findings.” This desired service must be an objective and impartial assessment and concluding professional opinion.

***Informed consent & confidentiality.***

In relation to this unique psychological service, Annexure 12 confirms that since the psycholegal assessment is usually attorney mandated or court directed, it is not essential to obtain informed consent (Rule 46(3)(a) and (c)) (Republic of South Africa, 2006a). In the former situation, there is usually explicit permission by the client. However, the best ethical practice is that, before the assessment, the client is still informed of the nature and purpose of the psycholegal assessment. This includes who mandated the assessment, the reason for the assessment, the limitations to confidentiality, and the probable uses of the assessment results and information obtained (Rule 11(3)(a), 17(2), 24, 25(1), 27, 30, 46(3)(a), 46(4)) (Republic of South Africa, 2006a).

Furthermore, the psychologist shall document that the client has been informed of the nature and purpose of the assessment, with the corresponding consent, permission or assent (Rule 11(3)(b)) (Republic of South Africa, 2006a). The rules of conduct do not *clarify where or how* this documentation of ethical considerations should be noted (during the discussion chapter of the research results, it will be argued and explained why this should be included in the report). The limitations to confidentiality are more lenient in psycholegal assessments due to their very nature and purpose (Allan & Louw, 1995; Allnutt & Chaplow, 2000). However, the psychologist should only disclose information that is relevant and appropriate for scientific or professional purposes, as per normal (Rule 26) (Republic of South Africa, 2006a). In other words, any sensitive information must be relevant and have a valid reason for its disclosure.

Consequently, it is vital that psychologists are attentive to the additional professional and ethical demands in psycholegal work (Cohen & Malcolm, 2005). As such, these exceptional ethical rules of conduct during psycholegal assessments are considered in the QRS for the analysis of the sampled reports.

## Psycholegal Reports

*Experts must appreciate that their reports can have an irreversible impact on people's lives...* (Allan & Meintjes-Van der Walt, 2006, p. 354).

A psycholegal report is the final product of the psycholegal assessment and is a way to communicate the psychologist's understanding of the client and the findings of the assessment to other professionals (Kaliski, Allan, & Meintjes-Van der Walt, 2006). Kaliski, Allan, and Meintjes-Van der Walt (2006, p. 329) summarised that psycholegal reports should address "the required legal issues with clarity, relevance and ethically appropriate content." This includes content as per the *Rules of Conduct*, particularly Annexure 12 (Republic of South Africa, 2006a, 2006b). Reports should further encompass the core issue(s), the observed facts and the opinion that the psychologist would testify on in the role of an expert-witness (Ireland, 2008).

In *S v. Ramgobin and Others* 1986 (4) SA 117 (N), the essential distinction was made between an expert witness' oral opinion evidence in court and the report that he or she uses as a memory aid. These reports were deemed not evidence but a tool used by the expert witness to remember and demonstrate to the court how and why his or her opinion was reached (Allan & Meintjes-Van der Walt, 2006; Meintjes-Van der Walt, 2006; van der Berg & van der Merwe, 2016). Consequently, evidentiary credence is placed on the oral evidence under oath. Moreover, due to the adversarial nature of our legal system, the "verbal confrontation between the witness and the cross-examiner is seen as the most effective way to test the version of the witness" (Meintjes-Van der Walt, 2006, p. 22). It is during testimony and cross-examination that the expert can be questioned and challenged on their investigations and opinions (Allan & Meintjes-Van der Walt, 2006).

However, the importance of the report is illustrated if expert evidence is separated into 'content' (the report) and 'presentation' (oral testimony) (Ireland, 2008; Meintjes-Van der Walt, 2006). As highlighted in *Rocha vs. Great American Insurance Co.* 850 F.2nd 1095,

Sixth Circuit (1988) (n.d., p. 1103), “in this age where the ‘forensic expert’ populates the judicial landscape in ever increasing numbers... there are a plethora of experts who look good on paper and do not reveal their shortcomings until they start testifying.” Psycholegal reports are indicative of a psychologist’s thought processes and methods of assessment, and are a vital view into the quality of his or her applied forensic practice (Allnutt & Chaplow, 2000).

Accordingly, if a psycholegal report (‘content’) is of a high quality, the oral evidence in court (‘presentation’) will too be of a high quality because it will reflect a high quality and well-reasoned assessment. If the assessment results and recommendations are clearly and logically communicated, the concluding opinion is perceived as being meaningful, credible, and thus, persuasive (Meintjes-Van der Walt, 2006; Weiner, 2006). Furthermore, the expert will be able to defend his or her assessment and opinions accurately and successfully during cross-examination (Allan & Meintjes-Van der Walt, 2006; Allnutt & Chaplow, 2000). It is believed that a well-prepared report will positively influence the judge’s evaluation of the expert’s opinion. In legal terms, it strengthens the ‘probative value’ of the opinion (Bellengere et al., 2013).

Additionally, the quality of the report would be particularly vital in the circumstances where the report is placed onto the court record, becomes documentary evidence, and the necessity for oral evidence is discharged (van der Berg & van der Merwe, 2016). There are common instances where this occurs:

1. The judge has read the report and the expert affirms on record that the contents are correct, accurate and updated;
2. The parties have agreed to the contents, with no intention to challenge the opinion;
3. The referral question has been answered, and no new issues requiring expert oral testimony and opinion have been raised; and/or

4. The judge has read the report in his or her chambers and is satisfied with the contents, and that the contents do not contain prejudicial information (Allan & Meintjes-Van der Walt, 2006; Bellengere et al., 2013; Brandt et al., 2004; Ireland, 2008; Meintjes-Van der Walt, 2003; Meintjes-Van der Walt, 2006; van der Berg & van der Merwe, 2016).

In these cases, the quality of the report is essential because even though the legal professionals and court has accepted the report, it does not guarantee the psychological correctness of the report's contents. It has been determined that in South Africa, psychologists will only testify for approximately half of the cases that they complete reports for (D. A. Louw & Allan, 1998). This emphasises the need for good quality reports being produced for *all* occasions

In addition to the above situations, the report's contents will be available to an appeal court. However, an appeal court only relies on the evidence presented in the *court a quo* and no further oral evidence can be led. In these situations, the report then becomes both evidentiary 'content' and 'presentation', and its quality would be crucial, as the expert will not have the opportunity to testify and defend his or her opinion (van der Berg & van der Merwe, 2016).

Particularly in civil law, the report can be crucial pre-trial. Firstly, a comprehensive report can be an indication to the attorneys as to whether their client has a substantial claim (Allan & Meintjes-Van der Walt, 2006). The second reason is most applicable to this research as it applies to the reports that constitute the research sample. In accordance with the *Uniform Rules of Court as per the Supreme Court Act* (Republic of South Africa, 1999), parties must file a notice of intention to call an expert witness before the trial starts, including delivery of a summary of expert's opinions with reasons for the opinion (Rule 36(9)(a) and (b)). This enables the parties and experts to exchange reports and opinions. Therefore, a well-written

report, even in its summarised version, gives the opposing party an accurate overview of the opposing opinion (Meintjes-Van der Walt, 2006). This assists with making sound decisions on how to proceed with the matter – settlement or trial. If the trial proceeds, the report allows the opposing party to be adequately prepared to challenge the expert opinion and/or evidence (Zeffertt & Paizes, 2009). In other words, a good quality report can limit the duration of the trial and the costs. As succinctly remarked by Meintjes-Van der Walt (2003, p. 94), “[i]n order to enhance dissemination of information amongst all the role-players, it is essential that the expert reports that are disclosed should be as comprehensive as possible and comply with a code of ethics.” This upholds the role of being of ‘assistance to the court’, which is the golden thread to being an expert witness (Meintjes–Van der Walt, 2003; van der Berg & van der Merwe, 2016; Zeffertt & Paizes, 2009).

### **Expert Opinion and/or Evidence**

*Testifying in a court of law is never a display of mental agility. It is not a game of ‘flinkdink’. Testifying on issues as complex and obscure as the human psyche, demands reflection, cogitation and careful weighing of both the question and the answer. It requires wisdom, not wit (S v. M 1991 (1) SACR 91 (T), paras. 100F).*

As noted, assisting the court with an expert opinion has considerable ethical and human rights considerations. Furthermore, as Cohen and Malcom (2005, p. 65) highlight, “[e]xpert psychological evidence can also shape case law and determine the types of psychological evidence that are admissible in court.” Thus, it is vital that any psychologist undertaking forensic work and submitting psycholegal reports is aware as to what is required of them and their professional opinion. When assisting the court, psycholegal duties of psychologists fall under the guise of ‘expert opinion evidence’. This process entails the psychologist accepting the mandate from the attorney and/or court, conducting the assessment and providing an opinion and/or recommendation(s). Thereafter, the opinion and/or recommendation(s) is accepted by the attorney, handed to the court, and the psychologist testifies as an expert witness and his or her expert opinion is stated under oath,

either written or orally, which becomes expert evidence (Weiner, 2006).

Thereafter, the court considers the admissibility of the expert evidence on a case-to-case basis. In other words, the judge must decide if all or part of the expert evidence is relevant or important to the facts and issue in question (Zeffertt & Paizes, 2009). Thereafter, the judge determines the weight and probative value that will be attached to this evidence after it is viewed in light of the other evidence that has been presented (Allan & Louw, 2001; Meintjes–Van der Walt, 2003).

Due to the scope of this research, it would be sufficient to highlight that the current legal requirements for expert opinions and/or evidence remain vague, and are dependent on the unique facts before the court. As aptly remarked by Bellengere et al. (2013), “[w]here the court draws the line... is often arbitrary and unpredictable.” In *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd* 1993 (2) Lloyd’s Report 68 (pp. 68–81), the duties of an expert testifying in court are characterised as follows:

1. Expert evidence presented to court should be, and should be seen to be an independent product of the expert uninfluenced as to form or content by the exigencies of litigation;
2. An expert witness should provide independent assistance to the court by way of objective and unbiased opinion in relation to a matter within his expertise. An expert witness should never assume the role of an advocate;
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion;
4. An expert witness should make it clear when a particular question or issue falls outside his expertise; and
5. If an expert opinion is not properly researched because he or she considers



insufficient time is available, then this must be stated with an indication that the opinion is no more than provisional one. In the case where the expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

Meintjes-Van der Walt (2003) points out that these vague requirements lend judges being cautious on using this expert evidence to decide matters. This cautionary discretion does not assist in determining what acceptable expert evidence is, nor does it formalise the quality of psycholegal assessments expected by courts.

The researcher perused both legal and psychological sources to uncover possible distinct requirements – in order to verify criteria in the QRS for the analysis of psycholegal reports. Interestingly, the psychological authors were able to identify and discuss *particular*, practical standards to uphold for expert evidence. The legal authors focused on the differing court judgements (Bellengere et al., 2013; van der Berg & van der Merwe, 2016; Zeffertt & Paizes, 2009). Consequently, the main basis for the criteria is from Allan and Louw's (2001) study on the perception of psychologists involved in forensic work. The authors identified 'rules' for adherence of expert testimony. Further understanding of these rules is from Allan and Meintjes-Van der Walt's (Allan, 2005a; Allan & Meintjes-Van der Walt, 2006) discussions on expert evidence. These rules uphold the spirit of psychological expert evidence as remarked by Deimont JA in *Stock v. Stock* 1981 (3) SA 1280 (A) (paras. 1296E-G),

An expert in the field of psychology... who is asked to testify in a case of this nature, a case in which difficult emotional, intellectual and psychological problems arise... must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is

partisan and consistently asserts the cause of the party who calls him... [and] when it comes to assessing the credibility of such a witness, this Court can test his reasoning...

The above authors maintain that such rules should be reflected in the psycholegal report. As such, the following rules are represented in the measure tool for the analysis of the psycholegal reports. As mentioned, the measure, the QRS, was developed and used in the UK (Ireland & Pinschof, 2009). This measure and how it was adapted for the South African context is discussed in the methodology chapter.

Accordingly, these rules will be expanded upon to assist the reader in having a richer understanding of the QRS criteria.

**The testimony must add to the court's knowledge and assist the deliberations.**

***The relevancy rule.***

As highlighted above, the main use for expert opinion and/or evidence is to assist the court – the ‘helpfulness’ or ‘usefulness test’ (*Holtzhauzen v. Roodt* 1997 (4) SA 766 (W)). Additionally, the expert's testimony should add to the court's knowledge and assist the court's deliberations on the legal issues at hand (Allan, 2005a; Allan & Meintjes-Van der Walt, 2006; Meintjes–Van der Walt, 2003; Zeffertt & Paizes, 2009). The English case, *R v. Turner* (1975) 1 QB 834 (paras. 874h) set the precedent that the courts do not need specialists giving evidence on the daily functioning of ‘ordinary folk’ – that deemed to be ‘common knowledge’ to the average person. In other words, mental health expert witnesses should only testify on ‘abnormal’ mental health or functioning – the ‘common knowledge test’ (Allan & Meintjes-Van der Walt, 2006; Bellengere et al., 2013; Meintjes-Van der Walt, 2006; van der Berg & van der Merwe, 2016). Although, it is argued that there are instances where an expert psychologist would comment on ‘normal’ mental functioning, such as describing a person's intelligence or personality. Though the court as a layperson might have their own opinions on

these ‘normal’ issues, a psychologist has unique expertise and training. In these instances, the ‘usefulness test’ of the opinion would override the ‘common knowledge test’ (Allan, 2005a).

**Expert witnesses must possess the relevant expertise.**

***The expert rule.***

The general rule of evidentiary law is that witnesses testify on fact, not opinion. However, expert witnesses can provide opinions if it will assist the court in making legal decisions in areas that the attorneys or judge lack knowledge (i.e. the ‘usefulness test’) (Allan, 2005a; Allan & Louw, 2001; Meintjes–Van der Walt, 2003; Zeffertt & Paizes, 2009). The practice of psycholegal assessments is an ‘occupational speciality’ (Allan et al., 1995a, p. 682), and should occur after specialised training, and the gaining of theory, practical skills *and* experiential knowledge (Allan, 2005a; Meintjes–Van der Walt, 2003). This upholds the *Rules of Conduct* that emphasises that a practitioner shall perform a professional act for which he or she is adequately educated, trained and sufficiently experienced (Rule 3) (Republic of South Africa, 2006b).

Furthermore, as per Annexure 12, any unprofessional behaviour, and/or any misrepresentation or deception about his or her professional capabilities can cause disciplinary sanctions being imposed (Rule 111 and 75) (Republic of South Africa, 2006a). It is for the court to determine if the ‘expert’ has the necessary qualifications and experience to give expert opinions of significance to the case (van der Berg & van der Merwe, 2016; Zeffertt & Paizes, 2009). To assist in this determination, it is believed that Curriculum Vitae (CV) should be made available to confirm the expert’s qualifications, experience and registration category.

