

# EVIDENCE LAW AND 'CREDIBILITY TESTING' OF WOMEN: A COMMENT ON THE *E* CASE

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## I INTRODUCTION

Evidence law is not simply a body of “neutral rules” of general application: its doctrines have been developed to reflect particular interests and understandings of the social world in which we live.<sup>1</sup> Nowhere is its partiality more exposed than in the rules governing the use of evidence in the prosecution of rape, which was itself a sex specific crime,<sup>2</sup> where men's power to define and deny allegations of rape historically weighed more heavily than women's word. Science and particularly psychiatry proclaimed truths about women and girls that were used to justify sex specific practices and legal principles in the criminal law governing rape.<sup>3</sup>

Women's changed legal and social status has been mirrored in doctrinal shifts in evidence law in the past thirty years in both Australia and Canada, but underneath the

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<sup>1</sup> See generally M MacCrimmon, ‘Developments in the Law of Evidence: The 1995-96 Term: Regulating Fact Determination and Commonsense Reasoning’ (1997) 8 *Supreme Court Law Review* 367.

<sup>2</sup> In Canada it was not until 1983 that rape was rendered ‘gender neutral’ in statutory language: *Criminal Law Amendment Act*, SC 1980-81-82, c 125. Rape and sexual assault remain, however, crimes that are overwhelmingly committed by men (99%) against women and girls (90%): *R v Osolin* [1993] 4 SCR 595, 669; *R v Conway* [1993] 2 SCR 872, 877. See also S Bond, ‘Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance’ (1993) 16 *Dalhousie Law Journal* 416, 417-418.

<sup>3</sup> For an example of a very influential text see John Wigmore, who wrote: ‘Modern psychiatrists have studied the behaviour of errant young girls and the women coming before the courts in all sorts of cases. Their psychic complexes are multifarious and distorted ... One form taken by these complexes is that of contriving false charges of sexual offences by men.’ He went on to recommend that no charges proceed to court unless a psychiatrist testified as to the woman's ability to tell the truth: J Wigmore, *Evidence* (3<sup>rd</sup> ed, Little, Brown, Boston, 1940) s 924a.

surface, the “old” rules to test women's credibility bubble to the surface in new practices and legal doctrines as a broadening group of men, has become vulnerable to rape prosecution. The legislative retreat from the old doctrines, such as recent complaint and the corroboration requirement, has opened up the possibility of prosecuting historic sexual assault cases, and the need to carefully scrutinize women’s evidence has been vigorously re-asserted. A woman's word is tested against her actions and their socially ascribed meanings (did she resist vigorously? did she report immediately?), against her history and reputation (has she consented in similar circumstances? has she ever lied?), against the evidence provided by her own body (does the Rape Evidence Kit indicate any tears or bruising consistent with forced intercourse?<sup>4</sup> has she ever been pregnant before?), against her “records” (what did the counsellor say she said about the rape? what did she say about the accused in her diary?), and against her unconscious (could she have imagined the assault? could she be mistaken that it was her stepfather who assaulted her?).

Most testimony in court cases, both criminal and civil, relies upon memory, but with the possible exception of challenges to eyewitness testimony, only in the area of sexual assault prosecutions have we seen such an extraordinary effort to undermine the reliability of memory through “science.” The claim that a complainant is suffering from “False Memory Syndrome” [FMS], may coincide<sup>5</sup> with an application of disclosure of a woman’s private counselling records, another recently emerged credibility-testing device. Like the demand for disclosure of women’s records,<sup>6</sup> FMS claims permit the re-assertion of obsolete credibility-testing devices; re-produce the same pernicious myths about women; demonize the feminist community and its knowledge; and alienate women from their therapists and counsellors by generating anxiety and distrust.<sup>7</sup> The sex discrimination inherent in disclosure applications and perpetrated through the use of therapeutic records to discredit women<sup>8</sup> is compounded when a FMS label is attached to

<sup>4</sup> G Feldberg, ‘Defining the Facts of Rape: The Uses of Medical Evidence in Sexual Assault’ (1997) 9 *Canadian Journal of Women and the Law* 89.

<sup>5</sup> One basis for arguing that records are likely ‘relevant’ for the purposes of disclosure is that the rape was reported to police within a time frame that either corresponded with or followed upon a course of therapy, and cases where sexual assault was disclosed for the first time in therapy: *R v O’Connor* [1995] 4 SCR 411.

<sup>6</sup> The defence strategy of seeking access to women's records --school, birth control, abortion, truancy, child welfare, health, tax, telephone, diaries, criminal injuries compensation, letters, counselling, and therapy-- in order to challenge the complainant’s credibility, emerged only in the 1990s in common law countries, but quickly gained the legitimacy of a constitutional right to make ‘full answer and defence’ in 1995 in Canada in *O’Connor*, *ibid*. This defence strategy emerged in the same period in Australian courts and in December 1995 Australia boasted the first rape crisis counsellor to resist disclosure of a woman’s confidential records such that she was jailed for refusing to obey the subpoena: M Kingston, ‘Privacy issue as rape therapist jailed’, *The Sydney Morning Herald*, 15 December 1995, 1.

<sup>7</sup> A Cossins and R Pilkinton, ‘Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials’ (1996) 19 *University of New South Wales Law Review* 222, 226 and 230-31 discuss the experience of one crisis clinic and several therapists who recount that some women decline support services for fear of disclosure of their records and that the parameters of the counselling relationship and trust therein are difficult to establish in the context of a legal regime that permits the therapeutic relationship to be used as a weapon against a complainant.

<sup>8</sup> *Ibid* 236-40. In addition to facilitating the resurrection of the old evidentiary rules, women’s health and counselling records can be used in a multiplicity of ways to discredit the complainant because in addition to containing information about women’s sexual practices, they may cover a much wider terrain: women’s struggles with mental illness or depression, any addictions, criminal misbehaviour or moral failings, such as lies, sexual infidelities or deceptions, any statements that she made that may suggest consent on her part or honest mistake on his, including the self-blaming

a complainant: a psychiatric or therapeutic history facilitates the inference that women may falsely allege rape or they may have "fantasized" a rape.<sup>9</sup> Psychiatric definitions of normalcy tend to reinforce sex roles, archetypes of "good" and "bad" women and male standards of mental health such that it is relatively easy to use psychiatric labels and records to portray a "bad" woman who is not worthy of law's protection.<sup>10</sup>

In this case comment I hope to illustrate, using the 1997 decision of the New South Wales Court of Criminal Appeal in *E*,<sup>11</sup> that the strategy of using the pseudo-science of FMS to discredit women's accounts of sexual violence is reliant on the same old "truths" about women and rape that have long been officially repudiated in law's doctrines. This relatively new strategy has great appeal, in spite of its questionable lineage, since it is cloaked in the objective language of science, echoes our collective disbelief that the ruthless sexual abuse of children by normal, adult men could really be this widespread,<sup>12</sup> and perhaps most importantly, avoids calling women liars. Its sub-text is strategic, since women and girls may abandon prosecution when confronted with the high price to their privacy, dignity and sanity exacted by intrusive defence tactics.<sup>13</sup>

My comment firsts summarize the facts and ruling in the *E* decision. I then set the case in the context of some of the feminist literature on FMS discourses, and particularly the one study to examine its use in criminal and civil litigation in Canada. In the next section I situate *E* against the history of rape law reform by briefly reviewing the rules of evidence that were specific to rape prosecutions. In doing so, I will rely mainly upon the secondary literature in Australia and Canada, since the failure of these reforms to dramatically shift the terrain of rape prosecutions has been amply documented and theorized in both jurisdictions. I will then return to the *E* case in order to illustrate the many ways in which FMS discourse revives discarded doctrine and discredited myths.

