

Rape Trauma Syndrome: An Evidentiary Tool

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Lors des procès intentés pour cause d'agression sexuelle, qui est une infraction criminelle, on tient rarement compte de l'expérience des femmes. La mythologie sur la sexualité des femmes et la violence contre les femmes abonde lors des procès pour viol. La preuve de traumatisme consécutif au viol a été utilisée devant bien des tribunaux aux États-Unis afin de réfuter cette mythologie et prouver le non-consentement à l'acte sexuel. L'auteure fait un examen du droit américain et une analyse féministe de l'utilisation possible devant les tribunaux canadiens de la preuve de traumatisme consécutif au viol.

In the prosecution of the criminal offence of sexual assault, account is rarely taken of women's experience. Mythology about women's sexuality and violence against women abounds in the judicial processing of rape complaints. Evidence of Rape Trauma Syndrome has been used in many United States courts to refute this mythology, and to prove the element of non-consent to intercourse. The author provides a review of the United States law and a feminist analysis of the possible use of Rape Trauma Syndrome evidence in Canadian courts.

Women who choose to prosecute criminally men who have sexually assaulted them must prove that they did not "consent" to the act.¹ To do this, they must also challenge the beliefs held about rape by police officers,² prosecutors,³

Much credit must be extended to Elizabeth A. Sheehy who has been a teacher, sister, and friend — pushing me to write, to write well, and, most importantly, to think. This paper would not have been possible without her work and support.

1. Criminal Code, R.S.C. 1985, c. C-46, s. 265.
2. Rita Gunn and Candice Minch, *Sexual Assault: The Dilemma of Disclosure, The Question of Conviction* (Winnipeg: University of Manitoba Press, 1988), 54-59. In some cases which were terminated by police as being unfounded, the authors quote the following reasons given by police: "She had been in the suite for a period of about four or five hours and it is doubtful that any victim would be attractive enough for an assailant to wait for that period of time." *Ibid.*, 57; "I found her to be extremely composed and rational. She did not show any of the usual emotional trauma one would associate with being a rape victim." *Ibid.*
3. Gunn and Minch, *Sexual Assault*, 90, 94, 97.

judges,⁴ and juries.⁵ These beliefs, called "rape myths" in the social psychology literature, deny the pervasiveness of rape; assert that virtuous women cannot be raped; suggest that women who are raped somehow "asked for it;" dictate certain victim responses to the aftermath of rape as "normal;" and insist that, barring physical injuries, rape is a relatively trifling harm.

Women who survive sexual assault commonly experience psychological and physiological symptoms which have been labelled "Rape Trauma Syndrome" (RTS). Prosecutors in the United States have begun to introduce evidence of RTS as part of proving that the victim was in fact subjected to non-consensual sexual contact. In this article, I describe the history and context of this legal development in the United States, and I assess the receptiveness of Canadian criminal law to the use of RTS evidence. More importantly, I identify the risks and advantages associated with the introduction of RTS evidence as part of a rape prosecution, and I suggest that this legal development may not be a positive one for women. My conclusion, however, is that when combined with particular strategies, use of RTS evidence can assist women in challenging patriarchal⁶ values and perhaps in shifting the legal understanding of rape.

Development of the Concept of Rape Trauma Syndrome

The idea that women can be expected to undergo relatively predictable forms of trauma as part of recovery from a sexual assault has its origins in the wisdom and practice of feminist rape crisis counsellors, and in the diagnostic criteria for a more generalized "Post-Traumatic Stress Syndrome" used by the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders (3d Edition)* (DSM III).⁷ I will discuss these two sources in turn.

The earliest studies of rape victims did not originate out of feminist practice, but instead appear to have been motivated by interest in the study of survivors of traumatic events. The first study of rape victims was conducted with respect to 13

4. Quote from Judge David Wild, Cambridge Crown Court, in Polly Patullo, *Judging Women: A Study of Attitudes That Rule Our System* (London: National Council for Civil Liberties, 1983), 20-21:

Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it she has only to keep her legs shut and she would not get it without force and there would be marks of force being used.

Quote from Judge Frank Allen, Manitoba Provincial Court, 1984 in "Woman Assaulted by Boyfriend to File Complaint Against Judge," *The Globe and Mail*, 27 March 1989, A8: "Unless you have no worldly experience at all, you'll agree that women occasionally resist at first but later give in to either persuasion or their own instincts."

See also "Judge's sex case comments prompt demand for his removal," *The Globe and Mail*, 27 November 1989, A8, where Judge Peter van der Hoop gave a suspended sentence to a man found guilty of sexually assaulting a 3 year old girl, finding that the girl was "sexually aggressive," and the accused tired and under the influence of alcohol at the time of the assault.

5. For a discussion on misperceptions about rape which influence triers of fact, see text at footnotes 24-34.

6. "Patriarchy in its wider definition means the manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general." Gerda Lerner, *The Creation of Patriarchy* (New York: Oxford University Press, 1986), 239.

7. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (3d)* (1980), 236-238, hereinafter referred to as DSM III.

hospital patients by Sandra Sutherland and Donald Scherl in 1970.⁸ The authors found that the women who survived rape experienced three stages of recovery. Phase one was what they termed "Acute Reaction." During this phase the victim feels shock, disbelief, and dismay. She may also have a tendency to be incoherent and highly volatile. This phase may last from a few days to a few weeks. Phase two, or the "Outward Adjustment" phase, often follows. During this time the woman may return to work or school, and cope with her memories by denial and suppression. Finally, in the "Integration and Resolution" phase, the woman begins to resolve her feelings. This phase may be disrupted by events, such as court appearances, which provoke further feelings of distress.

Another early study was conducted by Ann Wolbert Burgess and Lynda Lytle Holmstrom. They observed and interviewed 96 victims who admitted themselves into the Boston City Hospital during a period in 1972 and 1973.⁹ The authors identified two stages of trauma following a rape. The first, or acute stage, occurs immediately after the attack. Somatic reactions occur in the first several weeks and take the form of physical trauma, i.e., bruises or irritation, skeletal-muscular tension, headaches, gastrointestinal irritability – stomach pains, genitourinary disturbances – vaginal discharge, and, generalized pain and fatigue. The emotional reactions during this phase range from fear, humiliation, and anger, to revenge and self-blame. The long-term process, or reorganization phase occurs after the acute phase. Many women undertake changes such as moving, changing jobs and telephone numbers, and travelling to either obtain support from family members or to get away from the surroundings of the attack. Many victims experience nightmares and traumatophobia, which is the reaction to a traumatic situation. Depending on where and in what circumstances the assault occurred, the woman could have a fear of the indoors/outdoors, of being alone, of crowds, or of people following her. Many women also experience sexual tension and are unable to resume pre-rape sexual relations.

In spite of their observation that survivors of sexual violence tend to undergo these two stages of recovery, Burgess and Holmstrom nonetheless emphasized that women's emotional responses may be quite different, particularly in the acute stage. They identified two types of response: expressive, where the woman is in obvious emotional distress, and controlled, where the woman appears to be calm, unemotional, and not in need of assistance.

The later studies by Burgess and Holmstrom appear to have been influenced by the work of rape crisis centres and counsellors. In 1979, they designed a follow-up to their 1974 study.¹⁰ They found that the long term recovery of the woman depends on several factors – prior life stress, method of attack, relationship with the offender, amount of violence, institutional response to the victim, and the amount of social support received. In their third study, also in 1979, they focused attention on sexual disruption experienced by the women.¹¹

8. Sandra Sutherland and Donald J. Scherl, "Patterns of Response Among Victims of Rape," *American Journal of Orthopsychiatry* 40 (1970) 3: 503.
9. Ann Wolbert Burgess and Lynda Lytle Holmstrom, "Rape Trauma Syndrome," *American Journal of Psychiatry* 131 (1974) 9: 981.
10. Ann Wolbert Burgess and Lynda Lytle Holmstrom, "Adaptive Strategies and Recovery from Rape," *American Journal of Psychiatry* 136 (1979) 10: 1278.
11. Ann Wolbert Burgess and Lynda Lytle Holmstrom, "Rape: Sexual Disruption and Recovery," *American Journal of Orthopsychiatry* 49 (1979) 4: 648.

