TRAUMA-INFORMED "CREDIBILITY"

Friday Nov 18th

40 minutes 9:40am to 10:20 am.

OVERVIEW

Outline < 1 min

- evidence watched
- analysis of the evidence
- science / logic issues
- expert evidence admissibility issues
- Materials contain some additional related references

Program

Evidence is watched 10 mins

Evidence analyzed 5 mins

Science / logic issues 12 mins

Expert evidence admissibility issues 12 mins

ANALYSIS OF EVIDENCE

The evidence at issue raises the following issues:

***how trauma affects behaviour**

-examples about practice for dangerous occupations

-examples of producing reliable muscle memories - point of spring training?

***how trauma affects attention and perception**

- how does consensual sex affect attention and perception?

***how trauma affects memory**

- how does consensual sex affect memory?

-Sadness or agitation is a possible response after “loving consensual sex”

The International Society for Sexual Medicine describes postcoital dysphoria (or the "post-sex blues") as "feelings of deep sadness or agitation after consensual sex, even if the encounter was loving, satisfying, or enjoyable," leading to a deep emotional response after orgasm. One article advised:

> "If you've ever experienced a strong feeling of sadness or anger immediately after sex, you may have felt the effects of PCD firsthand and should consider talking to a therapist to understand why."

Is it possible that post-sex feelings of “deep sadness or agitation” might occasion a reassessment of consent?

- "Great sex can cause memory loss": according to a report in the *Huffington Post* Kyrsty Hazell, "Study: Great Sex Can Cause Memory Loss," updated December 12, 2011

> "If you’re having mind-blowing sex with your partner, you might want to slow down, because according to a recent medical journal – great sex can temporarily wipe your memory.

According to a real life case study in the US, a woman arrived at a hospital in a fluster, because she had just had sex and couldn't remember anything from the last 24 hours, reports The Journal of Emergency Medicine.

The sex-induced memory loss even has a name – 'transient global amnesia' – and is thought to be a temporary thing but because it comes on suddenly and causes complete memory loss, it can be worrying for those who experience it.

Despite the condition being identified, little is known about what triggers the post-coital memory loss but some scientists believed that it could be down to misfiring valves in the neck that may be the cause.

These valves, instead of closing shut, remain open to allow pressure to the stomach to push oxygen-less blood back up to the jugular veins and into the section of the brain that controls the memory."

***memory after trauma is fragmented**

*fragmentation of memory after a traumatic event appears no different than fragmentation of memory after any positive or important event;

- perhaps consensual sex qualifies as positive or important?

Quality of Memories in Women Abused by Their Intimate Partner: Analysis of Traumatic and Nontraumatic Narratives Fernandez-Lansac, Violeta; Crespo, María. Journal of Traumatic Stress; San Francisco Vol. 30, Iss. 1, (Feb 2017): 80-87. DOI:10.1002/jts.22154

"this study compared the trauma narratives of 50 battered women (trauma-exposed group) with narratives about positive experiences and narratives of 50 nonexposed women (controls), and analyzed the relationship between trauma narrative aspects and the severity of PTSD. Results showed that trauma narratives were detailed, oriented, and coherent."

Rubin, D. C., Deffler, S. A., Ogle, C. M., Dowell, N. M., Graesser, A. C., & Beckham, J. C. (2016b). "Participant, rater, and computer measures of coherence in posttraumatic stress disorder." Journal of Abnormal Psychology, 125(1), 11–25. https://doi.org/10.1037/abn0000126

"the incoherence of the trauma memory has little support as a component of PTSD, in that incoherence is not substantially greater in trauma memories than it is in control memories nor is it substantially greater in PTSD participants than non-PTSD participants".

Taylor, A., Jordan, K., Zajac, R., Takarangi, M. K. T., & Garry, M. (2020). Judgments of memory coherence depend on the conditions under which a memory is retrieved, regardless of reported PTSD symptoms. Journal of Applied Research in Memory and Cognition, 9(3), 396–409. https://doi.org/10/1016/j.jarmac.2020.07.003.

how a person retrieves and recounts memories, including traumatic ones, influences the person's judgements of the memory's coherence. . . . judgments of coherence are attributions affected by the mode of retrieval rather than properties of the memory itself.

McNally, R. J. Are memories of sexual trauma fragmented? Memory Vol. 30, Iss. 1, (Jan 2022): 26-30.

On average, memories of trauma are no more fragmented than are memories of positive, other negative, or important memories.

