THE CRIMINOLOGIST AS AN EXPERT WITNESS IN COURT

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ABSTRACT

In this article the place and function of the criminologist as an expert witness in Criminal Courts are scrutinised and critically evaluated. Firstly, the terms forensic expert, criminology, forensic criminology and criminalistics are clarified. Subsequently, in order to determine the place of the criminologist as an expert witness in court, the scope and expertise of related social scientists are depicted. It is also pointed out that, in order to gain professional status in court, criminologists should register with a professional board, which should be established to regulate standards, develop an ethical code and determine the fees for the various services rendered by them. This is followed by an explanation of the admissibility of expert opinion in court. The major part of the article is devoted to the requirements with which criminological evaluation reports should comply. Criticism has been levelled at the way criminologists compile their pre-sentence reports. For this very reason, the various components of the report are discussed in detail. Particular attention is paid to victim impact statements as part of the evaluation report. Furthermore, preparation for the court and presenting the pre-sentence report in court are discussed. Finally, criticism levelled at criminologists as expert witnesses in court is debated.

INTRODUCTION

Expert testimony in criminal courts has a long history. The necessity for expert witnesses who are more qualified than the court to express their opinion regarding certain matters, has been acknowledged since the 14th century (Schmidt & Rademeyer 2000:463; Pretorius 1997:334). According to Anderson (1987: 12) social science research was formally introduced into the judicial system in 1908 by Louis Brandeis in Muller v Oregon. Since the 1950s social scientists in the United States have played a pivotal role as expert witnesses in litigation regarding school desegregation. Behavioural and social scientists with criminological and criminal justice expertise have increasingly been requested to appear as expert witnesses.

Criminologists as expert witnesses in court offer testimony on a broad range of criminal justice practices and procedures and in criminal trials. In South Africa, the courts only started using expert testimony given by social scientists as expert witnesses on a regular basis in criminal court cases during the latter part of the previous century. The first organised project to introduce the criminologist in the courtroom in South Africa was undertaken in the middle of the 1980s by Dr Irma Labuschagne and Dr Charlene Lea under the guidance of Judge Richard Goldstone (Labuschagne, JJ 2003:2). At present, there are still only a small number of criminologists who compile pre-sentence reports for the courts from time to time and even a smaller number who are full-time forensic criminologists.

In this presentation the focus will be on the place and function of the criminologist as an expert witness in court.
CLARIFICATION OF KEY TERMS

The term **forensic expert** is often used with regard to specialist witnesses in court. The word “forensic” is derived from the Latin “forensis” which means relating to the forum as a place for administration of justice (Cassell’s Compact Latin-English Dictionary 1954). The Latin word “forum” means a meeting or assembly for the open discussion of subjects of public interest. Originally, it related to the Roman Forum or judicial bench, the main forum of ancient Rome, where arguments were conducted in public to prove the guilt or innocence of an accused. A **forensic expert** therefore is a person who is called to testify in court on a regular basis, due to the fact that the person is more qualified than the court to express an opinion on certain matters in a particular field, or as one who has acquired specific skills and knowledge on a subject of a technical nature that the court lacks.

The term **criminology** can briefly be defined as the scientific study of crime as a social phenomenon in all its facets. Sutherland and Cressey (Siegel 2004:4), define criminology as the body of knowledge regarding crime as a social phenomenon. It includes within its scope the processes of making laws, of breaking laws, and of reacting towards the breaking of laws.

**Forensic criminology** refers to the actions of a criminologist in collecting, analysing and presenting evidence in the interest of objective proceedings in the judicial process.

Criminology should not be confused with **criminalistics**, which is primarily concerned with the implementation of the methods, techniques, instruments and knowledge of the **natural sciences** in the investigation of crime (Du Preez 1996:8). The criminalist is trained in forensic investigative techniques, and applies knowledge from sciences such as chemistry, physics, pharmacology, physiology, biology, entomology, odontology, agrostology, botany and metallurgy. The criminalist focuses on the **crime scene** with the purpose of collecting forensic evidence to link a specific individual to the crime. Fields of specialisation are, for example, fingerprinting (dactyloscopy), ballistics, disputed documents, and forensic medicine (Cilliers, Marais, Ovens & Van Vuuren 2001:30).

COMPARISON BETWEEN THE SCOPE OF EXPERTISE OF RELATED SOCIAL SCIENTISTS

The court may call upon social scientists from various disciplines to give testimony in court, such as social workers, psychiatrists, clinical psychologists and criminologists. It is of paramount importance that social scientist experts should know the boundaries of their field of specialisation so as not to trespass in another social scientist’s field of expertise. The difference between the scope and study field of the various social sciences must be clearly demarcated. In order to elucidate the place of the criminologist as an expert witness in court, the scope of expertise in related fields of study must be incontestably defined.

**Differentiation in the training and function of social workers psychiatrists, clinical psychologists and criminologists in court**

Although evaluation reports are usually probation reports compiled by probation officers employed by the state (social workers), other divergent experts can also be requested to submit a pre-sentence report to the court, such as criminologists, psychiatrists or psychologists. In view of their specialised training, these experts will have divergent
perspectives of a specific criminal case. Consequently, the contents of the evaluation report of the various disciplines will differ. The training and perspective of social workers, clinical psychologists, psychiatrists and criminologists will now be briefly explained.

Social worker

The basic university training for social workers is a four year career-oriented Bachelor of Arts (BA) degree in Social Sciences which includes workshops and practical sessions. The curriculum comprises, *inter alia*, modules in social welfare law, social work, basic psychology, communication science, anthropology, sociology, economics, business management, comparative religious studies, marriage guidance and counselling.

Students who register for Social Work on a second-year level, must already have registered with the South African Council for Social Service Professions (SACSSP) as a student social worker. Once qualified as a social worker, registration with the SACSSP is a requirement in terms of the Social Service Professions Act, 110 of 1978, as amended.

