THE ROLE OF THE PSYCHIATRIST AS AN EXPERT IN COURT PROCEDURE:

CHANGING PATTERNS AND NEW TRENDS - INTRODUCTION

Helmut E. Ehrhardt

University of Marburg
Ortenbergstrasse 8, D-3550 Marburg, F.R.G.

Rules or codes of procedure determine the function of an expert witness in court practice of any kind of jurisdiction. In the position of an expert witness, the psychiatrist is expected to provide not only facts and findings, but also opinions, conclusions and evaluations. Not the medical diagnosis, but rather the consequences of an illness, a disorder or an impairment in relation to the demands of a law or a legal regulation, are the central concern of the jurist. Incompetency, insanity, disability etc. are legal terms, with a special meaning in a special context. In a concrete case, it is up to the psychiatrist to outline and to explain the medical and psychological conditions causing a legal insufficiency of this kind. The ultimate reply to the question as to whether a person is competent or incompetent, sane or insane, able or disabled, is always left to the judge, the jury, or to a special tribunal. The expert witness is always and only, assistant to the court or another legal body.

These principles, which govern the provision of an expert opinion in judicial proceedings are relatively old and they are equal or similar in all countries with a Constitution based upon the rule of law. During the last decades however, the role of the forensic psychiatrist has been differentiated and complicated by a problematic and oscillating litigation concerning mental illness and mental health. In a recent decision of the U.S.Supreme Court, Justice Potter Stuart made this point explicit: "Issues concerning mental illness are among the most difficult that courts have to face, involving as they often do, serious problems of policy disguised as questions of constitutional law" (Parham v. J.R., 99 S.Ct. 2493 (1979)).

With a delay of about ten years, a similar development can be observed in the F.R.G. Purely pragmatical questions of health policy
as for instance the provision of appropriate care facilities for mental patients, experience a stylization into juridical issues of ever increasing complexity. A few key-words for this phenomenon are: dangerousness, civil commitment, right to treatment, right to refuse treatment, competency. Similarly, the patient-doctor relationship which in psychiatry represents a specialized form of human intercommunication, is being increasingly threatened by the rapidly accumulating number of law-suits for reasons of malpractice or lack of informed consent. The objectively unbased but noisy echo of the public media in reaction to such cases, added to the problematic mental health litigation, has caused feelings of progressing insecurity in the general public, experienced above all however by patients as well as physicians and resulting in the latter group in a blatant or disguised tendency toward practice of a "defensive medicine" which proves detrimental for the patient, and increases the financial burden accruing to social insurance agencies.

Legislation and jurisdiction as practiced during the last decades, has rendered the function of the psychiatrist as an expert witness increasingly problematical within all areas of legal competence, within the boundaries of psychiatry and the law. For that reason, it was intended that this Symposium should comprehensively cover a broad area of subjects, an aim which was subsequently only partially attained. In civil or social law for instance, the questions confronting the psychiatrist as an expert are internationally comparable. The legal basis however differs considerably and only few psychiatrist are conversant with these divergencies or even interested in the subject.

A typical example is the evaluation, through the psychiatrist, of the effects of injuries upon an individual person. If a worker is injured in the course of his employment, he seeks to obtain compensation benefits by a workmen's compensation action as provided in social law regulations. If someone suffers an injury not connected with his employment, he sues the person responsible, in a civil liability tort action. In the case of insurance policy subscribers, who claim benefits for the effects of an accident, the legal procedure would be a - civil law based - contract action and psychiatric testimony would be desired by both parties to the suit. - The legal meaning and evaluation of the result of an injury, or of the effects of an accident, is different in the three instances and still more different in an international comparison of the pertinent legislation.

Here we are once more confronted with problems of terminology and classification which I have tried to outline in the first plenary session of this World Congress. The judicial meaning of terms like injury, damage or disease, changes analogously to the intent of the pertinent legal stipulations and in line with national court practice. The Federal Court for Social Affairs (Bundessozialgericht