*that fragmentation does not undermine reliability *transmutes* to the claim that fragmented memory is 'reliable'

- reliability of fragmented memories no different than the reliability of any memory

ALCOHOL

If alcohol is involved any claims about inadequate and fragmented memory must not ignore that alcohol consumption is the obvious explanation. Depending on the BAC fragmentary memory “blackouts” can occur. A blackout involves the impossibility of any experience to be encoded as a memory. Consequently there is fertile ground for misinformation effects (inferences, assumptions, etc) to be used to fill in the gaps. Alcohol produces no memory. So what is (hypothetically) retrieved cannot be a 'memory' because nothing was encoded in the first place.

SCIENCE / LOGIC ISSUES

Witness is EXPRESSLY NOT being offered to be diagnostic

- Not saying complainant suffered traumatic event

This is to avoid the fallacy of affirming the consequent.

Need to dispel away the fog of generalities and talk specifics about what complainant actually said and did and focus on

- consistency with no trauma and

- consistent with trauma only by device of generalities and generics; similar to Crown's approach in similar fact evidence cases

R. v. Bent, 2016 ONCA 651 at para. 74: "In my view, the cogency of the similar fact evidence is relatively low. … …[M]ost of the similarities arise at a high level of generality. …"

R. v. Blake, 2003 CanLII 13682 (ONCA) at paras. 64-65 & 69 (affirmed by S.C.C.)

> Haggard: complainant's lack of departure and feigned phone call examples of 'lack of thoughtful decisions', an example of loss of prefrontal cortex which controls executive functions and rational thought'

What constitutes 'not thinking clearly' after a traumatic sex attack is precisely perfectly understandable behaviour after a consensual sex act. You need to know whether there was a sex attack or a sex act to decide whether the behaviour is not thinking clearly or thinking quite clearly and routinely. The fact that a complainant may not think clearly after a sex attack is of no assistance in deciding whether there was a sex attack. **Not to mention that labels like 'not clearly thinking' are vague and rubber yardsticks that can be found by the expert witness in every fact situation.**

The most generous interpretation of the evidence is that it goes to show the complainant 'could' be credible and reliable. The danger is the illogical reasoning

produced by confirmation bias: it will be interpreted as evidence the complainant ***is*** credible and reliable.

The Jury instructions must express this dangerous reasoning and caution against it and tell the jury that unless they are going to unfairly think in stereotypes it is of no probative value and irrelevant.

More on these two points shortly.

Focus on behaviour of accused inconsistent with offence because the expert evidence cannot explain away the accused's behaviour:

> Defence in Haggard case emphasized post-event behaviour of accused was inconsistent with a male who experienced the complainant's version of the event

EXPERT EVIDENCE ADMISSIBILITY ISSUES

Expert evidence admissibility test:

Logical relevance

Relevance requires that the evidence affect the probability whether a fact in issue is true or not. Logical relevance requires that the evidence is so related to a fact in issue that it tends to establish or disestablish it. This is a matter of logic and the rules of proper reasoning. *R. v. Cloutier* (1979), 48 C.C.C. (2d) 1 (S.C.C.); *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Ferris* (1994), 27 C.R. (4th) 141 (Alta. C.A.), aff'd [1994] 3 S.C.R. 756.

Legal relevance (a cost-benefit analysis)

- whether its probative value is outweighed by its prejudicial effect;

- whether the time and effort involved in receiving the evidence is not commensurate with its value; or

- whether its influence on the trier of fact because of the prestige of the witness, the complexity and potential for confusion of the evidence, or any other cause will be out of proportion to its reliability.

Necessity

To be admissible, expert testimony must be more than merely relevant or even helpful or useful; it must be necessary, in the sense that a correct result could not be reached without it. As reiterated in *R. v. D.D.*, necessity exists "in those exceptional cases where the jury would be unable to reach their own [correct] conclusions in the absence of assistance from experts."

Necessity has two aspects. The first and best-known aspect is that expert opinion is characterized as necessary when its substance is likely outside the experience and knowledge of the trier of fact, and the expert witness will assist the trier of fact in reaching the correct conclusion on the matter.

The second, sometimes overlooked, aspect of necessity deals with necessity for the particular form of providing the information, by way of expert opinion testimony. "Necessity" is assessed not solely by the proposed subject matter of the opinion,

per se, but also in light of all the circumstances of the case. If the information to be furnished by the expert will be revealed adequately by the particular evidence in the case, the expert evidence will be unnecessary.

