

# **WHOM DO I BELIEVE: EVALUATING PSYCHOLOGICAL EVIDENCE**

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In many different contexts judges, legal advisers and mental health professionals are confronted with the difficult task of evaluating psychological evidence. Reliable criteria for the task are elusive while the number of psychological tests, principles and theories seem to multiply considerably quicker than scientific analyses or considered legal assessments. Anglo-American legal systems have oscillated between recognition of the need to draw upon the fruits of psychology and bemoaning what is often the state of flux within psychology on particular topics and assessment tools and what are the limitations of psychology in terms of giving definitive or diagnostic answers to legal problems.

This paper focuses upon two controversial contributions from the mental professions to the assessment of litigation dilemmas faced with regularity in the family law context. It argues that the two areas chosen, parental alienation syndrome and child sexual abuse accommodation syndrome, exemplify the tensions between psychology and the law, in particular the potential for unrealised aspirations on the part of the law in respect of contributions by psychology, and the need for rigorous analysis of the methodologies employed by mental health professionals. However, it is important that the legal system learn sufficient of what psychology has to offer not to ask for what it cannot have and not to abandon what it can obtain when its aspirations are not satisfied. Just as deference and uncritical acceptance of the fruits of other disciplines do not conduce to sound fact-finding, not does frustrated abandonment of the availability of modestly enhanced insights and awarenesses.

### **Syndrome Evidence**

One of the developments of the last two decades has been a confluence of the contributions of forensic psychology, the victims' movement, the women's movement, the children's rights movement and a variety of law reform lobby groups. The result has been an attempt to provide to the courts means of understanding better a number of phenomena which have the potential to mislead, confuse or otherwise lead to erroneous evaluation of data before the courts. Thus, evidence has been adduced from a variety of mental health professionals about rape trauma syndrome since the mid-1970s in relation to the responses of adult women to sexual assault. Similarly, evidence has been presented to many courts and tribunals since the early 1980s about battered woman syndrome, endeavouring to disabuse decision-makers of

myths which they might have harboured about domestic violence and its impact upon women. In particular, forensic psychology has sought to explain how “learned helplessness” can result in some women being unable to leave assaultive partners and how a percentage of such women paradoxically erupt with lethal force against their assailants when the defences of provocation and self-defence would not generally avail them. Repressed memory syndrome since the early 1990s has endeavoured to rectify a prosecution dilemma and to explain why some victims of physical and sexual violence do not complain or report it - because they do not recall it, as a result of a complex variety of psychological forces, including dissociation, denial, psychogenic amnesia and Freudian repression. Premenstrual syndrome has been adduced on a number of occasions in the 1980s and 1990s to explicate why some women in their late luteal phase have erupted with a violence that without the evidence have seemed irrational and inexplicable. Many other instances of counter-intuitive, permitted on the basis that the evidence will either be necessary to the fact-finder or will enhance its capacity for effective decision-making could be instanced.

As Myers<sup>3</sup> and others<sup>4</sup> have pointed out, however, significant difficulties have been identified in the transplantation of syndrome evidence from the clinical/therapeutic context into the forensic. McCord commented in the context of syndromes that although the law and psychology are uneasy bedfellows, they are sometimes forced to sleep together<sup>5</sup>. The coerced cohabitation on occasions has been marked by a troubled conjugal relationship and false and disappointed expectations between the partners. Part of the difficulty lies in the excessiveness and inappropriateness of the expectations about psychology that are harboured by the courts. The role of psychometric “tests”, the usage of medical-sounding terminology (such as “symptoms”), and the employment of statistical analyses have tended to obscure the “soft

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<sup>3</sup>See JEB Myers, “Expert Testimony Describing Psychological Syndromes” (1993) 24 *Pacific Law Journal* 1449; JEB Myers, “The Tendency of the Legal System to Distort Scientific and Clinical Innovations: Facilitated Communication as Case Study” (1994) 18 *Child Abuse and Neglect* 505.

<sup>4</sup>See eg I Freckelton, “The Syndrome Evidence Phenomenon: Time to Move On?” in R Roesch, RR Corrado and RJ Dempster (ed), *Psychology in the Courts: International Advances in Knowledge*, Harwood Academic, Amsterdam, 2001.

<sup>5</sup>D McCord, “Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases” (1987) 67 *Oregon Law Review* 19 at 21.

science” aspect of much psychological testimony and many forensic reports by psychologists where they have related to the subject matter of what in the United States is called “novel psychological evidence”.

Two other syndromes have dealt with fact-finding conundra faced by the courts in relation to the behaviour and evidence of children - parental alienation syndrome and child sexual abuse accommodation syndrome. It is these areas of psychological interest upon which the remainder of this paper will concentrate.

### **Parental Alienation Syndrome**

In 1985 Richard Gardner, a United States psychiatrist, introduced the term “parental alienation syndrome” (“PAS”) in order to explain the “programming” or “brainwashing” of a child by a parent to denigrate the other parent and the self-created contributions by the child in support of the alienating parent’s campaign of denigration against the alienated parent<sup>6</sup>.

When Gardner did so, he employed terminology that drew upon the legacy of at least “rape trauma syndrome”, “cult indoctrinee syndrome”, “battered woman syndrome” and “child sexual abuse accommodation syndrome”.

In the second edition of his book on parental alienation syndrome in 1998 Gardner defined it as:

“A disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child’s campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent’s indoctrinations and the child’s own contributions to the vilification of the target parent. When true parental abuse and/or neglect is present the child’s animosity may be justified, and so the parental alienation syndrome explanation for the child’s hostility is not applicable.”<sup>7</sup>

Since the first edition, Gardner has argued that the syndrome includes not only conscious but

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<sup>6</sup>R Gardner, “Recent Trends in Divorce and Custody Litigation” (1985) 29 (2) *Academy Forum* 3; R Gardner, *The Parental Alienation Syndrome and the Differentiation Between False and Genuine Sex Abuse*, Creative Therapeutics, Cresskill, New Jersey, 1987.

<sup>7</sup>R Gardner, *The Parental Alienation Syndrome*, 2<sup>nd</sup> edn, Creative Therapeutics, Cresskill, New Jersey, 1998, at pxx.

subconscious and unconscious factors within the alienating parent that contribute to the child's alienation from the target parent, as well as factors in the child, independent of the parental contribution, that play a role in the development of the syndrome<sup>8</sup>.

Gardner has emphasised that a parent who inculcates such a syndrome in their child is perpetrating a form of emotional abuse "in that such programming may not only produce lifelong alienation from a loving parent, but lifelong psychiatric disturbance in the child. A parent who systematically programs a child into a state of ongoing denigration and rejection of a loving and devoted parent is exhibiting complete disregard of the alienated parent's role in the child's upbringing."<sup>9</sup> He has argued that the syndrome is characterized by a cluster of symptoms that usually appear together in the child, especially in the "moderate" and "severe" types of the syndrome (as distinguished from the "mild" type), including:

1. A campaign of denigration.
2. Weak, absurd, or frivolous rationalizations for the deprecation.
3. Lack of ambivalence.
4. The 'independent thinker' phenomenon.
5. Reflexive support of the alienating parental in the parental conflict.
6. Absence of guilt over cruelty to and/or exploitation of the alienated parent.
7. The presence of borrowed scenarios.
8. Spread of the animosity to the friends and/or extended family of the alienated parent."<sup>10</sup>

He has maintained that children "suffering with" the syndrome will exhibit most, if not all of the "symptoms" - "This consistency results in PAS children resembling one another. It is because of these considerations that the PAS is a relatively 'pure' diagnosis that can easily be made by those who are not somehow blocked from seeing what is front of them."<sup>11</sup> As of 1998 he maintained, in spite of what he termed a campaign of politically correct attacks, that "in the vast majority of families it is the mother who is likely to be the primary programmer and the father the victim of the children's campaign of denigration. My own observations since the early 1980s, when I first began to see this disorder, have been that in 85-90 percent

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<sup>8</sup>Ibid, at p73.

<sup>9</sup>Ibid, at pxxi.

<sup>10</sup>Ibid, at pxxv.