They found that some women developed a sexual aversion or disinterest, especially where specific activities related back to the assault. They noted that 71 per cent of the women who were sexually active pre-rape decreased sexual activity and 38 per cent of those who were active abstained for at least six months. The finding that rape victims frequently suffer long-term sexual dysfunction after rape has been validated by several other studies.¹²

A 1982 study by Beverly Atkeson, Karen Calhoun, Elizabeth Ellis, and Patricia Resick focused on the "depressive symptoms" exhibited by a rape victim.¹³ In a study of 115 victims, with a control group of non-victims, the researchers tested for signs of "depression" at intervals of one, two, four, eight, and twelve months post-assault. The victims initially exhibited significantly greater symptoms than the non-victims; however, after the second and fourth months, these differences decreased. Prolonged depression in some of the victims was attributed in part to a lack of support. The authors also documented the amount of reorganization that rape victims engage in. Work was the most affected area, with some women experiencing problems as late as the eighth month. Work "problems" consisted of quitting a job; moving, whereby the woman was forced to quit; and, taking time off work for court appearances. The researchers also found that women who had been assaulted curtailed their social and leisure activities out of fear.

Finally, several studies have focussed on rapist behaviour as a way of understanding the woman's responses, including her response during the attack, her actions in the immediate aftermath, and her form of long-term recovery. For instance, Martin Symonds¹⁴ has studied the reactions of victims of violence and has found that only one in ten robbery victims¹⁵ responds with active resistance, thus "normalizing" the reaction of frozen fright experienced by many women who are confronted with sexual violence. Symonds describes all victim behaviour during and after sexual assault as motivated by self-preservation in response to what he states all rapists have in common: "their use of terror, intimidation and acts of violence to achieve the subjugation of the victim."¹⁶ Similarly, another study by Burgess confirms that many of the reactions and behaviours of the survivor are rational responses to hostility trauma; an "[a]nalysis of the dynamics and method of operation of the rapist helps to explain what specific aspects have terrorized and/or victimized the person."¹⁷

These trauma reactions find a parallel in the literature and diagnostic criteria used by the APA for Post-Traumatic Stress Syndrome. Mardi Horowitz has studied this "syndrome" and explains the diagnostic criteria outlined in the

12. It is not apparent from these studies how rape would affect the sexuality of a lesbian. Forced heterosexual intercourse may be more traumatizing and the recovery process may be somewhat different. Further study is necessary in this area.
13. Beverly M. Atkeson, Karen S. Calhoun, Elizabeth M. Ellis, and Patricia A. Resick, "Victims of Rape: Repeated Assessment of Depressive Symptoms," *Journal of Consulting and Clinical Psychology* 50 (1982) 1: 96.
14. Martin Symonds, "The Rape Victim: Psychological Patterns of Response," *American Journal of Psychoanalysis* 36 (1976): 27, and more generally, Martin Symonds, "Victims of Violence: Psychological Effects and After Effects," *American Journal of Psychoanalysis* 35 (1975): 19.
15. Symonds, "The Rape Victim," 34.
16. Symonds, "The Rape Victim," 29.
17. Ann Wolbert Burgess, "Rape Trauma Syndrome," *Behavioural Science and the Law* 1 (1983) 3: 97, 102.

DSM III.¹⁸ Psychological responses to events which are beyond the usual human experience are fairly universal. The responses, elicited in a certain order, are identified as "phases of reaction:" shock, outcry, denial, intrusiveness, working through, and completion.

As well as these particular phases, there are four criteria for diagnosis of Post-Traumatic Stress Syndrome. The first criterion required by the DSM III is that a recognized traumatic event must have occurred. As an illustration, there are certain events considered traumatic enough to meet the first criterion such as war, earthquakes, and floods.¹⁹ The second criterion is that the victim show evidence of re-experiencing the trauma in at least one of the following ways: recurring recollection of the event, recurrent dreams, or feeling as if the event was repeating because of exposure to stimulus such as a similar environment. The third criterion is that the woman is expected to feel "numbing" in her day-to-day operation, and to withdraw from the external world. This can be demonstrated by a loss of interest in significant activities such as work or school, a feeling of estrangement from others, or a feeling of being constricted in her normal environment. The DSM III model also requires, as the fourth criterion, that the woman show two of several symptoms that were not present before the event, such as being easily startled, sleeping problems, guilt about survival, lack of concentration, memory loss, avoidance of activities which remind the survivor of the event, or an intensification of symptoms when exposed to things which symbolize the traumatic event. The latter symptoms can be delayed in reaction.

The stages in recovery and the diagnostic criteria for Post-Traumatic Stress Syndrome have an obvious resonance for women who have been raped. In fact, the DSM III specifically recognizes rape as one of the traumatic events which produces the symptoms described.²⁰ While the Canadian Medical Association (CMA) relies upon the DSM III as a general matter, it has not specifically addressed either Post-Traumatic Stress Syndrome itself or rape as a precipitating trauma.²¹ The significance of recognition on the part of the medical profession of Post-Traumatic Stress Syndrome and, more importantly, RTS, for the purposes of use of such evidence in criminal prosecutions will be explored in the section which follows.

Legal Recognition of RTS

Feminist researchers and feminist prosecutors have worked together to use this knowledge of women's experience of rape to educate and inform decision-makers in the criminal justice system, and to influence the outcomes of

18. Mardi J. Horowitz, "Post-Traumatic Stress Disorders," *Behavioural Science and the Law* 1 (1983) 3: 9.

19. See the work on Vietnam veterans for examples of the reaction to service during war: John O. Lipkin, Raymond M. Scurfield, and Arthur S. Blank, Jr., "Post-Traumatic Stress Disorder in Vietnam Veterans: Assessment in a Forensic Setting," *Behavioural Science and the Law* 1 (1983) 3: 51. There has also been extensive work on natural disasters. See Jacob D. Lindy and James Titchener, "Acts of God and Man: Long Term Character Change in Survivors of Disasters and the Law," *Behavioural Science and the Law* 1 (1983) 3: 85.

20. See Burgess, "Rape Trauma Syndrome," 97 for examples of rape victim reactions which meet the diagnostic criteria.

21. Canadian Psychiatric Association, Ottawa, Canada.

rape prosecutions. Prior to 1980, for instance, Ann Wolbert Burgess had testified in civil trials regarding RTS on behalf of women who were suing their attackers for the tort of assault.²² In 1978, New York feminist prosecutor Judith Rowland first introduced the testimony of a police detective who had expertise on RTS as part of the state's case in a rape trial. The admissibility of this evidence was later challenged successfully in the appellate review of that first trial and in several subsequent cases. However, in consultation with Burgess and after doggedly pursuing the issue, Rowland was finally successful in getting RTS evidence admitted in her fourth prosecution.²³

In the 12 years since Rowland first initiated this issue, the admissibility and use of RTS evidence have been litigated in numerous state courts across the United States, with varied results. What follows is a summary and analysis of the ways in which prosecutors have proposed to use RTS evidence, and the legal hurdles which must be overcome in the United States before this type of evidence can be influential in the outcome of a rape trial. In this context, the applicability of the American use of RTS evidence to its use in Canadian rape prosecutions will be explored.