***The competence rule.***

The psychologist should only give opinions within his or her specialised competency (*Schneider NO and Others v. Aspeling and Another* 2010 (5) SA 203 (WCC)). The rules of

competence in Annexure 12 direct that the psychologist must have the appropriate competency in the areas underlying psycholegal work, and the specialised knowledge to perform the assessment (Rule 3(1) and 67(2)) (Republic of South Africa, 2006a). This includes general psychology and psycholegal knowledge, but particularly includes the specialised field or area of psychology that is relevant to the particular issue before court (Allan & Meintjes-Van der Walt, 2006; Bellengere et al., 2013; D. A. Louw & Allan, 1998; van der Berg & van der Merwe, 2016). The expert's competency and specialised expertise is best described by the details of the CV, rather than this or her qualification and registration alone.

***The recognised field of study rule.***

The field of study that the expert testifies upon should be scientifically recognised (Allan, 2005a; 2001). Allan (2005a), and Cohen and Malcolm (2005) argue that based on the numerous reported cases where psychological testimony has been admitted, it is clear that South African courts consider psychology a recognised field of expertise. However, the South African courts have not yet defined a clear test on how to determine if the specialised area of psychology is recognised. Usually, the courts will allow the testimony of the expert and decide the probative and scientific value of the evidence after considering the opinions of other experts in the field and case law from other jurisdictions (Allan, 2005a; Allan & Louw, 2001). To uphold this rule, it would be important for the psychologist to stay within the recognised scopes of psychological practice and the recognised scope of their registered category (Republic of South Africa, 2008, 2011).

**The evidence and testimony must have scientific trustworthiness.**

***The trustworthiness rule.***

The well-known American Supreme Court case, *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993) determined standards for admitting expert evidence.

Trustworthy and ‘scientific’ evidence must be:

1. Falsifiable (a product of a empirically testable theory or technique);
2. Reviewed (subject to peer review and publication in professional journals);
3. Accepted (the theory or technique must have general acceptance in the scientific community); and
4. Reliability and valid (with a known error rate and standards in place to control its use).

This *Daubert* standard (1993) is applicable in South African courts to evaluate the scientific trustworthiness of expert evidence (Allan, 2005a; Meintjes–Van der Walt, 2003). This standard of scientific trustworthiness is applicable to psychological assessment methods, psychometric tests, psychological theory and empirical literature. This criteria is also included in the rules of competence in Annexure 12 (Rule 68 and 3(2)) (Republic of South Africa, 2006a),

3(2). A psychologist shall ensure that his or her work is based on established scientific and professional knowledge of the discipline of psychology

Furthermore,

68. A psychologist shall ensure that psycho-legal assessments, recommendations and reports are based on information and techniques sufficient to provide appropriate substantiation for the findings.

It is also argued that this includes the cultural and ethical applicability of the assessment methods.

***The comprehensibility or clarity rule.***

In order for the results of the psycholegal assessment to be accepted, it first needs to be understood (Meintjes–Van der Walt, 2003). In other words, the psychologist should give expert opinion and/or evidence that is comprehensible to the applicable legal professionals

(Allan & Louw, 2001; Bellengere et al., 2013). Annexure 12 indicates that when the psychologist communicates his or her findings to the attorney or court, it shall be done in a manner that is clear and reasonably understandable, or accompanied by adequate interpretative aids or explanations (Rule 52 and 49) (Republic of South Africa, 2006a).

***The objectivity rule.***

To uphold the professional identity and trustworthiness of psychologists and psychology, expert opinion and/or evidence must be impartial, objective and unbiased (Allan & Louw, 2001; Cohen & Malcolm, 2005; Ireland, 2008; Meintjes–Van der Walt, 2003; Zeffertt & Paizes, 2009). As discussed above in the ethical considerations, one of the main themes of the *Rules of Conduct* and Annexure 12 is maintaining professional judgement and objectivity (Republic of South Africa, 2006a, 2006b). This includes:

70. In psycholegal testimony and reports, a psychologist shall –

- (a) Testify truthfully, honestly and candidly and in a manner consistent with the applicable legal procedures; and
- (b) Describe fairly the basis for his or her testimony and conclusions.

**Expert must be able to provide facts, data and reasons on which their opinions are based.**

***The basis rule.***

Meintjes-Van der Walt (2003) suggests that judges consider the basis for the opinion to be the most important, and most persuasive factor. An expert's opinion should not be presented as a 'statement of fact' but rather a reasonable conclusion to the available facts and results determined in the psycholegal assessment (Allan & Meintjes-Van der Walt, 2006; Weiner, 2006; Zeffertt & Paizes, 2009). As per Annexure 12 (Republic of South Africa, 2006a),

68. A psychologist shall ensure that psycholegal assessments, recommendations and

reports are based on information and techniques sufficient to provide appropriate substantiation for the findings.

Ireland (2008) further suggests that the psychologist should include all possible explanations for the conclusion, with an explanation for his or her chosen opinion. Moreover, the psychologist should identify and admit weaknesses in the assessment, opinion and/or report; and the limitations to the provisional or concluding opinion(s) (Ireland, 2008; Meintjes–Van der Walt, 2003). This rule is echoed in Annexure 12 (Republic of South Africa, 2006a),

69. ... Provided that when, despite reasonable efforts, such an examination is not feasible, the psychologist shall clarify the effect of his or her limited information on the reliability and validity of his or her reports and testimony, and limit the nature and extent of his or her findings accordingly.

Also, Annexure 12 indicates that when interpreting assessment results (Republic of South Africa, 2006a),

51(2). A psychologist shall indicate any significant reservations he or she may have about the accuracy of his or her interpretation.

This reveals to the court that the expert has considered all possibilities, and speaks to the veracity and reasoning of their opinion. This would include the use of psychological opinion to support the chosen opinion, such as published reference works. For example, diagnoses should be discussed and recorded in the DSM-5 (American Psychiatric Association, 2013) or ICD-10 (World Health Organisation, 1992) format, as despite criticisms, these are globally accepted by the mental health community (Allan, 2005a). This allows the court the opportunity to understand, challenge and determine the correctness of the expert's opinion, and the weight of admissibility that should be attached (*Coopers (South Africa) (Pty) Ltd v. Deutsche Gesellschaft für Schädlingsbekämpfung MbH* 1976 (3) SA 352 (A)).

Furthermore, this rule of evidence directs that the expert's opinion should be based on facts that are admissible, and can be reconciled with the other evidence before the court (*S v. Shivute* 1991 (1) SACR 656 (NM)). Annexure 12 emphasizes that the psychologist should base his or her assessment, recommendations, reports and psychological diagnostic or evaluative statements on substantiated information (Rule 44(2)) (Republic of South Africa, 2006a). These substantiated or admissible facts include the facts gathered and/or observed by the psychologist during his or her assessment, which should be verified before being used as a basis for the assessment and/or findings (Allan & Louw, 2001; Ireland, 2008). As per Annexure 12 about 'qualified opinions' (Republic of South Africa, 2006a) [emphasis added],

69. A psychologist may provide written or oral psycho-legal reports or testimony about the psychological characteristics of a client only after he or she has *conducted an examination of the client which is adequate to support his or her findings:*

Provided that when, despite reasonable efforts, such an examination is not feasible, the psychologist shall clarify the effect of his or her limited information on the reliability and validity of his or her reports and testimony, and limit the nature and extent of his or her findings accordingly.

For example, the common practice of giving an estimated intellectual functioning based on a Mental-State Examination (MSE) (i.e. a description of the client's objective presentation) would not be considered an adequate examination of intelligence. This is rather a limited finding, and if it were the only feasible examination available, the expert would have to clarify the reliability and validity of this information and finding. Moreover, the clarification of 'limited information' will also apply if the expert has relied upon allegations that have not yet been determined by themselves or has not yet been declared by the court as being factual and accepted as being correct (Ireland, 2008).

The expert must be able to provide these facts, data and reasons on which their



opinions are based. However, Annexure 12 indicates an additional consideration to disclosure. The psychologist should only disclose the *raw* test data to the attorney or court when required by law or court order, and only when the client is protected from harm or disadvantage (Rules 54(2) and 54(3)) (Republic of South Africa, 2006a). This provision is particularly significant when the disclosure is to a person who is not qualified to use the raw data or test and can interpret the results incorrectly or without due consideration of other psychological factors (Rule 45(b)) (Republic of South Africa, 2006a).

**Experts cannot express opinions on questions that the court has to decide upon**

***The ultimate issue rule.***

In *S v. Gouws* 1967 (4) SA 527 (EC) (paras. 528D), Kotze J explained this rule, The prime function of an expert seems to [the court] to be to guide the court to a correct decision on questions found within his specified field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried.

In other words, the expert should not express opinions on the factual or legal issues and/or questions that the court has to decide upon (*Ruto Flour Mills Ltd v. Adelson* 1958 (4) SA 235 (T)). Specifically, the psychologist should not overstep the boundary between legal and psychological issues. Additionally, the psychologist should not discuss issues that may negatively impact the client's case or disrupt the legal proceedings (Allnutt & Chaplow, 2000). The rules of conduct echo this sentiment. Annexure 12 indicates that in the written report, in consultations with attorneys or during oral testimony, the psychologist may only disclose information that is relevant to the presenting problem and/or legal issue.

Furthermore, disclosure is only to those that have a professional and legitimate interest in the matter (Rule 26 and 27(1)(b), 27(2), 30) (Republic of South Africa, 2006a).

These rules for expert testimony make it is clear that there are many factors that

should be taken into consideration when undertaking psycholegal work, and submitting reports to courts.

### **Conclusion**

This chapter focused on providing the background to forensic psychology, and psycholegal work in the South African legal system. Firstly, relevant previous research was examined in order to contextualise this present study. That assisted with determining a summary of poor practices found by previous researchers. Such poor practices were further understood through the discussion on the challenges in defining the scope and duties of forensic psychology, nationally and globally, and the current standing of psycholegal activities in South Africa. A discussion followed on the concepts of psycholegal assessments, psycholegal reports and the requirements for expert opinion and/or evidence. The ethical considerations in this specific field of applied psychology were elaborated. This chapter created a basis to orientate the reader with the current knowledge of what will be discussed in the findings of this research.

The next chapter will describe the methodology used in this study. As noted, in the previous research, apart from the work of Ireland (2012), their methodologies did not include a systematic analytic procedure against clear criteria taken from relevant legal and psychological literature. It appeared to be experts sharing anecdotes or giving opinions on the work of other experts. In contrast, this present study will use a structured approach to evaluate the sampled reports. Therefore, the findings might be quite different to those suggested by the previous studies described in this chapter.

### **Chapter 3: Methodology**

*Virtually every clinician will be required to write a report for legal purposes at some time. Whether for a known patient, or client, or as the culmination of a formal assessment - all reports should conform to certain essential principles (Kaliski et al., 2006, p. 329).*

#### **Overview of the Chapter**

In this chapter, the methodology used for this research will be elaborated. The design of this archival study was an evaluative quantitative method. The archival aim was to collect psycholegal reports from the Grahamstown division of the Eastern Cape High Court.

Thereafter, the evaluative quantitative method offered the opportunity to evaluate the reports using a systematic measure and collect some quantitative data. The systematic and objective measure, the QRS, was an adapted instrument originally developed by Ireland and Pinschof (2009). The purpose was to answer the research question about the quality of psycholegal reports collected at the court. Thereafter, the evaluation would assist in the discussion of the content of the reports, which would inform the discussion of the quality of psycholegal writing (Bryman, 2012). The exploratory and descriptive nature was to understand and gain a richer understanding of the approaches used by psychologists in psycholegal assessments and the subsequent reporting. The QRS instrument will be discussed, including how it was adapted for the South African context. Unique ethical considerations were navigated and the steps taken to maintain the integrity of the research will be detailed.

#### **Research Problem**

In view of the discussed lack of structure and guidelines pertaining to psycholegal reports in the South African field of applied psychology, the research question is as follows: What is the quality of psycholegal reports submitted to the civil section at the Grahamstown division of the Eastern Cape High Court as evaluated by the instrument developed by Ireland and Pinschof (2009) and adapted for the South African context? A further question is: What is the comparison of quality of this sample of South African reports as compared to Ireland's

(2012) results? The expectations, based on the literature review, are that the quality of this sample of reports as evaluated would be low. However, many of the claims made about psycholegal reports in South Africa seem rather anecdotal, and this research is important in that it uses a set of objective criteria in a structured measure to assess the quality of the reports.

### **Sample**

Given the detailed analysis of each report and the scope of a mini-thesis, 20 reports were assessed, from 20 court case files, written by 20 different psychologists. The report writers comprised of seventeen (85%) clinical psychologists and three (15%) counselling psychologists. In relation to the location of the psychologists, nine (45%) of the psychologists were based in the Eastern Cape, eight (40%) from the Western Cape, two (10%) from Gauteng, and one (5%) from Kwa-Zulu Natal.

### **Data Collection**

#### **Unit of analysis.**

Kaliski et al. (2006, p. 329) outline that a psycholegal report is a “report [written] for legal purposes.” For this research, reports must have been written for legal purposes *and* have been voluntarily disclosed and submitted by the party as basis for evidence that would be tendered in a court. This distinction is vital because reports not handed to the court, remain privileged and confidential to the client, the client’s legal representative, and the author (Meintjes-Van der Walt, 2006).

#### **Sources and sampling procedures.**

A systematic sampling procedure was followed to gather the necessary sources in this jurisdiction (Bryman, 2012). Initially, psycholegal reports for civil matters recently heard at the Grahamstown division of the Eastern Cape High Court during the period 2011 to 2016 were collected. This court was chosen for practical purposes due to the locality of the

university and researcher. The choice of civil cases was for ease of availability.

The researcher employed a hand search, as there was no itemised catalogue of court cases that included psycholegal evidence. For five days, the researcher drew all the largest court files that she could find. The researcher had noticed that these large files had the highest chance of containing multiple expert reports. These files were usually Road Accident Fund (RAF) claims, with assessments involving personal injury. It was kept in mind to collect reports written by different psychologists, from the different registrable categories. This was to increase the authorship and different styles of report writing. This research was not concerned in the substantive theories underpinning the assessments, and as such, the focus was not on the personal injury assessment but the overall content and general psychological theoretical aspects. Therefore, the choice of these RAF court cases was to compare reports within the same area of psychology and law.