<sup>11</sup>Ibid, at pxxv.

of all cases in which I have been involved, the mother has been the alienating parent and the father has been the alienated parent.”<sup>12</sup> However, in a remarkable turn-around, in the 2000 “addendum” to the book he said that around 1998 he began to notice a shift in the gender ratio of men and women inducing the syndrome in their children - “in the last few years I have seen a shift that has brought the ratio now to 50/50.”<sup>13</sup>

Gardner has argued for two decades that “when a sex-abuse accusation emerges in the context of a PAS - especially after the failure of a series of exclusionary maneuvers - the accusation is far more likely to be false than true”.<sup>14</sup> Where cases of the syndrome are “moderate” or “severe”, Gardner has advocated a series of sanctions against the alienating parent. He has argued that consideration for transfer of custodial responsibility should be given where “the mother’s campaign of denigration has been so relentless that there is the risk that the children will move along the track to the moderate and even severe form of PAS.”<sup>15</sup> He has instanced cases where therapeutic interventions in relation to the alienating parent have been completely unsuccessful.

### **Criticisms of Parental Alienation Syndrome**

Increasing numbers of critics of Gardner’s syndrome have emerged with the passage of the better part of two decades<sup>16</sup>. They have pointed out that the syndrome continues to be

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<sup>12</sup>Ibid, at pxxv.

<sup>13</sup>Ibid, at p442 (2000 printing).

<sup>14</sup>Ibid, at pxxvii.

<sup>15</sup>Ibid, at p.378-379.

<sup>16</sup>See eg KC Faller, “The Parental Alienation Syndrome, What is It and What Data Support it?” (1998) 3 *Child Maltreatment* 100; RJ Williams, “Assessing for Alienation in Child Custody and Access Evaluations” (2001) 39 (3) *Family Court Review* 267; JB Kelly and JR Johnston, “The Alienated Child: A Reformulation of Parental Alienation Syndrome” (2001) 39(3) *Family Court Review* 249; CL Wood, “The Parental Alienation Syndrome: A Dangerous Aura of Reliability” (1994) 27 *Loyola Los Angeles Law Review* 1367; K Niggemyer, “Parental Alienation Syndrome is Open Heart Surgery: It Needs More than a Band Aid to Fix It” (1998) *California Western Law Review* 567; R Smith and P Coukos, “Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations” (Fall 1997)

confusing and unclear in its criteria, its purpose and its dimensions<sup>17</sup> focusses almost exclusively on the alienating parent as the aetiological agent of the child's alienation - "This is not supported by considerable clinical research that shows that in high-conflict divorce, many parents engage in indoctrinating behaviors, but only a small proportion of children become alienated. ... Hence, alienating behavior by a parent is neither a sufficient nor a necessary condition for a child to become alienated."<sup>18</sup>

It has also been observed that Gardner's formulation is unfalsifiable because it is only true by reference to its own definition<sup>19</sup>. The syndrome is controversial within psychology and psychiatry, in particular because of a relative absence of empirical or research support for the reliable identification of its symptom clusters<sup>20</sup>. Most of Gardner's writings about it have been self-published and not submitted to peer review<sup>21</sup>. In addition, Gardner has been evangelical in relation to the syndrome, leading to a number of doubts about his objectivity and investment in its promotion.

The syndrome has not been included in the DSM or ICD systems of psychiatric classification, having no commonly recognised or empirically verified pathogenesis, course, familial pattern or treatment selection. At most it is a non-diagnostic syndrome with little light to shed on cause, prognosis or treatment of the allegedly pathological behaviours. Many of the criteria for determining whether a child has the syndrome are derivative from and borrowed from Gardner's "earlier and now widely discredited objective test for determining whether children were fabricating allegations of sexual abuse, the Sex Abuse Legitimacy

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*Judges' Journal* 38.

<sup>17</sup>See eg JM Bone and MR Walsh, "Parent Alienation Syndrome: How to Detect it and What to Do About It" (1999) 73 *Florida Bar Journal* 44; see also MR Walsh and JM Bone, "Parental Alienation Syndrome: An Age-Old Custody Problem" (1997) 71 *Florida Bar Journal* 93.

<sup>18</sup>Kelly and Johnston, op cit, at 249.

<sup>19</sup>Ibid, at 249.

<sup>20</sup>See eg J Etemad, Review (1999) 38(2) *Journal of the American Academy of Child and Adolescent Psychiatry* 223 at 224.

<sup>21</sup>See S Dallam, "The Evidence of Parental Alienation Syndrome: An Examination of G

Scale (SAL).”<sup>22</sup> In this regard, a problem identified by critics is Gardner’s published view that the “vast majority” of sexual abuse allegations made during custody argumentation are false - the difficulty is that there is a serious potential for erroneous identification of the syndrome when in fact children’s hostility toward a parent may have another and factually legitimate explanation<sup>23</sup>. Wood has also criticised Gardner for suggesting that the projection of a mother’s own needs or fantasies onto children is a contributor to false allegations of sexual abuse<sup>24</sup>. The extent to which the syndrome, like Divorce Related Malicious Mother Syndrome<sup>25</sup>, is gender-neutral (or as Niggemyer<sup>26</sup> puts it “blatantly anti-mother”) has also been questioned, as has its sophistication in terms of typically multiple aetiology.<sup>27</sup>

Moreover, variants on Gardner’s version of the syndrome have emerged, resulting in the potential for significant disuniformity of conceptualisation of the syndrome. Darnell, a United States psychologist, for instance, has distinguished between parental alienation and Gardner’s parental alienation syndrome, defining “parental alienation” as “any constellation of behaviours, whether conscious or unconscious, that could evoke a disturbance in the relationship between a child and the targeted parent”, classifying alienating parents into “naive”, “active” and “obsessed” categories<sup>28</sup>. Others, such as Cartwright<sup>29</sup>, have sought to expand the parameters of the syndrome arguing that others than biological parents can be

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<sup>22</sup>Williams, op cit, at 269. See especially L Berliner and JR Conte, “Sexual Abuse Evaluations: Conceptual and Empirical Obstacles” (1993) 17 *Child Abuse and Neglect* 111.

<sup>23</sup>See eg Niggemyer, op cit.

<sup>24</sup>Wood, op cit, at 1373.

<sup>25</sup>I Turkat, “Child Visitation Interference in Divorce” (1994) 14 *Clinical Psychology Review* 737; I Turkat, “Divorce Related Malicious Mother Syndrome” (1995) 10 *Journal of Family Violence* 253.

<sup>26</sup>Op cit.

<sup>27</sup>See eg Wood, of cit.

<sup>28</sup>D Darnell, “Parental Alienation: Not in the best Interests of the Children” (1999) 75 *North Dakota Law Review* 323.

<sup>29</sup>GF Cartwright, “Expanding the Parameters of Parent Alienation Syndrome” (1993) 27 *American Journal of Family Therapy* 205. See further Williams, op cit.

responsible for persistent attempts to alienate children. Kelly and Johnston in 2001 too advanced a “family systems focus” upon the problem of the alienated child, categorising a complex set of factors in both the child and the alienating parent which have the potential to conduce toward alienation<sup>30</sup>. Sullivan and Kelly<sup>31</sup> have stressed the need for courts to engage in humane, flexible, prompt and non-confrontational management of cases involving suspected alienation of children.

Kopetski on behalf of the Family and Children’s Evaluation Team in Colorado developed Gardner’s approach, identifying particular familial and personality characteristics on the part of “alienating parents”:

- “1. A narcissistic or paranoid orientation to interactions and relationships with others, usually as the result of a personality disorder. Both narcissistic and paranoid relationships are maintained by identification, rather than by mutual appreciation and enjoyment of differences as well as similarities. Perfectionism and intolerance of personal flaws in self or others have deleterious effects on relationships. When others disagree, narcissistic and paranoid people feel abandoned, betrayed and often rageful.
2. Reliance on defenses against psychological pain that result in externalizing unwanted or unacceptable feelings, ideas, attitudes, and responsibility for misfortunes so that more painful internal conflict is transformed into less painful interpersonal conflict. ...
3. Evidence of an abnormal grieving process such that there is a preponderance of anger and an absence of sadness in reaction to the loss of a marital partner.
4. A family history in which there is an absence of awareness of normal ambivalence and conflict about parents, enmeshment, or failure to differentiate and emancipate from parents; or a family culture in which ‘splitting’ or externalizing is a prominent feature. Some alienating parents were raised in families in which there is unresolved or unacknowledged grief as the result of traumatic losses or of severe but unacknowledged emotional deprivation, usually in the form of absence of empathy. More frequently, alienating parents were favorite children or were overly indulged or idealized as children.”<sup>32</sup>

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<sup>30</sup>JB Kelly and JR Johnston, “The Alienated Child: A Reformulation of Parental Alienation Syndrome” (2001) 39 *Family Court Review* 249.