The Uses of RTS Evidence

The prevalence of erroneous beliefs about rape and the influence such beliefs have upon judges and juries who sit on sexual assault trials is well-documented. As well, there are several aspects of rape prosecutions which are problematic. Evidence that a complainant has experienced RTS can assist both in challenging rape myths which might taint the fact-finding process, and in overcoming other evidentiary difficulties.

Many of the rape myths which influence the thinking of triers of fact are beliefs which are unarticulated and untested by either knowledge or experience. These beliefs cover an array of sexual and coercive activity, and are held by a surprising number of people. One such belief is the idea that "women want to be raped;" it is part of their sexual fantasy. Where women "tease," i.e., dress, look, or smell pleasant, they are playing with their fantasy and "they get what they deserve" when they are raped.²⁴ "Good girls don't get raped" has been repeated again and again to explain away the incidents of rape. The women whose behaviour can be described as seductive or provocative are the only ones who are raped.²⁵ Related to this myth is the idea that forced intercourse between parties

22. *Delia v. Torres*, 184 Cal. Rptr. 787 (1982).

23. All of these cases are unreported. The earliest reported case which refers to Rape Trauma Syndrome is *People v. Mathews*, 154 Cal. Rptr. 628 (Ct. App. 1979).

24. Vivian Berger, "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom," *Columbia Law Review* 77 (1977): 1.

25. The ludicrousness of this myth is highlighted by the following scenario from "Legal Bias Against Rape Victims," *American Bar Association Journal* 61 (1975): 464:

"Mr. Smith, were you held up at gunpoint on the corner of First and Main?" "Yes."
 "Did you struggle with the robber?" "No." "Why not?" "He was armed." "Then you made a conscious decision to comply with his demands rather than resist?"
 "Yes." "Did you scream? Cry out?" "No, I was afraid." "I see. Have you ever been held up before?" "No." "Have you ever given money away?" "Yes, of course." "And you did so willingly?" "What are you getting at?" "Well, let's put it like this Mr.

who know each other or in situations short of extreme violence is not "real" rape. As Robin D. Weiner states: "A great many incidents women consider rape are, in effect, considered 'normal' by both male perpetrators and the male-dominated legal system."²⁶ The other interlocking myths are that women who fail to forcibly resist rape enjoy the attack in spite of themselves, and therefore actually consent, and that women will afterwards "cry rape" out of malicious motivations.²⁷ Finally, there are beliefs which are focused on the manner in which a woman who has "really" been raped will behave, including the idea that she will immediately report the offence to the police,²⁸ will tell a clear, coherent, and unwavering version of the assault, will exhibit certain emotions and behaviour, and will follow through with all court procedures in a co-operative manner.²⁹

The significance of rape myths for the woman in a rape trial cannot be underestimated. As J.J.I. Cooper and J.C. Weimberg note "the chances of obtaining a conviction in a rape case are extremely small. According to official statistics, even in cases where charges are laid and no witnesses drop out before the trial, the Canadian conviction rate is only 42%."³⁰ In another Canadian study of the attitudes of juries towards the information provided in a "typical" rape trial, the researchers found that the jurors rarely find the accused guilty. Provided with information about a woman's sexual conduct and the extent of force applied in the rape, 38 of 95 jurors said that there was not enough evidence to convince them of guilt beyond a reasonable doubt.³¹ The typical juror will view the woman as a "provocateur" and will be skeptical and judgmental where the woman did not resist or where she was raped by an acquaintance. These situations are viewed as the woman's own fault or as less serious than "real" rapes,³² and jurors may be reluctant to find guilt. In a study on judicial attitudes, Carol Bohmer found that if a woman withdraws her complaint at any stage and for whatever reason, judges believe that the original complaint must have been fabricated.³³ Furthermore, in

Smith. You've given money away in the past. In fact, you have quite a reputation for philanthropy. How can we be sure you weren't contriving to have your money taken from you by force?" "Listen, If I wanted..." "Never mind. What time did this holdup take place?" "About 11:00 p.m." "You were out on the street at 11:00 p.m.? Doing what?" "Just walking." "Just walking? You know that it's dangerous being out on the street that late at night. Weren't you aware that you could have been held up?" "I hadn't thought about it." "What were you wearing at the time, Mr. Smith?" "Let's see... a suit. Yes, a suit." "An expensive suit?" "Well - yes. I'm a successful lawyer, you know." "In other words, Mr. Smith, you were walking around the streets late at night in a suit that practically advertised the fact that you might be a good target for some easy money, isn't that so? I mean, if we didn't know better, Mr. Smith, we might even think that you were asking for this to happen, mightn't we?"

26. Robin D. Weiner, "Shifting the Communication Burden: A Meaningful Consent Standard in Rape," *Harvard Women's Law Journal* 6 (1983): 143.
27. Matthew Hale, *History of the Pleas of the Crown* (1st Am. ed. 1847), 635. See also, *Allison v. U.S.*, 409 F. 2d 445 (D.C. Cir. 1969).
28. Criminal Law Amendment Act, S.C. 1980-81-82, c. 125, s. 19. See also, Carol Bohmer, "Judicial Attitudes Toward Rape Victims," *Judicature* 57 (1974): 303 and *Allison v. U.S.*, 409 F. 2d 445 (D.C. Cir. 1969).
29. Bohmer, "Judicial Attitudes Toward Rape Victims," 303.
30. J.J.I. Cooper and J.C. Weimberg, "The Rape Victim: Everybody's Plaything," *Legal Medical Quarterly* 2 (1978): 169, 169.
31. Susan Hess Nelson, "An Experimental Study Concerning Jury Decisions in Rape Trials," (1978), 1 C.R. (3d) 265, 280.
32. Susan Estrich, *Real Rape* (Cambridge: Harvard University Press, 1987).
33. Bohmer, "Judicial Attitudes Toward Rape Victims," 303.

a Canadian study of jury prejudice, the researchers found that many jurors will not step forward when a judge asks them to disqualify themselves if they are in any way biased. The authors suggest that this occurs because the jurors are not aware of what the judge means by bias, or the jurors are aware that they are biased but want to remain anonymous.³⁴ The United States studies and cases³⁵ offer similar confirmation of the fact that jurors do not perceive their own biases and therefore may be incapable of hearing the evidence in a neutral fashion.

These rape myths must be directly addressed in the trial process; the introduction of RTS evidence can perform this function. Cooper and Weimberg explain:

[T]he false assumption that rape is a form of sexual expression is deeply embedded in our society, where sexual intercourse is seen as something that men do to (not with) women. The triers of fact are assisted, through evidence, in identifying and giving respect to the psychological damage which results from sexual violence and which is usually invisible both within and outside the legal system.³⁶

Judith Rowland is convinced that the jury benefits by being more informed about the experience of a woman post-rape. The following is from a letter written to Rowland by a juror after one of her first trials. The juror said that she was responding to the defence attorney's comment that RTS evidence was irrelevant:

From the legal standpoint, according to instructions, we, the jurors, received, the alleged victim need only resist enough to make it clear to the alleged rapist that she does not want to have intercourse with him. How much is enough? Expert testimony helps to clarify that point. Why must a woman jeopardize her physical wellbeing or life on top of suffering the emotional trauma of experiencing infuriating, demeaning treatment, just to satisfy a jury that she resisted a man's advances?³⁷

In another case where RTS evidence was admitted Rowland comments, "[t]he jury was out less than two hours. The verdict was "guilty" and when [we] spoke with members of the jury, there was no room for doubt: without the expert it would have been a different story."³⁸ Testimony as to RTS can thus be used to explain incidents traditionally detrimental to the prosecution's case. Where the

34. Neil Vidmar and Julius Melnitzer, "Juror Prejudice: An Empirical Study of Challenge for Cause," *Osgoode Hall Law Journal* 22 (1984): 487, 509.