This hand search resulted in 50 reports by 48 different psychologists, written between 2011 and 2016. The categories of the authors were 23 (48%) clinical, four (8%) counselling, 17 (36%) industrial and four (8%) educational psychologists. Thereafter, reports that met the following inclusionary criteria were chosen:

1. Reports were written for RAF claims and submitted to the court under Rule 36(9)(a) and (b) of the *Uniform Rules of Court as per the Supreme Court Act* (Republic of South Africa, 1999);
2. Reports written after 2 September 2011 when Annexure 9 (Republic of South Africa, 2011) was promulgated in order to compare the same regulated scopes of practice, including that of forensic psychology (the reports were also all written before 14 November 2016 when the *Regulations* and scopes of practice were declared invalid (Chuma, 2017a; Republic of South Africa, 2008, 2011));
3. Psychologists based in South Africa who completed reports for matters finalised in

the Grahamstown division of the Eastern Cape High Court;

4. Due to the vast differences in the scope of practices, only reports completed by authors purporting to be clinical and counselling psychologists were considered. The researcher decided to concentrate on duties that were similar to her own, as the assessments completed by industrial and educational psychologists were beyond her knowledge;<sup>6</sup> and
5. Reports written in English to prevent concerns with the reliability of translating reports written in another language.

Of these 50 reports, 20 met these criteria and were thus included in the analysis. Due to the forum of this research, this number seemed appropriate enough to draw analogies and explore themes in the content, style and process of the psycholegal assessments. To assist in determining the qualification of the authors, the HPCSA's 'iRegister' website was referred (Health Professions Council of South Africa, 2017). The researcher noted the qualification, registration category and year of registration of independent practice.

### **The Instrument**

The quantitative evaluation of psycholegal reports was accomplished using Ireland and Pinschof's (2009) measure, "Quality Criterion – Assessment of expert psychologist reports" (the QRS). As discussed in the literature review, this was a tool developed and used in the UK. The QRS was adapted for the South African context and this particular research. How the instrument was adapted is discussed in the next section.

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<sup>6</sup> It has been found that the training and practice of counselling and clinical psychology in South Africa do overlap (Leach, Akhurst, & Basson, 2003).

**The Quality Rating Scale (QRS) criteria.**

The measure, Quality Rating Scale (QRS), is divided into Content (Fact and Opinion, and Methods), Process, and Qualification (See Appendix A). The following sets out the criteria as adapted for this research in a South African context.

***Content: Fact and Opinion.***

With regards to fact and opinion, on a scale of 1 (*not at all*) to 5 (*completely*), the raters assessed whether:

1. The opinion would assist the court as it falls outside the ‘common knowledge’ of the judge, and concerns abnormal mental health or functioning;
2. The report included the data from which inferences were drawn;
3. The report included raw test data from the assessment and/or irrelevant information about the client;
4. Each element of opinion could be linked back to a fact cited within the report;
5. The author had evaluated the quality of the evidence presented;
6. Theory was used to support clinical opinion;
7. Provisional opinion was included;
8. A range of opinion was included; and
9. Allegations were reported as fact.

***Content: Methods.***

With regards to method, on a scale of 1 (*not at all*) to 5 (*completely*), the raters assessed the extent to which:

1. The psychometric tests met the *Daubert* standard for submission as scientific evidence;
2. These trustworthiness criteria were discussed in the report;
3. The psychometric evidence was relevant to the current case;

4. The assessment method fitted with the referral question; and
5. The opinion would be clear and reasonably understandable to legal professionals.

***Process.***

Regarding process, on a scale of 1 (*not at all*) to 5 (*completely*), the extent to which:

1. Emotive or prejudicial terms were used;
2. The report remarked on ethical issues, such as informed consent and limitations to confidentiality; and
3. The information disclosed about the client was relevant and non-sensitive.

***Qualification.***

Regarding qualification, this was assessed on a scale of 1 (*not at all*) to 5 (*completely*), the extent that:

1. A Curriculum Vitae (CV) of relevant experience was provided;
2. The chosen expert had the required knowledge and experience of mental health practice;
3. The chosen expert had the specialised expertise to complete the assessment and remain within a scope of psychological practice; and
4. The author commented on the legal question or issue(s) in the remit of the judge.

***Overall Quality Rating.***

Lastly, there was an overall quality rating based on a scale of 1 (*very poor*) to 5 (*excellent*).

**Adaptation for South African legal system**

Ireland and Pinschof's scale (2012; 2009) is based on the English Civil Procedure Rules (which set out measurable expectations for report content) and the standards set by *Daubert* (1993). It was also developed for analysis of particular psycholegal issues surrounding reports submitted in Family Court, and includes criterion on risk assessment.



It was vital to determine the applicability of the quality scale in the South African context, and the context of this research. Due to the researcher's legal background, she was aware that because of its European origins, South African law is considered a hybrid system of Roman-Dutch and English law (Allan, 2005b). Therefore, it would be assumed that there would be similarity between the English and South African law's concerning expert opinion and/or evidence.

***QRS: Original criteria as compared to South African law***

To determine the extent of similarity, the researcher compared the criteria employed in Ireland and Pinschof's (2009) scale (QRS), to the rules of expert opinion and/or evidence discussed in literature review (Allan, 2005a; Allan & Louw, 2001; Allan & Meintjes-Van der Walt, 2006). The researcher felt equipped to make these comparisons due to her academic and experiential legal background. The findings have been tabulated below in Table 1 to Table 4 for ease of comparison. The criteria that were not applicable for this South African (SA) context and/or current research have been noted and crossed-out.

Table 1

*Original criteria of the UK QRS 'Content: Fact and Opinion' as compared to SA rules for expert witnesses*

Ireland and Pinschof's (2009) UK scale	'Rules' for SA expert witnesses
To what extent does the report include the data from which it draws its opinion?	The basis rule (The expert must be able to provide the facts and data on which his or her opinion is based)
To what extent is the final opinion linked back to facts in the main body of the report?	The basis rule (The opinion should be a reasonable conclusion to the available facts and results determined in the psycholegal assessment)
To what extent does the psychologist evaluate the quality of the evidence they present (e.g. do they note problems with measures; deal with potential criticisms etc.)?	The basis rule (The expert should be able to identify and discuss weaknesses or limitations in the assessment, opinion and/or report)
To what extent is psychological theory used to support clinical opinion?	The basis rule (The expert must be able to provide the facts, data and reasons on which his or her opinion is based)
To what extent are fact and opinion clearly separated, (i.e. with fact in the main body and opinion in the conclusion section)?	The basis rule (The expert should include all possible explanations for his or her conclusion, with an explanation for his or her chosen opinion)
To what extent is provisional opinion included?	The basis rule (The expert should include all possible explanations for his or her conclusion, with an explanation for his or her chosen opinion)
To what extent does the expert include a range of opinion? (e.g. extent to which they give more than one opinion on a topic under examination and indicate which they prefer).	The basis rule (The expert should include all possible explanations for his or her conclusion, with an explanation for his or her chosen opinion)
To what extent does the expert report allegations as fact?	The basis rule (The expert should be based on facts that have been verified as factual and are admissible to the court)

Table 2

*Original criteria of the UK QRS 'Content: Methods' as compared to SA rules for expert witnesses*

Ireland and Pinschof's (2009) UK scale	'Rules' for SA expert witnesses
With regards to the psychometrics used to what extent do they fit the following criteria: Clinical measures; peer-reviewed measures; accepted in the field; known error rate; and research measures?	The trustworthiness rule (The evidence must be falsifiable/empirically tested, peer-reviewed, accepted in the field, and reliable and valid with a known error rate)
<del>What method(s) have they used to assess general violence risk; sexual violence risk; and domestic violence risk?</del>	(Not applicable to this research sample of reports assessing personal injury in motor vehicle accidents – therefore, removed for the adapted version)
To what extent are the psychometrics used relevant to the current case?	The trustworthiness rule (The expert shall ensure that the assessment is based on information and techniques that are sufficient to provide appropriate basis for the findings)
To what extent are the chosen methods fitting to the instructed questions?	

Table 3 *Original criteria of the UK QRS 'Process' as compared to SA rules for expert witnesses*

*Original criteria of the UK QRS 'process' as compared to SA rules for expert witnesses*

Ireland and Pinschof's (2009) UK scale	'Rules' for SA expert witnesses
To what extent are emotive terms used? (i.e. those that could prejudice such as referring to a client as a victim of rape in the absence of fact)	The objectivity rule (The expert must be impartial, objective and unbiased)
<del>To what extent does the report follow the structure of expert's reports as dictated in CPR?</del>	(Not applicable in the South African context as we do not yet have a formalised structure or format for psycholegal reports – therefore, removed for the adapted version)

Table 4

*Original criteria of the UK QRS 'qualification' as compared to SA rules for expert witnesses*

Ireland and Pinschof's (2009) UK scale	'Rules' for SA expert witnesses
The extent to which the chosen expert has experience of mental health practice? (See CV)	The expert rule (The expert should have the training, knowledge, skills and expertise of psychological work)
Based on the CV included in the report, to what extent does the expert have the competence to complete this assessment? (See CV)	The competence rule (The expert should have the relevant expertise of psycholegal work and his or her specialised field/area of psychology)
To what extent does the expert remain within their remit? (e.g. do they go outside their expertise? Do they comment on issues in the remit of the judge?)	The recognised field of study (The expert should stay within the scope of psychological practice)  The ultimate issue rule (The expert should not express opinions on issues and/or questions that the court has to decide upon)

As it can be seen, there is a large degree of similarity between the criteria for expert opinion and/or evidence in the United Kingdom and South Africa. As such, it is argued that the "Quality Criterion – Assessment of Expert Psychologist Reports" scale is applicable in this context.

***QRS: Adapted criteria for South African context***

The scale was slightly adapted to include unique aspects of South African ethical codes and law of conduct. The researcher felt equipped to make these adaptations due to her understanding of legal principles. Table 5 to Table 7 set out the criteria that were added to supplement the applicability of the use of the measure for the current research in the current context.

Table 5

*Added criteria for the adaption of the UK QRS 'Content: Fact and Opinion' to represent SA supplementary rules for expert witnesses*

Criteria included into Ireland and Pinschof's (2009) UK scale	'Rules' for SA expert witnesses
To what extent does the opinion assist the court?	The relevancy rule (The main use for expert opinion and/or evidence is the assistance to the court, and its relevance to the court's deliberations on the issues at hand)
To what extent has raw test data been included?	The basis rule (The expert should only disclose raw test data as required and with discretion)

Table 6

*Added criteria for the adaption of the UK QRS 'Content: Methods' to represent SA supplementary rules for expert witnesses*

Criteria included into Ireland and Pinschof's (2009) scale	'Rules' for SA expert witnesses
To what extent is the opinion clear and reasonably understandable?	The comprehensibility rule (The opinion should be clear and reasonably understood or accompanied by adequate interpretative explanations)

Table 7

*Added criteria for the adaption of the UK QRS 'process' to represent SA ethical considerations for psycholegal activities*

Criteria included into Ireland and Pinschof's (2009) scale	Ethical considerations for SA psychologists
To what extent does the expert comment on ethical issues?	Ethical rules of conduct (The expert should discuss and document the non-fiduciary ethical considerations with the client)
To what extent is the information disclosed relevant and non-sensitive?	Ethical rules of conduct (The expert should only disclose information that is relevant to the issue at hand and non-sensitive to the client)

Subsequently, it was believed that this adapted measure is suitable as a tool for this research. The measure should assist in highlighting themes in psycholegal assessments and reporting, the overall quality of report writing, and the qualification of the authors.

**Reliability: Inter-raters.**

A blind rating of a small sample of the reports was conducted for inter-rater reliability and consistency (Moerdyk, 2009). Two colleagues were approached - a clinical psychology intern and a registered clinical psychologist completing her community service. Both were employed at the same psychiatric hospital as the researcher and had worked in the forensic unit for at least three months completing psycholegal assessments. The researcher trained the raters on the purpose and use of this measure.

Four reports were randomly selected by the raters and double-rated to check for reliability. An inter-rater agreement statistic (K, Kappa) was calculated using *Medcalc* software with 95% confidence interval. A comparison between the two raters for each of the 23 items of the four reports that were rated twice results in a K of 0.39 [95% CI: 0.27, 0.51]. According to Altman (1991), this can be interpreted as a fair to moderate strength of agreement.

**Procedure of Analysis**

Before any ratings were made, each of the reports was carefully read to get an overview of all 20 reports, and an understanding of the content and general quality. Initial notes were made on the reports to highlight any aspects that may be of interest. Each report was then individually rated. The rating procedure was to start with the first item of the instrument and read as much of the report as was necessary to make the rating for that item, highlighting any aspects in the report that influenced the rating, and then proceeding to the next item until all the ratings for the report were done. The analysis, therefore, involved multiple readings of each of the reports.

Ratings were captured on an *Excel* spreadsheet, and the mean rating for all the items was calculated with their standard deviations, as well as the frequencies of the different Likert options for the items. The recording of the means, standard deviations and the frequencies was to enable comparison with the results reported by Ireland (2012).

In addition, a chi-squared test was used to compare statistically the overall ratings with those reported by Ireland (2012). Finally, to determine the association between psychologists' years of experience with the overall ratings of their reports, a Spearman rank-order correlation coefficient was calculated. Both of these nonparametric statistical procedures were chosen because the sample size is relatively small (Pett, 2016).

### **Ethical considerations**

The researcher obtained ethical approval from the Department of Psychology's Research Projects and Ethical Review Committee (RPERC) to undertake this research (Appendix B).

Permission was gained from the Registrar at the Grahamstown division of the Eastern Cape High Court to obtain copies of the reports (Appendix C). Rule 62(7) of the *Uniform Rules of Court as per the Supreme Court Act* (Republic of South Africa, 1999), allows for the inspection and copying of case documents, and annexures, by interested members of the public once judgment has been handed down in open court, and the matter is finalised.

Since these reports are public documents, it was not necessary to obtain the consent of the authors of the reports. However, to protect these psychologists and clients who are unaware of this research, no identifying details concerning the case was retained or published, and any data collected from the reports remained anonymous. The following steps were taken to maintain confidentiality:

1. Reports were chronologically numbered from 1 to 20;
2. The names of the psychologists (authors) were removed, and were referred to by their

field – ‘Clin’ (Clinical) and ‘Coun’ (Counselling);

3. The names of the clients were removed, and were referred to by the court case number;
4. The reports were immediately returned to the court archives after being photostated; and
5. The copies of the reports were kept in a locked filing cabinet.

The researcher also made email contact with Ireland (2012) and obtained her permission to use and adapt the measure, “Quality Criterion – Assessment of expert psychologist reports” developed by herself and Pinschof (Ireland, 2016; Ireland & Pinschof, 2009) (Appendix D).

Initially, the researcher was going to use a mixed method of analysis. After quantitatively evaluating the reports using the QRS, the researcher was going to quote excerpts of the reports as qualitative illustrations of the poor practices determined through the evaluation. However, as the researcher proceeded with the research with the qualitative analysis, it became more apparent that the inclusion of actual report’s excerpts carries some ethical risk. One risk is, for example, that lawyers might be able to trace the reports that the research is critical of, and then use this later in cross-examining the psychologist who wrote the report. Moreover, psychologists might recognise their own reports and object to the depiction.

