

The Bearing of Daubert on Sexual Abuse Allegations

Presented at The Australian Academy of Forensic Science, 9 February 2000. Published in The Australian Journal of Forensic Sciences, The Official Journal of the Australian Academy of Forensic Sciences. Vol 32, No 2 45-57, June -December 2000.

The last decade and a half has seen a massive increase in cases where people charge parents and others with having abused them sexually. In my practice, I see more than a 100 cases per year in which allegations of sexual abuse are made by persons referred for treatment or for medico-legal assessment in criminal, custody or compensation proceedings. The cases to which I refer are not those where a rape or assault took place and was investigated while physical evidence was still present. Rather these sexual contacts are said to have taken place a long time ago. The accusers and their bewildered families are different from children and paedophiles whom psychiatrists encountered 20 or 30 years ago. [1]

Experienced practitioners agree that this phenomenon has reached epidemic proportions and has all the characteristics of mass hysteria, now termed moral panic. [2] Society has altered its attitude towards those who claim abuse of various kinds, and it designates them 'victims'. This collective action is driven by hysterical beliefs, unvalidated and untrue.

What passes for 'memory' has become important in legal proceedings. Specialists in mind sciences were not called as experts in sexual abuse matters until the question of validity arose when delayed allegations became widespread.

The 1993 United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals* changed the criteria by which the views of experts are to be admitted as scientific testimony in court. [3]

Daubert was one of a thousand actions, on behalf of infants with abnormalities, against the manufacturer of Bendectin, known in Australia as Debendox, a common morning sickness remedy. The judges allowed evidence from epidemiologists who had found no excess of foetal abnormalities among the progeny of users of the drug. The judges barred from giving evidence to a jury those experts who only pointed out that it was impossible to prove that no causal relationship existed when Bendectin use and foetal abnormality coincided [4].

The unanimous ruling states that the criterion of the scientific status of a proposition is that it can be tested, particularly by way of a logical process called 'falsification'. That is, it must be possible to specify a set of circumstances, the occurrence of which, would demonstrate that the proposition is false.

In effect, *Daubert* replaces the Frye and Bolam tests of 'expert opinion', being that which is 'generally accepted' by a significant number of authorities in the field, with Karl Popper's notion of science as 'knowledge' which has withstood rigorous testing. This sometimes entails a preliminary assessment, a *Daubert* Hearing, to decide if the reasoning or methodology underlying the testimony is scientifically valid.

Daubert has not been adopted in Australia where simple plausibility of expertise has held sway, with *Adamcik* [5] and *Abalos* [6] setting the standard. In each case, the High Court lost an opportunity to comment on the difference between expert evidence within the relevant body of scientific knowledge, and the unsupported opinions of persons who hold

expert status. The High Court confirmed that a judge or jury could choose whichever opinion they preferred.

Scientific method includes putting up a proposition couched in the negative, a null hypothesis, and testing it to see if it can be knocked down. Examples of the null hypothesis are that the prisoner is not guilty and that the unicorn does not exist. In junk science, the null hypothesis is replaced by a positive assertion, one which cannot be proved to be untrue even if it is untrue. One can never prove that a unicorn does not exist, as it might always be just out of sight, so a proposition asserting that a unicorn exists is not a suitable one for a scientific investigation. The presumption of innocence is a null hypothesis, a hallmark of good law as well as good science.

Hypotheses come out of their precursor paradigms. Thomas Kuhn, in his seminal text, *The Structure of Scientific Revolutions* [7] introduced the concept of the paradigm as an organising principle that governs perception itself. The book itself started a revolution in evaluating competing theories and research results. Kuhn tells us that a paradigm is a set of pre-scientific ideas which comprises the tenets of a given society and it consists of an assortment of beliefs which pass for 'common knowledge'. Laws are passed within the taken-for-granted framework of a dominant paradigm. Research and professional activities are predicated upon its assumptions.

What Kuhn called 'normal science' proceeds through a process of paradigm shifts because, as knowledge grows, information which does not fit in with an existing assumption causes the paradigm to become wobbly around the edges. Then a new paradigm, a new set of assumptions, is introduced to accommodate new knowledge gained through observation and scientific research. This causes the community to reject the discredited model and to shift to a new framework. When that occurs, activities which have been conducted on a basis thus shown to be false have to be re-evaluated. When a paradigm shift appears inevitable, some people will immediately structure their thinking to a new one, but others will have difficulty and will retain it until they die out. After Galileo demonstrated that the earth revolved around the sun, a paradigm shift took place while conservative interests in Rome fought a rearguard action.

The increase in child abuse allegations has been causally linked to a paradigmatic set of beliefs around the notion that sexual contact in childhood inevitably causes harm. This is a remnant of Freudian pseudoscience, a once-dominant paradigm which posited that neurotic conditions had sexual origins. The argument further runs to the effect that, by corollary, disturbances in adult life can, and should, be traced back to abuse in the distant past. This notion flourishes among patients whose therapists promote and share such beliefs. Like Freud, they cite their own 'clinical experience', what their patients told them, to justify what they believe.

