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**What is the “Evidence” in the “Expert Witness” Debates?
The trials (and tribulations) of child sexual abuse case
evidence and the demise of section 23G**

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Abstract

Conflicts dogged the 1990 amendments to the Evidence Act 1908. These amendments were intended to make it easier for children alleging sexual abuse to give evidence in court. Section 23G, which made provisions for an “expert witness” to testify for the prosecution in such a case, was particularly contentious. The Evidence Act 2006 came into effect on 1 August 2007 and relinquished s 23G. The debates that surrounded s 23G expert witness evidence raise epistemological issues which are explored in this thesis. An analysis of constructions of expert witness evidence pertaining to child sexual abuse within legal, psychiatric and psychological discourses and the situation of these constructions in the socio-political environments of their times expose their gendered origins. A feminist methodology is employed to identify the ongoing impact on child sexual abuse cases of the gendered epistemology that underpins modern Western knowledge construction.

Dedication

This thesis is dedicated to the memory of the late

Anna Woods (1931 – 2005).

Anna worked tirelessly against the exploitation

of women and children.

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Abbreviations and Acronyms

ACC	Accident Compensation Corporation
ACIDPOC	Advisory Committee on the Investigation, Detection and Prosecution of Offences against Children
COSA	Casualties of Sexual Abuse Allegations
CSA	Child Sexual Abuse
DSAC	Doctors for Sexual Abuse Care
DSM	Diagnostic and Statistical Manual of Mental Disorders
ECT	Electro Convulsive Therapy
FMS	False Memory Syndrome
FMSF	False Memory Syndrome Foundation
ICD	International Classification of Diseases
IPNZ	Innocence Project New Zealand
MHF	Mental Health Foundation
MMP	Mixed Member Proportional Representation
MOJ	Ministry of Justice
NACPCA	National Advisory Committee on the Prevention of Child Abuse
NZCYPS	New Zealand Children and Young Persons' Services (later New Zealand Child Youth and Family Services)
NZLJ	<i>New Zealand Law Journal</i>
NZLS	New Zealand Law Society
S 23G	Section 23G, Evidence Act 1908
THAW	The Health Alternatives for Women

Introduction

The construction of child sexual abuse must be set within the political conflicts of the time. These involve not only hotly contested definitions of the nature, incidence and impact of abuse, but also theories of causation and prevention, and so, overall, questions of how the sexual abuse of children is related to society as a whole (Atmore, 1991:30).

Criminal justice services in Aotearoa/New Zealand are based on the British Westminster system and criminal cases, including child sexual abuse (CSA) cases, are adjudicated through an “adversarial” court process.¹ The last two decades of the twentieth century saw an increase in the number of formal complaints of child abuse, including CSA, received in Western jurisdictions. Some CSA complainants were adults recalling abuse that had gone unreported for years while others were small children. Aotearoa/New Zealand was among the countries that legislated changes to accommodate and protect the increasing numbers of child witnesses who were appearing in the courts² (Levesque, 1999).

Section 23G (s 23G) of the Evidence Act 1908 (see Appendix One) became law in January 1990 and made provisions for an “expert witness” to give evidence for the prosecution in a CSA case. S 23G was one of a number of amendments designed to make it easier for child complainants to give evidence. Generally a witness’ evidence is limited to observed facts and must not include opinions or beliefs as to the meaning of those facts. When an understanding of the facts requires special skill, knowledge or interpretation an expert witness may be permitted by the court to state an opinion within her/his area of expertise. It is the trial judge’s responsibility to ensure the testimony of an expert witness is ‘scientifically valid in that it is methodologically reliable and relevant to a given task’ (Blackwell, 2007:79). The construction of what is accepted as a scientifically valid knowledge claim is examined in this thesis.

¹ Some countries, for example The Netherlands, Israel, Norway, and Germany, employ an “inquisitorial” system of justice to adjudicate on CSA complaints (Levesque, 1999).

² Law reforms were implemented in Britain, Canada, Australia and the United States of America (Levesque, 1999).

The reliability of children's evidence, the evidence of adults recalling childhood events and the evidence of expert witnesses is generally vigorously contested in cases where CSA is alleged. The heated media debate that s 23G generated, the public humiliation of two leading expert witnesses, and the possibility of the defence counsel calling an expert with a contrary view to the prosecution's expert witness led to s 23G no longer being employed. Prosecutors were not prepared to risk the possibility of a mistrial or retrial (Blackwell, 2005). The Evidence Act 2006 does not include a special provision for an expert witness in a CSA case but expert evidence is admissible, as in any other case, if it is likely to provide 'special help...in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding' (Evidence Act 2006, s 25).

Under s 23G an expert witness could be an appropriately qualified psychologist or psychiatrist who had experience in the professional treatment of sexually abused children. The construction of CSA expert evidence under s 23G was therefore informed by the discourses of law, psychiatry and psychology. A deconstruction of the s 23G debates necessitates an understanding of how knowledge claims gain credibility in the disciplines of law, psychiatry and psychology, and an awareness of the social and legislative contexts in which they arose. In the next section the contested nature of CSA will be summarized and some of the historical factors that have influenced the understanding of CSA today will be outlined.

The Contested Nature of Child Sexual Abuse

A conviction for CSA involves a prison sentence. Allegations are generally, therefore, strenuously denied. Consequently courts are charged with reaching decisions on the basis of the evidence of a child or denial of an adult. The gendered histories of the law, psychiatry and psychology are influential in decisions about what is generally accepted as "knowledge" in respect of CSA. Fiona Raitt and Suzanne Zeedyk contend that

'Child sexual abuse' is a generic term for a range of sexual offences, labelled variously by the criminal law as rape, incest, indecent assault, sodomy and lewd and libidinous behavior. This abuse usually occurs in the family home and is perpetrated by a trusted family member, often the father (Raitt & Zeedyk, 2000:136).

Due to the efforts of feminists and child protection lobbyists in Western jurisdictions, there has been increased public awareness of CSA since the 1970s. The problem is not new however – it has just been rediscovered (Colton & Vanstone, 1996). Nineteenth century activist and writer Josephine Butler (1828-1906) commented on the ‘strange Victorian taste for deflowering virgins and preferably children’ (Butler, cited in Else, 1978:8). The debates of Butler’s time have frequently been revisited during the controversies generated by s 23G.

During the middle years of the twentieth century political activity in the area of CSA was ‘largely submerged’ in Aotearoa/New Zealand³ but, as in many other Anglo-American jurisdictions, feminist and child protection activism during the 1970s and 1980s ensured that the political prominence of these issues was revived (Atmore, 1991:30). The last three decades have seen significant changes in the way all cases of sexual assault are represented in Western societies, particularly by the media and in psychology and the law. A “blame the victim” attitude and public expressions of tolerance towards these crimes are still powerful discourses but they are now being strongly contested (Gavey, 2005).⁴

Despite widespread agreement that sex between an adult and a child is undesirable, there is no single and universally accepted definition of what constitutes CSA. For an accurate estimation of the prevalence of sexual assaults against children to be produced and accepted, an agreement on how such offences are to be defined is required. Definitions are bitterly fought over by experts whose divergent academic and political viewpoints have prevented the production of an informed consensus (Colton & Vanstone, 1996).

³ Stephen J. Ceci and Maggie Bruck refer to the ‘dry middle years of the 20th Century’ (1924-1963) when there was little interest in psychological research on children’s suggestibility in the courts of the United States of America. During this time the European Courts were ‘eager consumers’ of such research but few of the European studies were published in English (Ceci & Bruck, 1993:407).

⁴ A recent example (2007) is the ongoing public debate and scrutiny of the historical rape trials of Assistant Police Commissioner Clint Rickards and ex-policemen, Bob Schollum and Brad Shipton.

Estimates of the incidence of CSA are usually based on reported CSA cases or survey studies of adults that ask about childhood molestation (Geddis, Taylor & Henaghan, 1990). The low reporting rate of CSA creates difficulties and criminal justice and social services statistics cannot be relied upon for estimates. According to a 1995 United Nations report, between one-fourth and one-third of women in Barbados, Canada, the Netherlands, Aotearoa/New Zealand, Norway and the United States reported being sexual abused when they were children or adolescents (Freedman, 2002:298). When he examined the prevalence of CSA in different countries, David Finkelhor found that the incidence ranged from seven percent to thirty six percent in women and from three percent to twenty nine percent in men (Finkelhor, 1994). The definitions and methodologies employed in retrospective surveys such as Finkelhor's provoke vehement criticism and comparing the results is problematic without a standard definition of what constitutes CSA (Hood, 2001; Goodyear-Smith, 2003).

According to the American Psychological Association, fathers commit about one-fourth of the CSA of girls, stepfathers commit another one-fourth, and most of the remaining perpetrators are adoptive fathers and other male relatives (Freedman, 2002:299). Roger Levesque observes that rather than physical force being employed, children are seduced by adults and 'psychological coercion and other forms of "force" undoubtedly have profound effects on the child and contribute to the silencing of victims' (Levesque, 1999:155). Keary and Fitzpatrick contend it is probable that less than half of CSA victims disclose their experiences to anyone, least of all to the authorities that might assist them. It is not unusual for those who do report their assaults to recant or deny their allegations later (Keary & Fitzpatrick, 1994).

Prevalence rates reported in Aotearoa/New Zealand are similar to those reported internationally (Blackwell, 2007). During 1989-1990 Eleanor Morris, Judy Martin and Sarah Romans surveyed 497 urban women and found 32 percent had been subjected to unwanted sexual experiences before the age of sixteen years and 20 percent before the age of twelve years. It was rare for any of these women to have told anyone prior to their participation in the research (Morris, Martin & Romans, 1998). In a sample of 1,000

eighteen year olds David Fergusson, Michael Lynskey and John Horwood found 17.3 percent of women and 3.4 percent of men had experienced CSA (Fergusson, Lynskey & Horwood, 1996). Mental Health Commission researchers Heather Barnett and Hilary Lapsley found when they were interviewing young adults about mental distress, that few of those who had experienced CSA had ever talked about it to anyone (Barnett & Lapsley, 2006).

Many incidents of CSA that are reported to authorities do not get prosecuted and of the cases that are prosecuted, many do not result in a conviction (Blackwell, 2007). Feminist legal academic Wendy Ball claims that successful prosecutions in CSA cases were comparatively rare in this country before the Evidence Act 1908 amendments became law in 1990 (Ball, 1995). Writer and researcher Lynley Hood would dispute this claim. She does not accept feminist analyses of the widespread nature of CSA. Hood argues that during the 1980s estimates of the extent and severity of CSA were inflated and subsequently all estimates of the prevalence of CSA became 'contaminated by unknown and unknowable levels of under-reporting and over-reporting' (Hood, 2001:71). She claims that the *New Zealand Truth's* accounts of CSA cases prior to the 1970s are evidence that the issue was being dealt with adequately⁵ (Hood, 2001). The *New Zealand Truth's* accounts provide evidence that some CSA cases did reach the courts but a feminist analysis would view these as being the "tip of the iceberg"⁶ and charge Hood's arguments with upholding the powerful discourses that deny and maintain the prevalence of CSA and contribute to the maintenance of women's subordination.

Historically the law has been protective of men against false claims of rape and CSA. In 1660 British Lord Chief Justice, Sir Matthew Hale⁷ (1609-1676) proclaimed '[Rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the

⁵ Hood claims that feminists were not aware of this because 'respectable women did not read *Truth*' (Hood, 2001:58).

⁶ In her *Child Abuse Data Collection: An Investigation of Recording and Statistical Procedures in New Zealand* Chris Atmore uses the image of an iceberg in Figure One: 'The Child Abuse Iceberg' (Atmore, 1984).

⁷ Hale J was an active participant in the persecution of witches (Davies, 2002:35, note 7).

party accused, tho' never so innocent' (Hale J, 1680, cited in McDonald 1994:176). The seventeenth century legal system in which Hale J made this statement was very different to that of today. Criminals were not presumed innocent, proof beyond reasonable doubt was not required, notions of due process had not been fully developed and the accused did not have the right to counsel, the right to testify under oath or the right to subpoena witnesses (Bourke, 2007:392). Nevertheless Hale J's words have been absorbed into legal discourse and their power has not diminished over the centuries. Today they continue to underpin legal and cultural beliefs about rape and CSA. Hale J's words have influenced the development of rape laws and evidence rules ensuring their practical effect reverses his claim. Rape is, in fact, difficult to allege, simple to deny, prosecutions are grueling for the complainant and frequently convictions are not achieved (Davies, 2002). A controversial modification to British law in 1975 exposed the legislators' inherent gender bias when it was decided a jury should not convict a man for rape if 'whether reasonably or not, he believed his victim to be a consenting participant' (Thompson, 1975:30).

The Legacy of the Nineteenth Century

In 1840, before the signing of the Treaty of Waitangi had been completed, the New Zealand Company settlers at Port Nicholson had formed themselves into a government, enacted laws, and appointed magistrates (Owens, 2002). The British saw the Treaty of Waitangi as the formalization of British imperial rule in Aotearoa/New Zealand and immediately introduced the British Westminster legal system.

By the beginning of Queen Victoria's reign the evidence of children was accepted in British courts provided it was clear a child understood the meaning of the oath and could be sworn in. Twelve judges had agreed on the admissibility of the evidence of children in the 1773 Brazier case. They ruled the admissibility of the evidence of children under the age of seven

depends on the sense and reason they entertain the danger and impiety of falsehood (sic), which is to be collected from their answers to questions propounded to them by the court (Beck, 1838, cited in Jackson 1999:223)

Brazier was convicted of the rape of a seven year old girl who had given evidence but was not sworn in. The Criminal Law Act 1885 allowed children of 'tender years' to give evidence without being sworn in but no one could be convicted on the unsupported evidence of a child (Jackson, 1999:224). Between 1860 and 1885 the age of consent to sexual intercourse⁸ was raised from ten to twelve, to thirteen, and finally the Criminal Law Amendment Act 1885 raised it to sixteen. The age of consent for indecent assault,⁹ which was fixed at thirteen in 1880, was only raised to sixteen in 1922 (Jackson, 1999). When a girl who was over twelve was raped she could not take legal action against her assailant unless she could produce medical evidence that she had been violated against her will (Else, 1978). Such evidence is difficult to produce even with the technology that is available today. As children were the property of their fathers, only fathers could complain if they were abused. Children who did not have a father had no means of redress. A mother had no rights over her children unless they were illegitimate in which case she alone was responsible for their upkeep. A father of children who were born in wedlock had complete control and custody of those children and was able to stop their mother from seeing them if he wished (Phillips, 2004).

The status of the child underwent significant change during the nineteenth and early twentieth centuries. Western industrialization necessitated the introduction of child labour laws and compulsory education. During the nineteenth century the 'wage-earning non-child' was being transformed into the 'economically worthless child-scholar'¹⁰ and as the twentieth century dawned children were being redefined into a 'romantic middle-class ideal of childhood in which children became "priceless"¹¹ (Levesque, 1999:263, note 17). In Britain the "Social Purity Alliance" was set up in 1873 by men who wanted to eradicate prostitution by changing men's behaviour and eliminating the demand for it. Feminists became involved and the Social Purity movement successfully lobbied for the

⁸ The charge for underage sexual intercourse was 'unlawful carnal knowledge' (Jackson, 1999:223).

⁹ Indecent assault covered all forms of molestation other than penetrative vaginal sex (Jackson, 1999).

¹⁰ Aotearoa/New Zealand introduced free, compulsory, primary schooling in 1877 (Graham, 2002).

¹¹ Viviana Zelizer claims the 'general rule continues to be simple: as children lose their economic value to parents and become economic burdens, they become increasingly emotionally valued' (Zelizer, 1985, cited in Levesque, 1999:263 note 17). In Britain and the United States of America societies for the prevention of cruelty to animals were established before societies for the prevention of cruelty to children (Julich, 2001).

age of consent to be raised¹² and for incest to be criminalized.¹³ However their accompanying efforts to bring about an increase in the sentences for sexual assaults on female children failed.¹⁴ Renowned American legal educator Judge John Henry Wigmore's (1863-1943) observation in 1904 (cited below) indicates that in the courts the power of the discourse of possible false allegations was likely to outweigh the pricelessness of the children¹⁵ and the veracity of their evidence. Wigmore J's statement has been cited frequently for over a century

Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by their complexes is that of contriving false charges of sexual offences by men... Judging merely from reports of cases in the appellate courts, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed (Wigmore J, 1904, cited in Olafson, Corwin & Summit, 1993:8)

Nearly a century later, Australian legal academic Anne Cossins claims that CSA is a difficult crime to prosecute (Cossins, 2001). She attributes this difficulty to the fact that historically CSA has been treated by legislators and criminal justice systems as a crime that is committed by men against female children.¹⁶ Cossins argues that like rape, the historical sex and gender specificity, together with the criminal justice system's historical desire to protect men from false allegations and its entrenched cultural belief that girls frequently lie about being sexually assaulted, has affected the way in which child sex offences are prosecuted (Cossins, 2001). Feminist legal researcher Elisabeth McDonald concurs with Cossins when she contends that, despite a lack of evidence to support the statements of Hale J and Wigmore J and the fact that they were made in the seventeenth century and in 1904 respectively, during the 1990s they still exerted

¹² In Aotearoa/New Zealand the age of consent to sexual intercourse for girls was twelve years until, to conform with changes in the British law, it was lifted to fourteen years in 1893, to fifteen years in 1894 and to sixteen years in 1896 (Eldred Grigg, 1984; Coney, 1993).

¹³ Incest was criminalized in Aotearoa/New Zealand in 1900 (Eldred-Grigg, 1984) and in Britain in 1908 (Olafson et al, 1993).

¹⁴ Sentences given for sexual offences against girls were less severe than sentences given for sexual offences against boys or minor offences against property (Jeffreys, 1985).

¹⁵ The male bias of the justice system meant the offence of sexual abuse was not treated as though it was at all serious, particularly if the offence was against a girl (Jeffreys, 1987).

¹⁶ Boys are one and-a-half to three times less likely than girls to be sexually abused and international reports consistently find that offenders are 90 to 100 percent male (Levesque, 1999).

influence in court even with the amendments to the Evidence Act 1908 (McDonald, 1994). Cossins and McDonald are identifying historical discourses that underpin the gender based politics that continue to surround rape and CSA.

When the British Criminal Law Act was amended in 1885 to allow children to give unsworn testimony, criminal law in Aotearoa/New Zealand followed Britain's lead. The Oaths Amendment Act 1894 differentiated the way that Aotearoa/New Zealand children's oral, unsworn testimony was accepted from the British law but in both jurisdictions the competency and credibility of child witnesses has continued to be an issue for the courts (Ball, 1995). Today child complainants are required to promise an interviewer to tell the truth but the ubiquitous notion that their claims are likely to be untrue continues to disadvantage them. The introduction of the 1990 Evidence Act 1908 amendments was an attempt to reduce their disadvantage. Contributing significantly to the belief that CSA complainants' claims are likely to be untrue are the theories of Sigmund Freud (1856-1939). Freud's theories have come to be accepted as fact.

Early Understandings of Child Sexual Abuse

In a letter to the *British Medical Journal* general practitioner J.K. Isley attributes society's difficulties in confronting the realities of CSA to Freud's change of mind in 1896. Freud believed the mental disorders his women patients were experiencing were the result of CSA (Isley, 1998). Initially Freud also addressed power, class and gender issues. He believed that incest was more common than was generally believed and that it occurred in respectable families (Olafson et al, 1993). However when his contemporaries responded negatively to his beliefs, Freud changed his mind.¹⁷ He decided that his women patients' stories of incestuous abuse were the 'stuff of fantasy' and this has been the legacy he left to the future generations (Isley, 1998:1012).

¹⁷ Freud joined the nineteenth century psychiatrists who, intent on finding a biological basis for mental illness, decided that predisposing weaknesses were caused by the female reproductive system – 'the female malady' (Olafson et al, 1993). These psychiatrists also made a connection between insanity and sexuality but identified sexual misbehaviour rather than sexual abuse as the connecting factor (ibid).

There are earlier accounts than Freud's of the psychological consequences of CSA. When they were researching their article 'Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression', Erna Olafson, David Corwin and Roland Summit discovered a case study written in 1821, in which a doctor describes a sixteen year-old girl's breakdown and repeated suicide attempts after she was sexually assaulted by her father (Olafson, et al, 1993). Many of the currently contested CSA issues were being debated before and during Freud's early career. Auguste Ambrose Tardieu (1818-1879) was Professor of Legal Medicine at the University of Paris, Dean of the Faculty of Medicine and President of the Paris Academy of Medicine. Tardieu analyzed 632 cases of sexual abuse in females, most of whom were children, and 302 cases in males. In his book *Forensic study on cruelty and the ill-treatment of children* (1860) he describes the thirty-two cases he was commissioned by the court to examine from a medico-legal point of view (Masson, 1984). Eighteen of these cases resulted in death (http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6V7N4G1GFCS-1...). Tardieu found the most frequent perpetrators were the children's fathers. His colleagues were hostile to his research results and after he died in 1879 they publicly rejected his findings saying the children lied (Blackwell, 2007). In France some nineteenth and early twentieth century physicians argued that sexual offences against children were frequent and often there were no physical signs. These physicians found that children's statements were largely truthful, that the perpetrators in many instances were fathers and brothers, and that higher education did not deter men from abusing children (Olafson et al, 1993).

A longtime colleague and friend of Freud's, Sandor Ferenczi (1873-1933), wrote a paper entitled 'Confusion of tongues between adults and the child: The language of tenderness and passion' (1932). Ferenczi came to believe, as Freud had done until he changed his mind, that the cause of neurosis was CSA (Masson, 1984). Despite Freud's objections, Ferenczi presented and published his paper¹⁸ but in 1933, when it was being translated for publication in English, he died. The translator, London doctor

¹⁸ Ferenczi presented his paper to the Twelfth International Psycho-Analytic Congress held in Wiesbaden in September 1932.

Edward Jones,¹⁹ decided to destroy the translation because, he said in a letter to Freud, it was a 'tissue of delusions' (Olafson, et al, 1993:12). Consequently Ferenczi's paper did not appear in English until 1949.

