This research essay investigates the admissibility of evidence of various mental syndromes in Australian courts.

"Criticisms of battered woman syndrome, child sexual abuse accommodation syndrome and repressed memory syndrome have been appropriately formulated and argued. Evidence relating to these syndromes should therefore be inadmissible in court. Discuss."

Introduction

During the 1980s and 1990s, various types of novel psychological evidence were introduced into the courts. These included battered woman syndrome evidence, child sexual abuse accommodation syndrome evidence, and repressed memory syndrome evidence. This paper aims to explore the scientific foundations of each of these syndromes, the criticisms related to their reliability, and the approaches taken by courts in determining their admissibility as evidence. Considering these factors, the author then assesses whether these criticisms are well-founded, and ultimately whether evidence of each syndrome should be admissible in court.

Battered Woman Syndrome

Battered woman syndrome (BWS) is a syndrome conceived by Dr Lenore Walker in her early 1980's book *The Battered Woman*.[1] This book details the cycle of violence theory, which is said to consist of three stages. The first is called the 'Tension-Building Phase', which involves minor battering incidents by the violent batterer towards the woman. [2] At this stage, the woman is nurturing and compliant with the abuse and denies that anything is wrong. She may also attempt to avoid conflict and mentally withdraw from the relationship. The second phase, termed 'The Acute Battering Incident', is the point at which tension peaks and the batterer explodes with rage. The battered woman may have attempted to provoke the batterer to complete this phase, so that she is able to feel she has some control over where and when the

[1] L E Walker, *The Battered Woman* (Harper & Row, 1979).
[2] Ibid 55.

incident occurs. After the incident, the battered woman is believed to be in shock and denial over the incident, and both parties attempt to rationalize the outburst. This is followed by the final phase of 'Kindness and Contrite Loving Behaviour', in which the batterer behaves in a charming and loving manner, begging for forgiveness and pleading that such an incident will never occur again. This behaviour encourages the battered woman to believe in the legitimacy of the relationship they share, and the cycle begins again.

According to the cycle theory, the battered woman is full of fear and anxiety during the first two stages, and her perception of danger extends far beyond the acute battering incident. This makes her constantly fearful that she will be harmed - even during the peaceful interlude in stage three. It is at this point that the woman may lose control of their suppressed rage and fear, ultimately attacking the batterer in order to avoid future abuse. [3]

Another core theory that makes up BWS is that of learned helplessness. Walker relied on this theory in order to illustrate why battered women could not simply leave an abusive relationship, and dispel myths of battered women being masochistic or consenting to beatings. The theory was originally conceived by Martin Seligman, who found that dogs subjected to repeated shocks over which they had no control "learned" that they were helpless.[4] Even when they were placed in a situation in which they could escape from harm, the dogs failed to take action. Walker applied this theory to the experiences of battered women, stating that "the women's experiences…of their attempts to control the violence would, over time, produce learned helplessness and depression as the repeated battering, like electrical shocks, diminish the woman's motivation to respond."[5] This theory was embraced in *State v Kelly*, in which battered women were framed as "becom[ing] so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter their situation."[6]

BWS has been used to support legal defences such as self-defence, provocation and duress in situations where women have committed a serious assault or homicide against their male partners.[7] Providing expert evidence of BWS has been thought to shine a light on the reasons

[3] Ibid 69.
[4] M. Seligman, *Helplessness: On Depression, Development, and Death* (1975); Abramson, Seligman & Teasdale, 'Learned Helplessness in Humans: Critique and Reformulation' (1978) 87 *Journal of Abnormal Psychology* 49, 50.
[5] L E Walker, *The Battered Woman Syndrome* (Springer, 1984) 87.
[6] 97 N.J. 178 (1984)
[7] See e.g. *R v Runjanjic* (1991) 56 SASE 114; 53 A Crim R 362.

behind the battered woman's behaviour. In *Osland v The Queen*,[8] Justice Kirby noted that evidence of BWS can assist the court in understanding:

> "(1) why a person subjected to prolonged and repeated abuse would remain in such a relationship; (2) the nature and extent of the violence that may exist in such a relationship before producing a response; (3) the accused's ability, in such a relationship, to perceive danger from the abuser; and (4) whether, in the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve herself or himself from death or serious bodily harm than by resorting to the conduct giving rise to the charge."[9]

However, the BWS theory has also faced significant criticisms in regard to its scientific reliability, the methodology used in related research, its sexist undertones and its inability to present unique information to jurors. These criticisms will now be considered.

Critical commentary on BWS

Admissibility of BWS evidence

In order for expert testimony to be admitted, it must pass several legal hurdles. The evidence must provide jurors with unique information beyond their common understanding, as well as be deemed scientifically reliable by the judge.[10] The expert providing the evidence must also be sufficiently skilled and qualified in the field in question.[11] If the evidence has relatively small probative value but can be prejudicial to the accused, the judge must also use their discretion to determine whether the evidence should be admissible.[12] Many critics argue that BWS evidence cannot pass these hurdles.

Scientific reliability

[8] (1998) 197 CLR 316.
[9] Ibid [378].
[10] I. Freckelton, S. Selby, *Expert Evidence: Law, Practice, Procedure and* Advocacy (Thomson Reuters, 4th Ed, 2009) 912.
[11] Ibid 914.
[12] Ibid 915.

Determining scientific reliability commonly involves application of the *Frye* test.[13] This requires that experts in the field of enquiry generally accept the scientific validity of the evidence presented. Even if the *Frye* criterion is not explicitly applied, it is generally required that the evidence be accepted by experts competent in the field.[14] BWS has struggled to meet this criterion because of the questionable validity of the theory and the methodology employed in BWS research.

The validity of the cycle of violence theory has faced significant criticisms due to a lack of safeguards against bias. Firstly, researchers interviewing participants have been found to have used leading questions which would imply the hypothesis being tested. Faigman notes that interviewers prodded participants for particular answers, often asking if they "would call it…?", to which many responded with "tension building and/or loving contrition."[15] Such responses are seemingly unnatural for a participant who does not know the aim of the investigation. It is for this reason that participants are suspected of "hypothesis guessing" due to the actions of Walker's interviewers.[16] That is, they discerned the hypothesis being tested, and simply told the interviewers what they wanted to hear. Hypothesis guessing can be avoided by carefully guarding the hypothesis being tested from participants. It appears that Walker took a rather different approach by making the hypothesis quite clear to participants.

The manner in which BWS research interviews were conducted has also been criticised. Interviewers were apparently aware of the hypotheses being tested, which had the potential to create bias, in turn influencing both the interpretation of interviewee's responses and the reporting of results.[17] The fact that results were based on interviewers' evaluations of participants also made the research susceptible to experimenter expectancies.[18] Cook and Campbell argue that this could have been overcome this by "employing experimenters who have no expectations or false expectations, or by analysing the data separately for different kinds of levels or

[13] *Frye v United States*, F 2d 1013, 1014 (1923).
[14] See e.g. R v Runjanjic (1991)56 SASR 114; 53 A Crim 362.
[15] D. L. Faigman 'The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent' (1986) 72(3) *Virginia Law Review*, 619, 637.
[16] Ibid.
[17] Ibid.
[18] Ibid.

expectancy."[19] Walker's failure to implicate such safeguards greatly impacts the validity of her findings.

Another potential source of bias is Walker's personal feelings towards sufferers of domestic abuse. In *The Battered Woman*, she explicitly states: "I view women as victims in order to understand what the toll of such domestic violence is like for them. Unfortunately, in doing so I tend to place all men in an especially negative light, instead of just those men who do commit such crimes."[20] It has been suggested that Walker reached conclusions before beginning her research, and that she engaged in research merely in order to substantiate those theories and conclusions.[21] This is reinforced by her failure to justify her findings with data, as well as not apply statistical tests of significance to the results.[22]

The fact that Walker's cycle of violence fails to occur within any sort of time frame is also considered a major flaw.[23] For example, it seems unrealistic for fifteen minutes of tension building to result in a constant state of fear. Walker also fails to specify whether a period of normality takes place between the phases of loving contrition and tension building.[24] If there was a period of normality, this would suggest that there are four phases. Walker does not consider this.

Another issue not considered is whether there are instances of tension building that do not lead to severe beatings.[25] This has been shown to almost certainly occur, as merely 65% of cases studied by Walker included a tension-building stage, and 58% involved a period of loving contrition.[26] Cherry-picking results in order to focus on battered women leaves the research lacking authenticity and reliability.

