PROBLEMS AND PROSPECTS FOR FORENSIC ASSESSMENT AND REPORTING FROM THE PCP PERSPECTIVE: A PRELIMINARY EXAMINATION.

Bill Warren

University of Newcastle, Australia

The legal systems with which psychologists in Australia, the UK and North America are familiar, and in which they may work as 'expert witnesses', that is, 'common law' countries, frequently require a 'diagnosis' be made and, if necessary, defended under cross-examination. This last system is the 'adversarial system' in which the parties conduct themselves as combatants, vigorously putting evidence and challenging each other's claims as if in a 'battle'. For a psychologist convinced of the merit of Personal Construct Psychology (PCP), however, there are conscientious and good theoretical objections to the practices of categorization and classification that underpin the idea of diagnosis. The notions of 'disorder', 'mental illness', 'mental health', and 'diagnosis' also take on a quite a different significance in PCP. This raises a problem for such a psychologist assisting the court. Given the significance of diagnosis in the law and the PCP position in relation to it, this paper considers the broad question of whether and how PCP might assist the court process. It does this by discussing the legal context in which psychologists operate when they provide so called 'expert evidence'. In addition, a number of other matters are raised to further highlight the problems and prospects for PCP in this particular area of forensic work: the 'inquisitorial system', which is more familiar in Continental Europe (and elsewhere); a recent notion of 'therapeutic jurisprudence'; and the problem raised in forensic assessment as 'malingering'.

Keywords: *expert witness, common law, personal construct psychology*

DIAGNOSIS, DISORDER, AND MENTAL HEALTH IN PCP

The notion of *diagnosis* is a problematic notion in PCP and this is perhaps the overarching issue for our topic of the problems and prospects in the particular forensic field that is our focus here. Kelly (1955/1991, Vol. II, p. 774ff/Vol. II, 153ff) provides a discussion of diagnosis and he provides "guidance for formulating the client's complaint" (Vol. II, p. 962ff/Vol. II, 265ff), and both of these ideas are given in a context of his significant criticism of the practices of classification and categorization that underpin diagnosis as in present times, for example, the *DSM-IV* and *ICD-10*. Equally, two other relevant concepts, *mental illness* and *mental health* also have a different significance. The expression 'optimal psychological functioning' is preferred to the term 'mental health' and this is understood in terms of the individual constantly engaged in the mental and behavioural activity of three 'Cycles', conscientiously framing hypotheses and, importantly, testing these in interaction with others and the world (Winter, 1992, Walker, 2002, Walker & Winter, 2005). Briefly, these cycles are as follows. The *Creativity Cycle* is a sequence starting with loose construction in which many possibilities are considered, then progressive tightening to a construct that can be tested, that is, validated or invalidated. In persons not functioning optimally, the cycle will not be completed in that, for example, tightening may not occur and so no validation or invalidation; thus, there is no change or growth in the way the individual understands the world. The *Experience Cycle* is a sequence of: Anticipation (a prediction is devised); Investment (the individual gets thoroughly involved in the prediction); Encounter (where the individual is open to the event or situation in all of the dimensions in terms of which it can be experienced); Confirmation-Disconfirmation (the initial prediction is validated or is not); Constructive Revision, in which

appropriate revisions are made to the original prediction. The person who does not function optimally is seen to be blocked at one or more of the phases of the cycle; for example, she or he might not tighten to confirm or otherwise their construing, or may refuse to modify in the face of invalidation. Finally, the *C-P-C Cycle* describes a narrowing of attention from the more general to the more focused. *Circumspection* sees one attempting to take account of as much of the information in a situation as possible, remaining open to complexity. *Pre-emption* is when a selection from the complex of possibilities is made and a particular element or aspect that appears to be the most significant for making sense of things is selected as 'most likely' to be true of that situation, event or whatever. *Control* sees one make a selection of this last element or aspect, and form a prediction in terms of a construct pole to be tested in behaviour, and, again, validated or invalidated.

These cycles describe a *process* view of mental illness/health, in contrast to attempts to state set criteria, such as those offered by Jahoda (1958) who suggested: self-awareness and acceptance, growth and self-actualization, integration, autonomy, perception of reality, environmental mastery. While the process view is arguably an advance, there is a difficulty in that the process is content-neutral. Historical figures such as the Nazi leaders, who might be widely felt were not mentally well may be found to be completing the three cycles, but with not only morally objectionable constructs being tested, but socially divisive ones. Elsewhere (Warren, 1996), it has been argued that PCP has since its origination been premised on the idea of the individual functioning – that is, going about his or her business of making sense of their world – in a social world that is *democratic*, one in which a more general *egalitarianism* prevails. These notions require elaboration, and that was done in the earlier discussion of the apparent content neutrality of the PCP understanding of mental health/illness in terms of the ideas of Barbu (1956). Barbu was less concerned with democracy as a set of external arrangements such as universal suffrage, limited terms of office for representatives, government of, for and by the people, and the like, and rather democracy as an outlook of mind, the *democratic mentality*. He provided a comprehensive account of this idea, an idea that was, highly consistent with core features of PCP.

