

AAPL: Ask the Experts-2020

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Neil S. Kaye, MD, DFAPA and Graham Glancy, MB, ChB, FRC Psych, FRCP (C), will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send questions to nskaye@aol.com.

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Q: How do you define “expert?”

Kaye:

Expertise is not just about knowledge, but also about the capacity to spot errors. Without affirmative action, efforts to be thoughtful, and practice, most of us are more likely to fall in the former group than the latter. Humans hunger for information, but often lack the know-how to evaluate it or the sources that we reference. This is the epistemological crisis of the moment: there’s a lot of “expertise” around, but fewer tools than ever to distinguish it from everything else. “Pure credentialism” doesn’t always work. A well credentialed person may not really be an expert and their ability to teach to a trier of fact may be woefully lacking. Or, their viewpoint may be tainted by significant bias or an undisclosed agenda.

Real experts have experience in making decisions and knowledge of how things usually play out in a similar set of circumstances. This idea is reflected in Gladwell’s book *Outliers*. Education, fellowship training, and clinical practice are part of becoming an expert, but they alone cannot substitute for experience.

A lack of expertise becomes especially problematic when it is combined with extreme overconfidence, and with society’s tendency to reward projected confidence over humility. When scientists offer caveats instead of absolutes, the uncertainty we are trained to acknowledge makes it sound as if we don’t know what’s really happening. This creates opportunities for people who present as skeptics to undermine our profession and our testimony.

The idea that there are no experts (Douthat) is overly glib. The issue is more that modern expertise tends to be deep, but narrow in their expertise. Even within a hard science such as epidemiology, someone who studies infectious diseases

knows more about epidemics than, say, someone who studies nutrition. Our work as forensic psychiatrists demands both depth and breadth of expertise.

A major area of concern should be that knowledge is tinged by confirmation bias. When doing our work as scientists we should be happier when we find people, opinions, viewpoints and/or facts with which we disagree. This provides the opportunity to reconsider our methodology and processes, and can enlighten our formulations, conclusions, and ultimate opinions.

Knowledge is often thought of as a quantity of information. A person who “knows” a lot is often referred to as knowledgeable. The Internet has become the font of knowledge in today’s world. Many people turn to the Internet for answers and in the medical world, we are constantly faced with the idea that “Dr. Google” has the answer to all of our medical problems. In reality, Google is a great example of endless knowledge with no expertise. It is no surprise that Internet based medical diagnosing is accurate only about 50% of the time (Park, 2018.) While the hope for artificial intelligence remains high, there is still no substitute for an experienced physician!

In court, the strongest attractor of trust shouldn’t be confidence, but the recognition of one’s limits, including the willingness to acknowledge expertise beyond one’s own. It is very difficult to walk this line, as overconfidence is associated with persuasiveness, especially when espoused by a court admitted expert and hiring lawyers look for persuasive experts.

A recent NJ Appellate case (HKS v. Kensey) provides some guidance specific to psychiatric expert testimony. The court gave a thoughtful analysis of a scientific report in terms of objectivity and providing a basis for an opinion. Although psychiatry has little in the way of objective diagnostic tests, the court noted that expert reports cannot be admitted if they simply repeat the subject’s reporting of subjective symptoms. There must be more. The objective piece, then, should be what the expert brings to the table. Although excellence is not necessarily the standard, expert witnesses must do more than fact witnesses--if they want to give opinions. The court makes its reasoning clear and insists on a standardized diagnostic approach, give credence to objective testing, and also stress methodology is reaching an opinion, which I favor and believe is what Daubert is about.

Glancy:

I remember very early on in my career being called as an expert in Superior Court and being cross-examined on my CV. In particular I was asked how many times had I been qualified as an expert in court and when I answered that I had been qualified on one occasion previously. The distinguished judge peered at

me and, accepting me as an expert in forensic psychiatry, stated “well, he is the only expert that we have here so I suppose he’ll have to do”.

This is a simple question that is very difficult to answer. I can approach this in two ways. First what is the legal definition and second, how is an expert defined outside of the legal forum.

At the most basic level an expert witness could be said to be somebody who possesses the necessary expertise in a given field. Most particularly, the expert must strive for objectivity and honesty (AAPL 2015; CAPL 2018) and give their opinion in a non-partisan manner, which is free of conflict. Gutheil and Simon (1999) discuss the inherent tensions in the relationship between forensic experts and lawyers, stemming from the different roles that they adopt. Most importantly, in particular, the expert witness must adhere to the duty to provide fair, objective, and non-partisan assistance to the courts. In a recent Canadian case the judge was charged with the gatekeeper function of ensuring this, prior to admitting expert evidence (White Burgess, 2015), as opposed to this issue going to weight as it did previously. A frequent role conflict is between the concept of providing treatment and that of providing expert opinion. Strasburger and others (1997) describe this conflict in an important paper, which has been enshrined in the ethical principles of forensic psychiatry.

Interestingly, Canadian courts have come to an awkward compromise on this issue, differentiating between ‘litigation experts’ who may be forensic experts retained for the case; and ‘participant experts’, for instance, treating physiotherapists or rehabilitation specialists (Westerhoff v Gee Estate, 2015). The role of forensic expert therefore is to undertake a search for the facts of the case, supported by evidence-based tests and come to an objective opinion. It is common in forensic practice to review collateral information, such as that provided by informants who may have relevant information. A number of cases in Canada have reviewed this practice (Lavalley, 1990) and have ruled that experts are allowed to use what amounts to hearsay evidence but, if these facts are not proven in court, this goes to the weight of the expert opinion. If relying on this evidence, therefore, it is important to communicate with the retaining attorney and suggest that this evidence is proven prior to your final opinion.

The admissibility of expert evidence has been subject to various legal decisions. In Canada, the prevailing decision is *R v Mohan* (1994), which deemed four factors that should be considered. These included the relevance of the evidence; the necessity of the evidence; the absence of an exclusionary rule; and the assurance that the expert was properly qualified. In the United States, two major cases prevail, namely the general acceptance rule (Frye, 1923) and more comprehensively, the Daubert decision. This case cited three additional factors beyond the general acceptance rule, which included whether the theory or technique is testable and has been tested; whether the theory or technique has

been subjected to peer review; whether the error or potential rate of error has been identified.

Perhaps most importantly for forensic psychiatrists is a consideration of whether we can give an objective and honest opinion that is not advocacy, considering the limits of our expertise, and educating the courts.

Regehr defines, at the basic level, an expert is one who possesses authoritative knowledge or basic skills. She emphasizes that the expert's expert possesses intuitive decision-making and problem solving, beyond simple knowledge. She outlines the contrasting theories of whether expertise is inherited or the result of what Ericsson calls deliberate practice. I argued for the role of "deliberate practice" (Glancy, 2015), the kind that makes you sweat, but with good coaching, delivering actionable feedback. This was supported by a qualitative study that I performed (Glancy, 2020) interviewing some of the "Greats" of forensic , who all spontaneously say that working 60-80 hours in at least the first ten years of their career, corresponding to Gladwell's 10,000 hours, helped them become an expert's expert. Most of us strive merely for 'competence', Dreyfus describes a five stage model, where the progression goes from novice to advanced beginner to competence to proficiency to expertise.

Take Home Points:

The difference between knowledge and experience is a critical distinction to keep in mind. You will notice Dr. Glancy's inclusion of his wife's publications in his citations. There is no doubt he is a true expert!

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