<sup>31</sup>MJ Sullivan and JB Kelly, “Management of Cases with an Alienated Child” (2001) 39 *Family Court Review* 299.

<sup>32</sup>LM Kopetski, “Identifying Cases of Parent Alienation Syndrome: Part I and Part II” (1998) *Colorado Lawyer* 61 and 65.

Serious question marks in relation to the concept of the flawed concepts of “programming” and “brainwashing” have been raised in the context of the conduct of cults and new religious movements<sup>33</sup>.

Perhaps most seriously, a series of commentators has criticised the “punitive” aspect of Gardner’s proposed solution in relation to serious cases of the syndrome - that of shifting custody and access arrangements Johnston, Walters and Freidlander<sup>34</sup>, for instance, have argued in favour of an integrated and persistent therapeutic approach with both the alienated child and the aligned parent made the target of intervention, introducing the possibility of complexity and nuance and working toward reality-testing of entrenched perceptions and values.

### **Forensic Application of PAS**

In many cases Gardner’s parental alienation syndrome has been applied by courts<sup>35</sup>, on a number of occasions controversially<sup>36</sup>. Its status has been questioned on some occasions, while on others courts have apparently uncritically applied Gardner’s theories. The Florida District Court of Appeals for instance identified that there has been no claim of general professional acceptance of parental alienation syndrome as a tool for diagnostic evaluation and suggested that in *Re TMW* that parental alienation syndrome evidence should be remitted

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<sup>33</sup>For a review of the literature see I Freckelton, “Cults, Coercion and Psychological Consequences” (1998) 5(1) *Psychiatry, Psychology and Law* 1.

<sup>34</sup>See eg JR Johnston, MG Walters and S Friedlander, “Therapeutic Work with Alienated Children and their Families” (2001) 39 *Family Court Review* 316

<sup>35</sup>See *People v Loomis*, 658 NYS 2d 787 (NY Co Ct 1997) for a list of cases in the United States admitting PAS evidence.

<sup>36</sup>See eg *Karen B v Clyde M*, 574 NYS 2d 267 (Fam Ct 1991, aff’d sub nom *Karen “PP” v Clyde “QQ”*, 602 NYS 2d 709 (App Div 1993), discussed in CL Wood, “The Parental Alienation Syndrome: A Dangerous Aura of Reliability” (1994) 27 *Loyola of Los Angeles Law Review* 1367 and L Ziogiannis, “Evidentiary Issues with Parental Alienation Syndrome” (2001) 39 *Family Court Review* 334. See too *Hanson v Joseph*, 685 NE 2d 71 (1987); *Schutz v Schutz*, 581 So 2d 1290 (Fla 1991); *Coursey v Superior Court*, 194 Cal App 3d 147 at 150; *In re TMW*. 553 So 2d 260 (Fla Dist Ct App 1989).

in the same direction as the outdated tort of spousal alienation of affection. Difficulties with the syndrome's satisfaction of either the *Frye* "general acceptance test"<sup>37</sup> or the *Daubert* "reliability test"<sup>38</sup> have been identified by commentators<sup>39</sup>.

In Australia the most significant family law decision to canvass parental alienation syndrome is the procedural decision of the Full Court of the Family Court in *Johnson and Johnson*<sup>40</sup>. The case dealt with whether a husband should have been permitted part the way through trial to raise issues and call evidence about the syndrome. The Full Court, reviewing how the issue arose, noted an article by the psychologist Kenneth Byrne in 1989, who applied the writings of Gardner<sup>41</sup> indicating that the symptoms of the syndrome are:

- “1. The child shows a complete lack of ambivalence - one parent is described almost entirely negatively, the other almost entirely positively;
2. The reasons given for the dislike of one parent may appear to be justified, but investigation shows them to be flimsy and exaggerated; with younger children the reasoning is even more transparent;
3. The child proffers the opinion of wanting less contact with one parent in a way which requires little or no prompting. The complaints have a quality of being rehearsed or practiced;
4. The child seems to show little or no concern for the feelings of the parent being complained about;
5. The alienating parent, while seemingly acting in the best interests of the children, is

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<sup>37</sup>*Frye v United States*, 293 F 1013 (1923).

<sup>38</sup>*Daubert v Merrell Dow Pharmaceuticals*, 125 L Ed (2d) 469, 113 S Ct 2786 (1993)/ For a discussion of the issues see I Freckelton and H Selby, *Expert Evidence: Law, Practice and Procedure*, 2<sup>nd</sup> edn, Law Book Co, Sydney, 2002 (forthcoming). For the status of *Daubert* in New Zealand, see *R v Calder*, unreported, High Court, New Zealand, 12 April 1995; *R v Brown*, unreported, High Court, New Zealand, 19 September 1997.

<sup>39</sup>See eg Wood, op cit. See though L Ziogiannis, "Evidentiary Issues with Parental Alienation Syndrome" (2001) 39 *Family Court Review* 334.

<sup>40</sup><http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/family%5fct/unrep1120.html?query=title+%28+%22j ohnson%22+%29>, unreported, Full Court of Family Court of Australia, 7 July 1997.

<sup>41</sup>See too K Byrne, "Allegations of Child Sexual Abuse in Family Law Matters" in I Freckelton and H Selby (ed), *Expert Evidence in Family Law*, Law Book Co, Sydney, 1999.

actually working to destroy the relationship between them and the other parent. It is not uncommon for this to be further fuelled by new spouses or de factos;  
6. Most importantly, while the children will verbally denigrate one parent, they retain an unspoken closeness and affection for that parent. However, if the syndrome is allowed to develop unchecked, this can be all but erased by the alienating parent.”<sup>42</sup>

Again purporting to give voice to the views of Gardner, Byrne expressed the opinion that such symptoms are seen “exclusively” in children where patients are engaged in custody or access litigation and argued that the syndrome represents an extreme form of brainwashing by parents whose goal is “to get revenge”<sup>43</sup> but contended that the syndrome has clear signs and “with appropriate procedures can be diagnosed and treated”.

Another witness, a psychiatrist, Dr Craig, gave evidence that the diagnostic symptoms of the syndrome are:

- “1. The child makes negative non-ambivalent statements about the non-custodial parent;
2. The child makes entirely positive statements about the custodial parent and entirely negative statements about the non-custodial parent;
3. The reasons given for the dislike of one parent may appear to be justified but investigation shows them to be flimsy and exaggerated;
4. The child offers the opinion of wanting less contact with one parent in a way which requires little or no prompting and these complaints have a quality of being rehearsed or practiced.
5. The child shows little or no concern for the feelings of the parent being complained about.
6. The alienating parent, while seemingly acting in th best interests of the child is actually working to destroy the relationship between the child and the other parent;
7. While the child will verbally denigrate one parent they retain an unspoken closeness and affection for that parent.”

The Full Court observed that in a case where there had been obvious contact difficulties between the parties, the possibility that the child had either been brainwashed or indoctrinated by one of the parents “must be a relevant consideration.” It found that Dr Byrne’s article left it “in no doubt that “Parental Alienation Syndrome” is a very real psychological phenomenon which the husband, in our opinion, was entitled to investigate and pout to the relevant experts

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<sup>42</sup>K Byrne, “The Parental Alienation Syndrome” (1989) 4(3)  
*Australian Family Lawyer* 1.

<sup>43</sup>*Ibid*, at 5.

called in the course of the trial.”<sup>44</sup> The decision is limited in terms of its significance as precedent in relation to the syndrome. However, it is an example of a superior court not being assisted to take a critical perspective on a difficult area of expert evidence, resulting in something of a message being broadcast as to the legitimacy of the evidence.

### **Potential Solutions**

Borris has argued that until such time as the parental alienation syndrome is independently and empirically validated “attorneys should attack or defend alleged abusers without discussing PAS ... Otherwise experts who allege that PAS has occurred in a particular case will face a stiff cross-examination on the very existence of the syndrome, and the court’s focus will be shifted from the child’s best interests to the existence of PAS.”<sup>45</sup> Similarly, Judge Williams has urged the inadmissibility of evidence about the syndrome<sup>46</sup>, arguing that the legal system should not be distracted by the fledgling efforts of mental health professionals - “Not all negative or inappropriate behavior has to be a named pathology. The limits of, and plethora of, conceptualisations concerning AS and PA create real problems when the medical or social science concepts enter the legal phase.”<sup>47</sup> Wood<sup>48</sup> has passionately argued that until such time as the syndrome passes muster in terms of meaningful peer review, publication and empirical testing, it should be consigned to the waste bin of untested speculations.