Walker also fails to relate the cycle of violence to the "cumulative terror" experienced by battered women, which purportedly occurs between the acute battering incident

[19] T. Cook & D. Campbell *Quasi-Experimentation: Design and Analysis Issues for Field Settings* (1979) 67.
[20] L E Walker, *The Battered Woman* (Harper & Row, 1979, introduction.
[21] *Buhrle v State* 627 P.2d 1374 (Wyo. 1981).
[22] L E Walker, *The Battered Woman Syndrome* (Springer, 1984) 89.
[23] D. L. Faigman 'The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent' (1986) 72(3) *Virginia Law Review* 619, 638.
[24] Ibid.
[25] Ibid.
[26] R. A. Schuller and N. Vidmar 'Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature' (1992), 16(3) *Law and Human Behavior* 273, 280.

and the womans violent response.[27] Walker argues that BWS statistics are sufficient to prove this; namely that eighty six percent of women interviewed believed their husbands were capable of killing them, and that fifty percent of woman believed they were capable of killing their husbands under some circumstances.[28] However, extrapolating this data to confirm the existence of 'cumulative terror' has been considered inappropriate, particularly because other studies have found that battered women engage in various attempt to stop the abuse.[29]

In relation to the learned helplessness theory, Walker has failed to consider the aims and constraints of Seligman's work. He clearly intended on restricting his findings to animal behaviour, and dismissed any attempts to explain human behaviour with his results. Seligman himself noted that researchers such as Walker were "increasingly disenchanted" with the hypothesis derived from his animal studies.[30] Relying on Seligman's findings, despite his explicit disapproval of such reliance, leaves Walker's learned helplessness theory essentially unsupported.

The applicability of learned helplessness has also been questioned by commentators, as it appears to ignore cases of women who have terminated their relationship with their spouse. These women were found not to have any symptoms consistent with the theory.[31] Further research has also shown that the majority of battered women attempt to end the domestic abuse in a variety of ways, and employ a wide range of coping mechanisms while attempting to do so.[32] [33] The fact that Walker failed to include a control group in her research on learned helplessness meant she could avoid

[27] D. L. Faigman 'The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent' (1986) 72(3) *Virginia Law Review* 619, 638.
[28]L. P. McDonald 'Helping with the termination of an assaultive relationship.' in B. Pressman, G. Cameron and M. Rothery (Eds.), *Intervening with Assaulted Women: Current theory, Research and Practice. (*Hillsdale NJ: Erlbaum, 1989).
[29] See e.g. Browne, *When Battered Women Kill.* (New York: Free Press, 1987); R. E.Dobash & R. Dobash, *Violence Against Wives*. (New York: Free Press 1979); C. P. Ewing *Battered women who kill: psychological self defense as legal justification.* (Lexington, MA: Health, 1987); D. Martin *Battered Wives.* (San Francisco, CA: Glide, 1976); M. G. Pagelow *Woman Battering: Women and their experiences.* (Beverley Hills CA: Sage, 1981).
[30] LY Abramson, M E P Seligman and J D Teasdale 'Learned Helplessness in Humans: Critique and Reformulation' (1978) 87 *Journal of Experimental Psychology* 49, 49.
[31] R. S. Gelles & M. A. Straus, *Intimate Violence.* (New York: Simon and Schuster, 1988).
[32]See e.g. Browne, *When Battered Women Kill.* (New York: Free Press, 1987); R. E.Dobash & R. Dobash, *Violence Against Wives*. (New York: Free Press 1979); C. P. Ewing *Battered women who kill: psychological self defense as legal justification.* (Lexington, MA: Health, 1987); D. Martin *Battered Wives.* (San Francisco, CA: Glide, 1976); M. G. Pagelow *Woman Battering: Women and their experiences.* (Beverley Hills CA: Sage, 1981).
[33] A. Browne, *When Battered women kill.* (New York: Free Press, 1987).

discussing this issue, which in turn limits the applicability of the learned helplessness theory to women suffering domestic abuse[34].

These criticisms strongly suggest that BWS cannot be considered scientifically reliable. The potential for bias to infiltrate Walker's findings is extensive, as both researchers and participants likely knew of the hypothesis being tested. Walker's own opinions seemingly helped shape and influence the interview procedure and the reporting of findings. The complete lack of support for learned helplessness in humans also contributes to the study's invalidity. The lack of reporting in relation to the cycle of violence theory further confirms this.

Diagnostic accuracy

The issue of diagnostic accuracy comes into play when experts proffer an opinion on whether the witness actually suffers from the syndrome.[35] In allowing this to take place, courts consider the extent to which an expert is likely to make a diagnostic error. Commentators have expressed concerns about experts diagnosing women with BWS due to several reasons.

Firstly, BWS is not itself a diagnostic category. Despite being known as a 'syndrome', it is not a diagnosable mental disorder as such. Instead, BWS should be thought of as a descriptive term that refers to the effects of abuse on a woman.[36] Some researchers, including Walker, have argued that BWS should fall under the (then) DSM-III-R category of posttraumatic stress disorder ('PTSD'), as it "comes closest to describing battered woman syndrome, the group of psychological symptoms often observed after a woman has repeatedly experienced physical, sexual and or serious psychological abuse."[37] PTSD involves a set of symptoms developed due to a "psychologically traumatic distressing event…outside the range of human experience."[38] Categorising BWS as a subcategory of PTSD raises some serious issues such as: (i) the extent to which 'symptoms' of BWS are internally reliable; (ii)

[34] R. A. Schuller and N. Vidmar 'Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature' (1992) 16(2) *Law and Human Behavior,* 273, 280.
[35] Ibid 281.
[36] Ibid.
[37] I. Freckelton, S. Selby, *Expert Evidence: Law, Practice, Procedure and* Advocacy (Thomson Reuters, 4th Ed, 2009) 850.
[38] American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (3rd ed.; text rev., 1987)

the covariance of BWS symptoms and posttraumatic stress disorder; and (iii) whether there is overlap of symptoms of BWS and other mental disorders.[39]

Several studies have investigated these issues, and tend to find that there is less of a crossover of BWS and recognised mental disorders than what was originally thought. For example, a study by Rosewater showed that the symptoms of battered women have been confused with symptoms of schizophrenia and borderline personality disorder, resulting in the misdiagnosis of several individuals.[40]

A study by Dutton and Goodman also argues that diagnosing battered women with PTSD is misleading as it can be inconsistent with the experiences of battered women.[41] They note that the DSM-III-R definition can be read in a way which excludes partner violence, as such assaults are so common that they cannot be classified as "outside the range of usual human experience." They also note that the PTSD diagnostic criteria generally assumes that the primary stressor is no longer present, which is not the case for battered woman, as they often react while still faced with ongoing threat or danger. Furthermore, Dutton and Goodman argue that PTSD diagnosis focuses on the psychological impact of a single traumatic event or a circumscribed set of events; not chronic or repetitive abuse conditions like domestic abuse. For this reason, it cannot account for "the multiplicity of symptoms, somatization, and alternations in affect regulation and consciousness that frequently result from being subjected to totalitarian control over a prolonged period".[42] They also argue that PTSD does not account for psychological reactions to battering which are due to changes in a woman's perception of safety or vulnerability, expectations of future violence, views of themselves, perceptions of the ability to control violence, and beliefs about the trustworthiness and powerfulness of others.

In response to these issues, Herman has proposed an alternative diagnosis for battered women called Disorder of Extreme Stress Not Otherwise Specified (DESNOS).[43]

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[39] R. A. Schuller and N. Vidmar 'Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature' (1992), 16(2) *Law and Human Behavior*, 273, 282.
[40] L. B. Rosewater (1987) 'The clinical and courtroom application of battered women's personality assessments. in D. J. Sonkin (Ed.), *Domestic violence on trial: Psychological and legal dimensions of family violence* (New York: Springer, 1987), 86, 94.
[41] M. Dutton and L. Goodman 'Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications' (1994) 12 *Behavioural Sciences and the Law*, 215-234.
[42] Ibid 222.
[43] J. L. Herman, *Trauma and Recovery.* (Basic Books: USA, 1992).