The revival of the notion that sexual abuse is the cause of later mental disorders has been traced back to a psychiatrist, Cornelia Wilbur, who treated Sybil. [8] Sybil displayed multiple personalities which were presented by Wilbur as caused by sexual abuse perpetrated by Sybil's disturbed mother. After the book was published in 1973, and followed by the film *Sybil*, therapists expected to find horrible sexual abuse in their patients' histories. And they did find what they expected. Sybil herself repudiated the truth of the story related by her therapist. Sybil had been impressed by *The Three Faces of Eve*, and, having been told that the book about her would be more successful if it had a happy ending, she re-integrated all 16 personalities after a therapy which had lasted more than

12 years. Wilbur had treated her unsuccessfully for schizophrenia before experimenting with hypnosis which had generated her accounts of abuse.

During the early development of his talking therapy, Freud wrote that 'almost all' of his adult female patients told him of abuse by their fathers [9]. For a while Freud believed that infantile seduction, in current terminology, being 'sexually abused', was the cause of their ailments, then collectively known as 'hysteria'. His colleagues were appalled at the preposterous nature of this claim. Freud came to recognise his role in generating these fantasies and retracted his theory. A hundred years later, Jeffrey Masson, in his book, *Assault on Truth*, denounced Freud, claiming that he had recanted only to protect his friend Fleiss who was, at that time, the recipient of an embarrassing sexualised transference which, in common language, is a crush experienced by a patient [10].

Ideologically driven feminists now believe Masson is right and that Freud had been wrong not to accept, at face value, the reports of his women patients.

The literature linking reports of 'sexual abuse' to current mental disorder is underpinned by the ideologically driven belief that what a patient calls her 'memory' should not be questioned. It is also backed by the 'Believe the Children' movement which propelled Janet Reno, US Attorney General, into prominence. Ultimately, it was her knowledge that the children associated with David Koresh were being abused that caused her to send the tanks into Waco with the result that both the abusers and the abused were destroyed [11].

Many researchers and clinicians take reports of having been abused at face value. Hundreds of publications are underpinned by two naive assumptions: first, that reports of abuse are the equivalent of instances of abuse and, second, that a cause-and-effect relationship exists between these reported events and later patienthood.

The adherents of this 'recovery' paradigm are called 'true believers'. Surveys indicate that 25% of American doctoral-level therapists, about 62,500, are 'true believers' [12]. The social movement associated with 'recovery' is said to have created, in terms of numbers of people and resources involved, the greatest moral panic since the Salem witch-hunts. Its adherents claim that sexual abuse constitutes a major and ubiquitous evil in society which must, at all costs, be rooted out. Australia is affected to a lesser degree than the United States. They got the Puritans and we got the convicts, and thank God for that!

The recovery paradigm is laid out for the self-help movement in *The Courage to Heal* [13], a million copy self-help best seller by Ellen Bass and Laura Davis, respectively, a journalist and a self-styled 'survivor'. This pop psychology 'survivors' bible' attributes all problems of living and many other forms of disturbance to having been sexually abused. The book advises that, if you cannot remember, it is because you have repressed your memories. You must 'recover' the memories to be 'healed'.

Those who recovered memories in therapy are a tiny percentage of those who believe that they have been abused. Many more identify themselves as victims and seek out counsellors to enable them to remember and be healed. No one denies that false memories are sometimes generated, but true believers say that they are generated only by unethical or bad therapists. The attractions of the recovery paradigm are its ability to rationalise away all doubts, its explanatory power and its jargon: 'victim', 'repression', 'remembering', 'disclosure', 'perpetrator', 'healing', 'survivor', and 'revictimisation'.

The recovery movement's seminal texts are Judith Herman's *Trauma and Recovery* [14], Lenore Terr's dramatic *Unchained Memories* [15], and Renee Fredrickson's *Repressed Memories: A Journey into Recovery from Sexual Abuse* [16]. Herman, Terr, and van der Kolk [17] believe that memories of child sexual abuse (CSA) are traumatic memories and that these are laid down in the brain through a unique process that does not apply to other forms of trauma. In Terr's view, trauma sets up entirely new rules for memory. In their view, a child represses, or involuntarily forces out of awareness, each instance of sexual abuse until it is recalled in therapy. They expect that the recall during therapy will lead to recovery from a condition which they term Complex Posttraumatic Stress Disorder (PTSD).

Orthodox psychiatrists call it Borderline Personality Disorder (BPD). PTSD and BPD have some clinical features in common. Both are diagnosed by reference to symptom lists constructed by committees of psychiatrists. Because some symptoms are common to both, true believers argue that they must have a common cause, psychic trauma. The patient does not know about it because it is repressed, hence inaccessible to normal everyday recalling. Therapy will be long and costly. The emergence of repressed material is the expected by-product of therapy. Therefore that which emerges in therapy has to be repressed material.

My Medline search reveals over 100 studies of personality-disordered subjects reporting CSA [18]. Most researchers have concluded that CSA is the cause of borderline personality disorder. More significant to the social scientist, however, is my observation that the rate of reporting of having been sexually abused within such clinical samples has risen from 10% in the early 1980s to 90% twenty years later.

The recovery paradigm's critics, the sceptics, have repeatedly demonstrated it to be more than wobbly around the edges. Loftus [19], Ofshe [20], Crews [21] and Pendergrast [22] all call its underlying assumptions into question. Our compatriots, Ferguson and Mullen, reviewed the literature to publish *Childhood Sexual Abuse: an Evidence-Based Perspective*, a very slim volume [23].