Such ethical risk was particularly clear after the researcher became aware that Ireland (2012), the author of the original QRS measure (Ireland & Pinschof, 2009), had to defend charges of misconduct and unprofessional practice related to her research (Smith, 2016a). In June 2016, she was exonerated of the charges and the case was dismissed (Smith, 2016b). The trouble is that forensic practice is so fraught, with many complaints of misconduct made to the HPCSA and PBP (Cohen & Malcolm, 2005).



Consequently, the researcher decided to be more cautious in reporting the results of the research. In order to protect herself and the practitioners/authors of the reports, the researcher will not quote excerpts and will rather describe the practices used in the reports in terms that are more general. While this may detract somewhat from the detailed findings that were intended, it is deemed a necessary measure to protect the researcher, supervisor, and the psychologists who wrote the reports, as well as the plaintiffs and defendants.

### **Conclusion**

This chapter detailed the methodology undertaken to complete this research. Specific psycholegal reports were collected and filtered through identifiable inclusionary criteria, while upholding research ethical considerations. The method of analysis was based on a measure used in the UK for a similar study, and adapted for the South African context. The QRS measure was a rating scale to assess the overall quality of the collected psycholegal reports. It was hoped that the QRS would identify areas of good and bad practices, which will be discussed through examples found in the reports. This should assist to highlight practices surrounding the basis of the facts and the content of the opinions, the methods of assessment, and the process used to arrive at a conclusion, whilst paying due regard to the qualification of the authors.

## Chapter 4: Results

*The present case exposes... difficulties that may be the product of more recent trends particularly in fields where providing expert [psycho-legal] reports have become an industry in itself - Spilg, J (Ndlovu v Road Accident Fund (39302/10) [2013] ZAGPJHC 201; 2014 (1) SA 415 (GSJ), p. 79).*

### Overview of the Chapter

This chapter will set out the results from the present study in Table 8 to Table 13. These results will follow Ireland's (2012) presentation through the overall means or proportions of the different rating categories, where appropriate. The ratings were on a scale of 1 (*not at all*), 2 (*not as much*), 3 (*somewhat*), 4 (*greatly*) and 5 (*completely*), unless otherwise indicated.

Since this study took guidance from Ireland (2012), the present findings will be compared to her results. It must be noted that in Ireland's (2012) summary report, she presented her findings inconsistently. For some criteria, she offered the mean scores, and for others, she collapsed the scores and only gave the proportions of the different rating categories. Consequently, the comparative results cited in Table 9, 10, 13 and 14 were the results that were available (Ireland, 2012). For ease of comparison, the current researcher then cited the present research's overall means and the same collapsed proportions.

Overall, the current study's results indicated that two-thirds of the sampled South Africa reports were rated as being 'good' to 'very good'. These findings are in contrast to Ireland's (2012) determination that two-thirds of the sampled UK reports were rated as 'very poor' or 'poor'. Still, despite the positive overall results, the current QRS scores highlighted a number of concerning practices in South African report writing, which will be illustrated through examples from the reports' content.

**Content: Fact and Opinion**

In Table 8, the criteria rated the usefulness, and factual basis of the opinion(s). In the similar criteria, it can be seen that the present findings were generally higher than those in Ireland's (2012) study.

Table 8

*QRS mean scores for 'Content: Fact and Opinion' criteria*

Criteria	Present study's overall mean (SD/n)	Ireland's (2012) overall mean (SD/n)
To what extent did the opinion assist the court?	4 (0.94/20)	N/A <sup>7</sup>
To what extent did the report include the data from which it drew its opinion?	4 (0.56/20)	3.3 (1.31/126)
To what extent had raw test data been included?	2.5 (1.23/20)	N/A
To what extent was the final opinion linked back to facts in the main body of the report?	3.9 (0.88/20)	2.9 (1.1/126)
To what extent did the psychologist evaluate the quality of the evidence they presented?	3.6 (1.00/20)	1.9 (1.3/126)
To what extent was psychological theory used to support clinical opinion?	3.7 (0.86/20)	1.5 (0.93/126)
To what extent were fact and opinion clearly separated?	3.7 (1.13/20)	2.8 (1.3/126)
To what extent was provisional opinion included?	3.6 (1.00/20)	1.3 (0.87/126)
To what extent did the expert include a range of opinion?	3.6 (1.31/20)	1.2 (0.72/126)
To what extent did the expert report allegations as fact?	1.9 (0.85/20)	2.0 (1.2/126)

<sup>7</sup> Results marked 'N/A' are those criterion included in the QRS for adaption to a South African context.

**The extent to which the opinion assisted the court?**

To rate this criteria, the researcher analysed whether the expert had discussed mental health and/or behaviour that would fall outside the general knowledge of the court – which all of the reports did. Of more interest, was the scope of the referral question, and whether that had been answered? It was determined that only eight reports (40%) had detailed referral questions. The 12 other reports (60%) had vague reasons for referral, and were similar to this, “[The expert] has been instructed by [the attorneys] to assess [the client] neuropsychologically and to discuss the prognosis.” Moreover, this included one report (5%) that had no specific reason for a psychological referral, and only indicated the background information to the referral received from the instructing attorney. In four reports (20%), the referral question remained unanswered, as the report did not include a concluding opinion.

Furthermore, in six reports (30%), there was a strained link between self-reported symptoms and DSM diagnostic criteria (American Psychiatric Association, 2013). For example, in one report (5%), the reason for referral was a neuropsychological assessment. The expert explained that they were giving a preliminary opinion as the expert was of the opinion that there was no evidence that the accident had caused a brain injury. However, based on collateral information, the expert had requested further information from the paramedics who assisted the client on the day of the accident. This requested information from the ambulance was included in the list of source document – in other words, the expert had all the available information they deemed necessary. No testing occurred, and only one interview was conducted with the client. Based on the client’s history of bereavement, teary presentation during the interview, a brief discussion on her low mood states, and the self-report of memory problems, the expert concluded that the client was suffering from Major Depressive Disorder, and cognitive difficulties. The expert recommended that the client first be treated for her depression before further opinion was made on the causative factors of her

cognitive difficulties. It is believed that the basis for this expert's opinion and diagnosis seems vague. Moreover, the bibliography was incomplete which hampers the scientific basis for the opinion. Further, this delay in giving an opinion on neuropsychological sequelae was contentious as the expert completed the assessment for the RAF attorneys, who would be opposing the client's claim or arguing a lesser degree of impairment.

Also of note, in six reports (30%), the recommendations were vague, as the client was referred for 'treatment by a psychologist and/or psychiatrist'. However, in the reports with more detailed recommendations, the expert would specify the type or modality of psychological treatment, the duration or number of sessions, and the estimated cost of the sessions.

#### **The extent to which the report included the data for the opinion?**

In relation to the expert including the data for their opinion, most reports listed their sources and summarised the collateral documents and/or interviews. However, in eleven reports (55%), some important information was outstanding. For example, the severity and course of symptoms were not fully explored by the expert. In the above mentioned example, the client's mood states were very briefly described and she was still diagnosed with a Major Depressive Disorder, without fulfilling the diagnostic criteria as per the DSM (American Psychiatric Association, 2013).

#### **The extent to which the expert evaluated the quality of the evidence?**

The extent that the experts evaluated the quality of the evidence includes the possibility of malingering in the client's self-reports. In ten reports (10%), something similar to the following was only noted, "[the client] appeared to give his or her best effort on the tests, and there was no indication of any attempt to malingering or misrepresent the facts of results." Moreover, collateral information was lacking or inadequate. However, in the more detailed reports, the expert obtained thorough collateral information and compared it to the

client's self-reports, expanded on the basis for their clinical judgement on the evaluation of the evidence, and the reasons why the possibility of malingering was not present. Some of these reports included testing specifically for malingering.

**The extent to which the expert supported their opinion?**

In ten reports (50%), the expert cited partial references, an incomplete bibliography or did not cite any references.

**The extent to which the expert provided the basis for their opinion?**

There were no stark examples of inferior practices in the other criteria. This included the inclusion of raw data, the separation of fact and opinion, the inclusion of provisional opinion and a range of opinions, and reporting allegations as fact.

**Content: Methods**

In Table 9, the criteria rated the trustworthiness and relevance of the assessment methods. Overall, the present findings were generally more positive in comparison to Ireland (2012).

Table 9

*QRS scores for 'Content: Method' criteria*

Criteria	Present study		Ireland's (2012) rating proportions
	Overall mean (SD/n)	Rating proportions	
To what extent did the psychometric tests met the <i>Daubert</i> standard?	1.7 (0.73/20)	85% 'not at all' or 'not as much'; and 15% 'somewhat' fulfilled the standard.	(No results were indicated in the summary report.)
To what extent were the trustworthiness criteria discussed?	1.2 (0.37/20)	85% 'not at all'; and 15% 'not as much' discussed trustworthiness criteria.	
To what extent were the psychometrics used relevant to the current case?	4.2 (1.14/20)	10% irrelevant; 10% 'somewhat'; and 80% 'greatly' or 'completely' relevant.	20% irrelevant; 40% 'somewhat'; and 40% 'greatly' or 'completely' relevant.
To what extent were the chosen methods fitting to the referral question?	3.6 (0.94/20)	35% 'not at all', 'not much', or 'somewhat' fitting; and 65% 'greatly' or 'completely' fitting.	33% 'not at all' or 'not much'; 33% 'somewhat'; and 33% 'greatly' or 'completely' fitting.
To what extent was the opinion clear and reasonably understandable?	3.7 (0.81/20)	35% 'not much' or 'somewhat' clear; and 65% 'greatly' or 'completely' clear.	N/A

### **The extent to which the methods fitted the Daubert standard criteria?**

Ireland (2012, p. 18) determined that there were 90 different sets of tests used in her sample of reports (n=126), which included research-focused tests, clinical tests and some unidentified methods seemingly "self-generated by the expert but presented as a 'test'." The researcher determined that 55 different tests were used across this sample of 20 reports (please see Appendix E for the list). The types of tests used in this sample are explored in the

discussion chapter.

When determining the extent that these psychometrics used fitted the *Daubert* standard (1993), it was difficult to assess whether the tests used by the experts would fulfil the *Daubert* standard. As Ireland (2012) also found, the experts consistently neglected to provide sufficient information about test nature and quality. In the present findings, most experts provided very basic information concerning the nature of the test (i.e. what it tested for and how). Additionally, only three reports (15%) included brief information on the quality of the test and/or its universal use in psychology.

Moreover, the researcher found that the experts did not provide adequate information on scientific trustworthiness of the test or approach to assist the court to determine if the *Daubert* standard (1993) was met. In the present findings, 17 reports (85%) did not provide any of this information.

#### **The extent to which the psychometrics were relevant to the current case?**

In discussing the extent that the testing was relevant to the current psycholegal assessment, the researcher was interested in whether the expert used relevant norms, and whether the home language of the client was considered. Only eight reports (40%) used relevant norms or discussed the use of norms during testing. Seventeen reports (85%) noted the home language of the client, including eight clients (40%) spoke isiXhosa and five clients (25%) spoke Afrikaans. Only thirteen reports (65%) indicated the language used during assessment and/or whether a translator was used; whereas, most tests are standardised for administration of English-speaking, Northern-Hemisphere nationals. In one report, the expert administered the 'Becks Depression Inventory'. The expert noted that these self-report questionnaires are written in English, but the questions were read to the client in isiXhosa. The expert did not comment on how this influenced the standardisation of the test results. In another report, during the testing of a white female, that was English-speaking and obtained



advantaged schooling, the expert used the ‘South African normed Wechsler Adult Intelligence Scale III.’ However, this expert did not clarify as to what group of the diverse South African population this was normed, and how this affected the results. Usually the Northern-Hemisphere standardised norms would be appropriate in this context (Shuttleworth-Edwards et al., 2004).

**The extent to which the methods were fitting to the referral question?**

In Ireland’s (2012) study, the average number of tests used in the psycholegal assessments was 2.6 (SD=1.9), with a range of 1 to 11. There were a number of comments that there was an overuse of psychometrics (Ireland, 2012). The present study’s analysis of whether the methods were appropriate and/or fitting to the reason for referral was far more positive than Ireland (2012). Moreover, the present results revealed that psychologists used a larger number of testing methods in their assessments. The average number of testing methods used by the psychologists was 9.7 (SD=8.51). The most methods for an assessment were 33 tests, and the least was zero as no formal testing occurred.

**The extent that the opinion was clearly and reasonably understandable?**

To determine if the opinion of the assessment was clear and reasonably understandably, the researcher adapted the QRS to include this criterion. The reports that were difficult to understand either described the testing results in detailed psycho-jargon or did not explain the testing interpretation thoroughly. Additionally, in fifteen reports (75%) there was at least one instance of unprofessional descriptions and/or non-clinical terms. Moreover, no quotation marks were used to indicate if the term or description was the client’s self-report.

## Process

In Table 10, the criteria assessed the language used in the reports, and the ethical content. In the one similar rating with Ireland (2012), the present sample of reports was significantly rated differently.

Table 10

*QRS scores for 'Process' criteria*

Criteria	Present study		Ireland's (2012) rating proportions
	Overall mean (SD/n)	Rating proportions	
To what extent were emotive or prejudicial terms used?	2.9 (1.04/20)	45% 'not at all' or 'not at all'; 25% 'somewhat'; and 30% 'greatly' or 'completely' used emotive language.	75% 'not at all' or 'not much'
To what extent did the expert comment on ethical issues?	2.9 (1.23/20)	35% 'not at all' or 'not as much'; 45% 'somewhat'; and 20% 'greatly' or 'completely' discussed ethics	N/A
To what extent was the information disclosed about the client relevant and non-sensitive?	4.3 (0.64/20)	10% 'somewhat'; 55% 'greatly'; and 35% 'completely' disclosed such information.	N/A

### **The extent to which emotive and/or prejudicial terms were used?**

Ireland (2012, p. 20) explored the use of emotive terms as being “terms that could prejudice a case in the absence of fact.” In a small percentage of her reports, there were instances of emotive language, including “non-motivational expressions likely to disengage clients from the process of assessment” (Ireland, 2012, p. 20). However, the present study found that the majority of the sampled reports included at least one instance of emotive

and/or prejudicial language. For example, in one report, the expert seemed to embellish the client's difficulties by using extravagant descriptions throughout the formulation. In most of the testing, the client had achieved 'High Average' to 'Superior' results and it appeared as if the expert was trying to paint a grimmer picture of the client to substantiate the claim.