## II THE *E* DECISION

The *E* case was decided by the Court of Criminal Appeal in New South Wales in 1997. The case had been tried in 1995 and resulted in a conviction of E. In fact, this was the second prosecution of E for crimes of sexual violence against his step-daughter M and

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statements that all survivors of trauma must work through in coming to terms with life-threatening attacks, as well as any statements allegedly made by the complainant, as reported in her records, that might contradict statements she makes in court. See also K Busby, 'Discriminatory Uses of Personal Records in Sexual Violence Cases' (1997) 9 *Canadian Journal of Women and the Law* 148 and S Bronitt and B McSherry, 'The Use and Abuse of Counseling Records in Sexual Assault Trials: Reconstructing the 'Rape Shield'?' (1997) 8 *Criminal Law Forum* 259.

<sup>9</sup> Bond, above n 2, 424-27.

<sup>10</sup> Ibid 430.

<sup>11</sup> *R v E* (1997) 96 A Crim R 489 (NSW CCA).

<sup>12</sup> For example, Roberts notes that in 1993 in Canada, two-thirds of reported sexual assaults had been committed against a victim who was a child, and one-third of victims were under 10 years of age: J Roberts, 'Sexual Assault in Canada: Recent Statistical Trends' (1995-96) 21 *Queen's Law Journal* 395, 420.

<sup>13</sup> While we do not know how FMS allegations affect complainants' decisions, women subjected to disclosure applications may decide not to report or, having reported, to withdraw from the prosecution rather than submit to this modern "ordeal." Cossins and Pilkinton, above n 7, 226 report the Sydney Rape Crisis Centre's estimate that 25% of their clients have made decisions not to proceed to court based on the potential for disclosure of their confidential records. For the argument that disclosure of records is the modern form of trial by ordeal for women, see M T MacCrimmon, 'Trial by Ordeal' (1996) 1 *Can Crim LR* 33.

his third set of charges for crimes of sexual violence against a child, since he had also been charged but acquitted of sexual assault against his daughter R.

The first set of charges was based upon the statements of M, who had, when she was nine years old in 1988, disclosed sexual assaults involving sexual touching perpetrated against her by her stepfather E during the past year when she was eight or nine years of age. He was charged by police with those assaults and he entered guilty pleas; he was released on a three-year recognizance bond and not jailed. Thereafter, in 1989, a doctor found evidence of severe damage to M's anus—'a huge split'-- as well as older damaged tissue, and suggested to M and to her therapist that since constipation had been ruled out, the injuries were consistent with repeated anal intercourse.

In 1993 M's half-sister R disclosed sexual assaults perpetrated against her by E when she was five years old by inserting his penis into her mouth, removing her clothes and rubbing his penis over her body, attempting to insert his penis into her vagina, and inserting straws and pencils into her anus. E's acts of sexual violence against R were the subject of a second set of charges. Soon thereafter in 1993, M made further disclosures to police, and gave a statement describing a series of assaults from the time she was five until she reached eight years of age that involved E inserting his fingers and straws in her vagina. She dated these assaults by reference to a medical visit to investigate blood in her faeces. She made a further statement to police in 1995, before E was actually tried on the charges relating to R, describing anal penetration perpetrated by E and vaginal penetration when she was eight. Charges for the assaults against R subsequently resulted in an acquittal at trial.

The evidence led by the prosecution at the trial of M's two further sets of allegations in 1995 included M's testimony, the medical records documenting the physical damage to M's body, the fact that E was an acknowledged pedophile and testimony from M's mother that E had confided to her in 1987-88 that he was 'attracted' to M, that he should not be left alone with the child and urging her to quit work so that she could ensure that he was never left alone with M.

M was cross-examined with respect to her failure to disclose these assaults in 1988 to police when she disclosed sexual touching by her step-father, and her failure to reveal these assaults to her counsellor. She was also asked to explain how she could have forgotten such a brutal and injurious attack. Her responses to the defence lawyer's repeated demand for an explanation were 'I don't know,' 'I really can't explain it,' 'I just didn't know at the time,' 'I didn't remember until then,' 'I had put out of all my mind about him and everything about my past,' and 'probably ...I'd put it at the back of my head and not thought about it.'<sup>14</sup> She was cross-examined with respect to possible collusion in making her second set of allegations because she had stated to the prosecutor that when she read her sister's statement to the police, she found that all of her memories came back. She admitted under cross-examination that she was upset about the fact that her stepfather had not received a sentence of incarceration with respect to his earlier convictions, that her half-sister R received 'a lot of attention' during the trial of R's allegations and that she was distressed when he was acquitted of sexually assaulting R.

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<sup>14</sup> *R v E* (1997) 96 A Crim R 489 (NSW CCA), 491-92.

The prosecution attempted to call expert evidence to explain M's late and piecemeal recovered memory. The trial judge denied the motion but went on to accept that recovered memory is possible and in fact within common experience and common sense:

You see a small child is in a very difficult position if the allegations are true. Little children do not commit suicide, they have to adopt some other stratagems to deal with a totally unbearable situation and one of those, and this is a matter of common sense not psychiatric lore, they must try to put in place some sort of defence mechanism whether that is by way of denial or blocking out one does not know.<sup>15</sup>

The Court of Appeal quashed the conviction on the basis that the verdict was unsafe and unsatisfactory and entered an acquittal, with one justice dissenting. The majority held that on the whole of the evidence the trial judge should have had a reasonable doubt about the accused's guilt because the case was dependent on M's recovered memories, whose reliability could not be tested: 'the point in the appeal then turns on the reliability of MH's evidence as distinct from her honesty.'<sup>16</sup> The majority held that there is no common or accepted knowledge about children and recovered memory and the judge was therefore not entitled to take judicial notice of this proposition:<sup>17</sup>

I do not accept as common knowledge that, in the case of children, memory of abuse is frequently lost and later reliably recovered. The content of the ostensible memories in this case is beyond common experience. There is no common knowledge on which to draw for guidance. To generate false memories of this kind is not commonplace. To lose memories of this kind for 10 years or so and then to recover them is not commonplace. The case is remote from common experience. There is no common knowledge which is applicable to such a case.<sup>18</sup>

On the other hand, without the benefit of any expert evidence, the Court of Criminal Appeal said '[f]alse memories are common knowledge.'<sup>19</sup> There is 'no guarantee that the event occurred that way or even that it occurred at all...particularly...when motivations for having such a memory are apparent.'<sup>20</sup> Hinting at these 'motivations', the majority said 'His Honour did not appear to regard it as being a matter of significance that the 1995 complaint was made when her step-sister was very much the centre of attention.'<sup>21</sup> Further, the court found that the trial judge's conclusions contradicted the premise of repressed memory as a subconscious process: 'it is difficult to see how anything said by MH about her own mental processes could be of relevance.'<sup>22</sup>

Having put the possibility of memories being either true or false on the same basis, the court found that there was no other evidence on which to conclude here that M's memories were true. The court reasoned that although E was an 'admitted pedophile', there was no proof regarding which damage had been caused by E given that it was

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<sup>15</sup> Ibid 497.