Richard Ofshe was called in to assist the prosecutor in a famous case concerning Richard Ingram where, in a small religion-obsessed town in the United States, two girls charged their father, his friends and public officials with years of orgies and satanic ritual abuse [24]. Ofshe found that he was able to suggest fabricated events and that the accused father endorsed Ofshe's fabrications as what he 'would have done.' The children had been doing the same at the suggestion of various police and clergy. Their mother believed the accusations until they included her as well. Satanic ritual abuse has never been substantiated by physical evidence and its existence is denied by the FBI and the NSW Royal Commission into the Police.

The sceptics argue that conclusions drawn from 'clinical experience' are biased, contaminated, dangerous, unvalidated and unscientific. They argue that, before anyone can draw conclusions about the effects of abuse, the question of whether or not it really occurred must first be answered. Sceptical critics point out that no research has linked the development of abnormal personalities solely to CSA. No researcher has validated patients' reports of having been abused. Some claim to have done so, but they have done it, as lawyers would say, by eliciting further particulars from the dubious complainants themselves, and have called it 'corroboration'. This is not corroboration, not in law and not in science.

No research has examined the credibility of complainants. A huge literature reports that borderline and related personality-disordered persons misinterpret or misremember social interactions, misreport and distort the past, lie manipulatively and convincingly, and voluntarily enter into destructive sexual relationships even at a young age. Up to 90% of borderlines volunteer and insist that they have been 'abused' and, given the opportunity, they will, like Erika Ingram, go into a dissociated state of consciousness and relate stereotypical events in detail and technicolour.

Critics point out that the term 'sexual abuse' is presumptive and ill-defined, involving activities from genital display through fondling to brutal rape, and incorporates retrospective complaints about consensual but illegal contact. Childhood can encompass up to 18 years. This all confounds meaningful research [25]. Even if it were the case that CSA, however it be defined, had occurred in some or many of these people, causal links to patienthood would be hard to establish given the confounding variables of upbringing and genetics [26].

Anorexia, bulimia and chronic pain states are currently being associated in the professional literature with sexual abuse and incest. But anorexia is most prevalent in educated families where parents would be devastated to learn that such allegations made by their children could be taken seriously without further investigation. Even the bible of the American Psychiatric Association, the Diagnostic and Statistical Manual, known as the DSM, fails to distinguish in its text between the idiom of 'having' and 'reporting' a history of sexual abuse. Courts have acknowledged the responsibility of therapists to third parties when they operate on unsupported beliefs and blame parents for their children's difficulties [27].

In order to explain the well-documented phenomenon of having developed 'memories' of abuse and later repudiating them as having been false and instilled by therapists, Professor Roland Summit constructed the 'Child Sexual Abuse Accommodation Syndrome' (CSAAS). In this model, threats have ensured that secrecy be maintained about the sexual abuse, and this results in emotional helplessness and inability to resist or complain, hence, 'accommodation'. Then there is a later, conflicted and unconvincing disclosure of the abuse, followed by retraction, according to Summit, in an attempt to restore order to the family structure which the disclosure threatens to destroy [28]. This 'syndrome' maintains the truth status of repudiated beliefs but there is no way that the child can say that the abuse never occurred.

Karl Popper would dismiss CSAAS as a hypothesis incapable of being falsified, an example of scientific nonsense. The controversy is played out in the New York Review of Books [29], in learned texts, legal and clinical journals, on the Internet and, unfortunately, in court rooms.

There is consensus that those who seek to 'recover' from CSA are afflicted with borderline and related psychopathologies. It is the relationship between these pathologies and CSA that is at issue, and this must be resolved before a testable hypothesis can be generated. True believers assert that borderline psychopathology is a posttraumatic state caused by being sexually abused in childhood. The sceptics observe that the making of delayed allegations of sexual and other forms of maltreatment is a manifestation of borderline states where perceptual distortions of past and present situations are demonstrable and prominent.

The recovery paradigm holds the moral high ground on shaky foundations. It contains a set of discredited assumptions all of which still underpin the Criminal Law, Victims

Compensation, judicial investigations and procedures, as well as research and therapeutic activities. Resource allocation follows zealously held beliefs and prejudices and is influenced by a huge industry of activists, investigators, therapists and lawyers. Estimates of CSA in the histories of women range from 3% to 63% with much confusion between incidence and prevalence [30]. Variance depends on how CSA is defined, the age group specified, how questions are framed, and how the sample is selected. A prevalence of 3% to 5% means that one child out of each class of thirty might be abused at some time, and the number would include street kids, runaways who enter into catamite relationships, and young boys who father children. At this minimal estimate, childhood sexual activity is the tip of another massive social problem.

Research suggests that sexual abuse takes place in disturbed families in conjunction with other abuse and neglect, comprising 3% of the abuse-neglect spectrum. However, current statistics from the NSW Department of Community Services (DOCS) place CSA at 2,640 'substantiated' cases against only 7,000 for all emotional and physical abuse and neglect cases [31]. Without physical evidence or a confession, the best that such so-called substantiation can be is an assertion. These statistics have two serious consequences: if it is the case that a false report is made and accepted, then untold damage is done by all the interventions conducted within a framework that simply assumes its truth. If CSA is being targeted with undue attention, then it is at the cost of taking resources from other, more obvious, child abuse and neglect which often have fatal consequences.

