Rehabilitation of Children's Evidence in Child Sexual Assault Cases

PAMELA BUDAI*

The credibility of child victims in sexual assault trials is often questioned, because of the nature of the crime itself. Their credibility may be rehabilitated by evidence showing that adults should not necessarily expect children to react to sexual abuse in the same way as an adult would react to a crime like burglary. Some overseas jurisdictions have allowed such evidence, but Australian courts have not followed these cases. In this article, four relevant Australian decisions, and the New Zealand position, are discussed.

Abuse of children usually involves acts which are not as physically traumatic as sexual intercourse. Parkinson,[1] using a survey by Goldman and Goldman,[2] describes the types of activities that may occur when a child is sexually abused. These include sexual hugging and fondling, exposing genitals, touching genitals and engaging in sexual intercourse. There are often problems proving that abuse has occurred. Usually there are no witnesses, and the victim may be as young as three or four years old. A medical examination will not give evidence that abuse has occurred in most cases.[3] Damage to the genitals may heal quickly, leaving no trace if the child is not taken soon afterwards to a doctor. It is difficult for a psychiatrist or psychologist to diagnose with complete certainty that a child has been sexually abused, because there is no checklist of symptoms as there is, for example, with schizophrenia.

Conviction of an accused person requires proof beyond a reasonable doubt. If the only person giving evidence is a child, a jury may consider the possibility that the allegation is being fabricated by the child. Some lawyers and mental health professionals see this possibility as a very real danger.[4] Whenever a child's evidence is uncorroborated, the accused can raise the argument that the allegation is false by attacking the child's credibility. This is all too easy to do because of the way in which children typically disclose the abuse.

Sorensen and Snow analysed 116 confirmed cases of child abuse and identified how disclosure took place.[5] Seventy-two per cent of the children initially denied that abuse had occurred. The next phase of the disclosure process for 78 per cent of children involved tentative (uncertain and vacillating) acknowledgment of what had happened, before the

* SJD student, Faculty of Law, University of Sydney.

1 Parkinson, P, "Child Sexual Abuse Allegations in the Family Court" (1990) 4 *AJFL* 60.

2 Goldman, R and Goldman, J, "The Prevalence and Nature of Child Sexual Abuse in Australia" (1988) 9 *A J Sex Marriage and the Family* 94.

3 Myers, J, Bays, J, Becker, J, Berliner, L, Corwin, D and Saywitz, K, "Expert Testimony in Child Sexual Abuse Litigation" (1989) 68 *Nebraska LR* 1 at 1.

4 Byrne, K, "Allegations of Child Sexual Abuse and the Expert Witness: Common Problems — Part I" (1991) 6 *Australian Family Lawyer* 4 at 14; Byrne, K, "Allegations of Child Sexual Abuse and the Expert Witness: Common Problems — Part II" (1991) 7 *Australian Family Lawyer* 1 at 5; Coleman, L and Clancy, P, "False Allegations of Child Sexual Abuse" (1990) Fall *Crim Just* 14.

5 Sorensen, T and Snow, B, "How Children Tell: The Process of Disclosure in Child Sexual Abuse" (1991) LXX *Child Welfare* 3.

stage of active disclosure (details of the occurrence). At some stage, 22 per cent of the children retracted, but most of these reaffirmed the allegations. Only a minority of 11 per cent actively disclosed at the initial interview. This account of disclosure is consistent with findings cited by Salter.[6]

Where the defence attacks the child's credibility because of the manner of disclosure, the prosecution may wish to use expert evidence to rehabilitate credibility. This has been done many times in overseas jurisdictions, but there are only four relevant Australian appellate decisions.

