

1-1-1996

False Memory Syndrome: "The Female Malady"

Erin Brady

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/djls>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License](https://creativecommons.org/licenses/by-nc-nd/3.0/).

Recommended Citation

Erin Brady, "False Memory Syndrome: "The Female Malady"" (1996) 5 Dal J Leg Stud 69.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Journal of Legal Studies by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

FALSE MEMORY SYNDROME: “THE FEMALE MALADY”¹

ERIN BRADY†

The theory of memory repression has been both relied on by adult survivors as evidence of sexual crimes committed against them, and endorsed by many of the higher courts in Canada, including the Supreme Court of Canada. Advocates of the false memory syndrome refute the scientific validity of repressed memories, and vigorously oppose their judicial acceptance, by contending that recovered memories of childhood abuse are more often the product of a therapeutic relationship gone wrong. An examination of the manner in which the false memory syndrome is being pleaded by defence counsel, and heard by Canadian courts, reveals that it is a decidedly gendered phenomenon and employed almost exclusively to describe female experience. The article explores the anti-women stereotypes which underlie the defence and seeks to demonstrate the extent to which the false memory syndrome represents a formidable obstacle to all survivors of sexual abuse seeking legal redress.

Les plus hauts tribunaux canadiens, y compris la Cour suprême du Canada, ont reconnu la théorie de la répression des souvenirs par les victimes d'agressions sexuelles. Les défenseurs du syndrome de la mémoire trompeuse nient la justesse scientifique de cette théorie et s'opposent vigoureusement à l'idée que ce syndrome devrait être accepté par les juges. Ils prétendent que des souvenirs d'agressions sexuelles dans la jeunesse sont plus souvent les effets de relations thérapeutiques qui n'ont pas marché. Une analyse de la façon dont le syndrome est utilisé par les avocats, et considéré par les tribunaux, démontre qu'il est employé presque exclusivement pour décrire les expériences des femmes. Cet article examine les stéréotypes anti-féministes qui sous-tendent la défense et veut démontrer comment le syndrome de la mémoire trompeuse constitue un obstacle important aux victimes d'agressions sexuelles qui cherchent l'aide des tribunaux.

¹ The title of this paper alludes to a book by E. Showalter, *Female Malady: Women, Madness, and English Culture 1830-1980* (New York: Penguin, 1987).

† B.A. (McGill), LL.B. (Dalhousie) anticipated 1997.

On June 22, 1994, Justice Hanssen of the Manitoba Court of Queen's Bench dismissed a nineteen-year-old woman's claim that her father sexually assaulted her as a child. The complainant's allegations were based primarily on repressed, but recently recovered, memories of the abuse. The defence of false memory syndrome was led. Ruling before expert testimony was led with respect to the syndrome,² Hanssen J. wrote that, although it was apparent that the complainant honestly believed in her recovered memories, she was suffering from delusions. Concerned that the accused "would suffer a great stigma in the community" as a result of being charged with sexual abuse, the trial judge made a point to add that, in his view, the violations never occurred and were "merely a product of [the complainant's] mind."³

Just one month earlier, a California man accused of raping his daughter sued her psychotherapists, claiming that they had implanted false memories of childhood sexual assault in the twenty-three-year-old woman's mind. The jury agreed. On May 13, 1994, Gary Ramona was awarded \$500,000 in a verdict which marked the first successful third-party suit against a therapist over the use of recovered memory therapy.⁴

These two cases represent the growing and extremely alarming influence that the so-called false memory syndrome is beginning to wield in Canadian and American courtrooms. The theory that the brain can repress memories of traumatic events has been relied on by adult survivors as evidence of sexual crimes committed against them. The Supreme Court of Canada and other courts have accepted this evidence.⁵ Unmistakably, the false memory syndrome (FMS) constitutes a concerted reaction to this judicial affirmation of memory repression. Proponents of FMS maintain that the mind is incapable of repressing knowledge of such painful events, and that

² July 19, 1994, Canadian Press wire service, NEWSTEX database. (QL)

³ *R. v. R. L. B.*, [1994] M.J. No. 416 at paras 4 and 5 (Man.Q.B.) (Q.L.).

⁴ M. Hansen, "More False Memory Suits Likely: Critics Buoyed by Father's Verdict Against Daughter's Psychotherapists" (August 1994) 80 A.B.A. Journal 36 at 36.

⁵ See the discussion of (*K.*) *M. v. (H.) M.* (1992), *infra* note 26.

recovered memories of abuse are the creation of overzealous therapists intent on financial gain.

To the extent that FMS attacks both the fundamental grounds of a complainant's claim, both her⁶ memories of the abuse and the competence and professional ethics of the therapeutic community, it presents a new and formidable obstacle to survivors who wish to bring their abusers to justice. In the process, the defence resurrects historical stereotypes of women which not only denigrate all survivors of sexual violation, but threatens to shift public and judicial focus away from the social epidemic of child sexual abuse.

The subsequent discussion will, first, explore the theory of memory repression and will outline, in detail, the challenge which the false memory syndrome poses to it. Second, the arguments of opponents to the false memory syndrome concept will be briefly canvassed. The third section will examine the manner in which FMS is being pleaded by defence counsel and heard by Canadian courts. Following this section will be an analysis of the unmistakable anti-women stereotypes which underlie the defence and the extent to which FMS acts as a barrier to all survivors seeking legal redress. Finally, recommendations will be advanced as to how FMS *should* be received by the courts, taking into account both the scientific uncertainty of the syndrome as well as its ideological underpinnings.

I. SURVIVAL INSTINCTS: THE THEORY OF MEMORY REPRESSION

When the conflict caused by my sexual relationship with my father became too acute to bear, I created a secret accomplice for my daddy by splitting my personality in two. Thus, somewhere around the age of seven, I acquired another self with memories and experiences separate from mine, whose existence was unknown to me.

⁶ The female personal pronoun is used for two reasons. First, although we are becoming increasingly aware that the percentage of boys who are sexually abused is much higher than previously estimated (see Steed, *infra* note 8), current statistics demonstrate that girls are more often the target of sexual assault. Second, the false memory syndrome is not a gender neutral concept and is employed almost exclusively to describe female experience.

My loss of memory was retroactive. I did not remember my daddy ever having touched me sexually In future, whenever my daddy approached me sexually, I turned into my other self, and afterwards I did not remember anything that had happened.