Social workers focus mainly on the social functioning of an individual. They pay particular attention to social relationships regarding the interaction between people and between people and the environment (Labuschagne 2003: 5-6). An evaluation report compiled by a social worker usually consists of the following components:

- Introduction
- family composition
- background history
- work and financial position
- marital and family life
- criminal record
- physical and psychological aspects
- leisure time activities
- religious aspects
- evaluation of the respondent and recommendation regarding a suitable sentence.

Clinical psychologist

Clinical psychologists must first obtain a BA degree with psychology as one of the major subjects, followed by an honours degree in psychology. Potential candidates for the master’s degree in clinical psychology are carefully selected. A master’s degree course takes two years of full-time study to complete, followed by one year internship at a psychiatric institution. A clinical psychologist receives training in interviewing skills, psychotherapeutic methods and counselling techniques. Clinical psychologists can also diagnose mental illnesses or personality disorders, but they cannot prescribe medication.

The function of the clinical psychologist is not restricted to mental illnesses, but such a specialist can also do
marriage counselling, counsel people with serious personal problems, and counsel trauma victims. Training of clinical psychologists differs at the various universities. At the University of South Africa (UNISA) the main emphasis is on training students to identify interactional and social patterns in a person’s life. It is assumed that the typical interactional and social patterns of the individual in the past will also be a reliable indication of the way the person will behave in future.

Psychiatrist

Psychiatrists in South Africa are first trained as medical doctors. After successfully completing their medical training, they must practise for two years before they are allowed to specialise. In order to qualify as a psychiatrist, a further four years of clinical and academic training in psychiatry and psychiatric medicine is required. Psychiatrists receive their practical training as registrars at a psychiatric hospital attached to a university. Some psychiatrists are attached to psychiatric hospitals, whereas others are self-employed in private practice.

A psychiatrist can diagnose mental disorders and other psychiatric conditions and prescribe psychiatric medication. Psychiatrists are also trained in psychotherapy. They mainly treat patients suffering from moderate to serious mental disorders, for example the psychotic, mood and anxiety disorders, as well as personality disorders and sexual deviations. From time to time psychiatrists may treat patients with less severe conditions. Psychiatrists are also trained to diagnose other mental disorders or defects that may adversely affect the criminal capacity of an accused. The courts may require both these functions when an accused is referred for psychiatric assessment.

Psychiatrists as well as clinical psychologists must register with the Health Professions Council of South Africa.

Only psychiatrists and psychologists may give evidence in court in terms of the Criminal Procedure Act 51 of 1977 on whether an accused is fit to stand trial, or was criminally responsible at the time of committing the alleged act (Allan & Meintjes-Van der Walt 2006:343).

Criminologists

The study field of criminology involves the social sciences as well as elements of criminal law. Bartol (1999:3) considers criminology as the multidisciplinary study of crime. Reid (2003:G3) defines the term criminology as the scientific study of crime, criminals, criminal behaviour and efforts to regulate crime. According to Dantzker (Hunter & Dantzker 2002:24), criminology is the scientific approach to the study of crime as a social phenomenon, that is, a theoretical application involving the study of the nature and extent of criminal behaviour.

Terblanche (1999:10) describes the field of study of criminology as follows: “Criminology, broadly speaking, studies crime, criminals, victims, punishment and the prevention and control of crime. The most important role of a criminologist is to study crime, and to interpret and explain crime”. In the past, the emphasis was on explaining the behaviour of the offender, but the emphasis has recently shifted to include analysis of the consequences of imposed sentences. This makes it all the more important for judicial officers to take note of the research done by criminologists.
Criminologists such as Reid (2003: xvii - xx), Siegel (2004:xv -xvi) and Bartol (1999:v - viii) identify the following main areas of criminology:

- Criminal statistics (measuring crime patterns and trends)
- Distribution of criminal behaviour amongst gender, age and ethnic groups
- Detailed studies of specific types of crime (economic crimes, crimes of violence, etc.)
- Causes of crime and criminality (biological, psychological, social factors)
- Theoretical explanations of crime (various perspectives)
- Impact of crime on individuals and communities
- Social origin of the criminal law, development of laws and the role of law in society, as well as the function of legislation
- Societal reaction to crime
- Criminal Justice Administration, including the police and legal professions
- Correctional programmes
- Victimology (the nature and cause of victimisation as well as aiding crime victims).

Briefly, it can be stated that criminologists are trained in the social sciences and focus mainly on the causes, explanation and prevention of criminal behaviour. The study field includes the profiling of offenders as well as of victims of crime. The main emphasis is therefore on the individuals involved in the criminal act.

Dr Irma Labuschagne (2003: 5) rightly points out that criminology not only focuses on individual criminal behaviour, but also on all environmental circumstances, as well as the context within which the criminal was functioning when the crime was committed.

Criminologists specifically study the criminal in all his facets, such as causal factors contributing to the criminal event, predisposition (e.g. personality make-up, genetic factors), precipitating factors, triggering factors, the interaction between the offender and the victim, victim vulnerability, victim rights, role of the victim in the criminal justice process, the criminal justice process, the prevention of crime and victim support, et cetera. Criminological studies involve personality and sexual deviations, for example the antisocial personality, paedophilia, violent offenders, rapists, and phenomena such as domestic violence, school violence and workplace violence. Criminologists focus on the causes, dynamics, theoretical explanation and prevention of violent behaviour. They also study the offender’s patterns of criminal behaviour in the past to predict his or her behaviour in future.