This disorder incorporates symptoms of chronic and continuous abuse, and is therefore more appropriate to house BWS. It also characterizes the psychological reactions listed above as transformations in self-perception, perceptions of the perpetrator, relations with others and systems of meaning. At the time of Herman's work, DESNOS was not included in the DSM-III-R. However, he noted that there were signs that it could be included in future editions.[44]

The current DSM 5 is arguably more appropriate to house DESNOS for several reasons. Firstly, it has expanded the definition and criteria of PTSD. It defines trauma as "exposure to actual or threatened death, serious injury, or sexual violence", in which the individual (i) directly experiences the traumatic event; (ii) witnesses the traumatic event in person; (ii) learns that the traumatic event occurred to a close family member of close friend; or (iv) experiences first-hand repeated or extreme exposure to aversive details of the traumatic event. [45] The DSM 5 has also expanded upon the behavioural symptoms of PTSD by including four diagnostic clusters instead of three. These involve (i) re-experiencing traumatic memories of the event; (ii) avoiding distressing memories, thoughts, feelings or external reminders of the event; (iii) experiencing negative cognitions and mood; and (iv) experiencing biological arousal such as self-destructive, aggressive or reckless behaviour, sleep disturbances, hyper-vigilance or related problems. These are arguably a much better fit for instances of complex trauma.[46] DESNOS could therefore comfortably fit under the current criteria for PTSD.

Presenting unique information to jurors

Another admissibility requirement of expert evidence is that the evidence presented provides jurors with unique or novel information. In the first case to consider the admissibility of BWS evidence, *R v Lavallee,*[47] the majority held the expert evidence admissible because it was required to (i) dispel myths related to domestic violence; (ii) explain why an accused did not flee when she perceived her life to be in danger

[44] T. J. Luxenberg, Spinazzola, B. A. van der Kolk. 'Complex trauma and disorder of extreme stress (DESNOS) diagnosis, part one: assessment.' (2001) 21 *Directions in Psychiatry*, 373, 390.
[45] American Psychiatric Association, *PTSD Fact Sheet* (2013) DSM5.org <http://www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf>.
[46] J. Turkus DSM-5: *Concepts, changes and critique* (2013) <http://www.isst-d.org/downloads/MEMODocs/DSM-5website(c).pdf>
[47] 55 CCC (3d) 97 (1990).

and (iii) allow the jury to effectively assess the reasonableness of the woman's belief that killing her batterer was the only way to save her life. The Australian case of *R v Runjanic* affirmed this approach.[48]

Several studies have also investigated whether jurors were indeed lacking a requisite understanding of domestic violence with interesting results. Dodge and Green, for example, surveyed both experts and potential jurors on their understanding of BWS.[49] They found that jurors were less likely to believe that a battered woman would stay in an abusive relationship, that she would believe that using lethal force was the only way to protect herself from further harm, or that she would believe that her spouse would kill her. Jurors were also significantly more likely to believe that battered women were abused due to being emotionally disturbed or having masochistic tendencies. The study also found that male and older jurors were more likely to hold beliefs significantly different from that of the surveyed experts.

Another study by Green et al confirms these findings.[50] By presenting participants with a brief description of a wife suffering domestic abuse, they found that laypersons were more likely to believe that abuse had taken place if the couple were of a lower socio-economic status. This supports the concept that laypersons believe in the myth of the "prototypical" battering relationship, that is that domestic abuse is believed to occur in couples of low socioeconomic status.

Research has also shown that laypersons' understanding of domestic abuse varies based on age, gender, level of education and sex-role attitudes.[51] Women, younger individuals, those holding egalitarian gender views and those who are more educated

[48] (1991) 56 SASR 114; 53 A Crim R 362 at 366 per King CJ.
[49] M. Dodge and E. Greene. 'Jurors and expert conceptions of battered women.' (1991) 6 *Victims and Violence*, 6, 271, 282.
[50] E. Greene, A. Raitz and H. Lindblad, 'Jurors' knowledge of battered women' (1989) 4 *Journal of Family Violence*, 4, 105, 125.
[51] See e.g. J. Briere, 'Predicting self-reported likelihood of battering: Attitudes and childhood experiences'. (1987) 21 *Journal of Research in Personality*, 61.69; J. Finn. 'The relationship between sex role attitudes and attitudes supporting marital violence' (1986) 14 *Sex Roles*, 235,244; K. Greenblat '"Don't hit your wife…unless…": Preliminary findings on normative support for the use of physical force by husbands.' (1985) 10, *Victimology: An International Journal*, 221, 241; K. M. Gentemann. 'Wife beating: Attitudes of a non-clinical population' (1984) 9, *Victimology: An International Journal*, 109,119; D. G. Saunders, A. B. Lynch, M. Grayson, D. Linz 'The inventory of beliefs about wife beating: The construction and initial validation of a measure of beliefs and attitudes' (1987) 2 *Violence and Victims*, 39, 57.

tend to hold less negative views towards battered women and condemn the use of force in marital relationships to a greater extent than those with the opposite traits.[52]

However, it should be noted that all of the research above was conducted two to three decades ago. It is possible that laypersons today would convey different views on domestic violence and battered women. Research conducted by VicHealth found that participants surveyed in 2006 were significantly more likely to view violent behaviour as domestic violence compared to participants surveyed in 1995.[53][54] They also found that 97% of respondents in 2006 agreed that domestic violence was an offence, compared to 93% in 1995.

Despite these hopeful findings, they also found that a large number of participants held misguided views such as: 'domestic violence can be excused if it results from temporary anger or results in genuine regret'; 'women going through custody battles often make up claims of domestic violence to improve their case' and 'rape results from men not being able to control their need for sex, and they should therefore not be held responsible for their actions.' The report concludes that although individuals have become more aware of domestic abuse issues, more work needs to be done to improve societal perceptions of domestic violence. This suggests that the modern layperson may still hold different views to experts on the topic of BWS, and therefore that evidence on BWS may be useful in dispelling myths related to domestic violence.

BWS evidence and the feminist agenda

Many feminist scholars have advocated for the use of BWS as a defence because of its ability to relieve women of the stigma and pain of criminal punishment for actions brought on by abuse.[55] However, others note that admitting syndrome evidence used solely by women encourages society to label their activity as an irrational product of a mental health disorder. Such a label can be stigmatising and painful in its own right.

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[52] Ibid.

[53] Violent behaviour included 'slapping or pushing partner to cause harm or fear', 'throwing or smashing objects near partner to frighten or threaten partner', 'yelling abuse at partner', 'controlling social life of partner by preventing them from seeing friends and family', 'repeatedly criticising to make partner feel bad or useless', and 'controlling partner by denying partner money'.

[54] K. McGregor, *National Community attitudes towards violence against women survey 2009: project technical report.* (Canberra: AIC, 2009).

[55] See e.g. E. Anderson and A. Read-Anderson. 'Constitutional Dimensions of the Battered Woman syndrome' (1992), 53 Ohio State Law Journal 363, 387; V. Mather, 'The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense and Expert Testimony', 39, *Mercer Law Review,* 545, 574.

Academics like Anne Coughlin believe that BWS evidence institutionalises negative stereotypes of woman within the law and reaffirms women's incapacity for rational self-control.[56] She argues that the defense denies that women have the same capacity for self-governance as men and that they are thereby exposed to forms of interference against which men are safe. This is viewed by Coughlin as a serious flaw in criminal law, and that BWS evidence should therefore be inadmissible and that steps should be taken to repair the patriarchal assumptions underlying the criminal law's normative model for human behaviour.

Coughlin's work seemingly ignores the issue of whether BWS can be regarded as applying to both genders. This was discussed by Justice Kirby in *Osland v The Queen*.[57] While accepting that commentators have reason to resist the proposition of a gender-neutral BWS, he also found that:

> "…there is no inherent reason why a battering relationship should be confined to women as victims. Instances exist where the reverse is the case, including in some same-sex relationships of analogous dependence and prolonged abuse. Moreover, it is important to be wary of the effects that BWS can have on the perception of women as fully independent and responsible individuals. What is as stake in reflecting the reality which may accompany long-term abusive relationships of dependence is not "gender loyalty or sympathy" but ethical and legal principle."[58]

It should also be noted that legislation in many United States jurisdictions employ gender-neutral terms in relation to BWS.[59] For these reasons, the feminist argument that BWS inadvertently oppresses women and therefore should not be available as a defence should be rejected. That said, the approach set forward by Justice Kirby is also questionable for different reasons. In theory, allowing all individuals to use BWS as a defence is ideal. But will further expanding the concept of BWS make it even

[56] A. Coughlin 'Excusing Women' (1994) 82(1) *California Law Review*, 1, 93.
[57] (1998) 197 CLR 316
[58] Ibid [159].
[59] I. Freckelton, S. Selby, *Expert Evidence: Law, Practice, Procedure and* Advocacy (Thomson Reuters, 4th Ed, 2009) 848.

less concrete as a theory, and further damage its reputation as a result? This issue should be considered in further commentary.

