HOW PSYCHOLOGISTS CAN ASSIST IN THE RECOVERED MEMORY ARENA

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I. INTRODUCTION

Fred Seymour's article has discussed the psychological evidence supporting recovered memory theory. It raises the important issue of how psychologists can assist in recovered memory trials. This article also reflects on that issue and will discuss, from a legal perspective, the areas in which psychologists, psychiatrists and other mental health professionals can provide necessary guidance to lawyers working with clients who have recovered memories of childhood sexual abuse.

Law and psychology are two disciplines directly concerned with the consequences of adults recovering memories of child sexual abuse. As well, many of the solutions to the problems encountered by these adults can be found in a collaboration between psychology and law. However, the convergence of psychology and law is not without its difficulties:

> The law demands precision, concise answers, and prefers yes or no formulations. Psychology, on the other hand, emphasizes process, behaviour and change over time, prefers to review all relevant hypotheses and rule out irrelevant alternatives. The legal focus is on rule and order, concrete facts, on maintaining rights, and doing justice. In clinical practice, the focus is on the person or the group of persons in all their diversity, on abstract theory, on achieving health, and doing good.[1]

The focus of this article is on how psychology can assist law in recovered memory cases. This can occur in two ways. First, psychology *informs* law by providing information that is useful to the courts, both in specific cases and in general. Second, psychology can attempt to *influence* law and policy.[2] The following discussion will focus on how these methods of assistance can work in practice.

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1 Hall, "The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse" (1989) 23 FLQ 3, 451.

2 Small, "Legal Psychology and Therapeutic Jurisprudence" (1993) 37 St. Louis LJ 675.

II. Psychology Informing Law

1. Expert evidence

Arguably, the most visible role that mental health professionals play in the legal arena is that of expert witness for either the prosecution or the defence. It is beyond doubt that such experts are a necessity in sexual abuse cases. Jurors and judges are unlikely to be aware of common behaviours exhibited by sexual abuse victims or of the dynamics of child abuse which explain many complainants' seemingly inconsistent behaviour. In cases involving adult complainants of childhood sexual abuse, expert evidence is necessary to explain the long-term effects of child sexual abuse which the complainant may exhibit and to explain why the offences went unreported for so long. In recovered memory cases, expert evidence is also necessary to explain how memory functions, the effects of trauma on memory, the processes of repression and dissociation, and specifically how and why some people have amnesia for traumatic events for long periods of time.

A. Evidence on the effects of trauma on memory

Expert evidence on the concepts of repression and dissociation is necessary in recovered memory cases. The jury is unlikely to understand how it is possible for a complainant to have previously had no conscious recollection of the abuse. However, problems associated with novel scientific evidence currently surround the admission of this type of evidence.

In New Zealand, admissibility of novel scientific evidence was based on the common-law rule requiring "general acceptance" of a scientific theory or technique before it could form the basis of an expert's opinion. Specifically, there had to be general acceptance of the theory in the particular discipline to which it belonged. This principle was first enunciated in *Frye v. United States*.[3] The *Frye* test has since been adopted in other jurisdictions as a test for admissibility of, inter alia, psychiatric and psychological evidence. There has been a great deal of argument about what type of evidence satisfies the *Frye* test. When dealing with recovered memories, this debate is of critical importance because there is no decisive viewpoint on the issue of repressed memory within the field of psychology.

In 1991 the New Zealand Law Commission questioned whether the *Frye* rule formed part of the law in this country. The Commission referred to

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3 *Frye v United States* (1923) 293 F 1013.

the possible New Zealand counterpart of the *Frye* test in the judgment of McMullin J in *R v B*,[4] stating that scientific evidence must be from a "recognised branch of science".