<sup>16</sup> Ibid 501.

<sup>17</sup> Ibid 497.

<sup>18</sup> Ibid 500.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 497.

<sup>22</sup> Ibid.

reasonably possible that M had been raped by another person.<sup>23</sup> As an aside, the majority also remarked in reference to E's convictions and his attraction to the five-year-old M, 'This evidence makes plausible conduct which one would think to be highly unlikely absent such a disposition'.<sup>24</sup> Finally, the court questioned the trial judge's assessment that E was not a credible witness because he testified without emotion and simply categorically denied the allegations. While unprepared to disturb this finding, the court expressed skepticism about the adequacy of the foundation for the conclusion that E's account lacked credibility, and said that the case must be assessed putting the 'appellant's denials out of account'.<sup>25</sup>

The court concluded that there was necessarily a reasonable doubt about the accused's guilt in light of the fact that there was nothing to compel one to the conclusion that M's memories were true as opposed to falsely remembered. At the same time, it stated that 'it does not follow that a case of sexual abuse of a child can never be made out where a memory of events is absent for some time and later comes to be experienced. Every case must turn on its own facts'.<sup>26</sup>

The *E* decision, at first glance, may appear relatively unproblematic. Neither the trial judge nor the New South Wales Court of Appeal explicitly relied upon expert evidence or the "science" of FMS. Neither level of court has suggested that the young woman was mendacious, nor has her credibility been directly attacked through efforts to portray her as promiscuous. It is also true that the court has disavowed an intention to set a precedent by stating that the ruling in *E* does not mean that a prosecution relying on woman's recovered memory regarding crimes committed against her as a child could never result in a reliable finding of guilt.

However, by situating this case in the context of a study that examined the legal understanding of recovered memory and claims of FMS in a sample of Canadian cases, one is struck by some common themes that suggest adherence to FMS discourse and its sex discriminatory stereotypes. Furthermore, when *E* is placed in historical context of the reform of rape law, one sees more clearly the continuity between abolished rules and emerging practices that rely on precisely the same beliefs about women, men, and rape.

### III FALSE MEMORY DISCOURSE

As a starting point, it must be noted that the mere hint of FMS in *E* was able to overpower a substantial amount of evidence that supported the trial judge's verdict of guilt. While it is difficult to assess whether *E* represents any sort of trend in the legal treatment of FMS discourse in sexual assault prosecutions in Australian courts since I am unaware of any studies of this nature, *E* is worth our attention for the broad claims to knowledge made by the court, its precedential value as an appellate decision and its surprising consistency with trends observed by the available Canadian research on the use of this evidence in criminal and civil litigation.

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<sup>23</sup> Ibid 498.

<sup>24</sup> Ibid 498.

<sup>25</sup> Ibid 501.

<sup>26</sup> Ibid.

FMS is defined by the False Memory Syndrome Foundation<sup>27</sup> as operative where a woman's identity and relationships are centred around the memory of trauma that is objectively false and that was created by her therapist. FMS is premised on the notions that sexual abuse is too serious to be "forgotten," that accounts of recovered memories are highly suspect and that therapists "implant" memories in complainants. This "diagnosis" is not recognized by the *Diagnostic and Statistical Manual of Mental Disorders*<sup>28</sup> [DSM] or by the scientific community generally since there is no systematic, recognized study of a phenomenon of alleged false memory of sexual abuse.<sup>29</sup> The claims made by the FMS Foundation are based upon anecdotal accounts by some parents accused of historical sexual assault, recantations by complainants, criticism of specific methods used by individual therapists and the fact that some portion of the population is susceptible to suggestion.

In contrast, the broader scientific community and the DSM have provided a more reputable research basis for women's recovered memories of sexual violence at the hands of adult men while they were children. The DSM recognizes dissociative amnesia as a medical condition arising from severe trauma,<sup>30</sup> and sexual violence experienced by a child is agreed to be one such traumatic event. Indeed, Canadian courts have relied upon this knowledge and built doctrine on it by, for example, extending the limitation period for sexual assault civil claims to run from the time when a woman recovers her memory and is able to link it to her ongoing dysfunction.<sup>31</sup>

Although the FMS Foundation has not managed to achieve scientific accreditation for its theories, its claims have clearly resonated in public discourses and in some courtrooms in Canada. For example, two conviction appeals have resulted in new trials because trial judges were held to have wrongly refused to admit expert evidence regarding FMS;<sup>32</sup> one acquittal has been squarely based upon reasonable doubt grounded in FMS;<sup>33</sup> and one accused man managed to achieve acquittal by successfully arguing that his confessions of his crimes were due to *his* FMS, due to his wife's therapy and the stresses he faced at the time!<sup>34</sup>

<sup>27</sup> S Vella, 'Recovered Traumatic Memory in Historical Childhood Sexual Abuse Cases: Credibility on Trial' (1998) 32 *University of British Columbia Law Review* 91, 108-12; SM Vella, 'Credibility on Trial' [hereinafter Vella] in M Rivera (ed), *Fragment by Fragment. Feminist Perspectives on Memory and Child Sexual Abuse* [hereinafter *Fragment-by-Fragment*] (Gynergy Books: Charlottetown, 1999) 135, 136. Vella notes that the Foundation is an American, non-profit, private corporation.

<sup>28</sup> (American Psychiatric Association: Washington D.C., 4<sup>th</sup> ed, 1994).

<sup>29</sup> The studies commonly cited by FMS proponents are those conducted by Campbell Perry *et al* and Elizabeth Loftus, involving the implantation of false memories in adults of having awakened during the night through hypnosis and the implantation of false memories in children of having been lost in a shopping mall through persistent prompting by their parents. For a discussion of these studies and analysis of the limits of their predictive value with respect to traumatic memories of childhood sexual abuse see S Park, 'Re-Viewing the Memory Wars. Some Feminist Philosophical Reflections' in *Fragment-by-Fragment*, above n 27, 283, 285-87. More targeted studies have not been pursued because of serious ethical concerns: D A Poole, SD Lindsay and R Bull, 'Psychotherapy and the Recovery of Memories of Childhood Sexual Abuse: U.S. and British Practitioners' Opinions, Practices, and Experiences' (1995) 63 *Journal of Consulting and Clinical Psychology* 426, 427 [hereinafter Poole *et al*].

<sup>30</sup> Vella, above n 27, 139.

<sup>31</sup> *Ibid* 145, citing *M (K) v M(H)* [1992] 3 SCR 3.

<sup>32</sup> *R v SCH* [1995] BCJ No 2538 (S Ct); *R v Bel*, [1997] NWTJ No 18 (CA).

<sup>33</sup> *R v GDD* [1995] NSJ No 529 (S Ct).

<sup>34</sup> *R v HWO* [1997] OJ No 2287 (Gen Div).