Alongside nineteenth and early twentieth century debates about CSA, women were agitating for education, suffrage and an expanded social role. Temperance and anti-prostitution advocates were demanding that men modify their behaviour. Contemporaneously men were developing, expanding and "professionalizing" the secular medical and social sciences. Self-serving prejudices were incorporated into explanatory "scientific" models enabling 'the misogyny and masculine valorization of the late Victorian gender battles survived into the 20th century disguised as science' (Olafson et al, 1993:13). The professionals used the newly acquired authority and power of their "science" to discredit the feminists and sex reformers who, with no "credentials", criticized male sexual behavior and made claims about the extent of CSA. The women were branded as 'man-hating, frigid, and possibly lesbian "prudes" who threatened to "desex" society'²⁰ and they were effectively silenced (Olafson et al, 1993:13).

Carol-Ann Hooper claims that since feminists raised the issue in the 1870s, their definitions of CSA have located the problem in the social construction of masculinity. These definitions have generally been marginalized. Hooper argues that in the late nineteenth century it was the seductive behavior of sexually abused girls²¹ that was problematized by authorities but today it is their mothers whose behavior is under scrutiny. In Hopper's view

¹⁹ Doctor Edward Jones was imprisoned but not charged for behaving indecently towards two young girls. Later he resigned his position after another such accusation from a patient aged ten years (Olafson, et al, 1993).

²⁰ In late nineteenth and early twentieth century Britain lesbianism was generally referred to as "sexual inversion". The surplus of women at that time meant almost one in three of all adult women were single and one in four would never marry. Spinsters provided the backbone of the feminist movement and homosexuality, feminism and man-hating were deemed to be caused by, and the cause of, frigidity (Jeffreys, 1985).

²¹ Hooper notes that concerns about the behaviour of sexually abused girls frequently arose from worries about their futures as healthy, able mothers rather than their well-being in terms of what had happened to them (Hooper, 1997).

The responses of voluntary and statutory agencies to child sexual abuse have also been centrally concerned with the regulation of women, much more so than the control of men who abuse (Hooper, 1997:336).

Hooper argues the social conditions that support CSA have remained consistent since the nineteenth century. The combined impact of new definitions of motherhood (but generally not fatherhood) and increased state intervention in the home to protect children have served to reinforce mothers' responsibility for the safety, protection and rearing of children (Hooper, 1997). If CSA occurs a mother is accused of colluding in some way to cause it to happen and if the CSA is reported she is accused of colluding with her sexually abused child's false allegations especially if there is evidence of marital disharmony, divorce or custody dispute (Blackwell, 2007). Fathers, on the other hand, are not deemed responsible for their children's upbringing and male sexuality continues to be constructed as erotically dominant and predatory (Hooper, 1997).

Children's Evidence in Child Sexual Abuse Cases

In Aotearoa/New Zealand children's evidence was generally regarded with suspicion for most of the twentieth century and judges were required to warn juries to take special care when examining the testimony of children because they were 'believed to be prone to invention and distortion' (NZLC MP13, 1999:37). However, in the late twentieth century an attitudinal change towards children's evidence was brought about in many Western jurisdictions by child abuse advocacy and activism and this was bolstered by research results. In the United States in 1989, for example, 900,000 of the 2.4 million reports of suspected child maltreatment were substantiated (Ceci & Bruck, 1993). In Aotearoa/New Zealand the Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences against Children (ACIDPOC), *A Private or a Public Nightmare?*, was published in 1988. The Committee was highly critical of the rules of evidence pertaining to proceedings involving allegations of CSA. It noted that

while there is a widespread belief that children are not as credible as adults we found no evidence to suggest a child victim is less reliable than any other with respect to events of personal significance. Our review of the literature and our own experiences lead us to conclude that children have been undervalued as witnesses (ACIDPOC, 1988:6).

There was also an increase in the number of child witnesses appearing in court at this time and in an endeavour to make it easier for them to give evidence some countries (see note 2), including Aotearoa/New Zealand, amended their laws (NZLC MP13, 1999). Nevertheless in the early years of the twenty-first century the veracity of children's evidence continues to be fiercely contested and the legal process continues to be a harrowing one for child complainants.

Incidence and Impact of Child Sexual Abuse

It is usually older or adult males who sexually abuse children²² and though the abuse is not limited to girls some feminist theorists view it as an adjunct to the social constructions of male sexuality. Ann Levett observes that given its high prevalence it is hard to think of CSA as an unusual experience but she considers it is generally studied as if it were uncommon (Levett, 2003). As well as the prevalence, the impact of CSA is widely contested and many researchers claim that comments like Levett's are part of a baseless "moral panic" (Newbold, 1998; Hood 2001; Hill, 2005).

It might appear reasonable to assume the existence of a universal will to eliminate CSA but the frequency with which it occurs²³ and the demand for child pornography²⁴ are indicators that this is not so. In Aotearoa/New Zealand it is generally believed that the tendency for parents of primary school children to drive their children to school and pick them up afterwards can be traced back to the abduction, sexual assault²⁵ and murder of

²² David Finkelhor estimates that 95 percent of girls and 80 percent of males, who are sexually abused, are sexually abused by males (Finkelhor, 1984, cited in Colton & Vanstone, 1996:26). In the 1989-90 University of Otago Child Sexual Abuse Study women were reported to have perpetrated two percent of the abusive experiences (Morris, Martin & Romans, 1998).

²³ In 2001 there were 1,498 convictions for violent sex offences in Aotearoa/New Zealand. 74% of the victims were under the age of 17 years. Females were more likely to be victims of violent sexual assault and made up 82% of the victims. 45% of the females were under the age of 12 years (Statistics New Zealand, 2005:126).

²⁴ The international, multi-billion dollar child sex industry spawns other forms of exploitation such as child pornography (Levesque, 1999). On 5 June 2008, the news media reported an international investigation into a website that carried abusive (described as 'extreme') images of child pornography. The site depicted images of babies through to eighteen year olds being abused. During a three day period there were 12 million "hits" on the site (Radio New Zealand National, News; TV ONE, 6pm News, 5 June 2008).

²⁵ The sexual assault of Louisa Damodran is alleged. Peter Joseph Holdem was convicted for abduction and murder. He had a number of other convictions for sexually offending against young girls (<http://www.safe-nz.org.nz/Data/holdempeter.htm>).

two six year olds. In Christchurch Louisa Damodran was abducted on her way home from school in October 1986 and in June 1987 Napier girl Teresa Cormack was abducted on her way to school.²⁶

While these tragic, high profile cases caused nationwide horror and dramatic change in parental behaviour it would be easy to be misled by them. They confirm the common myth that CSA is likely to be perpetrated by a stranger when it is actually more likely the perpetrator will be known to the child and also to her/his family. In many instances the abuser is a member of the family (Morris et al, 1998; Levesque, 1999; Blackwell, 2007). Overt physical force is not necessarily a factor when a relationship already exists - offenders tend to 'seduce and psychologically trap' their victims (Levesque, 1999:155). The Crimes Act 1961 acknowledges a prior acquaintance or a relationship when it outlaws the "grooming" of children.²⁷ Levesque cites research (Hartman & Burgess, 1989; Finkelhor, Hotaling, Lewis & Smith, 1990; McCurdy & Daro, 1994) that has found parental figures account for between 30-50 percent of sexual abuse against girls and acquaintances account for 40 percent (Levesque, 1999:154). Up to 50 percent of the abuses children suffer occur in their own homes while other likely places are schools and day care centres (ibid). In Aotearoa/New Zealand Morris et al found the majority of their respondents' experiences were perpetrated by family members or family friends (Morris et al, 1998). When they interviewed young adults about severe mental distress Barnett and Lapsley found that sexual abuse typically occurred in a context connected to the family, and in which the young adult was unable to escape contact with the abuser (Barnett & Lapsley, 2006).

The construct of the "sanctity of the family" assists resistance to an acknowledgment of the occurrence of CSA within families and creates a barrier for the victim and for the

²⁶ Louisa was thrown into the Waimakariri River and Teresa was buried in a shallow grave at Whiranaki Beach. Both cases received extensive media coverage. (for further information see (<http://www.safe-nz.org.nz/Data/holdempeter.htm> and <http://www.answers.com/topic/teresa-cormack>).

²⁷ A person who 'grooms' a child 'is liable to imprisonment for a term not exceeding seven years' (Crimes Act 1961, s 131B).

services that might assist her/him. In *Governing Child Sexual Abuse: Negotiating the Boundaries of Public and Private, Law and Science* Samantha Ashenden observes that

the term 'child sexual abuse' is based upon a distinction between public and private life, in which children are considered to be the natural responsibility of parents, and where the legitimacy of public intervention into the private family is sanctioned only where there is evidence of harm underwritten by medical and psychological experts and admitted before a court of law (Ashenden, 2004:7).

Child pornography, child prostitution²⁸ and sex tourism are condemned by the law and the mainstream media but there is a resistance to any examination of the institution of the family as an environment where CSA may occur. Olafson et al explain this resistance when they observe 'Political conservatives, who are traditionally defenders of the family, can hardly be expected to applaud an apparent challenge to paternal authority' (Olafson et al, 1993:19). They claim that by 1993 a backlash had occurred against the 1980's increases in research into the prevalence and impact of child CSA.

Definitions of Child Sexual Abuse

Because definitions are frequently disputed, it is important to ascertain what definition researchers have employed in studies of CSA. The Crimes Act 1961 does not provide a definition but it identifies offences of a sexual nature (Crimes Act 1961, ss127 – 144). The Evidence Act 2006 defines a child or young person as being someone under the age of seventeen at the time of commencement of prosecution (Evidence Act 2006, s 23C(b)).

American paediatrician and late twentieth century pioneer children's advocate Henry Kempe, who with others founded the International Society for Prevention and Treatment of Child Abuse and Neglect in 1977, defines CSA as the

involvement of dependent, developmentally immature children and adolescents in sexual activities they do not fully comprehend, to which they are unable to give informed consent, or that violate the social taboos of family roles (Kempe, 1980:198).

²⁸ Roger Levesque cites United Nations Reports that estimate approximately ten million Third World children are involved in prostitution (Levesque, 1999).

Feminist psychologist Miriam Saphira, who is one of the people responsible for bringing the issue of CSA to public attention in Aotearoa/New Zealand in the 1970s and 1980s, says CSA occurs when

A child is used by an adult in a sexual way. This may include: touching the genitals; penetration of the genitals with fingers, penis, or objects; rape; tongue kissing; genital exposure; the viewing of pornographic videos; and coercion into nudity and masturbation for the adult's gratification (Saphira, 1987:3).

The New Zealand Psychological Society provides a broad and inclusive definition of CSA when it gives direction to psychologists, in relation to the law, saying

Sexual abuse can be defined as the involvement of children or adolescents, in sexual activities which they do not fully comprehend and/or to which they are unable to give informed consent and/or which violate culturally acceptable sexual taboos of family roles or adult/child relationships (Maxwell, Seymour & Vincent, 1996:6).

Felicity Goodyear-Smith,²⁹ a general practitioner, medical researcher, and author of *First Do No Harm - The Sexual Abuse Industry* (1993),³⁰ questions the notion that children are unable to give consent when she argues

the mainstream belief in the sexual abuse field is that children are never able to consent to sexual acts under any circumstance. There are however other opinions regarding the issue of consent (Goodyear-Smith, 1993:70).

However Goodyear-Smith's sources for the 'other opinions' are paedophile organizations³¹ and in this country the law states that consent is not an acceptable

²⁹ Goodyear-Smith is presently an Honorary Research Fellow at the Department of Psychiatry and Behavioural Science at the Auckland Medical School. In 1988 she became General Practitioner for the Centrepoint Community in Albany, Auckland. Her husband John Potter spent four months in prison in 1992 after being convicted for sexual offences he committed against under-age girls. His father (and leader of the Centrepoint Community), Bert Potter and his mother, Margie were also convicted for CSA offences. Already in prison for drug offences at this time, Bert Potter received a sentence of seven and a half years (Goodyear-Smith, 1993:90).

³⁰ The most frequently cited authors in *First Do No Harm – The Sexual Abuse Industry* are Americans Ralph Underwager (1929-2003) and his wife Hollida Wakefield. Underwager was a psychologist and minister of the church who testified for 'about four hundred' defendants in CSA cases (<http://www.ritualabuse.us/research/memory-fms/ralph-underwager/>). He founded "Victims of Child Abuse Laws" (VOCAL) in 1984 and was a founding member of the False Memory Syndrome Foundation (FMSF) in 1992. He was forced to resign from the advisory board of the FMSF because of an interview he and his wife gave to *Paidika: The Journal of Paedophilia* in 1991. He is quoted as saying 'Paedophiles can boldly and courageously affirm what they choose. They can say what they want is to find the best way to love. I am also a theologian... I believe it is God's will that there be closeness and intimacy, unity of the flesh, between people' (<http://www.nonstatusquo.com/ACLU/NudistHallofShame/Underwager2.html>).

defence³² (Crimes Act 1961, s 134A(2)(a)). Goodyear-Smith is among those who opposed the 1990 amendments to the Evidence Act 1908 that were intended to make the legal processes easier for CSA complainants.

Amendments to the Evidence Act 1908

In Aotearoa/New Zealand amendments to the Evidence Act 1908 that, it was hoped, would make the court processes easier for sexual assault complainants, became law in January 1986. However, these amendments applied only to adult sexual assault complainants. In January 1990 further amendments (ss 23C to 23I) to the Evidence Act 1908 became law. These pertained specifically to CSA complainants. S 23C outlined the appropriate applications of ss23D to 23I. A judge could allow a child to provide evidence on a videotape or via closed circuit television. The child could sit behind a screen while being cross-examined (Evidence Act 1908, ss 23D, 23E). The Judge 'may disallow any question put to the complainant that the Judge considers is, having regard to the age of the complainant, intimidating or overbearing' (Evidence Act 1908, s 23F(5)). Child psychiatrists and child psychologists 'with experience in the professional treatment of sexually abused children' could provide expert evidence in CSA cases (Evidence Act 1908, s 23G(1)(a)(b)). An expert witness could comment on other witnesses' evidence that related to the complainant's behavior (Evidence Act 1908, s 23G (2)(c)). Provision was made for a judge to advise a jury not to draw 'any adverse inference against the accused from the mode in which the complainant's evidence is given' (Evidence Act 1908, s 23H(a)). Judges could no longer warn juries about the non-corroboration of a child's evidence or the need to scrutinize that evidence with special care or suggest that young children 'generally have tendencies to invention or distortion' (Evidence Act, 1908, s 23H(c)). The drawing up of regulations for the

³¹ Goodyear-Smith refers specifically to the paedophile organizations: The Paedophile Information Exchange; the Rene Guyon Society (whose motto is 'sex before eight or it's too late') and the North American Man/Boy Love Association (Goodyear-Smith, 1993:70-71).

³² It is not a defence to a charge of CSA to plead that the young person concerned consented or that the accused believed that the young person was over the age of 16 years (Crimes Act 1961, s 134A(2)(a)).

purposes set out in sections 23D to 23H, Evidence Act 1908 was dealt with in Evidence Act 1908, s 23I.³³

The contentiousness of s 23G can be understood in the light of the competing discourses that surround CSA. Some feminist writers identify a connection between the construction of male sexuality, gender identity, male power and CSA (Levett, 2003) and some argue that CSA plays a role in socializing women and training them for sexual submission (Armstrong, 1997). On the other hand, The Paedophile Information Exchange publishes a magazine called *Understanding Paedophilia* and argues that sex between adults and children is 'healthy, positive, natural, normal and does not require explanation' (The Paedophile Information Exchange, cited in Colton and Vanstone, 1996:10). It is against the law in Aotearoa/New Zealand for an adult to groom or engage in sexual activities with a person under the age of sixteen (Crimes Act 1961, ss 131B, 132, 134). Nevertheless Ball claims that even with the 1990 amendments to the Evidence Act 1908 in place, recourse to legal redress for CSA complainants has remained a difficult process (Ball, 1995).

The diagnosis of CSA is complex – it involves a painstaking process of observation and information gathering. It is not possible to identify definitively the behaviours associated with CSA.³⁴ Hamlin claims that when it legislated s 23G of the Evidence Act 1908, the Aotearoa/New Zealand Parliament believed that if a child had been sexually abused this would be apparent in the way s/he behaved (Hamlin, 1997:45). He also points out that

³³ In her 2003 Supplementary Submission to the Justice and Electoral Select Committee considering Petition 2002/55 Hood pointed out that two provisions of s 23I of the Evidence Act 1908 had never been implemented: s 23I(b) concerning the certification of evidential interviewers and s 23I(c) concerning consent by a complainant to be videotaped. Hood claimed that the failure to implement these regulations raised questions about the statutory authority of interviewers and the legal status of their interviews during the previous fourteen years (Hood, Pet/0055/1G/2003). The Ministry of Justice (MOJ) submitted that s 23I of the Evidence Act 1908 was an 'empowering provision – it authorizes but it does not require the making of regulations'. (Justice and Law Reform Committee, 2005:13). The MOJ pointed out that the way had been open to challenge the admissibility of videotaped evidence on the basis that regulations had not been made but no such challenge had been made. The Justice and Law Reform Committee's Report recommended that regulations directing the process of taking evidential evidence of children be promulgated (2005:13).

³⁴ However, a 1993 review of 45 studies demonstrates that sexually abused children do have more adverse symptoms (such as fear, behavioural problems and poor self esteem) than non abused children (Kendall-Tackett, Meyer and Finkelhor, 1993).

though this is a widely held view, it is not universally accepted and the wording of s 23G suggests that it was not what those who drafted the legislation intended. S 23G permitted evidence to show “consistency” but not to make a diagnosis. A diagnosis could have breached the “ultimate issue” rule - that is, it could state in evidence something that was for the jury to decide.

Defence lawyers have argued in CSA cases, that the behaviours about which s 23G expert evidence was being given were consistent with things other than sexual abuse and questioned what behaviours might be inconsistent with sexual abuse (Hamlin, 1997). This questioning in court exposed the difficulties associated with identifying behavioural indicators of CSA and contributed to the abandonment of s 23G.

S 25 of the Evidence Act 2006 (see Appendix Two) is not specific to CSA cases and deals with the admissibility of expert opinion evidence generally. The ultimate issue rule is replaced by the ‘substantial helpfulness test’ (Illingworth & Mathias, 2007:55). S 25(2) states that an expert opinion is not inadmissible simply because it is about the ultimate issue. In a preliminary assessment of expert opinion evidence the court has to decide whether or not it will help the jury reach its decision (Evidence Act 2006, s 25(2)).

The Evidence Act 2006

Psychologist Suzanne Blackwell³⁵ agrees with the abolition of s 23G. In her view, it has been unsuccessful. She is concerned however, about the propensity for defence counsel to exploit common misconceptions about CSA and to ask leading, misleading and confusing questions when cross examining children (Blackwell, 2007). Blackwell believes it is time for the law to be ‘reviewed and reformed’ in respect of expert witnesses in CSA cases (Blackwell, 2005:14). Robert Ludbrook of ‘Action for Children and Youth Aotearoa’ (ACYA) is critical of the amended law. He argues that s 23G

³⁵ In August 2007, when the Evidence Act 2006 became law, Suzanne Blackwell was a PhD student in the Psychology Department at the University of Auckland. Her thesis entitled *Child Sexual Abuse on Trial*, investigated ‘the knowledge and beliefs of New Zealand jurors in relation to the complex area of child sexual abuse...and the extent to which they may subscribe to some of the common misconceptions that abound’ (Blackwell, 2007:1). She is experienced in providing expert testimony in respect of indicators and effects of sexual abuse pursuant to Evidence Act 1908, s 23G (Blackwell, 2006).

served a useful purpose in providing juries with evidence about children's developmental capacities and it reduced the disadvantage they might experience when under cross examination. In court a child witness may be cross examined by an experienced criminal lawyer who sets out to upset and confuse the child and discredit her/his evidence. Ludbrook does concede that the Evidence Act 2006 improves upon the Evidence Act 1908 when it says

the Judge may disallow, or direct that a witness is not obliged to answer, any questions that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand (Evidence Act 2006, s 85(1)).

While s 85 is not specific to children s 85(2) says for the purpose of s 85(1) the Judge may 'have regard to – (a) the age or maturity of the witness' (Evidence Act 2006, s 85(2)). Although Ludbrook does see s 85 as an improvement, he argues there should be a separate section in the Act that disallows any question put to a witness under the age of 18 years where the question is

(a) phrased in language or in a form which is inappropriate or confusing taking into account the child's age, language development and level of comprehension; (b) unclear, intimidating or oppressive or is likely to mislead or confuse the child (Ludbrook, 2005:2).

Ludbrook argues that any difficulties s 23G may have posed in the past had been overcome by Court of Appeal rulings. He claims the support and protection that was available to child complainants under s 23G has been considerably weakened under the new legislation (Ludbrook, 2005).

Blackwell and Fred Seymour, both of whom have testified as expert witnesses in CSA cases, lobbied for the abolition of s 23G in its current form. In their submission to the Select Committee considering The Evidence Bill 2005 they submitted that 'expert psychological evidence should be available to juries in order to educate them and inform them on child sexual abuse issues, but through more appropriate mechanisms than s 23G' (Blackwell & Seymour, 2006:11). Blackwell and Seymour are concerned that in the adversarial judicial system truth and fact are not necessarily priorities and juries are often given only limited factual information. They claim that a neutral expert

witness could educate jurors about the realities of CSA and prevent defence counsel exploiting myths that disadvantage complainants. Blackwell and Seymour argue that s 23G2(c) has become 'fraught with difficulty' and that Court of Appeal decisions have 'rendered such evidence almost impossible to lead' (Blackwell & Seymour, 2006:11). They also note that during the twelve months between May 2005 and May 2006 s 23G was not used at all.