The Supreme Court of Canada has referenced jury instructions as sufficient substitutes for the excluded testimony: *R. v. D.D.* [2000] 2 S.C.R. 275 and *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.).

Judicial notice is another potential, albeit limited, mechanism whereby a court may acquire information to render proposed expert opinion evidence unnecessary.

Judge alone

Since impermissible stereotypical reasoning is an issue of law and since Judges are presumed to know the law, this type of evidence should never be "necessary" in a Judge alone trial.

Absence of Exclusionary Rule

Properly Qualified Expert

Logical relevance

To rebut stereotypical thinking

Legal relevance

Probative value is rebut stereotypical thinking; to show that conduct consistent with consent is not inconsistent with non consent.

Evidence does not show conduct is consistent with sex assault (trauma); only that it is not inconsistent with non consent.

What are the stereotypical errors possible? What is the complainant conduct in issue? What is risk of trier misweighing (stereotypical reasoning) as only consistent with consent?

How strong is the evidence: mostly word play and labelling?

Prejudicial value

Undermines the fact that the complainant conduct in issue is evidence of consent.

The problem with the admission of this evidence is the risk of "pseudodiagnosticity".

Two short excerpts from **Expert Evidence In Criminal Cases: The Scientific Approach** (Irwin Law, 2nd ed., Sept. 2009)

Precedents abound. For the longest time, prosecution experts were prepared to state that any physical finding they considered abnormal was the product of supposed sex abuse. But what is abnormal cannot be known without an examination of what is normal,57 and only in recent years has such basic research been done.58 *Bona fide* researchers were shocked to find that what they had been considering abnormal was in fact statistically normal in the general population.59 Base rate studies of nonabused children indicate that many of the findings often used to support a diagnosis of abuse are found with a high enough frequency in normals that they do not support an opinion that abuse occurred.60 It is alleged that as a result, the leading researcher sardonically quipped, "It took us three years to find a 'normal.'" [Footnotes omitted except:
60 *Lillie v. Newcastle City Council*, [2002] EWHC 1600(Q.B.), at para. 399]

"Pseudodiagnosticity" refers to making an inference about the validity of a hypothesis *h* on the basis of evidence *e* without considering alternative hypotheses, in particular without considering the hypothesis -*h* . . . . People do that when they state that a bit of evidence is "consistent with" or "typical of" some hypothesis without concerning themselves about alternative hypotheses, or in particular the negation of the hypothesis. For example, after the William Kennedy Smith rape trial, a number of "experts" on a talk show expressed the opinion that they wish they could have testified in order to inform judge and jury of "what a rape victim was like." These experts who work in such places as women's shelters in fact had a

great deal of experience with rape victims. What none had, however, was experience with women who claimed they were raped when they were not. But the whole point of the trial was to make a judgment about whether the person claiming was actually raped or not. Thus, all the experiences in the world with actual rape victims simply can yield some estimate of the probability of particular types of evidence given that person was a rape victim.

Advocacy experts do not practice science.

Advocacy experts conduct no comparison with a control or comparison group.

Advocacy experts do not recognize their biased conclusion based on biased data.

Advocacy experts are blissfully ignorant of confirmation bias.

Prejudice is very real risk. Confirmation bias is a very normal feature of human thinking. Our brains are designed to jump to conclusions. Logical reasoning has to be learned; it is not intuitive or inherent or inevitable.

Even honest experts have trouble recognizing and preventing reasoning errors, including confirmation bias.

Well-credentialed sympathetic witness increases danger of pseudodiagnosticity

The logic and logical fallacies involved are illustrated in a case that excluded the Child Sexual Abuse Accommodation Syndrome nonsense.

In *R. v. S.W.*, [1996] O.J. No. 1410 | 1 O.T.C. 399 | 47 C.R. (4th) 354, at issue was admissibility Crown 'expert' evidence of a doctor who was to testify about the general behaviour of people who had suffered past sexual abuse.