Overseas jurisdictions

There have been relevant decisions in New Zealand, the United States and Canada. The publication in 1983 of an article by Summit[7] describing the Child Sexual Abuse Accommodation Syndrome led to its use by prosecutors in the United States. The article explains aspects of the behaviour of sexually abused children which appear to be the opposite of behaviour expected of these children, for example, retractions of allegations of abuse. The purpose of the article was to enable "an empathic clinician ... [to provide] vital credibility and endorsement for the child". Since then, some cases have involved the argument that if a child shows behaviour as described by Summit, this is proof that the child has been sexually abused. This is a misuse of the syndrome. The *Diagnostic and Statistical Manual* of the American Psychiatric Association (*DSM III*)[8] does not recognise it as a diagnostic tool. Despite this, Myers et al[9] cite a decision in the United States where syndrome testimony was allowed to prove that abuse had occurred,[10] and Mason[11] found three such decisions at appellate level (for example, *People v Luna*[12]).

The problem arises because there is no checklist of behaviours which proves that a child has been sexually abused. There are, however, many documented effects of abuse. Oates quotes studies showing psychological symptoms such as nightmares, sadness, anxiety and inappropriate sexual behaviour (for example, open masturbation and frequent exposure of genitals). Long-term effects found were self-destructive behaviour, drug and alcohol abuse, depression and anxiety attacks.[13] These behaviours can also be the result of difficulties other than sexual abuse, and it is not possible to say that if a child shows self-destructive behaviour, for example, this is due to abuse.

This situation arose in the New Zealand case *R v Accused*.[14] A school counsellor gave evidence that the behaviour of the victim was consistent with having been sexually abused, but the Court of Appeal said that the evidence was inadmissible because it was not proved

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6 Salter, A, "Response to the 'Abuse of the Child Sexual Abuse Accommodation Syndrome'" (1992) 1 *J Child Sexual Abuse* 173.

7 Summit, R, "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 *Child Abuse and Neglect* 177.

8 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders Third Edition Revised (DSM-III-R)* (1987) American Psychiatric Association, Washington DC.

9 Above n3.

10 *Keri v State* 179 Ga App 664 (1986).

11 Mason, M, "A judicial dilemma: expert witness testimony in child sex abuse cases" (1991) Fall *J Psychiatry and Law* 185.

12 204 Cal App 3d 726 (1988).

13 Oates, R, "The Effects of Child Sexual Abuse" (1992) 66 *ALJ* 186.

14 (1989) 1 NZLR 714.

"in an unmistakable and compelling way and by reference to scientific material that the relevant characteristics [meaning behaviours] were signs of child abuse".[15] This decision, which seems to have the effect of excluding all "consistent with" type evidence (because it does not prove compellingly and unmistakably) led to a change in the *Evidence Act* 1908 (NZ) (see below). It has been suggested that questions should be worded to obtain the reply that the behaviour under discussion is "not inconsistent with" sexual abuse, and reasons for the answer, as a way of avoiding this problem.[16]

Evidence of recent complaint in sexual assault cases is given to bolster credibility by showing consistency.[17] Evidence of delay therefore clearly diminishes the complainant's credibility.[18] Evidence which explains such delay is given in an attempt to rehabilitate credibility. This argument was not used in *R v B (an accused)*.[19] A psychologist had given a deposition on the behaviour of children who have been sexually abused. The accused objected at the trial, and the New Zealand Court of Appeal had to decide whether or not to allow the evidence. The basis of inadmissibility was said to be that the effect of the evidence was to bolster credibility, and it was therefore disallowed. Counsel may not have put the argument as to rehabilitation of credibility, as it seems the trial had not reached the point of attacks on the credibility of the complainant. McMullin J apparently was not completely happy with his decision, as he suggested that legislation be passed to provide for the admission of such evidence. As a result, the *Evidence Act* 1908 (NZ) was in fact amended. Casey J was prepared to allow the psychologist to say whether or not the behaviour of the complainant was consistent with the behaviour of similarly aged sexually abused children.[20]

In the United States, of the court decisions examined by Mason, 77 per cent allowed expert testimony for the purpose of rehabilitation of the child's testimony, whereas only 44 per cent admitted it when it was offered affirmatively to support credibility.[21]

Evidence that certain behaviours in children were consistent with their having been sexually abused was allowed in the Canadian case *R v J (FE)*.[22] The Ontario Court of Appeal emphasised that it was not admitted to bolster credibility but to show the significance of facts in an area outside the knowledge of the jury but where experts have experience. Here, it was to show that recantation of allegations is consistent with abuse. The British Columbia Court of Appeal in *R v RAC*[23] allowed evidence to be given as to why the complainants delayed disclosure, and why they continued to associate with the accused after the abuse, in order to rehabilitate their credibility.