On addressing the 2005 Courts Conference of the National Judicial College of Australia, Blackwell commented that while there are those who would label her 'naïve', she believes that 'an expert giving psychological opinion evidence in a child sexual abuse case should be giving the same evidence to the court whether they be instructed by prosecution or defence' (Blackwell, 2005:14). Blackwell's comment highlights the flaws in the generally accepted notions of "absolute truth" and "scientific objectivity" that are implicit in the legal process and integral to the epistemology that underpins this thesis.

Methodology

It is a perspective held by many that science is objective. As a result scientific or expert evidence is regarded as being immutable and unchallengeable. In itself, this is a misconception. As any jury which has heard conflicting expert evidence will readily recognize, the expert will give opinion evidence. This is and will often be challengeable (Hamlin, 1997:6).

Epistemology, the theory of knowledge, is the focus of this thesis. As Hamlin observes, knowledge claims are not impartial. This will be demonstrated by an examination of the construction of debates that have surrounded s 23G expert evidence. This section outlines the methodology employed and ethical position taken in the production of the thesis.

Feminist principles and epistemological positions have informed the methodology of "feminist textual analysis" that has been utilized in the production of this thesis. Feminist textual analysis is based on a poststructuralist epistemology. It does not involve interviews or surveys but examines texts. Textual analysis includes a consideration of the historical, social and political context in which a text was written, an

examination of what is stated, what is omitted, and the identification of contradictions within and between texts (Reinharz, 1992). Poststructuralist epistemologies assume that knowledge is constructed (rather than being out there waiting to be discovered), that it is not neutral and it is associated with power. A feminist textual analysis methodology, therefore, rejects the notions of 'absolute truth' and 'scientific objectivity' (Gavey, 1989:462).

Feminism is committed to exposing and challenging the gender power relations that are embedded in traditional, Western epistemologies and methodologies. Their employment in the production of (what is generally viewed as) "value-free", "authoritative" knowledge about social life frequently disadvantages women and/or children and feminists question the objectivity of traditional knowledge production. Feminist methodology always involves a theory of power. The employment of a poststructuralist methodology enables the deconstruction of "authoritative" knowledge claims and exposes their impartiality.

Feminist research was initially developed utilizing traditional empirical methodologies that claim a value free approach and establish a hierarchical relationship between the researcher and the researched. The problems the early feminist researchers encountered prompted them to address the male bias that is embedded in traditional research methodologies and the epistemologies on which they are based.³⁶ Consequently feminist researchers realized that as well as researching the position and experience of women, it is necessary to expose this bias.

Section 23G was vehemently contested for nearly seventeen years in a constantly changing social and political environment. An examination of the competing discourses that surrounded s 23G raises questions about how the validity of evidence given by children and expert witnesses is arbitrated. The introduction, the controversy and the subsequent abolition of the provision for expert witnesses to testify in CSA cases

³⁶ Such as Carol Gilligan's pioneering deconstruction of Kohlberg's (1981) theory of the development of moral judgment. Gilligan challenged Kohlberg's research findings claiming he had used only males in his study and had therefore only confirmed how male adolescents and young adults experienced moral development (Gilligan, 1982)

implicates discourses of law, psychiatry, psychology and feminism. A deconstruction of the s 23G debates enables a comparative analysis of the ways in which gendered power relations operate within these discourses in respect of “truth”, “authority” and “objectivity”. It also provides an opportunity to examine how the discourses of the disciplines of law, psychiatry and psychology interact with each other in the maintenance of, or challenge to, gendered power relations.

The production of this thesis is not value-free. It has been produced with the objective of exposing the impossibility of value-free knowledge claims. This is achieved when the inseparability of knowledge claims and power in texts pertaining to expert witness and children’s evidence is demonstrated. The deconstruction of the texts highlights their partiality, their contradictions, their omissions, the discourses of which they are a part and the gender power relations that they uphold. The thesis argues that knowledge production and legal decision making are not impartial processes and the impact of this is insidious and destructive. Iris Young contends that claims of impartiality mask the power of the dominant discourses of the privileged and enables them to appear as if they represent the ‘common good’ (Young, 1990/1997:196).

Ethics

The project of criticising, analysing and when necessary replacing the traditional categories of moral philosophy in order to eradicate the misrepresentation, distortion and oppression resulting from the historically male perspective is, broadly speaking, the project of feminist ethics (Browning-Cole and Coultrap-McQuinn, 1992:2).

In present day Aotearoa/New Zealand the generally accepted ethical standards that are required for the production of social scientific knowledge have their origins in feminist achievement. In 1987 a magazine article by two feminists exposed the unethical research methods utilized by an Auckland medical specialist (Bunkle and Coney, 1987). The recommendations made by the subsequent Cartwright Commission led to an overhaul of medical research and treatment ethics. Since the publication of the Cartwright Report in 1988 nearly every professional group in Aotearoa/New Zealand has implemented a written set of ethical considerations. Health and academic

institutions now have ethics committees, made up of academic researchers and lay persons, to monitor research proposals (Tolich, 2001). This thesis has not involved interviews or questionnaires and it has not been necessary to apply to the University Ethics Committee for approval. Nevertheless ethical considerations have been essential in its production.

The ethical use of other people's texts has been fundamental to the production of the thesis. I have endeavoured to be true to the context and intention of authors whose texts are cited. The work of feminist scholars has not always been treated with this level of respect. For example, economist Stuart Birks claims that

Spurious academic subjects such as "black studies" and more recently "women's studies", putatively designed to "raise consciousness" and strengthen commitment to credos of "emancipation", manifestly fail to meet the stringent requirements of scholarship: certainly the doctrines of these ideologically based "studies" are not regarded by their proponents as provisional and refutable hypotheses (Birks, 1998:166).

Feminists have been subjected to derision, misrepresentation³⁷ and to personal attacks.³⁸ The need for such bullying tactics in academic discourse highlights the contentious nature of the feminist scholarship that has exposed the biased underpinnings of traditional epistemologies. However, bullying tactics only serve to undermine the scholarship of an author's own work.

An Overview of the Thesis

Chapter One outlines the issues and events that are pertinent to the debates provoked by s 23G and identifies the changing political environments in which these debates took place. In the 1980s, governments of Aotearoa/New Zealand responded to international and local pressure for action on CSA. Before it was defeated in 1990, the Labour

³⁷ For example Hood argues that the 'All men are rapists' slogan of the 1970s meant that feminists no longer made a distinction between 'men we like' and the 'male chauvinist pigs'. She claims that feminists subsequently viewed all men as 'predatory bastards' (Hood, 2001:41). Hood chooses to ignore the fact that the purpose of the slogan was to highlight the fact that women have no way of knowing which men are rapists and which are not.

³⁸ Hood makes personal attacks on Miriam Jackson (later Saphira) and Hilary Haines (later Lapsley) in *A City Possessed* (2001).

Government legislated the Evidence Act 1908 amendments. However the National & National-led Governments, in power during the 1990s, were less sympathetic to CSA issues than their predecessors. Accident Compensation Corporation (ACC) compensation for sexual assault victims was relinquished. During the nine years of Labour-led Governments that followed the 1999 election the campaign against the Ellis verdict was bolstered by the publication of Hood's book, the presentation of petitions supported by high status citizens, the public humiliation of two prominent child advocates, and the abandonment of s 23G. Paradoxically, during this time, the sexual assault cases of high profile citizens including members of the police force, were receiving massive media coverage that was accompanied by public disquiet. The National-led Government is presently investigating the possibility of an inquisitorial system for CSA cases. The Chapter traces significant events during these periods and includes an examination of literature relating to the introduction of s 23G and the debates that followed. The credibility of children's evidence and the authenticity of memories of CSA are discussed. Arguments that oppose and support s 23G and advocate better legislation are summarized together with its subsequent demise. The issues that have been raised about psychological research and by the Ellis case, which has been used to encourage public debate by the critics of s 23G, are outlined. ACC restructuring and the formation of organizations to protect men from false allegations of CSA in Anglo American jurisdiction, are discussed. The impact of high profile public figures appearing in court on sexual assault and CSA charges is considered together with the public humiliation of two expert witnesses prior to the abandonment of s 23G. The establishment of a new organization to advocate for people facing perceived miscarriages of justice; a further change to ACC policy and the possibility of an inquisitorial system for the adjudication of CSA cases are also discussed.

To enable a critical consideration of the discursive construction of the "expert" and the nature of the "expert witness", Chapter Two traces the historical development of traditional epistemologies. Beginning with the Ancient Greeks it traces the development of liberal humanist epistemologies. These epistemologies, that are now seen to be "traditional", were developed by men and are said to produce "authoritative", "impartial"

knowledge. Challenges to liberal humanism and the development of feminist poststructuralist theories are summarized. Rather than seek “the truth”, feminist poststructuralist researchers are interested in how knowledge and truth are constructed. Poststructuralist researchers examine how meaning is constituted in language and how conflicting discourses enable us to give meaning to the world. The examination of power relations and historical specificity are vital in the deconstruction of knowledge claims and the exposure of their biases. Feminism questions why some knowledge claims are accepted and others are not. Challenges to, and questioning of, the authenticity of traditional knowledge claims and the objectivity of “science” provide an answer to feminism’s question.

The construction of evidence within Anglo American legal discourse is examined in Chapter Three. This chapter traces historic legal responses to sexual assault and nineteenth century medico-legal attitudes to sexual assault allegations. It identifies the influences that have survived into the law of today including the powerful myths that surround rape and CSA. The gender power relations that are embedded in the liberal humanist epistemology, on which the law is based, impact on the construction of evidence. The resulting disadvantage that sexual assault complainants experience is significant in the debates that have surrounded s 23G. The Evidence Act 2006 dispensed with s 23G and legal opinion on the how the new act will impact on survivors of sexual assault is included.

Chapters Four and Five shift attention to discourses of psychiatry and psychology. In Chapter Four the development of the discipline of psychiatry is charted and the historic origins of a view that hysteria has a connection with women’s sexuality are explored. The divisions within the discipline, in respect to the origins of mental illness are traced. Various influences such as those of “degeneration” theory and Freudian psychoanalysis are discussed together with challenges to psychiatry from within the discipline itself and from feminists. The mid-twentieth century impact of pharmaceuticals and deinstitutionalization programmes on psychiatry are considered and the relationship with the law in the provision of expert testimony explored.

Chapter Five considers the development of the discipline of psychology, its differences from psychiatry and its origins in philosophy. The influence of Freudian seduction and memory theories on the construction of psychological theories is explored. The chapter shows how controversies within psychology, involving memory, are highlighted in the debates pertaining to s 23G. Psychology's relationship with the law and the ongoing disagreement between clinical and research psychologists in respect of their relative objectivity is discussed.

The conclusion sums up the impact of debates that took place during the nearly seventeen years that s 23G was on the statute books. Although s 23G has been dispensed with these debates have continued. Discourses of false allegations, Freudian seduction theory and the CSA myths are upheld by the arguments of s 23G opponents and reinforced by the gendered liberal humanist epistemology that underpins them. Questions in respect of the "neutrality" of the law and the "objectivity" of expert witnesses are revisited.

Chapter One

A Review of the Issues

The children feel physically and morally helpless, their personality is still too insufficiently consolidated for them to be able to protest even if only in thought. The overwhelming power and authority of the adults renders them silent; often they are deprived of their senses (Ferenczi, 1933/1985:297-298).

For well over a century throughout the Western world the sexual abuse of children has been an issue that has repeatedly been brought to public and professional attention only to be suppressed by the negative reaction it elicits (Olafson et al, 1993). At international and at state level child sexual abuse (CSA) is viewed as a very serious problem and extensive laws have been put in place to deal with it. Despite all the legislation that prohibits it, CSA continues to be a world-wide problem. In fact it has developed into a multi-billion dollar a year international industry (Levesque, 1999).

As discussed in the Introduction, children's inferior legal and social status diminishes their access to legal redress when they are abused. This chapter explores CSA issues raised during the latter decades of the twentieth century³⁹ that continue to be debated in the early twenty-first century. It outlines the changing political environments in which they have taken place and in which they continue. Significant events and conflicts that preceded and followed the introduction of s 23G are identified. Specific attention is given to: the powerful discourses that deny the prevalence and impact of CSA; false memory syndrome; debates relating to the credibility of children's evidence; the authenticity of adult memories of CSA and the accessibility of repressed memories. Ongoing debate was exacerbated in 1990 by the Evidence Act 1908 amendments - in particular by s 23G and s 23H(b)⁴⁰. Until these amendments became law judges warned juries in CSA cases about the lack of corroboration and children's propensity to invention and fantasy. Subsequently strong lobbies for the re-instatement of the judicial

³⁹ There was little interest in CSA issues in English speaking countries during the middle years of the twentieth century. (See note 3.)

⁴⁰ S 23H(b) says 'the judge shall not give any warning to the jury relating to the absence of corroboration of the evidence of the complainant if the judge would not have given such a warning had the complainant been of full age' (Evidence Act 1908, s 23H(b)).

warnings challenged the increasing recognition of children's testimony as generally reliable (NZLC MP13, 1999). These lobbies condemned s 23G (2)(c)⁴¹ in particular and this chapter considers how the Ellis case may be understood as a vehicle for the opponents of s 23G.

In the 1970s American Henry Kempe was an important contributor to the revival of public interest in CSA issues in Anglo-American jurisdictions. Kempe claims that CSA is a medical and a legal issue and it can occur in any sector of society. He set up the National Centre on Child Abuse and Neglect in 1974 with United States Government assistance and in 1976 the First International Congress on Child Abuse and Neglect was held in the World Health Organization facilities in Geneva (<http://www.ispcan.org/about/ISPCAN-history.html>).

The 1980s

The impact of the international spotlight, together with 1970s feminist campaigns against male violence, ensured that CSA was high on 1980s' Western public and political agendas (Hooper, 1997). The decade of the 1980s marked a period of significant change in the social and political landscape of Aotearoa/New Zealand. A strong lobby of feminist and child protection groups, such as the Plunket Society, pressed for public education, prevention strategies and law changes that would ensure improved support for child complainants (Slater, 1983:W/S29).⁴² The National Advisory Committee on the Prevention of Child Abuse was established in 1981 by the Minister of Social Welfare and the Department of Justice. The Institute of Criminology undertook a

⁴¹ S 23G(2)(c) allowed an expert witness to give evidence regarding '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' (S 23G(2)(c), Evidence Act 1908). Different groups condemned s 23G(2)(c) for different reasons. For example research psychologists argued that they were more qualified experts than clinical psychologists while some barristers, legal academics and others believed the section should be removed from the law altogether (Hood, 2001; Corbalis, 2003; Anderson, 2003; Robertson and Vignaux, 2005).

⁴² Mary Slater presented Workshop 29 entitled 'Sexual Abuse of Children and the Role of Department of Social Welfare' at the 1983 YWCA Conference *Sexual Violence to Women and Children* that was held at Victoria University of Wellington in September 1983 (Peteru, 1983:W/S29)

victim-oriented study of rape in 1982. Multidisciplinary sexual abuse teams were established in South Auckland, Lower Hutt and Christchurch in 1988. The amendments to the Evidence Act 1908 became law in 1990 and during the next two decades CSA issues maintained a high media profile. Provoking media attention were the contentiousness of s 23G, the disputed Ellis verdict, CSA and rape charges being laid against prominent citizens and revelations that many Catholic priests had been guilty of sexually abusing children.

The 1984-1990 Labour Governments

Feminists were encouraged in 1984 when the David Lange led Labour Government announced the establishment of the Ministry of Women's Affairs. Its function was to advise all the other ministries on how proposed legislation was likely to impact on women. Later, during its first term and under protest from Treasury, the Government also ordered a Royal Commission on Social Policy. Many feminists spent hours putting together submissions for the Commission to consider. The Lange Government won a second term with an increased majority at the 1987 election. However, the Cabinet and Caucus were deeply divided. Supporters of the Minister of Finance, Roger Douglas, were committed to free market economic policies that did not sit well with the Prime Minister, many of his colleagues and the traditional Labour electorate. With no 'public or social good' – only the 'wondrous efficiency of the market' (Bunkle, 1993:85) under consideration, the Government's fiscal policy was making large numbers of people redundant. Retrospectively, former Prime Minister Lange believed that the October 1987 stock market crash burst the bubble that had been sustaining the 1980s Labour Governments. The Royal Commission on Social Policy report was released in April 1988. Published in four large volumes, it was derided by the Douglas supporters one of whom claimed it would be useful only as a doorstep.⁴³ Douglas resigned from the finance portfolio in December 1988⁴⁴ but in August 1989 the Cabinet re-elected him to its benches and Lange resigned from being Prime Minister. In his autobiography Lange

⁴³ Bunkle says the Commission's Report was 'like a letter to Santa'. It did not, as the monetarists required, assess public policy on 'the business criteria of short term profit and loss' and it was, therefore, speedily discredited (Bunkle, 1993:87).

⁴⁴ It has frequently been reported that Lange sacked Douglas but Lange says this is not correct (Lange, 2005).

commends the achievements of the Labour Women's Council and feminism during the 1980s (Lange, 2005). Feminist political commentators have since pointed out that by the time of the 1990 election the only real differences between the Labour and National parties were by how much they would cut back the welfare state, deregulate the labour market and acknowledge Maori rights (Bunkle, 1993).

1980s Feminism and Child Sexual Abuse

Many feminists claim that historically women have been silenced and their 'truths' about their childhood abuse have been repressed. To this end these truths become 'not merely unspoken but unspeakable' (Rich 1977:3). The attention that 1970s feminists focused on rape was encouraging to many silenced women and enabled them to speak out about the sexual abuse they had experienced as children (O'Toole & Shiffman, 1997).

In Aotearoa/New Zealand Miriam Jackson (later Saphira) was at the forefront of a feminist campaign to bring CSA to public attention. She cautioned that a little girl is 'probably safer from sexual assault playing on the swings at the park than she is in her own home' (Jackson, 1979:16). She was part of a group that organized a 'Knicker Sticker' campaign designed to alert young children. The sticker was printed on fluorescent paper and read

CHILDREN - Don't let an adult put his hand down your pants. Tell someone about it. Tell your mother, social welfare, the police (Saphira, 1983:9).

Saphira circulated a questionnaire through the *New Zealand Women's Weekly* (NZWW) and found that of the 315 women respondents, who had been sexually abused as children, nearly half (44.77 percent) were victimized by relatives (NZWW, 24 March 1980). She first published her book *The Sexual Abuse of Children* in 1981. It was reprinted in 1984 and with the help of a grant from the Mental Health Foundation (MHF), a second edition was published in 1985 (Saphira, 1985:2). Subsequently Saphira and the MHF were accused of 'trying to destroy the New Zealand family by publicizing within-family abuse' (Haines, 1988:21). Hilary Haines (later Lapsley) views the personal attacks that were made on Saphira as 'probably libellous' (1988:21).

The Auckland Sexual Abuse HELP Foundation (ASAHF) was set up in 1982 by the then Police Surgeon because he believed the ‘traumatised survivors of sexual violence’ needed ‘appropriately trained personnel and advocates to take care of their needs’⁴⁵ (ASAHF, 2005:1). The 1987 Telethon raised money to assist campaigns against sexual and physical violence in the community and in the family but when the publicists quoted the CSA statistics incorrectly the campaign received a considerable amount of negative media publicity (Haines, 1988).⁴⁶

In response to what she perceived in 1989 as a ‘media and liberal backlash’ against the inroads that had been made, *Broadsheet* writer Lisa Sabbage asked, ‘what is threatening about exposing sexual abuse, what is there to be gained by discrediting those who work in counselling and healing the survivors, and why is the work of the last ten years being undermined?’ (Sabbage, 1989:29). She claimed that by depicting feminists as ‘puritanical zealots trying to take the fun out of sex, the media is trivializing and diminishing sexual abuse in the eyes of the public’ and when the media focuses on men as ‘potential “victims” of false allegations’ it actually denies CSA (ibid). Sabbage’s questions and claims highlight the political conflicts between the various constructions and accounts of CSA. As Sabbage lamented the Aotearoa/New Zealand Parliament was legislating changes to the Evidence Act 1908 that were designed to make it easier for child complainants to give evidence in the courts.

The Evidence Act 1908 Amendments

The Evidence Act 1908 amendments were included in the Government’s Law Reform (Miscellaneous Provisions) Bill. This was an omnibus bill affecting more than fifty different Acts which was introduced under urgency on the last Parliamentary sitting day before Christmas 1988. Hood claims that the timing of the introduction of the Bill meant it did not attract much attention because, apart from the usual distractions prior to

⁴⁵ Since it was set up in 1982 the Auckland Sexual Abuse HELP Foundation has worked with more than 10,000 survivors of rape and sexual violence (Auckland Sexual Abuse HELP Foundation, 2005).

⁴⁶ Telethon advertisements presented the Mental Health Foundation’s (MHF) information in an over-dramatized and misleading way and an article in *The Auckland Sun* accused the MHF of transplanting overseas statistics (Haines, 1988).

Christmas, the media was preoccupied with the resignation of Roger Douglas from the finance portfolio (Hood, 2001). Of the eleven submissions that were considered by the select committee eight supported the amendments. Three submissions arrived too late to be considered.

The National Advisory Committee on the Prevention of Child Abuse (NACPCA) submission included a recommendation that mandatory reporting for sexual offences against children should be an integral part of the overall process of reform but this was not acted upon. The NACPCA supported s 23G but cautioned that it is for the court to decide whether or not a child is telling the truth and the expert witness 'must avoid usurping this role' (NACPCA, 1989:7). The Mental Health Foundation (MHF) supported the reforms adding that many of them were long overdue (MHF, 1989). The Association for the Protection of Sexually Abused Children (South Auckland) (APSACSA) recommended an inquisitorial system replace the adversarial system for the purposes of sexual abuse trials. APSACSA favoured the appointment of an 'Investigative Judge' who would 'operate in ways similar to the Procurator Fiscal in the Scottish system of Justice' (APSACSA, 1989:1). Such a judge would gather and analyze the evidence in order to arrive at a decision. The APSACSA submitted that 'certain principles/axioms, underlying the present adversarial system of justice would no longer assume the validity they currently hold in relation to sexual abuse trials if such an inquisitorial system were to be adopted' (APSACSA, 1989:2).