So how might this confusion arise? 129 women with authenticated, documented histories from fondling to forced sexual intercourse dating from the early 1970s were interviewed by Williams 17 years after the abuse. 38% did not report the abuse but two thirds of them said that they knew something, but did not recall the index event. They would be vulnerable to plausible misinformation and perpetrator substitution [32]. Of the total sample, 12% insisted that they were never sexually abused in childhood. Extrapolating suggests the possibility that 12% to 38% of reports which should be positive are false negatives.

Sexual abuse allegations in borderline personality disorder are well-researched. Psychotic, antisocial, histrionic, schizotypal and narcissistic personality-disordered individuals also indulge in this behaviour. If that personality-disordered sector of the population, say 8%, is reporting sexual abuse falsely, and the sampled population is large, then probability analysis indicates that any one report is many times more likely to be false than true.

Borderline and Histrionic personalities comprise 3-4% of the population and they provide the majority of the reports that I see. Some of them have had their day in court. A huge Georgian study, currently on the true believers' modern equivalent of the Index Librorum Prohibitorum, reported that 55% of female children under 14 had sexual experiences, mostly trivial ones, and two thirds were voluntary participants, most having initiated the experience. A similar proportion had found them pleasant or better, 28% of children found their childhood experiences harmful, and 16% found them abusive. The latter were mostly the ones where it was forced and involved penetration [33]. Incest, defined by a relationship too close for marriage, involved less than 1% and was confined to isolated rural outposts.

The clinical evidence suggests that there are two distinct populations which are totally different. Those who promote themselves as 'abused' are the personality-disordered and, as such, they do not represent the spectrum of normal women who may have been inappropriately handled. Women who have been raped or sexually traumatised want to get

on with their lives and readily recognise the personality-disordered who want to make a fetish of their miseries. They decline to continue in group therapy with them.

Sexualised activities between children and older persons are very common. Most are trivial and forgotten but it is the personality-disordered who provide the majority of reports because, by blaming some evil in their childhood, they find a justifying cause for their predicaments. A similar overlap of events was noted in the nineteenth century between persons who had masturbated, now also known to be a majority, and the mentally ill. Psychiatric case histories of the time reflected a paradigmatic belief that masturbation caused insanity.

The epidemic of remembering abuse has provided an impetus for research into the science of memory. Elizabeth Loftus has 200 memory experiments to her credit, all of which demonstrate that memory is fragile and unreliable. She denies the need for 'new rules,' pointing out that children who witness rape, homicide and suicide do not suffer from traumatic amnesia. Loftus writes: "Human remembering does not work like a videotape recorder or a movie camera. When a person wants to remember something, he or she does not simply pluck a whole memory intact out of a 'memory store'. The memory is constructed from stored and available bits of information; any gaps in the information are filled in unconsciously by inferences. When the fragments are integrated and make sense, they form what we call a memory."

Loftus repeatedly demonstrates how easy it is to trigger false recall in normal volunteers rendering them incapable of differentiating confirmed events of their childhood from experimentally implanted false narratives [34]. She argues that no experiment can be devised that will differentiate repression, a phenomenon for which there is no evidence, from simple forgetting which is common.

Loftus tells a personal story. On her 44th birthday, at a family gathering, an uncle informed her that she had been the one to discover her dead mother's body when she was 14. Until then, she remembered little about the death itself. Suddenly the memories began to drift back, clear and vivid. A few days later her brother called to say her uncle realised he had made a mistake, that her aunt had found the body, not Loftus.

"Therefore, those few days of 'recovered' memories were utterly false," she wrote. "My own experiment had inadvertently been performed on me! I was left with a sense of wonder at the inherent credulity of even my sceptical mind." [35]

Studies of hypnotism, borderline states, trance-mediumship, multiple personality, hysteria, brain disorders, epilepsy and psychosis reveal that memory associated with these states is qualitatively different from that found in laboratory studies of healthy individuals [36].

The characteristics of memory and recall are not common knowledge. Commonplace but mistaken beliefs underpin the statements that false memory victims provide with great detail relating to action, costume, climate and furniture. The level of detail is well beyond normal memory. The form of the allegation, known as the 'Hollywood presentation', is that of a film or video, and this is consistent with mistaken beliefs of the accuser or her assisting scribe.

Recovered memory is claimed in jurisdictions where the statute of limitations can be overcome by claiming delayed awareness, but denied in those states where it is not admitted as evidence. It can be used to explain a family that was happy before the allegation surfaced. But is it memory at all? The multiple phenomena covered by the term

'memory' are part of the diagnostic repertoire of psychiatrists trained in the identification and diagnosis of false belief states.

The conflation of mental content and psychiatric phenomenology with 'memory' originated in American folk psychology was taken up by professionals who had little if any experience of working with the mentally ill and mentally disordered. Psychologists are not universally trained to recognise psychopathology. The focus on the notion of memory has hijacked the debate into arguing about the truth or falsehood of mental content. For example, the False Memory Syndrome Foundation in the USA has limited its language and thinking to the 'memory' model and seems to be locked into it [37]. I suggest the Abigail Syndrome, named after the leading character Arthur Miller's updated screen play for *The Crucible*, described as 'a timeless tale of truth on trial' [38].