The verdict on BWS evidence: should it be admissible in court?

It is clear that evidence on domestic violence is still necessary in order to dispel myths commonly held by jurors. However, it is questionable whether this is sufficient reason to allow admissibility of BWS evidence. The flaws in Walker's research and subsequent theories are essentially fatal, and her disinclination to address them suggests that the reliability of the research will not improve in the future. Further research on BWS would need to be conducted in order for evidence of the theory to be admissible.

The inability to diagnose a witness with BWS further limits its appropriateness in the courtroom. Attempts to rectify this have involved categorising BWS as a form of PTSD. Such efforts were arguably inappropriate at the time, as the DSM-III-R category could not comfortably house BWS. However this is no longer an issue, as the current definition and criteria for PTSD is wider and includes a more diverse range of symptoms. It is therefore likely that BWS, as a form of DESNOS, could be categorised as a subcategory of PTSD.

However, admitting BWS evidence solely because of this would fail to consider issues of gender equality in the law, as well as domestic violence in same-sex relationships. Considering these issues, along with the fact that similar outcomes could be met by presenting evidence on domestic violence (as opposed to BWS evidence), and diagnosing witnesses with PTSD, indicates that BWS evidence is essentially redundant. For this reason, it is argued that BWS evidence should be ruled inadmissible.

Child Sexual Abuse Accommodation Syndrome

Around the same time that Walker was researching BWS, physician Roland Summit identified the "Child Sexual Abuse Accommodation Syndrome" (CSAAS). He believed CSAAS was suffered by children who were molested by a member of their family, and that these children consequently exhibited behavioural characteristics

that could be accurately profiled.[60] Instead of providing a precise definition of the syndrome, Summit focussed on breaking the syndrome down into the five following categories: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted and unconvincing disclosure and (5) retraction of disclosures.

The first category, 'secrecy', describes the inherently secret relationship between the offending adult and the abused child. The child will be reluctant to tell others of the molestation because the adult makes it clear that doing so will result in adverse consequences. The second category, 'helplessness', describes the lack of power felt by the child due to the authoritarian relationship between them and their abuser. This feeling of helplessness, according to Summit, makes children even less likely to disclose the abuse they have suffered. These two categories are thought to be preconditions to the occurrence of sexual abuse, in that they are felt by the child and reinforced by the adult abuser before or while molestation takes place.

The three remaining categories are seen as sequential contingencies commonly occurring as a result of the abuse. In category three, children experience feelings of entrapment, believing that there is nowhere they can run to escape the abuse. This is experienced by children who did not seek or receive immediate protective intervention after their initial exposure to the abuse. While experiencing feelings of entrapment, they develop accommodation mechanisms to be able to deal psychologically with the betrayal and objectification they face. These mechanisms include pathological dependency, self-punishment, self-mutilation, selective restructuring of reality and multiple personalities. As a consequence of this category, any disclosure of the molestation by the child is likely to be delayed, conflicted and unconvincing. Summit labels this category four. Because of the delay, a victim's disclosure may be misconstrued by others. This may lead the victim into category five, in which they retract their disclosure. They may do this because of a newfound awareness of the consequences of their actions, family pressure, or a sense of guilt for betraying their abuser.

Summit established this syndrome in order to "provide a common language for the several viewpoints of the intervention team and a more recognizable map to the last

[60] R. C. Summit, 'The Child Sexual Abuse Accommodation Syndrome' (1983) 7 *Child Abuse and Neglect*, 177.

frontier in child abuse."[61] He implies that it is to be employed by clinicians and counsellors in offering abused children "a right to parity with adults in the struggle for credibility and advocacy."[62] Summit made no suggestion that CSAAS should be used by lawyers and clinical expert witnesses in trial, instead stating that the syndrome should be understood as a clinical opinion; not a scientific instrument.[63]

Critical commentary on CSAAS

CSAAS has received criticism because it has been used as evidence when it was not designed for such a function. Commentators also disapprove with its lack of diagnostic utility, applicability and consideration of other impacting factors of sexual assault.

Intended use of CSAAS

After the release of Summit's work, CSAAS was employed by prosecutors in an attempt to explain defects in a complainant's evidence. As stated above, this was not the intended role of Summit's research. In his second publishing, Summit disapprovingly noted that "lawyers and a few clinical expert witnesses have tended to seize on the CSAAS as a major weapon".[64]

Commentators have also argued that it is inappropriate to employ CSAAS evidence in criminal cases. Levy, for example, complained that the syndrome had been:

> "…turned into a perverse testimonial tool: it could be, and it was, used to prove sexual abuse when the child made an accusation in an unconvincing fashion; and, because the experts asserted that sexually abused children suffering from the syndrome retract their accusations, sexual abuse could be proved even when the child himself claimed that the accusation was untrue."[65]

Summit believed that CSAAS was being used in this way because of his employment of the word "syndrome". In his 1992 work, Summit described the word as meaning

[61] Ibid 191.
[62] Ibid.
[63] R. C. Summit. 'Abuse of the Child Sexual Abuse Accommodation Syndrome', (1992), 1(4), *Journal of Child Sexual Abuse*, 153, 155.
[64] Ibid.
[65] R. J. Levy, 'Using Scientific Testimony to Prove Child Abuse' (1989) 23 *Family Law Quarterly* 383.

a "list or pattern of otherwise unrelated factors which can alert the physician to the possibility of disorder", which he admitted was markedly different to the common meaning employed in forensic evidence.[66]

It is possible that Summit intentionally mislabelled the disorder. Freckelton has argued that by using the word "syndrome", Summit cloaked CSAAS in the language of medical diagnosis, thereby investing the syndrome with a resonance of legitimacy it would not otherwise receive.[67] It is also likely to have been intentional due to the controversies surrounding battered woman syndrome and rape trauma syndrome at that time.[68]

Despite his dissatisfaction with CSAAS being employed as evidence, Summit endorsed the judgement of *People v Gray*.[69] In this case, the court admitted CSAAS evidence in order to supply the jury with information on how children generally behave during and post-sexual abuse. The fact that Summit endorsed this suggests that he had altered his views depending on the courts' findings, and that he therefore had a lack of insight into the intended use of the syndrome. His changing opinions have not appeared to have been quoted in any New Zealand or Australian cases, which seemingly confirms this.[70]

The way in which Summit presented CSAAS to society therefore deserves the criticism it has received. The seemingly intentional mismarketing of the "syndrome" suggests that Summit's research should not be relied upon.

Diagnostic utility

Another major issue relating to CSAAS is the extent to which it can be used to identify children who have been sexually abused. Many psychiatrists and psychologists believe that there are "typical reactions" of child sexual abuse victims, such as anxiety, phobias, hypochondriasis, bed wetting and headaches.[71] However,

[66] R. C. Summit 'Abuse of the Child Sexual Abuse Accommodation Syndrome' (1992), 1(4), *Journal of Child Sexual Abuse*, 153, 157.
[67] I. Freckelton, 'Child Sexual Abuse Accommodation Syndrome Evidence: The Travails of Counterintuitive Evidence in Australia and New Zealand', (1997) *Behavioural Sciences and the Law* 247, 260.
[68] Ibid.
[69] [1987] 187 Cal App 3d 213, 213, 218-219
[70] I. Freckelton, 'Child Sexual Abuse Accommodation Syndrome Evidence: The Travails of Counterintuitive Evidence in Australia and New Zealand', (1997) 247, *Behavioural Sciences and the Law* 247, 260 262
[71] See e.g. R. K. Oates, 'The Effects of Child Abuse' (1992) 66 Australian Law Journal 1986, 1989.

there is no concrete evidence showing that the sexual abuse itself causes these symptoms. For this reason, diagnosing a child with CSAAS without an explicit disclosure of abuse can be inaccurate and misleading.

Indeed, in a 1991 literature review, Beitchan and his colleagues found that stereotypical child sexual abuse symptoms (apart from sexualised behaviour) were characteristic of clinical samples in general.[72] They also found that other environmental factors also often caused the same symptoms of sleep disturbance, somatic complaints, fearfulness and withdrawal. For this reason, they argued that there was insufficient evidence to diagnose a child with CSAAS simply because of the aforementioned symptoms.