The criticisms that have legitimately been mounted of Gardner’s parental alienation syndrome cannot properly be interpreted as a denial of the reality of children’s estrangement

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<sup>44</sup>*Johnson and Johnson* at [96].

<sup>45</sup>EB Borris, “Interference with Parental Rights on Non-Custodial Parents as Grounds for Modification of Child Custody” (1997) 9 *Divorce Litigation* 1 at 10.

<sup>46</sup>See too Wood, *op cit*.

<sup>47</sup>Williams, *op cit*, at 278.

<sup>48</sup>CL Wood, “The Parental Alienation Syndrome: A Dangerous Aura of Reliability” (1994) 27 *Loyola of Los Angeles Law Review* 1367 at 1415.

from a parent for reasons other than abuse<sup>49</sup>. However, the causes and means of addressing such toxic alienation lie within a complex evaluation of the dynamics of what has given rise to the alienation within the family unit at the earliest possible opportunity<sup>50</sup>. If a tool for identifying such alienation is to be accepted by the courts, it needs to have as a core element of its criteria means of discerning between (1) families where estrangements are normal or characterised by developmentally normal preferences, alignments and attachments; (2) families where estrangement has been generated by phenomena such as abuse; and (3) families where rigid and non-ambivalent estrangement has been generated by pathology existing as a result of either the attitudes of the child or encouraged by an aligned parent. The misleading pseudo-scientific patina of objectivity and reliability provided by the word “syndrome” appears not to be justified<sup>51</sup>. This is not to argue that all components of scientific rigour need to be applied to the evidence by psychologists<sup>52</sup> as a condition of admissibility. However, until such a scientifically sound instrument exists, it may well be that the disadvantages of focus upon such an unscientific and misleading tool as parental alienation syndrome may be such as to make its reception unhelpful or even counter-productive.

### **The Child Sexual Abuse Accommodation Syndrome**

At around the same time that Walker<sup>53</sup> was studying the reactions of adult victims of domestic assault, in the context of what became known as "battered woman syndrome", and

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<sup>49</sup>See JM Bone and MR Walsh, “Parental Alienation Syndrome: How to Detect it and What to do About It” (1999) 73 *Florida Bar Journal* 44; DC Rand, “The Spectrum of Parental Alienation Syndrome” (1997) 15 *American Journal of Forensic Psychology*.

<sup>50</sup>See eg SM Lee and NW Olesen, “Assessing ofr Alienation in Child Custody and Access Evaluations” (2001) 39 *Family Court Review* 282.

<sup>51</sup>See Zioggianis, op cit.

<sup>52</sup>See JT Richardson, GP Ginsburg, S Gatowski and S Dobbin, “The Problems of Applying *Daubert* to Psychological Syndrome Evidence: (1995) 10 *Judicature* 10.

<sup>53</sup>L Walker, *The Battered Woman*, 1979; L Walker, *The Battered Woman Syndrome*, 1984; L Walker, *Terrifying Love*, 1989.

just before Gardner coined the term “parental alienation syndrome”, researchers commenced to attempt to determine whether children who are battered or sexually abused also exhibit consistent and predictable behavioural characteristics capable of being profiled accurately. In 1983 Summit<sup>54</sup> identified a pattern of characteristics that he termed the "child sexual abuse accommodation syndrome" ("CSAAS") experienced by children who had been sexually molested by a member of their family. He maintained that, "A syndrome should not be viewed as a procrustean bed which defines and dictates a narrow perception of something as complex as child sexual abuse. ... The syndrome represents a common denominator of the most frequently observed victim behaviors"<sup>55</sup>. He declined to provide a precise definition of the syndrome, instead identifying the following characteristics:

- . secrecy;
- . helplessness;
- . entrapment and accommodation;
- . delayed, conflicted and unconvincing disclosure; and
- . retraction of disclosures<sup>56</sup>.

The first two attributes were maintained to be preconditions to the occurrence of sexual abuse, while the remaining three were "sequential contingencies", each category reflecting a reality for the victim and a contradiction to what Summit described as "the most common assumptions of adults"<sup>57</sup>. In other words, the syndrome was developed in order to disabuse

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<sup>54</sup>RC Summit, “The Child Sexual Abuse Accommodation Syndrome” (1983) 7 *Child Abuse and Neglect* 177.

<sup>55</sup>Ibid at 180.

<sup>56</sup>See also J Meyers, “Expert Testimony in Child Sexual Abuse Litigation” (1989) 68 *Nebraska Law Review* 1; R Roe, “Expert Testimony in Child Sexual Abuse Cases” (1985) 40 *University of Miami Law Review* 97; V Serrato, “Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses” (1988) 68 *Boston University Law Review* 155.

<sup>57</sup>Ibid at 181. Notably, therefore, the CSAAS is different in its

decision-makers of misconceptions.

The notion of "secrecy" relates to the covertness which Summit maintained is inherent in the abusive adult-child relationship in the course of which the abuser makes it clear to the child that adverse consequences will follow the child's disclosure of what has been happening to him or her - for the child, or someone close to the child, or for the abuser. "Helplessness" describes the absence of power that a child has in an abusive relationship with a parent or trusted adult, making disclosure exceptionally difficult because of the adult's exploitation of the authoritarian relationship.

By "accommodation" Summit described a phenomenon in the course of which abused children

"learn to accept the situation and survive. There is no way out, no place to run. The healthy, normally emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse. There is the challenge of accommodating not only to escalating sexual demands, but to increasing consciousness of betrayal and objectification by someone who is ordinarily idealised as a protective, altruistic, loving parental figure."<sup>58</sup>

To facilitate the acceptance of the situation, Summit asserted that the child victim may develop accommodation mechanisms, including "domestic martyrdom", "splitting of reality", "altered states of consciousness", self-mutilation, promiscuity, projection of rage, substance abuse and a range of other destructive behaviours<sup>59</sup>. To these might also be added the

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formulation to a syndrome such as RTS (or perhaps BWS) which depends much more closely upon criteria associated with PTSD symptomatology, to be arrived at within the psychiatric framework.

<sup>58</sup>At 184.

<sup>59</sup>See more recently C Feiring, L Taska and M Lewis, "A Process Model for Understanding Adaptation to Sexual Abuse: the Role of Shame in

development on some occasions by the child victim a paradoxically intense bond of affection toward the abuser.

Summit asserted that disclosure of abuse may be long delayed<sup>60</sup>, resulting in the potential for misunderstanding by those who do not appreciate the reasons for such delay. He identified a propensity on the part of children to retract their allegations because of a newfound awareness of the consequences of their disclosures, pressures brought upon them by family members and a sense of guilt for betraying the abusing family member. He also identified a tendency amongst some child victims to come to doubt their own perceptions when they receive no validation from adults around them<sup>61</sup>.

Summit maintained that, left unchallenged, the reality of sexual abuse reinforces both the victimization of children and societal complacency and indifference to the dimensions of victimisation<sup>62</sup>. He argued that what the CSAAS did was to provide "a common language for the several viewpoints of the intervention team and a more recognizable map to the last frontier in child abuse"<sup>63</sup>

Most of Summit's assertions in 1983 were clinically unsurprising, being consistent with previous research and an increasingly sophisticated understanding of the dynamics within

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Defining Stigmatization" (1996) 20(8) *Child Abuse and Neglect* 767.

<sup>60</sup>See also J Conte and L Berlina, "Sexual Abuse of Children: Implications for Practice" (1982) 62 *Social Casework* 601; P Parkinson, "Child Sexual Abuse Allegations" (1990) 4 *Australian Journal of Family Law* 60 at 71.

<sup>61</sup>See also D Schetky, "The Child as Witness" in D Schetky and AH Green (ed), *Child Sexual Abuse*, Brunner/Mazel, New York, 1988.

<sup>62</sup>Ibid at 188-189.

which child sexual abuse takes place.