> The Crown seeks to introduce the evidence of Dr. Pickering who will testify that it is consistent with a history of past sexual abuse for a person to display such behaviours. The Crown does not seek to introduce this evidence as diagnostic of the alleged sexual abuse but for the limited purpose of attempting to dispel the otherwise negative inference which the jury may otherwise draw from the display of such behaviours.
>
> **4** The Crown argues that evidence of the behavioral and psychological characteristics of victims of sexual abuse is likely to be outside the experience and knowledge of a jury. It is not evidence

that may be offered by non experts on areas of common human experience as in Graat v. The Queen *(1982), 31 C.R. (3d) 289*. It is thus said to be essential for the trier of fact to understand and assess properly certain aspects of human behaviour which are important to the credibility of the complainants. The Crown acknowledges that the witness may not testify as to the credibility of the witnesses but only as to the consistency or lack of consistency of certain behaviours with a past history of sexual abuse. Thus the Crown argues that the expert's opinion would be relevant and helpful.

5 I was initially persuaded to accede to those arguments. Mr. Gold has since replaced earlier counsel and has sought and obtained leave to revisit the issue.

6 Mr. Gold first attacked the authorities on which the expert relied in reaching her conclusions. He claimed that the "studies" or background material on which the expert relied were informal and undocumented studies amounting to little more than anecdotal evidence; that she referred to no papers which had been subjected to peer review. Mr. Gold had no opportunity himself to cross examine the witness and to put these arguments to her. This line of attack was not pursued by previous counsel. While his argument was persuasive, I am without any evidentiary basis on which to evaluate his arguments. The witness had extremely impressive credentials as outlined in her c.v. I am not an expert in Dr. Pickering's field of study. I have no way to assess her evidence in the light of Mr. Gold's submissions. While tempted, I cannot give effect to this ground of objection without, myself, donning the mantle of an expert.

7 Mr. Gold has persuaded me, however, that I was in error in my previous ruling and that I should reject Dr. Pickering's evidence.

8 First I agree that the proposed evidence is not logically relevant to the issue of the complainants' credibility. I shall assume that the complainants will be found by the jury to display some or all of the suggested behavioral characteristics. The jury then will be in a position to reason that the complainants are troubled persons and that as consequence their evidence ought to be treated with caution or perhaps rejected. The fallacy in the Crown's reasoning is as follows: Merely to assign blame for the troubled nature of the complainant, for instance by demonstrating that those troubles are consistent with a history of past sexual abuse, does not blunt the finding that the complainant is a troubled witness. It is illogical to reason that the past history of sexual abuse explains away the lack of credibility; it does not. Whatever the cause, the witness remains troubled and his or her credibility must be assessed accordingly.

9 Even assuming there may be some relevance to the proposed evidence, (there is not), its admission would lead to great prejudice in the sense that it would almost certainly be misused by the jury. In order for the "explanation" (that the behaviour(s) are consistent with a history of sexual abuse) to have any meaning and hence any impact on the jury's assessment of the complainant's credibility, the jury must find that the complainant was sexually abused. Without that foundation the explanation is meaningless. There is no suggestion that anyone other than the accused abused the complainants. But the central issue in the proceedings is whether the accused sexually abused the complainants. If the jury is satisfied that he did so then any "explanation" which tends to support the complainants' credibility is superfluous. If the jury is not satisfied that the accused did so, the jurors are not permitted to assume his guilt for the

purpose of supporting the credibility of the complainants. The proposition needs only to be stated to be rejected. What could be more prejudicial than erroneously assuming the guilt of the accused? I am more than a little embarrassed that I did not see the error earlier.

10 There is a third reason for the rejection of the evidence. It lies hidden in the careful assertion that to demonstrate the particular behaviours is consistent with a history of past sexual abuse. The Crown concedes that for a complainant to exhibit the behaviours is not diagnostic of a history that the complainant was sexually abused. The behaviours is not diagnostic of a history that the complainant was sexually abused. The behaviours are not symptoms. This is so because in a forensic setting there are two classes of persons who must be considered as potential complainants. The first is one who was sexually abused. The second is one who was not sexually abused but who falsely claims he was.

11 Ir may be that Dr. Pickering has a reasonable basis for concluding that person who have been sexually abused do frequently display some or all of the enumerated behaviours. She is a member of a healing science. For the purposes of that science it may be sufficient to proceed on the basis that if the patient (complainant) claims to have been sexually abused, then he or she has been. Without that acceptance it may be that healing cannot proceed. Certainly it would be the exception rather than the rule for the psychiatrist or psychologist to challenge the patient's history. Dr. Pickering neither had nor referred to any study of behaviours which are "consistent with a history of not having been sexually abused but now falsely claiming to the contrary". It seems to me unlikely that any such class of persons has even been proposed by the healing sciences much less identified or studied. Until such studies are undertaken there is little reason to suppose that "false claimants" do not exhibit these same behaviours. If both classes (true claimants and false claimants) may equally exhibit the same behaviours and there is no reliable information that one class may do so in a greater or less proportion than the other, then, in a forensic context where both classes must be considered, the fact that one class exhibits the behaviours, is, without any information whether the other class does or does not do so, utterly without probative value. Such evidence does not have the capability of making the disputed (and irrelevant) fact (whether these behaviours may be explained away as consistent with having been sexually abused) either more or less likely; it is irrelevant, again.