Limited applicability

The fact that Summit only discusses cases of molestation by family members severely limits its applicability. Commentators such as Gardner argue that this is yet another reason why CSAAS evidence should not be admissible:

> "Accordingly, the syndrome's application to other situations, such as nursery schools, molestation by a stranger, molestation by a babysitter, and molestation by a teacher, is inappropriate. In all of these situations the child is not living with the molester and is not as likely therefore to develop the kinds of reactions seen at those levels in which there is a sense of entrapment."[73]

Other critics have also suggested that CSAAS even has limited applicability within the circumstances prescribed by Summit. For instance, Freckelton has suggested that additional parameters of sexual abuse influence the impact of the assault on the victim. Potential additional parameters include the age the child at the onset of abuse; the duration, invasiveness and frequently of the abuse; the extent of overt brutality; the type of sexual assault; the identity of the assailant and general familial circumstances. All of these factors have the potential to determine the extent and

[72] J. H. Beitchman, K. J. Zucker, J.E. Hood, G. A. Da Costa et al, 'A Review of the Long Term Effects of Child Sexual Abuse' (1991) 15 *Child Abuse and Neglect*, 537.
[73] R. A. Gardner, *True and False Allegations of Child Sex Abuse* Creative Therapeutics, New Jersey, 1992), 297.

manner in which the victim is impacted by the molestation, and therefore the extent to which their behaviour will be indicative of abuse.

CSAAS leaves the courts with little to work with, as it was not intended to be used as forensic evidence and cannot be used as a diagnostic tool to identify sexual abuse in children who have delayed in reporting mistreatment or retracted their statement. This essentially leaves only a general description of the syndrome able to be admitted. The section below investigates how the courts have dealt with these restrictions.

Judicial findings related to CSAAS

Several New Zealand and Australian cases have considered the admissibility of CSAAS evidence. Majority of the court findings have concluded that it would be inappropriate to allow admission of CSAAS evidence.

The first case in the region was that of *R v B*, in which the prosecution attempted to call a psychologist to testify that the 12 year old complainant "had features of behaviour typically found in sexually abused children".[74] The New Zealand Court of Appeal found the evidence inadmissible, as its main aim was to enhance the credibility of the complainant, which would impinge upon the exclusive province of the jury.[75] Justice Casey accurately summed up the expert evidence in this case as attempting to "usurp the jury's function by answering the ultimate question that they have to decide."[76]

R v B was closely followed by *R v Accused* in 1989. [77] Here the Crown sought to call a psychologist to provide expert evidence that the complainant had not made false allegations, as this was submitted by defense counsel. The prosecution thus submitted that the child exhibited behaviour characteristics "definitely consistent" of children who had been sexually abused. The court affirmed the finding in *R v B*, holding that there was not sufficient evidence of the child's behaviour being a concomitant of sexual abuse, and that expert evidence "went some distance towards usurping the jury's function".[78] However, they maintained that CSAAS evidence was admissible

[74] [1987] 1 NZLR 362, 366.
[75] Ibid [372].
[76] Ibid.
[77] [1989] 1 NZLR 714.
[78] Ibid [271].

in principle if a two-pronged criteria could be met: that (i) "a particular child has exhibited traits displayed by sexually abused children generally" and (ii) the evidence shows "in an unmistakeable and compelling way and by reference to scientific material that the relevant characteristics are signs of sexual abuse".[79]

The Tasmanian case of *Ingles v The Queen* involved slightly different circumstances.[80] Instead of a psychologist being called as an expert witness, the Crown called a psychiatrist named Dr Sale to provide information on CSAAS. Once again, the court found this expert evidence inadmissible, as it served only to bolster the credibility of the Crown's evidence. Justice Zeeman summed up the court's finding when he stated that "evidence of a recent complaint does no more than act as a buttress to the credibility of a complainant, an explanation for an absence of such a complaint does no more than relate to credibility." Such a finding was particularly appropriate to the circumstances of the case, as the psychiatrist had not seen the complainant or conducted tests on the complainant, nor had any facts on the assault been elicited during the examination-in-chief. By applying these circumstances to those in *R v Runjanjic* and *Lavallee v The Queen*, the court found that there was no other potential use for the evidence apart from its ability to bolster credibility.[81]

R v C followed shortly thereafter in the South Australian Court of Criminal Appeal.[82] This case seemingly broke away from those above, with the court finding that expert evidence provided in order to improve the credibility of a witness could be admissible if the evidence was "a fit subject of expert opinion."[83] Chief Justice King held that CSAAS evidence could fulfil this criterion, as it was so admitted in California in order to disabuse jurors of commonly held misconceptions relating to child sexual abuse. The core issue was instead whether the evidence to be admitted "…is so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries." In relation to this, Chief Justice King found CSAAS evidence lacking. Despite the evidence being able to offer insights into the

[79] Ibid [720].
[80] Unreported, Tasmanian Court of Criminal Appeal, 4 May 1993.
[81] I. Freckelton, S. Selby, *Expert Evidence: Law, Practice, Procedure and* Advocacy (Thomson Reuters, 4th Ed, 2009) 886.
[82] (1993) 60 SASR 467; 70 A Crim R 378.
[83] Ibid [473].

familial dynamics of abused children and the impact of secret-keeping, he was "far from convinced" that those were sufficient reasons to impair the trial process.

The Victorian Court of Criminal Appeal case of *R v J* also questioned whether it was appropriate to admit expert evidence relating to CSAAS.[84] Again, the Crown wished to submit expert evidence in order to rehabilitate the credibility of the complainant, as the complainant had reportedly continued to live with her father and regularly sent him greeting cards. They submitted that this needed to be identified as normal behaviour in sexually abused children. Here, the court found that expert evidence presented in order to rehabilitate an individual's credit may be admitted. However, the finding differed from that of Chief Justice King in *C v The Queen* by creating a different criteria for admission. The court found that evidence could be admitted if: (i) the opinions expressed by the witness were on questions relevant to their field of knowledge; (ii) the witness was an expert in that field; and (iii) the information presented by the witness were not within the knowledge and experience of the jury.

The New South Wales case of *F v The Queen* took place in 1995.[85] In this case, the Crown sought to call a specialist paediatrician as an expert witness to provide evidence on the behaviour of a complainant whom she examined after allegations of sexual assault surfaced. At trial, the witness gave evidence of what she referred to as "Accommodation Syndrome", which the Crown submitted in order to "rehabilitate" the complainant, who continued to show affection towards her abuser. Dr P but did not provide an opinion on whether the complainant had symptoms of the syndrome, nor whether the behaviour of the complainant was consistent with the syndrome.

On appeal, the majority expressed concern about this information being presented to jurors. Chief Justice Gleeson and Justices Grove and Abadee gave several reasons for this. Firstly, Dr P was not able to give evidence on CSAAS. This was because the literature on CSAAS was "in the area of psychiatry or psychology", and the witness, a paediatrician, did not fulfil this qualification.[86]

Next, the court found that the evidence of CSAAS itself was lacking. They expressed a reluctance to refer to it as a "syndrome", as delay and inconsistency in reporting

[84] (1994) 75 A Crim 522.
[85] (1995) 83 Crim R 502.
[86] Ibid [507].

can occur in cases not attributed to the syndrome. They therefore noted that delay and inconsistency relating to CSAAS should be distinguished from other forms of delay and inconsistency if the word "syndrome" is to be used.[87]

Finally, they found that the counterintuitive evidence offered could not reach its goal. It was held that much of what Dr P:

> "… was talking about, whilst it might apply to victims of sexual abuse, could apply to all manner of people in a wide variety of circumstances. It is not only abused children who feel helpless or powerless, or who delay in making complaints of conduct which victimises them, or who disclose information piece by piece for the purpose of testing the water. Many victims of crime delay in reporting it because it occurred in circumstances subjecting them to fear or shame. Sometimes the reporting of crime may disclose conduct on the part of a person doing the reporting which such person may prefer to conceal. Sometimes people judge, and perhaps rightly judge, that the consequences of reporting a crime might be more detrimental than the consequences of the crime itself." [88]

Moreover, the court noted that the evidence could potentially "be regarded by a jury as destroying the utility of seeking to test the evidence of a complainant by examining the circumstances and the content of complaints".[89] This was particularly relevant in relation to the respective consistency of delayed and prompt complaints of alleged victims. That is, they may adduce that a child is making an inconsistent claim because of their prompt complaint, and not consider any other evidence in determining the legitimacy of the complaint. For these reasons, Dr Packer's evidence was found to be inadmissible on appeal.