Everything we say is prefixed with a silent "I know" or "I remember". 'Pseudomemories' known to psychiatry include beliefs based on information from another person, scenarios borrowed from television, films and books, the products of guided imagining, delusions, dreams and nightmares, elaborations engendered by therapeutic processes or by hypnosis or trance in a process known as 'hypnotic pseudomemory production', inserted memories, mystical experiences, oedipal fantasies, plausible explanations, reconstructed scenarios and unverified conclusions achieved by short-circuiting in panic situations. A thorough psychiatric examination also searches for indoctrination suggestion and fantasy.

Courts are not in a position to recognise what the psychiatrist sees as the products of dissociation and manifest hysteria. The court sees a well-rehearsed performance. The psychiatrist observes the alteration in consciousness, the change to a different voice, and trance-like behaviour associated with detailed, but false, 'remembering.'

The layman rarely recognises the pervasive disorder of perception of the personality-disordered, being easily misled by needy women who claim to have been mistreated who appeal to protective instincts. A disorder of inner life and perception is involved in the formation of sexual and sado-masochistic victim fantasies which they act out as they describe them.

Hysterical beliefs, shared or singular, are spread by group contagion. This is the explanation for the epidemic of preposterous satanic abuse allegations which has spread along with films whose scenarios are standardised myths [39]. Sexualised dreams get a life of their own when they are supported by sexual abuse counsellors, police or prosecutors. Disconnected events with no lead-up are believed with delusional fervour, even in the face of contradictory evidence. Some can be sourced to a true believer therapist, to reading a self-help book such as *The Courage to Heal*, others to a dominant partner in a psychotic folie à deux, or to a localised outbreak of hysteria in which information has been shared with reinforcing and authoritative agents.

The form and context of the notification should be available for expert inspection before they have been contaminated. Form includes the genesis, growth and mode of disclosure of the allegations. Context extends to the predicaments, characteristics and motives of all involved. Beliefs are even more liable than tissue samples to become contaminated in their travels from a crime scene to many places and back to court. They demand stringent precautions to avoid error.

Pseudologia fantastica, the pathological recounting of tall tales, often passes for 'memory' as in the Ingram case [40]. A pseudologue talks like James Ellroy writes, creating an impression of intimate knowledge of events of which he or she cannot possibly have had

personal experience. Linguistic analysis reveals the use of the past conditional construction concerning what the offender 'would have done'. This betrays the coincident re-construction of a scenario. Lawyers do not recognise confabulations of childhood, intellectual disability and brain damage, but nurses know about them. This population is prone to innocent lying and misinterpretation. Perpetrator substitution is also reported, but the High Court has rejected it once as a defence [41]. Child welfare workers are no longer allowed not to pass on reports, and police have no understanding at all of these pitfalls.

Memories emerge in response to a family fight, called the Parental Alienation Syndrome [42], a compensation payment, a conversation or training in child abuse. Most people do not routinely distinguish between information which they have obtained from observation, and that gleaned from other sources. A therapeutic support group discussing rumours and hearsay, without malice, can both promote and enhance entirely false beliefs.

The ability to recognise a delusion is the province of an expert, but non-bizarre delusional beliefs are routinely accepted as true by laymen. Delusional constructions of situations, confabulations and perceptual disturbances are associated with personality disorders.

Delusions that manifest in personality disorders can be transient and elusive, or persistent if nourished. Some emerge from brief psychotic episodes which have passed unremarked and are experienced as reality by those afflicted with them.

Most of the persons suddenly claiming to have been abused would attract a diagnosis of 'factitious disorder with psychological symptoms' over and above the histrionic and borderline personality disorder diagnosis. Munchausen, and Munchausen by Proxy, perpetrators want a ticket for endless attention and ply the listener with accounts of pity-evoking factitious abuse, bereavement and disease. Mothers implore the child to tell 'the truth', and advance a litany of horror stories to mask their own activities. Over long periods they elaborate and change allegations, incorporating borrowed scenarios with innovations and inconsistencies.

One victim-accuser had undergone sexual abuse therapy with a counsellor who believed her false account that the accuser's father had been convicted. She had been treated on that false basis. She received forty thousand dollars from the Victims Compensation Tribunal before entering the witness box where she lied about having received the money. The jury convicted, and the Court of Appeal and High Court allowed the conviction to stand.

Young, single-degree graduates with as little as ten days of in-service training, work as sexual abuse counsellors in Community Health Centres. This lends them the authority of the government and high status as legitimators. They have no credentials in the diagnosis of mental disorders nor in current research on memory, nor do they see it as their role to investigate the validity of claims. My patients tell me in jargon that counsellors have helped them remember so much more and how they have helped them prepare their statements for the courts. Their statements leave me in no doubt of the extent to which The Courage to Heal and its associated Workbook is used as a template, and that unacknowledged coaching takes place during counselling and report preparation. The professional's use of such books in the USA is considered malpractice.

The defence is to be refused access to reports in which the evidentiary gold dust regarding 'memory' is located [43]. Documents from sex abuse counselling services are not available for inspection by the defence, as this has been made difficult by new legislation [44].