Trial barrister and former Senior Lecturer in the Law of Evidence, C.B.Cato reflected the adages of Hale J and Wigmore J when he submitted that 'it should not be forgotten that whether true or not, charges of sexual impropriety are difficult and unpleasant to refute' (Cato, 1989:1). He claimed that if the amendments were enacted trials would be weighted 'so heavily against a defendant that fair trial will be impossible, irrespective of judicial direction' (Cato, 1989:7). Cato was concerned about the proposed use of video tapes and argued that they would be 'unacceptable in lieu of evidence' (Cato, 1989:4). He predicted that inevitably there would be 'trial by expert on issues of credit' if s 23G(2)(c) were to be enacted in the form that was proposed (Cato, 1989:8). Cato

recommended cases of child molestation that 'may involve indecency but not such as to really warrant the intervention of the criminal law, particularly where families are involved' should be dealt with 'in the discretion of the police after consultation with the Crown Solicitor' (Cato, 1989:11).

Late submissions expressing anti-feminist sentiments from the Credo Society Incorporated (CSI)⁴⁷ and Pat Cook opposed the amendments. The CSI submitted the amendments were the result of 'feminist-inspired political activism' (CSI, 1989:3). Pat Cook alleged that 'anti-heterosexual' and 'anti-man biases' underpinned the Bill and questioned whether lesbians should be allowed to be expert witnesses (Cook, 1989). She also enclosed a copy of the October 1988 *Broadsheet* 'Herspective' in which Athena Tsoulis comments on the nuclear family and CSA. Cook submitted this as an example of feminist 'anti-heterosexual and anti-man' literature (Cook, 1989:2). The Bill was passed and the amendments to the Evidence Act 1908 became law in January 1990.

The 1990s

After the Labour Party was defeated at the 1990 election National was in government or led the government for nine years. The Labour Government had ignored the report of the Royal Commission on Social Policy and as a result of its free market and privatization policies, unemployment had increased. Hardship had been created by welfare benefits not being kept in line with inflation. Incoming National finance minister Ruth Richardson, reduced the already inadequate benefits drastically to enable the lowering of wages and penal rates. She followed much the same free market policies as Labour, but with greater vigour. Between 1989 and 1992, the number of New Zealanders living below the poverty line increased by 35 percent (Kelsey, 1995).⁴⁸

⁴⁷ The Credo Society Incorporated was formed in 1981 by Barbara Faithful and her supporters. Its aims were to protect society's morality, the interests of men and those of the family from what they saw as the scourges of feminism, socialism and communism (<http://menz.org.nz/menz-issues/may-1999/>).

⁴⁸ By 1993 one in six Aotearoa/New Zealanders was considered to be living in poverty (Kelsey, 1995). The Salvation Army's food parcel assistance increased by 76 percent in the first three months of 1991, by 432 percent in 1992 and by 30 percent in 1993 (Kelsey, 1995:292).

The contentious Evidence Act 1908 amendments were highlighted following the 1993 Ellis case and s 23G became the focus of much media debate.

Section 23G – the Expert Witness

Two important Appeal Court decisions preceded the introduction of s 23G. They were *R v B* [1987]⁴⁹ and *R v Accused* [1989].⁵⁰ *R v B* involved allegations of sexual assault by a child complainant under the age of twelve years and the Judge had ruled a psychologist's evidence inadmissible because

it was considered to be evidence on the ultimate issue and intended to usurp the function of the jury; it was opinion evidence, based on hearsay; it was evidence led by the Crown to "bolster the credibility" of its principal witness (*R v B* [1987], cited in Blackwell, 2005:2).

The appeal was declined but McMullin J noted that there 'may be a case for the enactment of special statutory provisions for the admission of evidence of the kind sought in this case' (*R v B* [1987], cited in Blackwell, 2005:2). Casey J suggested that

there may be room for a psychologist to give expert evidence of her observation and testing of the complainant with a view to saying whether the complainant's condition and reactions are consistent with those of a child of a corresponding age who had been sexually abused (*R v B* [1987], cited in Blackwell, 2005:2).

Two years later the expert evidence of a psychologist was ruled inadmissible in *R v Accused* but this case was successfully appealed on the grounds that the expert evidence

amounted to a powerful and almost unchallenged corroboration of the complainant's evidence, and went some distance to usurping the jury's function (*R v Accused* [1989], cited in Blackwell, 2007:85).

In his judgment McMullin J stated that in a CSA case the behaviours described by an expert witness

must be demonstrated in an unmistakable and compelling way and by reference to scientific material that relevant characteristics are signs of sexual abuse (*R v Accused* [1989] cited in *NZ Recent Law Review*, 1990:56).

⁴⁹ This case was: Court of Appeal, *R v B (an accused)* [1987] 1 NZLR 362.

⁵⁰ This case was: Court of Appeal, *R v Accused* (CA 174/88) [1989] 1 NZLR 714.

Bernard Robertson, editor of the *New Zealand Law Journal (NZLJ)*, claims the issue is more complex. As a critic of s 23G prior to and following its inception, Robertson argues that any behaviour can be interpreted as a reaction to sexual abuse and an expert's evidence is unlikely to satisfy the court's need for evidence of a 'standard beyond reasonable doubt' (Robertson, 1989:165). Robertson and Law Professor Tony Vignaux claim that the High Court Judges' rulings in both the above cases were correct and if the evidence had been allowed to be heard it would have been allowing 'evidence that was prejudicial and of no probative value' (Robertson & Vignaux, 2005:38). They question why it should have been necessary for Parliament to legislate s 23G when, under common law, as long as evidence was relevant and probative it would be admissible. They argue that evidence about whether "the behavior of the complainant is "consistent or inconsistent" with the behaviour of sexually abused children of the same age group" is of no probative value and is irrelevant. Robertson and Vignaux conclude that

Allowing a witness [a psychiatrist or psychologist] to say that evidence is consistent with sexual abuse without explaining what that means or without saying whether the evidence is consistent with other causes must inevitably lead to an unfair trial (Robertson & Vignaux, 2005:40).

S 23G was one of the legislative changes designed to make the court processes easier for children, to change attitudes towards child witnesses and to better inform juries about children's evidence (Pipe, Henergan, Bidrose & Egerton, 1996). However Robertson and Vignaux condemn what they call the 'fundamental incoherence' of s 23G(2)(c) and insist that 'the convictions of Peter Ellis and hundreds of others', who have been convicted after evidence was given under this section, must be reviewed (Robertson & Vignaux, 2005, 37). Barrister John Anderson also questions the ability of the amended law to provide justice for people charged with CSA. He argues s 23G(2)(c) evidence is 'purely the opinion of the witness' and cannot be relied upon⁵¹ (Anderson, 2003:10). These commentators' concerns are for the alleged abusers and do not show

⁵¹ The Evidence Act 1908 excluded 'opinion evidence' but it was admissible in some limited circumstances and where a matter called for specialist knowledge. In such cases an expert witness was permitted to state her or his opinion (Midson, 2003). Under s 25(1) of the Evidence Act 2006 'opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceedings' (Evidence Act 2006, s 25(1)).

interest in the well-being of child complainants. The veracity of children's evidence has always been contentious.

Children's Evidence

Ball contends that one of the main reasons for the comparative rarity of successful prosecutions in CSA cases has been that the law's stringent evidential requirements of children were based on an assumption that children are prone to 'invention, fantasy and a distortion of reality' (Ball, 1995:63). The 1990 legislative changes to the Evidence Act 1908 provided alternative ways for children to give their evidence, dispensed with judges' warnings to juries about a lack of corroboration and the need to scrutinize the evidence of young children or to suggest to juries that young children might have tendencies to invent or fantasize when giving evidence. Prior to these changes children gave evidence and were cross examined in an open court in front of the alleged perpetrator (Blackwell, 2007).

The 1990 amendments generated heated debate about the ability of children to remember what happened, their suggestibility, their truthfulness and their ability to give evidence in court. Ball argues that the 'essential issue' is whether a child is sufficiently developed intellectually and able to give a rational account of what has happened and that s/he understands the obligation to tell the truth (Ball, 1995). It is generally agreed that the memories of both adults and children are fallible and research psychologists Stephen J. Ceci and Maggie Bruck found no support for some of the extreme arguments on both sides of the debate that they say have appeared in the media - such as 'children never lie' or 'children cannot get it right because they cannot distinguish between reality and fantasy' (Ceci & Bruck, 1993:433). Some children are highly resistant to suggestion and are reliable witnesses while others do have difficulty distinguishing reality from fantasy and are susceptible to coaching by powerful authority figures. Ceci & Bruck conclude from their research that, though preschoolers are disproportionately more suggestible than older children and sometimes they will lie, 'children - even preschoolers - are capable of recalling much that is forensically relevant' (Ceci & Bruck, 1993:433).

Defence lawyer Gerald Nation,⁵² claims that the court's decisions are usually determined by the credibility of the child alleging the abuse. He adds, however, that such decisions are not always straight forward as courts are frequently faced with a convincing complainant on the one hand and a defendant who steadfastly denies the charges on the other. He points out that disciplines other than law have had input into how the law is investigated, presented and applied in CSA cases. Despite expert research being used persuasively to remove obstacles from the legal processes 'misconceptions remain in the community as to how abuse is perpetrated and how it affects those who are its victims' (Nation, 1997:1). A high proportion of CSA allegations continue to go unreported or the police are unable to make a case against the perpetrator with the evidence available. Psychiatrist Karen Zelas, an experienced expert witness who, as a member the NACPCA was an advisor on the amendments, maintains that the 'enlightened' amendments to the Evidence Act 1908 were legislated to empower and begin to redress the longstanding imbalance of power between the accused and a child complainant. There was also an endeavour to ensure that the best available 'information/evidence' is put before the court (Zelas, Unpublished:1).⁵³ The court process will always be an ordeal for the complainant and on occasions it can lead to a secondary victimization (Blackwell, 2007).

In Ball's view the reforms did not go far enough as the fundamental purpose of the 1990 amendments was to reduce stress and assist child complainants in giving their evidence (Ball, 1995). She claims a child was disadvantaged by the "competence test"⁵⁴ that gave the impression that s/he may not be believed. The competence test for child witnesses was removed in August 2007, by the Evidence Act 2006, but legal academic Alison

⁵² Gerald Nation has acted for both Crown and defence in sexual abuse cases. He was counsel for the four women who were charged in connection with the Ellis case (see Page 47).

⁵³ Zelas distributed her unpublished paper '*Trial by Expert, or Expert on Trial?*' at the breakfast sessions she ran for doctors. These sessions were set up to familiarize the participants with what was required of an expert witness in 'child abuse and family matters in general' (Zelas, Unpublished:1).

⁵⁴ Young children were not asked to take the oath but legal regulations required that they be examined to i) determine that the complainant understood the necessity to tell the truth and ii) obtain from the complainant a promise to tell the truth, where the complainant was capable of giving and willing to give, a promise to that effect. The judge was not present when the video interview was recorded so this task was carried out by the interviewer (Pipe et al 1996:18).

Cleland warns that juries' suspicions towards children's evidence may persist (Cleland, 2008:427).

Ball acknowledges that, like adults, children are suggestible but emphasizes that it is the skill, sensitivity and questioning techniques of the interviewer that are 'essential in eliciting the truth in child witness accounts' (Ball, 1995:80). She identifies a continuing struggle between two competing factors in cases where children allege they have been sexually assaulted.

On the one hand there is a need to ensure a fair trial to both the accused and the complainant and to follow the procedures used to maintain this balance. On the other hand there is a reluctance of society as a whole to accept the reality of child abuse and its effects on the concept of the family unit; this reluctance can perpetuate the belief that children lie, fantasize and make false allegations (Ball, 1995:81).

Ball claims CSA is a threat to the concepts of the "ideal" and "harmonious" family and that society perpetuates myths about children being liars to protect these ideals that, in reality, do not exist (Ball 1995). Reaction to amendments to the Evidence Act 1908 mobilized to protect these ideals.

Opposition to s 23G

Goodyear-Smith is concerned about the combined impact of the 1986 and 1990 legislative changes to the Evidence Act 1908. Although she has no legal qualifications she claims the reforms have resulted in the impartiality of the judicial system being seriously compromised in sexual assault cases by 'practices of validating and supporting complainants at the expense of the accused' (Goodyear-Smith, 1996:9). She argues that

The principles of the presumption of innocence, the requirement of corroboration, and concerns about the ability of children to be credible witnesses all have time-honoured legal tradition with which we tamper at our peril (Goodyear-Smith, 1996:10).

Hood also has no legal training but, based on her research on the Ellis case, maintains the 1990 amendments made it impossible for the Aotearoa/New Zealand justice system to 'reliably distinguish the innocent from the guilty' in cases where allegations of CSA

are made (Hood, 2003a:C4).⁵⁵ Another critic with no legal qualifications directs his condemnation at s 23G in particular. Australian psychiatrist Keith Le Page⁵⁶ claims s 23G is 'scientifically invalid and as a consequence innocent people have been imprisoned, others smeared for life and families have been destroyed' (Le Page, 1995, cited in Hood, Pet/0055/1/2003:5). Robertson describes s 23G as 'nonsense' (Robertson, 2005:A9).

Five years after the 1990 amendments became law, University of Otago researchers⁵⁷ Margaret-Ellen Pipe, Mark Heneghan, Sue Bidrose and Janice Egerton surveyed Children and Young Persons Services (NZCYPS), prosecutors, police, and defence lawyers to gauge their approval or disapproval of the new statutory provisions for child witnesses in sexual abuse cases. In their paper *Perceptions of the legal provisions for child witnesses in New Zealand* they report that generally the new provisions were perceived as 'satisfactory; but perhaps understandably it was defence lawyers who expressed most concern' (Pipe, Heneghan, Bidrose & Egerton, 1996:18). Defence lawyers found expert testimony given under s 23G to be 'least useful' and one described it as 'utterly pernicious' (Pipe et al, 1996:26). Blackwell claims that one of the reasons defence counsel are opposed to expert evidence is that they are no longer able to exploit myths about CSA such as the notion that late reporting of an allegation is an indication it did not happen (Blackwell, 2005). Judges, police, prosecutors and social workers were more positive in their estimations. There was a general consensus that expert testimony under s 23G was of most use to the prosecution. This view was expressed most strongly by the defence lawyers who were concerned that s 23G favoured the child complainant at the expense of the defendant (Pipe et al, 1996).

The Government's stated intention to remove the lump sum compensation available to victims of sexual assault was another event that brought the issue of CSA to the public's attention in the early 1990s.

⁵⁵ Hood says of the Ellis case that in her years 'of dredging through the mire in which this story has foundered' she found 'no evidence of illegality by anyone accused in this case' (Hood, 2001:33).

⁵⁶ Le Page was an expert defence witness in the Christchurch Civic Crèche case (see also Chapter Four).

⁵⁷ The researchers were from the Department of Psychology and the Faculty of Law.

The Accident Compensation Corporation

The Government's proposals to restructure the Accident Compensation Corporation (ACC)⁵⁸ systems were set out in Finance Minister Richardson's July 1991 "Mother of all Budgets". While ACC would continue to fund counselling for victims of sexual assault, the \$10,000 lump sum compensation for pain, suffering and loss of enjoyment of life would be abolished. Richardson's budget announcement prompted many women's organizations throughout Aotearoa/New Zealand to advise their clients that if they were thinking of making an application for compensation now was the time to do it.⁵⁹

In the ACC Annual Report, presented to Parliament on 1 October 1991, the Chairman Colin Beyer claimed payouts 'in the range of \$30 million and \$50 million a year' for sexual abuse claims were being made. Beyer said he was uneasy because it was almost impossible to check the 'veracity of claims, particularly when they relate to events that took place 10 or 15 years ago' (ACC, 1991:10). He noted a case where ACC had paid compensation of \$10,000 for a sexual abuse claim but when the case went to court the accused was acquitted. Contrary to Beyer's claims however, at the time the Report was presented ACC payments for sexual assault had not exceeded \$10 million per annum. The number of claims was certainly increasing. In 1990 there were 667 sexual assault claims and \$5,969,935 was paid out in compensation. In 1991 the payout of \$9,925,067 paid to 1,075 claimants and this was the largest amount that ACC had ever paid to victims of sexual assault. ACC's figures show that in 1992 there were 2,175 claims, with approx \$20 million being paid in compensation and \$4.3 million in counselling fees (Newbold, 2000:135, THAW, 1992:9).⁶⁰ When The Health Alternatives

⁵⁸ The budget announced that lump sum payments for non-economic loss, including permanent disability, pain and suffering and loss of enjoyment of life were to be abolished. At a meeting in Christchurch Public Library's Stringleman Room on 25 November 1991 Ross Wilson, a former deputy chairman of ACC, alerted attendees to the fact that, along with other social services, ACC was being prepared to become a State Owned Enterprise which could then be sold. Wilson reiterated this claim in January 1992 (NZPA, 1992:9).

⁵⁹ Rape Crisis Centres, The Help Foundation, Women's Centres, Women's Refuges, The Federation of Women's Health Councils, THAW and others circulated the information to women.

⁶⁰ The figures quoted were supplied to Greg Newbold by ACC on 23 June 1993 and 16 November 1998 (Newbold, 2000). The head office statistics section of ACC supplied a different figure for the year ending 31 March 1991 to The National Collective of Rape Crisis and Related Groups of Aotearoa Inc.

for Women (THAW), in an oral submission to the Select Committee considering the Accident Rehabilitation and Compensation Bill, questioned Beyer's \$30-50 million figure, the ACC representative advised the select committee the figure was an estimate.⁶¹

The introduction to Parliament of The Accident Rehabilitation and Compensation Insurance Bill⁶² on the 19 November 1991 was followed by the publication of newspaper articles that covered ACC rape claims where compensation had been paid but the alleged perpetrators had been acquitted by the courts (Vasil, 1991, *Sunday News*, 1991). These articles were condemned by many women's organizations who pointed out that while an acquittal indicated that the evidence presented had not proven the case beyond reasonable doubt, it did not necessarily mean that the alleged perpetrator had not assaulted the complainant. Women's organizations were already upset by the Minister of Labour's announcement the previous month that drunk drivers were not about to lose their earnings-related compensation while victims of sexual assault were to lose their lump sum compensation (NZPA, 1991).⁶³

It is reasonable to assume that the increase in ACC sexual assault claims was contributed to by the impending abolition of lump sum compensation and to the 20.8 percent increase in reported sexual assaults (New Zealand Police, 1991). The total

(NCRCRGA) when the organization was preparing a submission for the Accident Rehabilitation and Compensation Insurance Bill. On 15 January 1992 ACC stated that sexual abuse claims made up about 5.42% of \$159,029,620 – the total claims for pain and suffering and loss of enjoyment of life (NCRCRGA, 1992). This amount was \$29,341,258 (and almost reached the lower figure of the chairman's claimed \$30-50 million). This figure was not correct - it was nearly twice as much as the claims for 1990 and 1991 put together.

⁶¹ This was confirmed by an ACC Corporate Office researcher on 29 September 2006. The researcher also stated that ACC had destroyed all statistics that preceded 1992.

⁶² The New Zealand Law Society's (NZLS) submission to the Bill labelled the abolition of lump sum payments for non-economic loss, including permanent disability, pain and suffering and loss of enjoyment of life as 'the clearest possible breach of the social contract' (NZLS 1992, cited in Kelsey, 1995:204).

⁶³ It is interesting to note that, at the same time ACC was relinquishing compensation payments for victims of sexual assault ACC Managing Director Jeff Chapman was helping himself to ACC money he was not entitled to. In September 1994 Chapman, who by then had become Auditor General, resigned his position. He was charged with 'milking ACC and Audit Office money for private use' and was convicted on ten fraud charges. An example of Chapman's extravagance is the helicopter he hired at public expense to take him and his wife from Nice to Monte Carlo (Welch, 1997/2004:150,152)

amount paid by ACC to victims of sexual assault was between 1.5 and 2.5 percent of the total ACC annual payout and during the year ending 31 March 1991 the number of ACC claims paid out to women was one third of the number of claims paid out to men overall (THAW, 1992). Lump sum payments were abolished by the Accident Rehabilitation and Compensation Act in 1992 but over the next four transitional years nearly 110,000 further payouts were made for 'historical claims' (Newbold, 2000:135).⁶⁴

National Governments 1990-1999

The 1992 referendum on electoral reform enabled people to vote overwhelmingly against the "First Past the Post" (FPP) electoral system that had allowed monetarist policies to 'run rampant' (Bunkle, 1993:88). Consequently the 1993 election included a referendum on "Mixed Member Proportional Representation" (MMP) and was the last to employ the FPP electoral system. Although 1,178,344 electors voted against the National party and only 673,892 voted in favour of it, National won the election by one seat (Trotter, 2007:344). Jim Bolger remained Prime Minister but Richardson was no longer Finance Minister. A period of economic prosperity followed the 1993 election and saw unemployment decline. In the new electoral environment the domination of the two main parties began to diminish a little.

At the 1996 MMP election the National party's share of the vote remained more or less unchanged while the Labour vote dropped significantly. Winston Peters' recently formed New Zealand First party won seventeen seats and unexpectedly entered into a Coalition Government with National. Peters was an 'old fashioned conservative' (Trotter, 2007:353). He opposed the Douglas/Richardson economic policies and Chris Trotter thinks he suspected Bolger did too. Bolger remained Prime Minister until Jenny Shipley ousted him in 1997. The following year Prime Minister Shipley sacked Peters from his positions as Treasurer and Deputy Prime Minister and disestablished the National/New Zealand First Coalition.

⁶⁴ Newbold cites the *COSA Newsletter*, v.6 (3):2 which states the total cost of these claims was about \$50 million. Gordon Waugh does not source the figures that he used when he addressed the Australian False Memory Association in Melbourne and claimed that ACC paid out close to \$900 million during the transition period (Waugh, 18 September 1999).