### **Legal Usage of CSAAS**

Expert evidence in terms of Summit's syndrome was very quickly seized upon by prosecutors seeking to explain defects in complainants' evidence. Its reception in the courts and at the hands of critics was troubled from the start. Early on in the syndrome's forensic history, Levy complained that it had been "turned into a perverse testimonial tool: it could be, and it was, used to prove sexual abuse when the child made an accusation in an unconvincing fashion; and, because the experts asserted that sexually abused children suffering from the syndrome retract their accusations, sexual abuse could be proved even when the child himself claimed that the accusation was untrue"<sup>64</sup>. Haugaard and Repucci regarded the principal flaw of the syndrome that:

"no evidence indicates that it can discriminate between sexually abused children and those who have experienced other trauma. Because the task of a court is to make discriminations, this flaw is fatal. In order for a syndrome to have discriminant ability, not only must it appear regularly in a group of children with a certain experience, but it must not appear in other children who have not had that experience."<sup>65</sup>

McCord<sup>66</sup>, took a related tack, arguing that researchers had been unsuccessful in isolating

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<sup>63</sup>Ibid at 191.

<sup>64</sup>RJ Levy, "Using Scientific Testimony to Prove Child Abuse" (1989) 23(3) *Family Law Quarterly* 83.

<sup>65</sup>JJ Haugaard and ND Reppucci, *The Sexual Abuse of Children*, 1988, at p178). Monteleone (JA Monteleone, *Recognition of Child Abuse for the Mandated Reporter*, 1994 at p165 similarly comments that a reason for the reluctance of courts to accept CSAAS evidence, as against, for instance, BCS evidence is that the former evidence is "speculative as compared to physical factors that are either concrete or qualitative".

<sup>66</sup>D McCord, "Expert Psychological testimony about Child

distinctive characteristics in relation to children the victims of sexual abuse:

"In fact, research has indicated that children react in incredibly diverse ways to sexual abuse. Nevertheless, there are expert witnesses who will testify that they can diagnose a child as having been sexually abused."<sup>67</sup>

Gardner<sup>68</sup>, too, expressed significant hesitation about the status of Summit's syndrome, noting that the phenomena described by Summit relate to observations made a significant time ago. He maintained that it presupposes "an incredulous mother and a disbelieving community, especially police and child protective services." He also pointed out that Summit described a series of reactions in children who have been sexually molested by an assailant from within their family:

"Accordingly, the syndrome's application to other situations, such as nursery schools, molestation by a stranger, molestation by a babysitter, and molestation by a teacher, is inappropriate. In all of these situations the child is not living with the molester and is not as likely therefore to develop the kinds of reactions seen at those levels in which there is a sense of entrapment."<sup>69</sup>

However, Summit has always had his supporters, not all of whose patronage he would welcome because of the uses to which they have sought to put CSAAS. Stewart and Young<sup>70</sup>,

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Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence" 77 *The Journal of Criminal Law and Criminology* 1 at 41.

<sup>67</sup>See also J Gutman, "The Effects of Child Sexual Abuse: Is there a Child Sexual Abuse Syndrome?" (1997) 4(4) *Journal of Law and Medicine* 361.

<sup>68</sup>RA Gardner, *True and False Allegations of Child Sex Abuse*, Creative Therapeutics, New Jersey, 1992, at p297.

<sup>69</sup>At 297-8.

<sup>70</sup>WF Stewart and R Young, "The Rehabilitation of the Child Sexual Abuse Accommodation Syndrome in Trial Courts in Kentucky" (1992) 1(4) *Journal of Child Sexual Abuse* 133 at 139-140.

for instance, have argued that CSAAS evidence should be admissible in child sexual abuse prosecutions, provided that three conditions are satisfied: (1) the expert witness should have interviewed the victim to have determined that the victim exhibits its "symptoms"; (2) testimonial use of the syndrome should be generalized, referring to the behavioural dynamics of child victims broadly, so as to avoid hearsay objections; and (3) prosecutors should avoid specific questions about the victim so that the expert is not in effect testifying about the credibility of the victim.

The greatest difficulty that has beset the admissibility of the syndrome is the question of its diagnostic utility - whether the presence of the kind of patterns of behaviour identified as common by Summit make it likely that a child has been sexually abused. Many psychiatrists and psychologists working in the sexual abuse area accept that "typical reactions" of child sexual abuse victims can be isolated (although fewer and fewer would reason that the presence of some of such symptoms mean that it can be said that a child necessarily has been sexually abused). For instance, Oates<sup>71</sup>, citing a variety of studies conducted both in Australia and the United States, instanced typical reactions of sexually abused children to include anxiety, phobias, nightmares, separation anxiety, depression, stomach aches, headaches, hypochondriasis, faecal soiling, bed-wetting and excessive blinking as reactions of children to sexual abuse. However, other disturbances can also cause such symptomatology. The fact that a child exhibits a range of the constellation of symptoms typified by the responses of a sexually abused child does not necessarily mean that the child has been so abused.

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<sup>71</sup>RK Oates, "The Effects of Child Sexual Abuse" (1992) 66 *Australian Law Journal* 186 at 189.

In 1992 in introducing the first issue of the *Journal of Sexual Abuse*, Geffner<sup>72</sup> summarised research studies that had indicated disorder/chemical dependency, depressive disorders, suicidal behaviour, eating disorders, dissociative disorders and teenage pregnancies as common sequelae of sexual abuse of children. Numerous researchers have reported on the nexus between sexual abuse and a variety of cognitive, interpersonal, emotional, somatic and behavioural sequelae. However, there are limits to the inferences that can be drawn from many of the studies. Beitchman et al in a 1991 review of the literature noted that as the majority of studies examining the short-term effects of child sexual abuse were based on samples drawn from child protective services or psychiatric facilities, there was a possibility that they overstated the prevalence and symptomatology associated with child sexual abuse in the general population<sup>73</sup>. They concluded that with the exception of sexualised behaviour, most of the symptoms found in child and adolescent victims of sexual abuse

"were characteristic of clinical samples in general. Specifically, children from disadvantaged or disturbed families often displayed behavior problems, difficulties at school, and low self-esteem. Internalizing behaviors such as sleep disturbance, somatic complaints, fearfulness and withdrawal were also common symptoms in child psychiatric populations and so cannot be automatically conceptualized as sequelae specific to sexual abuse."<sup>74</sup>

They maintained that the research literature at that time did not yield sufficient evidence "to postulate the existence of a unique "sexual abuse syndrome" with a specific course or

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<sup>72</sup>R Geffner, "Current Issues and Future Directions in Child Sexual Abuse" (1992) 1(1) *Journal of Child Sexual Abuse* 1, 3.

<sup>73</sup>1991, at 546.

<sup>74</sup> Ibid at 546. See also, for instance, the interesting study by E Greenwald, H Leitenberg, S Cado and MJ Tarran, "Childhood Sexual Abuse: Long-Term Effects on Psychological and Sexual Functioning in a Nonclinical and Nonstudent Sample of Adult Women" (1990) 14 *Child Abuse and Neglect* 503; M Mian, P Marton and D LeBaron, "The Effects of Sexual Abuse on 3-To 5-Year-Old Girls" (1996) 20(8) *Child Abuse and Neglect* 731.

outcome."<sup>75</sup> In addition, it may well be that parameters of sexual abuse, such as age of onset, frequency, duration, invasiveness, overt brutality, type of sexual intercourse, identity of assailant and general circumstances within the family are significant factors, amongst others<sup>76</sup>, in the impact of domestic sexual assaults upon child victims, and thus the extent to which behaviour patterns can be said to be generally indicative of the occurrence of sexual abuse. Studies by Mullen et al<sup>77</sup> in New Zealand have emphasised the variability of response to different forms of sexual and physical abuse. In 1996 the researchers commented, "The message for therapists is that when evaluating the relevance of childhood abuse to beware an exclusive, and potentially exaggerated focus on the traumas of sexual abuse which may obscure both the relevance of other forms of abuse and the unfolding of other damaging

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75At 546; see also Beitchman et al, 1992 at 115. Arnold et al have gone so far as to maintain that there can be a correlation between investigations into sexual abuse and the traumatic responses later exhibited by complainants: RP Arnold, D Rogers and DA Cook, "Medical Problems of Adults who were Sexually Abused in Childhood" (1990) 300 *British Medical Journal* 705. Earlier Oates et al (RK Oates, AA Davis, MG Ryan and LF Stewart, "Risk Factors Associated with Child Abuse" (1979) 3 *Child Abuse and Neglect* 547 pointed out that a range of cross-fertilising factors impacted upon the predictive discernment of single factors.

76See Beitchman et al 1991, 1992 for some suggestion to this effect; A Mannarino and J Cohen, "Family-Related Variables and Psychological Symptom Formation in Sexually Abused Girls" (1996) *Journal of Child Sexual Abuse* 105.