Another aspect of prejudicial language was explored through the phrasing of the referral question. In five reports (25%), the reason for referral appeared to assist the attorney and/or support the claim, rather than assist the court. The phrasing was similar to the following, "[the author] has been approached by [the attorneys] to prepare a report in support of a Motor Vehicle Accident claim instituted by them on behalf of [the client]." Another observation was that three reports (15%), the client was referred to as 'the plaintiff', whereas the other reports cited the client's name.

#### **The extent to which the expert commented on and adhered to ethical issues?**

To determine the extent that the expert commented on the unique ethical issues of the psycholegal assessment, the researcher added this criterion to the QRS to reflect the South African *Rules of Conduct* (Republic of South Africa, 2006a, 2006b). In 17 reports (75%), at least one ethical aspect of psychological assessment was considered by the expert and/or discussed with the client. Only four reports (20%) explored the ethical issues in depth.

In terms of the relevancy and/or sensitivity of the information in the reports, there were no overt concerning examples.

#### **Qualification**

In Table 11, the criteria rated the authors' level of mental health and specialised experience, and the extent that he or she remained within the scope of psychology. The ratings on the authors' experience were more positive than those found by Ireland (2012).

Table 11

*QRS scores for 'Qualification' criteria*

Criteria	Present study		Ireland's (2012) rating proportions
	Overall mean (SD/n)	Rating proportions	
To what extent did the chosen expert have the experience of mental health practice?	3 (0.69/20)	20% 'not as much'; 70% 'somewhat'; and 10% 'greatly' or 'completely' experienced.	33% did not have mental health assessment experience.
To what extent did the expert have the specialised expertise to complete the particular assessment?	3.3 (0.55/20)	80% 'somewhat'; and 20% 'greatly' or 'completely' competent.	20% were not competent; 20% 'somewhat'; and 60% 'greatly' or 'completely' competent.
To what extent did the expert remain within a scope of psychological practice?	4.4 (1.10/20)	15% 'not as much'; and 85% 'greatly' or 'completely' remained within their psychological scope.	20% strayed from their scope; 20% 'somewhat'; and 60% 'greatly' or 'completely' remained within the scope.
To what extent did the expert comment on the legal question or issue(s) in the remit of the judge?	1.1 (0.22/20)	95% did not stray; and 5% slightly strayed within the scope of the judge.	

### **The extent to which the expert had experience of mental health practice?**

Ireland's (2012) study assessed whether the expert's CV included details of completing mental health assessments. However, she did not indicate the number of experts that completed the sample of 126 reports. Moreover, she did not indicate the number of reports that had attached CVs (Ireland, 2012). However, based on her detailed discussion of the qualifications, it could be assumed that all the expert's CVs were available. In the present analysis of the sampled reports, only one expert (5%) attached a CV. This made it difficult

for the researcher to determine the extent that the experts had experience of mental health practice.

Consequently, the researcher analysed the letterhead of the reports to determine the expert's qualifications and registration. As per the *Rules of Conduct*, a practitioner's letterhead should include the following information: his or her name, profession, registered category, speciality/field of professional practice, registered/academic qualifications in abbreviated form, registration number, practice code number<sup>8</sup> and contact details (Rule 4(1)) (Republic of South Africa, 2006b). Due to the contention around scopes of practice and registrable categories (Chuma, 2017a), the concept of identifiable specialities was not focused on. It was found that only nine reports (45%) included all the necessary information in the letterhead, and one report did not have a letterhead. In relation to the other information, Table 12 indicates what information was included in the reports' letterheads.

Table 12

*Information included in the reports' letterheads*

Information in letterhead	Number of reports (n=20)
Name	19 reports (95%)
Profession	19 reports (95%)
Registered category	18 reports (90%)
Qualifications	16 reports (80%)
Registration number	10 reports (50%)

<sup>8</sup> It is noted that psychologists are not obliged to have a practice number, as it is only relevant for private practice medical aid claims.

**The extent to which the expert had specialised expertise for the current assessment?**

To determine if the experts had specialised expertise to complete the requested assessment, Ireland (2012) considered the referral question and the expert's CV. For this analysis, once again, the lack of CV also made it difficult to determine if the psychologist's knowledge and skills were relevant to the particular issues the court must consider. To assist in determining the level of specialised expertise to complete the particular assessment, 'iRegister' (Health Professions Council of South Africa, 2017) was used to determine the date of registration of the experts. Thereafter, the researcher calculated the years of experience as an 'Independent practitioner'.<sup>9</sup> The overall mean was 15.7 years (SD=8.98), with the range of between 2 to 36 years.

Furthermore, the lack of CVs also hampered on knowing the psycholegal experience and/or knowledge of the experts on expert opinion principles. Two reports (10%) mentioned the expert's forensic/psycholegal experience. One noted their LLB qualification in the letterhead, and the other indicated in the CV that they had completed the major subject of Law in their Bachelor's degree and had performed previous medico-legal work.

**The extent to which the expert remained within their scope of practice?**

To determine the extent that the remained within their scope of psychological practice, Ireland (2012) assessed the referral question, the opinion, and the expert's CV to establish if the experts remained within their remit. In the South African context and the declaration of invalidity of the different scopes of practice in psychology (Chuma, 2017a; Republic of South Africa, 2011), the researcher interpreted this criterion as broadly as Ireland (2012). Did the expert remain within the scope of general psychological practice, and,

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<sup>9</sup> The years of experience for two psychologists were calculated from date of qualification and not registration as an 'Independent practitioner'. This information was not on the report nor on the 'iRegister' website (Health Professions Council of South Africa, 2017) (See footnote 11 for further explanation).

separately, did the psychologist comment on the ultimate issue? For the former criterion, most of the experts completely remained within their cope.

There were a few instances where the expert would comment on issues that typically fall within a medical scope. For example, an expert discussed the neurological cause of the client's headaches. In two other reports, both experts had cited collateral reports from an Orthopaedic Surgeon but had not summarised the orthopaedic opinions in the psycholegal report. Thereafter, the experts had discussed orthopaedic opinions that seemed to be the opinion of the psychologist witness. This practice would be satisfactory if the expert makes it clear that he or she is quoting another expert, which often happens and may be relevant to the psychological findings.

In another report, the expert discussed the use of non-psychological assessment methods that tested the grip strength of the client. These tests would rather fall into the scope of an Occupational Therapist, especially when the psychological expert concludes with an opinion on the client's ability to perform daily physical activities.

To determine whether the experts were commenting on the remit of the judge (the legal issues still in contention), the referral question was considered. In other words, was the cause of the client's injuries accepted by all the parties as being from the motor vehicle accident? Based on the referral questions, it seemed that the only issue in contention was the extent of the sequelae that warranted the client to be awarded compensation, and if so, to what value. Only one report (5%) was rated as slightly straying within the remit of the judge and making firm decisions on the claim instituted by the client. These comments seemed to stipulate that the client was due compensation, and due compensation to a vast extent.

### Overall Quality of Reports

In Table 13, the criterion assessed the impression of the overall quality of the reports.

The present findings were the inverse of Ireland's (2012) findings.

Table 13

*QRS scores for 'Overall Quality of Reports'*

Criteria	Present study		Ireland's (2012) rating proportions
	Overall mean (SD/n)	Rating proportions	
Overall quality of reports	2.8 (1.06/20)	15% 'very poor'; 20% 'poor'; 35% 'good'; and 30% 'very good'	66% 'very poor' or 'poor'; and 33% 'good' to 'excellent'

To statistically compare the overall quality of the reports with the overall quality ratings by Ireland (2012), a 2x2 contingency table comparing the numbers of combined 'poor' and 'very poor', and combined 'good' to 'excellent' for the respective studies is reported in Table 14 followed by a chi-squared analysis.

Table 14

*Comparison of 'Overall Quality of Reports' between the present study and Ireland's (2012) study*

Overall Quality Rating of Report	Present Study (n=20)	Ireland (2012) (n=126)
'Poor' or 'very poor'	7	84
'Good', 'very good' or 'excellent'	13	42

The results of the chi-squared test for the two independent samples indicate that the ratings of the 20 reports included in the present study are statistically significantly higher than those evaluated in the Ireland (2012) study ( $\chi^2(1) = 7.32, p = .007$ ).

Finally, Table 15 provides a comparison between the report's overall ratings and the authors' years of experience (years of independent practice).



Table 15

*QRS 'Overall Quality Rating of Reports' as compared to the years of experience of the authors*

Reports overall quality rating	Average years of experience of authors (SD/n)	Range of years of experience
'Very poor'	13 (7.21/3)	5 to 19 years
'Poor'	22 (8.98/4)	13 to 34 years
'Good'	10 (4.86/7)	2 to 16 years
'Very good'	20 (11.00/6)	8 to 36 years
'Excellent'	N/A	N/A

The Spearman rank-order correlation was used to examine the extent to which years of experience of the practitioners is positively associated with the overall ratings of their reports. The results of this analysis ( $r_s = -0.02$ ,  $p = .467$ ) indicate that there is no statistically significant association between experience and quality of reports.

### **Conclusion**

The objective of the research was to evaluate and determine practices in psycholegal reporting by psychologists, while determining the overall level of quality of report writing, and the qualification and experience of the authors. These results were then compared to the findings by Ireland (2012). By using the QRS, the findings determined that in this sample of psycholegal reports, the quality was more positive than previously researched in South Africa, found by Ireland (2012) or expected by the researcher.

## Chapter 5: Discussion

*As [demonstrated], psychology has a lot to offer, but it has limitations. As in other sciences, and perhaps more than most, much of psychological knowledge is not perfect or certain, and will likely never be (Allan, 2005a, p. 304).*

### Overview of the chapter

In this chapter, the researcher will discuss the abovementioned results to demonstrate and analyse certain practices in this sample of psycholegal reports. This chapter also includes discussion on findings unique to the South African context.

### Content: Factual Basis and Usefulness of the Opinion

The ratings suggest that the criteria of ‘Content Fact and Opinion’ were generally dealt with appropriately in this sample of reports. It could be argued that in this sample, the experts were better at arguing the accuracy and basis for their opinions, and writing the reports. One reason that should be considered is the nature of the RAF claims, especially those made in the High Court. Due to the high value of the claims,<sup>10</sup> more experienced judicial officers preside over the matter. Moreover, it is believed that legal representatives and judges will closely scrutinise these expert witness’ reports and testimony more so than other matters. Accordingly, lawyers are perhaps more likely to seek more experienced psychologists, who would produce better reports to better substantiate their client’s claim. Correspondingly, there are high chances of opposing psychological experts being employed, which means that there is a high chance that the opinion will be questioned if it is not fully substantiated.

In a recently reported RAF matter in the High Court (Gauteng Division), expert evidence was discussed. A psychologist was one of the expert witnesses. Legodi J in

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<sup>10</sup> The monetary jurisdiction for causes of action in the Magistrate Courts are claims up to R400 000 (Republic of South Africa, 2014). As such, any claims in excess have to be made to the High Court, which is a regular occurrence (*Mbatha v. Road Accident Fund* 2017 (1) SA 442 (GJ)).

*Nonyane v. Road Accident Fund* (3126/2016) [2017] ZAGPPHC 706 (paras. 4–5) stated that,

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific technical or other specialised knowledge. The most common source of this knowledge is the expert witness... It is common place for experts to be utilised by the [parties] to bolster their respective cases and give guidance to the courts and this role has been welcomed by our courts.

However, after an evaluation of the expert evidence, Legodi J (*Nonyane*, 2017, paras. 14–16) confirmed the need for the verification of this expert evidence,

Experts are readily amenable to overstep their mark by pronouncing their opinions without logical foundations and thereof attempt to abuse the powers of the court. It is therefore important that courts should stick to the approach and legal principles that govern the role and value of expert evidence. It is evident from the [cited court judgments], that it is necessary to be consistent and guard jealously to protect its role and power of the courts. It is important for the experts to understand their role and function and leave the courts to be the ultimate arbiters in any court proceedings... The tendency to think that our courts capitulate to every evidence or report of an expert is wrong and has to be dispelled and discouraged. Each case has to be determined on its merits. That responsibility for evaluation of the reliability of facts and or evidence lies in the domain of the courts contrary to belief of those participating in the court proceedings.

These sentiments confirm the need for good quality expert opinion, and the strict governance that should be followed by the courts. Consequently, it could be argued that this sample of psychologists took more care in formulating their opinions and writing these reports due to the nature of the claim and court context, as compared to the reports sampled by Ireland (2012), or those discussed in the previous research.

This care in arguing the factual basis for the opinion should have a positive influence on the usefulness of the opinion. As emphasised, the golden thread of expert opinion is the assistance to the court. Positively, all of the experts had discussed mental health and/or behaviour that would fall outside the general knowledge of the court. However, there were a number of concerning practices that emerged from the reports' content that negatively influenced the ratings of the 'Content: Fact and Opinion' criteria.

Another important aspect of whether the opinion assisted the court was to the extent that the referral question had been answered, and the corresponding final recommendation. The referral question is an important indication of the professional standards of what the report should contain (Genis, 2008). The framing of the referral question by the attorneys is one factor that can influence the direction and depth of the assessment process, and as such, the concluding opinion. Unfortunately, nearly two-thirds of the reports had cited vague reasons for referral, and one-fifth did not answer the referral question. This would hamper on the usefulness of the opinion. It is also believed that a well-phrased referral question helps prevent the expert from commenting on issues in dispute (the ultimate issue rule). Moreover, without an answered referral question (where a reasoned conclusion and/or diagnosis was lacking), the report might not assist the court in understanding the client's presentation and impairment.

Additionally, if the recommendations were vague, this would arguably give weak assistance to the court. This was found in just less than one-third of the reports. On the other hand, detailed recommendations would be of better assistance to the court in determining the psychological worth and value of compensation that should be awarded. This emphasises Ireland's (2012) argument that by remaining in general psychological practice, expert witnesses continue to know current and best practice treatment, and are better able to give substantiated recommendations.

In order to substantiate their opinion and recommendations, the expert has to provide his or her data. In just over half of the reports, there was some important information that was not included in the report. Without a reasonably thorough and holistic overview of the client's history and current presentation, the validity of the opinion could be superficial or questioned as being 'cherry-picked' (Jackson, 2006).

Another concern was the extent that the experts evaluated the quality of the evidence, particularly the possibility of malingering. It is argued that the possibility of malingering should always be thoroughly considered by using, as far as possible, objective means. There should not be a reliance on only subjective, self-reports of symptomology and/or sequelae (Erlacher & Reid, 2006) – which occurred in most reports. This does raise an interesting challenge for psychologists. Psychologists are generally trained to be trusting and accepting of the accounts given by the clients. However, forensic and psycholegal work demands a very different approach, and it is possible that many psychologists are simply unaware of these particular demands. If anything, this highlights the necessities of specific training. On the other hand, the reports that included a thorough reasoning and discussion on malingering, demonstrated a more objective and robust consideration of the quality of the facts and/or evidence that the expert was relying upon.