Beyond these overt adoptions of FMS theory, several Canadian researchers have found that even judges who have denied expert witness status to proponents of this theory on the basis of its lack of scientific reliability have gone on to rely on FMS claims in their scrutiny of the evidence. In their study, Katharine Kelly, Connie Kristiansen and Susan Haslip used a random sample of 10% of the 170 sexual assault judgments that they found on the Quick Law database in Canada, both criminal and civil, wherein “false memory” or “FMS” was referred to in a sexual assault case, in order to examine the judicial treatment of this type of evidence.<sup>35</sup>

The analysis derived from the work of Kelly *et al* identifies several common themes that emerge in the legal treatment of FMS. First, FMS may be accepted as “fact” by judges who either repeat its premises or affirm its “common sense” logic: some say, for example, that careful scrutiny is required for all recovered memory and caution that a woman's demeanour is an unreliable indicator of her credibility because while she may be honest, equally she may be deluded.<sup>36</sup> Interestingly, this basic acceptance of the risk of false memories flies in the face of judicial acknowledgment that FMS is not a “science” and is not accepted by the medical community as a recognized syndrome. Furthermore, Kelly *et al* note that in none of the cases they examined did the judge put the spectre of false allegations or false memories in statistical context,<sup>37</sup> leaving the erroneous impression that it is a widespread phenomenon.

Second, the introduction of FMS discourse in court narrows the issues for adjudication by maintaining rape prosecutions as single-issue trials limited to scrutinizing the woman's credibility.<sup>38</sup> At the same time, of course, this focus obscures the issue of the credibility of the accused man in those cases where he testifies. It may even elide the significance of the additional evidence that corroborates the crime.

Third, FMS discourse generates new myths that discredit women and deny men's responsibility for rape. These myths are deeply gendered and some are specifically anti-feminist. In the cases, the FMS premises that women are highly suggestible to implanted memories, that abuse is too traumatic an event to ever be “forgotten,” and that the real perpetrators of abuse are feminist therapists who have brainwashed their clients, appear in many forms. For example, Kelly *et al* note cases that consider whether a woman has FMS simply by having seen “too many therapists,” having read a single line in one book, or having participated in group therapy.<sup>39</sup> They also identify judgments that struggle to assess the accused's guilt or innocence by reference to whether he can be characterized as “bad” or abnormal.<sup>40</sup> Erin Brady in her work and Kelly *et al* note intimations in the cases where FMS is raised that women whose evidence is reliant upon recovered memory are delusional or psychotic.<sup>41</sup>

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<sup>35</sup> K Kelly, C Kristiansen and S Haslip, ‘Memory on Trial: The Use of False Memory Syndrome in Court’ in *Fragment by Fragment* above n 27, 155 and 156 [hereinafter Kelly *et al*]. The authors state at 159 that ‘While the study is reliable (it could be replicated), the data do not necessarily reflect all cases where recovered or false memories are at issue’.

<sup>36</sup> Kelly *et al*, *ibid* 162-63, discussing five of the cases sampled.

<sup>37</sup> *Ibid* 165.

<sup>38</sup> Vella, above n 27, 136.

<sup>39</sup> Kelly *et al*, above n 35, 171.

<sup>40</sup> *Ibid* 172-73.

<sup>41</sup> E Brady, ‘False Memory Syndrome: “The Female Malady”’ (1996) 5 *Dalhousie Journal of Legal Studies* 69, 82-87; Kelly *et al*, *ibid* 168-73.

So successful has been the public campaign to convey the "truths" of FMS that considerable slippage appears in some of the case law between the definition of FMS and its application by lawyers and judges. FMS can be inappropriately used to discredit large categories of complainants, even though only a small portion apparently recover memories in therapy.<sup>42</sup> "False memory" attacks are launched against women simply because they have used therapists, whether or not they ever "forgot" the rapes,<sup>43</sup> and even in cases where the rape was not historic, but happened only months earlier. For example, one of the important records cases decided by the Supreme Court of Canada concerned disclosure of records suggesting possible "false memories" where the woman sought counselling at a rape crisis centre only *after* she reported the crime to police (by two months) and only eleven months after the assault.<sup>44</sup>

Returning to the *E* decision, it appears first, at a very basic level, that the "truths" of FMS have permeated the judgment even in the absence of an accepted scientific or research base. The appeal court did not question the trial judge's decision to exclude the proposed expert evidence regarding recovered memory proffered by the prosecution, and at the same time ruled that he was wrong to have taken judicial notice of repressed memory as a survival device for children. On the other hand, without any expert evidence for the contrary proposition, the court simply declared false memories to be common knowledge. The court did not interrogate the source for this "knowledge" or its precise dimensions. As noted by Frank Bates in his comment on the case, reliance on "common knowledge" instead of reliable expert evidence is disturbingly 'vague and unsatisfactory'.<sup>45</sup> It also has a discriminatory impact upon women when the rejected expert evidence provides support for women's accounts over men's denials.

More importantly, the court has created a new rule that will have its greatest impact for appeals of sexual assault convictions because it permits appellate reversal of any conviction involving a woman who testifies based on recovered memory. This is so because the court stated that while ordinarily it must defer to a trial judge's factual findings and verdicts since the trial judge has had the advantage of seeing and hearing the witnesses, it held that where an appellate court experiences a doubt as to the accused's guilt it must act on this doubt to set aside a verdict of guilt if the doubt does not arise from the witness's honesty but rather from the reliability of her evidence in certain circumstances. Here the court distinguished assessments of reliability that depend upon demeanour where, for example, a witness's difficulties in recalling events might lead the trier of fact to reject the evidence from the kind of unreliability it claimed to see in this case, which 'arises in a more abstract way, namely, the degree of reliability or unreliability to be accorded to honestly experienced memories'.<sup>46</sup>

Second, the *E* decision on appeal focuses almost exclusively on the complainant's credibility and reliability as a witness as opposed to the character and credibility of the

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<sup>42</sup> Poole *et al*, above n 29, 432 found in their survey of clinicians that among adult female clients who initially denied having experienced childhood sexual abuse, approximately 15% recovered such memories during the course of therapy.

<sup>43</sup> *R v JL* [1994] OJ No 3262 (Gen Div).

<sup>44</sup> *R v Mills* [1999] 3 SCR 668, as discussed in K Busby, 'Third Party Records Cases Since *R v O'Connor* (2000) 27 *Manitoba Law Journal* 355, para 28.

<sup>45</sup> F Bates, 'Case and Comment: *Eishauer*' (1998) 22 *Criminal Law Journal* 233, 234.

<sup>46</sup> *R v E* (1997) 96 A Crim R 489 (NSW CCA).

accused, let alone the other evidence in the case. While it could be claimed that *E* stands for a narrow proposition that trial judges' verdicts can be interfered with by appellate courts where they depend entirely on uncorroborated testimony based in recovered memory, this optimistic view is difficult to sustain in light of the additional evidence available in this prosecution and discounted by the appeal court. Bates comments, for example, that *M*'s account was substantiated by the medical evidence of the extensive trauma to *M*'s anus: 'Once the reliability of one item of evidence had been established, it was open to the tribunal of fact to accept the allegations of the complainant that it was the respondent who was responsible'.<sup>47</sup> It should be noted here that in addition to the accused's prior convictions for sexual assaults against *M*, his acknowledged pedophilia and his confessed attraction to *M* also corroborated her account. Very few allegations of sexual assault against children are supported by this much evidence, such that the *E* case, when read with its facts, may effectively provide criminal immunity for adult men who assault children.