Even now, I don't know the full truth of that other girl I created to do the things I was too frightened, too ashamed, too repelled to do, the things my father made me do⁷

Before exploring the false memory syndrome in detail, it is important to consider the context in which the defence has emerged and the psychological phenomena it speaks against. Over the last fifteen years, Canadians and their courts have slowly come to acknowledge the devastating fact that incest and the sexual violation of children are pervasive social realities. The findings of the federal Badgley Committee heightened the awareness of the prevalence of childhood sexual abuse. In 1984, the Committee reported that approximately "one in four girls and one in seven boys experienced unwanted sexual acts."⁸ Experts in the field contend that these figures are considered conservative by current standards, particularly as they pertain to males who are just beginning to come forward in larger numbers.⁹ In 1992, Statistics Canada disclosed that of all reported cases of sexual abuse, forty percent were enacted against children eleven years of age and under.¹⁰ It is further estimated that 42,000 Canadian children under the age of fifteen are sexually assaulted every year.¹¹ Indeed, the pervasiveness of child sexual abuse has prompted American psychiatrist Roland Summit to designate it a "normative experience."¹²

⁷ S. Fraser, *My Father's House: A Memoir of Incest & Healing* (Toronto: Doubleday Canada Ltd., 1987) at 15.

⁸ J. Steed, *Our Little Secret* (Toronto: Random House, 1994) at xii.

⁹ *Ibid.* at xii-xiii. Steed notes that the sexual abuse of children has had a particularly devastating impact in Canada's Aboriginal communities, where several generations of First Nations children were uprooted from their families and enrolled in residential schools.

¹⁰ *Ibid.* at xiii.

¹¹ *Ibid.* at xii.

¹² *Ibid.* at xiii.

As our justice system becomes increasingly sensitized to the widespread problem of child sexual abuse, and as strict legal barriers such as limitation periods are liberalized, more and more adult survivors are feeling empowered to seek redress for their injuries in the courts. Significantly, some of these litigants are unable to remember or recognize the effect of their abuse until well into their adult years. Some survivors rely on the theory of repression to explain *how* the realization of their abuse came to light, as well as *why* they deferred the commencement of their claim. Contrary to what proponents of the false memory syndrome contend, the phenomenon of repression has been well supported, both by clinical experience with patients undergoing therapy and "by solid experimental laboratory findings."¹³ Often described as "traumatic amnesia,"¹⁴ repression occurs when the memory of an event which is too painful for the conscious mind to handle is "forced into the unconscious where it becomes inaccessible."¹⁵ Dissociation is characterized as a milder form of repression and acts in much the same way as a defence mechanism against extreme trauma.

Psychologists contend that repressing memories of past abuse often leads to serious debilities later in life, ranging from depression and sexual dysfunction to suicidal tendencies.¹⁶ Mark Roseman maintains that painful memories of childhood assault may be stored in the survivor's memory for decades and may be recollected by "triggering cues in the everyday environment,"¹⁷ such as significant or highly emotional events in the survivor's life: childbirth, the death of the abuser,¹⁸ or professional intervention. It is important to note that while repression serves as a survival

¹³ J.G. Watkins, "Dealing with the Problem of 'False Memory' in Clinic and Court" (1993) 21 *Journal of Psych. and Law* 297 at 302.

¹⁴ M.E. Roseman, "Adult Survivors of Childhood Sexual Abuse Litigation: Repressed Memories and Tolling the Statute of Limitations" (1992) 20 *W. St. U. L. Rev.* 81 at 85.

¹⁵ M.L. Hayes, "The Necessity of Memory Experts for the Defense in Prosecutions for Child Sexual Abuse Based Upon Repressed Memories" (1994) 32 *Am. Crim. L. Rev.* 69 at 71-72.

¹⁶ J.B. Lamm, "Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule" (1991) 100 *Yale L. J.* 2189 at 2193.

¹⁷ *Supra* note 14 at 85.

¹⁸ See generally, Fraser, *supra* note 7.

technique for young victims of sexual assault, it also benefits the abuser by guaranteeing the secrecy of his acts.¹⁹ As Judith Herman explains, the “perpetrator does everything in his power to promote forgetting. Secrecy and silence are [his] first line of defence.”²⁰

1. Evidence of memory repression in clinic and court

At least three major studies have documented the partial or complete repression or dissociation of childhood sexual trauma. In a recent study by Linda Williams of the Family Violence Research Laboratory in New Hampshire, 200 women were surveyed who had been treated as children for sexual abuse in the early seventies. One in three women (thirty-eight percent) did not remember the assaults which had been reported in their hospital records almost twenty years earlier.²¹ Williams’ research findings led her to conclude that “having no memory of child sexual abuse is a common occurrence.”²² In a 1993 study of 450 adults who reported a history of sexual abuse, a full fifty-nine percent “identified some period in their lives before they reached age eighteen when they had no memory of their abuse.”²³ A third study conducted in 1987 revealed that repressed memories of childhood sexual violation could be verified by an independent source. Of fifty-three self-identified survivors who had experienced a delay in remembering incidents of sexual abuse, seventy-four percent were able to obtain corroborating evidence supporting their allegations. Only six percent of the women were unable to adduce any external proof of their claims.²⁴

Not only have the phenomena of memory repression and dissociation been well documented by health care professionals and those working with survivors of sexual assault, but they have also garnered considerable acceptance by Canadian courts. In a recent case before the Ontario Court of Appeal, Robins J.A. stated that

¹⁹ *Ibid.* at 86.

²⁰ R.B. Rockwell, “Insidious Deception” (1995) 22(3) *Journal of Psychohistory* 312 at 324-5.

²¹ S.L. Bloom, “Hearing the Survivor’s Voice: Sundering the Wall of Denial” (1994) 21(4) *Journal of Psychohistory* 461 at 474.

²² P. Begin, *Child Sexual Abuse: The Recovered Memory / False Memory Debate* (Ottawa: Library of Parliament Research Branch, 1994) at 7.

²³ *Ibid.* at 6.

²⁴ *Supra* note 20 at 474.

the mental blocking of childhood sexual abuse is a “widely recognized psychological [process].”²⁵ Indeed, it is the complainant’s repressed memories of abuse which informed the landmark decision of the Supreme Court of Canada in *(K.) M. v. (H.) M.* Justice La Forest delineated his reasons for extending the limitation period for survivors of incest to assert their claims in court by focusing on the complainant Karen Miersma’s evidence of dissociation. He noted that while the complainant was being raped by her father, she would “imagine herself as an inanimate object, for example a door handle or carpet.”²⁶ In applying the doctrine of reasonable discoverability to Miersma’s claim, the Supreme Court implicitly affirmed that her repressed memories were both valid and credible.²⁷ Moreover, La Forest J. acknowledged the often crucial role of professional help, such as psychotherapy, in overcoming psychological blocks and “uncovering the nexus between fault and damage.”²⁸

II. THE FALSE MEMORY SYNDROME AND THE CASE AGAINST REPRESSION THEORY

Advocates of the false memory syndrome refute the scientific evidence of repressed memories and, more critically, vigorously oppose the acceptance of their validity by the courts. The term “false memory syndrome” came into popular usage in 1992 with the creation of the False Memory Syndrome Foundation, a Philadelphia-based advocacy group for parents who claim that they have been wrongly accused of sexually abusing their children. Advocates of the syndrome maintain that memories of “emotionally charged events are among the least forgettable memories [people] have.”²⁹ They contend that, because memories of childhood sexual abuse are so traumatic, it is extremely unlikely

²⁵ *R. v. Francois* (1993), 64 O.A.C. 140 at 147.