Against this background of how mental health and 'illness' is seen in PCP can be considered what was provided in lieu of classification and diagnosis. This was a number of 'diagnostic questions' and these disclose a significant difference from the idea of diagnosis as arising from systems such as the *DSM-IV*. These see the clinician asking questions like "Exactly what is peculiar about this client, when does he or she show it, and where does it get him or her?"; "In addition to the client himself, what is there to work on in this case?"; "How is the client going to get well?" (Kelly, 1955/1991, Vol II, p. 779/Vol II, p.156) These questions look to how the client thinks about the problem and what he or she think they are trying to do in terms of the symptom they are presenting; what the 'advantages and disadvantages' of those symptoms are for them?

The matter of the client's difference from others and how the client sees the problem points to the *formulation* of the problem, and Kelly, (1955/1991, Vol II, p. 962/Vol II, p.282) offers some guidelines for doing so. At the simplest level there is *uncontrolled elaboration*, which sees the therapist simply letting the client tell it in his or her own terms. A step beyond that is to 'help them' in what he calls *controlled elaboration* and here the guidelines involve some suggested specific questions: "Upon what problems do you wish help? When were these problems first noticed? Under what conditions did these problems first appear? What corrective measures have been attempted? What changes have come with treatment or the passing of time? Under what conditions are the problems most noticeable? Under what conditions are the problems least noticeable?" Two additional questions are detected by Winter (1992): (i) Have you known other people with the same complaint? (ii) Tell me a little more about yourself (for example, what sort of a person are you?)

Kelly's general discussion raised in an earlier time and form the debate that is now more directly addressed as that between *diagnosis* and *formulation*; though in Kelly's use of 'diagnosis' the latter was an aspect of the former, not antagonistic to it. Interestingly, and perhaps fortu-

nately for present interests, this debate has had a relatively recent and somewhat vigorous restatement. Pilgrim (2000) argued that psychiatric diagnosis raised more questions than it did answer, and challenged that psychologists could or should work with it; as is required, particularly here, in the forensic context. The outcome of the debate across opinion pieces and letters to the Editor in *The Psychologist* was terminated when the Professional Affairs Board of the British Psychological Society (BPS), stated that the discourse of the law is the discourse of diagnosis and of categorization, and if one took objection to this, then one should not work in forensic contexts (Professional Affairs Board, BPS, 2000).

More recently, Mellsop and Kumar (2007) have raised this matter from outside the specific debate and outside PCP, likening classification and diagnosis as welcomed by the court, to 'the King's new clothes' in Hans Christian Anderson's story. They summarize arguments supporting the need for, and a current process of, rethinking the classificatory systems such as *DSM-IV* and *ICD-10*, and argue themselves that courts should take little comfort from diagnosis. A turn to formulation and hence to PCP might appear timely.

LEGAL CONTEXTS

Preliminary: Divisions and sources of law

Law is generally thought of as falling into two main divisions each of which addresses one of two main types of issue. The *civil jurisdiction* is where one citizen takes action against another citizen for an alleged breach of an agreement or for a wrong committed against him or her. Breach of contract is a straightforward example, negligence causing harm or damage to someone to whom a 'duty of care' is owed (one's 'neighbor') is another example, here in the field of *tort*, or a 'legal wrong'. The *criminal jurisdiction* is where the state (acting on behalf of all citizens of a society) takes action against a particular citizen for a crime, which is conduct (an act or the failure to do an act) which is detrimental to the community, conduct that would, unchecked, lead to the collapse of that community. Some conduct has both a criminal and a civil aspect; assault, for example, which will see legal action by the state leading to some sort of punishment, and possibly civil action wherein a victim seeks an outcome in terms of monetary damages for injury or loss.

In relation to its sources, law is found expressed in statutes, enactments, proclamations, and the like; this is so called 'black letter law'. In addition, there is the interpretation and determination in regard to contested interpretations of statute law that is 'judge made law'; in countries where this is a strong feature of the law this gives rise to so-called 'common law' and hence the expression 'common law countries'. There is also a recent trend toward 'tribunal made law' wherein disciplinary tribunals make determinations. Tribunals may be concerned with the conduct or performance of a particular professional person, such as a psychologist, and look back to their own determinations as if they were precedents in the same sense that judge-made law can constitute a precedent. This is a development that not everyone would see as a good one because of the possibility that Tribunals may have little legal experience sitting on them and operate outside the usual safeguards concerning such matters as admissibility of evidence, natural justice, and procedural fairness.

The psychologist in the adversarial system

The basic approach of the legal system in which Australian, UK, and North American forensic psychologists work is the so-called adversarial approach. In the adversarial approach, when the psychologist gives testimony to assist the legal process, he or she is appearing as an 'expert witness'. Just what constitutes an 'expert witness', and when such are required in a particular case, is a matter for determination by the Magistrate or Judge. One is *recognized* as an expert, not automatically accorded that status. In the matter of a psychologist being recognized as competent to use the *DSM-IV*, for example, it is now well established that a psychologist's evidence based on that system is not automatically to be rejected; however, it still remains to be shown to the court that a particular psychologist has familiarity with that system. In recent times there have been concerns about expert witnesses favoring one side in a case, usually the side that pays them (Warren,

2004). This is both a problem of morality and also an empirical problem in that many psychologists report feeling pressured to provide reports of a type that solicitors want, or to change reports that do not 'suit'. This has given rise to the expression 'hired gun' referring to those whose assessments always favor one side or the other. It has generated sufficient concern to see various jurisdictions construct Codes of Conduct that lay down as a basic principle that the expert witness owes a primary duty to the court. In the UK there was debate around the value of constructing panels of experts in different fields, panels from among the membership of which the court could select and commission an individual to assess a party involved in a dispute.