When compiling pre-sentence reports and testifying in court, there are certain limitations that should be taken into consideration. Criminologists are not trained to diagnose mental illnesses or personality deviations. They neither apply or interpret personality tests, nor intelligence tests unless specifically trained as psychometrists. Diagnosis, as well as applying and interpreting psychometric tests is the highly specialised and exclusive field of the psychiatrist and the clinical psychologist. Although personality deviations are the study field of criminologists, they are not trained to diagnose a person for instance as an Antisocial Personality or Psychopath, but they can describe the characteristics of such a person and indicate that the accused shows similar characteristics. Should a criminologist suspect that the accused may be suffering from a mental illness or personality disorder, it should be brought to the attention of the accused’s legal representative, and a psychiatric or psychological report requested before the...
commencement of the court hearing.

When the criminologist is required to write a pre-sentence report for the court regarding a dangerous criminal, the criminologist can indicate risk factors pointing to future violent behaviour. Criminologists cannot perform personality tests, but they can develop their own scales and models to identify risk factors which may indicate the individual’s level of dangerousness. Criminologists should have sufficient knowledge to evaluate the offender and, on the basis of certain specific risk factors, to indicate whether the person poses a danger to society or not. The criminologist’s prediction of dangerousness should be supported by an evaluation report from a psychiatrist or clinical psychologist. While criminologists cannot give an opinion in court regarding the accused’s mental capacity or accountability, they can give an opinion concerning the accused’s blameworthiness based on mitigating and aggravating factors.

When compiling a pre-sentence report, criminologists follow a holistic approach, taking all relevant factors into consideration which could have influenced the personality make-up of the individual and the development of violent tendencies. In order to obtain a complete picture, their reports should be complemented and supported by psychiatric and psychological reports. Ideally, a psychiatrist, a clinical psychologist, a criminologist and a social worker should work together as a team in high-profile cases when violent offenders who committed serious crimes, are on trial. Owing to their divergent and specialised training, each expert will approach the case from a different perspective as determined by their specific discipline. The psychologist focuses on the psychological aspects of an individual, whereas the forensic criminologist has a holistic view and approaches the offender in his or her totality (Labuschagne 2003:5). The psychiatrist’s main role is determining the criminal capacity of the accused before judgment. The forensic criminologist, in turn, can only consider the offender’s moral blameworthiness after conviction, but before sentencing (Labuschagne 2003:5).

Pre-sentence reports compiled by all the above-mentioned experts can contribute to a complete and clearer picture of the offender as a person and the most appropriate sentence and treatment programme for rehabilitation purposes.

**Required training of criminologists as expert witnesses**

Appropriate training at a high level is a prerequisite for establishing criminologists as professionals within the Criminal Justice System as well as in private practice. Advanced students should be equipped with the necessary skills, knowledge and practical experience, to enable them to perform their tasks with diligence. This is the responsibility of tertiary institutions, namely universities, who must develop advanced programmes, such as applied master’s degrees in forensic criminology and victimology.

In order to be considered as an expert witness by the court, criminologists should have attained at least a master’s degree in criminology. As early as 1999 Yusuf Cassim (1999:19) pointed out the need for fully trained forensic criminologists to have certain litigation and report-writing skills. Cassim (1999:19) added that “students studying criminology should not have a false impression that an honours degree with a course in forensic criminology will immediately qualify them to be forensic criminologists”. Furthermore, he added that “it is questionable whether a three or a four-year degree in social sciences at undergraduate level would be sufficient to practise as a criminologist.” (Cassim 1999:19). Owing to the complicated nature of pre-sentence reports, advanced training at
master’s level is a necessity. Such a degree course or advanced programme should include practical training in conducting interviews, analysing and explaining criminal behaviour, compiling pre-sentence reports, and ethical behaviour in court. Students should also have practical training in criminal profiling, assessment of criminal behaviour, debriefing techniques as well as in writing victim impact statements for the court. Moreover, training should also equip the student with techniques and skills in defending his or her evaluation report under cross-examination.

Criminologists should not only have a sound knowledge of criminology itself, but they should also study psychology and certain law subjects. In order to testify effectively in court, students should be trained in court procedures. Those students interested in forensic criminology should study law courses such as Criminal Law, Law of Evidence and Procedural Law.

ESTABLISHING A PROFESSIONAL BOARD

Criminologists should be able to register with a professional board sanctioning their professional status. The function of such a board should be to set and maintain educational standards. Advocate JJ Labuschagne (2003: 5) states that “...registration with a Professional Board entails endorsement from that body that the practitioner has met specific educational requirements that make him or her able to practise in the field. Such registration also certifies that the attainment of a specific prescribed qualification is regarded by the person’s peers to be sufficient to regard him or her an expert in the field”.

A professional board should also develop a specific ethical code of conduct that members should adhere to in order to regulate and control professional conduct. Disciplinary steps can then be taken against the members who contravene the ethical rules of the Board. Ethical principles should deal with competence, integrity, professional and scientific responsibility, respect for human rights and dignity, concern for others’ wellbeing, and social responsibility (Labuschagne, JJ 2003: 8-10).

EXPERT OPINION IN COURT

Sections 112(3) and 274 of the Criminal Procedure Act 51 of 1977 permit the state and the accused to present evidence regarding any matter in order to place the court in a better position to arrive at a just and proper sentence.

In terms of section 274(1) of the Criminal Procedure Act 51 of 1977 “a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed”.

As a general rule, opinion evidence is inadmissible because it is usually the function of the court to form an opinion. Witnesses may only give evidence about facts they have witnessed. One exception to this rule is when expert witnesses voice their opinion on facts which fall within the scope of their expertise. The reason for this exception being that the knowledge and/or expertise of the expert on the specific subject qualifies him or her to form a better opinion of the facts concerned, than the court (Naudé 2004:251).
Allan and Meintjes-Van der Walt (2006:343) point out that, while South African courts are not explicit about what the specific criteria are that persons must satisfy before they will be regarded as experts, it is clear that they must have both theoretical and practical knowledge.