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15 Id at 720.

16 Roe, R, "Expert Testimony in Child Sexual Abuse Cases" (1985) 40 *University of Miami LR* 97.

17 *R v Roach* (1988) VR 665.

18 *Kilby v The Queen* (1973) 129 CLR 460.

19 (1987) 1 NZLR 362.

20 It should, however, be noted that in the later case of *R v Accused* discussed above n14, a differently constituted Court of Appeal once again disallowed such evidence.

21 Above n11.

22 *R v FEJ* (1990) 53 CCC (3d) 64.

23 (1990) 57 CCC (3d) 522.

Four Australian decisions

The attitude of Australian courts to expert evidence on child sexual abuse is different from the American courts studied by Mason.[24] Mason is critical of the United States decisions because of the reluctance of the judges to inquire into the acceptance by mental health professionals as a group of the reliability of such evidence, which she attributes to their ignorance of social science research.

R v Runjanjic[25]

Australian judges may be equally ignorant of social science research, but their response is not unquestioning acceptance of expert evidence in relation to the social sciences. A recent case in which such evidence was allowed is *R v Runjanjic*, where the South Australian Court of Appeal allowed evidence of the battered woman syndrome. This case is not about rehabilitation of credibility, but it lays the foundation for the use of expert evidence in relation to the reactions of people who have suffered abusive behaviour. Apparently King CJ knew something already about the topic of battered women, and his research produced 14 legal articles on the syndrome. The court held that it was a prerequisite, to be proved in evidence, that the syndrome was accepted by mental health professionals as "a scientifically established facet of psychology".[26] King CJ relied on *Murphy v The Queen*[27] to allow testimony of the behaviour of battered women who are not abnormal but are in a situation "so special and so outside the experience of jurors".[28] They were abnormal in their behaviour as a result of their particular circumstances. The testimony was directed not at explaining the behaviour of the accused in particular, but of battered women generally. The problem here, however (a problem not recognised in *R v Runjanjic*[29]), is that the majority of battered women do not react in the way that the accused reacted in this case, that is, by becoming violent.[30] The court was prepared to follow the decision of the Canadian Supreme Court in *Lavallee v The Queen*.[31] This case was followed by *R v Hickey*[32] in New South Wales, a case which Freckelton considers to be unimportant in terms of precedent.[33]

Ingles v The Queen[34]

The first Australian case to consider expert psychiatric evidence in relation to child sexual abuse is *Ingles v The Queen*. Rehabilitation of credibility was not argued, and it was accepted that the effect of the evidence was solely to bolster credibility. The Tasmanian Court of Criminal Appeal followed the reasoning of *R v Accused*.[35] Crawford J stated that the

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24 Above n11.
25 (1991) 56 SASR 114.
26 Id at 119.
27 (1989) 167 CLR 94.
28 Above n25 at 120.
29 Above n25.
30 Schuller, R and Vidmar, N, "Battered Woman Syndrome Evidence in the Courtroom" (1992) 16 *Law and Human Behaviour* 273 at 275, cited by Freckelton, I, "Contemporary Comment: When Plight Makes Right — The Forensic Abuse Syndrome" (1994) 18 *Crim LJ* 29.
31 (1990) 55 CCC (3d) 97.
32 Unreported, Supreme Court of NSW, 1992.
33 Above n30.
34 Unreported, Supreme Court of Tasmania, 4 May 1993.
35 Above n14.

expert evidence "did no more than suggest that some of the conduct of the complainant was consistent with her having been sexually abused"[36] but excluded it. He could see that there was a problem in his reasoning: the jury may have been aware anyway of the fact that most abused children do not disclose immediately, and used that knowledge in reaching a verdict, but his decision would prevent them from hearing expert evidence on the matter if they were unaware of it. Zeeman J said that evidence showing particular behaviour is consistent with the behaviour observed in sexually abused children is inadmissible, because it is equally consistent with the situation in which no abuse has occurred. There is a logical inconsistency here. The reason for the evidence is to show exactly that fact: that the behaviour is not consistent only with lack of abuse, which is what the defence is trying to demonstrate. Zeeman J could see that the effect of the evidence was to show that the complainant was not necessarily lying, but he did not realise this is actually rehabilitation of credibility. It is unfortunate that none of the North American cases were cited.