²⁶ *(K.) M. v. (H.) M.* (1992), 14 C.C.L.T. 1 (S.C.C.) at 11-12.

²⁷ S. Vella, “False Memory Syndrome: Therapists Are the Targets in New Sexual Assault Defence Theory” (1994) 3(1) *National* 36 at 39.

²⁸ *Supra* note 26 at 25.

²⁹ C. Bannon, “Recovered Memories of Childhood Sexual Abuse: Should the Courts Get Involved When Mental Health Professionals Disagree?” (1994) 26 *Ariz. St. L.J.* 835 at 845.

that an adult survivor could repress them for years or decades at a time.³⁰ Instead, FMS Foundation supporters allege that memories are malleable and constructive, and as such are highly imperfect and inherently unreliable.³¹ Thus, those who are suffering from FMS “come to believe” that they have repressed memories of abuse through pressure from an external, suggestive source.³² As a consequence, they begin to re-interpret events in their lives around this memory.³³ The FMS Foundation’s mission statement asserts the syndrome typically manifests itself in the following manner:

[G]rown children while undergoing “therapeutic” programs have come to believe that they suffer from “repressed memories” of incest and sexual abuse. While some reports of incest and sexual abuse are surely true, these “decade-delayed memories” are too often the result of False Memory Syndrome caused by a disastrous “therapeutic” program. False Memory Syndrome has a devastating effect on the victim and typically produces a continuing dependency on the very program that creates the syndrome. False Memory Syndrome proceeds to destroy the psychological well-being of not only the primary victim but—through false accusations of incest and sexual abuse—of other members of the primary victim’s family.³⁴

As the FMS Foundation’s mission statement reveals, proponents of FMS are vocal in their condemnation of the manner in which traumatic “memories” are uncovered. In their view, memories of childhood sexual abuse are either intentionally or unwittingly implanted by inexperienced, overzealous or “ideologically driven” therapists.³⁵ FMS Foundation supporters argue that psychotherapists and those working within the recovery movement are motivated by financial gain to implant false memories in the minds of their

³⁰ *Supra* note 27 at 37.

³¹ J.M.Kosmond Murray, “Repression, Memory and Suggestibility: A Call for Limitations on the Admission of Repressed Memory Testimony in Sexual Abuse Trials” (1995) 66 U. Colo. L. Rev. 477 at 498.

³² I. Cote, “False Memory Syndrome: Assessment of Adults Reporting Childhood Sexual Abuse” (1993) 20 W. St. U. L. Rev. 427 at 428.

³³ *Ibid.* at 428.

³⁴ *Supra* note 21 at 470, quoting from an FMS Foundation document.

³⁵ *Supra* note 22 at 3. As discussed below, “ideologically driven” reads “feminist.”

hapless patients. The creation of false memories during therapy is said to occur in the following manner: First, since most therapists today are highly sensitized to the prevalence of sexual assault, they often focus on recovering lost memories of abuse as a means of "freeing the patient" from her suffering and explaining her dysfunctions. Second, the survivor, who yearns to please her therapist, responds to these suggestions by fabricating recollections of such childhood trauma.³⁶ FMS Foundation advocates encourage parents accused of assault to take legal action against their daughters' therapists.

The syndrome's advocates are particularly suspicious of memories recovered during the course of therapy, although they also contend that FMS can also be engendered through other suggestive external influences, such as self-help books and the media. Therapists and authors of self-help books for incest survivors are thriving in what FMS proponents dub a "sexual assault industry."³⁷

1. Evidence of the False Memory Syndrome

The Foundation cites the recantation of abuse by women who previously accused family members of sex crimes as strong evidence of the existence of false memory syndrome. In addition, FMS proponents rely on a number of clinical experiments to highlight the fallibility of human memory. One study required a group of adults to recollect the manner in which they first heard news of the *Challenger* explosion in 1986. The subjects of the experiment were questioned the day after the tragedy and a second time three years later. According to researchers who conducted the study, none of the memories of the explosion were entirely correct. Moreover, one-third were characterized as "wildly inaccurate."³⁸ In an investigation directed by Dr. Elizabeth Loftus, a fourteen-year-old boy was persuaded by his older brother to believe that he had been lost in a

³⁶ *Supra* note 32 at 430.

³⁷ N. Gedney, "The Backlash and Beyond: The Game of Shame and Blame" (1995) 22(3) *Journal of Psychohistory* 417 at 435. See also Cote, *supra* note 32 at 430, and Bannon, *supra* note 29 at 846, where she maintains that "the therapeutic industry earns millions of dollars from patients' insurance payments."

³⁸ E. Loftus, "The Reality of Repressed Memories" (1993) 48(5) *American Psychologist* 518 at 531.

shopping mall at the age of five. Several days later, the boy “described his feelings about being lost, recalled a conversation with his mother after he was found,”³⁹ and remembered physical details about his rescuer, including a conversation they shared. Loftus concluded that her findings demonstrate that false memories of mildly traumatic experiences can be fabricated “by a small suggestion from a trusted family member, by hearing someone lie, [or] by suggestion from a psychologist.”⁴⁰

2. The Impact of the FMS Movement on Repression Theory

The FMS Foundation is strident in its denunciation of particular therapeutic practices employed to recover memories. Foundation members assert that unqualified therapists are using questionable methods of memory retrieval, such as hypnosis, age regression and injections of sodium amytal (“truth serum”). The FMS Foundation claims these methods are highly suggestive techniques which “‘promote confabulation’ of vivid memories.”⁴¹ While some psychologists admit that there are psychotherapists who misuse memory retrieval techniques,⁴² they contend that FMS advocates are dishonest in representing such abuse as the norm.⁴³ Nevertheless, the American Medical Association has responded to criticisms surrounding memory recovery by cautioning that the “use of recovered memories is fraught with problems of potential misapplication.”⁴⁴ The Australian Psychological Society has also recently issued guidelines warning health care professionals to “‘be alert’ to the possibility that they may play a role”⁴⁵ in fabricating memories in the course of their clients’ treatment.