12 The proof of the pudding lies in the past experience of many trial judges with evidence that was recently "in vogue" and frequently tendered in similar cases, viz., the Child Sexual Abuse Accommodation Syndrome. I have to confess to having admitted such evidence. What always worried me about the reception of such evidence was that no matter what the child did, it was consistent with his or her having been abused. If the child delayed disclosure, that was consistent with the "syndrome". If he or she did not, well that was not necessarily inconsistent with the syndrome. Similarly if the child recanted after disclosing; but if the child did not recant it did not indicate that his or her claim was false. In short, the syndrome was a crutch which handily supported any witness whose testimony betrayed obvious weaknesses but was incapable of discrediting a similar witness whose testimony did not. It had no other effect than to assist witnesses for the prosecution. Fortunately it is now seldom tendered.

13 The foregoing analysis is sufficient to lead to the rejection of Dr. Pickering's expert evidence. Mr. Gold had yet another arrow in his quiver. He referred me to a number of learned and peer reviewed articles in psychological journals which persuasively argue that there are no behavioral

identifiers of persons who have been sexually abused that may not equally be demonstrated by those who have not, or more accurately, by those who have not but who claim to have been sexually abused. While I find the argument persuasive, it fails for the same reason as Mr. Gold's first argument; he has not had the opportunity to put it to the witness. For me to read the articles and reach my own conclusion is for me to don the mantle of expert. I cannot do so. (It seems I have difficulty enough wearing the mantle of an expert in evidence.)

14 The evidence of Dr. Pickering will not be received.

Necessity

An obvious issue to argue. If the stereotypes in issue are so obvious to warrant expert evidence and the exercise required is to alert and warn jurors to their biases, why would a jury instruction be insufficient?

CONCLUSION

Diagnosticity would require a proper comparison with the post-event memories of participants in regretted sex or ambivalent sex or good, bad or indifferent consensual sex.

Admissibility of this expert evidence is sought to be legally achieved by eschewing diagnositicity and avoiding the fallacy of affirming the consequent.

Witness is NOT being diagnostic, not saying complainant suffered traumatic event

Risk of Judge or Jury committing pseudodiagnosticity has to be eliminated by a combination of clear cross-examination and jury instructions that

*emphasize the intentional lack of diagnosticity;

*explain the illogicality and unfairness of pseudodiagnosticity (inferring trauma and accordingly the acceptance of the complainant's accusation);

*explicate the stereotypical inferences to be rebutted by the evidence and explicate the inferential utility of the expert evidence to ensure there be no misuse by pseudodiagnosticity

*show the inapplicability of the post-trauma characteristics to the case at hand except by generalizing those elements so almost any complainant conduct can be labelled, especially conduct on its face consistent with consensual sex;

*emphasize the consistency with consensual sexual activity of the complainant behaviour; (this is distinct from relying on stereotypical behaviour of victims; this relies on common sense behaviour of consensual participants)

*emphasize the exculpatory aspects of the accused's behaviour

ADDITIONAL RELEVANT MATERIALS

General Reference re Memory

Deborah Davis et al., “Foibles of Witness Memory for Traumatic/High Profile Events," (2001) 66 Journal of Air Law and Commerce 1421.