35. *People v. Bledsoe*, 681 P. 2d 291, 298 (Cal. 1984). The court stated:
As a number of decisions have recognized, in such a context expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths.

36. Cooper and Weimberg, "The Rape Victim: Everybody's Plaything," 171.

37. Judith Rowland, *The Ultimate Violation* (New York: Doubleday & Co., 1985), 115-116.

38. *Ibid.*, 129-130.

defence argues that the woman consented and where physical injuries are not apparent, evidence of the often long-lasting psychological injuries suffered suggests that the woman in fact survived a traumatic, non-consensual attack.³⁹

Reliance upon women's experience of more subtle uses of violence and coercion might also assist in shifting the criminal law's definitions of rape, which are currently assessed from the perspective of the accused.⁴⁰ Evidence which documents survival behaviour in victims of violence may assist triers of fact in understanding passive resistance as a strategy for survival rather than as willing acquiescence.⁴¹ RTS as a framework may put into perspective the behaviour of a woman who does not immediately report the offence, who reacts calmly and unemotionally in the aftermath, or who experiences memory loss and blackout after the attack.⁴² Similar uses can be made of RTS evidence in civil suits where women sue their attackers or others,⁴³ and in claims processed before Criminal Injuries Compensation Boards.⁴⁴ Finally, at the sentencing stage after criminal conviction, and when damages are assessed after judgment in a torts suit, evidence which makes tangible the losses and pain suffered by the woman will also assist the judge.⁴⁵

The Admissibility of RTS Evidence in Court

Canadian criminal courts have addressed the issue of Rape Trauma Syndrome on only two occasions. In *R. v. Boyd*⁴⁶ in 1977 the Ontario Court of Appeal considered whether or not evidence of the complainant's emotional condition after the alleged attack would constitute corroborating evidence that the woman was raped. Evidence of RTS was not specifically referred to by the court, but it did state that evidence indicating the woman was in distress and crying when seen by police and hospital personnel after the assault was not enough to provide corroborating evidence.⁴⁷

39. *R. v. Guthrie* (1985), 20 C.C.C. (3d) 73 (Ont. C.A.).

40. *R. v. Chase* (1984), 55 N.B.R. (2d) 97 (C.A.). See also, T. Brettel Dawson, "Legal Structures: A Feminist Critique of Sexual Assault Reform," *Resources for Feminist Research* 14 (1985): 40, 42; Christine L.M. Boyle, *Sexual Assault* (Toronto: Carswells Co. Ltd., 1984), 180; Pappajohn v. The Queen, [1980] 2 S.C.R. 120, and Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 265(4).

41. Amy Depaul, "The Rape Trauma Syndrome: The New Weapon for Prosecutors," *National Law Journal*, 28 October 1985, 1.

42. John L. Ross, "The Overlooked Expert in Rape Prosecutions," *University of Toledo Law Review* 14 (1983): 707; *People v. Bledsoe*, 682 P. 2d 291, 298 (Cal. 1984).

43. Sharon Batt, "Our Civil Courts: Unused Classrooms for Education About Rape," *Feminism Applied: Four Papers*, Canadian Research Institute for the Advancement of Women, 7 (1984): 56-58; Lisa Freedman, "Civil Courts: A Powerful Tool for Education," *Status of Women News* 10 (1985) 3: 12; and *Q. v. Minto Management Ltd.* (1984), 49 O.R. (2d) 531 (Ont. H.C.J.), where the trial judge gave considerable weight to RTS evidence in a civil trial in which the plaintiff was awarded \$40,000 in damages for personal "injury."

44. RTS evidence has been used in several compensation cases in the United States for this purpose: *White v. Violent Crimes Compensation Board*, 388 A. 2d 206 (S.C.N.J. 1978); *Alphonso v. Charity Hospital of Louisiana*, 413 So. 2d. 982 (La. App. 1982); *Division of Corrections v. Wynn*, 438 So. 2d 466 (Fla. App. 1983).

45. In March 1987, the Ontario Attorney General's Office announced that it would be introducing Victim Impact Statements as part of the Crown's submissions on sentencing offences including sexual assault. See now s. 735 of the Criminal Code of Canada, S.C. 1988, c. 30, s. 7.

46. (1974), 17 C.C.C. (2d) 6 (Ont. C.A.).

47. The Criminal Code requirement that juries be warned as to the dangerousness of convicting for

More recently, in 1985 the Ontario Court of Appeal in *R. v. Guthrie*⁴⁸ allowed the Crown attorney to re-examine a rape victim about the emotional trauma she experienced following the incident. The judge held that this was relevant to explain why the woman did not report the incident to the police immediately. He did not, however, make a general ruling on the admissibility of RTS evidence or comment as to whether this would be relevant to the issue of consent.

While these two cases illustrate that some attention has been given by Canadian courts to the emotional trauma of a rape victim, they do not go very far in demonstrating how Canadian courts would deal with the introduction by the Crown attorney of RTS evidence. The lack of judicial precedent in Canada regarding the admissibility of RTS is further compounded by the fact that little research on the possible use of RTS evidence has been completed or published in Canada. Consequently, should a Crown attorney decide to present RTS evidence, a Canadian court would most likely consider its admissibility in light of foreign rulings on the issue, in particular those of the United States state courts.

What follows, then, is an overview of the approach taken by courts in the United States with respect to the admissibility of RTS evidence. This overview will involve looking at the general requirement of admitting expert testimony and whether or not the state courts have found RTS evidence admissible pursuant to these rules. Court rulings from the United States will then be considered in light of Canadian evidentiary requirements in order to anticipate the direction Crown prosecutors and courts within Canada are likely to take when dealing with RTS evidence.

United States Case Law

For expert testimony to be admitted in the United States, the evidence must be relevant,⁴⁹ meaning that it must relate to a matter in issue and must tend to prove that issue.⁵⁰ It must also be helpful to the jury, and in particular the testimony should be outside the jurors' normal scope of knowledge.⁵¹ As well, expert testimony must not be prejudicial to the accused or confusing to the jury.⁵² With respect to the expert witness herself, she must be qualified as an expert by virtue of her skill, knowledge, training, or education.⁵³ In addition to these requirements, special rules apply to scientific expert testimony, which would include testimony on RTS. These were developed in *Frye v. United States*⁵⁴ and have been used to evaluate recent developments in the medical field:

sexual assault in the absence of evidence corroborating the complainant's evidence, contained in the former s. 142, was repealed in 1976: S.C. 1974-75-76, c. 93, s. 8. The remaining common law vestiges of this "rule" were abolished (again) in 1982: S.C. 1980-81-82, c. 125, s. 5. See now the current s. 274: S.C. 1987, c. 24, s. 11.

48. (1985), 20 C.C.C. (3d) 73 (Ont. C.A.).

49. Fed. R. of Evid. s. 402.

50. Fed. R. of Evid. s. 401.

51. Fed. R. of Evid. s. 702.

52. Fed. R. of Evid. s. 403.

53. Fed. R. of Evid. s. 702.

54. 293 F. 1013 (D.C. Cir. 1923).

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.⁵⁵

The validity of new medical diagnosis can be adduced by expert testimony, scientific and legal writing, and judicial opinion. It is not enough that several experts agree with the theory; it must be "generally" accepted. Judges have said that it should be "accepted by those who would be expected to be familiar with its use," which is not a particularly helpful guiding principle. There has been no discussion of a percentage test or of whether or not divergent views are permitted.