Perhaps the most glaring evidence of FMS’s assault on the theory of memory repression is a May 1995 decision by the New

³⁹ *Supra* note 22 at 9.

⁴⁰ *Supra* note 38 at 533.

⁴¹ *Supra* note 29 at 846.

⁴² *Supra* note 21 at 471.

⁴³ See Bannon, *supra* note 29 at 846, where she quotes psychologist Richard

Ofshe stating that “recovered memory therapy will come to be recognized as the quackery of the 20th century.”

⁴⁴ Kosmond-Murray, *supra* note 31 at 503, quoting from the American Medical Association, Report of the Council of Scientific Affairs: Memories of Childhood Abuse 8 (1994).

⁴⁵ November 4, 1994, from CP wire service, NEWSTEX database (QL).

Hampshire Superior Court. In *State of New Hampshire v. Hungerford*, Justice Groff refused to admit the testimony of two complainants who accused the defendant of rape because the submissions were based on recovered memories.⁴⁶ More specifically, the court ruled that memory repression is “not generally accepted in the field of psychology”⁴⁷ and, as such, the complainants’ recovered memories were deemed scientifically unreliable.

In several American states, the FMS Foundation is also aggressively seeking support for proposals of draft legislation to be entitled *The Mental Health Consumer Protection Act*.⁴⁸ The proposal targets psychotherapists and would include provisions which would criminalize fraudulent techniques “such as the wilful or reckless induction of false accusations,”⁴⁹ ban repressed memory testimony from courtrooms, create a stringent licensing scheme for all therapists, and eliminate federal, state and private insurance funding for therapy procedures which are not pre-approved.

III. A CRITIQUE OF FMS

There are numerous criticisms lodged against the false memory syndrome. Several psychologists working in the field contend that there is very little hard data to support the incidence of FMS.⁵⁰ Indeed, Sandra Bloom maintains that there have been “no scientifically controlled comparison groups [and] no research to document or quantify”⁵¹ the phenomenon. Critics of FMS vigorously contest the experiments employed by the Foundation to support its claims. For instance, in a direct response to Loftus’ research, FMS critics contend that getting lost in a shopping mall and being sexually violated are not “comparable experiences . . . [T]he element of shame, secrecy and fear of disclosure that

⁴⁶ (1995) WL 378571 (N.H.Sup.Ct.) at 15. Case retrieved from WESTLAW.

⁴⁷ *Ibid.* at 15. Interestingly, Justice Groff also notes the *absence* of studies “indicating that false memories have ever been implanted by the therapy process.” (*Ibid.* at 13).

⁴⁸ S.A. Quirk and A.P. DePrince, “Backlash Legislation Targets Psychotherapists” (1995) 22(3) *Journal of Psychohistory* 258.

⁴⁹ *Ibid.* at 260

⁵⁰ *Supra* note 32 at 428-9.

⁵¹ *Supra* note 21 at 470.

typically coincide with sexual abuse”⁵² are markedly absent from the study. There is no proof, FMS detractors contend, that a memory as traumatic as sexual abuse could be similarly created.⁵³ Further, critics argue that the language used to describe the condition is extremely deceptive. Isabelle Cote explains that, clinically speaking, FMS is not actually a ‘syndrome’, which is “an entity with a specific [and recurrent] set of signs and symptoms.”⁵⁴ Bloom postulates that the use of the word ‘false’ conveys a subtle “element of lying and deception,” and suggests that more precise language such as “distorted, layered, complex, confused or altered”⁵⁵ might have been employed.

At a fundamental level, FMS fails to take into consideration the fact that false allegations of childhood abuse are exceptionally rare. Researchers in the field agree that false claims of sexual abuse comprise two to eight percent of reported cases.⁵⁶ Indeed, as Roland Summit contends, of those children “who were found to have misrepresented their complaints, more had sought to understate the frequency or duration of sexual experiences”⁵⁷ than to have lied or exaggerated. Moreover, critics are extremely sceptical of the FMS Foundation’s use of recanters as “proof” that FMS is widespread. Susan Vella asserts that withdrawn complaints often mask very real abuse, and further notes that survivors are seldom sufficiently supported or protected after disclosure.⁵⁸ As such, they are more vulnerable to threats of reprisal or fears of losing their family.⁵⁹ The phenomenon of recantation is particularly suspicious in the context of the FMS Foundation’s emphasis on the irreparable “damage to the family unit”⁶⁰ caused by FMS. It is not surprising that a survivor might recant her abuse when faced with the choice between shouldering the responsibility for destroying the

⁵² *Supra* note 22 at 10.

⁵³ *Ibid.* at 9.

⁵⁴ *Supra* note 32 at 428.

⁵⁵ *Supra* note 21 at 471.

⁵⁶ *Supra* note 27 at 37.

⁵⁷ *Supra* note 8 at p. xvi.

⁵⁸ *Supra* note 27 at 37.

⁵⁹ A.D. Robbins, “False Memories or Hidden Agendas?” (1995) 22(3) *Journal of Psychohistory* 305 at 307.

⁶⁰ *Supra* note 29 at 856.

family, or retracting her allegations, thereby regaining her family's approval and earning its forgiveness.

IV. THE FALSE MEMORY SYNDROME BEFORE THE COURTS

While the false memory syndrome is increasingly being argued before Canadian courts, it has yet to make any major inroads in the Supreme Court of Canada. In *R. v. Francois*, a 1994 decision, the majority of the Supreme Court explicitly refused to "pronounc[e] on the controversy that may surround the subject of revived memory amongst experts."⁶¹ This comment was made in the context of a case where the complainant's memories of abuse, which were retrieved through a flashback ten years after the incidents occurred, was the only evidence before the jury. Justice McLachlin concluded that there was nothing unreasonable about the jury's acceptance of the complainant's testimony regarding memory repression, and accordingly upheld the accused's conviction. The Court's ruling in *R. v. Francois* is consistent with its decision in *(K.)M. v. (H.)M.*, since the Court accepted the phenomenon of memory repression as legitimate and refused to treat it as inherently suspect or fallacious. Indeed, there are few Canadian decisions which explicitly reject FMS as an approach to evaluating the validity of repressed memories. *Colquhoun v. Colquhoun* is one such case and here the court asserted that the defence was "neither appropriate nor helpful."⁶²

While FMS continues to be vigorously contested by mental health experts and has yet to be recognized as a legitimate psychiatric phenomenon, lower courts in Canada have consistently accepted evidence of the defence in cases of sexual assault. Perhaps the most telling evidence of the impact of FMS on Canadian courts is the fact that it is being argued even in those cases in which memory repression is not at issue. In other words, defence counsel are pleading FMS and the courts are assessing it in proceedings in which the complainant has *always* remembered the incidents of sexual abuse. For instance, in *Coutts v. Popplewell*, the plaintiff testified that she had always recalled that the defendant had

⁶¹ *R. v. Francois* (1994), 31 C.R.(4th) 201 (S.C.C.) at 214.