A recent American case appears to have moved away from the *Frye* test of admissibility. In *Daubert v Merrell Dow Pharmaceuticals, Inc.*,[5] the evidence under consideration was based on pharmacological studies and animal studies which showed a link between an anti-nausea drug taken during pregnancy, and birth defects. In *Daubert*, although the Court recognised the importance of general acceptance as a factor, it rejected this standard as the exclusive test of admissibility for expert scientific testimony. Instead, the Court adopted a more systematic approach that inquires into the extent to which the expert's methodology or reasoning is grounded in the procedures of science. Specifically, the Court set out a non-exhaustive list of facts that would bear on the inquiry. These factors include:

1. The "falsifiability" of the theory or technique, i.e. whether the technique has been tested to determine the extent to which results can be "rigged".
2. Its known or potential error rate and the existence and maintenance of standards controlling its operation.
3. The extent to which it has been subjected to peer review and publication.
4. The extent to which it has been "generally accepted" within the relevant scientific community.

Daubert has been reviewed in a recent New Zealand High Court decision,[6] where the evidence in question was from a forensic scientist. Tipping J considered *Daubert* together with other authorities in formulating the test for admissibility of expert evidence. It was held that the proponent of the evidence had to show that the evidence was relevant, "helpful" (the assessment of this factor included a threshold test of reliability which had to be met), and more probative than prejudicial. It has yet to be seen whether later courts will adopt this formulation in recovered memory cases. Neither *Daubert* nor *Calder* specifically deal with psychological evidence.

Another avenue which could be pursued by psychologists wishing to circumvent the novel scientific theory problems is to testify as to the memory disorder known as Dissociative Amnesia.

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4 *R v B* [1987] 1 NZLR 362 at 367.

5 *Daubert v Merrell Dow Pharmaceuticals* (1993) 113 S. Ct. 2786; 1993 U.S. LEXIS 4408.

6 *R v Calder*, High Court, Christchurch. 12 April 1995 (T154/94). Tipping J.

> The essential feature of Dissociative Amnesia is an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness.[7]

Dissociative Amnesia most commonly presents in the form of retrospectively reported gaps in recall for aspects of the individual's life history. These gaps are normally related to traumatic events. Dissociative Amnesia has been associated with depressive symptoms, depersonalisation, trance states, spontaneous age regression and an inability to feel pain.[8]

Admitting evidence on Dissociative Amnesia will have the effect of educating the jury that traumatic events can be lost from consciousness and later retrieved.

In New Zealand, to date, the issue of recovered memories of sexual abuse has been raised in four reported decisions and four unreported decisions. Only one of these cases has dealt specifically with the admissibility of expert testimony on repression and dissociation in relation to sexual abuse complainants.[9] A further case has considered expert testimony on the "forgetting" of trauma generally.[10] The writer will briefly outline the decisions in these two cases. The other New Zealand cases involving recovered memories have dealt with the issue of whether *complainants* should be permitted to testify as to their recovered memories and, therefore, do not fall within the scope of this article.

The expert testimony proffered in *R v R*[11] consisted of distinguishing between declarative and non-declarative memory and explaining how non-declarative memory may not be retrieved in words but as a repetition of the original experience such as a bodily sensation. The expert also proposed to describe how the mind constructs psychological defences against trauma; about the concepts of repression, dissociation and denial; and about "false memory syndrome". The High Court held that the proffered evidence was admissible because it was relevant to the central issue of the credibility and reliability of the complainants' evidence; the subject-matter was well outside the ordinary experience and knowledge of a jury; it was not intended to endorse the reliability of the complainant's

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7 American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (4th ed 1994) 478.

8 Ibid.

9 *R v R* (1994) 11 CRNZ 402.

10 *R v Bain (No. 6)*, High Court, Dunedin. 23 May 1995 (T 1/95). Williamson J.

11 *R v R*, supra n. 9.

evidence; and the probative value of the evidence outweighed the possible prejudice to the accused. In this case, the High Court did not even consider the question of whether the basis for the evidence was "novel scientific evidence".

In *R v Bain (No. 6)*[12] the accused was charged with murdering five members of his family. The defence raised was that the accused's father had killed the remainder of the family before killing himself. The defence sought to admit evidence from a psychiatrist on the ability of persons who have seen or experienced horrific events to block them from their mind, but later be able to regain some or all memory of these events. This evidence related to the accused's state of mind at the time he was alleged by the defence to have discovered the bodies of his family, and also to his memories of that event. The High Court admitted the evidence on the basis that the behaviours referred to in the evidence were outside the limits of "normality" and the expert evidence might therefore assist the jury.