Several years later, the Queensland Court of Appeal case *S v The Queen* considered whether an experienced Family Services officer should be allowed to give evidence on the behaviour of two sexually abused children who wrote letters to their abuser.[90] At trial, the court allowed the witness to give evidence as to the behaviour of sexually

[87] Ibid at [508].
[88] Ibid at [507].
[89] Ibid at [507].
[90] (2001) 125 A Crim R 526; [2001] QCA 501

abused children. This included the observation that children are often affectionate towards their abuser, and that the main concern of many abused children is that they may be removed from their family setting. On appeal, it was held that such evidence was not a recognized body of learning, nor was it beyond the knowledge and experience of jury members. This finding was consistent of that found in *F v The Queen* in these respects.

Legislative changes

In 2001, the Tasmanian *Evidence Act* was amended to include section 79A. This section states that "[a] person who has specialised knowledge of child behaviour ... may … give evidence in proceedings against a person charged with a sexual offence against a child ... in relation to one or more of the following matters: (a) child development and behaviour generally; (b) child development and behaviour if the child has had a sexual offence, or any offence similar in nature … committed against him or her."[91] Victoria added a similar provision in 2006, where people with specialised knowledge could provide evidence on "(a) the nature of sexual offences; and (b) the social, psychological and cultural factors that may affect the behaviour of a person who has been the victim … of a sexual offence, including the reasons that may contribute to a delay on the part of the victim to report the offence."[92] A similar provision to Tasmania's section 79A now present in section 79(2) of the *Evidence Act 2008* (Vic) and the Commonwealth and New South Wales' *Evidence Act 1995.* Australian jurisdictions not listed here remain common law jurisdictions.

The case of *Bellemore v Tasmania* applied section 79A of the Tasmanian *Evidence Act.*[93] The majority found evidence provided by a psychiatrist on the behaviour of sexually abused children to be admissible, despite the evidence also alluding to the complainant being sexually abused themselves. However, it was noted by Justice Crawford that the probative value of the evidence was only slight, as it only gave one possible reason as to why the complainant acted in the manner that they did. This identifies an important feature of the legislation above – it enables admission of the

[91] *Evidence Act 2001* (Tas) s 79A.
[92] *Evidence Act 1958* (Vic) s37E.
[93] (2006) 170 A Crim R 1; 207 FLR 20; [2006] TASSC 111.

relevant evidence but leaves the jury to determine the probative value to be allocated to said evidence.

Are these rulings justifiable?

The cases above present several issues in relation to CSAAS-related evidence. One reason is its perceived ability to usurp the jury's function by presenting information to rehabilitate or bolster a complainant's credibility. Evidence of CSAAS-related behaviour was found to be inadmissible because of this reason in the cases of *R v B*, *R v Accused* and *Ingles v The Queen.* However, a shift occurred in 1993, with the cases of *R v C* and *R v J* viewing the issue of rehabilitating credibility as no longer fatal to admissibility. These cases stated the clear rule that where the credibility of a witness is attacked, evidence is admissible in order to rehabilitate the credibility of that witness, assuming other criteria are fulfilled. It is also likely that the legislative amendments made imply that CSAAS-related evidence should be admitted despite this issue. This is because legislation in New South Wales, Victoria, Tasmania and the Commonwealth do not require the consideration of the use of the evidence in order to determine if it is admissible. For these reasons, the role of CSAAS-related evidence in rehabilitating credibility, particularly in the jurisdictions listed above, cannot be substantially criticised.

A related issue is the expertise required for a witness to be considered an "expert". The cases of *R v J* and *F v The Queen* found that only psychologists and psychiatrists should be able to give evidence in relation to CSAAS, as the syndrome's research background occurs within these fields. In contrast with these cases, the current legislation in New South Wales, Victoria, Tasmania and the Commonwealth employ a broader definition of "expert". Instead of originating from a certain field, an expert need only have specialised knowledge of child behaviour based on training, study or experience, which can include specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse. This arguably better articulates the expertise required for witness evidence to be admissible, as it recognises the array of ways in which witnesses are able to develop experience in the area.

Another issue noted in the cases above was whether CSAAS-related evidence provided counterintuitive evidence to the jury. This was brought up in *R v C, R v J*

and *S v The Queen*. It was also alluded to in *F v The Queen,* with the finding that any counterintuitive CSAAS-related evidence will be of detriment to the jury by encouraging dangerous conclusions to be reached. In relation to this point, Freckelton aptly notes that the court seemingly misunderstood the purpose of presenting counterintuitive evidence in those circumstances; it was not presented to "answer the question definitively of what the triers of fact should make of a child's shift in story", but instead "enables the jury to exercise its evaluation in a more informed fashion."

The above judgements also ruled expert evidence inadmissible because it would not present jurors with information they were yet to possess. There is seemingly a common belief amongst judges that jurors possess a comprehensive understanding of sexual abuse and that presenting CSAAS-related evidence would therefore be inappropriate. However, research shows that jurors and jury-eligible citizens hold a number of misconceptions in relation to how children react to child abuse. These include beliefs that "children are easily manipulated into giving false reports of sexual abuse"; "child sexual abuse will result in physical damage and evidence"; "a typical victim would resist, cry out for help or escape the offender"; "delay in complaint is uncommon and is evidence of lying"; and "children cannot remember events well enough to be reliable witnesses in court".[94] Because of this evidence, the Australian Law Reform Commission has recommended that legislation in all Australian jurisdictions should allow the giving of directions to jurors on children's abilities as witnesses and their behavioural responses to child abuse.[95] They have also recommended that judges should develop model jury directions on these matters.[96] It is therefore more than appropriate for CSAAS evidence to be presented to alleviate these misconceptions. Any criticism towards CSAAS on this issue is clearly undeserved. It is essential that research relating to children's behaviour during and after sexual abuse is understood by jurors, as doing so will potentially remove a source of error from the evaluation process.

The only legitimate issue raised in several cases is that of the scientific accuracy of CSAAS as a "syndrome". This is stated as a reason for inadmissibility in *R v B* and

[94] A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153, 156.
[95] Australian Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114, recommendation 27-11
[96] Ibid 27-12.

F v The Queen. Much of this reluctance comes from the difficulty of diagnosing individuals with CSAAS, as the symptoms are far from unique to the disorder. The majority in *F v The Queen* had particular issue with the fact that it was not possible to tell when delay or inconsistency was due to the syndrome or, conversely, due to unreliability. Freckelton points out that this approach misses the point, as the information is not presented in order to persuade the evidence that the complainant suffers CSAAS.[97] Instead, its utility lies in removing misconceptions from the minds of jurors, and that evidence of CSAAS should be judged for admissibility based on this issue.

Despite this ringing true, it is likely that this flaw will continue to be an issue in relation to CSAAS admissibility. CSAAS evidence will likely be held inadmissible where it is framed in terms of a medical condition, and is submitted in order to determine whether the complainant conforms to the symptoms of CSAAS. Freckelton has developed a tiered evidence structure which reinforces this distinction between CSAAS evidence being used as evidence of children's behaviour post-sexual abuse at one end and used as a diagnostic tool confirming abuse on the other.[98] Level one evidence is the least suggestive and the least connected to CSAAS, as the expert merely explains the phenomena of the difficulties faced by children after being sexually abused. Level two evidence is slightly more tailored to the case facts, with the witness likely listing the complainant's behaviour and symptoms. At level three, the expert may suggest that the symptoms of the complainant are consistent with those who have suffered sexual abuse. The mentioning of CSAAS only enters level four evidence. An expert presenting this tier of evidence would classify the complainant as showing symptoms consistent with a syndrome such as CSAAS. Finally, level five involves the expert testifying that the complainant has symptoms of CSAAS and is therefore likely that they are telling the truth about the assault.

Freckelton has noted that level one evidence is currently admissible, as it merely describes what is known about a certain category of sexual assault victims – issues of scientific validity do not enter evidence of this tier. He also argues that level two

[97] I. Freckelton, 'Judicial Pedagogy and Expert Evidence on Victims' Responses to Trauma', (1997) 4(1) *Psychiatry, Psychology and Law*, 79, 83.
[98] I. Freckelton, 'Child Sexual Abuse Accommodation Syndrome Evidence: The Travails of Counterintuitive Evidence in Australia and New Zealand' (1997), 15(3), *Behavioural Sciences and the Law* 15(3), 247.

evidence is on par with the approach of Summit in his research on CSAAS – it mentions "symptoms" but does not imply a correlation between the complainant's symptoms and their credibility. Fourth and fifth level evidence is currently inadmissible, as it incorporates a diagnosis and suggests that the complainant is telling the truth because of this. Disrepute relating to CSAAS evidence used in a manner consistent with level four and five is deserved, as there is not sufficient evidence to support CSAAS evidence being used in such a manner. However, syndrome evidence not directly related to CSAAS (nor evidence suggesting the complainant's truth due to their symptoms) does not deserve the same level of disrepute.