⁶² [1994] O.J. No. 681 at para. 74 (Ont.Gen.Div.) (Q.L.).

assaulted her.⁶³ However, the defence alleged that her memories were falsely implanted by a therapist. After first assuring itself that her psychiatric treatment was not inappropriate or faulty, the court stated that “[i]n any event, Ms. C’s memories of [the abuse] were recollected before she commenced therapy.”⁶⁴ Likewise, in *R. v. Beckei*, counsel for the defence argued that the complainant’s memories of abuse were either fabricated or “honest but mistaken recollections.”⁶⁵ The Alberta Court of Appeal stated in its decision that “[t]his was not a case of repressed memory suddenly recurring,” because the complainant affirmed “she had never forgotten the incidents.”⁶⁶ While the courts do not accept FMS as a defence in these particular proceedings, the fact that it is being both employed and heard in cases beyond its original parameters (e.g. cases involving repressed memories) indicates its growing influence and legitimacy in Canadian legal circles.

V. THE ANTI-WOMEN UNDERPINNINGS OF FMS

1. FMS: “The Female Malady”

What is most disturbing about FMS are the historical stereotypes about women which underlie the manner in which it is presented to and heard by the courts. An examination of the use of the FMS in Canadian courts reveals that it is a decidedly gendered phenomenon. For example, in *R. v. H.B.F.*, the British Columbia Court of Appeal employed the testimony of a psychologist to describe FMS as a condition which “usually occurs in adult women who, after becoming depressed in their late 20s and 30s, go to a counsellor to deal with their depression.”⁶⁷ Similarly, in *R. v. Norman*, an Ontario court favourably cited the expert evidence of a psychiatrist who stated that, in his practice, FMS was encountered “where a woman was taking therapy after abuse.”⁶⁸ Indeed, of approximately twenty recent Canadian cases studied for this paper, only one—*R. v. Kenny*, which involved the prosecution of a

⁶³ [1994] B.C.J. No. 884 at para 96 (B.C.S.C.) (Q.L.).

⁶⁴ *Ibid.* at para 96.

⁶⁵ [1995] A.J. No. 160 at para 22 (Alta.C.A.) (QL).

⁶⁶ *Ibid.* at para 23.

⁶⁷ [1995] B.C.J. No. 961 at para 41 (B.C.C.A.) (QL).

⁶⁸ [1992] O.J. No. 1557 (Ont.Gen.Div.) (QL).

Christian Brother implicated in the Mount Cashel tragedy—involved the use of FMS as a defence against a *male* complainant.⁶⁹ Academic writing about the false memory syndrome also reveals that our “daughters” are the most likely victims of the syndrome.⁷⁰

2. Women as Unreliable Witnesses

As Justice Wilson stated in *R. v. Lavallee*, expert evidence admitted in the course of trial proceedings can be extremely valuable in counteracting stereotypes commonly held by jurors and judges.⁷¹ Indeed, in *R. v. Lavallee*, such testimony was used to dispel recurring myths surrounding the behaviour of battered women.⁷² However, to the extent that expert testimony is used to buttress the courts’ understanding of FMS, it serves to reinforce long-held stereotypes about sexual assault survivors as essentially unreliable witnesses.⁷³ As Vella contends, Canadian evidentiary rules once required that a child’s allegations of sexual abuse be corroborated by external proof. She cites a passage from John Wigmore’s 1940 text on evidence which succinctly encapsulates this legal attitude:

Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men.⁷⁴

⁶⁹ See *V.P. v. Linde*, *Coutts v. Popplewell*, *T.K.S. v. E.B.S.*, *R. v. G.D.L.*, *R. v. Beckei*, *R. v. Paar*, *R. v. J.E.T.*, *R. v. Russell*, *Colquhoun v. Colquhoun*, *R. v. Makarenko*, *R. v. E.F.M.*, *R. v. C.J.S.*, *R. v. Beaulieu*, *R. v. H.B.F.*, *R. v. Allen*, *R. v. Norman*, *S.M. v. D.D.R.*, *Kadar v. Kadar*, *B.O. v. E.T.*

⁷⁰ *Supra* note 29 at 840 and note 27 at 37.

⁷¹ [1990] 1 S.C.R. 852 at 871-2.

⁷² See C. Boyle, “The Battered Wife Syndrome and Self Defence: *Lavallee v. R.*” (1990) 9 Can. J. Fam. L. 171.

⁷³ N. Bala, “Child Sexual Abuse Prosecutions in Canada: A Measure of Progress” (1992) 1 *Annals of Health Law* 177 at 177.

⁷⁴ J.H. Wigmore, *Evidence in Trials at Common Law*, Vol. 3(a), revised J.H. Chadbourn (Boston: Little, Brown, 1970) at 736.

The assertion that women's memories of sexual abuse are merely fantasies dates back to Sigmund Freud's theories regarding hysteria. Judy Steed notes that Freud originally concluded that the neuroses and psychiatric dysfunctions of his patients had, as their root cause, "childhood trauma involving sexual violation."⁷⁵ She adds that Freud subsequently renounced his "seduction theory," and replaced it with the notion that memories of sexual violation are no more than children's fantasies.⁷⁶ Steed maintains that Freud's notorious about-face was likely caused by his fear of ostracism and backlash from Viennese society and his professional peers.⁷⁷

i. Women as Inherently Suggestible

FMS promotes the stereotype of women as unreliable witnesses who lie about sexual abuse in several ways. First, the manner in which the syndrome is described by its advocates and received by the courts focusses on the powerlessness and vulnerability of women throughout the course of therapeutic treatment. The syndrome portrays women as highly suggestible and open to persuasion not only by a more masterful therapist, but also by other external influences such as books, television programs and support groups.⁷⁸ For instance, in *R. v. Hudkins*, the court loosely defines FMS as involving the manufacturing of "illusions arising from subconscious suggestions or influences by others."⁷⁹ An Ontario judge in *R. v. E.F.H.* asserted that "an account or history being presented in the course of . . . group therapy"⁸⁰ may trigger a false memory. Similarly, the court accepted the notion that self-help literature on the subject of incest may induce FMS.⁸¹ In one Ontario trial, counsel for the defence reportedly argued that the complainant was afflicted with the syndrome as a result of reading material and

⁷⁵ *Supra* note 8 at xii.