Enhancing uncertain memories is malpractice which almost guarantees deregistration in the United States but Australian courts allow enhanced memories into evidence. This material, briefly made available by a decision of the NSW Court of Criminal Appeal [45], can provide, for those who know how to interpret it, evidence of escalation of claims, impossible scenarios, sudden and bizarre onset of 'memories' with atypical characteristics and impossibly detailed recall. This information enables the expert to understand the social context and mental phenomena that were involved in the generation and elaboration of the complaint.

Therapies and substantiation procedures which lack intellectual rigour might cost governments millions of dollars in compensation, claimed by the victims of accusers who should have been recognised as mentally disordered.

Therapists of all kinds have become the targets of law suits from convicted and defamed third parties. 26 Hypnotically and therapeutically enhanced memories are not reliable. The leaders of the recovery movement who helped their patients win five figure sums after recovering memories are now settling claims against themselves for millions of dollars [46].

Renee Fredrickson was charged with malpractice and lost her licence. Lenore Terr was sued over a repressed memory case where sexual abuse and murder were falsely alleged [47]. She argued successfully that expert witnesses have privilege which confers immunity from liability for civil damages for giving perjured testimony at trial and from conspiring with others to do so [48]. Insurers have paid out millions on behalf of psychiatrists who did memory work.

When it seems more likely than not that an accuser would be believed, an allegation of child abuse becomes a powerful weapon in the hands of the malicious, angry, vengeful, spiteful or greedy. False allegations emerge in up to 8% of litigated custody cases in the USA. Personality disorder can be diagnosed in up to 80% of parents who raise such allegations, about six times the rate one would expect to see in the general population and their disorders go unrecognised [49].

Studies of sexually abused children find that between 25% and 49% suffer no recognisable mental effects even allowing for dysfunctional family lives. No pathologist would ever offer a blood test which produced up to 49% false negatives, and substantially more than that of false positives. No court should admit that quality of evidence.

Deductions from the behaviour still underpin investigations. Many children have emotional disturbances especially while their parents are at war, but diagnosis of sexual abuse from behaviour, the anal reflex, or syndrome evidence such as the Abused Child Syndrome and the Child Sexual Abuse Accommodation Syndrome should have no value in a court room.

A review of doctors trying to differentiate, by inspection, penetrated from not penetrated small children yielded humbling results in the hands of experts, with an error rate of 75% false positives [50].

If all these so-called 'signs' of having been abused do not pass scientific scrutiny, are they not just witch's marks, and their proclamation today's Malleus Maleficarum? And should their use by investigators not be discouraged by having the courts soundly reject them? Denial by an accused is common. Bewilderment is different from denial and may result in soul-searching and false confession: "My daughter would not lie. If she says this, I must have done something." Such confessions are typically retracted.

Well-documented instances of false confession have occurred during police interrogations and fundamentalist prayer meetings. Religious hysteria may accompany sexual hysteria. A young woman, after her father had visited to return her car, suddenly became flooded by thoughts of repeated rape by her father in her cradle, recalling a period known to be subject to infantile amnesia. She was taken screaming to a psychiatric unit where 'delayed posttraumatic stress disorder' was diagnosed and the psychotic break in this severely borderline woman evaded discovery until she made identical allegations about the father of her own infant daughter some years later.

A young woman told me that her mother and father tied her to a four poster bed and regularly raped her with a double edged knife. I found it implausible. No doctor had ever been required to attend. To explain that, she alleged that her bewildered mother colluded. No one else knew, not her friends, her doctor, nor her school. The corroborating 'medical' evidence cited in this case was that the woman had refused to allow vaginal examination. This was cited as evidence of her having been sexually assaulted in early childhood. The jury accepted her story and her father went to jail for 11 years, while her mother was also punished. There was heavy media involvement in the case, signalling hysterical display, and she became a cause célèbre of the local feminist lesbian group and received tens of thousands of dollars in compensation, thus lending further credence to her story.

More commonly, after having used up all of his resources defending a set of preposterous allegations, the accused is offered an opportunity to make a plea of guilty to fewer or lesser charges. Rather than risk an adverse finding by a jury, he takes the option. In my view, prosecutors should proceed with all of the allegations, and in their original form. An amended charge constitutes, to my layman's mind, de facto plea bargaining and evidence tampering. Pragmatic defence lawyers weigh up the odds and do not agree with me.

Common knowledge on which juries rely in making their decisions depends on untested beliefs concerning the reliability of what people say when they are not obviously psychotic, confused or deluded. The odds are stacked against an accused person. The identity of a complainant cannot be reported and her prior sexual history, including similar previous allegations she has falsely made, cannot be raised in NSW courts where judicial discretion to admit such evidence has been removed, even when the accused has his freedom at stake.

For forensic purposes, it is necessary to determine if a complainant is reliable. Borderline psychopathology was formerly called 'malignant hysteria' and it can be diagnosed, often without traversing the matter before the court, as is already being done in examinations for fitness to plead. If there is a variety of psychological explanations for a person unwittingly telling untruths then the jury should certainly be told that the teller believes that he or she is telling the truth but is subject to a demonstrable disorder of perception, hence is 'an honest liar'. Out of this range of false beliefs, only 'lies for profit' are not part of the spectrum of psychiatric diagnosis.