R v C[37]

The next case was *R v C*, a South Australian Full Court decision. At least 13 North American cases were cited to the court which allowed evidence in child sex abuse cases to rehabilitate credibility. Despite this, King CJ decided that the expert witness had not proved that there is a scientifically accepted body of knowledge in relation to the behaviour of abused children in failing to complain, although he assumed it for the purpose of deciding whether expert evidence could be given about it. In *R v Runjanjic*[38] he had been prepared to rely on *Murphy v The Queen*[39] and allow evidence in relation to normal people in special situations. In the present case he went back to the earlier (and English) *R v Turner*[40] to disallow such evidence on the grounds, first, that abused children's behaviour is not surprising and not contrary to ordinary expectations and second, that ordinary jurors are "not ignorant of the behaviour and reactions of children". No doubt there are many people who sit on juries who believe, as did researchers of the 1960s, that many abused children are "victims in the legal sense only"[41] because they behave seductively, without considering that seductive behaviour in children is the result of the abuse and not its cause. It was all the more surprising that King CJ cited cases in which evidence was accepted that some sexually abused children behave in ways that ordinary people could well find strange: making recantations[42] and continuing association with the offender.[43]

The psychiatrist gave evidence that there was a field of study of child sexual abuse, and that she had experience in the field. Despite this, the court found her evidence inadmissible on the points of continued association with the abuser and failure to complain. This was because she did not give evidence specifically that her own experience or the literature related to these matters. This seems to be contradictory to *Commissioner for Government Transport v Adamcik*[44] where the High Court allowed expert evidence by one expert

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36 Above n34 at 2.
37 (1993) 60 SASR 467.
38 Above n25.
39 Above n27.
40 (1975) 1 QB 834.
41 Karpman, B, *The Sexual Offender and his Offences* (1962) quoted by Shea, P, "Adults charged with Sexual Offences against children: A Review of the Literature" (1969) *Proceedings Inst Crim* (no 2) 89.
42 Above n22.
43 Above n23.
44 (1961) 106 CLR 292.

whose views were not supported by any other experts in the field, and whose experience did not relate to the cause of the illness in the case. The High Court held that it was up to the jury to decide on the weight of the evidence of the contradictory opinions. King CJ referred to the Canadian case *R v RAC*[45] where evidence was given in relation to delay in complaining and continued association with the offender, and disallowed such evidence in the present case because the doctor did not testify that the literature or her own experience related to these matters: she gave her own interpretation as to why the complainant continued to associate with the accused. In *R v Runjanjic*[46] King CJ had quoted from *Lavallee v The Queen*:

> The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalisation? ... We need help to understand it and help is available from trained professionals. [47]

The answer was available in respect of children in the present case, but the court refused to let the jury hear it. The court allowed evidence in relation to the behaviour of a minority of battered women, but not in relation to the majority of abused children. (Despite these shortcomings, at least one writer sees the decision as correct, because child abuse cases are dealt with "by criminal prosecution for a very serious offence with a prison term at stake".[48])