⁷⁶ *Ibid.* at xii. See also R. Ofshe and E. Watters, *Making Monsters: False Memories, Psychotherapy, and Sexual Hysteria* (New York: Charles Scribner's Sons, 1994) at 290-1.

⁷⁷ *Supra* note 8 at xii.

⁷⁸ S.L. Bloom, "When Good People Do Bad Things: Meditations on the Backlash" (1995) 22(3) *Journal of Psychohistory* 273 at 279.

⁷⁹ [1995] N.W.T.J. No. 62 at para 14 (N.W.T.S.C.) (QL).

⁸⁰ [1994] O.J. No. 452 at para 38 (Ont.Gen.Div.) (QL).

⁸¹ *Ibid.* at para 41.

listening to tapes recommended to her by volunteers at a rape crisis centre.⁸²

ii. Women as Delusional

The second means by which FMS promotes the traditional view of women as inconstant is by portraying complainants as sick and their recollections of abuse as neurotic and delusional. The FMS Foundation characterizes FMS victims as “troubled” young women seeking an explanation for their unhappiness and depression. As mentioned above, in *R. v. R.L.B.* (hereinafter the Baker case), the Manitoba Court of Queen’s Bench asserted in a six paragraph oral decision that the complainant, who accused her father of sexual assault, “suffered from delusions and has been confused about what is real and what is not real.”⁸³ Although the ruling does not represent the norm in terms of how Canadian courts are responding to the defence of FMS, it is particularly shocking when one considers that Justice Hanssen reached his conclusion about the complainant’s memories before any expert evidence on FMS was apparently led.⁸⁴ Similarly, the influence of the theory of FMS is unmistakable in *R. v. G.D.L.*, where the court “expressively cautions [it]self that all of [the evidence of recovered memories] could be consistent with a delusional, honest, but mistaken recollection.”⁸⁵ The metaphor of sickness was also employed in *R. v. C.J.S.* to describe the female complainant’s memories of sexual assault. The Supreme Court of P.E.I. cited expert testimony to define false memories as the product of illness: “[W]hen illness occurs, it’s not improbable that fantasies of this type [e.g. about sexual abuse from family members] may be taken as fact rather than [the] fantasies they are.”⁸⁶ Like the court in *Baker*, the New Hampshire Superior Court in *State v. Hungerford* also ruled that the complainants’ memories of abuse were not credible because both “young women exhibited serious psychological disturbance.”⁸⁷

⁸² March 17, 1994, CP wire service, from NEWSTEX database (QL).

⁸³ *Supra* note 3 at para 3.

⁸⁴ July 19, 1994, CP wire service, from NEWSTEX database (QL)

⁸⁵ [1993] O.J. No. 3356 at para 13 (Ont.Gen.Div.) (QL).

⁸⁶ [1994] P.E.I.J. No. 22 at para 240 (P.E.I.S.C.) (QL).

⁸⁷ *Supra* note 46 at 14.

iii. Women as 'Honest Liars'

Not only does the FMS attack women's credibility as players within the justice system by portraying them as vulnerable, powerless, and mentally unstable, but it also reincarnates a myth which feminists and survivors' groups have worked tirelessly to dispel: the belief that women lie about their experiences of sexual abuse. As Vella suggests, the FMS Foundation attempts to render this stereotype more palatable by blaming negligent therapists for having created the patient's false memories.⁸⁸ Thus, women afflicted with the syndrome are "honest liars" because they believe that their memories of abuse are accurate and true. This is perhaps the most insidious aspect of FMS as it denies survivors the certainty of their beliefs, the power and the autonomy of self-knowledge, and even the solace of asserting "I *know* I was abused, no matter what the court decides."

The courts in several Canadian jurisdictions have implicitly sanctioned this characterization of survivors as honest liars by contending that a complainant's credibility is no longer an accurate indicator of the truth or rightness of her claim. The *Baker* case is a perfect illustration of this approach. Justice Hanssen stated that while "Ms. B honestly believes . . . what happened to her, . . . her honesty is not the issue. What is in issue is the reliability of her memory."⁸⁹ Similarly, in *R. v. Norman*, the Ontario Court of Appeal ruled that "the appearance of honesty and integrity on the part of such witnesses as the complainant gives us little assistance in assessing the reliability of their testimony."⁹⁰ The court adds that witnesses who claim they have repressed memories of abuse "believe in what they are saying, whether it is accurate or not."⁹¹ In *R. v. H.B.F.*, the correspondence of FMS to lying is still more conspicuous. In one paragraph, the British Columbia Court of Appeal considered the theory of FMS to explain the complainant's memories, while in the very next, the court inquired as to whether she "made a *conscious* choice to lie about the abuse (emphasis added)."⁹² Clearly, the implication is that the false memory

⁸⁸ *Supra* note 27 at 38.

⁸⁹ *Supra* note 3 at para 2.

⁹⁰ [1993] O.J. No. 2802 at para 47 (Ont.C.A.) (QL).

⁹¹ *Ibid.* at para 47.

⁹² [1995] B.C.J. No. 961 at para 42 (B.C.C.A.) (QL).

syndrome involves the unconscious creation of lies, or lying in spite of oneself.

VI: THERAPY ON TRIAL

Although assessing the accuracy and reliability of a witness' memories is an exercise in which courts have always engaged,⁹³ FMS shifts the inquiry away from the content and consistency of the memories and highlights solely the memory retrieval process itself. Indeed, one recent Canadian decision reduced the entire case to one issue: "whether the acts of childhood sexual abuse testified to by the complainant are. . .the product of faulty therapy."⁹⁴ By placing therapeutic practices on trial, the courts are in effect burdening sexual assault survivors with an extra evidentiary obligation. As lawyer Megan Ellis explains, all complainants who allege abuse are judged on a standard established in a minority of cases, whereby it was assumed that the therapist made a suggestion to the patient that they may be a victim of sexual assault.⁹⁵ She maintains that those accused of sex crimes in these circumstances are consequently accorded "so much more protection"⁹⁶ than other offenders.