Finally, the *E* case supports the myth that normal men do not rape children. This myth is pronounced through the court's assertion that in the absence of *E*'s prior convictions, attraction to *M*, and his pedophilia, it would be difficult to believe that an adult man would commit such acts against a helpless child. The *E* case also contributes to the exaggeration of FMS, which has been propagated far beyond its original paradigm. The risks of FMS are seen as applicable even though some of *E*'s assaults were never forgotten and in fact were reported and prosecuted within a year of their perpetration: this was not a child who completely buried the trauma and suddenly recalled the whole of it years later. As well, it is clear on these facts that no therapist was involved in *M*'s recovered memories so that there was no legitimate claim that someone else's agenda or therapeutic techniques generated false memories.

*E* conforms with an overall pattern of resistance, by lawyers and judges, to the unmasking of sexual assaults committed by "normal men" against dependent children, with the assistance of FMS rhetoric. Furthermore, rape myths that fit with cultural and legal disbelief of rape claims but that have been abandoned in our recent history are coded into FMS "truths", thus allowing judges to use "common sense" to re-present these same myths,<sup>48</sup> as I hope to illustrate below.

#### IV THE FAILURE OF RAPE LAW REFORMS

The *E* decision illustrates the tenacity of the historical practices and specific rules that governed the prosecution of crimes of male violence and that were designed to test the suspect credibility of women and girls. Christine Boyle argues that the male gaze has shaped the rules of evidence in the interests of the legislators and judges who placed themselves in the shoes of the man accused of rape,<sup>49</sup> such that the legal principles addressed the anxieties of powerful men.<sup>50</sup> These rules of evidence mirrored women's subordinate legal status, their exclusion from government and law and the

<sup>47</sup> Bates, above n 45, 236.

<sup>48</sup> Kelly *et al*, above n 35, 173.

<sup>49</sup> C Boyle, *Sexual Assault* (Carswell:Toronto, 1984) 4-6.

<sup>50</sup> Sir Matthew Hale made his famous statement in 1734 that is still quoted today suggesting that rape was 'an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent.' M Hale, *Historica Placitorum Coronae*, vol. 1 (Nott and Gosling: London, 1734) 635-636.

conceptualization of rape as a wrong against the property rights of a father in the case of a previously chaste and marriageable daughter and a wrong against the possessory interests of a husband in the case of his wife. Thus the rape of a woman who was neither chaste nor a wife was not a crime and a husband could not rape his own wife.<sup>51</sup>

The modern incarnation of the crime of rape in many common law jurisdictions is now more clearly framed as a crime against the person,<sup>52</sup> thus reflecting women's changed legal status and a commitment to protecting women's personal autonomy.<sup>53</sup> In most jurisdictions it is no longer lawful for men to rape their wives;<sup>54</sup> an expanded definition of the offence frequently encompasses different forms of penetration;<sup>55</sup> and many sexual assault laws are now framed in strictly gender neutral terms, including those of Canada's *Criminal Code*. However, substantive reform has done little to alter the practices of credibility testing of women who allege rape as measured by unfounding<sup>56</sup> (or “no criming”) rates and the outcomes of rape prosecutions.

Specific evidentiary rules were developed for rape allegations in spite of the fact that there has never been any evidence demonstrating that allegations of rape carry a higher risk of false reporting than other crimes.<sup>57</sup> Rather than responding to any unique risk of fabrication, these rules reflected women's and girls' inferior social status and lack of credibility,<sup>58</sup> as well as common myths about women, men and rape. Some of the beliefs that undergird discriminatory evidentiary practices were set out and refuted by Justice L'Heureux-Dubé in *R v Seaboyer*<sup>59</sup> in her dissenting judgment regarding the constitutionality of Canada's *Criminal Code* bar against the admissibility of complainants' sexual history evidence. These include the myths that women and girls are likely to lie about sexual assault because they are vindictive, motivated to fabricate, and mendacious; only “bad” women and girls can be or are raped; “good” women and girls cannot be raped; if not complained of immediately and to the first available person, a rape has likely been fabricated; women and girls are often mistaken or confused about men's sexual assaults; and, without additional evidence, it is dangerous to convict a man of sexual violence based solely on the word of a girl or a woman.

<sup>51</sup> L Clark and D Lewis, *Rape: The Price of Coercive Sexuality* (Women's Press: Toronto, 1977).

<sup>52</sup> C Nowlin, ‘Against a General Part of the *Criminal Code*’ (1993) 27 *University of British Columbia Law Review* 291. He describes the paradigms that have shaped criminal law have been first protection of male-owned private property, which was in turn extended to include male-owned sexual property. He argues that a further transformation of the paradigm to one that protects women's security of the person in their own right is incomplete and contradictory.

<sup>53</sup> I Leader-Elliott and N Naffine, ‘Wittgenstein, Rape Law and the Language of Consent’ (2000) 26 *Monash University Law Review* 48, 64-65.

<sup>54</sup> In Canada this reform was part of the 1983 amendments referenced above n 2; in Australia the High Court abolished men's marital immunity for rape in *R v L* (1991) 174 CLR 379.

<sup>55</sup> See for example Chapter five of the proposed Model Criminal Code for Australia discussed by Leader-Elliott and Naffine, above n 53, 66.

<sup>56</sup> Roberts, above n 12, 412. Roberts reports that the unfounding rate in Canada for sexual assault remains significantly higher than that for other offences and that sexual assault has the highest attrition rate among fifteen categories of offences (at 417).

<sup>57</sup> Bond, above n 2, 423; MT MacCrimmon, ‘Consistent Statements of a Witness’ (1979) 17 *Osgoode Hall Law Journal* 285, 309-13.

<sup>58</sup> C Backhouse, ‘Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History’ (2001) 29 *Western Australia Law Review* 79, 80.

<sup>59</sup> [1991] 2 SCR 577.

Current practices of credibility-testing of women who allege sexual assault find their origins in three rules of evidence that manifested women's inequality: the doctrine of recent complaint, the requirement of corroboration and the use of sexual history. All three of these devices can be traced in the *E* decision, albeit in more subtle forms than their predecessors.

#### A *Recent or Fresh Complaint*

The invocation of the rule of recent or fresh complaint is implicated in *E* by the defence's emphasis on M's failure to report all of E's sexual attacks at the time she first disclosed when she was nine years old. The common law doctrine of recent or fresh complaint held that if a genuine sexual attack had occurred, the injured girl or woman would immediately raise a "hue and cry" to any listener at the first available opportunity. The complainant's failure to meet this standard had to be drawn to the jury's attention by the trial judge as suggestive of fabrication<sup>60</sup> and jurors were directed to draw an adverse inference from such a failure. This rule applied regardless of the complainant's age, the context in which the attack occurred, or the nature of the opportunity available to her to report the assault.<sup>61</sup> Her capacity to articulate what had happened and the impact of trauma were irrelevant: her failure to complain immediately to the first available person indicated her mendacity.