Throughout the 1990s and continuing into the 2000s critics of the Evidence Act 1908 amendments protested they were flawed, meaningless and likely to lead to miscarriages of justice (Goodyear-Smith, 1996; Waugh, 1999; Hood, 2002; Robertson and Vignaux, 2005). Some alleged that a “sex abuse industry” had emerged (Goodyear-Smith, 1996; Waugh, 1999; Hood, 2002) and it had ‘replaced injustice towards the abused with injustice towards the accused’ (Hubbard, 2003:C3).

Psychological Research

Opponents of s 23G frequently invoke science and legal tradition to uphold their arguments but they are unlikely to consider the power relations that are implicit in CSA cases. Zelas raises the power differential between adults and children and also points out that psychiatrists think in ‘shades of grey’ while lawyers think in ‘black and white’ (Zelas, Unpublished:3). However, psychologist Barry Parsonson questions Zelas’ credibility in a letter to the *NZLJ*. He claims that many psychiatrists, including Zelas, are unaware of the significant body of psychological research that exists in respect of children’s memory and suggestibility. When psychological evidence is cited in Courts, he argues, it should be drawn from a ‘settled body of scientific opinion’ (Parsonson, 2002:130). Parsonson is critical of s 23G’s provision for experts to, what he calls, ‘rely on their experience’ because of the danger that this could be ‘limited, biased and entirely unrepresentative, thus lacking in probative value’ (2002:130). Parsonson claims that some psychologists actually discount scientific research in favour of their experience and that these people should not be employed as expert witnesses.

Like Hood, Michael Hill⁶⁵ claims the Ellis case was the direct result of a moral panic about “satanic ritual abuse” that originated in the United States and ‘so-called experts...precipitated much of the panic’ (Hill, 2005:98). Leah Haines’ comment that in 1993 ‘the world was in the grip of a moral panic about ritualistic abuse’ following Prue

⁶⁵ Michael Hill is Professor of Sociology at Victoria University of Wellington. In 1991-92 he worked at the London School of Economics with Professor Jean La Fontaine who conducted the official British Government Inquiry that dismissed the idea there was an epidemic of satanic ritual abuse in the United Kingdom (Hill, 1995).

Vincent's case (see page 58), illustrates how, by 2001, this theory was viewed as fact by a mainstream journalist. After Peter Ellis' conviction in 1993 for sexual offences against children in his care at the Christchurch Civic Crèche his case became a vehicle around which the critics of the 1990 amendments marshalled their case.

The Ellis Case – A Vehicle for the Critics of s 23G

Ellis has always maintained his innocence and the media have followed his case closely since his arrest in March 1992.⁶⁶ Developments always engender extensive publicity and Ellis' release from prison in 2000 was accompanied by a celebrity style media conference. His case is frequently cited when the subjects of expert witnesses or miscarriages of justice are raised.⁶⁷ References to Ellis' case are regularly included in media articles on CSA⁶⁸ or men/teachers working in childcare or pre-school education⁶⁹ or not directly related to the case at all.⁷⁰

Pressure was put on the Government to instigate an inquiry into the Ellis case and in 1995 when Deputy Solicitor-General Lowell Goddard considered submissions⁷¹ that supported such an inquiry her decision did not concur with them (Hood, 2001). In 1998

⁶⁶ In 1994 Ellis' case went to the Appeal Court twice. (On the first occasion the Appeal was aborted because Nigel Hampton QC became ill.) Also in 1994 one of the children retracted her allegations against Ellis. In 1995 he applied for legal aid to take his case to the Privy Council and was declined. Also in 1995 the Civic Crèche staff's employment case was heard and the Government rejected calls for a Commission of Inquiry into Ellis' case. In 1996 the Civic Crèche staff Employment Court Appeal was heard and in 1997 Ellis petitioned for a royal prerogative of mercy which was referred to the Court of Appeal in 1998. He petitioned again in 1998 and in 1999 his case was referred to Sir Thomas Thorpe. In 1999 Ellis refused parole, because to accept it he would have to acknowledge his guilt, and later that year he petitioned again for a royal prerogative of mercy. This time his petition was referred to Sir Thomas Eichelbaum. The Eichelbaum Report was released in 2001 after Ellis had been released from prison. The Government rejected calls for a pardon and a commission of inquiry (Hood, 2001). The publication of Hood's award winning book, later in 2001, and the presentation of two petitions to Parliament, in 2002, received extensive media coverage. The petitions were referred to the Justice and Electoral Select Committee and the hearing of submissions in 2003, and the release of the Committee's report in 2005, also attracted considerable publicity.

⁶⁷ Citing of the Ellis case may be found in: Newbold, 2000; Hood, 2001; Anderson, 2003; Robertson, 2005; van Beynen, 2006.

⁶⁸ Examples of the Ellis case being cited in the media may be found in: Seymour, 1996; Editorial *NZLJ*, 2006; Harward, 2007.

⁶⁹ Examples of articles about child care and preschool that cite the Ellis case, are: Jones, 2003; Nichols, 2006.

⁷⁰ An example of the Ellis case being cited in an article when it was not directly related to the topic is Matthews, 2008.

⁷¹ Among these submissions was the one from Le Page which was highly critical of s 23G(2)(c) and is often cited by Hood.

Sir Thomas Thorp considered Ellis' petition to the Governor General for a free pardon and a Royal Commission of Inquiry. Sir Thomas' report, released in 1999, stated the case gives grounds 'for reconsidering the appropriateness of the 1989 amendments and the NZCYPS/Police guidelines in the light of current scientific opinion' (<http://www.peterellis.org/docs/1999/Thorp/07.htm>). Justice Minister Phil Gough ordered a Ministerial Inquiry into the reliability of the Ellis convictions in 2000. Sir Thomas Eichelbaum's Report on the Inquiry was released in March 2001 and upheld the convictions.

A flurry of publicity surrounded the launch of Hood's book *A City Possessed: The Christchurch Civic Crèche Case – Child Abuse, Gender Politics and the Law* in 2001. When it won the 2002 Montana Book Award for Non-fiction there was more media attention. The presentation on the steps of Parliament in 2003, of one of two petitions requesting a Royal Commission of Inquiry, was accompanied by further publicity.⁷² The petitioners wanted, not just a re-examination of the Ellis case but, a full scale investigation into the ability of the judicial system to dispense justice in CSA cases.

In a written submission to the Justice and Law Reform Select Committee that was considering the petitions, Hood cited Le Page's criticism (see page 42) of s 23G and the recommendations made in Sir Thomas Thorp's 1999 report. Hood was critical of the Eichelbaum Report's finding that the children's evidence was reliable. She and Robertson together with Dr George Barton QC and research psychologist Dr Maryanne Garry also presented an oral submission during which Hood told the Select Committee that

After 7 years of detailed research and analysis, I was faced with the inescapable conclusion that the child abuse scandal that ripped Christchurch apart was based on a botched investigation into a crime that never happened. In this case, the justice system failed, and failed catastrophically, at many levels, and has been unable to self-correct (Hood, 2003:3).

⁷² The petitions were: Petition 2002/55 of Lynley Jane Hood, Dr Don Brash and 807 others and Petition 2002/70 of Gaye Davidson and 3346 others.

The Select Committee recommended the Attorney-General not oppose, or oppose only in principle, Ellis' proposed application for leave to appeal to the Privy Council and that legal aid be provided for this purpose (Justice and Electoral Committee, 2005:17). In respect of the alleged justice system failure the Committee recommended that the Justice and Electoral Committee of the next Parliament

examine the operation from 1990 of the 1989 amendments to the Evidence Act 1908 relating to rules in sexual abuse cases involving child complainants, and the role of experts in the consideration of the evidence from such children, bearing in mind the risk that professional thinking can be affected by evolving theories, and make appropriate recommendations in its consideration of the Evidence Bill...(and) inquire as to whether the evolution of the trial process in the Family Court into an inquisitorial-type hearing may not be a pointer to a better way of determining criminal guilt in allegations of sexual abuse by vulnerable children (Justice and Electoral Committee, 2005:12).

The opponents of s 23G(2)(c) felt vindicated in 2006 when Judge Madgwick, an Australian judge, refused to extradite two men who were facing historical CSA charges on the grounds that they would not receive a fair trial in Aotearoa/New Zealand. An Editorial in the *NZLJ* heralds Judge Madgwick's decision as a 'badly-needed external assessment of what has been going on in New Zealand' (*NZLJ*, 2006:121). The Editorial called for an inquiry into 'every case in which prosecution evidence was given under s 23G(2)(c) of the Evidence Act 1908' (2006:121).

In December 2008 Hood and ex-National MPs Don Brash and Katherine Rich wrote to the new National Government Minister of Justice, Simon Power, appealing for a Royal Commission of Inquiry into the Ellis case. In October 2009 their appeal was turned down. The Minister pointed out that Ellis had not taken up the opportunity available to him of appealing to the Privy Council. These events were accompanied by further publicity and polarized debate.

An announcement that a further petition to the Governor General is going to be made by Ellis, was made in late December 2010. Professor Harlene Hayne of Otago University, has analyzed transcripts of the interviews held with the children and claims to have

found evidence that suggests questioning was ‘not of a proper legal standard’ (Duff, 2010:A2).

The last two decades of the twentieth century saw a dramatic increase in the number of allegations of CSA being made in Anglo-American jurisdictions. Perhaps it was predictable that considerable controversy arose as to the veracity of historical allegations and the validity of claimants’ memories (Thomson, 1995:97). The next section considers the emergence in the 1990s of organizations to protect men from false allegations of CSA and the contested nature of memory.

False Memory Syndrome

In some jurisdictions lobby groups formed in the 1980s, to protect men from false allegations of CSA. One such group, Victims of Sexual Abuse Laws (VOCAL) in the United States of America, was founded by Ralph Underwager in 1984. Parents Against INjustice (PAIN) was set up in Britain in 1985 and made a submission to the 1987 Cleveland Inquiry.⁷³ Soon afterwards PAIN groups formed in Aotearoa/New Zealand. During the 1990s new organizations began to appear in response to the legislative changes designed to make the court processes easier for child complainants. The “false memory syndrome” (FMS) movement originated in the United States of America with the setting up of the False Memory Syndrome Foundation (FMSF) in 1992. The FMS movement claims a wide range of supporters that are said to include ‘academic psychologists, therapists, clients, journalists, authors, family members and lawyers’ (Raitt and Zeedyk, 2000:135). FMS is not a medical term; the phrase was coined by the FMSF. Although the *Diagnostic and Statistical Manual (DSM)*⁷⁴ does not recognize it and it has no official status, FMS is increasingly being used to account for adult memories of CSA. Psychologist Kenneth S. Pope cites seventeen researchers who co-authored a statement objecting to the term FMS. They argue it is ‘a non-psychological

⁷³ The Cleveland case was the subject of widespread controversy in Britain. Two doctors at the Middlesbrough General Hospital noted cases of anal dilatation during routine examinations of children. Further investigation led them to diagnose 121 cases of CSA. This led to a public outcry and a judicial inquiry. The Inquiry’s Report was critical of the ‘management of the crisis’ and ‘exonerated’ the doctors’ diagnoses (Campbell, 1988:210).

⁷⁴ The internationally used *Diagnostic and Statistical Manual of Mental Disorders (DSM)* is the American Psychiatric Association’s manual of mental disorders.

term that has been originated by a private foundation whose stated purpose is to support accused parents' (Pope, 1996:959).

The FMSF⁷⁵ formed to support families who are or have been involved in allegations of CSA made by adult women. The FMSF is particularly sceptical of allegations based on recovered memories.⁷⁶ The FMSF claims 'within a couple of years more than 17,000 families had contacted the Foundation' complaining of false complaints of sexual abuse (Bourke, 2007:38). The Foundation also claims it has been contacted by 70 retractors (people who had accused a family member of sexual abuse and now believe they were mistaken) (Marshall, 1997:111). The FMSF alleges that many therapists have been guilty of making suggestions about childhood sexual abuse to their clients who have come to believe it has happened to them (Pope, 1996). In Britain "Adult Children Accusing Parents" formed in the early 1990s but members saw the wisdom in renaming the organization so as to sound more like a learned society than a pressure group. It became the "British False Memory Society" (BFMS) (Kitzinger, 2003). The "Australian False Memory Association" was formed in March 1995 (Waugh, 1991).

The FMSF is sceptical about CSA that has been forgotten and then recalled in therapy. Some memory theorists employ the concept of "repressed memory" to explain the inaccessibility of early traumatic memories. Psychology professor Donald Thomson argues

An unconscious mechanism protects the self of the individual from being overwhelmed by the memories of the traumas by quarantining these experiences from the consciousness (Thomson, 1995:97).

⁷⁵ One of the founders of The False Memory Syndrome Foundation was Pamela Freyd whose daughter, Professor Jennifer Freyd, alleges her father Peter Freyd, sexually abused her when she was a child. Pamela Freyd became the Executive Director of the False Memory Syndrome Foundation and Pope cites her describing the behaviour of her daughter as 'gestapo like' (Pope, 1996:970).

⁷⁶ Some psychologists argue that repressed memories are recoverable, that the majority of recovered memories are true and the incidence of false memories is relatively rare. On the other hand FMS advocates claim that because there is no known mechanism by which a person could forget and then recover memories of CSA, all memories must be false (Kristiansen, 1996:2).

FMS advocates disagree. They allege the recovered memories are likely to have been implanted by therapists who use improper techniques.⁷⁷ Some memory theorists argue that previously unreported allegations of CSA are no more than unconscious or conscious fabrications while others claim they are delusions (Raitt and Zeedyk, 2000). This contentious issue has caused a division within the discipline of psychology which will be outlined in Chapter Five.

In Aotearoa/New Zealand Goodyear-Smith (see note 29) was involved with the Central Auckland sexual assault centre in 1982. She became a trustee and the Chair of the HELP Foundation Trust and contributed to the pioneering services of Doctors for Sexual Abuse Care (DSAC) which was set up in 1988. DSAC doctors were aware of cases where both child and offender testified that penetration had taken place but there was no physical evidence to support this. They were concerned that doctors frequently expressed opposing views in court and that as well as being unhelpful this undermined the credibility of medicine as a science (Shand, 12 September 1991). Goodyear-Smith later parted company with DSAC because of what she described as an 'increasing divergence' between DSAC's perspective and her own (Goodyear-Smith, 1997b:7). She did not agree with the emphasis DSAC put on the rarity of false allegations of sexual assault. DSAC had granted Goodyear-Smith an honorary life membership for her work but changed its constitution to enable the annulment of the membership after Goodyear-Smith's focus shifted to testifying in the defence of men who said they had been falsely accused of sexual assault (Hume, 2009).⁷⁸

Goodyear-Smith joined Colleen and Gordon Waugh⁷⁹ who were also critics of the amendments to the Evidence Act 1908 and together they established "Casualties of Sexual Allegations" (COSA) in 1994. COSA, they claimed, was a response to men

⁷⁷ Fiona Raitt and Suzanne Zeedyck argue that FMS provides 'a prime illustration of the way in which psychological syndromes are culturally situated and politically inspired' (Raitt and Zeedyk, 2000:135).

⁷⁸ After DSAC affiliates, Drs Janet Say and Patrick Kelly, rebutted an article in *NZ Lawyer* in which Goodyear-Smith (2007) argues that genital gonorrhoea in pre-pubescent girls does not necessarily indicate sexual abuse, Goodyear-Smith took legal action against them (Hume, 2009).

⁷⁹ At a presentation to Psychology Honours Students at Victoria University of Wellington in 2002 Gordon Waugh explained that in 1992 his daughter accused him of molesting her when she was a child (<http://www.menz.org.nz/cosa/address-to-psychology-students>),

being 'falsely accused, charged and sometimes convicted of sexual crimes in the absence of any police scepticism or objective investigation into allegations' (Goodyear-Smith, 1997:8). Since it came into being COSA has actively lobbied Government and worked to raise public awareness about the situation of men who the organization believes, have been falsely accused of, charged with, or convicted of, sexual assault.

Opponents of s 23G campaigned for nearly seventeen years for its removal. They questioned the credibility of children's evidence, the validity of recovered memories as well as the testimony of expert witnesses. When there are no witnesses to an assault on a child a jury is charged with making a decision based on the evidence that is available. In such circumstances a conviction based on 'proof beyond a reasonable doubt' is difficult to achieve and the evidence of an expert witness might have a significant bearing on the verdict (Dawson, 2001:39). The Ellis case is regularly cited as an example of how, following the Evidence Act 1908 amendments, many of the 'traditional safeguards that protected the reliability of evidence in criminal cases no longer applied in child sexual abuse cases' (Hood, 2001:113).

The 2000s

National were soundly beaten in the 1999 election following which Labour and the Alliance⁸⁰ formed a "loose" coalition. Feminists celebrated as Labour's Helen Clark began what was to be her nine year period as Prime Minister. They were aware that a Labour led Government would be more sympathetic to the social issues they raised than the National/National-led Governments of the previous nine years had been.

Parliamentary politics during the early years of 21st Century in Aotearoa/New Zealand were dominated by Labour-led coalition governments. Controversy surrounded legislation decriminalizing prostitution, the provision of "Civil Unions"⁸¹ and the repeal of s 59 of the Crimes Act.⁸² Court cases involving prominent citizens and members of the

⁸⁰ The Alliance Party had been formed in 1991 by the New Labour Party, the Green Party, the Mana Motuhake Party and the Democrat Party.

⁸¹ The Civil Union legislation enabled lesbians and gay men to legalize their relationships.

⁸² The repeal of s 59 of the Crimes Act became known as the "anti-smacking" legislation.

police force ensured that the issues of sexual assault and CSA maintained a high public profile. The next section will identify some of the high profile sexual assault cases that were adjudicated during the 2000s. It will cover the very public discrediting of two CSA expert witnesses that are thought to have influenced prosecutors' decisions to abandon s 23G. It will also describe the emergence of the Innocence Project, another organization advocating for people facing false allegations of criminal behaviour.

High Profile Sexual Assault Cases

As well as all the publicity generated by the Ellis supporters and the opponents of s 23G, intense media coverage of sexual assault cases involving well known citizens and members of the police force attracted the media's attention. The court cases were those of General Practitioner and Deputy-Mayor of Christchurch Dr Morgan Fahey,⁸³ the leader of the Christian Heritage Party and ex-police prosecutor Graham Capill, the Auckland Assistant Police Commissioner Clint Rickards and ex policemen Brad Shipton and Bob Schollum.

Fahey pleaded guilty to thirteen sex charges, involving patients and including rape. He was sentenced to six years in prison in June 2000. His conviction shocked the nation - particularly the people of Christchurch and the medical establishment (Editorial, *The Press*, 2000). Later that year he was struck off the medical register for 'disgraceful conduct' (Clausen, 2000:2). Capill, Leader of the Christian Heritage Party and 'New Zealand's one time moral crusader', was sentenced to nine years in prison for raping, sexually violating and indecently assaulting three girls aged between five and eleven (Henzell, 2005:1). At their 2006 trial Rickards, Shipton and Schollum admitted to having had sex with Rotorua woman Louise Nicholas in 1985-86 but they claimed that it was consensual. The jury found them not guilty. The jury was not allowed to know that Shipton and Schollum were already in prison for raping a 20 year old woman in 1989 and that all three accused were yet to be tried for kidnapping, handcuffing, and indecently assaulting another Rotorua teenager with a bottle in 1983-84. The jury were

⁸³ Fahey received the OBE in 1977 for community services and he headed the World Association of Emergency and Disaster Medicine.

also not allowed to know that ex-detective inspector John Dewar had been charged with four counts of trying to pervert the course of justice in relation to Nicholas' complaints (Nicholas & Kitchin, 2007). In 2007 Rickards, Shipton and Schollum were found not guilty of sexually assaulting the unnamed woman who was aged sixteen when the alleged assaults took place. Later that year Dewar was convicted of 'four counts of attempting to obstruct or defeat the course of justice relating to Mrs Nicholas' complaints of sexual offending by police in the 1980s' (Kitchin, 2007:A5).

Each of these cases provoked strong public condemnation. 29,000 people had voted Fahey for mayor despite TV3's 20/20 programme revealing three former patients' allegations of Fahey's sexual misconduct, being broadcast less than a week before the election. Rape Crisis spokesperson Claire Benson commented that

People still want to believe that it's the dirty old stranger waiting in the park for the kiddie. The reality is that a sex offender may be a father, a trusted friend, or a family doctor who is a fine, upstanding pillar of the community. Nobody wants to believe that these people are capable of such acts (Benson, cited in Martin, 2000:2).

The revelations that followed the Rickards, Shipton and Schollum verdicts prompted feminists to organize a candlelight vigil outside the Wellington High Court. Pickets and protest marches took place in most of the main centres. People were outraged that so much of Nicholas' personal history had been revealed in court while the defendants' histories were suppressed (Dickens and New Zealand Press Association, 2007). The New Zealand Press Association (NZPA) quotes Andrea Black of Rape Crisis as saying she had no doubt that

The latest trial or earlier Louise Nicholas trial would have turned out differently if details of Shipton's and Schollum's convictions had not been suppressed. "It's not a justice system, it's a legal system" (NZPA, 2007:A3).

In February 2004 Prime Minister Helen Clark announced that a Commission of Inquiry would carry out a 'full, independent investigation into the way in which New Zealand Police had dealt with allegations of sexual assault by members of the police and associates of the police' (<http://www.cipc.govt.nz/>). The Commissioner for the Inquiry was Dame Margaret Bazley. The Commission reviewed all police investigative files on

complaints of sexual assault by police since 1979. It also examined the police policies during that time. A 1979 manual reflects the words of Hale J, Wigmore J and Cato when it warns that 'false rape complaints are not uncommon' (Dewes, 2007:B5). The Commission's Report, published in April 2007, cites evidence of "'disgraceful" conduct by officers exploiting vulnerable people since 1979' (Dewes and Watt, 2007:1). It highlights

a "wall of silence" from officers protecting colleagues, systemic flaws in dealing with allegations of sexual abuse by police – including the lack of a basic code of conduct or clear rules for complaint processes – and negative stereotyped views of complainants (Dewes and Watt, 2007:1).