References re Memory in Sex Assault Context

Cynthia V. Ward, “Trauma and Memory in the Prosecution of Sexual Assault,” William & Mary Law School Research Paper No. 09-418; (2021) 45 Law & psychology Review 87:

> “Slowly but surely, it also became politically permissible to acknowledge that the "recovered" memories of patients had produced many wrongful convictions and the courts began to apply a more skeptical lens to claims of recovered memory and satanic abuse. In addition, forensic interview techniques were amended to make questioning less leading and suggestive in order to reduce the chance of inadvertently creating a false account of abuse.
>
> What did *not* happen, unfortunately, was a systemic examination of just how the theory of recovered memory had produced so many wrongful convictions and, in particular, how it had managed to leapfrog over the procedural and substantive protections meant to protect accused defendants against unjust prosecution and punishment. Thus, while RMT itself faded from prominence in sexual assault cases, the criminal law remained vulnerable to arguments which share its foundational claims (l) that traumatic memory is importantly different from ordinary memory in ways that conflict with the normal processes of criminal investigation, and (2) that the law should amend its processes of investigating and adjudicating criminal cases of sexual assault to "fit" the requirements of the theory'
>
> Meanwhile, a contrasting view of trauma and its effect on memory has attracted considerable support in the field of psychology. In striking parallel to the dispute between clinicians and memory scientists over RMT, this second view challenges all the major premises of Trauma-

Informed Theory as well as their implications for the criminal process. According to this second view, whose adherents include Harvard Psychologist Richard McNally among others:(1) Neuroscience does not demonstrate that traumatic memories are differently processed, stored, or retrieved in the brain as compared to "non-traumatic" memories; (2) All memories, including both traumatic and non-traumatic ones, are distributed and stored throughout the brain, and are reassembled upon recall - thus, the process of storing and recalling memories of trauma is no different in that respect from the process of storing and recalling any memory; Traumatic memory is no more "fragmented" than non-traumatic memory; (3) Memory, including traumatic memory, is not a "video-recorder" and is vulnerable to gaps, distortions, and falsification; (4) Trauma victims are not more prone than other witnesses to misremember, distort or lie about what happened to them; and (5) People actually remember the central aspects of traumatic events better than they do non-traumatic ones."

Part I of this Article traces the history of the recovered memory movement in the criminal prosecution of sexual assault, discussing some prominent cases and their consequences for wrongly convicted defendants. Part II asks why the criminal law was so vulnerable to claims of sexual assault, and other violent crimes, that were often wildly improbable on their face. I conclude that the structure of recovered memory theory had the effect of disabling checks in the criminal process which are designed to prevent unjust convictions. Part III applies that conclusion to the theory of Trauma-Informed Investigation and the neurobiology of Trauma". Although the law itself "recovered" from the recovered memory craze, it remains susceptible to manipulation by theories, such as TII, which unite these three claims: (l) that memory of trauma is importantly different from ordinary memory; (2) that the experience of trauma chases memory from consciousness, but (3) that memory for traumatic events can be accurately recovered using techniques which necessitate the circumvention of the normal, fact-based investigation and prosecution of a criminal case. In addition, and in striking parallel to the scientific debate over repression and recovered memories in the 1980s and 90s,

the science on these questions is far from settled. Ultimately, the Article questions the need to import psychological conceptions of "trauma" and "traumatic memory" into the task of investigating and processing cases of sexual assault.

To be clear: Nothing in this Article is intended to assess, let alone criticize, the definition of emotional trauma as used within psychology, or the role and funnction of that concept in the field of mental health. It is for the professionals in those fields to decide such questions. My focus here is the criminal process, not psychology or psychotherapy. Psychiatry and psychology are quite aware, and have repeatedly warned, that psychiatric concepts designed for diagnosing and treating mental disorder may be a poor fit with the requirements of law. A lesson which might be drawn from the criminal law's experience with theories of traumatic memory is that police, prosecutors, courts and legislatures should take this warning more seriously. Although psychological input can be extremely helpful to the criminal law, in the end the two fields have very different goals and functions and must answer to very different imperatives. This truth was forgotten by many legal actors in the era of Recovered Memory Therapy - with calamitous results for the many criminal defendants who were unjustly convicted and punished."

Deborah Davis and Elizabeth F. Loftus, "Remembering Disputed Sexual Encounters: A New Frontier For Witness Memory Research," (2016) 105 The Journal of Criminal Law & Criminology 811:

"This paper reviews sources o f distortion in memory for sexual encounters, particularly those between intoxicated participants. We review factors leading to initial misinterpretations o f sexual consent including the indirect nature o f sexual consent communications, misleading cultural sexual scripts, misinterpretation of passivity, and others. In this context, we consider the way in which alcohol can both contribute to initial misunderstanding and promote specific distortions in memory over time.

Finally, we discuss additional influences on memory, including motivations related to self-esteem, self-concept maintenance, or litigation, and the effects of social influence from sources such as friends, forensic interviewers or therapists."