Objectivity can also be demonstrated using psychological opinion to support the clinical opinion. In half of the reports, the use of references was incomplete or omitted. This practice leaves doubt not only on the validity of the concluding diagnosis and/or opinion, but the veracity of the expert's assessment.

As noted, the reasoning and basis for the expert's opinion is one of the more important aspects of the report. Genis (2008, pp. 99–100) highlighted "... [t]he court will not lightly disregard the opinions of expert witnesses. This will happen only if the court thinks that the experts have based their opinion on insufficient knowledge of the applicable facts or

have ignored such facts.” Therefore, the results of the ‘Content: Fact and Opinion’ criteria generally being higher than illustrated in the previous research, paints a more positive picture of expert opinion and psycholegal report writing than expected.

### **Content: The Scientific Trustworthiness and Relevance of Methods**

The ratings suggest that there were two areas of the criteria of ‘Content: Methods’, which were dealt with differently by these sampled authors. The *Daubert* standard (1993) or scientific trustworthiness of the methods was lacking. However, the methods that were used were deemed relevant for the particular assessments, and the opinions were generally understandable.

The deficit of scientific trustworthiness is worrisome; the use of various assessment methods is one way to substantiate the reasoning of the concluding opinion. However, as aptly emphasised by Ackerman (1999, p. 1), “... while courts will go a long way to admitting expert testimony deduced from a well-recognized scientific principle or discovery, the principle from which the deduction is made must be sufficiently established...” This evidently refers to the *Daubert* standard (1993), which over four-fifths of the sample authors did not discuss in their reports. It is conceded that this information might be included in the expert’s testimony *if* the trustworthiness of the testing is challenged. However, this lack of information made rating the use of scientific trustworthy methods difficult for the researcher.

Besides the lack of relevant information in the reports, there was a second reason that rating and analysing the trustworthiness of tests was difficult – the seemingly vague standard in the South African profession. The *List of Tests Classified as Being Psychological Tests* (Psychometrics Committee of the Professional Board for Psychology, 2010) (hereafter referred to as the ‘List of tests classified’) published by the HPCSA and PBP was consulted. It was determined that eight of the 55 testing methods (15%) used in this sample of South African reports are on this list, and are then classified as tests ‘approved’ for use in South

Africa (Cohen & Malcolm, 2005). It is conceded that the tests used in the reports included structured clinical interviews and symptom inventories, which use criteria rather than normative references.

However, as per the *Policy on the Classification of Psychometric Measuring Devices, Instruments, Methods and Techniques* (The Professional Board for Psychology, 2006) (hereafter referred to as the 'Policy of classification'), "psychometric" is not defined. Rather, the definition for a 'psychological act' is the "the use of psychometric measuring device, test, questionnaire, technique or instrument that assesses intellectual or cognitive ability or functioning, aptitude, interest, personality, make-up or personality functioning" (The Professional Board for Psychology, 2006, p. 1), which appears wide and inclusive. This is confirmed by the *Policy of classification* (The Professional Board for Psychology, 2006, p. 5), noting that,

[T]he term 'test' has been used in the generic sense. Consequently, throughout the document where 'test' is used, the reader should assume that terms such as 'psychometric measuring devices', 'questionnaires', 'instruments', 'techniques', 'projections', 'apparatus' are also meant to apply."

It is acknowledged that psychological assessment does involve a degree of clinical judgement. Consequently, the basis for how the expert interprets the results is essential, but the use of standardised testing methods increases the reliability and validity of the assessment, and, therefore, the opinion (Cohen & Malcolm, 2005). Therefore, it is of concern the *List of tests classified* (Psychometrics Committee of the Professional Board for Psychology, 2010) does not include tests or methods commonly used by South African psychologists.

The debate on psychometric testing is not within the scope of this research, but it is of something to take heed. Moreover, whether these traditional clinical assessment tests should

be used in the forensic setting is another contentious issue (Jackson, 2006; Nicholas & Coleridge, 2000), and also not within the scope of this research. However, it must be noted that, due to a dearth of specialised forensic instruments, many standardised tests have become universally accepted for psycholegal assessments (Archer, Buffington-Vollum, Stredny, & Handel, 2006).

As noted, the methods used were generally relevant for the particular psycholegal assessments. However, of concern was the authors' lack in discussing testing standardisation in the South African context. Testing in South Africa is highly contentious and disputed due to the diversity of language, culture, ethnicities, and quality of education (Cohen & Malcolm, 2005; Jackson, 2006). The *Policy on classification* (The Professional Board for Psychology, 2006, p. 1) concedes that "...very few tests are available that have been developed and applied with the necessary appreciation of cultural and other diversity concerns..." It is also a contradiction that some of the tests on the *List of tests* are non-standardised tests (Genis, 2008; Psychometrics Committee of the Professional Board for Psychology, 2010). However, of most concern are the experts that did not disclose this in their limitations or weaknesses in their findings. The HPCSA (Psychometrics Committee of the Professional Board for Psychology, 2010, p. 3) specifically states that,

... although a test may be classified as a psychological test, the onus rests on the test user to ensure that the test is valid for the purposes for which it is being used; appropriate norms are consulted; and where tests that have been developed in other countries are concerned, appropriate research studies need to be undertaken to investigate whether the test is culturally biased and special care should be taken when interpreting the results of such tests.

This duty on the expert corresponds with the rules of conduct in Annexure 12 with the use of relevant tests and measures (Rule 55) (Republic of South Africa, 2006a). Hopefully, as the



HPCSA improves the list of classified tests, and further norms are developed for the South African population, there will be more tests approved for use in psycholegal assessments.

In this sample of psycholegal assessments, there was a considerable variation in the number of tests used. However, this variation is not surprising considering that some assessments involved neuropsychological testing, and some did not. It is difficult to comment on what is the appropriate number of tests in an assessment, as there is no standardised method of assessment in South Africa. As Genis (2008) points out, most of the DSM diagnoses (American Psychiatric Association, 2013) do not need formal testing. Therefore, the number of testing methods used will depend on the referral question, the nature and severity of the impairment, and the thoroughness of the assessing psychologist (Jackson, 2006). Again, a detailed reason for referral is necessary to guide the assessment.

In order to know whether the reason for referral has been answered, it is important that the report is written clearly and is reasonably understandable. It is particularly concerning in the few instances when the discussion on testing used psycho-jargon, and/or lacked a full interpretation and clear explanation, especially as it is written for a non-psychological audience. On the other side of the spectrum, the seemingly common practice of using unprofessional descriptions and/or non-clinical terms in the reports could detract from the professionalism of the report, and understanding of the opinion. Moreover, this use of unprofessional language, without further explanation, obstructs the value of the expert's expertise and specialised knowledge, and clinical judgement. Not only does such language influence the objectivity and professionalism of the expert, but also it influences the professional identity of psychology. There is a subjective aspect to psychological assessments and writing reports, and a psychologist must take care in formulating his or her professional opinion (Allnutt & Chaplow, 2000).

**Process: Use of Prejudicial Language and Ethical Considerations**

The ratings suggest that the criteria of 'Process' was adequately dealt with by the sample authors. This is uplifting as if looked at cynically, the adversarial nature of the legal system relies on which party has the better argument (Weiner, 2006). As argued above, a persuasive report can influence the weight of admissibility that the court attaches to the evidence (Jackson, 2006). This is particular relevant during a civil case, as attorneys may not present evidence that is detrimental to their client's case, and will only present the experts that seemingly confirm their argument and/or claim (Allan, 2005a). In this sample, the majority of reports used emotive and/or prejudicial terms. Any emotive language or bias on the part of expert can damage the quality and objectivity of the concluding opinion as it can appear that the expert was biased towards the client, and the assessment opinion was impartial towards the client's claim. Thus, it is vital that psychologists remain as objective and neutral as possible to circumvent any view of being partial or partisan.

Another practice that could affect the objectivity of the reports is the phrasing of the referral question, and the allusion that the assessment was to support the claim, rather than assist the court. This was found in one-fourth of the reports. Moreover, the referral to the client as 'the plaintiff' in a few reports, rather than by name, seemed to emphasis the support of the legal claim rather than a psychological assessment of the client.

However, one of the more concerning practices was that only one-fifth of the reports fully explored ethical issues related to the assessment. It is vital that psychologists performing psycholegal work are aware that ethical considerations must include all aspects of the assessment and the testimony process (Rule 70) (Allan, 2005; Cohen & Malcolm, 2005; Republic of South Africa, 2006a). However, this does not negate the possibility that in the other reports these issues were discussed with the client, and documented by the expert in the file notes - and just not *explicitly* documented in the report.

**Qualification: Reported Experience and Competence, and Remaining Within Scope**

The ratings suggest that the criteria for ‘Qualification’ were reasonably met. However, it was difficult to assess the qualification and expertise of the experts due to the lack of attached CVs. On face value, this cannot be described as poor practice as the expert’s CV is generally discussed during the witness’ oral testimony to prove his or her experience and qualified status as an expert. However, one concern about this practice is the status of the expert is not proven if the report is accepted as documentary evidence - the witness does not testify and the CV is not included in the courts record (Allan, 2005a). This could create uncertainty within the field as attorneys and judges struggle to know what makes a witness a ‘specialist in their field’, and whether disciplinary sanctions should be brought against a psychologist for misconduct (Rule 111) (Republic of South Africa, 2006a).

In South Africa’s current context of unclear psycholegal work, Allan (2005a) suggested a three-prong approach to determine the level of qualification of an ‘expert’: (a) Has the psychologist registered with the PBP of HPCSA? (b) What category of registration did the psychologist complete his or her Masters in? (c) And, are the psychologist’s knowledge and skills relevant to the issues the court must consider? The discussion of the results will be discussed using this approach.

The law in South Africa dictates that for a psychologist to practice, he or she must be professionally registered with the HPCSA (Cohen & Malcolm, 2005; Republic of South Africa, 1974, 2006b). This registration is vital for the regulation of those practicing psychology. As Ireland (2012, p. 14) noted, registration to practice is a “good indicator of qualification to practice and to provide court assessments.” As noted, there were two reports that did not indicate the expert’s registration category in the letterhead. However, by using ‘iRegister’ (Health Professions Council of South Africa, 2017), it was determined that all the

experts had been registered as psychologists.<sup>11</sup>

‘iRegister’ (Health Professions Council of South Africa, 2017) also confirmed that all the experts had completed their respective Master’s degrees, and all of them corresponded to the title noted in the reports’ letterhead or signature. Allan (2005a) indicated that the Master’s qualification was a general indicator of the type of training the psychologist received. Both the clinical and counselling psychological qualifications will include basic mental health assessments training (Leach, Akhurst, & Basson, 2003).

The lack of CV also made it difficult to determine if the psychologist’s knowledge and skills were relevant to the particular issues the court must consider, and whether the psychologist had the requisite specialised knowledge (Rules 3(1) and 67(2)) (Republic of South Africa, 2006a). However, it is acknowledged that this information could be given during the expert’s oral testimony. Consequently, by using ‘iRegister’ (Health Professions Council of South Africa, 2017), the date of registration of the experts were determined and compared to the ‘Overall Quality Rating’ of the reports. Genis (2008) argued that although these years of experience could prove the experience as being a psychologist, it does not certify that the psychologist has the expertise as being an expert witness on the issues before the court that requires their expert assistance. Louw and Allan (1998, p. unknown) substantiated that

[I]t is not clear exactly what degree of skill is required of a person before he or she will be considered an expert, [but] there is a general consensus amongst psycholegal scholars that ‘being a psychologist... does not make one an expert on any particular topic... Expert witnesses must therefore be specialists in their fields and accepted as

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<sup>11</sup> With ‘iRegister’ (Health Professions Council of South Africa, 2017), it was determined that two of the psychologists had their memberships with the HPCSA erased or terminated. However, they had qualified in 1995 and 1991, respectively, so one assumption could be that the psychologists had retired by this point. As such, it will be assumed that these experts were duly registered at the time of writing of the reports.

such within their peer community.

The Spearman rank-order correlation confirmed that there is no statistically significant association between the years of experience of the author and quality of the reports. In other words, the longer that a psychologist has been practicing does not significantly correlate to being more knowledgeable or skilful in writing psycholegal reports. One could speculate that this strengthens the need for specialised psycholegal training, as without such training, the quality of report writing does not change with gaining experience. It could further indicate that if psycholegal work is not the focus of these authors, there is little learning ‘on the job’ and poor practices are ignorantly repeated.

What is also of interest is the low mean average of experience of the authors of ‘good’ reports. This could be explained by these authors compensating for their inexperience by writing thorough and substantiated reports. On the other hand, it could speak to these authors still relying on the foundations learnt during their academic training, rather than relying on gained experiential skill and confidence. Perhaps recently graduated psychologists are more likely to have had some academic psycholegal training – due to the above discussed concerns being raised by the psychological community, such training has been introduced into some of the universities’ curriculum.

Two reports had mentioned some form of psycholegal experience and/or skill. However, it should be emphasised that being an ‘expert’ in psycholegal work is not as important as being an ‘expert’ on the particular issues before the court – the psychologist’s specialised expertise would be more useful to the court. Rather, it is believed that experience in psycholegal work would allow the expert to know court etiquette, and the best practices of report writing and presenting his or her evidence.

On most accounts, the psychologists followed best practice and remained within the scope of psychological practice. It is vital that experts remain within their expertise, and knowledge to uphold the usefulness and professionalism of the field of psychology.

### **Overall Positive Quality of the Reports.**

Overall, these findings suggest that the quality of psycholegal reports is not as poor as those evaluated by Ireland (2012) or as described in previous South African research. It is conceded that the described concerning practices echo the previous research findings, but not to the same dreadful extent as described by those researchers. One possibility for this differing result could be the use of the QRS, a systematic and objective measure.

Louw and Allan (1998, p. unknown) remarked, “much of the controversy [surrounding previous research] is based on emotions rather than on empirical data or a true appreciation of the situation.” The previous research conducted in South Africa seemed to rely on personal anecdotes by psychologists or lawyers, and surveys on the psycholegal work by their colleagues. It is useful to consider that these anecdotes and surveys could have been overly influenced by examples of poor practice – misperceived social norms surrounding the field of forensic psychology and/or psycholegal activities.<sup>12</sup> This is particularly evident in high profile court cases and the corresponding media attention, which can affect the overall impression of psychology (Jackson, 2006).

Thus, this present study’s use of the QRS, a systematic and objective measure would prevent subjective anecdotes, misperceived social norms or the influence of media attention being taken into consideration.

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<sup>12</sup> This idea of social norms being misperceived and/or exaggerated comes from research on alcohol use as per Perkins (2002), but it would seem to apply to other situations as well.