The presiding officer must be convinced that the witness is qualified to testify as an expert witness on the subject concerned. Therefore, it is essential that the expert witness must provide the court with a written curriculum vitae in order to convince the court of his or her expertise. Furthermore, the expert will be requested to compile a pre-sentence evaluation report of the offender. Pre-sentence reports will be read out in court in evidence under oath by the expert who compiled the report. In this report, the expert must state the facts or reasons upon which his or her opinion is based.

The court allows expert witnesses to consult textbooks to refresh their memory during testimony. However, they should not only present opinions from textbooks to the court, but should also bring to bear their personal knowledge and experience of the specific topic. Practical experience is often a more decisive factor than qualifications when the court has to decide on the suitability of the expert witness.

The value attached to the expert’s opinion, also depends on the persons’s qualifications and the court’s ability to verify the contents of his or her testimony (Schmidt & Rademeyer 2000:470). To enable the court to determine the correctness of the opinion expressed by the expert, it is essential that the reasons that led to it, as well as the assumptions upon which it was based, be disclosed to the court (Allan & Meintjes-Van der Walt 2006:346).

A second factor to be considered by the court is the scientific trustworthiness of the evidence (Allan & Meintjes-Van der Walt 2006:344). The reliability, academic standing and authority of the specific textbook and its authors must be proven to the court. Therefore, the criminologist should not only include a bibliography of all the sources consulted for the evaluation report, but also the credentials of the various authors, which can usually be found in the preface of the academic textbooks to which reference has been made. Furthermore, it can be required from the expert to present the specific textbook to the court as an exhibit. For this reason, the expert witness should take the main sources of reference (books and articles referred to in the evaluation report) with him or her to the courtroom.

THE CRIMINOLOGICAL PRE-SENTENCE REPORT

According to Terblanche (1999:111) any report which has been compiled by an expert of some standing, with the aim to assist the court in finding an appropriate sentence, can be described as a pre-sentence report. In this section, the focus will be exclusively on the requirements for compiling a criminological evaluation or pre-sentence report.

**Purpose of the pre-sentence report**

The main purpose of a pre-sentence report is to assist the presiding officer in gaining a better understanding of the offender and the reasons for his or her crime (Terblanche 1999:111). This contributes towards the individualisation of the sentencing process. On the basis of their training, experts in social science and in particular criminologists, are well equipped to explain the causes and motives of the offender’s behaviour.
Initiating the legal process

In criminal cases, the instruction of the expert will generally be to evaluate the accused, prepare a report and, if necessary, give testimony in court. Usually an attorney will instruct or brief the expert to prepare the evaluation report for a particular client. This means that the expert’s entire knowledge of the particular case will usually be obtained after he or she has been instructed as a witness.

Compiling pre-sentence reports for the court

Pre-sentence reports compiled by specialists are essential in many cases, especially in those cases where a minimum sentence is prescribed by law which must be imposed on the accused unless substantial and compelling circumstances can be proven. It is the task of the criminologist to convince the court that substantial and compelling factors are present in a particular case which should be taken into consideration in the sentencing process.

The main task of the forensic criminologist is to present a more comprehensive picture of the accused before the court, to enable the court to come to a just conclusion regarding individualised punishment. “Forensic” merely describes the type of work done by any expert who testifies in a court of law (Labuschagne, JL 2003:2) The criminologist can furnish the court with a comprehensive picture of the social and personal history of the offender, future criminal potential, mental and physical abnormalities or deviations and other relevant matters in order to determine a suitable sentence for that specific individual.

It is the responsibility of the expert to ensure that the facts presented in the report are accurate. Once an expert has written and submitted a report it should not be amended. Should experts realise that they have made a mistake, or when new information becomes available that has a bearing on the opinions expressed in the report, an addendum can be filed. In the addendum, the expert should explain the circumstances that have led to the changes (Allan & Meintjes-Van der Walt 2006:348).

In the criminological evaluation report, the following factors receive attention:

- biographic details
- the character of the accused
- level of intelligence
- health and physical appearance
- mental health
- habits, such as alcohol consumption, motivation leading to the criminal event
- possible provocation
- triggering factors
- the possibility of intimidation
- remorse
- cultural factors such as belief in forefathers, or belief in sorcery
- degree of participation in the criminal act by the accused
- prospects of rehabilitation of the accused, and
Furthermore, the criminologist can offer theoretical explanations for the accused’s deviant behaviour. The recent trend is to apply integrated theoretical models to explain criminal behaviour. These models take into account individual-oriented factors, milieu oriented factors, motivation for committing the crime, facilitating factors, and instigating factors. In addition, the consequences or aftermath of the crime must be taken into consideration. Victim impact statements form a vital part of the pre-sentence report in order to explain to the court the harm or pain suffered by the victim. The effect of the crime on the community must also be addressed because the interests of the community are at stake as well.

A crucial part of the evaluation report is considering sentence options. It must be kept in mind that it remains the prerogative and responsibility of the court to decide on the most suitable sentence.

In order to arrive at appropriate sentence options, criminologists are guided by the following components:

- The nature and seriousness of the crime itself
- The type of offender and his or her circumstances (Triad of Zinn)
- The interests of the community (reaction to the crime)
- Harm suffered by the victim

The objectives of punishment should be taken into account, namely retribution, deterrence, prevention (protection of the community by means of incapacitation) and rehabilitation of the offender.

There are more complicated elements that should also be considered, namely remorse, blameworthiness (mitigating and aggravating factors), balance and mercy.

**Blameworthiness**

According to Terblanche (1999:165-166) a sentence should be an expression of the blameworthiness of an offender. The blameworthiness is basically determined by the first two components of the Zinn triad, namely the extent of the blame which can be attributed to the crime committed by the offender, and secondly the extent to which any personal factor relating to the offender either lessens the blame (mitigating) or increases the blame (aggravating).