Recently revelations alleging Pope Benedict XVI's role in covering up past allegations of CSA against Catholic clergy, have shocked the Western world. It is alleged that when the Pope was the archbishop of Munich he approved the transfer of an abusive priest to another jurisdiction. It is also alleged he failed to discipline Father Lawrence Murphy, who abused up to 200 boys at a Wisconsin school for the deaf. Having obtained internal church documents as part of their lawsuit, United States lawyers are now determined to sue the Vatican for access to documents that indicate the church's past policy in respect to paedophile priests. The Catholic Church in the United States has already paid out more than \$NZ1.56 billion in compensation to victims since 2004 (The Sunday Times, 2010:B3). In Aotearoa/New Zealand the Catholic Church has paid more than \$5 million to victims of the St John of God Order. CSA has also been exposed in institutions run by the Salvation Army and the Presbyterian Churches (McLeod, 2010:B4).

The publicity generated by these cases together with the Police Commission of Inquiry's Report resulted in the issues surrounding sexual assault being regularly discussed in the media during the first decade of the 21st century. Further publicity was generated by the discrediting of two CSA expert witnesses.

Expert Witnesses on Trial

Evidence Zelas had presented was blamed for a possible miscarriage of justice by the Appeal Court and, at a New Zealand Psychologists Board meeting, psychologist and

Family Court expert witness Prue Vincent admitted two charges of conduct unbecoming. Both women were high profile child advocates.

In August 2003 the Court of Appeal quashed the sixteen convictions of a man who had been accused of sexually abusing three young girls. The judges said Zelas could have been perceived as an advocate for the complainants rather than as a truly independent expert (Hubbard, 2003:C3). A retrial was ordered because Zelas was found to have “gratuitously” exceeded the scope of permissible expert opinion’ during her testimony (Conway, 2003:5). She departed from her agreed brief of evidence when she commented that there was ‘no known prior sexual abuse’ of one of the complainants (Conway, 2003:5). The judges ruled that this comment also carried the inevitable inference that the matters before the Court were sexual abuse. Zelas also gave evidence that it was ‘unrealistic for a young child to be able to accurately estimate distances or describe geographical locations’ (Conway, 2003:5). The judges ruled that this was not so much an opinion as an apology for the quality of the child’s evidence in certain respects. Together, they said, these evidential breaches by Zelas amounted to a miscarriage of justice. *The Press* accompanied Matt Conway’s report on the Court of Appeal’s decision with the headline ‘Expert for Ellis gets blame’ (Conway, 2003:5) and *The Sunday Star-Times* titled Anthony Hubbard’s article ‘Are courts over Zelas?’ and subtitled it ‘Child psychiatrist Karen Zelas, a key prosecution witness in the trial of Peter Ellis is blamed for a possible miscarriage of justice in another sex abuse case.’ (Hubbard, 2003:C3).

Two years earlier psychologist Prue Vincent⁸⁴ had pleaded guilty to two charges of conduct unbecoming that were laid against her by the New Zealand Psychologist’s Board. The case was reported to *The Dominion* newspaper by the father of the family involved. He was angry because although she had pleaded guilty, Vincent had not been struck off the psychologists’ register. He alleged she was responsible for his being ‘cut

⁸⁴ Vincent was one of the authors of the New Zealand Psychological Society’s 1996 handbooks, *The Practice of Psychology and the Law: The Role of the Expert Psychological Witness in Criminal Trials Involving Child Sexual Abuse* and *The Practice of Psychology and the Law: Guidelines for Psychologists Working in the Courts Regarding the Assessment of Allegedly Sexually Abused Child*.

off from his young family after accusations of sexual abuse' (Haines, 2001:1). The events at issue occurred when Vincent was employed by New Zealand Child, Youth and Family Services (NZCYFS)⁸⁵ and was working with a family whose case was before the Family Court.⁸⁶ Vincent was asked to prepare a report for the Family Court. It was during the preparation of this report, when she had sessions with the children, they told her they had been sexually abused. Journalist Leah Haines records that the Board charged Vincent with not handling the "transition" between roles properly' (Haines, 2001:1). The client was referred to Vincent in 1993 when, according to Haines, 'the world was in the grip of a moral panic about ritualistic abuse and "recovered memory" of past sexual abuse' (Haines, 2001:1). Haines describes Vincent as one of Wellington's most experienced family court psychologists. She was once head of Social Welfare's psychologist team, and is a 'leading expert in child sexual abuse' (Haines, 2001:1). Haines' report alleges that Vincent had 'botched a sex abuse investigation that left a man wrongfully accused of molesting his young children' (Haines, 2001:1). She was fined \$5,000.00 and given a letter of censure from the Psychologist's Board and, according to psychologist and researcher Johnathon Harper, NZCYFS have stated that Vincent will not be employed again (Harper, 2006:70). The case was reported on widely in the media.⁸⁷ Vincent did claim that she

was not to blame for the decision made in the man's case in the family court, comprising a number of decisions between 1994 and 1999. She implied that, since the court scrutinized her work and cross-examined her rigorously when she appeared she was not responsible for court decisions of abuse in those instances (<http://www4.wave.co.nz/~brianr/PrueVincent/>).

While these events involved the Family Court rather than the Criminal Court, the polarized nature of the debate meant that those who opposed the 1990 amendments saw Vincent's humiliation as their triumph (<http://www4.wave.co.nz/~brianr/PrueVincent/> and <http://www.menz.org.nz/new.htm>).

⁸⁵ New Zealand Child, Youth and Family Services were formerly New Zealand Children and Young Persons' Services.

⁸⁶ On occasions CSA is an issue in custody and access cases.

⁸⁷ Other media that reported on Vincent's case included: 'Fine Censure in botched inquiry' in *The New Zealand Herald* 4 December 2001:A5; 'Psychologist still working' in *The Press* 4 December 2001:2; 'I am not to blame, says psychologist' in *The Press* 5 December 2001:6, *Radio New Zealand Nine to Noon* - an Interview with Dr Barry Parsonson (Former Chair of Psychologists Board) 4 December 2001.

Vincent and Zelas were both high profile advocates for sexually abused children. Vincent's disciplining did not involve evidence presented under s 23G but when viewed alongside the judicial finding against Zelas' evidence the two events were seen by s 23G opponents as significant. By 2005 prosecutors had stopped employing s 23G expert witnesses. Experienced expert witnesses Blackwell and Seymour supported the abolition of s 23G in their submission to the Evidence Bill 2005. They said it has become 'fraught with difficulty' because Court of Appeal decisions have 'rendered such evidence almost impossible to lead' (Blackwell and Seymour, 2006:11). S 23G evidence was not used in any CSA trials during the twelve months from May 2005 to May 2006. Blackwell is of the opinion that 'Given the variability of child response to sexual offending against them, it is easy to see that the "consistent/inconsistent" wording of s 23G(2)(c) was doomed from the start' (Blackwell, 2005:6). Blackwell believes that expert evidence is needed in child sexual abuse trials – she argues that it is needed to correct

the over-reliance on child complainant credibility by introducing information on contextual issues such as child development and aspects of child response to sexual abuse (and the) common myths about child sexual abuse which, according to my preliminary results, are alive and well (Blackwell, 2005:14).

Blackwell and Seymour⁸⁸ conclude their submission stating that expert psychological evidence should be available to juries to educate and inform them on child sexual abuse issues but it must be through more appropriate mechanisms than s 23G (Blackwell and Seymour, 2006).

A new organization was formed in 2007 to provide advocacy, not just for people facing allegations of sexual assault but, for all people who are facing miscarriages of justice. Psychologists Maryanne Garry, Matthew Gerrie of Victoria Univeristy of Wellington and Harlene Hayne of the University of Otago are the core members of the Innocence

⁸⁸ Blackwell and Fred Seymour are conducting a 'Jury Research Project' to assess the opinions, beliefs and knowledge of New Zealand jurors about 1. child sexual abuse (exploration of myths); 2. normative child sexual behaviour and knowledge; 3. child credibility; 4. the impact on jurors of court technology used for child witnesses and 5. the impact of expert psychological evidence on jurors (Blackwell, 2005:4).

Project. They are supported by an advisory board of experts in forensic science, law and psychology. The Advisory Board includes Lynley Hood and Elizabeth Loftus.

The Innocence Project

Based on the first “Innocence Project” that was set up in New York in 1992, Aotearoa/New Zealand’s Innocence Project (IPNZ) was established to: investigate wrongful convictions; to educate people working in the legal system, and to conduct research aimed at making criminal investigations as effective and safe as possible (<http://www.menz.nz/2007/report-from-2207-innocence-project-nz-conference/>). The IPNZ is a non-profit organization that assists victims who claim injustices by obtaining and retesting evidence, launching appeals, and fighting for judicial change (<http://www.salient.org.nz/features/innocence>).

The application of false memory theory in CSA cases is an area of special interest to the IPNZ but the organization is concerned for any case of perceived injustice. Comprehensive articles questioning the Ellis verdict, by Ross Francis⁸⁹ and Johnathon Harper,⁹⁰ appeared in the *NZLJ* before and after the NZIP’s December 2007 National Conference. Following the conference another article questioning the Ellis verdict and covering nearly two pages appeared in the *Weekend Herald*. The author, Phil Taylor, cites IPNZ Director, Maryanne Garry,⁹¹ who finds it curious the Eichelbaum Inquiry (into the Ellis case) ruled out scientists because of their ‘research direction’ when ‘science by definition is the search for information free from bias’ (Taylor, 2008:B3). Garry studies the causes and consequences of false memories. She argues that

Memories are active reconstructions. They’re stories we tell ourselves and each other, blending reality and fiction to keep us happy and bond us together (<http://www.wellington.scoop.co.nz/?p=15107>).

⁸⁹ Francis, R. ‘New Evidence in the *Peter Ellis* case’ in *NZLJ* November 2007:3399-404 and Francis, R. ‘New Evidence in the *Ellis* case – II’ in *NZLJ* December 2007:439-444.

⁹⁰ Harper, J. ‘Failure by a distinct margin’ in *NZLJ* February 2008:39-44.

⁹¹ Maryanne Garry became a Professor of Psychology at Victoria University of Wellington in 2009. She appeared as an expert witness in Noel Rogers’ case. Rogers had told police he remembered killing Katherine Sheffield in 1994. Garry testified that Rogers had been duped by his own false memories. She says ‘I looked at the statements he made and assessed some interesting features of his memory, and it struck me that he was particularly prone to thinking that his dreams were his repressed memories trying to break free’ (Garry, cited in Watt, 2009:D3).

Research undertaken by IPNZ core member Harlene Hayne, is the basis for Ellis' proposed 2011 Appeal to the Governor General for a pardon.

2008 - National Coalition with ACT and the Maori Party

Following a convincing victory at the 2008 election National formed a Coalition Government with the Maori Party and the Association of Consumers and Taxpayers (ACT). John Key, an investment banker, became Prime Minister. Feminist concerns were justified when it became clear that during 2009 the Government had excluded women from its advisory bodies (*Dominion Post*, 2010:A2). The ACC review, the tax working group, the infrastructure and capital markets task forces included not one woman. The National-led coalition insisted that privatizing ACC was not on its agenda but in March 2009 ACC Chairman Ross Wilson, (see note 58) was sacked and replaced by former Ernst and Young chief executive, John Judge (Small, 2009:A2).

Accident Compensation Corporation Policy Re-visited

In October 2009 ACC changed its policy and restricted the access of survivors of sex crimes, to counselling. A new requirement was implemented whereby claimants had to be diagnosed formally with a mental injury as defined by the American Diagnostic and Statistical Manual (DSM-IV). During the next eight months ACC paid out \$7 million less to 2889 fewer claimants than it had over the same period the previous year (Hume, 2010:C1). When it was disclosed that a recommendation for this policy was contained in a research paper that had been commissioned by ACC, published in 2005, and co-authored by Goodyear-Smith, critics of the policy were outraged (Hume 2010:A1). In August 2010 ACC re-visited the policy and announced that sexual assault victims are now automatically entitled to sixteen sessions of counselling. Change in respect of the adjudication of CSA cases, is also under consideration. The National led Government is investigating the suitability of an inquisitorial system.

Inquisitorial System Investigation

Minister of Justice Simon Power went to Europe in June 2010, to investigate a move to the employment of an inquisitorial system in sexual assault cases. Under an inquisitorial system a judge would gather information and determine the facts. Aggressive cross examination is frequently a feature of the adversarial system and would be avoided. Power is reported to have said he believed victims, particularly child victims, were being brutalized by the current cross examination system (Watkins, 2010:A2). No decision has been made on whether changes will be implemented. The next chapter traces the historical development of traditional Western epistemologies and explores how knowledge claims gain acceptance and authority. Feminists question traditional epistemologies and their claims of “truth” and “objectivity”. The adoption of poststructuralist epistemologies by many feminists to examine the historical origins, contradictions, and omissions of discourses and to challenge the operation of gender power relations in discourse is examined.

Chapter Two

Epistemology

An 'epistemology' is a framework or theory for specifying the constitution and generation of knowledge about the social world; that is, it concerns how to understand the nature of 'reality'. A given epistemological framework specifies not only what 'knowledge' is and how to recognize it, but who are the 'knowers' and by what means someone becomes one, and also the means by which competing knowledge-claims are adjudicated and some rejected in favour of another/others (Stanley and Wise, 1993:188).

The previous chapter identified conflicts that were precipitated by the introduction and implementation of s 23G of the Evidence Act 1908. The focus of this thesis is the discursive constructions of expert witness evidence in court cases where child sexual abuse (CSA) is alleged. The issues that this topic raises bring into question the generally accepted authenticity of what constitutes knowledge⁹² and the authority of science. This chapter addresses these questions as it outlines some of the philosophical developments that have impacted on traditional Western epistemologies. Western thought, including feminist thought, has been shaped by seventeenth and eighteenth century Enlightenment thought and it is this period that has been significant in laying the foundations for the construction of traditional Western science, philosophy, politics and culture (Ramazanoglu, 2002).

The question central to this thesis is how do knowledge claims gain acceptance and authority in today's world? This chapter traces the historical development and construction of modern knowledge claims as it identifies key movements and philosophies that have impacted on the dominant epistemologies of today. Questions concerning the nature of knowledge and the validity of knowledge claims have been central to feminist writings (Kemp and Squires, 1997). The writings of Christine de Pisan, a fifteenth century feminist writer, are perhaps the earliest known feminist challenges to the exclusivity of male claims to knowledge identified. Today feminists

⁹² Knowledge is not the same as belief or opinion. Epistemology is the theory of knowledge (Mautner, 2000). Philosophers have devised methodologies to establish knowledge that once established can be claimed as truth (Code, 1991). The impartiality of these traditional methodologies and the knowledge claims they produce is challenged by feminists (and others).

question the construction of what are perceived to be traditional epistemologies from which mainstream knowledge claims gain acceptance and authority.

Epistemology is a theory of knowledge. It is concerned with how we understand reality, what is accepted as knowledge, whose knowledge claims are accepted and whose are not, and who becomes recognized as a “knower” (Stanley and Wise, 1993). Sandra Harding notes that sociologists of knowledge describe epistemologies as “strategies for justifying beliefs’ such as the ‘authority of God’, ‘common sense’ or ‘masculine authority’ (Harding 1987:3). Harding is one of many feminist academics who claim traditional epistemologies ‘systematically exclude the possibility that women could be “knowers” or *agents of knowledge*’ and maintain ‘the voice of science is a masculine one’ (1987:3).

Fundamental aims of feminism are for women to be able to define themselves, determine their own lives and change their subordinate position in relation to men. Throughout much of Western history women have been a ‘silenced population’ in that they have been excluded from public and political activities (Elshtain, 1981:15). Consequently Western philosophy and political theory have been constructed by men who have not just forgotten to include women; rather, the exclusion of women has been an ‘active process’ (Thiele, 1992:27).

Feminist thought has been shaped by Enlightenment thought but as it has developed it has also resisted and challenged its philosophical underpinnings. Although the voice of feminism is a marginal one the adaption and utilization of traditional epistemologies has enabled the achievement of some significant gains for women during the nineteenth and twentieth centuries. Nevertheless the generally unseen and unquestioned underpinnings of traditional epistemologies constantly reconstruct powerful male discourses and assumptions of male superiority.

Feminists have taken critical, but not unified, positions in relation to traditional epistemologies. Feminist poststructuralist theories emphasize difference, acknowledge the plurality of truth and are able to expose the role that gender power plays in what has

become accepted as “scientific objectivity”. Such exposure has resulted in many feminist knowledge claims being rejected and, on occasions, ridiculed by mainstream commentators⁹³ (Ramazanoglu, 2002). This chapter lays a foundation for analysis of how questions concerning the authority of science and knowledge claims in discourses of law, psychiatry and psychology can be addressed in later chapters.

Historical Origins and Impacts of Liberal Humanist Thought

The question of what we can know and how we can know it, or make judgments about its probability, is relevant to virtually every intellectual discipline (Childs and Ellison, 2000:1).

During the nineteenth century radical, social and technological changes occurred in Europe at a much more rapid pace than changes had done in any previous century.⁹⁴ These radical nineteenth century changes were made possible by the development of science and “modern thought”. The modern period in Western European thought had its beginnings in the seventeenth century with the revolution that was brought about by Enlightenment thought. Two developments that clearly distinguish the modern period from the preceding medieval period are the diminishing authority of the church and the increasing authority of science. While religion still plays a role in modern societies, Western states have become predominantly secular and the rule of church leaders and kings has gradually been replaced by democratic, dictatorial and sometimes tyrannical, governments (Russell, 1946/2006). With the rise of science it was widely believed that the days of superstition and authority were over and henceforth everything would be considered rationally (Thompson, 2006).⁹⁵ Although primarily associated with the

⁹³ Examples can be seen in Birks, 1998:166 and Hood, 2001:41.

⁹⁴ In the area of communications for example, the telegraph was patented in 1837, the telephone in 1876 and mechanized printing presses made newspapers affordable for working class people. Modern European historian T.W.C. Blanning notes the virtual disappearance of illiteracy from western, northern and central Europe that accompanied the changes. In the area of transport, in just one hundred years, the wealthy changed from horse drawn carriages to first class train carriages or their own cars while the poor changed from walking to third class train carriages, buses, trams and underground railways (Blanning, 2000).

⁹⁵ Nevertheless a scientist may be considered a ‘heretic’ within the world of ‘scientific orthodoxy’ if s/he has radically different views to the majority of her/his peers (Thompson, 2006:61).

Enlightenment period, elements of liberal humanist thought can be traced back to the Ancient Greeks.

The Ancient Greeks

Ancient Greek thinkers in the sixth century BC began asking philosophical questions about reality and how we can be certain that we know what we know. Teaching *men* to break away from superstition and use their minds to question and speculate, Ancient Greek philosophy was developed by men who believed their authority over women was natural (Code, 1991). The Greeks were the first to conceptualize and seek equality before the law and the right to free speech (Gregg, 1963). The thinking of Plato (427-347 BC) and Aristotle (384-322 BC) set the agenda for subsequent developments in Western philosophy and many of the questions they explored continue to be debated today (Russell, 2006). For example the notion of a (male) public and a (female) private sphere, that has shaped Western thought, can be traced back to the Ancient Greeks (Cox & James, 1987).

In Mel Thompson's opinion there is a great deal of truth in the saying 'the whole of Western philosophy is a set of footnotes to Plato' (Thompson, 2006:19). Questions raised by Plato continue to be debated today. He was the first to make a distinction between "opinion" and "knowledge" (Norris, 2005). He conceived a world of 'forms' that are known only to the intellect and a perfect world free of the things we experience (Thompson, 2006:20). He postulated that prisoners sitting at the back of a cave cannot see a fire behind them but they can see the shadows it casts on the cave walls. Plato thought this depicted human experience – shadows but not reality itself (ibid). His philosophy was based on this distinction that separated 'appearance' and 'reality' (Russell, 2006:121). Plato originated the dualistic hierarchy of 'man as mind' and 'woman as body' (Tong, 1998:258). He defined two types of women: those who fulfilled reproductive function in the private sphere and those who joined men in the public sphere. He believed that some women have the qualities that make them worthy of positions of power (Cox and James, 1987). For the harmonious functioning of each part of society he envisaged that rulers, rather than pursuing their own interests, should seek

only truth. His philosophical work *Republic* explored the questions 'What is justice?' and 'What is the value of justice itself?' (Thompson, 2006:196).

Plato's pupil Aristotle based his philosophy on what is known through experience. He believed that everything has a 'final cause or purpose' a 'good' for which it exists (Thompson, 2006:161). He contended

Every art and every enquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim (Aristotle, cited in Thomson, 2006:170).

Aristotle classified the categories of science that are now physics, psychology and economics. He coined many of the terms and concepts that have dominated science such as 'energy', 'substance', 'essence' and 'category' (Thompson, 2006:21). Leading twentieth century British philosopher Bertrand Russell (1872-1970)⁹⁶ claims that 'after Aristotle's death it was two thousand years before the world produced any philosopher who could be regarded approximately as his equal' (Russell, 2006:157). Although Plato's analysis included women as members of the 'guardian class', Aristotle saw them only as a 'medium for man's sperm' (Zalewski, 2000:24). In *Politics* Aristotle wrote that

The male is by nature superior and the female inferior, the male the ruler and the female the subject... (Aristotle, cited in Cox and James, 1987:4).

and

The freeman rules over the slave after another manner from that in which the male rules over the female, or the man over the child; although, the parts of the soul are present in all of them, they are present in different degrees. For the slave has no deliberative faculty at all; the woman has, but it is without authority, and the child has, but it is immature (Aristotle, cited in Code, 1992:9).⁹⁷

During the early years of the first millennium the philosophy of the Greeks was 'submerged' in Western Europe and the rise of Christianity ensured that theology and

⁹⁶ Philosopher Bertrand Russell is quoted as saying 'What men really want is not knowledge but certainty' (http://www.quotationspage.com/quotes/Bertrand_Russell). Russell's view that men are superior to women was explicit in his insistence to Lady Ottoline Morrell (with whom he was having an affair) that 'no woman's intellect is really good enough to give me pleasure as intellect' (Spalding, 2005:101).