Another problem is with *what* exactly must be generally accepted by the experts — the scientific technique, the underlying principle, or the technique of applying it; it is also unclear whether empirical evidence is required to substantiate the theory. Finally, apart from its inherent vagueness, the *Frye* test can also be criticized because its "cultural lag" may deprive the courts of useful evidence. These problems have all influenced the determination of the admissibility of RTS evidence.

When ruling on the admissibility of RTS testimony, judges must first determine who is a qualified expert for this purpose. Many medical and non-medical professionals have been involved in the initial diagnosis of the syndrome. Due to the detailed development by medical professionals, it seems that psychiatrists and psychologists would be best qualified by legal standards to give "expert" evidence about RTS. For example, in *State v. Taylor*⁵⁶ the Missouri Supreme Court accepted the expert qualification of a psychiatrist. Dr. Amanat had 15 years experience as a psychiatrist and had treated over 300 sexual assault victims. The doctor had written an article and part of a book on RTS.

In addition to doctors, other medical and non-medical people with related experience have qualified as experts. Judith Rowland has used both types of experts. In her first case in New York she introduced the testimony of a police detective while in another, she used a psychiatrist.⁵⁷ The police detective qualified as an expert witness because of her education, her eight years of investigating sex offences and juvenile crime, her involvement in community programs for rape victims, her instruction of a self-defence class, and her lengthy and numerous contacts with victims and rapists. In another case, the Missouri Court of Appeal also allowed a police detective to testify because he had investigated over 200 incidents of rape.⁵⁸ Social workers have qualified as RTS

55. *Ibid.*, 1014.

56. 663 S.W. 2d 235 (Mo. banc 1984) (evidence excluded for other reasons; see text at footnotes 75 and 81).

57. Rowland, *The Ultimate Violation*, 331-349.

58. *State v. Thompson*, 668 S.W. 2d 179 (Mo. App. 1984).

experts: in *State v. Middleton*,⁵⁹ the Oregon Supreme Court allowed a social worker to testify about post-rape trauma. A social worker also testified in a civil case, *Delia v. Torres*.⁶⁰ The judge found that she was qualified to testify because she was a licensed clinical social worker with a Masters degree in social work, and had considerable experience working with rape victims. Furthermore, the Oregon Appellate Court has allowed the testimony of a Rape Victim Advocate who had a Masters degree in social work and who had worked with approximately 100 juvenile and child victims of sexual abuse.⁶¹

Judith Rowland suggests that professionals other than psychiatrists may be better suited to give testimony in respect of RTS for two reasons. First, she notes the general societal skepticism about the psychiatric field, and speculates that juries may be more well-disposed toward experts who are not psychiatrists. Second, "rape victims usually represent a small segment of the psychiatrist's patient population, as opposed to both rape counselor/sociologists and psychologists, who more frequently specialize."⁶² It is thus extremely important to choose experts who have a solid and extensive knowledge about rape victims and RTS. These are considerations Canadian Crown prosecutors may want to take into account when choosing experts to lead testimony on RTS. This rigour will enable experts to import clearly the necessary information to the judge and/or jury, and to withstand attacks on their knowledge or credibility on cross-examination.

Even if a witness qualifies as an "expert," the judge must still determine the admissibility of RTS evidence itself. Pursuant to the rules of evidence previously outlined, United States courts have ruled RTS evidence admissible or inadmissible based on whether or not consent was at issue, on whether the evidence was helpful to the jury, on whether it went to the credibility of the woman, was prejudicial to the accused, was irrelevant, or whether it had adequate scientific validity.

RTS Evidence Admissible

A number of United States courts have found RTS evidence to be admissible to prove lack of consent when the woman's consent was used as a defence. In the 1982 decision, *State v. Marks*,⁶³ the Kansas Supreme Court acknowledged that there was a plethora of literature on RTS, and that it was "generally accepted to be a common reaction to sexual-assault." As such it was found to be relevant to the issue of consent. Further, in the case of *State v. McQuillen*,⁶⁴ the same court held that expert evidence as to RTS is relevant and admissible, and that an expert can describe whether the woman herself exhibits the emotional and psychological trauma consistent with the syndrome. Similarly, in the earlier case of *People v. Laporte*⁶⁵ the Michigan Court of Appeal held that

59. 657 P. 2d 1215 (Or. 1982).

60. 184 Cal. Rptr. 787 (1982).

61. *State v. LeBrun*, 587 P. 2d 1044 (Or. App. 1978).

62. Rowland, *The Ultimate Violation*, 391.

63. 231 Kan. 645, 647 P. 2d 1292 (1982).

64. 236 Kan. 161, 689 P. 2d 822 (1984), aff'd 721 P. 2d 740 (1986).

65. 303 N.W. 2d 222 (Mich. App. 1981).

the expert witness could give an opinion as to whether the sexual assault was against the will of the complainant according to his evaluation of the physical and emotional symptoms of the woman.

Like Kansas and Michigan, in *State v. Liddell*,⁶⁶ the Montana Supreme Court admitted RTS evidence where consent was at issue. The same court held in *State v. Brodniak*⁶⁷ in 1986 that this evidence could be used to explain to the jury the symptoms which follow a forcible rape, but that it could not be used to make a judgment as to the woman's credibility. Other cases in which courts have admitted RTS evidence to establish the rape victim's lack of consent are *State v. Huey*⁶⁸ (Arizona), *People v. Hampton*⁶⁹ (Colorado), *State v. Kim*⁷⁰ (Hawaii), and *State v. Allewalt*⁷¹ (Maryland).

RTS evidence has also been admitted where it was found to be helpful to the trier of fact. Acknowledging that the subject of rape "is pervaded by myth, emotion and prejudice," the New York Supreme Court in *People v. Reid*⁷² allowed evidence in respect of RTS. The court stated that expert testimony about this syndrome is admissible because it is beyond the knowledge of the average member of the jury. However, the expert was not permitted to testify as to the veracity of the woman herself.

In addition, the Pennsylvania Superior Court in *Commonwealth v. Gallagher*⁷³ and the Florida Appellate Court in *Kruse v. State*⁷⁴ allowed expert testimony on RTS and Post-Traumatic Stress Disorder, respectively, in two sexual assault trials. This information was held to be beyond the knowledge and experience of the average juror and was therefore helpful to the jury's decision. Both courts noted that this evidence could not be used to support the complainant's credibility.

RTS Evidence Inadmissible

In several other American jurisdictions, courts have found RTS evidence inadmissible because it goes to the credibility of the woman, is prejudicial to the accused, or because it is not scientifically "valid."

Several courts have disallowed RTS testimony where the expert proposed to state that the woman in fact manifested the syndrome. The difficulty is that the expert in such a situation is essentially making an evaluation of the credibility of the victim. As stated in the leading case of *State v. Taylor*,⁷⁵ decided in 1984 by the Missouri Supreme Court, where an expert testifies that the woman is truthful

66. 685 P. 2d 918 (Mont. 1984).

67. 718 P. 2d 322 (Mont. 1986).

68. 145 Ariz. 59, 699 P. 2d 1290 (1985).

69. 746 P. 2d 947 (Colo. 1987).

70. 64 Haw. 598, 645 P. 2d 1330 (1982).

71. 308 Md. 89, 517 A. 2d 741 (1986).

72. 475 N.Y.S. 2d 741 (Sup. 1985).

73. 510 A. 2d 735 (Pa. Super. 1986).

74. 483 So. 2d 1383 (Fla. App. 1986).

75. 663 S.W. 2d 235 (Mo. banc 1984).

and that rape did occur, she is purporting to decide the fact in issue in the case.⁷⁶ As well, in *People v. Roscoe*⁷⁷ the California Appellate Court stated that the expert cannot assert in evidence that the woman was raped, and in *People v. Farley*,⁷⁸ the Colorado Court of Appeal stated that while it was acceptable for the expert to talk about RTS generally, she could not use her expertise to judge the veracity of the victim. Thus, the proposed testimony was inadmissible.