**Conclusion**

These findings are significant in the positive picture that they paint of the South African psycholegal reporting. Furthermore, in comparison to previous research, the value of this present study was in the use of a systematic and objective measure. However, the findings still revealed a number of poor reports and inferior report writing practices that are a cause of concern. These poor practices were highlighted in the literature, but seemingly not to the extent that those researchers described. However, there is still a concern that these practices could detract from the quality of the report, the value of the expert's opinion, and the usefulness of psychological opinion in the legal system. Even if one poor report assists the court in making their decision, there is still a miscarriage of justice, and a misrepresentation of psychology (Jackson, 2006; Nicholas, 2000). As such, these findings are in agreement that formalised training, standardisation and regulation of this field of psychology is needed.

## Chapter 6: Conclusion

*[E]xpert witnesses need to be astute professionals and specialists in the relevant field of psychology and au fait with the relevant legal rules and procedures as well as ethical rules (D. A. Louw & Allan, 1998, p. 238).*

### Overview of the chapter

This chapter summarises the findings of this research. Thereafter, limitations of the study are discussed together with recommendations for the field and for future research.

### Introduction

This research has highlighted the value and possible usefulness of psychology in the courts. Currently, the field of South African psycholegal psychology is regulated by vague standards gleaned from statutory regulations, ethical codes for psychologists, general legal requirements for the admissibility of expert witness evidence, and remarks in court judgments. More so, there are no standardised guidelines for psycholegal report writing. It is believed that this has been a contributing factor to court cases being the public showcase of psychologists as unprofessional and poor expert witnesses (Allan & Louw, 1995, 2001; Jackson, 2006). Such shortcomings of conduct have also been illustrated in previous research (Allan & Louw, 2001; Brandt et al., 2004; Genis, 2008; D. A. Louw & Allan, 1998; Nicholas, 2000; Nicholas & Coleridge, 2000). As such, this investigation joins this short list of research on the quality of psycholegal work in South Africa. The researcher focused on the current trends in psycholegal reporting, as a poorly written report can be indicative of inferior opinion and/or evidence given in court. Therefore, the value of this research is two-fold: To bolster academic literature on psycholegal reporting, and to assist in the real-world application in courts.



### Summary of Findings

This research took guidance from a UK study discussed by Ireland (2012). Ireland and Pinschof (2009), developed the QRS, which rated the fact and opinion, method, process, and overall quality of a report, and the qualification of the author. There was a similarity between these criteria, and the South African laws of expert opinion evidence and the rules established by Allan and Louw (1998). As such, with slight adaption, this measure was appropriate to use in a South African context. Relevant ethical *Rules of conduct* and Annexure 12 were also incorporated (Republic of South Africa, 2006a, 2006b). By using the QRS, the findings revealed that overall, two-thirds of the 20 sampled psycholegal reports were rated as being 'good' and 'very good'. This was in contrast to Ireland's (2012) findings, which determined that two-thirds of the UK reports were rated as 'poor' and 'very poor'. The present findings were also in contrast to the previous research. There were two possible reasons for this difference. Firstly, this study used a more objective and structured analysis, and was not as anecdotal or opinionated as previous research. Secondly, this particular sample of psycholegal reports submitted for RAF claims in the High Court is distinctive. Due to the large number of expert witnesses used to substantiate the high valued claims, expert evidence and the reports are scrutinised more judiciously, and, subsequently, argued and written with more care.

In spite of the overall positive findings of the QRS, a number of practices were highlighted that could undermine the quality of the reports and the veracity of the expert's opinion. Examples from the reports were described to illustrate such practices. Firstly, the referral question was vague and the issues in contention remained uncertain. The referral question is key in determining the expert's role in the assessment, and the purpose and function of the report (Brandt et al., 2004). A detailed reason for referral also allows the expert to know which issues would fall under the remit of the judge (the 'ultimate issue'), and

guides the assessment process. A vague referral question could affect the court's understanding of the scope and nature of the assessment, and whether the concluding opinion and/or recommendations had adequately answered the reason for referral. The objectivity of the report could also be affected by the phrasing of the referral question. In some instances, the referral was phrased for the assessment and opinion to support the attorney and/or the client's claim, rather than objectively assist the court.

The basis for the opinion is considered the most important aspect of the expert's opinion and/or evidence (Meintjes–Van der Walt, 2003). Moreover, the comprehensibility of that opinion is equally key for the readers, who are legal professionals – the opinion needs to be effectively communicated (Allan, 2005a). The findings illustrated examples where the basis for the expert's opinion was unclear. This included the omission of vital information; the expert not effectively questioning the validity of the evidence; diagnosis without linking symptoms to or reaching full diagnostic criteria; and the argument not always being reasonably understandable. Moreover, a majority of the reports did not fully cite or thoroughly discuss referenced psychological theory, and/or used emotive language and prejudicial terms, which leaves doubts as to the legitimacy of the final opinion.

The legitimacy of the testing methods used by the experts was also concerning. There were a vast range of different testing methods used, and the expert's did not sufficiently explain the nature of the tests. What was more problematic was that the experts failed to discuss and prove the scientific trustworthiness of the tests as per the *Daubert* standard (1993). This was especially since most of the tests used were not on the HPCSA's *List of tests classified* (Psychometrics Committee of the Professional Board for Psychology, 2010). This list should represent tests approved for use in South Africa. However, this list is short, does not include tests commonly used in the profession, and as per the *Policy of classification* (The Professional Board for Psychology, 2006), the classification standards seem ambiguous. In

spite of this, the experts still did not indicate any limitations of this testing and their opinions. This was particularly evident with standardisation concerns in the cultural diverse South African population.

Another ambiguous practice was the lack of documentation of the ethical issues in testing, and the experts failed to substantiate their qualifications and/or specialised expertise for the particular issues before the court. It is conceded that both these practices are not inherently poor as the ethics could have been considered and just not explicitly documented in the report. Moreover, experts usually produce their CV during court testimony. The concern over the lack of documentation of these aspects is regarding the reports that are admitted to court without testimony. As previously determined, psychologists testify on only half of the reports that they submit (D. A. Louw & Allan, 1998).

Consequently, the quality of the report as standalone evidence is crucial, as there are instances when the expert cannot substantiate his or her report and qualifications during testimony. Undertaking such psycholegal assessments and writing reports is challenging and demands specialised training and experience. These challenges include balancing his or her psychological qualifications and specialised expertise, and knowledge of relevant legal issues, and legal procedures. This is while maintaining their professional judgement and objectivity in a public arena (Allan & Louw, 2001; Gray & Williams, 2008; Gudjonsson & Haward, 1998; Hess, 2006; Republic of South Africa, 2006a).

### **Limitations**

The limitations to this study and its results are recognised due to the limited sample size, and the sampling procedure in one jurisdiction. Due to the data collection procedures, there were limitations in selection. It is possible that the quality of psycholegal work is different in various jurisdictions according to the demands of different judges. Additionally, the sample selection was focused to one area of High Court legal issues, where quality might

be different in the lower courts and in different areas of legal issues. Consequently, it is acknowledged that the sample of 20 reports is small and the findings are not representative of local or national psycholegal report writing.

Moreover, the use of a new tool developed in the United Kingdom and adapted by the researcher for a South African context also has its limitations in applicability. Additionally, upon reflection of the QRS, the nature of the measure and the ratings are somewhat subjective. Although the researcher approached the analysis procedure as systematically as possible, the ratings required an element of judgement. This could possibly explain why the inter-rater agreement, although adequate, was not high.

However, in spite of the limitations, these results still have some merit in that the quality of reports are not generally as poor as suggested in the literature. As Ireland (2012, p. 13) emphasises, “the themes identified from the assessed reports are useful in providing an initial view as to the quality of submitted expert psychological reports” in civil litigation. The results of this research determined themes in psycholegal reporting, which will assist future research and practice (Brandt et al., 2004). From an investigation of the literature, it would seem that this is one of the first studies of its kind in South Africa. As such, the researcher offers it as a preliminary study for future research, and hopes that the research might contribute towards improving the quality and image of psycholegal work in South Africa.

## **Recommendations**

### **Recommendations regarding the results of the study.**

#### ***Psycholegal report writing.***

As noted, the layout and structure of psycholegal reports is not fully regulated in South Africa (Allan, 2005a). At most, Annexure 12 of the *Rules of Conduct* gives ethical guidelines for psycholegal assessments (Republic of South Africa, 2006a, 2006b).

Subsequently, from Annexure 12, the literature, previous studies and the results of this study, a number of recommendations for psycholegal report writing have been highlighted. As such, a standardised format would be useful in South Africa to advise good professional practice and further improve the quality of report writing.

#### ***Legal requirements of expert witness and/or evidence.***

It would be advantageous if the courts would determine the exact requirements for psychological expert witness and/or evidence. Hopefully, this would include the contents, format and style of psycholegal reports and their use in the courts. This should further assist with the formalisation and regulation of psycholegal assessments and reports.

#### ***The practice and field of psycholegal activities.***

Recommendations surrounding the scope and registration of ‘forensic psychology’ in South Africa are beyond the scope of this research. It is also irrelevant because psychologists in the existing categories can perform psycholegal work. Moreover, the literature noted that the chances of every psychologist being involved in a legal process is high (Cohen & Malcolm, 2005; Kaliski et al., 2006), whether as an expert-witness or a (therapeutic) witness on the facts (Republic of South Africa, 2006a). As such, there should be sufficient and compulsory training at Masters level to educate every psychologist on basic legal processes, the unique ethical considerations as per the rules of conduct in annexure 12 (Republic of South Africa, 2006a), and on formulating opinions and reports that are appropriate for a legal

context (D. A. Louw & Allan, 1998). In other words, all psychologists should be trained on the content and process of psycholegal work, including writing good quality reports (Ireland, 2012).

It would be helpful if the HPCSA and PBP reviews the *List of tests classified* (Psychometrics Committee of the Professional Board for Psychology, 2010). As seen in these results, very few tests that are commonly used appear on that list, especially those that are appropriate for the South African population. Moreover, there should be a list for tests that are acceptable for psycholegal assessments (Genis, 2008).

Further recommendations include the training of legal professionals on the basic concepts of psychology, the role that psychological opinion can play in court matters, and the expected content of a high quality psycholegal report. This would assist with the selection of appropriate expert witnesses, cross-examination of psychologists during testimony, and the evaluation of expert psycholegal evidence by judges. This would allow the expert to receive constructive feedback on the quality of his or her assessment and/or report during or after the court's judgment, and assist with regulation of psycholegal reports (Ireland, 2012).

#### **Recommendations regarding the study and utilised measure.**

This research joins the shortlist of similar studies. The main recommendation is that this kind of research is conducted on a wider scale, including more reports in other court jurisdictions on different types of legal matters. This would determine if the results from this research could be generalised to a wider population of psycholegal reports. Moreover, reports written for civil litigation will be different to those written for criminal litigation. As such, further research is needed to determine the general requirements for report writing, and the specific requirements needed for the different legal matters.

Moreover, further research and analysis of Ireland and Pinschof's (2009) measure, "Quality Criterion – Assessment of expert psychologist reports" (QRS) is needed for adaption

in the South African context. Although it was believed that the researcher's legal background was sufficient to adapt the measure for this forum, it is suggested that legal professionals and/or law academics should be approached to confirm the adaptations. It is further suggested that there were a number of criteria that could be operationalised, instead of using a Likert Scale. This would allow for specific determination of whether certain aspects have been included in the report, and a less subjective deliberation of the reports. This would make the analysis of reports more clear, and the findings more objective. For example, 'Does the expert discuss his or her expertise and specialised field of psychological practice? (Yes or No); 'Does the expert discuss South African norms for use of the psychometric test(s) for the relevant demographic of the client? (Yes or No)'; and 'Does the expert discuss the limits of confidentiality with the client? (Yes or No)'. This operationalisation would also help prevent the researcher from facing allegations of misconduct and findings that are subjective and unsubstantiated (Smith, 2016a, 2016b).

**Appendices**

**Appendix A: Quality Rating Scale (QRS) Measure (adapted)**

1

**QUALITY RATING SCALE – ASSESSMENT OF EXPERT PSYCHOLOGIST REPORTS**

<b>Report No.:</b>			
<b>Court Case No.:</b>			
<b>Date of report:</b>			
<b>Psychologist:</b>		<b>Psychologist's location:</b>	
<b>HPCSA No.:</b>		<b>Year qualified:</b>	
<b>Initials of rater:</b>			

<b>CONTENT</b>		
<b>FACT AND OPINION</b>		
<b>Please circle one</b>		Comments?
To what extent does the opinion assist the court? (i.e. does it fall outside of common knowledge and concern abnormal mental health or functioning)	1    2    3    4    5 Not at all                      Some what                      Completely	
<b>Please circle one</b>		If circled 1, 2 or 3 what data is missing?
To what extent does the report include the data from which it draws its opinion?	1    2    3    4    5 Not at all                      Some what                      Completely	
<b>Please circle one</b>		If circled 3, 4 or 5 what data/information was included?
To what extent has raw test data been included?	1    2    3    4    5 Not at all                      Some what                      Completely	
<b>Please circle one</b>		If circled 1, 2 or 3 what facts are missing?
To what extent is the final opinion linked back to facts in the main body of the report?	1    2    3    4    5 Not at all                      Some what                      Completely	
<b>Please circle one</b>		Comments?
To what extent does the psychologist evaluate the quality of the evidence they present? (e.g. do they note problems with measures, deal with potential criticisms etc)	1    2    3    4    5 Not at all                      Some what                      Completely	

Adapted with permission from Ireland, J.L. & Pinschof, J. (2009). Quality Criterion – Assessment of Expert Psychologist Reports. University of Central Lancashire, School of Psychology.



CONTENT CONT		
FACT AND OPINION CONT.		
Please circle one		Comments?
To what extent is psychological theory used to support clinical opinion?	1      2      3      4      5 Not at all                  Some what                  Completely	
Please circle one		Comments?
To what extent are fact and opinion clearly separated? (i.e. with fact in the main body and opinion in the conclusion section)	1      2      3      4      5 Not at all                  Some what                  Completely	
Please circle one		Comments?
To what extent is provisional opinion included?	1      2      3      4      5 Not at all                  Some what                  Completely	
Please circle one		Comments?
To what extent does the expert include a range of opinion? (e.g. extent to which they give more than one opinion on a topic under examination and indicate which they prefer)	1      2      3      4      5 Not at all                  Some what                  Completely	
Please circle one		Comments?
To what extent does the expert report allegations as fact?	1      2      3      4      5 Not at all                  Some what                  Completely	

METHODS		
With regards to the psychometrics used, to what extent do they fit the following criteria? (i.e. are these standards highlighted or discussed in the report? Are well-known tests used? Are relevant norms discussed and applied?)	Falsifiable (empirically tested)? 1      2      3      4      5 Not at all                  Somewhat                  Completely	Of those measures and/or theory scoring 1, 2 or 3 on any of these criteria, what measures/theory are they?
	Peer-reviewed or published measures? 1      2      3      4      5 Not at all                  Somewhat                  Completely	
	Accepted by the community? 1      2      3      4      5 Not at all                  Somewhat                  Completely	
	Reliable and valid, with a known error rate? 1      2      3      4      5 Not at all                  Somewhat                  Completely	
	To what extent are these trustworthiness criteria discussed in the report? 1      2      3      4      5 Not at all                  Somewhat                  Completely	

Adapted with permission from Ireland, J.L. & Pinschof, J. (2009). Quality Criterion – Assessment of Expert Psychologist Reports. University of Central Lancashire, School of Psychology.