This rule constituted an exception to the usual rule of evidence that generally prohibits the introduction of prior consistent statements by a witness.<sup>62</sup> Here, however, prior statements by the complainant amounting to a "complaint" of rape were required to rebut the assumption that the woman or girl was lying. The doctrine of recent complaint has been modified or repealed in its formal guises in many jurisdictions, including Canada in 1983<sup>63</sup> as well as in several Australian states, including New South Wales, Victoria, Western Australia and the ACT.<sup>64</sup>

Implementation of these reforms has been partial at best. Kathy Mack and Sharon Anleu report that although New South Wales law, among others,<sup>65</sup> requires that a judge tell the jury that there may be good reasons for a delayed disclosure of sexual assault in order to counteract common assumptions about how someone who has been raped would react, the caution is given in only half of the cases where it is warranted.<sup>66</sup> Furthermore, the High Court has muted the potential impact of law reform in this area by ruling that the trial judge may be obliged to warn jurors that delay may reflect on credibility, in order to "restore balance" to the trial process.<sup>67</sup> In Canada Lorene Clark's thorough study of the impact of repeal of the doctrine of recent complaint has demonstrated that judges

<sup>60</sup> C Backhouse, 'The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia' (2001) 26 *Queen's Law Journal* 297, paras 35-36.

<sup>61</sup> *R v Bodechon* [1964] 3 CCC 233 (P EI SC) discussed in Boyle, above n 49, 155.

<sup>62</sup> Boyle, *ibid* 152 ff.

<sup>63</sup> *Criminal Law Amendment Act*, SC 1980-81-82, c 125, s 246.5.

<sup>64</sup> See Leader-Elliott and Naffine, above n 53, 66, n 93.

<sup>65</sup> K Mack and SR Anleu, 'Resolution Without Trial, Evidence Law and the Construction of the Sexual Assault Victim' in M Childs and L Ellison (eds), *Feminist Perspectives on Evidence* (Cavendish Publishing: London, 2000) [hereinafter *Feminist Perspectives*] at 127, 133, n 39.

<sup>66</sup> *Ibid* 133, n 40, citing Department for Women, *Heroines of Fortitude. The Experiences of Women in Court as Victims of Sexual Assault* (Department for Women: Sydney, 1996) 219.

<sup>67</sup> *R v Crofts* (1996) 88 A Crim R 232; Mack and Anleu, above n 65, 133, n 41.

continue to convey the same warnings to jurors although they do so without using the explicit language of the old doctrine.<sup>68</sup>

In *E* recent or fresh complaint takes a somewhat more sophisticated form. Although the judges' focus on M's selective or incomplete disclosure may seem to be a less crude form of scrutiny of the complainant's evidence, I would suggest that the court's skepticism relies upon precisely the same assumptions and myths (if it really happened it would be natural for a child to spontaneously, immediately and fully disclose the assaults; the gap between assault and disclosure suggests a motive to fabricate, etc) as does the simpler claim of fresh or recent complaint. It is true that recent or fresh complaint in *E* is not a mandatory rule requiring a warning as to likely fabrication, yet in practical effect it counsels acquittal in the absence of recent or fresh complaint since there must necessarily be a reasonable doubt if the prosecution relies upon recovered memories. These observations may form part of a larger pattern: the study by Kelly *et al* also notes that preoccupation about recent or fresh complaint emerges in eight of the 19 cases sampled where FMS was alleged and where, most commonly, judges referred to the presence or absence of recent complaint.<sup>69</sup>

### B Corroboration Requirement

The corroboration requirement is also at play in the *E* decision, in both the majority and dissenting judgments. Historically, this common law rule held that a conviction should not be entered in the absence of independent evidence corroborating an account of rape by a woman or a girl, and some statutory versions of the rule actually prohibited such a conviction.<sup>70</sup> The testimony of women and girls was presumed dishonest or mistaken, and independent, "objective" evidence was required for a conviction to be entered against the accused.<sup>71</sup> This rule was uniquely applicable to specific sexual offences in many jurisdictions like Canada<sup>72</sup> and was not a principle widely applicable to other criminal offences or even to other victims.<sup>73</sup> The common law version of this doctrine did not bar convictions without corroboration, but required judicial warnings as to the danger of convicting in such circumstances. However, Western Australia's governing statute in 1902 prohibited a conviction for unlawful carnal knowledge based on the uncorroborated testimony of one witness, defined as 'testimony which is not corroborated in some material particular by other evidence implicating the accused person'.<sup>74</sup>

<sup>68</sup> L Clark, *Evidence of Recent Complaint and Reform of Canadian Sexual Assault Law: Still Searching for Epistemic Equality* (Canadian Advisory Council on the Status of Women: Ottawa, 1993).

<sup>69</sup> Kelly *et al*, above n 35, 168.

<sup>70</sup> Backhouse, above n 60, paras 32-33.

<sup>71</sup> Ibid para 5.

<sup>72</sup> See, however, Scottish law: although there is a general corroboration requirement for all crimes, it has a very specific impact upon the prosecution of crimes of sexual violence: P R Ferguson, 'Corroboration and Sexual Assault in Scots Law' in *Feminist Perspectives*, above n 65, 149.

<sup>73</sup> For example Boyle reports that although there was in the Canadian *Code* a long list of sexual offences to which this rule applied, notably absent was indecent assault on a male: above n 49, 156.

<sup>74</sup> Backhouse, above n 60, 17, quoting The *Criminal Code 1902* (WA) s 188(1).

In Canada the statutory version of the corroboration requirement was repealed by statute in 1976.<sup>75</sup> Judges continued, however, to rely on common law doctrines and to warn juries that it was dangerous, although not prohibited, to rely upon the uncorroborated testimony of a woman or a child regarding a sexual attack. The legislature then explicitly prohibited judicial exhortations regarding the dangers of uncorroborated evidence in 1983.<sup>76</sup> The requirement for a corroboration warning has been abolished by statute in several Australian states, including Victoria, Tasmania, South Australia, Western Australia and the ACT.<sup>77</sup> The Australian reforms tend to echo that enacted in New South Wales in 1981, which abolished the requirement for a corroboration warning and essentially left it within the discretion of the presiding judge.<sup>78</sup>

These reforms have been undercut in Australia by the High Court in a decision that held that repeal of this rule did not affect the requirement to give a warning in the particular circumstances of a sexual assault prosecution.<sup>79</sup> The Department for Women's study of New South Wales cases found that in 40% of the cases studied in 1994-95, a strong corroboration warning was given by the judge; in 59% of the cases a more moderate warning was given, suggesting to the jury that they scrutinize uncorroborated evidence with "great care;" and in only 12% was no warning provided by the judge.<sup>80</sup> Equally disturbing were some of the judicial comments made that demonstrate tremendous resistance to discarding the corroboration warning.<sup>81</sup>

In *E*, the dissenting opinion commented that 'If the complainant's newly retrieved consciousness of [her memories of the alleged events] were unsupported by independent corroborative evidence I would share the concerns of the majority about the safety of the verdict'.<sup>82</sup> The majority opinion did not focus on the corroborative evidence identified by the dissent (the medical evidence, E's strong attraction to the child) and instead focused on the lack of evidence corroborating M's allegation that E was the perpetrator of the assault against her:

His Honour could not and did not find, on the evidence, that the accused had been the perpetrator of all of the damage to the anus. The corollary of that finding was that it was reasonably possible that much of the damage had been done by some other person. As to the consistency mentioned by His Honour between MH's complaint and Dr Small's findings, it is true that Dr Small's evidence established that the complainant had suffered anal penetration by some person or persons. That was consistent with MH's evidence, but the evidence went no further than that. ... His Honour mentioned that there was no direct corroboration of MH's evidence as to the facts charged in the three counts.<sup>83</sup>

It will be noted here that the majority in *E* relied upon a much narrower understanding of corroboration hearkening back to older statutory versions of corroboration that required evidence that went to a significant aspect of the crime alleged and that directly

<sup>75</sup> SC 1974-75-76, c 93, s 8.