If future courts were to follow the approach adopted in these two cases, it would not appear to be difficult to have expert testimony on the effects of trauma on memory admitted in court. However, it may be that given the wide-ranging debate in the area, a Court of Appeal decision is required to settle this matter.

B. The complainant's behavioural characteristics and history

There is a growing body of research suggesting that sexual abuse can have enduring negative outcomes for those who survive it. The fact that any such negative outcomes are evident in a complainant is vital evidence in recovered memory cases for three reasons:

1. Such evidence has an educative purpose in relation to typical reactions to sexual abuse trauma. Such testimony would assist the jury in understanding the behaviour of the complainant.

2. The negative outcomes of sexual trauma may profoundly affect the complainant's manner and interaction with people and events, and therefore have a negative effect on his or her credibility. Therefore, evidence explaining that such outcomes are common responses to sexual abuse is necessary.

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[12] *R v Bain (No. 6)*, supra n. 10.

3. The existence of any such behavioural characteristics in a complainant can be seen as supporting a conclusion that the complainant has been sexually abused.

With regard to initial effects of child sexual abuse, empirical studies have indicated reactions in at least some portion of the victim population which include fear, anxiety, depression, anger and hostility, aggression, and sexually inappropriate behaviour.[13] Cavaiola and Schiff report a clear correlation between substance abuse in adolescents and physical and/or sexual abuse.[14]

Browne and Finkelhor have found that empirical studies carried out on adults support the effects mentioned in clinical literature.[15] These effects include depression, self-destructive behaviour (including suicidality), anxiety, substance abuse,[16] dissociation, sleep disturbances, post-traumatic symptoms,[17] eating disorders, difficulties in forming and sustaining intimate relationships, and sexual dysfunction.[18] What is particularly noteworthy is that sexual difficulties have been found to be most often associated with sexual abuse, rather than physical or emotional abuse.[19] Briere and Runtz found that female university students with a sexual abuse history reported higher levels of, inter alia, acute and chronic dissociation and somatisation, than did a comparison group of non-abused women.[20]

The 1989 Amendment to the Evidence Act 1908 inserted section 23G, allowing evidence to be given on whether a complainant's behaviour is consistent or inconsistent with other sexually abused*children* of the same age as the complainant. This enactment implies that the legislature has recognised that there is a body of knowledge concerning certain characteristics which are concomitants of sexual abuse. There is no reason

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13 Browne and Finkelhor, "Impact of Child Sexual Abuse: A Review of the Research" (1986) 99 Psychological Bulletin 1, 66.

14 Cavaiola and Schiff, "Behavioural Sequelae of Physical and/or Sexual Abuse in Adolescents" (1988) 12 Child Abuse & Neglect 181.

15 Browne and Finkelhor (1986), supra n. 13.

16 Ibid.

17 Elliott and Briere, "Sexual Abuse Trauma Among Professional Women" (1992) 16 Child Abuse & Neglect 391.

18 Briere, J.N. *Child Abuse Trauma : Theory and Treatment of the Lasting Effects* (1992) 48-77.

19 Ibid., 34.

20 Briere and Runtz, "Symptomatology Associated with Childhood Sexual Victimization in a Nonclinical Adult Sample" (1988) 12 Child Abuse & Neglect 51.

why section 23G should not be expanded to apply to *adult* complainants also.

While it has been argued that the list of symptoms described as typical of sexual abuse victims is broad enough to encompass the experience of nearly all children who endure the turbulence of growing up, whether or not that turbulence entails sexual abuse,[21] there is another area of expert testimony which can assist courts in determining the source of trauma. This area is the psychological evaluation of objective data such as documented family history, and school and medical records.[22] Once it is established that the complainant has experienced some form of trauma, then an evaluation of family history can bring to light what other trauma-inducing factors existed which would have been likely to cause the trauma symptoms. It then may become a process of elimination. If the family history, school and medical records reveal no other possible sources of trauma, weight is added to the complainant's allegations of sexual abuse.