⁹⁷ Lorraine Code notes that Aristotle is just one in a long line of Western thinkers who refer to the limitations of women's cognitive capacities (Code, 1992). Code also cites influential eighteenth century philosopher Jean-Jaques Rousseau (1712-1778), who maintained that young men and women should be educated differently because of women's inferiority in reason and their propensity to be dragged down by their sensual natures.

superstition dominated thinking (Russell, 2006:2). In the thirteenth century Aristotle's works, having been preserved first in Byzantium (now Istanbul) and later by the Arabs, were rediscovered and translated into Latin (Thompson, 2006). Thirteenth century Western Europe was dominated by the Italian Catholic Church and the authority of the Pope. To maintain its authority the Church set up "The Inquisition" for stamping out, by torture or death, what it saw as "heresy" (Gregg, 1963).⁹⁸ The Dominican friars were active in the work of the Inquisition but in 1259 they also dispensed with St Dominic's decree that they should not learn secular sciences or liberal arts except by dispensation. Subsequently the Dominican friars, who included St Thomas Aquinas (1225-1274),⁹⁹ devoted themselves to study and to 'reconciling Aristotle and Christ' (Russell, 2006:417).

Although it would appear that the earliest public debates about the social position of women were conducted exclusively by men, by the fifteenth century women had become involved. The writings of Frenchwoman Christine de Pisan (1364-1430)¹⁰⁰ indicate a recognizably feminist perspective on women's role in society and her influence can be traced to the late seventeenth century debates in England (Bryson, 1992). In *The Book of the City Ladies* (1405) de Pisan's character Christine converses with three ladies – 'Reason, Rectitude and Justice' who refute the then contemporary theories of female inferiority (Freedman, 2007:3). De Pisan wrote

judging from the treatises of all philosophers...it seems that they all speak from one and the same mouth. They all concur...that the behavior of women is inclined to be full of every vice...I could not see or realize how their claims could be true when I

⁹⁸ Various Tribunals of Inquisition against heretics were set up within the Roman Catholic Church in 1232 by Pope Gregory IX. Later, in 1542, the 'Holy Office' in Rome was set up to crush the Reformation (Mautner, 2000:277).

⁹⁹ Aquinas was influenced by Aristotle's notion that 'If the written law tells against our case, clearly we must appeal to the universal law, and insist on its greater equity and justice' (Aristotle, cited in Ingram, 2006:16). Aristotle's thinking was an early formulation of "Natural Law Theory" - the idea that there are 'universal principles of justice intrinsic to human nature and that human-made law must adhere to them' (2006:16).

¹⁰⁰ Raised in Paris, de Pisan read widely about philosophy and science. She was the daughter of a scholar and when she was widowed at a young age her writing supported her family. Bryson spells Christine de Pisan's surname with an 's' and cites the year of her birth as 1364 while Freedman spells it with a 'z' and cites the year of her birth as 1365 (Bryson, 1992; Freedman, 2007).

compared them with the natural behavior and character of women (de Pisan, 1405, cited in Freedman, 2007:4-5).

In de Pisan's time, as the Catholic Church and the medieval states reinforced male authority, women were presumed to be intellectually weaker than men and therefore not worth educating. Later, the Renaissance women would defend their intellectual capacity and emphasize the importance of education for women (Freedman, 2007).

The Renaissance

The rise of modern science was made possible by a renewed sense of the value of human reason. Challenges to established ideas and religious dogma came about as a result of the Renaissance and the Reformation (Thompson, 2006). The Renaissance, a movement towards a modern outlook as opposed to a medieval one, began in Italy during the fifteenth century when many 'cultivated Italians, both lay and clerical', became adherents to the Ancient Greek philosophies (Russell, 2006:457). Only a few pursued science and philosophy any further and Russell believes that generally emancipation from superstition was only partial. From the sixteenth century onward the Reformation dominates the history of European thought. It was a 'complex many sided movement' which was in the main, a political and theological revolt of northern nations against the authority of the Pope (Russell, 2006:7). The Counter-Reformation was a revolt against the intellectual and moral freedom of Renaissance Italy. The Italian Renaissance period was not medieval but nor was it modern and Russell claims it was 'akin to the best age of Greece' (Russell, 2006:484).

Concurrent with the rise of science at the beginning of the seventeenth century, an adherence to superstition and religious dogma continued to impact on Western European thought. Galileo was condemned by the Inquisition in 1616 and again in 1633, for maintaining that the earth revolves around the sun. The Inquisition was successful in putting an end to science in Italy where it was not revived for several centuries. It failed, however, to prevent 'men of science' from pursuing their interests and it did much damage to the church (Russell, 2006:492). During the seventeenth century absolute monarchical power continued to be defended by those who believed it

to be sanctioned by God and as natural as the rule of the father over his family. However when philosophers, calling upon reason and consent, challenged the divine right of the king the same logic was not applied to the father and the family (Bryson, 1992). The seventeenth century was a turbulent time in England with civil war and the execution of the king in 1649. After the monarchy was restored in 1660 it was agreed that the monarch's role would be 'constitutional' and directed by 'the wishes of the people and Parliament' (Gregg, 1963:221). The transfer of power from the monarch to the people was a move towards modern democracy.

The Mind and Matter Split

The modern world, in terms of thought, is usually considered to have begun with 'philosopher, mathematician and man of science' Rene Descartes (1596-1650) (Russell, 2006:513). Descartes sought truth and certainty. He resolved to doubt everything, even the existence of his own body but he found that he could not doubt the existence of his mind. If he doubted anything his mind had to exist to do the doubting. He wanted to apply the certainty that he found in mathematics to other areas of knowledge. It is generally considered that Descartes' quest for certainty and knowledge set the agenda for epistemology (Thompson, 2006). He wrote

I observed that, whilst I thus wished to think all was false, it was absolutely necessary that I, who thus thought, should be somewhat; and as I observed that this truth, I think hence I am, was so certain and of such evidence, that no ground of doubt, however extravagant, could be alleged by sceptics capable of shaking it, I concluded that I might, without scruple, accept it as the first principle of the philosophy of which I was in search (Descartes, 1637/2004:53).

In Descartes' view it is not intelligence that distinguishes human beings from animals, it is "consciousness". He claimed that rather than being found in the study of classics, true knowledge is based on experience, self discovery, rational analysis and independent thought. Late seventeenth century feminists were encouraged by his insistence that true knowledge is available to all and even women were capable of rational thought (Bryson, 1992).

The Soul and the Body

Descartes' concern was for the 'scientifically appealing but religiously dangerous ideas of Renaissance naturalism' (Leahey, 1997:108). Renaissance naturalism was considered to be scientific because its explanation of the world did not include supernatural powers. Leaders of the Catholic Church were alarmed about the powers that seventeenth century physicians were attributing to the brain such as sensation, perception, common sense, and memory. They were concerned that thought and knowledge would soon be seen as functions of the brain and this would throw the existence of the "Christian soul" into doubt. Aware of the Church's concerns Descartes took care to make his mind and body framework acceptable to both the religious and the scientific world views of his time (ibid).

Influenced by Harvey's theory of the circulation of the blood,¹⁰¹ and some mechanical toys that were operated by a system of tubes through which water ran, Descartes conceptualized human beings as machines. Aware he would be considered a heretic by the church if he did not include the soul,¹⁰² he made a distinction between the soul and the body. He claimed the soul is not a material thing and it does not need the body to exist (Murray, 1983). In *Passions of the Soul* (1649) he outlined how the pineal gland in the brain controls the nerves that circulate 'vital' spirits' around the body to muscles that they inflate and contract. In this manner the non-material soul interacts with the mechanistic body. Although Descartes abandoned this theory he continued to investigate the control of the body by the mind and the interaction between mind and matter (Russell, 2006:514)

Descartes' system for the establishment of knowledge is based on the hierarchical dualism of mind over matter. Hierarchical dualisms are integral to the thinking of Descartes that has laid the foundation for modern thought. The superiority of the mind

¹⁰¹ William Harvey (1578-1657), an English physician, was the first in the Western world to describe in exact detail the systemic circulation and properties of blood being pumped around the body by the heart. He published *An Anatomical Study of the Motion of the Heart and of the Blood in Animals* in 1628. The only thing Harvey could not figure out, though he recognized that it took place, was how the blood was transferred from arteries to veins and this was not understood until after his death when the microscope was invented (<http://www.bluepete.com/Literature/Biographies/Science/Harvey.htm>).

¹⁰² In 1633 Descartes works were placed on the Catholic Index of banned books (Murray, 1983).

over the body, of reason over passion, of culture over nature is taken for granted and the male/female dualism ensures the maintenance of women's inferior position in relation to men. These dualisms have become embedded in Western culture and science. Modern thought assumes an inferior, external world (the object) that can be discovered by a superior, impartial knower (the subject). The knower's conscious mind is guided by reason in the establishment of knowledge (Ramazanoglu, 2002).

Enlightenment epistemologies and methodologies underpin today's "commonsense" approaches to the establishment of acceptable knowledge claims. The detached, neutral, objective knower theorized by Descartes, is reflected in the way 'empiricist-positivist' knowledge claimants perceive themselves (Code, 1992:114). Descartes did not consider that language was essential for thought, nor did he believe it could interfere with the purity of his thought. Language was not included, therefore, in the things that he doubted. Code argues that Descartes failed to take into account that his distrust depended on language to have meaning. He also overlooked the historical context his quest for certainty was taking place in and the spoken or written epistemological traditions that had informed it (Code, 1992).

The Age of Reason

The freeing of the subject from the superstitions of the Middle-Ages was the main objective of the Enlightenment (Hosbawn, 1977). The Ancient Greeks had perceived the subject as a member of a community and not as an individual. However with Descartes' 'fundamental certainty' "I think, therefore I am", philosophy was 'penetrated' by "individualism" (Russell, 2006:546). Descartes had created a basis for knowledge that could be different for each subject. Gradually a subject that had been controlled by external forces was replaced by a subject that was autonomous. Subsequent Enlightenment thinking was characterized by a belief in progress and an expectation that it would be achieved by the self-reliant use of reason and by the rejection of traditionalism and authoritarianism (Mautner, 2000). Enlightened opposition to authoritarianism was expressed in slogans calling for the liberty, equality and fraternity

of all *men* and in 1789 they became the slogans of the French Revolution (Hosbawn, 1977).

Industrialization

Beginning in the middle of the eighteenth century industrialization was a gradual and fragmented process that relentlessly transformed the social order of the Western world (Gregg, 1963; Heywood, 2003). Wealth among the middle classes increased while that of the aristocracy declined (Soboul, 1977). Prior to the industrial revolution women were associated with sin while men were associated with virtue. Industrialization demanded that men be aggressive and competitive and subsequently sin, lust and ambition were assumed to be inherent positive masculine traits. Consequently women were charged with the guardianship of morality and religion and were defined by men as innately pure, passive and asexual (Julich, 2001).

The concepts of public and private spheres were constructed by the Ancient Greeks but in European feudal societies they had been indistinct (Cox and James, 1987). Industrialization and the development of capitalism brought about the decline of family-based domestic industry and changes to women's roles. A strong distinction between the public world of employment and the private world of home and family was created and increasingly the women of the expanding middle and upper classes¹⁰³ were restricted to the domestic sphere (Bryson, 1992). Nevertheless the growth of individualism, the demands for human rights and the increasing literacy that was necessary for industrialization and capitalism to flourish, were inevitably leading to further changes in women's roles (Phillips, 2004).

Empiricism and Rationalism

Throughout the history of Western philosophy philosophers have asked two basic questions: 'what can we know?' and 'how do we know it?' (Thompson, 2006:12).

¹⁰³ At the beginning of the eighteenth century most Europeans referred to three or sometimes four 'social estates' such as 'those who fought', 'those who prayed' and 'those who worked with their hands' (Heywood, 2000:49). From the 1750s these references were disappearing as societies diversified and the upper, middle and lower classes began to be recognized (ibid).

Empiricists argue that all knowledge starts with the senses but rationalists claim that all knowledge starts with the mind. From the eighteenth century onwards these have been the two main strands of traditional Western philosophy (Russell, 2006:583).

John Locke (1632—1704) is regarded as the founder of empiricism and was influenced by Descartes when he also sought to establish what the mind can understand and what it cannot. His conclusions, however, differed from those of Descartes. Locke claimed that, with the possible exception of logic and mathematics, we know what we know through experience and from reflecting on that experience (Thompson, 2006; Russell, 2006). Reason as Locke saw it, consists of two parts: firstly an inquiry as to what is known with certainty and secondly an investigation of propositions that are probable but not certain (Russell, 2006). Rationalism was also influenced by Descartes. Its origins are in the thinking of German philosopher Immanuel Kant (1724-1804).¹⁰⁴ Kant employed Newtonian physics when he argued that experiences are shaped by the perceptions of space, time and causality that the mind imposes on them. Space, time and causality are not in themselves part of the external world but are imposed on the human experiences that occur within it. Knowledge of the external world, therefore, depends on the interpretation that is put on experiences (Thompson, 2006). Locke and Kant are seen as being among the ‘precursors or early representatives of liberalism’ (Mautner, 2000:317).

Liberalism

Liberalism originated in England and Holland. Russell contends the first ‘comprehensive statement of the liberal philosophy’ was made by Locke and adds that though Locke was the most influential he was not the most profound modern philosopher (Russell, 2006:548). Liberalism was opposed to everything medieval and was accompanied by industrialization and capitalism. Early liberalism was Protestant, but not fanatical; it valued commerce and industry and the rising middle class rather than the monarchy or

¹⁰⁴ Kant described the Enlightenment as ‘defining the conditions under which the use of reason is legitimate in order to determine what can be known, what must be done and what may be hoped’ (Kant, cited in Ramazanoglu, 2002:28). He was one of the most influential figures in the development of Western philosophy and he maintained that men are naturally superior to women in ‘accomplishing the common interest’ (Teo, 2005:114),

the aristocracy; it rejected the divine right of kings in favour of democratic government and although it did not abandon hereditary principles liberalism had particular respect for the rights of those who accumulated property as a result of their labours. Rather than the collective, the focus of liberalism was on the individual and the individual's rights and freedoms. There was a belief that all *men* are born equal and subsequent inequalities could be explained by circumstances (Russell, 2006).

The latter part of the eighteenth century was dominated by the American and French Revolutions and their revolutionary thinking impacted on the philosophical thinking of the time. The 'rights of *man*' and 'the nature of freedom and human rationality' were articulated in the American Declaration of Independence (1776) and the French Declaration of Man and Citizen (1789) (Bryson, 1992:18).

The intellectual life of nineteenth century Europe was more complex than that of any previous age. Russell notes some of the contributing factors were the influence of Russian, American and Indian philosophies, the advances in science, and the production of machinery. The impact of the 'counter-enlightenment movement known as "romanticism",¹⁰⁵ (which eventually underpinned the thinking of Mussolini and Hitler) and the "rationalism" that began with the French philosophers at the time of the revolution (and acquires a 'deeper form' in the writings of Marx) further contributed to the complexity of nineteenth century thought (Russell, 2006:652). By the late nineteenth century women were actively campaigning for things like legal rights, the vote, political representation and improved education, working conditions and health services. However modern humanism provided feminists with 'deeply contradictory goals and paths to knowing' (Ramazanoglu, 2002:34).

¹⁰⁵ Romanticism valued the exploration of strong emotions and non-rational intuition (Leahey, 1997; Russell, 2006). The Romantics admired what became known as "sensibility". Sensibility meant a person could be moved to tears by the sight of someone who was destitute but would not respond helpfully to appeals that would change the situation of the poor as a class (Russell, 2006). Rousseau was a leading figure in Romantic thought and through him it was initially connected with politics rather than philosophy. For an overview of the Romantic Movement see Russell, 2006:615-622 and Leahey, 1997:151-152.

Liberal-Humanism

The subject of liberal-humanism is a unified, knowing, autonomous *man* and the development of liberal-humanism can be traced back to the thinking of Locke. Liberal humanism is the most dominant form of humanism. It emerged during the nineteenth century in political debates over individual rights, freedoms, justices and liberties. Individual rights were seen in opposition to society rather than in relation to it and reflected the embedded Cartesian individual/social dualism (Lockhart, 1994). Humanism stems from the revival of classical learning during the Renaissance. It assumes the subject, the knowing self, to be an autonomous individual rather than part of a collectivity. However, while it denies difference on the basis of a 'universal humanity', the knowing self may deny humanity to those it deems inferior such as slaves, women, Jews, gypsies or homosexuals (Ramzanoglu, 2002:34). Humanism assumes each subject possesses a unique human nature. Various humanist discourses differ in terms of what that unique nature might be. For liberal humanism it is "rational consciousness". The subject can discover "truth" by employing reason. All subjects are rational and therefore able to claim their liberal rights to equality and self determination. Subjectivity is assumed to be the source of the meaning of reality. Subjects can contribute to progress by adding to existing knowledge employing rationality, knowledge and science (Weedon, 1987; Mautner, 2000; Ramazanoglu, 2002). Rational scientific inquiry has been significant in the shaping of modern life.

Rational inquiry, according to Cartesian principles, is 'the process of insuring that representations correspond to reality – so a fixed reality means a fixed method' (Rorty, 1994:44). Based on observations and the use of empirical data that form hypotheses, a scientific claim is verified by referring back to the data and without it the claim is not considered scientific. The successes of science made it 'very tempting' for philosophers to see science as a paradigm for the construction of all knowledge (Thompson, 2006:68). Logical positivism is one such example.

Positivism

Positivism encompasses a number of epistemological perspectives. The thinking of Auguste Comte (1798-1857), the founder of positivism, has strongly influenced subsequent mainstream thought. The “quantitative” methods employed by many of today’s social researchers are positivist methods. According to positivist theories, inquiry is concerned with description and explanation of empirical facts and all knowledge is based on sense-experience. As there cannot be different kinds of knowledge production, no difference is perceived between the methods of the physical sciences and those of the social sciences (Mautner, 2000).

Logical positivism was developed by Bertrand Russell’s student Ludwig Wittgenstein (1889-1951) who was impressed with the work Russell and his colleagues had done attempting to establish the ‘logical foundations of mathematics’ (Thompson, 2006:68). Wittgenstein’s ideas were taken up by a group called the Vienna Circle in the 1920s. They argued that the meaning of a statement is its method of verification and this became known as the ‘verification principle’ (Thompson, 2006:69). The Vienna School claimed that metaphysics and religion are meaningless because their propositions are not verifiable by empirical observation or analytical demonstration. Philosophy, they argued, consists purely of analysis that is conducted using logic and can be reconstructed employing mathematical and scientific discourse (Bullock and Stallybrass, 1978). Logical positivism maximizes the importance of empiricism and minimizes that of language. Thompson notes that reaction against logical positivism meant it became ‘widely recognized that a more sophisticated view of the function of language needed to be developed’ (Thompson, 2006:71).

Challenges to Liberal Humanist Thought

Structuralism and the Role of Language

As nineteenth century liberal philosophers began to assume a “free” society to be a capitalist one, dissenting philosophers questioned this assumption together with the accepted notions of history’s linear progression and absolute truth (Giddens, 1971). As previously noted, Descartes had not included language in the things he doubted but

during the nineteenth century questions were raised as to the role language might play in the construction of a subject's reality. These questions challenged some of the basic assumptions of liberal humanist thought.

For Karl Marx (1818-1883) an understanding of a modern capitalist society depended on consideration of the context and social relations of the societies that had preceded it (Layder, 1996). He highlighted the issue of class and argued the dominant ideas of a society were always those of the ruling class. A subject's perception of the world depended on social circumstances and it was language that formed what he called the 'practical consciousness' (Giddens, 1971). Marx contended

Language is as old as consciousness, language **is** practical consciousness that exists also for other men (sic), and for that reason alone it really exists for me personally as well (Marx, cited in Giddens, 1971:42) (emphasis added).

Marx challenged the liberal notions of an autonomous subject and a universal truth when he argued that in all class societies there were a range of competing and conflicting forms of consciousness. He linked ideology¹⁰⁶ with material interests and the reproduction of power relations when he maintained

The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men (sic) that determines their being, but, on the contrary, their social being determines their consciousness (Marx, cited in Tong, 1998:95) (emphasis added).

Chris Weedon says of Marx's challenge to the autonomous subject

early Marxist writing decentred the sovereign, rational, humanist consciousness of liberal political philosophy and economics making consciousness not the origin of social relations, but their effect. As such, consciousness is always historically and culturally specific (Weedon, 1097:27).

Marx argued that inequalities in a society are viewed as natural rather than the outcome of power struggles and therefore changeable. A society's values and norms will always represent the interests of those in power. Values and norms are, according to Marx,

¹⁰⁶ Marx saw ideology as a systematic distortion that is intended to affect the thinking of others. He and Engels describe ideology as making 'men (sic) and their circumstances appear upside down as in a *camera obscura*' (Marx & Engels, cited in Mautner, 2000:266) (emphasis added).

'ideological falsehoods' that camouflage power relations and create a "false consciousness" that prevents subordinate groups from recognizing their own best interests (Layder, 1996:38-39). There are many variants of Marxist theory, including Marxist feminism. 'Structural Marxism' became prominent in the 1970s but its influence has since waned (Layder, 1996:34).

'Structural Marxist' Louis Althusser (1969) sees Marxism as a science and emphasizes the importance of ideology in the reproduction of exploitative capitalist relations. As a Marxist he argues that ideology has a material base and serves the interests of the ruling class. It is through state institutions, such as religion, education, the family and the law that ideology is disseminated (Weedon, 1987; Sarup, 1996). In Althusser's view a subject's consciousness is constructed through ideology and it is in language that this is achieved. Meaning and consciousness do not exist outside language for Althusser (Weedon, 1987). The origins of structuralism can be found in the linguistics of Ferdinand de Saussure (1857-1913).