This use of FMS in the courtroom poses another obstacle for a complainant to overcome: she must demonstrate that her therapy was beyond reproach. For instance, the British Columbia Court of Appeal in *T.K.S. v. E.B.S.* scrutinized notes taken by the complainant's therapist and concluded that the plaintiff's psychiatric treatment "[was] unsound from the beginning of the retrieval process."⁹⁷ Significantly, the court ordered a new trial, one of the reasons being was that information regarding the therapeutic method used to retrieve the plaintiff's memories constituted fresh evidence.⁹⁸ In *S.M. v. D.D.R.*, another British Columbia case involving a woman suing her father for childhood sexual abuse, the

⁹³ See *Colquhoun v. Colquhoun*, *supra* note 62 at para. 42.

⁹⁴ *R. v. E.F.H.*, [1994] O.J. No. 452 at para 53 (Ont.Gen.Div.) (QL).

⁹⁵ L. Shorten, "False Memory Syndrome" (1994) 18(4) *Canadian Lawyer* 16 at

19.
⁹⁶ *Ibid.* at 19.

⁹⁷ [1995] B.C.J. No. 1542 at para 41 (B.C.C.A.) (QL).

⁹⁸ *Ibid.*

court examined the merits of the plaintiff's regression therapy. The court stated that her doctor's methods were considered highly suggestive and that this influence "cannot be ignored."⁹⁹ Likewise, in *R. v. S.C.H.*, the British Columbia Supreme Court concluded that, because hypnosis was employed in the revival of the complainant's memories, the proposed evidence of her abuse was inherently unreliable.¹⁰⁰

The special burden on the complainant to prove that her therapy was beyond reproach is rendered far more onerous by the FMS Foundation's assertion that women's minds are susceptible to suggestive influences above and beyond the control of a therapist. As discussed above, proponents of FMS argue that popular books, newspapers, films and television are all "potent source[s] of contamination."¹⁰¹ For example, one psychologist contends that viewing a television docudrama has the power to create "fears, expectations and imaginings in susceptible minds."¹⁰² The FMS Foundation is particularly harsh in its condemnation of a book which they call the "bible" of the incest recovery movement—*The Courage to Heal*. One study conducted by members of the Foundation estimates that *The Courage to Heal* was implicated in "almost all cases of several hundred families in which repressed memory accusations were made."¹⁰³ In *R. v. E.F.H.*, an Ontario court actually referred in its reasons to the complainant having read *The Courage to Heal* and accepted the suggestion that it may have helped to induce false memories.¹⁰⁴ Likewise, in *R. v. G.D.L.*, an Ontario judge noted that at the age of eighteen, the complainant read a book on the subject of child sexual abuse. The court stated that the book "is a potential source of information from which a false or a constructed memory might arise."¹⁰⁵

While the notion that popular culture could create false memories of sexual trauma belittles the experiences of incest

⁹⁹ [1994] B.C.J. No. 2243 at para 44 (B.C.S.C.) (QL).

¹⁰⁰ [1995] B.C.J. No. 237 at para 23 (B.C.S.C.) (QL).

¹⁰¹ E.F. Loftus and K. Ketcham, *The Myth of Repressed Memory* (New York: St. Martin's Press, 1994) at 89.

¹⁰² Loftus quoting Dr. Ganaway, *ibid.*, at 89.

¹⁰³ *Supra* note 31 at 494.

¹⁰⁴ *Supra* note 94 at para 41. It should be noted that in this case, the book was recommended to the complainant by her therapist.

¹⁰⁵ *R. v. G.D.L.*, [1993] O.J. No. 3356 at para 13 (Ont.Gen.Div.) (QL).

survivors and approaches the absurd, this facet of FMS effectively represents a complete bar on a complainant's reliance on repressed memories in bringing her claim to court. Taken to its logical conclusion, how many complainants could prove that they had never read a book, watched a television program, or been exposed to a magazine article about sexual assault, so as to be immune from any taint? More importantly, what is the likelihood that any woman would ever fully recognize her abuse and acquire the courage to seek vindication of her claim in court *without* the support of such potentially contaminating forces as therapists, friends or family members?

1. FMS and Access to a Complainant's Psychiatric History

Another related way in which FMS is being employed by defence lawyers is as a justification for seeking access to women's personal psychiatric documents. This practice presents not only the problem of a special evidentiary burden as described above, but also holds the potential for giving the accused abuser free licence to violate the complainant's privacy and the confidentiality of the patient-therapist relationship. Canadian courts' response to this tactic has been mixed. In *R. v. Hudkins*, the N.W.T. Supreme Court recognized a strong privacy interest in the documents pertaining to the complainant's therapy. The court ruled that there must be some foundation in the evidence that suggests that the woman's records are relevant to an FMS defence, and stated that such sensitive information will not be disclosed in order for the defence to indulge in a "fishing expedition."¹⁰⁶ Because repressed memories were not the basis of the complainant's claim, the court decided not to override her right to privacy for the purpose of mere conjecture as to a possible syndrome.¹⁰⁷ A 1995 decision by the British Columbia Supreme Court took a similar approach to the disclosure of the complainant's therapy records, when it gave paramountcy to the complainant's privacy interest over the accused's ability to mount an FMS defence.¹⁰⁸

¹⁰⁶ *R. v. Hudkins*, [1995] N.W.T.J. No. 62 at para 17 (N.W.T.S.C.) (QL).

¹⁰⁷ *Ibid.* at paras 21 and 22.

¹⁰⁸ *V.P. v. Linde*, [1995] B.C.J. No. 1965 at para 25 (B.C.S.C.) (QL). See also *R. v. Paar*, [1995] M.J. No. 333 (Man.Q.B.) (QL).

Regrettably, the Ontario Provincial Court reached the opposite conclusion in *R. v. Allen*.¹⁰⁹ In that case, the accused sought, from a social agency, the Family Services of Metro Toronto, all of the complainant's records as to her treatment and care, including any documents concerning her individual and group therapy. One of the troubling aspects of this case is that the Crown apparently "did not disagree that false memory syndrome was a legitimate consideration for the eventual triers of fact."¹¹⁰ In recognizing the significance of an individual's privacy with respect to past medical treatment, the court contended that this value "must be balanced with the rights of an accused person to make full answer and defence."¹¹¹ Ultimately, the right to mount a "full defence"—one which includes FMS—tipped the balance in favour of the accused as the court ruled that "the issue of past memory recalled *requires* the production"¹¹² of the records requested (emphasis added). The spectre of such a decision can only have a chilling effect on women who are contemplating litigation but fear having their privacy compromised and their personal history probed by the court and their abuser.