<sup>77</sup> PE Mullen, SE Romans-Clarkson, SE Walton and GP Herbison, "Impact of Sexual and Physical Abuse on Women's Mental Health" (1988) *The Lancet* 841; PE Mullen, JL Martin, JC Anderson, SE Romans and GP Herbison, "Childhood Sexual Abuse and Mental Health in Adult Life" (1993) 163 *British Journal of Psychiatry* 721; PE Mullen, JL Martin, JC Anderson, SE Romans and GP Herbison, "The Effect of Child Sexual Abuse on Social, Interpersonal and Sexual Function in Adult Life" (1994) 165 *British Journal of Psychiatry* 35; PE Mullen, JL Martin, JC Anderson, SE Romans and GP Herbison, "The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study" (1996) 20 *Child Abuse and Neglect* 7.

developmental influences."<sup>78</sup>

Finkelhor and Browne<sup>79</sup> have proposed a theoretical framework describing four "traumagenic dynamics of sexual abuse": traumatic sexualization, betrayal, powerlessness and stigmatization. However, a series of important issues pervades discussions on the utility and validity of the CSAAS. The first is exactly how it is to be defined. The second is whether it is properly to be described as a syndrome. The third is whether the features of the syndrome, or a cross-section of them, can properly be described as characteristic of a child who has been abused. The fourth is whether the features are also encountered in children who have been the victims of other forms of trauma, domestic, physical or otherwise. Lying behind the question of the usefulness of such evidence also is the question of whether the community generally actually is subject to the kinds of misconceptions asserted to be prevalent by workers such as Summit.

Kovera et al<sup>80</sup> have persuasively argued that problems lie within the "syndromal approach" to the provision of information about the responses of child sexual victims to their trauma because an assumption is made that "children who have been victimized exhibit prototypical responses such as delay in reporting the abuse, a fear of men, and nightmares with assaultive content. If a child exhibits these behaviors, a psychologist may infer that abuse has occurred."

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781996, at 20. See also the study by Varia et al (R Varia, RR Abidin and P Dass, "Perceptions of Abuse: Effects on Adult Psychological and Social Adjustment" (1996) 20(6) *Child Abuse and Neglect* 511 where the impact of minimization amongst victims is evaluated in terms of long-term effects of abuse.

79D Finkelhor and A Browne, "The Traumatic Impact of Child Sexual Abuse: A Conceptualization" (1985) 55 *American Journal of Orthopsychiatry* 530.

80MB Kovera, RJ Levy, E Borgida and SD Penrod, "Expert Testimony in Child Sexual Abuse Cases" (1994) 18(6) *Law and Human Behavior* 653.

The use of the term "syndrome", with its medical connotations<sup>81</sup>, has the potential to confuse the fact-finder by removing one source of error and substituting another in the form of a mistaken stereotype assumed by the fact-finder to be based upon medical or other diagnosis.

The most significant difficulty, though, is that there is considerable diversity in children's reactions to sexual abuse and also many children display pathological, deviant or dysfunctional patterns of behaviour for reasons other than childhood sexual abuse<sup>82</sup>. This is not in any way to downplay the perniciousness of the impact of the abuse, both short and longterm, but to recognise that reactions to many forms of traumata are various and not readily susceptible of across-the-board categorisation<sup>83</sup>. Moreover, the capacity to "diagnose" the incidence of sexual abuse from behavioural patterns and symptoms exhibited by a child is mediated by the existence of personal characteristics or skills that may foster resilience, and

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81Although it might be argued that strictly construed these should militate against the thesis that by application of the symptoms, an aetiology can be pieced together: see RP Mosteller, "Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence" (1989) *Law and Contemporary Problems* 85.

82West is emphatic about the variability in the responses of child victims: "The behaviors labelled sex offending are so heterogeneous that it makes no sense to consider their effects without first taking into account the varied nature and circumstances of victimisation. ... There is a great need for recognition of the diversity and complexity of 'victimisation' and for this to be followed by appropriately and discriminating responses." (DJ West, *The Effects of Sex Offences in CR Hollin and K Howells (ed) Clinical Approaches to Sex Offenders and their Victims*, 1991, p55, 69).

<sup>83</sup> For instance, it has been concluded that while abused children exhibit a range of pathological behaviours, no one symptom is exhibited by a majority of abused children: KA Kendall-Tackett, LM Williams and D Finkelhor, "Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies" (1993) 112 *Psychological Bulletin* 164.

so some degree of masking or even distortion. Mrazek and Mrazek<sup>84</sup> in 1987 outlined that such characteristics include (1) rapid responsivity to danger; (2) precocious maturity; (3) dissociation of affect; (4) information seeking; (5) formation and utilisation of relationships for survival; (6) positive projective anticipation; (7) decisive risk taking; (8) the conviction of being loved; (9) idealisation of an aggressor's competence; (10) cognitive restructuring of painful experiences; (11) altruism; and (12) optimism and hope<sup>85</sup>.

While there may be heightened incidence of a range of dysfunctional behaviour and symptoms in sexually abused children<sup>86</sup>, the fact that a child exhibits single or several elements of such behaviour appears not necessarily to mean that it has been sexually abused; it simply heightens the likelihood somewhat. The possibility remains that the behaviours are indicative of other forms of reactions to trauma or of psychological difficulties. Summit put the ambit and limitations well in 1992 in arguing that the "abstract presentation of the CSAAS" by an expert who has not seen the child and who may even know virtually nothing

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84PJ Mrazek and DA Mrazek, "Resilience in Child Maltreatment Victims: A Conceptual Exploration" (1987) 11 *Child Abuse and Neglect* 357 at 359-362.

85See also P Coffey, H Leitenberg, K Henning, T Turner, and RT Bennett, "Mediators of the Long-Term Impact of Child Sexual Abuse: Perceived Stigma, Betrayal, Powerlessness and Self-Blame" (1996) 20 *Child Abuse and Neglect* 447; MJ Himelein and JAV McElrath, "Resilient Child Sexual Abuse Survivors: Cognitive Coping and Illusion" (1996) 20(8) *Child Abuse and Neglect* 747.

86For the persistence of a wide variety of psychological effects into adulthood, see, for instance, J Briere and M Runtz, "Symptomatology Associated with Childhood Sexual Victimization in a Nonclinical Adult Sample" (1988) 12 *Child Abuse and Neglect* 51. See also PM Yellowlees and AV Kaushik, "A Case-Control Study of the Sequelae of Childhood Sexual Assault in Adult Psychiatric Patients" (1994) 160 *Medical Journal of Australia* 408 at 410; AB Silverman, HR Reinherz and RM Giacomia, "The Long-Term Sequelae of Child and Adolescent Abuse: A Longitudinal Community Study" (1996) 20(8) *Child Abuse and Neglect* 709.

about the case provides the jury with useful information<sup>87</sup>. He explained that the CSAAS from his point of view originated not as a "laboratory hypothesis or as a designated study of a defined population. It emerged as a summary of diverse clinical consulting experience, defined at the interface with paradoxical forensic reaction. It should be understood without apology that the CSAAS is a clinical opinion, not a scientific instrument."<sup>88</sup> The importance of these statements cannot be overemphasised for the forensic context. They have a profound significance for the kind of evidence that should be able to be given by expert witnesses in respect of the reactions of children to sexual abuse and the kinds of inferences that can legitimately be drawn from the presence or absence of such characteristics in a child suspected of being or claiming to have been sexually abused.

Summit at the same time bewailed that "lawyers and a few clinical expert witnesses have tended to seize on the CSAAS as a major weapon" and maintained that some of the adversarial alarm and distortion that he claimed by 1992 had attended the reception of CSAAS evidence had stemmed from a misunderstanding of the term "syndrome". Summit employed the term to mean a "list, or pattern of otherwise unrelated factors which can alert the physician to the possibility of disorder"<sup>89</sup> and acknowledged that such a pattern is not diagnostic: "the cause-and-effect relationship among the factors themselves and with the possible problem is generally obscure."<sup>90</sup> He contended that in the forensic context "*syndrome* seems to mean a diagnosis which an expert contrives to prove an injury. *Syndrome*

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87R C Summit, "The Rehabilitation of the Child Sexual Abuse Accommodation Syndrome in Trial Courts in Kentucky: Commentary" (1992) 1(4) *Journal of Child Sexual Abuse* 147 at 148.