The verdict on CSAAS evidence: should it be admissible in court?

CSAAS-related evidence should be appreciated for its ability to dispel damaging misconceptions amongst jurors. However, the criticism it has received in relation to its use as a tool to confirm to the jury that the complainant is telling the truth is deserved. This is due to the fact that there is insufficient evidence showing that behaviour such as delayed reporting and retracting of complaints is caused by child sexual abuse. This is aptly put by Freckelton when he says that "[evidence of CSAAS] cannot so readily be used to prove that a particular child has been abused because he or she exhibits indicia of the syndrome." It is therefore recommended that CSAAS-related evidence should only be admissible in a generalised and non-diagnostic sense until scientific research identifies distinct indications of sexual abuse.

Repressed memory syndrome

Repressed Memory Syndrome ('RMS') can be described as the ability for victims of major trauma to lack complete awareness or memory of the traumatic event from the time that it occurred until years later.[99] It became popular in the early 1980's as a means of explaining psychological disorders. It was also used in an attempt to

[99] I. Freckelton, 'Repressed Memory Syndrome: Counterintuitive or Counterproductive?' (1996), 20, Criminal Law Journal, 7.

"unlock" repressed memories of child sexual abuse in adult clients in order to bring about the healing process.[100]

Advocates of the syndrome argue that victims "forget" or repress memories of major trauma until they are triggered by psychotherapeutic intervention or associations of the trauma.[101] They posit that there are types of memory which have not yet been established that enable the body to remember, and repress, memories involving trauma.[102] Proponents refer to these as "somatosensory" or body memories.[103]

Conversely, opponents argue that memories do not wax and wane in this manner, and that psychotherapeutic intervention results in unintentional confabulation. Some of them go as far as renaming the phenomena "false memory syndrome", focussing on its ability to convince people who have not been abused that they have such memories. The inability to discern whether a complainant actually recalls a memory, or is merely fabricating it, has plagued many judgements. For instance, Justice Sperling in *E v The Queen*[104] stated:

> "Common experience does not enable one to say that the memory of a painful event, absent for a long time and later experienced, is more likely to be a revived, true memory than an honestly experienced, false memory. I do not accept as common knowledge that, in the case of children, memory of abuse is frequently lost and later reliably recovered."

Evidence of RMS has been employed in forensic cases in order to present counterintuitive evidence to jurors on why a victim could "forget" assaults and indignities upon them and recall them at a later date.[105] It serves to explain the long gap between the time at which the assault occurred, and the complaint and report

[100] Ibid 8
[101] See e.g. M. P. Gerrie, M. Garry and E. E. Loftus, 'False Memories' in N. Brewer and K. D. Williams (eds.), *Psychology and Law: An Empirical Perspective* (Guilford Press, 2005).
[102] Ibid.
[103] See e.g. L. Terr, *Unchained Memories* (Basic Books, 1994); B. Rothschild, *The Body Remembers: The Psychophysiology of Trauma and Trauma Treatment* (Norton & Co., 2000).
[104] (1997) 96 A Crim R 489
[105] I. Freckelton, S. Selby, *Expert Evidence: Law, Practice, Procedure and* Advocacy (Thomson Reuters, 4th Ed, 2009) 895.

being made. Presenting this evidence can therefore rehabilitate a complainant's credibility in the eyes of the jury.[106]

Employing RMS evidence in the courtroom brings forward many issues. Courts must consider whether methods such as psychotherapeutic intervention bring about reliable evidence. If not, checks and balances need to be put in place if RMS evidence will be deemed admissible. This, along with the controversial status of the syndrome, demand the court to consider the appropriateness of RMS evidence.

Critical commentary on RMS

Research on memory recall

RMS has received much refute because of psychological research into the way that memories are made and recalled. A commonly-accepted four-stage process illustrates our interactions with memories: first, a memory is stored or "encoded" while the experience is taking place. Next, the memory is stored. When necessary, it is retrieved, and finally it is recounted by the individual.[107] The Ebbinghaus curve on forgetting shows that details of memories are lost rapidly after the experience, and do not return once they are lost.[108]

It has also been found that certain techniques used to encourage recall of memories can bias the retrieval process and result in confabulation of pseudomemories. It has been noted that inappropriate retrieval cues can inhibit an individual's capacity to recall a particular memory, and that the perspective of childhood may particularly warp memories, as perception during childhood and adulthood are markedly different.[109] Stress or suggestion can also influence recall and recounting.[110]

Criticisms on MRS in relation to its lack of scientific proof are seemingly appropriate. Further investigation reveals research that an individual's ability to recall experiences of child sexual abuse will be dependent upon factors such as whether they initially

[106] I. Freckelton,'Repressed Memory Syndrome: Counterintuitive or Counterproductive?' (1996), 20, Criminal Law Journal, 8.
[107] I. Freckelton, S. Selby, *Expert Evidence: Law, Practice, Procedure and* Advocacy (Thomson Reuters, 4th Ed, 2009) 897.
[108] Ibid.
[109] D Thomson, 'Allegations of Childhood Abuse: Repressed Memories or False Memories?' (1995) 2(1) *Psychiatry, Psychology and Law*, 97.
[110] I. Freckelton, S. Selby, *Expert Evidence: Law, Practice, Procedure and* Advocacy (Thomson Reuters, 4th Ed, 2009) 897.

disclosed the incident. A study by Newton and Hobbs tested memory recall in adults who read a child sexual abuse scenario and role-played as the victim.[111] They found that participants from the groups which omitted information or were not required to report any information on the assault scenario in the first week suffered from greater recall errors in the second week, compared to those who were originally required to recall the whole scenario. These findings are consistent with those made by Zaragoza and colleagues, who found that initial forced confabulation led to false memories from confabulated information at a later date.[112] Children who fail to disclose incidents of sexual assault, or omit details of such an incident, are therefore more likely to recall confabulated information further down the track.

However, recent research into brain function suggests that repression is more likely to be a legitimate phenomenon compared to what was thought in the 1990s. There are now several model paradigms used to study memory control, such as the think/no-think paradigm, directed forgetting and retrieval-induced forgetting.[113] The think/no think paradigm, for instance, involves participants viewing reminders to previously encoded memories and attempt to either retrieve the memory associated to the reminder or exclude the memory from consciousness. It has been found that where participants attempt to recall the memory, the reminder enhances their ability to remember it.[114] Moreover, where participants attempt to forget the memory, the reminder not only fails to enhance it, but also encourages processes that impair that memory. This is thought to be due to executive control mechanisms mediated by the dorsolateral prefrontal cortex regulating activation in the hippocampus.[115] Some researchers argue that this proves the presence of mechanisms enabling repression of memories.

The evolution of our understanding of the brain seemingly suggests that repression may be possible. Further research undoubtedly needs to be undertaken before repression can confidently be said to exist, but until this takes place it would be

[111] J. W. Newton and S. D. Hobbs, 'Simulating Memory Impairment for Child Sexual Abuse', (2015), 33(4), *Behavioral Sciences & the Law*, 407.
[112] M. S. Zaragoza, K. E. Payment, J.K. Ackil et al., 'Interviewing witnesses: forced confabulation and confirmatory feedback increase false memories' (2001), 12, *Psychological Science*, 473.
[113] M. C. Anderson and B. J. Levy, 'Encouraging the nascent cognitive neuroscience of repression', (2006), 29(5), *Behavioral and Brain* Sciences, 511.
[114] Ibid 512.
[115] M. C. Anderson, K. N. Ochsner, B. Kuhl et. al., 'Neural systems Underlying the Suppression of Unwanted Memories' (2004), 303(5655). *Science*, 232.

premature to completely rule out the phenomenon. Such an understanding has seemingly been adopted by the Australian Psychological Society in relation to RMS.[116] Criticism directed at this form of syndrome evidence ought to take this into account. In relation to admissibility of repressed memory evidence, it seems appropriate to allow the evidence to be admitted, but also disclose to triers of fact that reservations ought to be kept in relation to the credibility of said evidence.