There is a wide range of mental health professionals in New Zealand, including counsellors specialising in child sexual abuse, who have the necessary skill and experience to provide expert testimony on matters relating to sexual abuse victims. These may not be registered psychiatrists or psychologists as required by section 23G of the Evidence Act 1908. It is submitted that the people most well-equipped to provide reliable testimony in the area of sexual abuse are the people who deal with this issue every day. In New Zealand, Department of Social Welfare social workers are presumably skilled in this area. They work extensively with adult complainants, and therefore are extremely well qualified to give expert evidence on the effects of child sexual abuse.

C. Court appointed experts?

One difficulty associated with the use of experts in adversarial proceedings is that they are inevitably aligned with either the defence or the prosecution.

It is difficult for experts to play the role of advocate for their client while also maintaining the objectivity of a scientist. Experts may feel pressured to misrepresent the scientific literature by not discussing specific findings or by not acknowledging the limitations of studies.[23] While most experts

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21 See for example Cohen, "The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims" (1985) 74 Georgetown Law Journal 429.

22 Hall, supra n. 1.

23 Cutler, B. and Penrod, S., *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995) 243.

do their best to testify accurately, lawyers who are interested in obtaining as much favourable testimony as possible may ask questions of the expert that invite the expert to exceed the bounds of existing knowledge.[24] More cynically, experts may have hidden agendas, and may use their position as an opportunity to expound their personal views:

> Some mental health professionals, in their normal role of zealous child advocate, may blindly testify to whatever the prosecution desires.[25]

Another difficulty that results from the adversarial system is that expert testimony on any subject is met with expert testimony which contradicts it.[26] This can be illustrated in the recovered memory context: for every expert who testifies as to the ability of individuals to recover reasonably accurate memories of abuse, another expert will testify as to the likelihood of false memories.

From these disparate views a "battle of experts" often results, leaving the jury more confused than ever. It may also raise doubts in the minds of jurors as to the value of expert testimony altogether.[27] Furthermore, a "battle of experts" diverts attention away from the real issues in the case, which are whether the alleged offences occurred and whether the accused committed them.

A possible solution to these problems is for the courts to appoint their own expert in the role of amicus curiae (friend of the court), who is not aligned with any party to the proceedings. Court-appointed experts would presumably be under less pressure to present a one-sided view. In France, all experts are court-appointed. Spencer outlines the benefits of such a system:

> In France, the court in each area has an official list of experts, membership of which is controlled by a committee and is something of a professional honour. A serious case will be handled from an early stage by a *juge d'instruction*, and when the need for an expert becomes apparent he will select one from the list. If either side does not like his report it can ask the Judge to obtain a supplementary report; and in a really

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24 Myers, "The Tendency of the Legal System to Distort Scientific and Clinical Innovations: Facilitated Communication as a Case Study" (1994) 18 Child Abuse & Neglect 6, 505.

25 Askowitz and Graham, "The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions" (1994) 15 Cardozo L Rev 2027.

26 Cutler and Penrod, supra n. 23, at 245.

27 Ibid., 246.

> difficult case a panel of neutral experts will be appointed to produce a joint report. This system, on the fact of it, solves at once the problem of bias, quality control and inequality of arms."[28]

As a general rule under the adversarial system, judges may not of their own accord summon witnesses of fact who are not called by either of the parties, although the court's overwhelming duty to do justice gives it the power to call witnesses.[29] Hodgkinson suggests that similar rules apply with regard to the calling of experts.[30] Civil courts in many jurisdictions, including the Family Court in New Zealand, have the power to appoint experts, and the same applies in Continental criminal and civil proceedings. In England and the United States the judge has a discretion to invite independent expert testimony on behalf of the court, but this power is rarely used.[31] It would seem that this position also applies in New Zealand.

The writer suggests that courts could take more advantage of the discretion to call their own neutral experts. The adversarial system is thought to be self-correcting: if one expert offers unreliable information, the opposing expert corrects the error and a balanced picture results.[32] However, the rhetoric does not always match the reality, and confusion and inaccuracies can often result from opposing expert testimony.