In the adversarial system the psychologist's role in respect of the two divisions of law is as follows. In the *civil jurisdiction*, encompassing matters of workplace and motor vehicle accidents and the like and also professional negligence, specific questions put by lawyers usually go to three matters. First, whether the claimant has in fact suffered a 'psychological injury', either alone or as a concomitant of a physical injury, and the extent of any disability or impairment in functioning. Second, whether the accident or negligence was the likely cause of that injury. Third, what prospects for 'cure' or rehabilitation there are available for the particular psychological injury sustained? The first of these matters, the one of most concern to this paper, has come to involve the assignment of a *diagnosis*, most often the language of the *DSM-IV*, usually, or *ICD-10*, being used. This assignment of a diagnosis will often be supported by so-called objective psychometric assessment using one or other or a combination of formal instruments, particularly when the assessment is done by a psychologist; as contrast with assessments done by psychiatrists. The third matter, that is, the possibility for rehabilitation or for restoring the claimant to their pre-accident or pre-incident functioning, involves an opinion as to *prognosis*. It is diagnosis that concerns us most here, however.

In the case of the *criminal jurisdiction*, there are different stages in the process of a case. At the first hearing questions may arise such as whether the defendant is fit to plead. Or, the matter of whether a charge ought to be reduced by reason of mental illness may engage the court. At perhaps the highest level of pleading in a serious matter is a plea of not guilty by reason of insanity (for example, using the 'McNaughton Rules' or similar). Here, diagnostic issues may be central as the question of whether there is 'insanity' as this question will very much look to diagnostic categories. Given the charge is proven, at the conclusion of that process, that is, at sentencing, the psychologist preparing a report has an opportunity to extend beyond diagnosis, but can be still stuck in it. This may be the case, for example, when he or she is asked for evidence of recidivism in regard to particular diagnoses, or prospects of re-offending, or for rehabilitation prospects with particular diagnoses. There are also matters that belong perhaps to the area of therapeutic jurisprudence discussed below; such matters as directions by the court at different stages in the process in terms of diversions of accused persons to treatment programs under specific legislation enacted for particular crimes.

However, despite differences in what might be offered by psychologists working from different Schools of thought and practice, or simple with different 'mind sets', in both the civil and criminal divisions, the advice of the BPS, Professional Affairs Board holds true:

> *The discourse of law, and hence of the courts, is generally categorical. In mental health law and compensation law it is the presence or absence of a 'mental disorder' that currently forms the basis of decisions about the application of powers or judging the severity of an injury* (Professional Affairs Board, BPS, 2000).

Thus, on the face of things, particularly in the civil field, PCP would appear to fall foul of the advice of the Professional Affairs Board of the BPS. Nonetheless, an example that follows (Appendix A), where a diagnosis and a formulation of the same 'case' are given, does raise at least the value of the PCP approach for a deeper understanding of matters.

As to the criminal jurisdiction, the different phases of the process of charge and trial are usefully separated. At the first hearing, the charge stage, the question of fitness to plead may be

raised, and also the matter of whether a charge might be reduced by reason of mental illness. Equally, a defense of 'not guilty by reason of insanity' (the McNaughton Rules or similar) may arise. PCP has no obvious contribution to this stage given that its analog of 'unfitness' and of 'insanity' as conventionally and forensically conceived remains still to be developed (but see later for a consideration of some possible impediments to such development).

Depending on the pleadings, however, there are various ways of dealing with a defendant at this stage in terms of the psychological state of that defendant. For example, diversion to treatment programs or even to a specialist court as in approaches informed by therapeutic jurisprudence and like concepts. Here, a deeper understanding of an accused person's 'mental state' may well come from a PCP assessment; again, see the example that follows below (Appendix A).

At the hearing, there is no reason in principle why a formulation rather than a diagnosis would not be equally helpful, and no reason why a PCP assessment would not do equally as well as does one based on diagnosis. Finally, at sentencing or the pre-sentencing stage, an opportunity to extend beyond diagnosis would appear to be very much available, and PCP arguably particularly well placed to provide deeper insights. This is so even given that the court system may be particularly concerned with issues of recidivism or prospects of re-offending, and related concerns over rehabilitation. Here there is less reliance on diagnostic issues, possibly because the court is looking for help in disposing of the accused by imposing a pertinent sentence. Possibly, too, this is because those writing pre-sentence reports are less drilled in and slavish to diagnostic questions (e.g. probation and parole Officers). Here there is an opportunity to elaborate on aspects of a convicted person's outlook on life that will assist the court determine the best way to dispose of him or her.