Perceived prejudice to the accused has also been a factor taken into consideration by the courts. In 1982, RTS evidence was disallowed by the Minnesota Supreme Court in *State v. Saldana*⁷⁹ because it went to questions of fact and thus invaded the province of the jury and was extremely prejudicial to the accused. The court also held that the expert's testimony invested the woman's complaint "with an aura of special reliability and trustworthiness."⁸⁰ *Saldana* was followed in *Taylor*, where the Missouri court stated that "the peril of the prejudice and confusion resulting from the opinion testimony substantially outweighs any probative value it might have."⁸¹ Similar reasoning was used in *State v. McGee*⁸² (Minnesota), *People v. Roscoe*⁸³ (California), and *State v. Bubar*⁸⁴ (Vermont).

Rape Trauma Syndrome evidence has also been called inadmissible because it fails the *Frye* test and is not a "scientific fact." In *People v. Beldsoe*⁸⁵ the California Supreme Court held the evidence to be inadmissible because RTS is not relied upon in the scientific community to prove the occurrence of a rape, but is rather only a therapeutic tool used to treat patients. Similar reasoning was applied in *Saldana*, *People v. Pullins*,⁸⁶ (Michigan) and *State v. Black*⁸⁷ (Washington) to decide that RTS evidence did not constitute a scientific fact. The Colorado Appellate Court in *People v. Farley*⁸⁸ also disallowed the RTS testimony on the basis that it was not a scientific fact since the trauma could arise after any number of tragic events and RTS was not, therefore, a "perfect diagnosis."

In summary, the United States case law has tended to find RTS evidence admissible when it goes to the issue of the woman's consent or when it can prove helpful in informing the jury of the effects of rape. Grounds for ruling RTS inadmissible, on the other hand, have focused on whether the evidence was used to assess the complainant's credibility, whether it was prejudicial to the accused, and whether it failed the *Frye* test in not amounting to a "scientific fact." The extent to which this case law can be applied in Canada will now be discussed.

76. Similar decisions were reached in *State v. Hellesvig*, 376 N.W. 2d 503 (Minn. App. 1985), and *People v. Smith*, 387 N.W. 2d 814 (Mich. 1986).

77. 215 Cal. Rptr. 45 (Cal. App. 1985).

78. 712 P. 2d 1116 (Colo. App. 1985).

79. 324 N.W. 2d 227 (Minn. 1982).

80. *Ibid.*, 230.

81. 663 S.W. 2d 235, 242 (Mo. banc 1984).

82. 324 N.W. 2d 232 (Minn. 1982).

83. 215 Cal. Rptr. 45 (Cal. App. 1985).

84. 505 A. 2d 1197 (Vt. 1985).

85. 681 P. 2d 291 (S.C. Calif. 1984).

86. 378 N.W. 2d 502 (Mich. App. 1985).

87. 109 Wash. 2d 336, 745 P. 2d 12 (1987).

88. 712 F. 2d 1116 (Colo. App. 1985).

Canadian Legal Context

The rules relating to the admissibility of expert testimony in Canada are found in section 7 of the Canadian Evidence Act⁸⁹ and in the case of *Fisher v. The Queen*.⁹⁰ Expert evidence is admissible as opinion evidence if it is presented by a qualified expert, deals with matters beyond the general knowledge of the trier of fact, and is necessary to resolve a fact in issue. Further, as in the United States, the Crown attorney will have to show that RTS is generally accepted by the scientific/medical profession as a reliable diagnostic tool.

In deciding who qualifies as an expert witness, the same considerations will apply in Canada as in the United States — the witness must qualify based on her knowledge, skill, or experience in the related field.⁹¹ Consequently, medical personnel, social workers, rape crisis counsellors, and police officers may well be permitted to give expert evidence on RTS in Canada provided they have had extensive experience dealing with women who have been sexually assaulted and are knowledgeable about RTS.

With respect to the second criterion, the Ontario Court of Appeal in 1977 held that an expert must speak to something which is beyond the general knowledge of the members of the jury.⁹² Where medical or particular knowledge strengthens the credibility of the witness, then the expert testimony will be admissible. However, where a lay person can give the same opinion as that given by the expert, judges express concern that the jury will be overwhelmed and unduly influenced by the credentials and knowledge of the expert. This is likely to be found prejudicial to the accused, and the evidence may therefore be disallowed because it would invade the fact-finding function of the jury. However, it is evident that jurors are exposed to the prevalent myths about rape and rape victims, and clearly some amount of de-briefing is necessary. Therefore, although some courts in the United States have ruled RTS evidence inadmissible because it invades the fact-finding function of the jury, Canadian courts should not follow this path.

The third test used to evaluate the admissibility of evidence such as RTS evidence in Canadian law is whether or not it is helpful to resolve the issue in question. Particularly when the issue is consent, RTS evidence can help the jury draw together the facts and evidence given by other witnesses to explain the actions of the woman. Symptoms which result from forcible intercourse are directly related to the issue of whether or not the woman consented to the sexual contact. In this regard, Canadian courts should follow the line of United States cases which have allowed RTS evidence where the accused alleged the woman had consented to the assault.

With respect to the scientific validity of RTS evidence, Canadian courts have yet to adopt any specific test to challenge the validity of new scientific/medical theories. However, in the case of *Phillion v. The Queen*,⁹³ Mr. Justice Ritchie

89. R.S.C. 1985, c. 307, s. 7.

90. (1961), 130 C.C.C. 1 (Ont. CA.), 19; aff'd 130 C.C.C. 1 (S.C.C., 1961).

91. Rupert Cross and Colin Tapper, *Cross on Evidence* (6th ed.) (London: Butterworth & Co. Ltd., 1985).

92. *R. v. French* (1978), 37 C.C.C. (2d) 201 (Ont. C.A.).

93. [1978] 1 S.C.R. 18.

indicated the Court's interest in the United States case law in the area, and discussed the requisite reliability of scientific evidence, in this case, the polygraph test. Should the United States tests be adopted in Canada, the major hurdle RTS evidence must overcome is its recent acceptance, particularly in light of the fact that the Canadian Medical and Psychiatric Associations have not formally or specifically recognized RTS. However, given that RTS has been diagnosed and studied for over 20 years in the United States, this should be less of a problem than it was in the earlier cases. The general body of medical and sociological research regarding RTS has lent empirical data and support to the early studies of Sutherland, Scherl, Burgess, and Holmstrom. Crown attorneys in Canada should consequently urge our courts to ignore those United States cases which have dismissed RTS evidence as scientifically invalid. To rule that RTS is not accepted in the scientific community would be a poor interpretation of medical practice, and should be avoided in Canada.

With respect to United States case law which has disallowed RTS evidence because it usurps the jury's role of ruling on the victim's credibility, these authorities may not be relevant in the Canadian courts. This is due to the challenge in the Canadian courts to the ultimate issue doctrine. This doctrine requires that a witness cannot be asked the question which would decide the issue of the case, i.e., was the woman raped? Although this doctrine was developed in the United Kingdom, it has been questioned by the Supreme Court of Canada.⁹⁴ This issue is important when discussing the admissibility of RTS expert evidence, because if this doctrine is rejected, experts would be permitted to give a direct opinion on whether or not the complainant was raped. This would allow Canadian courts to rule differently from those United States courts which have found RTS evidence inadmissible when it goes to the credibility of the woman.

In conclusion, should Crown attorneys decide to introduce RTS evidence in sexual assault cases, they may be able to obtain more favourable rulings than their counterparts in the United States. Furthermore, the courts in Canada should not feel obligated to follow United States case law which holds RTS evidence to be inadmissible because it is not scientifically valid. Given the length of time RTS has been studied, the amount of research, and the number of publications on the issue, Canadian courts should be more willing to find it an accepted theory in the scientific community.