Extenuating circumstances affect the offender subjectively and consequently reduces his or her blameworthiness. In the past, when the death penalty was still in force, a distinction was made between extenuating circumstances and mitigating factors. After the abolishment of the death penalty this distinction lost its meaning and at present, mitigating factors and extenuating circumstances can be used interchangeably (Terblanche 1999:212). Mitigating factors are, for example, a clean criminal record, youth or old age, low intelligence, poor health and dependants, to name but a few.

Aggravating factors include, for example, seriousness of the crime, planning, previous convictions, morally unacceptable motives such as greed or lust, lack of remorse, abuse of trust, involvement in a syndicate and prevalence
of the specific crime (Terblanche 1999:219).

**Intention and Motive**

Dr Irma Labuschagne (2003:8) points out that a criminological report should include well motivated discussions on the motive of the accused. The offender’s motive for committing the crime is always relevant.

Intention and motive are two different and complicated legal concepts the criminologist has to address when considering sentence options. A few motives are regarded as positive and may be raised in mitigation, such as euthanasia. For instance, a husband may have the intention to kill his terminally ill wife, motivated by his desire to end her painful suffering. In a case where the husband killed his wife in order to claim insurance money for himself, the motive will be seen as a morally unacceptable and can be taken into account in aggravation of his sentence. Another example is when a person has the intention to steal from somebody, but his actions are motivated by his desire to help someone else in need. In this case, the offender’s motivation can be a mitigating factor. On the other hand, a morally unacceptable motive may aggravate the sentence, for instance, when the crime is motivated by greed (Terblanche 1999:216).

Criminologists must actually make an in-depth analysis of the offender to determine his or her intentions and motives for committing the crime. These two elements are of pivotal importance regarding sentencing considerations. The offender’s intention and motivation for committing the crime have a bearing on his or her moral blameworthiness, severity of the sentence, as well as the individual’s specific needs for rehabilitation.

**Remorse**

Remorse is probably the most complicated and difficult concept for the criminologist to consider with regard to mitigating and aggravating factors. There is no existing test to apply to ascertain whether the offender is truly remorseful or not. It is a relative concept. According to Dr Irma Labuschagne (2003: 9), remorse is a process which can only be truly experienced and shown once there is full insight into the wrongfulness of the specific behaviour.

The legal meaning of remorse is not merely saying “I am sorry”. Remorse connotes repentance, an inner sorrow inspired by another’s plight or by a feeling of guilt, for instance, because of breaking the commands of a higher authority (Terblanche 1999:234).

When an offender pleads guilty, it does not necessarily mean that the person is remorseful. The offender may think that it is in his or her best interest to plead guilty because the court may consider it in mitigation. In such a case the offender’s motivation to a plea of guilty is self-interest and not really concern for the victim as such.

Paedophiles and offenders with an antisocial personality make-up are notorious for their lack of insight into the wrongfulness of their actions and, therefore, they are seldom remorseful. Lack of remorse is regarded as a seriously aggravating factor. When an offender is sincerely and deeply remorseful it is considered by the court as a strongly mitigating factor (Terblanche 100:234).
If an offender committed a crime over a long period of time, for instance, defrauded a company over a period of many years, or if a person had gradually and repeatedly poisoned the victim over a period of months, the court will not be impressed by the offender’s sudden “show” of remorse once he or she is in custody. A sign of true remorse is, for example, if the offender is making an effort to alleviate the victim’s suffering, such as paying the medical bills and asking for forgiveness. However, the criminologist should always be alert to insincere and manipulative behaviour.

Victim impact statements

The Truth and Reconciliation Commission in 1996 paved the way to bring the plight of victims of crime to the attention of the judiciary and to make legal provision for victim impact statements in the draft Sentencing Framework Bill. The South African Law Commission (2002: 68) pointed out that it is very difficult for any person, even a highly trained and experienced person such as a judge, to fully comprehend the range of emotions and suffering a particular victim of sexual violence might have experienced. It is also very difficult, if not impossible, to make a prognosis of what the effect of a particular act of sexual violence will have on a particular victim in future.

A victim impact statement can be defined as a document written by the victim who suffered personal harm as a direct result of an offence. The personal harm suffered relates to actual physical bodily harm, mental illness or nervous shock (Victims of Crime Bureau, New South Wales 1999:1). The South African Law Commission (2002:68) defines “victim impact statement” as “… a written statement by the victim or someone authorised by the Act to make a statement on behalf of the victim which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim”.

The term “victim” does not only include the direct victim of the crime, but also indirect victims such as family members or other significant people close to the victim, who are also affected by the crime. For the purpose of victim impact statements, the term “victim” can be defined as the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who has suffered injury as a result of the offence.

The Canadian Act Respecting Victims of Crime, 1995 (South African Law Commission 2001:651-652), defines a victim as a person, who, as a result of crime, suffers emotional or physical harm, loss of or damage to property or economic harm. If the crime results in the person’s death, the victims include the immediate family and dependants of the primary victim, unless they themselves are charged with committing the offence.

Section 46 (2) of the draft Sentencing Framework Bill (2000), stipulates that “a victim impact statement may be made by a person against whom the offence was committed and who suffered harm as a result of the offence or by a person nominated by such victim”. The use of victim impact statements in court can be considered as a means of giving victims the opportunity to voice their opinion about the case and their personal experience.

In terms of sections 46(4) and 46(5) of the draft Sentencing Framework Bill (2000), a victim impact statement is admissible evidence if the contents thereof are not disputed. Should the contents be disputed, the victim must be called as a witness. A victim impact statement is usually in the form of a written report that is presented to the court as part of the pre-sentencing proceedings, but it can also be submitted in the form of an oral statement in court by the
victim prior to sentencing (South African Law Commission 2002:69). The criminologist can compile a victim impact statement for the State or include a victim impact statement as part of a pre-sentence report for the Defence. Such a victim impact statement may be considered by the court during the sentencing phase. The South African Law Commission (2000:70) proposes that the prosecution should have the ultimate duty to ensure that such evidence or statements are available for submission in court.