The inquisitorial system

There is, however, a second main method of sifting through evidence that is brought to trial and making a determination: the inquisitorial system. In the inquisitional approach the court serves as a place less of 'battle' than a place where matters can be illuminated, where the truth (or a truth) can be determined. The aim is to secure the best understanding of the matter as is possible and there is considerable scope to use whatever evidence and make whatever enquiry the Judge(s) feel(s) appropriate.

The inquisitorial system sees the active involvement of the Judge or Judges, that involvement in the nature of an investigation or an enquiry from the bench, or orchestrated from the bench. There is wider scope for expert witnesses to canvass matters they think important, rather than simply answering questions put to them formally in the solicitor's or the advocate's correspondence to them. Their reports are more likely to be seen as not favoring one side of a case over another. While they need not be defended under cross-examination there is sometimes scope for the parties to request the expert to defend their report. In this last case the Judge(s) will question the experts and make whatever enquiry of those experts that is felt to be appropriate.

This system is not usually familiar in all but general outline to those working in common law countries and more specific comment in relation to such a system is left to those more familiar with it. However, one example of the style of this system in common law countries is the procedure of a Coronial Inquiry. The object of this Inquiry is to ascertain a cause of death and to point up any matters that might be followed-up by the police, for example. While there is no accused or defendant, claimant or respondent, the actual procedure, though, sees the Coroner actively questioning witnesses and others who may be called on to assist the Inquiry, and sometimes making public statements about the process, its progress, and the quality of testimony and the demeanor of witnesses.

Perhaps a second example is in the proceedings of a disciplinary Tribunal established under legislation which regulates the practice of professionals such as medical practitioners, nurses, psychologists and so forth. The object of these proceedings is usually that of establishing whether *unsatisfactory professional conduct* or *professional misconduct* has occurred, and in the context of protecting the public from incompe-

tent or unethical practitioners. The determination of whether particular conduct falls short of accepted standards can be difficult when there are different 'schools' of practice even within a broader School of psychology or psychotherapy. In such a case, a Tribunal may well feel it needs to have regard to the wider context of the practitioner's behavior and how it measures-up in terms of the different schools, as well as the broader School. An Australian example at this level, where the framework was psychoanalysis, is in a 2008 Appeal to the Victorian Civil and Administrative Tribunal (VCAT) against a decision of the Victorian Medical Board (http://medicalboardvic.org.au/pdf/DrNSWilliams.pdf). In this case a psychiatrist working in a particular school of psychoanalytic psychotherapy, saw his conduct discussed in relation to the *different* expectations and accepted practices of the different schools (e.g. Kleinian, Lacanian, Relational), as well as the wider School (Psychoanalysis) under which these sit. The VCAT, that is, considered it relevant to consider broader rather than narrower matters and to understand just how a practitioner might be expected to act, and why, when that practitioner professed allegiance to a particular school, within a broader School of psychotherapy. (In the event, the expectations of the broader School were found to have greater significance).

Comment here concerning PCP and the inquisitorial system must remain speculative and deeper consideration left to those who are more familiar with that system. However, on the face of things there appears to be greater scope for assisting the court (or Tribunal or Board) by way of providing that deeper level of understanding that the terms 'inquisition' or 'inquiry' would seem to imply. Here, it can be suggested that PCP would be more amenable to the type of approach the court is trying to establish. Here, a *formulation* would appear more useful than a diagnosis if for no other reason than for the greater information available within it and the individualizing of the understanding of the accused offered by it. The worth of this assertion can be gauged to some extent by the contrast provided in the example below (Appendix). Thus far, too, PCP itself would not appear to be caught up in the problem of different 'schools' of thought existing within PCP. However, the perhaps differential reception of such ideas as the 'integration' of PCP with other psychotherapy approaches in the UK and North American PCP, and the value of a more specific relationship between constructivism and constructionism may yet yield 'schisms', to present a scenario analogous to that in Psychoanalysis.

Therapeutic jurisprudence

Therapeutic jurisprudence is a relatively recent development associated initially with the work of David Wexler and Bruce Winick (for example, Wexler, 1990; Winick, 2000; Winick and Wexler, 1991). It focuses on the therapeutic and counter-therapeutic impacts of law and legal procedures and aims to bring about change in law and procedures such that therapeutic outcomes are more likely than are outcomes that are destructive of psychological well-being. Therapeutic jurisprudence tries to accommodate at least two facts. First, that the procedures of the courts are stressful in themselves in a way that may not serve the interests of justice or society. Second, that those procedures do not take account of the sometimes special circumstances of those caught up in the legal process (King, 2006). Therapeutic jurisprudence attempts to counter the disadvantage that some bring to the court process and to treat defendants in a way which recognizes different ways of dealing with them by reason of their special circumstances or the nature of their crimes; such as mental illness or addiction or domestic violence. A 'circle court' wherein a magistrate from the common law system sits with elders from an indigenous group to hear a matter and determine an outcome is one example.

Therapeutic jurisprudence would appear to be a most interesting development in terms of broadening and deepening reflection on mental health and illness in the law. Cooke (2006) notes that the general 'consumer orientation' expressed in these developments is bringing new demands on court administrators whose "process oriented approach … is being replaced by one which requires sophisticated skills in managing a network of relationships within and beyond the court itself' (p. 2). King (2006) also makes comment on the challenges and the need for

education that will allow those challenges to be met. This new context may well provide an opportunity for PCP to make a particularly valuable contribution.