METHODS CONT.						
<b>Please circle one</b>						
To what extent are the psychometrics used relevant to the current case?	1	2	3	4	5	
	Not at all		Some what	Completely		
<b>Please circle one</b>						
To what extent are the chosen methods fitting to the referral question(s)? (e.g. amount of testing, type of methods, etc.)	1	2	3	4	5	Comments?
	Not at all		Some what	Completely		
<b>Please circle one</b>						
To what extent is the opinion clear and reasonably understandable?	1	2	3	4	5	Comments?
	Not at all		Some what	Completely		

PROCESS						
<b>Please circle one</b>						
To what extent are emotive and/or prejudicial terms used? (i.e. those that could create bias)	1	2	3	4	5	If circled 3, 4 or 5 what examples of emotive/prejudicial terms are there?
	Not at all		Some what	Completely		
<b>Please circle one</b>						
To what extent does the expert comment on ethical issues (e.g. informed consent, limits to confidentiality, language/translator used, etc.)	1	2	3	4	5	Comments?
	Not at all		Some what	Completely		
<b>Please circle one</b>						
To what extent is the information disclosed relevant and non-sensitive?	1	2	3	4	5	Comments?
	Not at all		Some what	Completely		

QUALIFICATION						
<b>Please circle one</b>						
The extent to which the chosen expert has experience of mental health practice? (i.e. has a CV of relevant experience been provided)	1	2	3	4	5	Comments?
	Not at all		Some what	Completely		

Adapted with permission from Ireland, J.L. & Pinschof, J. (2009). Quality Criterion – Assessment of Expert Psychologist Reports. University of Central Lancashire, School of Psychology.

QUALIFICATION CONT.		
Please circle one		Comments on any absent competence?
To what extent does the expert have the specialised expertise to complete this particular assessment? (See CV)	<p>1      2      3      4      5</p> <p>Not at all                      Some what                      Completely</p>	
Please circle one		If circled 1, 2 or 3 what issues do they address that fall outside their scope of practice?
To what extent does the expert remain within their scope of practice? (e.g. do they go outside their specialisation or expertise? )	<p>1      2      3      4      5</p> <p>Not at all                      Some what                      Completely</p>	
Please circle one		If circled 3, 4 or 5 what legal issues do they comment on?
To what extent does the expert comment on issues in the remit of the judge? (i.e. the legal question(s) or issue(s) before the court)	<p>1      2      3      4      5</p> <p>Not at all                      Some what                      Completely</p>	

OVERALL QUALITY RATING		
Please circle one		
How would you rate the overall quality of the report?	<p>1      2      3      4      5</p> <p>Vary poor                      Good                      Excellent</p>	
Any specific comments on the report not already covered? (eg. format, writing style, length, etc.)		

Adapted with permission from Ireland, J.L. & Pinschof, J. (2009). Quality Criterion – Assessment of Expert Psychologist Reports. University of Central Lancashire, School of Psychology.

**Appendix B: Ethical clearance of research by RPERC**

**RHODES UNIVERSITY**  
*Where leaders learn*

Psychology Department  
1 University Road, Grahamstown, 6139, South Africa  
PO Box 94, Grahamstown, 6140, South Africa  
T: +27 (0) 46 603 8500  
T: +27 (0) 46 603 7614  
E: psychology@ru.ac.za

**RESEARCH PROJECTS AND ETHICS REVIEW COMMITTEE**

11 August 2016

Claire Marais  
Department of Psychology  
RHODES UNIVERSITY  
6140

Dear Claire

**ETHICAL CLEARANCE OF PROJECT PSY2016/18**

This letter confirms your research proposal with tracking number PSY2016/18 and title, 'Judging psycho legal reporting in civil court proceedings: Recommendations for standardisation in Eastern Cape', served at the Research Projects and Ethics Review Committee (RPERC) of the Psychology Department of Rhodes University on 11 May 2016. The project has been given ethics clearance.

Please ensure that the RPERC is notified should any substantive change(s) be made, for whatever reason, during the research process. This includes changes in investigators.

Yours sincerely



Dr Jacqui Marx  
CHAIRPERSON: RPERC

**Appendix C: Informed Consent from the Registrar at the Grahamstown Division of the  
Eastern Cape High Court**

***INFORMED CONSENT FORM***

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13 August 2016

To the Registrar of the Eastern Cape High Court division, Grahamstown

**RE: Research titled 'Judging psycholegal reporting in civil court proceedings: Recommendations for standardisation in Eastern Cape'**

My name is Claire Marais and I am doing a research study on the quality of psycholegal reports handed in for civil court matters, to make recommendations on how to standardize these reports. The data collected from this research is required in order for me to fulfil the requirements for a Master of Arts in Clinical Psychology at Rhodes University (Grahamstown). I am under the supervision of Prof. Charles Young, an Associate Professor, and registered Counselling Psychologist.

I am requesting copies of psycholegal reports from finalised civil court matters heard in the Eastern Cape High Court division, Grahamstown, during the period 2006 to 2016.


I make this request under Rule 62(7) of the Uniform Rules of Court in terms of the Supreme Court Act 59 of 1959, which states "Any party to a cause, and any person having a personal interest therein, with leave of the registrar on good cause shown, may at his office, examine and make copies of all documents in such cause." I have a personal interest in these matters due to my research purposes. Furthermore, this study will add to the knowledge related to expert evidence tendered by psychologists, and will further assist the courts in making informed judgments on psychological matters.

Please note that there are no foreseen risks to the parties of the matters due to the ethical procedures that will be put in place. This research will focus on the process of the psychological investigation set out in the report, rather than on the content of the legal matter. I will not be taking cognisance of the judgment and/or the findings of the court on the admissibility and reliability of the psychologist's evidence. Furthermore, any reference to the parties mentioned in the psycholegal reports will be by pseudonym, including any direct quotes from the reports. Copies of the reports will be kept in a locked place that only I will have access to. Only myself and my supervisor will know who the parties to a matter were. I will pay for any costs involved in the copying of the reports, and also offer my time to find the reports and make the copies.

You may withdraw your discretion at any time by notifying me by email. If you have any concerns regarding your participation in this research study you may contact my supervisor, Prof. Charles Young at the Department of Psychology at Rhodes University. You may ask for a copy of this document for your own records.

This document further acknowledges you understand your discretion to allow access to the reports, which I have discussed with you prior to signing this document.

I, as Registrar of the Eastern Cape High Court division (or on behalf of the Registrar), Grahamstown, acknowledge that the researcher has explained the ambit of her research study, including the purposes and ethical considerations. I understand there is no compensation for, or direct benefit of participating in this study. By signing below and providing my contact information I am indicating that I consent to the access to and copying of psycholegal reports for civil court matters finalised in the period 2006 to 2016. Furthermore, I confirm that due to my position as Registrar of the High Court, (or acting on behalf of the Registrar), I have the ability to allow the researcher such access to these reports.

Signature:  Date: 5/12/2016  
 Printed Name: MORRISON TOYISI  
 Phone Number: 046 6035000  
 Email Address: mtoyisi@judiciary.org.za  
 Postal Address: P/BAR XI011, GRAHAMSTOWN

Thank you for your assistance,



Ms. Claire Marais  
 MA in Clinical Psychology at Rhodes University (Grahamstown)  
[claire.a.marais@gmail.com](mailto:claire.a.marais@gmail.com) / 083 254 0626

Supervisor:  
 Prof. Charles Young  
 Associate Professor at the Department of Psychology at Rhodes University  
[c.young@ru.ac.za](mailto:c.young@ru.ac.za) / 046 603-8541

The Rhodes Psychology Department's Research Projects and Ethics Review Committee (RPERC) oversees the ethical practice of research involving human participants conducted by students at Rhodes University.

**Appendix D: Permission to Use and Adapt Ireland and Pinschof's (2009) Measure**

Claire Marais &lt;claire.a.marais@gmail.com&gt;

**Permission to reference your measurement**

11 messages

Claire Marais <claire.a.marais@gmail.com>  
To: jlireland1@uclan.ac.uk

Mon, Apr 25, 2016 at 8:00 PM

Good day,

Re: Your article "Evaluating Expert Witness Psychological Reports: Exploring Quality"


I am a Clinical Psychology Masters student at Rhodes University, South Africa. Under the supervision of Prof. Charles Young, I am doing my research thesis on a topic very similar to the one you did in 2012, and I was luckily enough to find your summary report in time for my research proposal.

I am wanting to use a similar, or the same measure, you used to evaluate psycholegal reports from a local court, and was hoping to receive your permission? You will be correctly acknowledged and referenced. I will also adapt the measure to include aspects of South African law.

I have attached the first draft of my research proposal so that you can see the legitimate nature of my request.

Regards,  
Claire Marais  
BA Hons (Psych) LLB  
Current MA (Clin Psych) student (G05M1098)  
Rhodes University, Grahamstown (South Africa)

Supervisor: Prof. Charles Young ([c.young@ru.ac.za](mailto:c.young@ru.ac.za))

 **Marais - Research proposal - psycholegal court reports 11.04.2016.pdf**  
352K

Jane Louise Ireland <JLIreland1@uclan.ac.uk>  
To: Claire Marais <claire.a.marais@gmail.com>

Mon, Apr 25, 2016 at 8:47 PM

Here you are Claire. I would be very interested in your results.

I am not sure how useful the scale will be as it is based on our CPR and also Daubert, but here it is.

I have also published two papers of relevance, which I attach for you.

All the best

Jane L. Ireland

*Professor in Psychology (Chair), School of Psychology, University of Central Lancashire, UK.*

<http://uk.linkedin.com/in/janelireland>

*Adjunct Professor, School of Social Sciences and Psychology, University of Western Sydney, Australia*

01/10/2017

Gmail - Permission to reference your measurement

*Associate Professor (Docent), Department of Social Sciences, Åbo Åbo Akademi University, Finland*

*Visiting Professor, Cardiff Metropolitan University, Cardiff, UK.*

*Academic Lead, Ashworth Research Centre (ARC), Mersey Care NHS Trust*

*Violence Treatment Lead, Ashworth High Secure Hospital, Mersey Care NHS Trust*

*Lead Trainer, The International Organisation of Forensic Practitioners (TIOFP)*

**From:** Claire Marais [mailto:claire.a.marais@gmail.com]

**Sent:** 25 April 2016 19:01

**To:** Jane Louise Ireland

**Subject:** Permission to reference your measurement

[Quoted text hidden]

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**3 attachments**



**CORERATING.docx**  
30K



**IRELANDANDBEAUMONTdaubert.pdf**  
204K



**2008expertpaper.pdf**  
131K



### **Appendix E: List of Tests Used in the Sampled Reports**

The following is a list of the different tests used during the assessments in the 20 reports. The tests marked with ‘\*’ and made bold, are the tests that are on the ‘List of tests classified as being psychological tests’ published by the Health Professions Council of South Africa (HPCSA) and the Professional Board of Psychology (PBP) (Psychometrics Committee of the Professional Board for Psychology, 2010).

1. Auditory Consonant Trigrams (ACT)
2. Automatisms Test
3. Beck Anxiety Inventory (BAI)
4. Beck Depression Inventory II (BDI-II)
5. **\*Beery Visual Integration Test**
6. **\*Bender Gestalt Test**
7. Benton Visual Reproduction Test
8. Brief Psychiatric Rating Scale
9. Burns Anxiety Inventor (BAI)
10. Clinical-Administered PTSD Scale (CAPS)
11. Complex Figure Test
12. Controlled Oral Word Association Test (COWAT)
13. Delis-Kaplan Executive Function System (D-KEFS) (including the Design Fluency, Verbal Fluency, Colour-Word Interference and Trail making Tests)
14. Draw-A-Bicycle
15. Draw-A-Clock
16. Draw-A-Person (DAP)
17. Finger Tapping Test
18. Grooved or Purdue Pegboard

19. Hamilton Anxiety Rating Scale (HAM-A)
20. Hamilton Depression Rating Scale (HAM-D)
21. **\*Individual Scale for Xhosa Speaking Pupils (ISXSP)**
22. Informal Handwriting Tests
23. Informal Language Ability Tests
24. Luria Motor Test
25. Mental Status, Cognition and Highest Integrative Functioning (MSCHIF)
26. Mini Mental State Examination (MMSE) (use of selected questions)
27. Montreal Cognitive Assessment (MOCA)
28. Pain Disability Questionnaire
29. Posttraumatic Stress Checklist 5 (PCL-5)
30. Psychiatric Impairment Rating Scale
31. Posttraumatic Stress Disorder Short Scale (NSESSS)
32. **\*Ravens Standard or Coloured Progressive Matrices**
33. Rey Auditory Verbal Learning Test (RAVLT) (Xhosa version also administered)
34. Rey Fifteen Item Test
35. Rey Verbal Designs Learning Test (RVDLT)
36. Ruff Figural Fluency Test
37. Serial Digit Learning
38. **\*Senior South African Individual Scale-Revised (SSAIS-R)**
39. Story Memory Tests
40. Stroop Colour-Word Interference Test
41. Symbol Digit Substitution
42. Symptom Check List 90 Revised (SCL-90-R)

43. Trail Making Test (TMT)
44. Unstructured Oral Word Association Tests (Words-in-a-minute)
45. Uses of Objects Test (AUT)
46. Victoria Symptom Validity Test (VSVT)
47. Vineland-II Adaptive Behaviour Scales
- 48. Wechsler Adult Intelligence Scale (WAIS III and IV) (with use of selected subtests (\*WAIS-R))**
49. Wechsler Abbreviated Scale of Intelligence (WASI)
- 50. Wechsler Memory Scales III (WMS III) (\*WMS-R)**
51. Wechsler Paired Association Test
52. Wechsler Visual Reproduction Test
53. Wechsler Intelligence Scale for Children (WISC-IV) Mazes (**\*WISC-III**)
54. Wisconsin Card Sorting Test
55. Wide Range Assessment of Memory and Learning Second Edition (WRAML 2)

### References

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