A victim impact statement differs from the general victim testimony in court, in the sense that it allows victims to personalise the crime and to express their pain, anguish and devastation caused by the crime. Even when compiled by an expert, the victim impact statement should include sentences in the victim’s own words. In the case of small children who cannot verbalise their feelings, drawings by the victims expressing their experiences, can be most effective. Including the victim’s own words or drawings of the traumatic experience renders authenticity to the victim impact statement as a legal document.

The South African Law Commission (2000: 52) submits that the purpose of expert testimony in sexual offences cases should not only be to assist the court in understanding the experiences of sexual offence complainants, but also to explain the context in which an individual sexual offence complainant acted and thus to explain the possible reasons for this action. Without an expert opinion, otherwise legitimate responses to a sexual offence may be interpreted as the complainant’s irrational or confusing conduct, thereby affecting the victim’s credibility. For instance, in the case of rape, many women cannot fight back to defend themselves because, instead of a fight or flight reaction, they “freeze” and literally become paralysed with fear and shock.

At present, legislation permitting some form of victim participation is in force in the United States of America (in 48 states), Canada, New Zealand and Australia. (South African Law Commission 2001:674). Judges from countries where a jury system is part of the judicial system, such as the USA, do not accept victim impact statements without reservation. The main argument is that victim impact statements do, in fact, influence lay sentencing decisions. Nadler and Rose (2003:437) point out that evidence about the emotional impact of crime on the victim is by nature subjective and more difficult to quantify than objective physical or financial harm. The effect of the emotional impact on an individual is unforeseeable because nobody can predict the emotional impact that a crime will have on a specific individual. Physical harm is a reliable indicator of factors related to culpability. Emotional harm, on the other hand, is particularly unreliable because individual emotional responses to a crime vary greatly among individuals (Nadler & Rose 2003: 442). It may be compelling to punish offenders more harshly when the emotional harm as a result of the crime is more severe. Should the victim impact statement evoke anger as a result of the severity of the harm suffered by the victim, the magistrate or judge may be motivated to call for greater punishment for that crime. Nadler and Rose (2003: 445) argue that victim impact statements generate a negative effect within the decision-maker and this leads to a higher likelihood that the decision-maker will search for reasons to blame and punish. Victim impact statements can activate contempt, anger and disgust towards the offender. In addition, victim impact statements often focus attention, not only on the harm to the individual victim, family and friends, but also on the manner in which the crime has affected a larger social group.

Another way that victim impact statements might influence sentencing decisions is through the decision-maker’s sympathy for the victim. This, in turn, may elicit more severe punishment (Nadler & Rose 2003:419). The victim
impact statement could also be considered as a cry for help – and, therefore, the offender must be punished more severely. There tends to be less sympathy for the victim who seems to be coping well. On the other hand, intensely emotional victim impact statements of the victim’s plight, provided by family, friends and neighbours evoke sympathy for the victim to such an extent that the presiding officer may consider only the most severe punishment for the offender.

In the South African Law Commission Report on Sexual Offences (2002: 346), Ms Hayley Galgut of the Gender Law Unit in Sonnenberg, Hoffman & Galombik Attorneys, points out that the provision of victim impact statements should be voluntary and that victims should not be forced to submit these statements if they do not wish to. The absence of a victim impact statement in a particular case should not result in a negative inference being drawn nor lead to the conclusion that the crime did not cause any harm, loss, or emotional suffering to the victim.

In view of the above arguments, it is preferable that a social scientist, such as a criminologist, compile the victim impact statement, rather than the victim or family members on their own. This will contribute towards a more balanced view, because the criminologist, as a social scientist, focuses on factual information and not exclusively on emotional factors. There must be a balance between the various components, such as the seriousness of the offence, the physical harm, psychological harm, changes in lifestyle, and financial loss caused by the victimisation. The prosecution should ensure that such evidence or a statement is available for submission in court.

The South African Law Commission (2002:319) recommends that uncontested victim impact statements be admissible evidence on production thereof. Should the contents of a victim impact statement, however, be disputed, the author and/or victim must be called as a witness. The court should allow a victim to make recommendations regarding an appropriate sentence to the presiding officer, provided that it is well understood that the presiding officer is under no obligation to follow this recommendation. Ms Linda Dobbs (South African Law Commission 2002:346) opposes this recommendation and argues that it would be more distressing for a victim of a sexual offence when a judge ignores his or her recommendation than not to have made any recommendation at all. The criminologist as an expert witness should not include a sentence recommendation in the victim impact statement.

By incorporating a victim impact statement into the pre-sentence evaluation report the criminologist ensures that the evaluation report is objective. It is impossible to write an objective report if the criminologist takes only the offenders’s personal circumstances into consideration and ignores or omits the harm suffered by the victim as a result of the offenders’s behaviour.

On the other hand, the damage or hurt suffered by the victim can be exaggerated to the detriment of the accused. There should be a balance between aggravating (harm suffered by the victim) and mitigating factors (personal circumstances of the accused) in the report.

**Balance**

Balance is an important consideration in sentencing. This means that the criminologist should consider all the relevant facts, factors and circumstances equally. The sentence options discussed must also meet all the purposes of
punishment. However, it must be understood that the seriousness of the crime may totally outweigh the mitigating factors and personal circumstances of the offender. The correct interpretation of the term “balance” is that all three the factors of the Zinn triad should be considered in conjunction with one another (Terblanche 1999: 167). The criminologist must be aware of this element and must ascertain that all the factors related to the crime involved, are included when contemplating the various sentencing options.