Therapeutic jurisprudence has, however, not developed without controversy and opposing views have emerged in a debate that law (*justice*) and therapy (*welfare*) are irreconcilable. In practice, law 'squeezes' psychology (e.g. the insistence of a particular discourse), just as psychology uses the law to, for example, compel treatment (e.g. involuntary hospital admission, community treatment orders). For the advocate of therapeutic jurisprudence, the law should always pursue a therapeutic advantage (social or individual). For the critic of therapeutic jurisprudence, such a course contaminates the idea and the processes of law.

Given the intentions of this development, and its origins in mental health law, as well as its conceptualization by the initiators of it as a school of social enquiry, there would appear to be significant affinities with PCP. PCP offers a particularly useful approach to deepening the understanding of defendants facing 'Circle Courts' or other specialist courts, and how best to respond to their crimes. It offers an equally useful approach to more fully or deeply understanding the psychological dimensions of accident or injury, a victim's psychological status, or just what a perpetrator of a crime was achieving, psychologically, by their conduct. It would appear to also have a function in assisting a perpetrator to better understand the psychological impacts of this conduct on their victim, or someone affected by their behavior. In such a context all participants may be significantly assisted by a 'burrowing down' into a perpetrator's construing, and also into a victim's understandings of what has happened to them. A domestic violence court may be assisted by trying to grasp exactly how a violent offender sees the world of marriage and relationships. A mental health court, perhaps the most difficult and impatient because ready-made models for understanding are entrenched, may nonetheless find useful a way of understanding from the individual's perspective such matters as the so called 'revolving door' phenomenon in psychiatric hospital admissions and court appearances. If, as Neimeyer and Neimeyer (1993) note "constructivist assessment techniques … attempt to provide a broader glimpse into [a person's] constructions of self and others" (p. 18), then this broader perspective could be of great value generally to therapeutic jurisprudence.

Malingering

A particular matter that becomes significant to the court process as far as expert witnesses are concerned – and more generally -- is that of an accused person or a respondent intentionally presenting him or her self in a 'good' or a 'bad' light. This issue has become a much researched one since the 1980s when approaches to detection were relatively theoretically unsophisticated and practically simplistic (Rogers, 1997). There is now a considerable literature addressing both the theoretical dimension and practical ways of detecting malingering, both within common tests (like the MMPI-2 and the PAI), and in purpose-built scales (such as the Rogers, Bagby, and Dickens, 1992, *Structured Interview of Reported Symptoms* (*SIRS*)).

The literature on malingering makes a number of conceptual differentiations. *Malingering* as a fabrication or gross exaggeration for an external goal is distinguished from 'defensiveness' and 'factitious disorder'. *Defensiveness* involves deliberate denial or minimization of symptoms, and *factitious disorder* involves feigning symptoms to present oneself as a patient or someone in need. Despite much research, however, there is no reliable way of concluding that a person is malingering. The most unhelpful method is arguably within the *DSM-IV*, which offers but four general criteria, one of which is tautological if one is trying to gauge malingering in a forensic context. That is, the first criterion is that "medico-legal context of presentation (e.g. the person is referred by an attorney …)" (p. 701)!

Now, the notion of malingering has a curious place in a theory that sees each of us as making the best sense of the world in which we live, and testing and validating that sense with reference to other people. Interestingly, the *DSM-IV*, despite its weak guide to malingering, does note that malingering "may represent adaptive behavior – for example, feigning illness while a captive of the enemy during wartime" (p. 701). Such

a view is quite consistent with a PCP approach in which all and any behavior will be taken at face value for enquiry as to just what it is meaning for the individual in the situation in which he or she finds him or her self. Malingering, defensiveness, the feigning of symptoms to present oneself as a patient as in so-called factitious disorder, even intentional lying, all present opportunities to understand just what the individual is trying to achieve in terms of making sense of their world. That understanding may be of assistance to a court, and it may be quite cognitively simple; for example, to escape punishment! However, in the individual case there may be more to learn and what appears to be malingering, or lying, or defensiveness, or feigning – whether it is or is not, and however this is determined – may provide a most valuable entry point into how the offender or the victim sees their world. As Fransella (2003, p. 127) notes, an exercise (a 'game') in which people are asked to write down lies about themselves may be most informative for what they take to be the 'truths' about themselves. .