A recent case in the High Court allows for a situation where an expert can bring a complainant's reliability to the attention of a jury if the condition that causes it is beyond common knowledge [51]. This case seems to apply only to those cases where a psychiatric history is available and known. In most cases a psychiatrist is able to make a diagnosis of borderline personality disorder on the documents, and on the report of persons close to the complainant, and from the scars of delicate cutting on the accuser's

arms. The immediate problem is getting the expert witness onto the stand when the expert has something scientific to say.

With complete access to the case materials and free access to the prosecution's witnesses, the expert examiner can reveal a fact pattern which may not be readily perceived by the defence [52]. If a prosecutor hears the incredible, or can expect expert evidence to be led on a complainant's or accuser's reliability, I submit that there should be consultation with a psychiatrist before deciding whether a case should be brought to court. The strong correlation of borderline psychopathology and false allegations suggests that it is negligent of the prosecution not to have the accuser examined.

In recent years barristers have noticed an increasing tendency for the child protection services to allow sexual cases to proceed, regardless of the quality of the evidence. At the same time both magistrates and judges are reluctant to use their powers to dismiss unsound prosecutions or to halt trials that are an abuse of justice. The terror that an innocent person might be found guilty, which has traditionally and rightly been the foundation of our justice system, has been replaced by the terror that a guilty man might go free.

There is no longer any disinterested complainant. They can all get money from a Victims' Tribunal, probably more if prosecution is successful. I do not think anyone has thought through the long term effects of compensating people for little more than making allegations which a credulous professional has legitimated. In a moral panic, hysterical beliefs short-circuit reasoning and an illusory paradigm governs perception. Judges, juries, social workers are all members of the same community. All reverberate with its beliefs, are prone to adopt the newly imposed values and, reluctantly, to suppress their own common sense.

The legislators of today should consider that the witch-hunts of the Middle Ages ceased when the accusers stopped being rewarded with half the convicted witch's property. A woman's privacy has been given a higher value than a man's freedom, higher than justice itself. The Daubert standard of expert, scientific knowledge can be used to keep experts off the stand if they cannot show scientific standards of validity for what they say. A paradigm shift has already taken place in what is to constitute expert evidence, irrespective of whether Australia adopts this standard in legislation. A new generation of Daubert-competent scientists, lawyers and tribunals is now learning how to judge science.

The United States was forced to adopt this standard to put an end to speculative litigation in which one side or the other had to be utterly and completely wrong. Typically, the plaintiff was poor and had nothing to lose, while the defendant suffered the disadvantage of having resources and a reputation to defend. This had resulted in a series of shakedowns as it was cheaper to buy off a suit by offering settlement than to pursue the uncertainty of a jury trial, especially when the law took an anarchic view of expert opinion.

If the Daubert standard renders pseudoscience inadmissible in the court room, then the rest of the community can be encouraged to follow this evidence-based standard in social practices.

An enlightened review of the convicted would lead to the release of a number of prisoners and restore some ruined lives and reputations. I watched helplessly as a diagnosed pseudologue alleged she had indulged in sex during sessions with her doctor. A psychiatrist and a surgeon on the Medical Tribunal warned that the complainant was a diagnosed borderline and not reliable and, indeed, she had been caught telling lies, but

she was believed by the lay member and the judge who used his casting vote to deregister my colleague.

- [1] Gardner RA.: Protocols for the Sex Abuse Evaluation, Creative Therapeutics, New Jersey: 1995.
- [2] Goode E. & Ben-Yahuda N: Moral Panics, Oxford & Cambridge: Blackwell, 1994.
- [3] Daubert v. Merrell Dow Pharmaceuticals Inc. 113 Supreme Court of the USA, 2786, June 28, 1993.
- [4] Foster K.R. & Huber P.W: Judging Science: Scientific Knowledge and the Federal Courts, Cambridge Massachusetts: The MIT Press, 1997.
- [5] Commissioner for Government Transport v. Adamcik (1961) 106 CLR 292.
- [6] Abalos v. Australian Postal Commission (1990) 171 CLR 167 F.C. 90/44.
- [7] Kuhn T.S: The Structure of Scientific Revolutions. The Chicago University Press, 1962, 1970.
- [8] Schreiber F: Sybil. Chicago: Henry Regnery Co., 1973.
- [9] Schimek J.G: Fact and Fantasy in the Seduction Theory: A Historical Review, Journal of the American Psychoanalytic Association, 1987; 35:937-965.
- [10] Masson J.M: Assault on Truth: Freud's Suppression of the Seduction Theory. Penguin Books, 1984.
- [11] Boyer P.J: Children of Waco. New Yorker 1995, May 15:37-45.
- [12] Paradise J: Predictive accuracy and the diagnosis of sexual abuse: a big issue about a little tissue. Child Abuse and Neglect 1989; (13):169-176.
- [13] Bass E. & Davis L: The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse. New York: Harper & Row, 1988.
- [14] Herman J: Trauma and Recovery. New York: Basic Books, 1992.
- [15] Terr L.C.. Unchained Memories. New York: HarperCollins, 1994.
- [16] Fredrickson R: Repressed Memories: A Journey into Recovery from Sexual Abuse. New York: Simon & Shuster, 1992.
- [17] van der Kolk B.A, & Kadish W: Amnesia, Dissociation, and the Return of the Repressed, in van der Kolk B.A. (Ed.), Psychological Trauma, American Psychiatric Press, Inc., Washington DC, 1987.
- [18] Medline searches 1980 to 1999 using 'sexual abuse' and 'borderline personality disorder' as keywords.
- [19] Loftus E., Creating False Memories, Scientific American 1997; 2(77(3)):50-55.
- [20] Ofshe R. & Watters E: Making Monsters, Berkeley, Los Angeles: University of California Press, 1994.
- [21] Crews F: The Memory Wars: Freud's Legacy in Dispute, New York: New York Review of Books, 1995.
- [22] Pendergrast M: Victims of Memory: Sex Abuse Allegations and Shattered Lives, Hinesberg Vermont: Upper Access, 1995.
- [23] Ferguson D.M. & Mullen P.E: Childhood Sexual Abuse: an Evidence-Based Perspective, Thousand Oaks: Sage Publications Inc., 1999; vol 40.
- [24] Wright L: Remembering Satan, New York: Alfred A Knopf, 1994.
- [25] Pope H.G.J. & Hudson J.I: Can Memories of Childhood Sexual Abuse be Repressed?, Psychological Medicine 1995; 25(1):121-126.
- [26] Rind B., Thomovitch P. & Bauserman R: A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse, Psychological Bulletin 1998; 124(1):22-53.
- [27] Johnston M: Spectral Evidence: the Ramona Case: Incest, Memory and Truth on Trial in the Napa Valley, Boston New York: Houghton Mifflin Company, 1997.
- [28] Summit R.C: The Child Sexual Abuse Accommodation Syndrome, Child Abuse & Neglect 1983; 7(177):181-88.