Analysis and Critique

Once accepted in the Canadian legal system, the use of RTS evidence has the potential of greatly facilitating the prosecution of a sexual assault charge while reducing the trauma experienced by the woman. Canadian feminists must, however, assess whether or not the use of RTS evidence in prosecuting sexual assault is a progressive legal development for women.⁹⁵ The effect of patriarchal

94. *Fisher v. The Queen* (1961), 130 C.C.C. 1 (S.C.C.); *Graat v. The Queen* (1982), 2 C.C.C. (3d) 365 (S.C.C.).

95. Elizabeth A. Sheehy, *Personal Autonomy and the Criminal Law* (Ottawa: Canadian Advisory Council on the Status of Women, 1987), 24-27.

societal norms on the operation of government, legislation, and the judicial process is pervasive, and recent trends in judging do not date such phenomena as a thing of the past.⁹⁶ When we acknowledge the cumulative impact of police reaction, defence counsel's cross-examination, judges' comments, and the verdicts reached by juries on the psyche and self-esteem of the woman who prosecutes rape, we must question whether the use of RTS evidence will reduce or exacerbate her trauma.

Feminists have expressed ideas about criminal law and psychiatry which suggest that Crown use of RTS evidence may have negative implications. One of the major disadvantages in putting RTS evidence before the courts is that it may prompt the return of sexual assault to the psychiatric realm where it is viewed as an individual woman's "problem," and not as a crime of public proportions. Because the DSM III is a manual for psychiatric diagnosis, feminists have expressed fear about the medicalization of RTS, and the implications that this may have in terms of treatment, which may include drugs and institutionalization.⁹⁷ In fact, some feminists have deliberately *not* promoted the reporting of RTS in the DSM III because "the stigma and shame of being raped is then compounded by the stigma and shame of being classified as mentally ill."⁹⁸

Reliance on psychiatry has other pitfalls. The mental health profession has traditionally been closely associated with patriarchal values and myths and, consequently, of little positive support for women. Psychiatric and psychological research has, until recently, been carried out with male only test groups.⁹⁹ Thus,

96. Note the number of sexual assault cases reported recently in the newspapers which have resulted in little or no penalty for the rapist and thereby little consolation for the victims. For instance, in the sexual interference case involving a three-year-old described in footnote 4, "Judge's sex case comments," the accused received a suspended sentence.

97. Psychiatrizing women's experience has resulted in institutionalizing many women, especially those who are working class, lesbian, and elderly. See *Phoenix Rising* 5 (1985) 1, Special Issue on Women and Psychiatry; Persimian Blackbridge and Sheila Gilhooly, *Still Sane* (Vancouver: Press Gang Publishers, 1985); and Bonnie Burstow and Don Weitz (eds.), *Shrink Resistant: The Struggle Against Psychiatry in Canada* (Vancouver: New Star Books, 1988) as a beginning for further critique. My writing in no way encompasses the experience of those women who have been psychiatrized. I hope my comments inspire/incite others to write on this issue; there is much thinking to be done.

98. Bonnie J. Buchele and James P. Buchele, "Legal and Psychological Issues in the Use of Expert Testimony on Rape Trauma Syndrome," *Washburn Law Journal* 25 (1985): 26, 30. In addition, evidence on premenstrual syndrome has been used to defend criminal actions by certain women. The use of this evidence has been criticized by feminists, including Sophie Laws in "The Sexual Politics of Pre-Menstrual Tension," *Women's Studies International Forum* 6 (1983) 1: 19, and Nora Mulligan, "Recent Developments: Pre-Menstrual Syndrome," *Harvard Women's Law Journal* 6 (1983): 219. Mulligan explains that the premenstrual syndrome defence is used similarly to the "duress" and "insanity" defences. She notes that there are positive aspects of this defence but states on page 227 that:

The benefits possibly available to the small class of women charged with crimes who would be able to raise a successful PMS defence, or use their PMS condition to mitigate their punishment, must be weighed against the potential setback to the women's movement stemming from reinforcement by the legal system of the widespread perception that all women are violent and irrational during their pre-menstrual phase.

In her work, Sophie Laws describes pre-menstrual tension as a male, medical perspective that supports a myth that all women want to be feminine, kind, and gentle, but there is a "bad woman" in all of us. It further supports the male idea that menstruation is "not nice." Laws suggest that making women's differences a medical sickness fails to address the possibility that they may be the result of a political and philosophical problem.

99. Some of the studies previously cited on general trauma research illustrate this point. They surveyed reactions of war veterans and then extrapolated their findings to the general population.

when researchers established a behavioural "norm," often women did not fit this "norm:" rather than looking for differences in male/female behaviour systems, women were classed as "abnormal." On the other hand, it may be argued that the movement of feminists into this field, and the inclusion of women in the norm, may stymie the diagnosis of women's reactions to trauma, such as sexual assault, as psychoses or sickness. However, regardless of such possible future developments, the characterization of RTS as a "medical" or "psychiatric" problem may trivialize rape and take the focus off the assaultive behaviour of men. Legal recognition of RTS may also reinforce the notion that women are the weaker sex, the sex whose psyche cannot survive the "real world."

A second concern is that the introduction of this evidence may open the door to new questioning of the woman's background — medical, psychological, and sexual. For instance, the defence may wish to examine the woman's medical records to attempt to prove that she had the symptoms of RTS before the incident in question, or arising from concurrent, later, and/or assaultive sexual intercourse. Using background information, the defence may also try to prove that there were other non-sexual traumatic events in the woman's life which caused her reaction. In addition, the defence may attack the woman's credibility by accusing the prosecutor of coaching her on the symptoms of RTS, and, in doing so, may assert that she does not in fact suffer from RTS, and thus was not subjected to non-consensual intercourse. Defence lawyers may ask in a preliminary motion to have their psychiatrist examine the victim, and may, through this avenue, attempt to introduce evidence of the woman's past sexual experience which would otherwise be prohibited.¹⁰⁰ This attempt would result, once more, in an inappropriate and damaging focus on the conduct of the woman rather than that of the accused.

A third disadvantage relates to procedural matters. The cost of purchasing the time of an expert witness to testify can be prohibitive. When a Crown attorney tries to manage this dilemma by relying on the testimony of inexpensive "experts" such as police detectives¹⁰¹ and crisis counsellors, they may sacrifice needed credibility in the "battle of the experts," since defence counsel may be in the position to call an expert whose professional credentials are more impressive to the trier of fact. This "battle of the experts" can increase the time required for a trial, and will certainly have a negative impact on the woman who must observe her own credibility being challenged and argued over by "experts."

This leads to the fourth, and perhaps most disturbing concern, which is the impact of introduction of RTS evidence upon the woman herself. This personal cost includes the potential of a trying and humiliating experience, since she must

100. Evidence of a victim's past sexual experience was limited by the Criminal Code, R.S.C. 1985, c. C-46, s. 276(1). In the United States, this principle was discussed in *State v. McQuillen*, 689 P. 2d 822, 830 (Kan. 1984):

The defendant may bring in his own expert witness in rebuttal to testify that the victim is not suffering from rape trauma syndrome. Such rebuttal evidence, however, would not allow wholesale admittance of victim's past sexual conduct, unless that information was used by the state's expert to make his determination of rape trauma syndrome. Nor may the defendant present evidence that the victim was not suffering from rape trauma syndrome where the state has not first introduced evidence that the victim was suffering from rape trauma syndrome.