Another perspective on the matter of malingering and PCP, somewhat broader but relevant to the present discussion, was given by Freckelton and Henning (1998) where the case of *Farrell v the Queen* was discussed. The detail of the case is of but passing interest but it involved an appeal by an Anglican priest against a conviction for rape of a man who had a diagnosis of anti-social personality disorder. Relevant here was the decision of the High Court of Australia concerning expert evidence, in this case evidence going to the supposed victim's mental condition where that condition had a direct significance for the victim's credibility: "The Court unanimously held that expert evidence as to a condition which may affect a witness' ability to give reliable evidence is admissible, provided that the expert evidence extends beyond the experience of ordinary persons" (p. 274); that is, may truly be a matter where an expert is required, given that the matter of credibility is primarily one for judge and/or jury to determine. In this case, a psychiatrist had given evidence in which, among other things, he had expressed the view that while borderline personality disorder would not have any effect on memory or what was reported as having happened, an anti-social personality disorder may have an impact because those suffering this condition "are inherently less truthful than the average person" (p. 273). Freckelton and Henning express the view that the impact of this case was "that it was likely to provide an opportunity for defendants to introduce expert testimony to undermine the credibility of complainants diagnosed as suffering a psychiatric condition associated with mendacity" (p. 281). The significance of these last observations for the issue of malingering in other areas, in particular, in civil cases, is unclear, but the notion of lying as a feature of a particular personality or personality disorder or diagnosable condition would not find ready acceptance in PCP. At one level, as noted, the very idea of a psychological disorder is questioned. In addition, though, as a lie might be seen as just another way of elaborating one's construct system, then PCP expertise may well be quite helpful in placing an alleged lie in the context of an individual's wider and deeper system of construing. There is, however, a substantial challenge to PCP in indicating how lying might be accommodated within a 'disorder of the *content* or of the *structure* of construing' (Winter, 1992), and how this would translate to the forensic sphere; an exercise beyond present preliminary concerns.

At best, then, at least for now, we might say that the notion of malingering and related notions, such as 'faking good', as well as broader ones like 'inherent untruthfulness' that are important in the forensic context, do present interesting challenges for PCP. Such notions as malingering and lying may be of great interest in a clinical context, illuminating 'true' construing and taking us to core construing and processes that maintain the integrity of the self. The exercise described in Fransella's account points up readiness or resistance to change, particularly when the question of whether the individual would like others to believe the lie, is in focus. Yet, maybe these types of matters, too, ought to be of interest to forensic contexts and expert evidence?

TWO PARTICULAR MACRO PROBLEMS ON WHICH TO END

Given that this paper is construed as but a preliminary attempt to raise a discussion, it is important at this point to raise two possible impediments for PCP making inroads into the field of forensic assessment and reporting. One is 'internal', the other 'external'. The external concerns the narrow pragmatism by which courts might prefer to be guided. The internal concerns the fact that PCP might be taken to apply to a different scenario; or, as we would say, it has a different focus of convenience and range of convenience. Let us take these problems in turn.

The courts and the system of criminal and civil justice are busy places. Magistrates and Judges have very significant workloads and matters are often best dealt with expeditiously. If someone appearing before the court can be quickly diagnosed with a mental illness and appropriately disposed of, then that may be a good thing; at least as far as the court is concerned and even perhaps as far as the person before it is concerned. PCP requires a significant shift in mind-set, a relearning of old ways of understanding people, a jettisoning of familiar notions. As Kelly (1963) said:

> … *it is only fair to warn the reader that he will find missing many of the familiar landmarks of psychology theory. In this new way of thinking about psychology, there is no learning, no motivation, no emotion, no cognition, no stimulus, no response, no ego, no unconscious, no need, no reinforcement, no drive. It is not only that these terms are abandoned; what is more important, the concepts themselves evaporate. If the reader starts murmuring such words to himself, he can be sure he has lost the scent* (p. xi)

Given that the shift in thinking required by PCP is already difficult for psychology as a discipline, how much more difficult is it likely to be for the law and the courts? Given that that shift is difficult for psychologists with already significant investment through study and training in the 'old ways' of thinking, how much more difficult for a court system in which ideas of 'diagnosis', of trait theories of personality, of *explanation* rather than *understanding*, and a discourse involving the terms that Kelly (1963) says have 'evaporated'? Moreover, Bannister's (1977) assertion concerning the absurdity of one 'being a psychologist' has merit – that is, because everyone is a psychologist or acts as one if the word 'psychologist' is properly understood as an enquirer into the world of meaning – then it is difficult to see how the status of 'expert witness' could ever be claimed by a PCP psychologist! Moreover, if psychology is an exercise in paradox as Bannister (1966) suggests, then the same question applies. As he notes, one implication of believing in the concept of the professional scientific psychologist "is that we have the magnificent arrogance to set up as experts on people", moreover, some "may gaze on our fumbling attempts to sort out our own personal lives and come to a conclusion that as experts on people we are phonies, bald headed barbers trying to sell hair restorers" (1966, p. 26).

The second macro problem arises from the fact that, as Kelly (1955/1991) notes, PCP itself has a *range of convenience* and a *focus of convenience.* Its range of convenience is restricted "as far as we can see at the moment, to human personality and, more particularly, to problems of interpersonal relationships" (Vol. I, p.11/Vol. I, p. 9). Its focus of convenience is the clinical area, this understood as having an objective not of diagnosis or research but, rather "the anticipation of actual and possible courses of events in a person's life" (Vol. I, p. 185/Vol. I, p. 129). More specifically, that focus of convenience is "the area of human readjustment to stress" the theory was formulated with the problems of psychotherapy in mind (Vol. I, p. 12/Vol. I, p. 9). Kelly does note that the range and focus of convenience may be extended – and this does present an 'authorization' for those seeking to argue a role for PCP in the forensic area. On the face of it, however, there is a problem for such an extension into the court process, if perhaps not so into other areas of forensic psychological work such as understanding offenders and treatment programs (Horley, 2003).