Mercy

This is a difficult concept that the court takes into consideration. According to Terblanche (1999: 168), the heinousness of a crime should not be allowed to exclude all other factors.

PREPARATION FOR THE COURT

After completion of the report, the expert should arrange for a consultation with the defence lawyer, if testifying for the defence, or with the state prosecutor, if testifying for the state. Allan and Meintjes-Van der Walt (2006: 348) recommend that the expert’s report should be critically examined during the consultation, in order to identify the strengths and weaknesses of the report, and how it should be dealt with in each case. Lawyers should prepare experts for possible questions they may be expected to answer during cross-examination. These consultations are of paramount importance in order to prepare and guide the expert witness, who is not familiar with cross-examination in court. Owing to the heavy workload of attorneys, this consultation in reality only takes place in high profile cases, with the result that expert witnesses sometimes go to court to testify not as well prepared as they should be.

PRESENTING THE PRE-SENTENCE REPORT IN COURT

In accordance with the judicial system in South Africa, a criminal trial is divided into three phases. Phase one is called the pre-trial stage, phase two the trial stage and phase three is the after sentence-phase. The trial stage is divided into the plea phase, followed by either the questioning stage or the stage where evidence is presented to determine the guilt or innocence of the accused. Once the accused has been found guilty, the sentencing phase commences. The criminologist as an expert witness is usually called during the trial stage, and specifically after conviction, but before sentencing (Engelbrecht 2001:1). The function of the criminologist’s opinion is to guide the court to arrive at a just and proper sentence. However, Engelbrecht (2001:1) points out that “the criminologist’s opinion should never displace the court’s decision”. In fact, the presiding officer (judge or magistrate) is in no way constrained to follow the opinion and sentence recommendations of the expert witness.

In an adversarial judicial system, it is difficult for the criminologist to remain totally objective. The adversarial system has been described as “...a contest between two equal parties seeking to resolve a dispute before a passive and impartial judge” (Meintjes-Van der Walt 2006:20). It becomes a particularly difficult contest for the expert witness when the presiding officer does not remain passive and impartial, but assumes the role of state prosecutor as well.

The evaluation report must be compiled in a balanced and objective way. In court, however, when the expert witness is cross-examined, there is a shift in emphasis with regard to the accused. The criminologist should acknowledge the
aggravating factors, such as the seriousness of the crime, harm suffered by the victim, previous criminal record et cetera, but when testifying for the defence, the main emphasis must be on mitigating factors. It should always be kept in mind that the expert must be truthful and present factual information to the court. It is the task of the advocate for the defence to defend his client. The criminologist must defend his or her evaluation report. Although a victim impact statement is an essential part of the evaluation report, the main emphasis falls on the offender and his or her circumstances, such as having suffered difficult childhood years, being a first offender, or the lack of planning.

When testifying for the state, more emphasis is placed on aggravating factors, and the harm suffered by the victims. In this case, the evaluation report should include a detailed victim impact statement. In order to compile an evaluation report for the State, the criminologist should interview all the significant direct and indirect victims available, who could have been adversely affected by the crime.

**Procedures in court**

The lawyer should indicate to the experts whether they should wait outside the courtroom to be called to the witness stand, or whether they will be allowed to sit in court before their testimony. Experts are usually, with the permission of the court, allowed to sit in court and listen to the other witnesses’ evidence before they give evidence themselves. In this way, they can comment on the testimony they have heard (Allan & Meintjes-Van der Walt 2006:349).

Expert witnesses are required to bring a number of copies of the evaluation report to court. The expert witness must take the original as well as one copy of the report to the witness stand. The original report will be presented to the presiding officer before the expert begins to testify. The state prosecutor, the attorney and advocate for the defence, as well as the translator, if present, should also have copies of the report.

After the expert witness has been sworn in, the person must first prove that he or she is, in fact, an expert in the particular field. To this end, the expert will be required to give an overview of his or her qualifications and experience.

The lawyer who called the witness, will lead the expert’s testimony. This stage in the trial is called *evidence in chief*. The lawyer will try to present the facts and opinions that support the client’s case, to the court. Allan and Meintjes-Van der Walt (2006:349) point out that the report itself is not the expert witness’s evidence but rather the evidence that is orally given from the witness stand. If the report is not controversial, and the other side does not wish to cross-examine the witness about it, the report may be read out in court without the expert witness being present. Alternatively, the presiding officer may read the report in chambers. While testifying, expert witnesses may consult their notes or textbooks at hand. The opposing party may inspect these sources and ask questions about the information referred to by the expert (Allan & Meintjes-Van der Walt 2006:350). Experts must be able to make an independent professional judgement regarding the reliability of the information provided in their reports and notes.

After the conclusion of the evidence in chief, the opposing party can cross-examine the expert. This is usually the most difficult part of the expert’s testimony. Cross-examination is considered as the most effective way of determining the credibility of a witness. Although Allan and Van der Walt (2006:350) state that it is the duty of the
court to ensure that cross-examination is not “discourteous, over-zealous, irrelevant, or inappropriate” the inexperienced expert may interpret and experience this phase in the trial as a personal attack on him or her. The cross-examination usually commences with questions regarding the expert’s qualifications, experience and competency to testify as expert witness. Questions will also be asked to test the expert’s objectivity and credibility as a witness, as well as the accuracy of the factual basis of the report. Experts are required to explain their position (whether testifying for the state or the defence) and to defend their opinion effectively during cross-examination. After completing the cross-examination the attorney who has called the expert can re-examine the witness. At this stage, contradictions or other matters emanating from the cross-examination can be clarified.

If the expert’s testimony is no longer required, the presiding officer will indicate that the witness is excused. The expert may then leave the courtroom. However, should the presiding officer instruct the witness to step down, the expert must remain in the courtroom, because the witness may be recalled.