<sup>76</sup> *Criminal Law Amendment Act*, SC 1980-81-82, c 125, s 246.4: 'the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.'

<sup>77</sup> Leader-Elliott and Naffine, above n 53, 65, n 91.

<sup>78</sup> *Heroines of Fortitude*, above n 66, 185-86, discussing s 405C of the *Crimes (Sexual Assault) Amendment Act 1981*.

<sup>79</sup> *R v Longman* (1989) 168 CLR 79 as discussed by Backhouse, above n 58, 81, n 5.

<sup>80</sup> *Heroines of Fortitude*, above n 66, 188-90.

<sup>81</sup> *Ibid* 192-94.

<sup>82</sup> *R v E* (1997) 96 A Crim R 489 (NSW CCA) 493.

<sup>83</sup> *Ibid* 498.

implicated the accused. In other words, evidence that supports aspects of the allegation or supports the complainant's credibility and reliability may not be adequate to the task of corroboration, particularly in cases where the woman relies upon recovered memory. For example, in the Canadian context, one appellate court stated that 'this type of case, perhaps more so than others, carries with it the potential for a serious miscarriage of justice'<sup>84</sup> but upheld the conviction, because, 'having recognized the inherent frailties associated with the complainant's evidence, the trial judge quite properly recognized the need to proceed with caution before acting upon it. To that end, he ... sought out confirmatory evidence designed to restore his trust in the complainant's testimony'.<sup>85</sup>

### C Women's Sexual History

In *E* the court's reliance upon the complainant's sexual history as part of her discreditation is even more subtle, but I would suggest that her previous victimization was used against her in this case. One might think that the accused's prior guilty pleas with respect to assaults upon M and the extensive damage to her body would only help, not hurt the prosecution. Instead this evidence was used in *E* to obfuscate the identity of the perpetrator and to undermine M's credibility. Historically, the law of evidence permitted the questioning of women complainants in rape prosecutions regarding their reputations for chastity and their past sexual experiences in order to suggest consent, dishonesty and unreliability. It is extremely rare for defence to use a victim's past acts to argue that no crime has occurred outside of the context of a rape trial<sup>86</sup> and the rule is very difficult to justify based upon ordinary evidence law because witnesses' past sexual acts would normally be seen as extremely collateral to the issue of an accused's guilt.<sup>87</sup>

Canadian legislators have introduced legislative measures on two prior occasions to limit defence access to women's sexual history and both have failed miserably. The first law, passed in 1976,<sup>88</sup> resulted in judicial interpretations that expanded instead of restricting defence access,<sup>89</sup> and the second<sup>90</sup> was declared unconstitutional in 1991 in *Seaboyer* as in violation of men's constitutional rights to a fair trial and to the benefit of the presumption of innocence: the Court held that the legislative bar on most forms of sexual history evidence would prevent the trier of fact from hearing relevant and critical

<sup>84</sup> *R v EFH* [1996] OJ No 553 (CA), para 26.

<sup>85</sup> *Ibid* para 10. Busby, above n 44, para 29 suggests that this ruling effectively discourages prosecution of sexual assaults based on recovered memory.

<sup>86</sup> R Pattenden, 'The Character of Victims and Third Parties in Criminal Proceedings Other Than Rape Trials' (1986) *Crim L Rev* 367, 368-69.

<sup>87</sup> S Easton, 'The Use of Sexual History Evidence in Rape Trials' in *Feminist Perspectives*, above n 65, 167, 175-77.

<sup>88</sup> *Criminal Law Amendment Act*, SC 1974-75-76, c 93.

<sup>89</sup> Until 1976 in Canada the law permitted the accused to ask the complainant questions about her sexual past and character, but the collateral issue rule prohibited him from compelling her to answer and from introducing evidence to rebut her answers. However, simply being asked insinuating questions about one's sexual past worked to discredit the complainant. Parliament aimed to restrict such questions by requiring a *voir dire* process and vesting the judge with discretion to prohibit the application. A 1976 judicial interpretation of the new law resulted instead in an expanded right on the part of the accused to attack the woman's credibility by forcing her to answer degrading questions about her past and permitting the introduction of evidence to contradict her responses. See *R v Forsythe* [1980] 2 SCR 268, discussed in C Boyle, 'Section 142 of the *Criminal Code*: A Trojan Horse?' (1981) 23 *Criminal Law Quarterly* 253.

<sup>90</sup> *Criminal Law Amendment Act*, SC 1980-81-82, c 125, s 276.

evidence that might favour the accused.<sup>91</sup> Parliament responded to *Seaboyer* in 1992 with new legislation<sup>92</sup> that attempts to guide the judicial exercise of discretion with respect to applications to admit women's sexual history evidence. In Australia, statutory reforms in most states have been enacted that place some limits upon the elicitation of complainants' sexual history evidence, yet still permit judges to exercise their discretion to admit the evidence in certain circumstances. For example, South Australia, Western Australia, Tasmania, Victoria, New South Wales and the ACT have introduced reforms of this nature.<sup>93</sup>

In spite of many different legislative attempts to curb defence efforts to discredit women through cross-examination on their sexual pasts, no jurisdiction can claim any clear success. Studies in Tasmania, Victoria and New South Wales indicate that the evidence is raised in 38, 30 and 35% of the cases respectively without even making the required application to court.<sup>94</sup> Other work suggests that the criteria for admission are not being applied even when proper application is made,<sup>95</sup> and that there is judicial resistance to legislative guidelines that curb their discretion.<sup>96</sup> One Canadian study sponsored by the Department of Justice has found a fairly high rate of admission of sexual history evidence as well as judicial reliance upon discredited myths about women and rape since the 1992 enactment of Canada's post-*Seaboyer* law regulating the use of women's sexual history evidence.<sup>97</sup>

It is, of course, a contentious claim to argue that M's prior victimization is her sexual history for the purpose of evidence law and to support the point that FMS is being used to displace rape law reforms. However, in the Canadian context, defence lawyers attempt to secure the admissibility of prior victimization of a given complainant in order to undermine her testimony by suggesting that: she was damaged by prior trauma such that she is an unreliable witness who may have imagined additional assaults; even if she was assaulted she may be confused and thus mistaken as to who injured her; her earlier rape allegations were not substantiated such that her current disclosure is tainted by her earlier statements; or if the complainant is a child, her detailed knowledge of sexual matters should not be relied upon as evidence corroborating guilt on the part of the accused because her experience was acquired through prior victimization.<sup>98</sup> In other

<sup>91</sup> At the same time, the Court held that the accused cannot use a woman's sexual history evidence for the purpose of "twin myths" reasoning, without more, eg, not to baldly assert she has had sex with some other man previously and is therefore more likely to have consented to the accused or that, simply because she has been sexually active, she is more likely to lie: *Seaboyer* [1991] 2 SCR 577.