- [29] Crews F: *The Revenge of the Repressed*, The New York Review of Books 1994, November, December.
- [30] Ferguson D.M. & Mullen P.E: *Childhood Sexual Abuse: An Evidence-Based Perspective*, Thousand Oaks: Sage Publications Inc., 1999; vol. 40.
- [31] NSW Department of Community Services, Annual Report 1999. <http://www.community.nsw.gov.au>
- [32] Williams L: Recall of Childhood Trauma: a Prospective Study of Women's Memories of Child Sexual Abuse, *Journal of Consulting and Clinical Psychology*, 1992; 62:1167-1176.
- [33] Kilpatrick A: *Long-Range Effects of Child and Adolescent Sexual Experiences: Myths, Mores, Menace*, Hillsdale New Jersey: Lawrence Erlbaum Associates, 1992.
- [34] Loftus E: Creating False Memories, *Scientific American* 1997; 2(77(3)):50-55.
- [35] Neimark J: The Diva of Disclosure, *Memory Researcher: Elizabeth Loftus*, *Psychology Today*, 1996; 29 (1 January):48.
- [36] Erdelyi M.H: *The Recovery of Unconscious Memories: Hyperamnesia and Reminiscence*, Chicago London: The University of Chicago Press, 1996.
- [37] Borch-Jacobson M., *Sybil - The Making of a Disease: An Interview with Herbert Spiegel*, The New York Review of Books, 24 April 1997.
- [38] Miller A.: *The Crucible Screenplay* 1997. Twentieth Century Fox.
- [39] Smelser N.J: *Theory of Collective Behaviour*, London: Routledge & Kegan Paul, 1970.
- [40] King B. & Ford C: Pseudologia fantastica, [Review]. *Acta Psychiatrica Scandinavica*. January 1988; 77(1):1-6.
- [41] *HG v. The Queen*. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne JJ. High Court of Australia: S67/1998, 1999.
- [42] Gardner R. *The Parental Alienation Syndrome: A guide for Legal and Medical Professionals*. Cresskill New Jersey: Creative Therapeutics Inc, 1995
- [43] NSW Evidence Act
- [44] *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999* NSW Government Printer
- [45] *R v. Young*. New South Wales Court of Criminal Appeal: 60522/98. 1999.
- [46] Anonymous: There'll be the Devil to Pay: The Future of America's Recovery Movement is at Stake: \$35M Lawsuit, *The Independent*, October 17, 1994.
- [47] Press Release, :19 June 1998, Barden & Associates. USA
- [48] Ruling Protects 2 Psychiatrists from Lawsuit, *San Francisco Chronicle*, Feb. 3, 2000, p.A20.
- [49] Wakefield H. & Underwager R: Personality Characteristics of Parents Making False Accusations of Sexual Abuse in Custody Disputes, *Institute for Psychological Therapies Journal*, 1990. http://www.ipt-forensics.com/journal/volume2/j2_3_1.htm
- [50] Underwager R.C. & Wakefield H: Oklahoma Seminar on Child Abuse, *IPT Journal*. 1995. <http://www.ipt-forensics.com/library>
- [51] *Farrell v. The Queen*. High Court of Australia: August 1998, HCA 50.
- [52] Ofshe R: Report: The Ingram Case, Washington: IngramOrg@aol.com, April 2, 1989.

The Author: Dr Yolande Lucire PhD MBBS DPM FRANZCP is a medical anthropologist and a forensic psychiatrist in private practice. She researches and writes about hysteria and moral panics.

The Occasion: Plenary session of the New South Wales Chapter of the Academy held on 9th February, 2000 to discuss Junk Science and the Epidemic of Sexual Abuse.