88RC Summit, "Abuse of the Child Sexual Abuse Accommodation Syndrome" (1992) 1(4) *Journal of Child Sexual Abuse* 153 at 155.

89At 157.

*evidence* has become a generic term for diagnostic medical or psychological testimony which must be closely scrutinized for scientific reliability, lest the intrinsic authority of the expert witness improperly prejudice a jury through contrived or eccentric opinion."<sup>91</sup> He made the telling comment that had he known the legal consequences of the term "syndrome", he would have eschewed it and might have chosen a name like "Child Sexual Abuse Accommodation Pattern". This is one of the weaker points of an otherwise candid apology for the syndrome advanced by Summit. The fact is that by cloaking the entity in the language of medical diagnosis, which is the inevitable connotation of the word "syndrome", Summit originally invested it with a resonance of legitimacy (and no doubt did so advisedly) which it would not otherwise have commanded. The difficulty is that the description is inappropriate from at least two points of view - it is not an entity susceptible of classification in terms of being a constellation of signs or symptoms whose medical aetiology may be unknown; nor is it a pathological condition of any demonstrated kind<sup>92</sup>.

Summit at least conceded that the behavioural patterns that he identifies are not pathological - rather, descriptive of normal children making normal adjustments to an abnormal environment. He acknowledged in 1992 that:

"There has been some tendency to use the CSAAS as an offer of proof that a child has been abused. A child may be said to be *suffering from* or *displaying* the CSAAS as if it is a malady that proves the alleged abuse. Or a child's conspicuous helplessness or silence might be said to be *consistent with* the CSAAS, as if not complaining proves the complaint. Some have contended that a child who retracts is a more believable victim than one who has maintained a consistent complaint. Such absurd distortions

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90At 157.

91At 157.

92Compare the overlap between RTS and post-traumatic stress disorder ("PTSD"), as defined in DSM-IV or ICD-10; or even BWS and PTSD.

fuel the fire against the CSAAS."<sup>93</sup>

His stance therefore is that an instrument with utility within the therapeutic environment has been highjacked by prosecutors and applied for purposes for which it was never designed when he coined it. Given that a number of other syndromes were controversial within the mental health areas and commencing to be used in the forensic context by 1983, however, in all probability the associations of the term "syndrome" must have been apparent to Summit in 1983 and in the succeeding years, however.

Summit has many adherents to his early-expressed views. Judge Elias, for instance, has thrown his weight behind Summit, arguing that the problem in the legal environment has arisen because lawyers have not read Summit's original article with any care, and have gone ahead and propounded the forensic utility of the syndrome. He has maintained that the syndrome "was pushed to legal and semantical extremes. It was delivered to that position with the help of rhetorical arguments, over-simplification, and at times over-zealousness by both lawyers and expert witnesses."<sup>94</sup>

Summit has endorsed the conservative Californian decision in *People v Gray*<sup>95</sup>:

"it was not an error to admit expert testimony to the effect that it was common for child victims to delay reporting of incidents of abuse and to give inconsistent accounts of such incidents to different people, where such evidence was not offered to prove that a molestation in fact occurred, but rather it was offered to rebut the inference proffered by the defendant that the alleged victim was being untruthful as shown by

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93At 160.

94HM Elias, "Commentary: Abuse of the Child Sexual Abuse Accommodation Syndrome" (1992) 1(4) *Journal of Child Sexual Abuse* 169 at 170.

95187 Cal App 3d 213, 213, 218-219.

her delay and inconsistencies in reporting, by showing that such behaviour is not necessarily indicative of deceit in children. Such expert testimony was proper so long as it was limited to discussion of victims as a class (eg children), and did not extend to discussion and diagnosis of the witness in the case at hand.

... expert testimony may play a particularly useful role by disabusing the jury of some widely held misconceptions about (child sexual abuse and its) victims, so it may evaluate the evidence free of the constraints of popular myth."

By contrast with the evangelical stance of Walker in relation to the forensic utility of battered woman syndrome<sup>96</sup>, therefore, Summit has adopted the position that the proper use of his syndrome is in terms of supplying information about how many children behave in the aftermath and during the process of being sexually abused by an adult. His stated wish is that such evidence be counterintuitive, rather than diagnostic or judgmental in terms of the likelihood of any particular complainant's credibility. Interestingly, these publicly expressed wishes do not appear to have been quoted in any of the New Zealand or Australian appellate cases which have ruled upon the admissibility of CSAAS evidence, or in most of the recent articles about CSAAS.

### **The Legal Reception Accorded to CSAAS**

A series of decisions, commencing with the New Zealand Court of Appeal decision of *R v B*<sup>97</sup>:

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<sup>96</sup>In spite of the fact that she admits that its definitional parameters cannot yet be fixed: "The definition is still evolving, though, so it may be too soon to codify one" LE Walker, "Understanding Battered Woman Syndrome" (1995) 31(2) *Trial* 30 at 33.

<sup>97</sup>[1987] 1 NZLR 362 at 368. See further I Freckelton, "Child Sexual Abuse Accommodation Syndrome Evidence: the Travails of Counterintuitive Evidence in Australia and New Zealand" (1997) 15 *Behavioral Sciences and the Law* 245

"As child psychology grows as a science it may be possible for experts in that field to demonstrate as matters of expert observation that persons subjected to sexual abuse demonstrate certain characteristics or act in peculiar ways which are so clear and unmistakable that they can be said to be the concomitants of sexual abuse. When that is so the Courts may admit evidence as evidence of direct observation."

In 1989 the Court of Appeal was asked to go further in *R v Accused*<sup>98</sup> and to hold that "child abuse syndrome evidence" was admissible. In a very strong judgment, it refused to do so. The Crown sought to call as a witness a psychologist, who was also a school guidance counsellor, to counter the suggestion arising from cross-examination that the complainant had fabricated her allegations. She gave evidence that the complainant had exhibited behavioural characteristics consistent with the characteristics of sexually abused children.

The Court held that it had not been properly established that children subject to sexual abuse demonstrate

"certain characteristics or act in peculiar ways which are so unmistakable that they can be said to be concomitants of sexual abuse; or that expert evidence in this field was able to indicate with a sufficient degree of compulsion, features which establish that the evidence of the complainant was indeed truthful; nor did the psychologist describe the tests she undertook and the reactions of other children from her own experience, or have recourse to the specialist literature to confirm her opinion."<sup>99</sup>

The Court drew attention to a problem that has been remarked upon in the context of battered woman syndrome, that many characteristics of a victim said to be consistent with a syndrome, may have other explanations:

"While the characteristics mentioned by the psychologist were said to be consistent with those the witness had come to know as the characteristics of sexually abused children, some at least of those characteristics, eg pen tattoos on hands and arms, cigarette burns and cuts and lack of eye contact, may very well occur in children who have problems other than sexual abuse."<sup>100</sup>

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98[1989] 1 NZLR 714.

99Ibid, at 720-721.

100Ibid, at 721.

The decision in *R v Accused* received support in *R v CS*<sup>101</sup> where Williamson J found that the problem in allowing expert opinion testimony in relation to human behaviour "is that it may in reality be little more than a cleverly packaged endorsement of the complainant's truthfulness or that it may be perceived by the jury as such an endorsement". By legislative amendment, though, evidence which would have been inadmissible under the judgment in *R v Accused* has been rendered admissible under s23G of the Evidence Act 1908 (NZ). Section 23G is stated to apply to sexual offences and other specified offences (s23C). It is provided that an expert may give evidence on the following matters:

- "(a) the intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on -
  - (i) Examination of the complainant before the complainant gives evidence; or
  - (ii) Observations of the complainant giving evidence, whether directly or on a videotape;
- (b) The general developmental level of children of the same age group as the complainant;
- (c) The question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant".

For the purposes of the section, an expert is defined as a medical practitioner registered as a psychiatric specialist, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or a registered psychologist practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children". The provision has recently been criticised by Lynley Hood in her book on the Christchurch Creche saga<sup>102</sup>.

Australia's approach has been different, essentially applying in a series of state Supreme

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101(1993) 11 CRNZ 45. See also *R v Schmit* (1992) 8 CRNZ 376.

102L Hood, *A City Possessed*, Longacre, Dunedin, 2001.