The use of court-appointed experts is not without its problems. Despite not being aligned with any particular party and being required to objectively state the scientific research, what the court-appointed expert offers as an opinion will be coloured by his or her own subjective biases. There are no safeguards that a court-appointed expert does not have a political agenda to pursue. However, court-appointed experts are not subject to pressure from defence or prosecution to present only one side of the story.

Any guidance which seeks to ensure objectivity in an expert's report is to be welcomed since it may engender in the court greater trust for the expert, and this in turn may lead to a less restrictive attitude towards the admissibility of expert evidence.[33]

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28 Cited in Graham-Hall, J. and Smith, G., *The Expert Witness* (1992) 72.

29 Hodgkinson, T., *Expert Evidence: Law and Practice* (1990) 66.

30 Ibid., 67.

31 Cutler and Penrod, supra n. 23, at 243; Hodgkinson, supra n. 29, at 66.

32 Myers, supra n. 24.

33 Ormerod, "Expert Witnesses in Children's Cases" (1992) Journal of Child Law 122.

Court-appointed experts can also be used as an adjunct to the use of experts called by the prosecution and defence. In this regard, however, they should be called not to give a third opinion, but rather to present a neutral review of the research and literature and assess the reliability of the underlying principles and methods at issue. The court-appointed expert could also assist the court in evaluating the qualifications and expertise of the prosecution and defence witnesses.[34]

2. An interdisciplinary approach to teaching law

Another way in which psychology can inform the law in recovered memory cases is by an interdisciplinary approach to teaching law. The Domestic Violence Advocacy Project (the DVAP) is such an approach which has been implemented at the George Washington University National Law Center.[35] This project is specifically structured around giving law students insights into working with battered women. The DVAP teaches students to be strong advocates for battered women by providing the students with a wider substantive understanding of the dynamics of domestic violence and exposing them first hand to the use of social science experts.[36] An interdisciplinary approach similar to the DVAP would be of great assistance in the wider context of domestic violence, including the area of sexual abuse. A project such as the DVAP in the context of sexual abuse would contribute to educating lawyers about the reality of recovered memories, and teach them how to be advocates for adult complainants of childhood sexual abuse.

The goal of what the DVAP terms "psychosocial" classes is to develop law students' understanding of the battered woman's participation in the legal process in light of her personal history, the social and psychological context in which she lives, and the interpersonal context which defines the lawyer-client relationship. This perspective enables the student to deal with potentially difficult aspects of acting for a battered woman, such as a perceived lack of co-operation, ambivalence about proceeding with the complaint, and ambiguity in their communications.[37] These difficulties also arise for lawyers when dealing with adult complainants of sexual abuse. Generally, lawyers may be unaware of family dynamics which

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34 Milich, "Controversial Science in the Courtroom: Daubert and the Law's Hubris" (1994) 43 Emory LJ 913.

35 Meier, "Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice" (1993) 21 Hofstra L Rev 1295.

36 Ibid.

37 Ibid.

might pressure a complainant to retract allegations. A client may also be suffering from the long-term effects of sexual abuse, such as PTSD, which a lawyer may translate as flighty, inconsistent, or "crazy" behaviour. Therefore, basic psychological concepts such as the nature and reasons for ambivalence, denial, and PTSD can be helpful as part of a lawyer's basic training.[38]

Law students also need to learn about memory. The study of memory is of vital importance for lawyers working in the sexual abuse field. Knowledge of the ability of both children and adults to remember and report details is a vital lawyering tool. In recovered memory cases, knowledge of the effects of trauma on memory is also an important step in a lawyer's understanding of their client's dilemma, and being able to be a strong advocate for their client's case in court. It is important for lawyers to understand that a client claiming to have recovered memories of sexual abuse that they had previously "forgotten" is not delusional. Because of the negative publicity about recovered memories, many lawyers may automatically assume that their client is suffering from "False Memory Syndrome"!