Brooking J in *R v Johnson*[49] has commented that King CJ seems to have adopted the *Frye*[50] test to decide whether a field of expert knowledge exists. In that case it was decided that "the field must have been accepted by the relevant scientific community before being accepted by the courts".[51] It was also adopted in *R v Runjanjic*.[52] This seems to be a somewhat strange position for King CJ to adopt, in view of his decision in *F v R*[53] (approved by the High Court in *Rogers v Whitaker*[54]): that the court will not allow professionals in negligence cases to decide the appropriate standard to adopt; it will decide that standard for itself, as professions may adopt unreasonable practices. The *Frye*[55] test was overruled in the United States for Federal courts in *Daubert v Merrell Dow Pharmaceuticals*,[56] which demands validity of scientific evidence (for example, falsifiability based on error rates). However, according to Freckelton, this requirement has not been applied so far to syndrome evidence.[57] It could be argued that evidence in relation to the behaviour of sexually abused children, although given by experts (people with experience in dealing with sexually abused children), is not "scientific", because it cannot be refuted by scientific evidence. Therefore the *Frye*[58] and *Daubert*[59] cases become irrelevant, and the Aus-

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45 Above n23.
46 Above n25.
47 Above n31 at 112.
48 Goode, M, "Case and Comment: C" 18 *Crim LJ* 231 at 233.
49 Unreported, Victorian Court of Criminal Appeal, 8 December 1994.
50 *Frye v United States* 293 F 1013 (1923).
51 Ligertwood, A, *Australian Evidence* (2nd edn, 1993) at 378.
52 Above n25 at 119.
53 (1983) 33 SASR 189.
54 (1992) 109 ALR 625.
55 Above n50.
56 No 92–102 US Lexis 4408 (1993) cited by Freckelton, I, "Science in the Witness Box" (1993) 24 *Search* 9 at 247.
57 Above n30.
58 Above n50.
59 Above n56.

tralian authority, *Murphy v The Queen*[60] (where expert evidence was allowed in relation to the low comprehension level of a normal person) would be applicable.

R v Johnson[61]

The final relevant Australian decision is *R v Johnson*, an unreported decision of the Victorian Court of Criminal Appeal. After the complainant gave evidence of child sexual abuse, the prosecution after a *voir dire* led expert evidence by a psychiatrist to explain why she had not left home until she was 29 years old. Unfortunately the psychiatrist's evidence was in terms of the battered woman syndrome, and the prosecution relied on *R v Runjanjic*[62] to have the evidence admitted. As the court pointed out in the present case, battered woman syndrome may occur in a woman who has been living in an adult sexual relationship with a man who beats and otherwise mistreats her, and result in her inability to leave the abusive man. Lack of complaint by a child victim of sexual abuse and continuation of a relationship with the abuser may occur, but the causes and the explanation are very different in the two situations. It makes no sense to use the battered woman syndrome to explain behaviour which is not uncommon in abused children. Brooking J stated that he would have allowed expert evidence on the effect of sexual abuse to rehabilitate the credit of the complainant, subject to compliance with the other rules of expert evidence. This is the closest Australian courts at appellate level have come to admitting expert psychological evidence in child sexual abuse cases.

The New Zealand response

The *Evidence Act* 1908 (NZ) was amended by the introduction of section 23G, which provides that an expert may give evidence on (inter alia) whether "the complainant's behaviour is from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant". [63] This section does not allow evidence by an expert as to the credibility of the complainant.[64]

Conclusion

There is no Australian High Court decision on whether expert evidence may be admitted in cases of child sexual assault, or whether it would serve a useful purpose. There are some Court of Appeal decisions from other Australian states. It is unfortunate that the Victorian case *R v Johnson*[65] is unreported. It is a more reasonable decision than the South Australian *R v C*,[66] which relied on an American case no longer the relevant authority in that country. *R v C* also has logical inconsistencies, and does not follow the reasoning in *Murphy v The Queen*.[67] The amendments to the *Evidence Act*[68] in New Zealand

60 Above n27, and see previous discussion at n39.
61 Above n49.
62 Above n25.
63 Sub(2).
64 Such evidence was held to be inadmissible in *R v Tait* (1992) 2 NZLR 666.
65 Above n49.
66 Above n37.
67 Above n27.
68 Above n63.

providing for the admission of a limited amount of expert evidence appear to be a reasonable compromise between allowing the jury to remain ignorant of the sometimes seemingly strange behaviour of abused children, and diminishing the rights of the accused by bolstering the credibility of the child. Similar amendments in New South Wales would overcome the possibly persuasive effect of the decision in *R v C*.[69]

69 Above n37.