CONCLUSIONS

There would appear to be so much variance between what PCP psychologists do and what the courts have come to require, that at first sight

there appears little scope for a genuinely PCP forensic psychology assessment and report that might assist a court. A 'hard line' position from this perception is that PCP psychologists should not work in the forensic field.

However, *diagnosis* is already a subject of debate even outside of a PCP perspective and the alternative approach of *formulation*, despite formulation itself not being a straightforward exercise (for example, Johnstone and Dallos, 2006), is being championed in that debate. Here, PCP would appear to be well placed to contribute to the debate. An elaboration of the person's outlook that extends the court's understanding of his or her unique position *vis a vis* their complaint or crime appears on the face of it to be worthy of attention by the court. While it may not replace it, a helpful formulation might be added to diagnosis, even a *DSM-IV* diagnosis, and enlarge the court's understanding. A PCP perspective on *malingering* in the forensic context remains to be developed and invites our attention. Just as *formulation* appears to enrich *diagnosis*, so a PCP understanding of *lying* generally may prove valuable for the issue of understanding *malingering.*

In general, in an adversarial system PCP would appear to have its most natural home in criminal law and at the pre-sentence stage. PCP would appear to have some problems in civil cases, though the case of John (Appendix A) may suggest otherwise if, for example, he was suing for damages. In an inquisitorial system, PCP would appear to be much more 'at home'. Finally, under the concept of therapeutic jurisprudence, PCP offers a particularly useful approach to deepening the understanding of defendants facing 'Circle Courts' or other specialist courts, and how best to respond to their crimes.

There remains much to explore in all of these areas and, hopefully, the forgoing discussion provides an outline of the territory, an impetus to such exploration, and some optimism for an ultimate outcome in something useful for at least the forensic assessment and report writing process.

APPENDIX: A DIAGNOSIS CONTRAST WITH ONE TYPE OF FORMULATION

A Diagnosis:

John suffers sleep problems involving disturbing dreams, he has intrusive, troubling daytime thoughts about the robbery, and he is constantly hyper-vigilant concerning risks of harm in even his most familiar of environments. He refuses to go into a bank. He experiences intense psychological reactivity and distress if he sees TV involving crimes where guns are produced or fired, and he is amnesic to specific details of the hold-up he experienced. He finds himself unable to engage with others and says he feels estranged from even his closest loved-ones. These symptoms have been experienced for over three (3) months, and they cause him very significant distress as well as periods when he cannot attend work or engage in social activities. John has PTSD, which is chronic, and it stems from his experience in the robbery.

A Formulation:

John has a range of symptoms that are common following a significant trauma. He has found himself unable to function at his optimal psychological level (relative to his history and assessed cognitive and emotional capacities), since the robbery. To fully understand his psychological predicament it is instructive to note a few facts about his life and how he now feels and sees things.

Having left school before completing his secondary schooling John has worked in unskilled jobs for some twenty-five years doing building work that he once enjoyed because it was active outdoor work which he felt kept him fit and gave him financial security for doing what he did outside of this line of work. Outside of work John was an active and highly graded martial arts exponent in three disparate styles, and conducted martial arts training to the highest level, as well as self-defense classes four nights a week, in his own successful and well regarded academy, *The Advanced Martial Arts and Self-Defense Academy*. He has played grade rugby league and once prided himself on his stamina and courage, "walking tall and confidently", as he puts, in all situations.

On the day of the bank robbery he was depositing the takings from his Academy when three men entered, shouting and pointing shortened shotguns at the customers and staff. John was singled-out as the one they would shoot if the staff did not co-operate and open the safe. A gun was held at his head and he was 'frog marched' to the Bank's vault, and locked in it for ten (10) hours after it had been opened, the money taken, and the locking mechanism damaged so it could not be re-opened easily.

John talks of the special responsibility he felt given his martial arts qualifications and experience. He talks of the resurfacing of an old, childhood fear of enclosed spaces when brutalized by his father who would lock him under the stairs. He says that he was very frightened in the robbery, a most unusual feeling for him and requiring a change in his core sense of himself. The experience went very significantly to both his sense of himself as a 'man' and the significance that term has had for him, and to a loss of self-esteem because he, of all people, was totally ineffective in the situation. This sense of being 'less that the man he thought he was' constitutes a significant threat and goes to core aspects of his sense of self that had revolved almost exclusively around his image of 'manliness' which is at the opposite of where he feels he has now found himself. All efforts to rationalize in terms of the element of 'surprise', of guns being more dangerous than fists or feet, of how a fight was unnecessary as the money was insured, and so on, fall on deaf ears. John finds he has no ideas, no concepts, no 'constructs' with which to understand his present situation and he is significantly anxious most of the time. He now sees life as composed of a very limited range of options for him (is constricted), and he cannot make choices between different options that he might be encouraged to recognize or contemplate. He is 'cognitively simple' in that he sees no 'shades of grey' in the situation in which he finds himself, and sees himself as an incompetent coward, and nothing but an incompetent coward (that is, he construes pre-emptively). All of this contrasts markedly with his pre-incident functioning.