VII. THE FALSE MEMORY SYNDROME AS BACKLASH

Critics of false memory syndrome argue that it unquestionably represents a backlash against survivors, and particularly women survivors, who are speaking out about their abuse. By portraying the family as idyllic and under siege by irresponsible and overzealous therapists, the FMS Foundation is turning public attention away from the reality that the family is often the locus of abuse, and that sexual violation of children, not "false accusations," which contributes to the destruction of families.¹¹³ This privileging of "the family" over the silent suffering of those who are abused is parallel to our culture's historical response to incest: denial. As Bloom aptly put it, "there has been an identifiable 'false memory syndrome'

¹⁰⁹ [1995] O.J. No. 150 (Ont.Prov.Div.) (QL).

¹¹⁰ *Ibid.* at para 23.

¹¹¹ *Ibid.* at para 25.

¹¹² *Ibid.* at para 30.

¹¹³ *Supra* note 21 at 471.

known for centuries"¹¹⁴—that of the abuser, that of family members and that of the larger community surrounding the family. Both Peter Jaffe and Dr. John Briere add that it is far easier for the public, juries, and perhaps even judges to believe in FMS than to confront the reality that “so many adults are capable of doing such awful things to children.”¹¹⁵ Blaming women who speak out about abuse for destroying the family—for contributing to the “litter of human lives destroyed by these memories”¹¹⁶—ironically harkens back to facets of what is known as the “Child Abuse Accommodation Syndrome.” As La Forest J. noted in *(K.)M. v. (H.)M.*, a sexually abused child is made to feel complicit in and responsible for “both instigating the incestuous activity and maintaining silence to ensure family stability.... [She] is given the power to destroy the family [and the] responsibility to keep it together.”¹¹⁷

In a much broader sense, FMS is part of a well-documented backlash against feminism as well as all of those persons who FMS advocates believe are laying claim to “victim status.” As Bloom contends:

[t]oo many abused and exploited adults have found their voice, and in seeking justice for themselves and the protection of others, they have threatened the seat of power—the right of a man to do anything he pleases in the privacy of his own house.¹¹⁸

Former member of the FMS Foundation’s board of directors, Ralph Underwager, holds radical feminism partly responsible for the false memory epidemic. He contends that radical feminists are anti-male, and thus “may be jealous that males are able to love each other, be comrades, [and] friends.”¹¹⁹ Richard Ofshe, a prominent American psychologist and proponent of the false memory syndrome, characterizes the retrieval of memories of abuse as a

¹¹⁴ *Ibid.* at 471.

¹¹⁵ March 20, 1994 and August 24, 1993, Canadian Press wire service, from the NEWSTEX database (QL).

¹¹⁶ *Supra* note 95 at 20.

¹¹⁷ (1992), 14 C.C.L.T. 1 at 18 (S.C.C.).

¹¹⁸ *Supra* note 78 at 280.

¹¹⁹ L. Armstrong, *Rocking the Cradle of Sexual Politics* (Reading, Mass.: Addison-Wesley Publishing, 1994) at 240.

vehicle for feminists to pursue their own political agenda "of exposing the unfairness of patriarchal family structures."¹²⁰ Members of the FMS Foundation, who are mostly individuals accused of abuse, are actually claiming victim status for themselves. Advocates of FMS, with their inflammatory allusions to "witch hunts" and McCarthyism, are attempting to (re)converge public attention on the predicament of the accused, who is portrayed as the victim of a "sexual abuse industry" controlled by anti-family feminists.¹²¹ Some legal academic writers have translated this focus on the accused into a concern that the accused's right to due process is being eroded.¹²² A Toronto court worker notes that those accused by their children of sexual assault "usually act like martyrs. . . displaying a 'How could she do this to me?' attitude."¹²³ A 1993 report by William Masters and Virginia Johnson revealed that many offenders who had in the past acknowledged "their abusive behaviour now deny it and carry articles on false memory with them to support their denials."¹²⁴

VIII. RECOMMENDATIONS FOR THE TREATMENT OF FMS BY CANADIAN COURTS

For a defence that is just three years old, it is alarming to observe the extent to which FMS is entering into the mainstream of childhood sexual assault cases in Canada. Lawyers and especially the judiciary should be cognizant of how FMS perpetuates harmful stereotypes of women and undermines the credibility of all sexual assault complainants seeking legal redress.¹²⁵ Canadian courts should meet the defence with caution by reason of its novelty within the psychiatric community and, more importantly, because its existence has yet to be conclusively documented. In this respect,

¹²⁰ R. Ofshe and E. Watters, *Making Monsters: False Memories, Psychotherapy, and Sexual Hysteria* (New York: Charles Scribner's Sons, 1994) at 11.

¹²¹ *Supra* note 78 at 280, 282.

¹²² See for example Murray, *supra* note 30, and M.L. Hayes, "The Necessity of Memory Experts for the Defense in Prosecutions for Child Sexual Abuse Based Upon Repressed Memories" (1994) 32 *Amer. Crim. L. Rev.* 69.

¹²³ *Supra* note 8 at 203.

¹²⁴ E.F. Kramer, "Repressed Memory" (1995) 38 *Res Gestae* 12. This information was taken from page 7 of the article as it appeared on WESTLAW.

¹²⁵ *Supra* note 27 at 39.

courts would do well to follow the approach set out by the Supreme Court of Canada in *R. v. Mohan* regarding the admission of expert evidence. The Court maintains that the subject matter of a witness' expertise, particularly where it "advances a novel scientific theory or technique, is [to be] subjected to 'special scrutiny' to determine whether it meets a basic threshold of reliability... (emphasis added)." ¹²⁶ Moreover, courts should continue to rely on conventional techniques to assess the authenticity of memory. *Colquhoun v. Colquhoun* is particularly instructive in this regard. The Ontario Court of Justice found that "[t]herapeutically-revived memory is not inherently or facially suspect," and that therapy is but *one* factor among many others which "bears on the reliability of memory." ¹²⁷

Finally, the legal community must continue to recognize the tremendous psychological obstacles facing litigants of sexual assault claims, including the secrecy surrounding incest and the social stigma associated with declaring oneself a survivor of abuse. The revictimization or "secondary traumatization" ¹²⁸ of the complainant during court proceedings also serves as a formidable disincentive to litigation, and lawsuits are "prohibitively expensive," particularly for survivors who have suffered work interruptions as a result of the crimes committed against them. ¹²⁹ Lawyers, judges and all those working within the courts must be sensitive to the potentially transformative role the justice system can play in educating the public with respect to the pervasiveness of child sexual abuse and by underscoring its intolerability.

¹²⁶ *R. v. J.E.T.*, [1994] O.J. No. 3067 at para 73 (Ont.Gen.Div.)(QL) paraphrasing *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 417 (S.C.C.).

¹²⁷ *Supra* note 62 at para 74.

¹²⁸ *Supra* note 73 at 177.

¹²⁹ *Supra* note 27 at 39.