101. Rowland, *The Ultimate Violation*, 22-24.

still testify, particularly when she is the only witness. She must therefore relive the experience and undergo the scathing cross-examination of the defence lawyer.¹⁰² As Burgess, Holmstrom, and others have stated, an event which follows the rape, such as testimony at a trial, may reactivate the stress disorder thereby thwarting the woman's long-term recovery.¹⁰³ Although healing may be promoted by a prosecution, the woman's intense pain will be prolonged until the completion of the trial. Her personal life, sexual lifestyle, and sense of privacy will all be examined and invaded. RTS may therefore give defence another avenue to undermine her, if that is the tactic chosen.¹⁰⁴

A final caveat is one which emerges from the work of feminist legal theorists such as Catharine A. MacKinnon,¹⁰⁵ T. Brettel Dawson,¹⁰⁶ and Carol Smart.¹⁰⁷ These authors have described the legal structures and ideologies which support patriarchy. They caution that seemingly progressive legal reforms will ultimately serve to reinforce women's subordinate position as long as the underlying paradigms and power relations between men and women remain unchallenged. It is therefore possible that the use of RTS evidence will somehow legitimate and rehabilitate the sexist *image* of the law of sexual assault, while simultaneously entrenching further the *notion* that women are emotionally fragile and in need of "treatment."

The advantages of this potential development in Canada are also of interest to feminists. The most direct advantage of RTS evidence is that it assists in proof of the essential element of rape, that of non-consensual intercourse. Facts about the effect of a sexual assault provide superior evidence than that used by jurors – mythology, bias, and prejudice based on traditional patriarchal values. The fact that psychological/sociological theories have substantiated the woman's symptoms and given these symptoms a diagnostic name, serves to endorse the woman's testimony. The expert evidence corroborates her story, and even though this requirement has been removed in law,¹⁰⁸ in reality jurors will be influenced by the additional evidence.

Another related advantage is that the use of RTS evidence will serve an educative function with respect to the triers of fact in individual cases and beyond. Members of juries will be exposed to the realities of women's experience of attack and violation, and judges who hear and rule on RTS evidence must also absorb at least some part of it.

In the long term, the use of RTS evidence may also result in a higher reporting rate for sexual assault, because women will come to expect that the case

102. See comments made by defence counsel at a conference: Cristin Schmitz, "'Whack' Sex Assault Complainant at Preliminary Inquiry," *The Lawyers Weekly*, 27 May 1988, 22.

103. See Randall M. Christenson, John Ingram Walker, Donald R. Ross, and Allan A. Maltbie, "Reactivation of Traumatic Conflicts," *American Journal of Psychiatry* 138 (1981) 7: 984, for a further discussion of this matter. The authors researched reactivating events in the lives of World War II veterans. Note that the results should not be extrapolated to women: results of male sociological studies are not necessarily consistent with women's experience.

104. Schmitz, "'Whack' the Complainant."

105. Catherine A. MacKinnon, "Feminism, Marxism and the State: Towards Feminist Jurisprudence," *Signs* 8 (1983): 635.

106. T. Brettel Dawson, "Legal Structures."

107. See generally, Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

108. See footnote 47.

will not depend solely upon "her word against his." Since women have traditionally had less social power and credibility than men, the woman may not foresee any positive outcome to reporting the incident: she will not be believed, and will be continually questioned by each person she meets in the prosecution process. However, knowing that her own experience may provide corroboration of her story may encourage her to report the assault, to persist with the prosecution, and to testify in the criminal proceedings. Not only is her experience validated, but also the rapist is not left with the belief that his behaviour was appropriate, and consequently he will have to face the legal repercussions. Perhaps the message will be received that sexual assault will not be tolerated by women or by the legal system.

A final and perhaps most significant advantage of RTS evidence is that it provides important validation by the public legal system of a woman's physiological and emotional response to sexual assault. In addition, it may be important in and of itself for women to tell our story, in a way that expresses our pain and fear in a public forum.¹⁰⁹ The knowledge that the legal system has accepted this phenomenon as truth could aid a woman in her healing process. The majority of people in this society respect the courts and judicial system, and validation of something by the judiciary seems to give it "truth." With RTS accepted as "truth," women may be better able to deal with the self-blame and self-doubt that often follows from an assault.

My conclusion is that the legal strategy of using RTS evidence to prosecute rape has some potential to advance women's interests. I now turn to discuss methods of implementation which might serve to minimize the dangers such evidence poses.

Implementation

A method of implementation takes this discussion from theory to reality. The first step is to educate interest groups which can help to achieve the legal acceptance of this expert evidence. The developments in United States case law and feminist research and writing should be distributed — mailed, published, and commented on — in order to introduce this evidence to the Canadian public. Education should be directed at women's groups, Rape Crisis Centres, as well as law schools and lawyers. Crown attorneys must be particularly well-informed because it is their support in the trial process which can alleviate some of the stress on the woman.¹¹⁰ By giving RTS a widespread introduction, the judiciary in all parts of the country will be challenged to deal with this evidence. The second step would be to canvass rape counsellors in order to establish a resource network of experts qualified to testify on RTS. With this network, we can also keep informed of the Canadian developments in this area. It is important to locate the people working in this field and to ensure that their knowledge of RTS has been fully developed. Also, it is valuable to educate them about the court system and about testifying as expert witnesses.

109. Batt, "Our Civil Courts."

110. Carol Bohmer and Audrey Blumberg, "Twice Traumatized: The Rape Victim and the Court," *Juricature* 58 (1975): 390.

The third step would be to act on the theory by continually challenging the courts with this type of evidence. Strong judicial decisions depend on good evidence and good facts. Therefore, education and preparation of feminists, lawyers, clinical workers, and assaulted women are needed to advance this new type of evidence. Further, by introducing this evidence in courts across the country, it is hoped that some favourable decisions will result. The specific strategy should be for the experts to testify as to RTS itself and, if permitted, as to their observations of the woman's experience and behaviour. Even if the expert is not allowed to testify regarding the emotional state of the woman herself, and is limited to the theory of RTS, family, friends, lovers, medical personnel, and police can be called as witnesses to the woman's reactions or changed behaviour. The woman herself may of course testify as to her reactions, but these other witnesses will take some of the focus off her.

In addition, Crown attorneys might find it necessary to educate judges more directly: Judith Rowland prepared lengthy memoranda for presiding judges to facilitate their processing of the evidence of her experts and its significance. Another tactic which may prove valuable is to attempt to educate judges and juries with respect to rapist behaviour. Rowland also made use of studies of rapists in her prosecutions to demonstrate to jurors that there is no one type of rapist and therefore, there is no one way of surviving an attack or responding in its aftermath.

A final long-term strategy is to develop uniquely Canadian statistics and analysis, and to urge the CPA to recognize RTS specifically. We also must encourage feminist researchers and experts to reclaim and define RTS as *women's* experience, not as medical or psychiatric "truth." We must develop these concepts in a way which is empowering for women who have survived sexual assault.

Conclusion

Sexual assault is a criminal act with which women will have to deal, indefinitely. Thus, feminists must continue to research, develop, and fight for its elimination, indefinitely. The use of Rape Trauma Syndrome evidence is a new development in this feminist pursuit. It can validate the woman's experience, facilitate convictions, and address myths regarding rape and women's sexuality. As Susan Heald has stated: "As long as we live in a society in which law is considered the only avenue for controlling sexual assault, efforts to make the law more consistent with reality as women experience it are vital."¹¹¹ Given the hidden dangers which RTS evidence poses, however, we must remember that this "reform" is only one part of our struggle to undermine and eradicate patriarchal legal and political structures in Canadian society.

111. Susan Heald, "Social Change and Legal Ideology: A Critique of the New Sexual Assault Legislation," *Canadian Criminology Forum* 7 (1985) 2: 117, 121.