Another way of educating law students in this area is to develop their awareness of sexual crimes generally. For example, at the Waikato School of Law, sexual violation (including recovered memory issues) is taught as part of the Crimes course.

An interdisciplinary approach to teaching law students will need to socialise students into a new way of thinking. Teaching students how to understand their own and others' psychological responses requires a degree of willingness to risk the vulnerability inherent in dealing with personal feelings.[39] This may not pose a large problem if law students are taught the interdisciplinary approach from year one. However, it is a huge step for those who have already been schooled in the importance of setting aside their own feelings to become lawyers.[40] Law students must be able to empathise with their client, but not allow their own feelings to dictate the outcome of the relationship. A lawyer who becomes submerged in their client's problems will not be helpful, nor will a lawyer who maintains total distance. A balance needs to be maintained at all times.

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38 Ibid.

39 Ibid.

40 Ibid.

II. Psychology using Law to Influence Law and Policy

Psychology can use the legal system to influence law and policy by submitting amicus curiae briefs to the courts in cases involving recovered memories.[41] It has been argued that amicus curiae briefs are not appropriate because there is no cross-examination to ensure the reliability of the research.[42] However, this problem is minimised if the brief is submitted by a recognised, reputable psychological body. As Small points out, the process of writing briefs is still a relatively new phenomenon to most psychologists.[43] However, this is a relatively minor issue which can be solved by lawyers assisting psychologists in the process of writing briefs.

Herzberger suggests that written opinions could be consulted by the courts as persuasive or binding authority.[44] One way in which psychologists can influence the law in the recovered memory context is by submitting briefs on the recent research on memory generally and the effects of trauma on memory, and whether this evidence is reliable enough to be admissible in court.

Walker and Monahan have also suggested that some social science research methodology should have precedential value. These authors suggest that in determining what social science findings should be treated as authoritative, the key is whether the methodology controls for competing hypotheses which might account for an observed state of affairs.[45] Presumably this could involve psychologists providing the legal system with methodologically sound examples of studies used to obtain data on, for example, the effects of child sexual abuse. This could provide the courts with a standard by which they could measure the reliability of the evidence in any given case. The provision of this type of information, while helping the courts in their task, enables the psychological community to influence law and policy, by ensuring that laws and policies are supported by the empirical literature.[46]

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41 Small, supra n. 2, discussing the use of amicus curiae briefs in general.

42 Etlinger, "Social Science Research in Domestic Violence Law: A Proposal to Focus on Evidentiary Use" (1995) 58 Alb L Rev 1259.

43 Small, supra n. 2.

44 Herzberger, "Social Science Contributions to the Law: Understanding and Predicting Behaviour" (1993) 25 Conn L Rev 1067.

45 Walker & Monahan, "Social Facts: Scientific Methodology as Legal Precedent" (1988) 76 Calif L Rev 877; Monahan & Walker, "Social Authority: Obtaining, Evaluating, & Establishing Social Science in Law" (1986) 134 U Pa L Rev 477.

46 Small, supra n. 2.

Psychologists can also influence law in the recovered memory context by having greater control in establishing the admissibility standards for expert testimony on repression and dissociation.[47] For example, proceedings could be held within the psychological community to identify and denounce scientifically inadequate testimony,[48] and to identify sound research.

III. Conclusion

It is beyond doubt that recovered memory cases cannot adequately be dealt with by the legal system working in isolation. Fred Seymour has outlined the psychological research in this area and the resulting evidence such research has produced. The writer suggests that more regard needs to be taken of this evidence. In particular cases, expert psychological evidence would assist juries by enabling them to assess the facts of each case in light of the current psychological evidence concerning recovered memories. For example, evidence that amnesia is a possible outcome of childhood sexual trauma will hopefully prevent the jury from necessarily concluding that the complainant is lying, or confused, or has a "false memory". In general, psychologists and other mental health professionals can have an impact on the way the legal system deals with the recovered memory issue, by educating legal workers who work with recovered memory complainants, by developing sound research techniques and by assisting in the formulation of law and policy in this area.

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47 Etlinger, supra n. 42.

48 Ibid.