(Note for those not versed in PCP. The notions of *fear*, *anxiety*, *threat*, *core role constructs* and *the self*, *pre-emptive construing*, *cognitive simplicity-cognitive complexity*, all have full and specific meaning within PCP.)

REFERENCES

Bannister, D. (1966). Psychology as an exercise in paradox. *Bulletin of the British Psychological Society, 19*, 21-26.

Bannister, D. (1977). On the absurdity of 'being a psychologist'. *Bulletin of the British Psychological Society, 30*, 211.

Barbu, Z. (1956). Democracy and dictatorship: Their psychology and patterns of life. London: Routledge.

Cooke, J. (2006). Innovation and transformation within Australian courts: A court administrator's perspective. *Journal of Judicial Administration, 15*, 174-178.

Diagnostic and statistical manual of mental disorders. (1995). Fourth Edition Washington: The American Psychiatric Association.

Fransella, F. (Ed.). (2003). *International handbook of personal construct psychology*. London: Wiley.

Freckelton, I., & Henning, T. (1998). Lies, personality disorders and expert evidence: New developments in the law: *Farrell v the Queen 155 ALR 652. Psychiatry, Psychology and Law, 5*, 271-283.

Horley, J. (2003). *Personal construct perspectives on forensic psychology*. London: Bruner-Routledge.

Jahoda, M. (1958). *Current concepts of positive mental health*. New York: Basic Books.

Johnstone, L. & Dallos, R. (Eds.). (2006). *Formulation in psychology and psychotherapy*. London: Routledge.

Kelly, G. A. (1955). *The psychology of personal constructs*. New York: Norton. Two volumes, continuous pagination. Republished 1991, London: Routledge. Two volumes, discontinuous pagination.

Kelly, G. A. (1963). *A theory of personality*. New York: Norton.

King, M.S. (2006). Therapeutic jurisprudence in Australia: New directions in courts, legal practice, research and legal education. *Journal of Justice Administration, 15*, 129-141.

Neimeyer. G. J. & Neimeyer, R.A. (1993). Defining the boundaries of constructivist assessment. In G.J. Neimeyer & R.A. Neimeyer (Eds.*). Constructivist assessment.* (pp. 1-30). Newbury Park: Sage Publications.

Pilgrim, D. (2000). Psychiatric diagnosis: More questions than answers. *The Psychologist, 13*, 302-305.

Professional Affairs Board (2000). Response from the Professional Affairs Board. *The Psychologist, 13*, 305.

Rogers, R. (Ed.). (1997). *Clinical assessment of malingering and deception*. New York: The Guildford Press.

Rogers, R., Bagby, R. M., & Dickens, S.E. (1992). *Structured Interview of Reported Symptoms* (SIRS). Lutz; Florida: Psychological Assessment resources, Inc.

Walker, B. M. (2002). Non-validation vs. (in)validation: Implications for theory and practice. In Raskin, J. D. & Bridges, S. K. *Studies in Meaning: Exploring Personal Construct Psychology*. (pp. 49-61) New York: Pace University Press

Walker, B.M. & Winter, D.A. (2005). Psychological disorder and reconstruction. In D. A. Winter and L.L. Viney (Eds.*). Personal Construct Psychotherapy: Advances in Theory, Practice and Research*. (pp. 21-33) London: Whurr.

Warren, W. G. (1996). The egalitarian outlook as the underpinning of the theory of personal constructs. In D. Kalekin-Fishman & B. M. Walker (Eds.*). The construction of group realities: Culture, society and personal construct theory*. (pp. 103-119) Malibar, Florida: Krieger.

Warren, W.G. (2004). Ethical considerations in private practice psychology forensic work: An Australian perspective. *International Journal of Forensic Psychology*, 1, 14-20.

Wexler, D. (1990). *Therapeutic jurisprudence; The law as therapeutic agent*. Durham, NC: Carolina Academic

Wexler, D. & Winick, B. (Eds.). (1991). *Essays in therapeutic jurisprudence.* Carolina: Carolina University Press.

Winick, B. (2000). Applying the law therapeutically in domestic violence cases. *UMKC Law Review 1, 69.*

Winter, D.A. (1992*). Personal construct psychology in clinical practice*. London: Routledge.

ABOUT THE AUTHOR

Bill Warren holds an appointment as a Conjoint Associate Professor in the University of Newcastle, Australia having retired from full-time academic work teaching Philosophy, in 2006. A member of the Colleges of Clinial and Forensic Psychology of the Australian Psychological Society he continues the private clinical practice in which he has been engaged for some twenty-five years.
Email: William.Warren@newcastle.edu.au
Home Page:
http://www.newcastle.edu.au/centre/sorti/people/billwarren.html

REFERENCE

Warren, B. (2008). Problems and prospects for forensic assessment and reporting from the PCP perspective: A preliminary examination. *Personal Construct Theory & Practice, 5*, 99-110.

Retrieved from
http://www.pcp-net.org/journal/pctp08/warren08.pdf

Received: 27 April 2008 – Accepted: 20 Oct 2008 – Published: 20 Dec 2008.