References re “Stereotypes”

> [28] The appellant argues that the trial judge incorrectly interpreted the law on sexual assault stereotypes. The appellant points to the following excerpt from the trial judge's reasons for conviction to support his argument:
>
> Defence counsel has submitted that [the complainant's] evidence is internally inconsistent in that some of her behaviour and words before, during and after the alleged offences did not accord with what one would expect from a true victim. By way of example, not leaving the accused and the scene at the earliest opportunity, delayed disclosure to the police, asking that a no contact condition be removed prior, her apologies to the accused after the alleged offence.
>
> I agree with the Crown's submissions that these examples are based upon rape myths and that that [sic] there is no one way for people to respond in abusive or troubled intimate relationships, or when they are assaulted or sexually assaulted.
>
> [29] There is no merit to this argument. The trial judge correctly interpreted and applied the law when dismissing trial counsel's arguments that relied on stereotypes about complainants and their behaviours. See generally the discussion and cases cited in ARD at paras 49-68.

R v Sheppard, [2022] AJ No 336, 2022 ABCA 88

> [108] I believe the complainant's detailed description of what took place in the bedroom, including him positioning her at the corner of the bed, his holding of her arms, the weight of his body on her, the manner in which he used his legs, his animal like trance, and his repeated utterances of "let me feel you one time".
>
> [109] The Photograph that the accused admittedly took of the complainant afterwards is consistent with that evidence and is inconsistent with the consensual love-making of a willing and sensual girlfriend.

> [44] Again, the judge did not find how a hypothetical woman, or a woman generally, would stereotypically look after consensual sex. Nor did he rely on such a finding to conclude that J.K.R. did, or did not, resemble this image to find R.K.K. guilty of sexual assault. The judge's comment that the photograph "is inconsistent with the consensual love-making of a willing and sensual girlfriend" was "infelicitous" and unnecessary in his analysis of the evidence, but was, in fact, drawn from and grounded in the evidence, and founded on J.K.R.'s particular circumstances.

R v RKK, [2022] BCJ No 89, 2022 BCCA 17

> [74] In this case, the defence invited the court to discount the credibility of A.A. and find it implausible that she would not have disclosed, even inadvertently, the allegations of sexual abuse after they occurred. He questioned A.A.'s ability to maintain composure after the assaults such that no adult was aware of something traumatic having occurred. He questioned why A.A.'s aunt and mother did not observe some evidence of trauma, either emotionally or physically on a child so young, if A.A. was telling the truth at trial.
>
> [75] The defence also questioned the three-year delay that occurred before A.A. finally disclosed the abuse. He found the fact that she disclosed that abuse to her boyfriend rather than to her mother undermined her credibility. He also noted that A.A.'s testimony that she had been distancing herself from the accused after she turned 13 did not accord with the photographic evidence and evidence of text message communications with A.A.'s aunt.
>
> [76] I disagree with defence counsel. It would be incorrect if I discounted A.A.'s credibility because she did not demonstrate fear or seek help from her mother or other family members immediately after one or more of the incidents of alleged sexual abuse or if I find her evidence is less credible because she delayed disclosing the alleged abuse. To assess her credibility on those bases would be to rely on

generalized and stereotypical assumptions of how a victim of sexual abuse ought to behave.

R v AK, [2022] OJ No 3000, 2022 ONCA 508

“Sexual Communication”

> "Sexual communication is a wonderfully and yet terrifyingly complex process, proceeding through multiple verbal and nonverbal channels, and filled with intentional and unintentional misdirection and ambiguity. Even without external influence, interpretation of these communications is further complicated by the expectations, motivational biases, personal and relationship histories, and acute states of arousal or intoxication of the involved parties. The potential for honest differences in perception between the involved parties is already high. But when sexual interactions become subject to legal disputes, the memories of those involved become subject to both internal motivations and external sources of suggestion that can magnify the honest differences between them. Each party can report honestly, and yet quite falsely, what originally occurred. Involvement in the legal system tends to cast the parties into opposing camps as either innocent victim--knowing perpetrator or knowing false accuser--falsely accused.
>
> The research reviewed here suggests that a third possibility may be more common than previously recognized: that of genuine miscommunication and disagreements of memory between two honestly reporting parties."

Guillermo Villalobos, Deborah Davis & Richard Leo, "His Story, Her Story: Sexual Miscommunication, Motivated Remembering, And Intoxication as Pathways to Honest False Testimony Regarding Sexual Consent," University of San Francisco Law Research Paper 2014-33