Ethical principles of conduct in court

An expert witness should observe court etiquette. It is expected from the expert to conduct himself or herself in a professional manner and to testify in a dignified and polite tone. When testifying, the witness should face the presiding officer. The correct manner to address a magistrate (Lower Courts) is: “Your Worship” (“Edelagbare”) and a judge (High Court): “My Lord” or “My Lady” (“U Edele”) (Meintjes-Van der Walt 2006:29). Furthermore, the expert witness should speak clearly and audibly, and should remain calm and composed under all circumstances. A golden rule to observe is never to lose one’s temper or to make sarcastic or rude remarks. Attempts by the state prosecutor or advocate for the defence to annoy or provoke the witness should be ignored by the expert, who should remain tactful and avoid arguments. The expert witness should be serious, honest and sincere at all times. Should a mistake be made by the expert witness during testimony, he or she should admit it.

CRITICISM LEVELLED AT CRIMINOLOGISTS AS EXPERT WITNESSES IN COURT

Some judges and lawyers are of the opinion that expert witnesses qualified in the social sciences cannot develop and present an objective understanding of scientific knowledge. They are sceptical and attach little value to criminological or psychological oriented explanations of the particular crime (Lambrechts & Prinsloo 2002:12). They only accept “hard” or concrete evidence, not “speculation”.

Although it is true that criminalists enjoy a greater advantage regarding the objectivity of the scientific evidence, compared with experts in the social sciences, such as criminologists, social workers and clinical psychologists, the social scientist should take certain measures to ensure objectivity as far as possible. For instance, the criminologist should interview not only the accused, but also the victim and other significant people in his or her life. Reports by other experts should be studied, as well as any other official documents to verify the factual information in the report.

Another point of criticism is that the criminologist manipulates the court to accept his or her sentence recommendation. Allan and Meintjes-Van der Walt (2006:352) point out that when deciding the value that should be attached to the expert’s opinion, the court will take into account a number of factors, such as the competency of the
expert, the credibility of the witness, the thoroughness of the pre-sentence report, and whether the expert was honest and fair in his or her presentation of the facts and opinions. The expert witness should constantly bear in mind that his or her function in judicial proceedings should be to assist the court by providing the background of scientific information necessary to evaluate the facts presented at the trial. It should not be seen as an attempt to influence the presiding officer in favour of the party who called the expert as a witness. (Ingraham 1987:181). The ideal would be that the expert should be summoned as a witness of the court rather than as a witness for the state or the defence.

Presiding officers easily lose confidence in the merits of pre-sentence reports when they find that the report is not properly researched, objective and well motivated. A hastily written report will not survive rigorous testing under cross-examination. In this regard, Dr Irma Labuschagne (2003:3) points out that in court the expert’s evidence is vigorously tested and it remains the prerogative of the court to make a decision regarding the validity thereof.

Lambrechts and Prinsloo (2002:18) stress another common mistake, namely a lack of balance in the report regarding the triad of Zinn, comprising the crime, the offender and the interests of society. The interest of the victim can be added to this triad. It is essential that the report must be balanced by paying equal attention to all these components.

Another problem deals with the delimitation of the scope of the specific field of study. Ingraham (1987: 180) points out that the social scientist as an expert witness should remember the limits of his or her competence and field of expertise. For instance, criminologists as expert witnesses are not qualified to make a statement that an offender is suffering from post-traumatic stress, or any other psychological, mental or physical disorder, unless supported by a report by an expert in that particular field, for instance a psychological, psychiatric or a medical report. Should the criminologist make statements that he or she is not qualified to make, such an expert will soon lose credibility in court.

As a result of the lack of regulation in South Africa regarding financial compensation to expert witnesses, some experts have been criticised for charging a fee for their services. According to Allan and Meintjes-Van der Walt (2006:347), many experts have acquired reputations for being “hired guns” because they are prepared to provide opinions that serve the party paying their fee. Compiling an evaluation report for the court takes many hours of the expert’s time and energy. Where it is not part of his or her normal remunerated work, he or she is entitled to be reimbursed for the time spent on preparation. In addition to the time factor, experts, such as criminologists, incur costs in compiling the report such as administrative costs (telephone calls, faxes, printing paper, etc as well as travelling expenses). However, reimbursement of the expert witness should not have any bearing on or relevance to the expert’s opinion. Expert witnesses must give independent, objective opinions, regardless of the fact whether they are paid for their expertise or not.

Meintjes-Van der Walt (2006:24) states that the expert witness is not in court to win the case - that is the function of lawyers and advocates, but to give evidence. Although the expert is instructed and may be paid by one party, his or her role is to give independent evidence without being biased.
CONCLUSION

In view of the extremely high incidence of crime in South Africa, especially crimes of violence, criminologists should play a more prominent role as expert witnesses in criminal court cases. From the above exposition, however, it is clear that giving evidence in court as an expert witness, is no easy task at all. Compiling a pre-sentence evaluation report for the court is a time-consuming and highly complicated process. It requires in-depth analysis of the offender’s circumstances, his or her characteristics, motives and intention to commit the specific crime. Furthermore, the criminologist must offer a convincing theoretical explanation for the accused’s behaviour. A hastily compiled and incomplete report, unsubstantiated statements and thoughtless sentence recommendation will be torn to shreds during cross-examination in court.

The study field of criminology places the criminologist in a very suitable position to provide valuable information to the court regarding the causes, motives and prevention of criminal behaviour. Possibly as a result of unfamiliarity with the study field of criminology, the significance of the criminologist’s contribution to the Criminal Justice System has not yet been adequately explored. It is clear, however, that the judicial system should make more use of the services of criminologists as expert witnesses in serious cases such as crimes of violence.

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END NOTE

i. Based on a paper read at a conference: A New Decade of Criminal Justice in South Africa - Consolidating Transformation, Villa Via Hotel, Gordon’s Bay, South Africa, 7-8 February 2005)