<sup>92</sup> *An Act to Amend the Criminal Code*, SC 1992, c 38.

<sup>93</sup> Leader-Elliott and Naffine, above n 53, 66, n 92.

<sup>94</sup> The studies are T Henning, *Sexual Reputation and Sexual Experience Evidence in Tasmanian Proceedings Relating to Sexual Offences* (Tasmania UP: Hobart, 1996) 24-28; M Heenan and H McKelvie, *Evaluation of the Crimes (Rape) Act 1991* (Department of Justice: Melbourne, 1997) 153; and *Heroines of Fortitude*, above n 66, 230, all cited in Mack and Anleu, above n 65, 133, n 34, 35, 36.

<sup>95</sup> T Henning and S Bronitt, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence' in P Eastal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press: Sydney, 1998) 90.

<sup>96</sup> K Mack, 'Continuing Barriers to Women's Credibility' (1993) 4 *Criminal Law Forum* 327, cited in Easton, above n 87, 187, n 65.

<sup>97</sup> C Meredith, R Mohr and R Cairns Way, *Implementation Review of Bill C-49* (Department of Justice: Ottawa, 1997) 15-16, 30.

<sup>98</sup> See, for example, *R v Ross* [1996] OJ No 1361 (Gen Div); *R v OB* [1995] NSJ No 499 (CA); and *R v Eyre* [1995] BCJ No 1377 (S Ct).

words, M's past victimization was in fact her "sexual history" in the sense that it was highly prejudicial evidence that rendered her vulnerable to the "calling up" of the pernicious myths about women and rape. In *E*, the prior victimization of the complainant was used overtly to suggest that her evidence was either dishonest or unreliable because she had not earlier disclosed all of E's crimes against her. Her prior victimization may also have affected the credibility of her evidence since her traumatic experiences were seen to have undermined her identification of E as the perpetrator.

The link between M's sexual history of victimization at the hands of her step-father and her discreditation is perhaps made more obvious given the specific myths that were invoked to justify judicial doubt as to E's conviction. Here it is important to note the inherent conflict between these myths and the FMS theory that M may have honestly, but erroneously, recalled attacks by her step-father, as this conflict shows that FMS claims are not benign. The appeal court identified two classic "motives to fabricate"—revenge exacted against M's step-father and a craving for attention—and suggested that such motives may subconsciously shape recovered memories. The attribution of motives of this sort relies upon deeply gendered beliefs about mendacious, self-centred and cruel women and girls. The court thus reinforced the notion that reports by women and girls of male violence must be treated as inherently unreliable and suspect, even when other evidence supports their accounts, and did so under the guise of "common knowledge" about female subconsciousness. Again, *E* does not seem to be an isolated example: Kelly *et al*'s analysis points out a disturbing tendency in the FMS case law to use women's sexual history, as gleaned from their therapeutic records, to discredit their memories if they are sexually dysfunctional, "promiscuous," or if the details of the sexual abuse are viewed as "bizarre."<sup>99</sup>

## V CONCLUSION

Every law reform in evidence law that has been generated to overcome sex discrimination in the adjudication of rape has been met with counter-moves by the defence bar and the re-emergence of myths and stereotypes about women, men, and rape in the guise of new legal practices and judicial discourses. The explicit and implicit use of FMS discourse to justify this continuing resurrection of discredited beliefs should perhaps not be surprising, although it is ironic. When science is, for a rare moment, offered in support of women's credibility and reliability, as it has been through the DSM's acceptance of recovered memory for traumatic experiences, a pseudo-scientific theory that resonates with long-held myths suppressed only superficially through legal reforms is bound to be far more appealing for the players in the criminal law as they struggle to re-assert what they see as the "balance" in the rape trial. In fact we have not come so far from the medieval reliance on the ordeal as a way of testing women's evidence, according to Marilyn MacCrimmon:

Ordeals were used in cases of adultery because the witness was believed to not be oathworthy and there was often an absence of visible evidence. Modern sexual assault trials are also viewed by many as battles of credibility and use of therapeutic records to assess credibility may be seen as providing a litmus test which will identify who is telling the truth. This belief assumes, among other things, that rational methods of fact determination developed over the centuries are not reliable and valid measures of the

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<sup>99</sup> Kelly *et al*, above n 35, 172.

credibility of sexual assault complainants. It is a belief that inflicts severe harm on the victims of sexual assault.<sup>100</sup>

At the same time as the continuities between historical and modern evidentiary practices in the treatment of women's evidence in rape trials emerge, it is clear that women's social and legal status has changed since the medieval period, even though women continue to experience oppressions and many forms of inequalities. This trite observation has implications for rape law reform over the longer term, particularly when the presence of women judges and their dissenting voices is brought into focus. For while most of the majority judgments written on rape law in the higher courts are authored by men, a significant number of the dissents in these cases are written by women judges,<sup>101</sup> some who scrutinize the facts without abstraction or reliance on hypotheticals, and who confront legal doctrine with rigour and with full recognition of the responsibility of judicial choice. In the *E* case, as is the case in many appellate decisions in Canadian rape law,<sup>102</sup> the sole dissenting justice was a woman. Her Honour Justice Simpson took a much more methodical approach to the totality of the evidence against E than did her colleagues, viewing the doctor's evidence as reliable support for the complainant's evidence based in recovered memory and adhering to the principle of deference to a trial judge's findings on the credibility of the witnesses and the accused.<sup>103</sup>

In conclusion, the *E* case shows us both how fragile are feminist victories in rape law in the face of women's relative lack of credibility both socially and legally, and how far we have come in this particular struggle. Although FMS was successfully conjured up and used to echo discredited sex discriminatory myths, an alternative rendering of the truth and the law is on record in the dissent of Justice Simpson. Twenty years of feminist activism, research, publication, litigation and law reform have not failed to leave a trace.

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<sup>100</sup> MacCrimmon, above n 13, 56.

<sup>101</sup> See C L'Heureux-Dubé, 'The Dissenting Opinion: Voice of the Future?' (2000) 38 *Osgoode Hall Law Journal* 495, 512, where Madame Justice L'Heureux-Dubé notes that the first four women justices of the Supreme Court have written or supported dissenting opinions more frequently than the men of the Court.

<sup>102</sup> See, for example, the dissenting judgment of Justice Abella in *R v Osvath* (1996) 87 OAC 274 (CA); the dissenting judgments of Justices L'Heureux-Dubé and McLachlin in *Osolin* [1993] 4 SCR 595 and *R v Esau* [1997] 2 SCR 777; the dissenting judgment of Justice Fraser in *R v Ewanchuk* (1998) 57 Alta LR(3d) 235 (CA); and the dissenting judgment of Justice Lane in *R v Ecker* (1995) 128 Sask R 161 (CA).

<sup>103</sup> *R v E* (1997) 96 A Crim R 489 (NSW CCA), 493.