Court judgments the tack taken by the New Zealand Court of Appeal<sup>103</sup>. The most significant decision has been that of the New South Wales Court of Appeal, delivered principally by Gleeson CJ, now the Chief Justice of Australia. The Crown in a criminal case sought to call a specialist paediatrician, Dr Packer, to whom the complainant had been taken for a physical examination after allegations of sexual assault had been made. Dr Packer took a history of sexual abuse from the complainant, At trial the prosecutor was allowed to ask questions of the paediatrician in relation to literature about the effects of sexual abuse and about whether children delay in making complaints. She gave evidence of what she termed "Accommodation Syndrome", referring to the writings of Dr Summit. She did not say that in her opinion the complainant was affected by the syndrome about which she had read in the literature or that the behaviour of the complainant was consistent with such a syndrome.

Gleeson CJ, Grove and Abadee JJ found that much of what

"Dr Packer was talking about, whilst it might apply to victims of sexual abuse, could apply to all manner of people in a wide variety of circumstances. It is not only abused children who feel helpless or powerless, or who delay in making complaints of conduct which victimises them, or who disclose information piece by piece for the purpose of testing the water. Many victims of crime delay in reporting it because it occurred in circumstances subjecting them to fear or shame. Sometimes the reporting of crime may disclose conduct on the part of a person doing the reporting which such person may prefer to conceal. Sometimes people judge, and perhaps rightly judge, that the consequences of reporting a crime might be more detrimental than the consequences of the crime itself."<sup>104</sup>

The Court found that, although Dr Packer was a specialist paediatrician, who had a substantial amount of experience in dealing with children who had been subjected to sexual abuse, she was not a psychiatrist or a psychologist. However, the evidence that she had been

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103See Freckelton, 1998, op cit; *Ingles v The Queen*, unreported, Tasmanian Court of Criminal Appeal, 4 May 1993; *F v The Queen* (1995) 83 A Crim R 502; *R v C* 91993) 60 SASR 467, 70 A Crim R 378; *J v The Queen* (1994) 75 A Crim R 522.

allowed to give at trial "included evidence concerning her reading in literature in the area of psychiatry or psychology and she gave that evidence in the capacity of an expert."<sup>105</sup>.

The Court also expressed concern about the use to which a jury might put counter-intuitive evidence of the kind given by the witness -

"Presumably the corollary of the proposition that some children delay in complaining of sexual abuse if that other children do not delay. presumably the corollary of the proposition that some children, for good and sufficient reason, make complaints which are inconsistent, is that other children make complaints which are consistent. From one point of view, the evidence, if taken at face value, might be regarded by a jury as destroying the utility of seeking to test the evidence of a complainant by examining the circumstances and the content of complaints".<sup>106</sup>

The Court expressed its dissatisfaction about the parameters of what Dr Packer's counterintuitive was conveying to the jury. It queried whether the evidence was intended to suggest that inconsistency in stories told by a complainant can never reflect adversely on the reliability of a complainant, and, if not, in what circumstances would such inconsistency be a useful guide to a complainant's reliability.

The Court also expressed reservations about the employment of the term "syndrome" , noting that it "is one that is not always associated with scientifically rigorous analysis"<sup>107</sup>. The Court commented that, "It is easy to understand why one would need any such term to describe the phenomenon whereby victims of crime, whether of a sexual or any other nature, who feel helpless or powerless, delaying in making complaints, or deciding to let the truth out piece by

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104Ibid, at 507.

105Ibid, at 507.

106Ibid, at 507.

107Ibid, at 508.

piece."<sup>108</sup>. The Court expressed the view that if the term were to be used, then the label should be accompanied by some explanation of how cases where delay or inconsistency are to be attributed to the syndrome should be distinguished from those where delay or inconsistency indicate unreliability on the part of the complainant - "So far as appears from the evidence of Dr Packer, the "syndrome" is non-diagnostic. It is not possible to tell when delay or inconsistency in complaint is a manifestation of the syndrome, as distinct from an indication of unreliability."<sup>109</sup>

The Court found that the problems posed by the evidence were exacerbated by the trial judge's failure to explain to the jury what use they could legitimately make of the evidence. However, the Court noted that this was "hardly surprising" when the conclusion to Dr Packer's evidence appeared to be that "some children conceal abuse when they feel threatened; some children conceal abuse when they feel safe; some children disclose abuse when they feel threatened; some children disclose abuse when they feel safe."<sup>110</sup>

The Court determined Dr Packer's evidence to be inadmissible, but noted that "it is not possible to say, categorically, that evidence about such a syndrome could never be admissible"<sup>111</sup>. It held that while evidence may be led to restore the credibility of a witness, this is subject to the conditions that the subject matter be a fit subject for expert opinion and that the evidence b/e given in a proper form and by a properly qualified person. None of the conditions had been fulfilled. The Court held that the syndrome had not been shown to be a "fit subject for expert opinion."<sup>112</sup>

### **The Future of Counterintuitive Evidence**

For Australia, the future of the admissibility of counterintuitive evidence in relation to the sequelae of child sexual abuse, as well as about a range of other matters, is bleak in the

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108Ibid, at 508.

109Ibid, at 508.

110Ibid, at 508.

111Ibid, at 509.

aftermath of the decision in *R v F*. The decision constitutes an archetypal example of a superior court's expression of frustration at aspirations unrealised by expert evidence. An expectation appears to have existed that evidence about child sexual abuse accommodation syndrome would be diagnostic and specific, enabling a court to identify whether a child had been sexually abused by reference to the "symptoms" exhibited by the child. However, the evidence, as presented, was to counterintuitive in form, endeavouring to factor out a potential source of fact-finding error by endeavouring to disabuse of potential misconceptions. Thus the law and the expert witness were travelling along entirely different roads, albeit toward the same destination but the disappointment of the Court of Appeal in being denied the determinative evidence which it expected, and which it feared juries would expect, has led to such evidence rarely henceforth being available.

The contrasting position is that obtaining in New Zealand where the wording of s23G is such as to posit that there is behaviour consistent with the behaviour of sexually abused children, a notion which few rigorous mental health practitioners would comfortably embrace.

### **Conclusion**

The stories attaching to both parental alienation syndrome and child sexual abuse accommodation syndrome are ones which reflect poorly upon both the law and the mental health professions. Both syndromes were designed to enhance the capacity of decision-makers to determine whom they should believe, and in what circumstances they could or should repose confidence in the evidence of important participants in family law, criminal law and civil law processes.

In the case of parental alienation syndrome, gathering scrutiny has cast grave doubts over the formulation of the syndrome, whose object it is to assist courts to deal with the contention by parents and children that custody or access ought not to be vested in the other parent. The syndrome is non-diagnostic, woolly, unsupported empirically, and the subject of considerable controversy within psychology and psychiatry. Yet it has been adopted and applied uncritically in a number of courts to the possible detriment of a number of parties. The ignorance of the legal profession about the status of the syndrome has not reflected well on it.

In the case of child sexual abuse accommodation syndrome, distortion of the syndrome and alleged misuse of it in the forensic context has led to its proponent partially recanting and emphasizing its non-diagnostic quality. Yet, it affords insight into a difficult issue, namely whether adverse inferences should be drawn, in the way that they otherwise would be, from delays in reporting and complaining by child said to have been sexually abused, imprecision in allegations of complaint and retractions in complaints. In the criminal context especially, the syndrome has the potential to factor out one potential source of error by fact-finders. Yet it is not diagnostic and is some distance from being so. The response in New Zealand has been to incorporate in legislation permission in the criminal context for experts to give evidence about a subject which arguably is not yet a matter of expert knowledge and in Australia it has been to dispense almost completely with evidence that had the potential to enhance the capacity of jurors to determine whom to believe.

Many lessons emerge from the evidence given internationally by mental health professionals in respect of parental alienation syndrome and child sexual abuse accommodation syndrome. First is the need for rigour, but rigour tempered by realistic expectations, in the assessment of the utility of mental health professional evidence. Second, there is the need for such evidence not to transgress the parameters of its expertise. Third, there is the imperative for expert evidence not to pass itself off as something which it is not - such as medical diagnostic evidence, when it cannot be. Evidence by both psychologists and psychiatrists is not always a fit subject for the imposition of criteria for scientific reliability. However, this is not to say that such evidence carries significant probative value when it is ill-defined and is not falsifiable. The difficult cases of parental alienation syndrome and child sexual abuse accommodation syndrome highlight the potential for poor law and poor mental health practice when the wrong questions are asked, not enough questions are asked and the wrong answers given by mental health professionals and lawyers alike.