Appealing to logic

Loftus and Ketcham also argue that the ability to recall memories with great accuracy and specificity appeals to us as humans: we want to believe that our mind works in an orderly and efficient way, always under our command.[117] They submit that out mind is much more disorganised than we would like to recognise:

> "When the wild cacophony of dreams, wishes and desires intrudes, the elegant, linear metaphors begin to sway and topple… Recent research featuring high-tech brain mapping procedures indicates that memory is not a broad, generalised capability drawing on a centrally located storehouse of images and experiences, but a network of numerous separate activities, each carried out in a separate part of the brain."[118]

Those who reject RMS thus rely on the fact that recalled memories can be confused, inaccurate and misleading, particularly when psychotherapy is used to encourage recall. However, it is questionable whether these are sufficient reasons to rule related evidence inadmissible. Many other forms of evidence (such as eyewitness accounts) are laden with confusion and haziness, and despite not involving psychotherapy, questioning on the stand can arguably replicate such circumstances. For this reason, there needs to be further justification for ruling evidence on repression and RMS inadmissible.

Methodological flaws of RMS studies

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[116] See e.g. Australian Psychological Society, *Guidelines Relating to Recovered Memories* (2000) <http://depressionet.com.au/dres/recovered_memories.pdf>.
[117] E. Loftus and K. Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (St Martin's Press, 1994), 67.
[118] Ibid 75.

Critics of RMS posit that studies establishing the occurrence of repression face many methodological flaws. Pope and Hudson, for example, argue that such studies need to start with the null hypothesis that repression does not occur.[119] From there, researchers need to be sure that traumatic abuse actually occurred, and that the individuals in question developed amnesia of a non-biological origin. They applied this criteria to studies seemingly establishing repression, and found that no studies could fulfil them. Pope and Hudson therefore concluded that further investigations need to take place for repression of sexual abuse memories to be proven to exist.

This finding was reiterated in the key child sexual abuse case of *New Hampshire v Hungerford and Morahan.*[120] In this case, the prosecution sought to submit expert evidence on RMS in order to prove the reliability of the complainant's memories. Justice Groff noted that such evidence was not scientifically reliable, as there was a lack of objective, quantifiable results in RMS studies. These studies reportedly failed to establish that forgotten memories were due to repression as opposed to stereotypical forgetting or a disinclination to make a disclosure. The studies thus failed at confirming whether any memory repression itself actually occurred.

Recent research on repression continues to fail to meet the criteria of Pope and Hudson. An example of this can be found in the work of Matthew Erdelyi, who despite known for his extensive work on repression, continues to disregard these critical points. His self-created "Unified Theory of Repression" attempts to widen the definition of repression, thus loosening the requirements of legitimate evidence of the phenomena.[121] His responses to critics also seems to ignore the issue of methodological flaws in his work, instead focussing on how criticisms are due to a "hiatus in scientific literature on repression" and the "current anti-Freudian climate".[122] Such an approach reinforces RMS' disrepute in relation to the methodological flaws of related research.

The potential to mislead and trespass upon the role of jurors

[119] H. G. Pope Jr and J. I. Hudson, 'Can Memories of Childhood Sexual Abuse be Repressed?' (1995), 25, *Psychological Medicine*, 121.
[120] Unreported, Superior Court, New Hampshire, Hillsborough County, Groff J, 23 May 1995.
[121] M. H. Erdelyi, 'The unified theory of repression' (2006), 29, *Behavioral and Brain Sciences*, 499.
[122] Ibid 535.

Concern over the appropriateness of repression evidence was expressed in the Canadian case of *R v Norman.*[123] Despite not directly ruling on the admissibility of repressed memories, the Ontario Court of Appeal noted that allowing such evidence would be dangerous in that the memories could be "false" and provide false promise as to the credibility of the witness' account. Particular focus was given to expert witness Dr. Carr's opinion that "the therapeutically induced memory recall process may or may not elicit real memories of what actually occurred, and that, in either case, the patient is convinced of the truth of what he or she is recalling."[124] It noted that expert evidence on delayed recall is relevant in cases of sexual assault, but that jurors should be wary of placing too much weight on the honesty and integrity of a complainant with such memories. After all, it is their responsibility to determine whether the Crown can make out its case beyond reasonable doubt.

The same issue was presented by counsel for the accused in *R v R.*[125] When the Crown sought to adduce expert evidence on RMS, the accused argued that such evidence was irrelevant and dangerous, as it would be perceived by the jury as bolstering the complainant's credibility. Interestingly, the court took an almost converse approach to that taken in *R v Norman*. Evidence on repression was found to be relevant in that it could rehabilitate the reliability of the complainant, which would be essential to the Crown's case. It was also noted that the proposed expert evidence did not trespass into their responsibility for deciding the verdict of the case. Instead, it would be used to aid jurors in reaching their conclusion. For this reason, the court found the evidence admissible.

The Victorian Court of Appeal decision in *R v Bartlett* also tackled the issue of whether expert evidence on RMS should be admitted despite its lack of scientific validity, which had the potential to mislead triers of fact on the legitimacy of the evidence.[126] In relation to this, the court noted that differing opinions on the legitimacy of repression (or "suppression") evidence was not sufficient to strike out the evidence as inadmissible. Instead, determining the admissibility of repression evidence should involve the judge discerning whether said evidence would assist the

[123] 16 OR (3d) 295; 26 CR (4th) 256; 87 CCC (3d) 153; [1993] OJ No 2802 (QL); 22 WCB (2d) 461; 68 OAC 22.
[124] Ibid [168].
[125] (1994) 11 CRNZ 402.
[126] [1996] 2 VR 687.

tribunal of fact to better understand the issues (as the evidence is outside the "ken of the lay person".[127]

One issue with this approach, however, is that evidence can be cloaked as "informative" when really it is adduced to bolster a complainant's credibility. The common knowledge rule does not consider the intention of the counsel in presenting the evidence, but merely whether the evidence is able to dispel myths held by jurors. The effect of this is that the prosecution is given the opportunity to inadvertently bolster the complainant's claim, giving them an unfair advantage over the accused. Such an approach is arguably an abuse of process.

The verdict on RMS evidence

As scientific theories, repression and RMS face two key downfalls. When considering each downfall separately, it seems that all is not lost: further research can be undertaken to strengthen their scientific validity, and investigators can employ methodologies which target current criticisms. However these future steps are insufficient to justify admissibility at the present. Currently, evidence on repression and RMS are used to dispel myths held by jurors in order for them to reach an informed verdict. But whether this actually occurs is questionable: it is possible that said evidence can give finders of fact false impressions of the credibility of both the evidence and the witness' account. The fact that it is also inadvertently used to bolster the complainant's credibility further confirms the inappropriateness of admitting said evidence. For these reasons, expert evidence on repression and RMS should currently be held to be inadmissible.

Conclusion

Syndrome evidence presents unique issues to the court. BWS, CSAAS and RMS have all been criticised on their scientific reliability, particularly in relation to methodological flaws which could have been overcome by more thoughtful experiments and methods of data collection. Unfortunately, it appears that further

[127] Ibid [695].

research has not adequately addressed these flaws. Each syndromes scientific reliability therefore remains questionable.

However, this is not the only factor that should be considered when determining evidence admissibility. BWS evidence, for instance, has been found to be admissible in order to dispel myths amongst jurors as to the impact of domestic violence on victims. Similarly, CSAAS evidence and RMS evidence have been found to be admissible in order to dispel myths as to the credibility of the complainant.

What, then, should determine if syndrome evidence should be admissible? In relation to BWS evidence, it is the fact that similar, more credible evidence on domestic violence could be admitted in its place. Such evidence would overcome issues faced by BWS evidence, including those of gender and sexual orientation equality in the eyes of the law. In relation to RMS evidence, it is the fact that any evidence admitted will have a misguided effect on the credibility of the complainant. The author believes that this effect is unavoidable and unjustifiable, rendering all RMS evidence inadmissible.

The only syndrome evidence which should be admissible is that of CSAAS. This is because general, non-diagnostic "level 1" evidence could bypass the critical downfall of CSAAS; namely, that it cannot be framed as a medical condition. If CSAAS evidence is submitted merely in order to enlighten the jury as to the behaviour of sexually abused children generally, it should be admissible.

It is therefore recommended that BWS and RMS evidence be inadmissible at the present, and that only general, non-diagnostic CSAAS evidence should be admitted in court.

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