Language was the focus of Saussure's theories. He saw language as a structured system that does more than express meaning; meaning, for Saussure, is specific to its context and culture and is formulated within language. Language has an 'underlying, fixed structure' (Beasley, 1999:90). This structure is a system of signs. Each sign is made up of a "signifier" (its sound or written image) and a "signified" (its meaning). Rather than intrinsic, the meaning of signs is relational (Weedon, 1987). Meaning is produced within language by relationships and oppositions. For example something that is "white" is recognized through an understanding of what is "non-white" (Beasley, 1999). In this respect Saussure located meaning within language but then saw it as fixed. His claim that language constitutes reality rather than reflects it became the 'founding insight' for poststructuralism (Weedon, 1987: 22). However, poststructuralist thinkers move away from Saussure's notion of a 'fixed underlying structure ordering meaning' (Beasley, 1990:91). Unlike traditional epistemologies that seek to establish universal truths poststructuralist epistemologies emphasize difference together with the plurality and fluidity of meaning.

Poststructuralism

Language enables us to think, speak and give meaning to the world around us. Meaning and consciousness do not exist outside of language... it is language, in the form of conflicting discourses which constitutes us as conscious thinking subjects and enables us to give meaning to the world and act to transform it (Weedon, 1987:32).

Postmodernism is the term applied to three main areas of recent Western history. Firstly a movement in art and architecture, secondly the poststructuralist writings of French theorists such as Michel Foucault (1926-1984) and Jacques Derrida (1930-2004) and thirdly more general, late capitalist theories that have designated today's Western societies 'post-industrial' or 'post-modern' (Ramazanoglu, 2002:84). Within the broader field of postmodern theory it is the writings of French poststructuralists that have impacted most on feminist thought and are of particular significance to this thesis.

Poststructuralist thinkers are interested in how knowledge and truth are produced rather than discovering "the truth". A poststructuralist analysis exposes the inadequacies of the epistemological foundations of traditional methodologies (Zalewski, 2000). For poststructuralist thinkers an awareness of the relationship between power and knowledge is fundamental to an understanding of why some knowledge claims are generally accepted while others are not (Ramazanoglu, 2002).

Poststructuralism rejects the notion of an impartial subject that produces "knowledge" and in so doing places the concept of "absolute truth" in doubt. Power, rather than being "held" by a subject or group, is located in language and is inherent in all social relationships. Meaning is never neutral. It is not fixed but neither is it entirely arbitrary. Meaning is historically and socially contextualized and it is constantly being constructed and re-constructed (Beasley, 1999). Social institutions, such as the law, psychiatry and psychology, are defined in language and their political consequences are contested in language. There is no foolproof method of separating knowledge from power, or prejudice from that which is deemed neutral. Knowledge that is said to be 'reasonable,

rational, neutral or truthful' must always depend on 'selective definitions' (Zalewski, 2000:57).

Foucault's theory of discourse and power has been influential in the development of feminist poststructuralist theory. "Discourse" is seen as a 'structuring principle of society, social institutions, modes of thought, and individual subjectivity' (Weedon, 1987:41). By examining the historical context of a particular text it is possible to identify the power interests that it represents. Nicola Gavey defines discourse as a constantly changing system of interrelated statements that constitutes the common meanings and values of particular groups or cultures or historical periods (Gavey, 1989). Discourse is not *about* objects; rather discourse *constitutes* objects (Sheridan, 1980).

Foucault concentrates on how discourses function, their histories, their effects, and on the connections between them. Rather than making decisions about what is true and what is false, Foucault asks why there are different claims to the knowing of what is true (Ramazanoglu, 2002). Foucault is critical of traditional philosophy because, he argues, since modern philosophy 'began with Descartes it can only advance in a Cartesian manner' and 'the philosophy of consciousness has failed to found a consciousness of knowledge, and especially scientific knowledge' (Foucault, 2007:151). He claims that the 'history of science is the most important testing ground for the theory of knowledge' (2007:151). His *L'archéologie du savoir (The Archeology of Knowledge)* was published in 1969 but he later abandoned the term 'archeology' preferring 'genealogy'. He did not want his archeology to be confused with the traditional view of history that is 'concerned with the already given, commonly recognized "facts" or dated events' (Davidson, 1994:222). Foucault writes about discontinuities and contends knowledge commonly undergoes sharp breaks as do forms of power (Hacking, 1994:235). The development of certain empirical forms of knowledge such as political economy, psychiatry or medicine, is not a smooth, sequential process (Foucault, 1991). Foucault rejects the notion of history's linear development and contends that genealogy 'opposes itself to the search for "origins"' (1991:77). He argues

What is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things. It is disparity (Foucault, 1991:79).

Historical specificity is vital to Foucault. He stresses that meanings cannot be lifted from one historical period and understood in another without taking into consideration that meanings always take the forms that are defined for them in historically specific discourses (Weedon, 1987). Foucault disagrees with Marx's focus on economic materialism. He argues Marxism's theoretical and practical weakness is that it was presented in the context of the nineteenth century as 'a humanistic discourse that could replace the abstract subject with an appeal to the real man, to the concrete man' (sic) (Foucault, 2007:150). In fact, the universalizing concepts, embedded Cartesian dualisms, and the search for "truth" that underpin humanist discourse 'hid the political reality that the Marxists of this period nonetheless supported' (2007:150). Rather than what is true and what is not, Foucault shows it is the underlying epistemology of a "scientific" discourse that is operational in deciding what is accepted as knowledge (Ramazanoglu, 2002).

The power of a discourse varies depending on how closely it is associated with the most dominant "discursive field". Foucault conceptualized the discursive field to enable understanding of the relationship between language, social institutions, subjectivity and power. An example of a discursive field is the law which is made up of competing ways of giving meaning to the world (in terms of what is considered legal and what is not) and the organization of social institutions, (such as courts and prisons) and processes (such as trials and parole hearings) (Weedon, 1987). Traditional legal practice and restorative justice are competing discourses within the discursive field of law in which restorative justice discourse is a marginal discourse invested with little power.¹⁰⁷

Foucault is critical of humanist discourses that put the subject at the centre of knowledge production. He asks how we are constituted as the subjects of our own knowledge, how we exercise or submit to power relations and how we are the moral

¹⁰⁷ Today, as the result of lobbying and the demonstration of its value, Restorative Justice has a little more power within the discursive field of the law than it did ten years ago.

subjects of our own actions (Ramazanoglu, 2002). Foucault contends that most philosophers prefer a 'subject without history' and most historians prefer 'history of social processes (where society plays the role of the subject)' (Foucault, 2007:150). He notes his theoretical debt to philosophers like Friedrich Wilhelm Nietzsche (1844-1900) who questioned the historicity of the subject (2007:151). Foucault says

I have tried to get out from the philosophy of this subject, by studying the constitution of the subject across history which has led us up to the modern concept of the self... In sum, the aim of my project is to construct a genealogy of the subject (Foucault, 2007:150-152)

Liberal humanism assumes the unitary subject to be the source of self knowledge and the authorial source of meaning. Foucault rejects these conceptions and argues the subject is constructed, is the product of power and the location of resistance to power. He stresses that power is exercised through discourse. The power relations in a society become explicit when, within a discourse, the subject position of a subject is at odds with and resists the subject position of that discourse (Beasley, 1999; Weedon, 1987). Poststructuralism emphasizes the constructedness of the self/identity of the subject but sees it as fluid rather than fixed. There is therefore, an abandonment of fixed categories of identity (Beasley, 1999); instead, plurality and difference are emphasized.

"Difference" has become a key concept in political, social and cultural theory and there are many reasons for this. Amongst these reasons, Weedon includes the changing composition of Western societies, the impact of new social movements (including feminism) on those societies and the impact of poststructuralist critiques of traditional approaches to 'meaning, identity and difference' (Weedon, 1999:1).

Difference - Challenges within Feminism

The Master's Tools Will Never Dismantle the Master's House (Lorde, 1979/1984:110).

Audre Lorde's (1934-1992) challenge to feminists is to take the differences among them (such as colour, class and sexual orientation) and make them their strengths. She contends that 'In our world, divide and conquer must become define and empower'

(Lorde, 1984:112). Lorde is critical of feminists' employment of traditional epistemologies because, she argues, they condition women to see their differences in opposition to each other and this thinking will never enable 'genuine change' (Lorde, 1984:112). Lorde's challenge invokes a postmodern epistemology.

As Lorde and other marginalized women challenged universalizing feminist theories, late twentieth century feminist academics were questioning whether traditional epistemologies, constructed by men, have any useful meaning for women. The problems associated with the universalizing concept of "woman" were highlighted and, as feminists contested its meaning, the women's movement was fragmenting. Ongoing issues of women's equality with men or difference from them divided feminists (Scott, 1988, Bacchi, 1990). These controversies together with events such as the Sears, Roebuck and Company's Equal Employment case¹⁰⁸ led feminists to challenge and deconstruct the underpinnings of the dominant, male centred epistemologies. A theory was needed that would enable feminists to think in terms of pluralities and diversities rather than unities and universals. The theory needed to accommodate constantly changing linguistic meanings, historical and political contexts and to overcome the normative hierarchical dualisms¹⁰⁹ (Scott, 1988). By the late twentieth century the employment of postmodern deconstructionist and poststructuralist epistemologies was enabling feminist researchers to challenge the power and authenticity of traditional epistemologies (Stanley and Wise, 1993).

The political commitment of feminist researchers to the challenge of gender power relations has meant that feminist knowledge claims are often criticized or ridiculed by members of the wider academic community for failing to produce "unbiased" scientific

¹⁰⁸ The equality versus difference debate was played out in the United States in an Equal Employment Opportunity Commission trial in 1979. Two women history professors provided the prosecution and defence with contradictory expert evidence in a gender discrimination case that was taken against Sears, Roebuck and Company. This case clearly illustrates how the construction of equality and difference in opposition to each other, creates an impossible choice for feminists as it misrepresents the relationship between these two terms. This case also highlighted the plurality of expert witness evidence (Scott, 1988).

¹⁰⁹ According to Scott feminist theories had hitherto either reversed or reinforced the dualisms (Scott, 1988).

knowledge¹¹⁰ (Ramazanoglu, 2002). Employing poststructuralist epistemologies and methodologies feminists have challenged the impartiality of traditional knowers and of the knowledge that they produce. As Weedon argues

The principles of feminist poststructuralism can be applied to all discursive practices as a way of analyzing how they are structured, what power relations they produce and reproduce, where there are resistances and where we might look for weak points more open to challenge and transformation (Weedon, 1987:136).

In providing an overview of the underpinnings and development of traditional dominant Western epistemologies, this chapter has demonstrated how the liberal humanist understandings of what counts as knowledge and who can be a knower are historically contingent and politically motivated.

The next three chapters focusing respectively on 'The Law', 'Psychiatry', and 'Psychology' operate in relation to one another. Chapter Three, 'The Law', will trace the development of legal discourse, identify historic legal responses to allegations of sexual assault and show how some nineteenth century medico-legal theories and myths have survived into today's legal discourse. Gender power relations, embedded in liberal humanist thought, reinforce the myths that surround sexual assault in Anglo-American law and culture and some feminist challenges to the gendered nature of the law are included. Evidence and how evidence is constructed for the presentation of a case together with expert evidence, in particular psychiatric and psychological expert evidence and its admissibility, are examined. The Evidence Act 2006 dispensed with s 23G and legal opinions regarding the implications of the new act for victims of sexual assault and the possibility of an inquisitorial system for adjudicating these cases are also included.

¹¹⁰ This criticism assumes that the critics use methodologies that are adequate in these respects (Ramazanoglu, 2002:3).

Chapter Three

The Law

It may surprise you to learn that our justice system isn't designed to discover the truth. Judges, lawyers and legal academics will all tell you that it's a game of words where the police have to prove each and every ingredient of an offence in accordance with a strict legal wording. If they can't the accused person is acquitted whether or not they did anything wrong. It's like a boxing match where the two sides slug it out with the judge as referee ensuring they keep to the rules and it's complicated, time-consuming, expensive and unreliable (United Future MP, Smith, M. 11 June 2005).

The majority of citizens in Western jurisdictions believe their criminal justice systems are designed to establish truth. This belief is dependent on the assumption that knowledge, truth and reality are fixed and are waiting to be discovered “out there”. In Anglo-American jurisdictions, an adversarial process is employed for the purpose of discovering truth. In these jurisdictions the formation of strong lobbies to protect men against false claims of child sexual abuse (CSA) was a feature of the 1990s (see Chapter One). Lobbyists in Aotearoa/New Zealand focused on s 23G and the Ellis case to make their case. The abandonment of s 23G during the first decade of the twenty-first century has not slowed their activities. Child advocates take issue with claims that allegations of CSA are frequently false and condemn the absence of experiences of women and children in a legal discourse that has been constructed by men (Taylor, 2004). Child advocates question the appropriateness of the adversarial process for the arbitration of CSA cases and cite the stress a child witness experiences during the court processes. They also question whether juries are acquainted with issues that are unique to CSA and are able to make informed decisions.

In the *Communist Manifesto* nineteenth century writers Marx and Frederick Engels (1820-1895) rail against the ‘capital-owning middle classes’ because, as they say, ‘your jurisprudence¹¹¹ is but the will of your class made into a law for all’ (Marx & Engels, 1888/1971:99-100). Until recently this criticism, that the values of a particular social

¹¹¹ Jurisprudence is the Anglo-American term most often used to refer to ‘the whole range of inquiries concerned with the broader significance of law’. It derives from a variety of social and human sciences, philosophies and ‘other intellectual disciplines’ (Cotterell, 2003:2).

group are imposed on the entire society and legitimated through the law, has generally been ignored by mainstream legal commentators. Roger Cotterell claims that it has usually been assumed or affirmed that democracy prevails without examining whether or not the processes that produce the law are democratic or whether all sectors of the population are treated equally fairly by the law (Cotterell, 2003).

To establish the ability of the legal processes to produce ‘a law *of* all as well as a law *for* all’ (Cotterell, 2003:209) in CSA cases, it is necessary to understand the philosophical origins of the law. This chapter will outline historic influences that have contributed to the development of Anglo-American law. Early legal responses to sexual assault and nineteenth century medico-legal constructions of rape and CSA are summarized and some feminist challenges to the gendered bias of the law and the powerful cultural myths about rape and CSA complainants are considered. The construction, presentation and admissibility of evidence and, in particular, expert evidence, are summarized together with the background and context of s 23G expert witness evidence in CSA cases. Some critical legal comment of the Evidence Act 2006 is included.

Influences and Issues in the Development of Western Law

The history of Western epistemology encompasses the history of Anglo-American law. This section traces significant historical events that were influential in the development of the law. The concept of “natural law” was developed by the Ancient Greeks and seen to be ordained by God. The emergence of rationality brought about by Enlightenment thinking saw God replaced by governments and reason and the law separated from morality. In the nineteenth century legal practice became professionalized but it was not until the late nineteenth century that the prohibition on women to practice law was lifted.

Natural Law

Early theories of law were based on morality and the authority of God. Developed by the Ancient Greeks, the concept of natural law is the notion that there are ‘universal principles of justice’ which are intrinsic to human nature and human-made law must

adhere to these principles (Ingram, 2006:16). Aristotle's claim that written law must 'appeal to the universal law and insist on its greater equity and justice' is an early formulation of natural law (Aristotle, cited in Ingram, 2006:16). The Roman philosopher Cicero (106-43BC) expanded on Aristotle's ideas when he envisaged a single, eternal and unchangeable law for all people at all times and claimed that the authority of natural law comes from God (Ingram, 2006). In the fifth century St Augustine argued that it is impossible for human-made governments to provide justice because of their predisposition towards domination, coerciveness, property acquisition, and enslavement as punishment for sin. He believed that true reason and lawfulness can only exist in the 'heavenly city of God' (Ingram, 2006:17).¹¹² In the thirteenth century St Thomas Aquinas distinguished between philosophy and theology and argued that while they were not incompatible they did not connect (Leahey, 1997). He took the position that earthly domination, legal coercion, private property and slavery can be viewed as natural and rational when they protect life or preserve peace. Aquinas also argued that disobeying and even overthrowing any tyrannical government whose actions were unjust and opposed to the common good could be justified by natural law. However, he condemned an overthrow that created 'such disorder that the society under the tyrant suffers greater harm from the resulting disturbance than from the tyrant's rule' (Aquinas, cited in Ingram, 2006:18).

Enlightenment, Industrialization and the Law

As the development of Enlightenment thinking brought about radical social and technological changes in the Western world it also provoked changes in the law. As the previous chapter has shown, in the modern pluralistic societies that emerged the authority of government superseded that of the church. An enlightened Western world view led to the development of liberalism, a reinvention of democracy and the rise of sciences. Enlightened legal knowledge, like all knowledge, is seen to be independent of the social and political position of the person who knows, and values culturally associated with men and masculinity, such as rationality, objectivity, authority and

¹¹² During the American Civil Rights struggle in the 1960s Martin Luther King appealed to St Augustine's theories of natural law when he was defending civil disobedience strategies. King argued that 'an unjust law is no law' (King cited in Ingram, 2006:19).

neutrality, are held in high esteem (Davies 2002). However, Margaret Davies argues the Enlightenment has 'not produced anything approximating a universal science or philosophy' and it is doubtful whether that would ever be possible (Davies, 2002:261). She claims that what the Enlightenment did produce was a mode of thought that was built on a solid European cultural base and which was able to promote itself as universal.

The Law and Morality

Until the Enlightenment, the law and morality were viewed as almost inseparable but by the second half of the eighteenth century an enlightened rationalist legal theory had become dominant in the rules of evidence (Childs & Ellison, 2000). Legal rationalism is based on positivist theory; it views the legal process as value free but it overlooks the inherently political and partial nature of law and facts (Nicolson, 1994). Legal positivists ridiculed the notion of natural law as 'nonsense' (Bentham, 1843/1962, cited in Ingram, 2006:22). Legal positivism recognizes only the laws that are made by sovereign states and does not require that the law be 'morally just in order to be legally binding'¹¹³ (Ingram, 2006:22). Legal positivists claim to study what *is*, not what *ought* to be (Davies, 2002).

The development of the rules of evidence has not always been consistent and the adversarial nature of the common law trial has done much to influence these rules (Childs & Ellison, 2000). Trials are about constructions of particular facts and not about possibilities. They are focused on winning and losing. Prosecution and defence counsel construct their cases and object strenuously to any evidence that does not fit their construction. Their job is to win a favourable (but not necessarily a just) verdict of guilty or not guilty. Caroline Taylor cites an Australian Queen's Counsel who is reported to have said 'You really feel you have done something when you get the guilty off' (Taylor, 2004:18).

¹¹³ An example of legal positivism can be found after World War II when Nazis charged with war crimes pleaded at the Nuremberg trials that under Nazi law their actions were lawful and they were not criminals (Ingram, 2006).

The Professionalization of the Law

Legal practice became professionalized in Britain during the nineteenth century and, like the men who developed modern medicine and the social sciences, the men who developed the law incorporated their prejudices into their discipline.¹¹⁴ Their task was made easier by the fact that under British law women were prohibited from practising law. The accepted authority for this prohibition was a statement by the sixteenth century Chief Justice of England, Lord Edward Coke, who simply declared ‘women cannot be attorneys’ (Coke J, cited in Gatfield, 1996:9).

Although the law prohibiting women from entering the legal profession in Aotearoa/New Zealand was relinquished in 1897,¹¹⁵ opportunities for women to obtain legal qualifications and positions continued to be limited until late in the twentieth century when the impact of second wave feminist campaigns began to take effect. Nevertheless a career in law was a challenge for a woman and in *Head & Shoulders: Successful New Zealand Women talk to Virginia Myers* (1986) Helen Melrose describes some of her experiences as a legal practitioner

I saw that male attitudes dominated the legal profession. It’s a case of do things our way, and you’re expected to adapt all the time. But their way is so foreign to a woman’s way because it is all adversarial, patriarchal and hierarchical. Law making, legal decisions and the way law has been taught and practiced have always been so male (Melrose, 1986, in Myers, 1986:90).

Melrose also comments

I ask myself why it took me twelve years to achieve a partnership when the men I went through Law School with did it in four or five. Part of the answer is sexism (Melrose, 1986, in Myers, 1986:88).

¹¹⁴ An example in English law that has now been repealed was the ‘irrebuttable’ assumption that a boy under the age of fourteen years could not commit rape (Childs and Ellison, 2000:2). There is, however, strong resistance to the elimination of prejudices that disadvantage women and children such as the presumption that they lie about sexual assault. Complainants are ‘routinely accused directly of lying during cross examination and are confronted frequently with outlandish reasons for bringing “false allegations”’ (Ellison, 2000:42).

¹¹⁵ The Female Law Practitioners Act 1896 was passed in 1897. Ethel Benjamin, who had been studying at Canterbury University, was the first woman to be admitted to the bar. She immediately set up her own practice as a barrister in Dunedin (Gatfield, 1996:37, 42). In Britain it was not until the passage of the ‘Sex Disqualification (Removal) Act in 1919 that women were able to practice law (Pugh, 2008:92).

Since the 1970s increasing numbers of women have been entering the legal profession but as Melrose has noted the professional environment is male dominated. Davies observes that historically, law and legal theory have been the province of men¹¹⁶ and they still are. She argues liberal male values have been 'embedded' in law and these values are constantly reinforced by the law's authority (Davies, 2002:198). Davies further claims that as liberal men have created the legal world in their own image, the process of its construction has excluded the knowledge of groups other than the privileged, educated, liberal, white males. Consequently any attempts to fit other knowledge into the 'dominant mould' are viewed as 'distorted or biased' (Davies, 2002:199). Thus, while the law is for all, it remains the law of a select few.

The Law and Sexual Assault

Some Historic Legal Responses to Sexual Assault

Historically, in both religious and cultural contexts, women have been unable to rely on the law for protection from sexual assault. Under Ancient Babylonian law if a man raped a married woman, regardless of the circumstances, she became seen as an adulteress and she and the rapist were tied up and thrown into the river to drown (Brownmiller, 1975/1986:19). The Biblical Ten Commandments did not include "Thou shalt not rape" but did forbid adultery and coveting a neighbour's wife. Under Hebrew law a virgin who was raped within the walls of the city was judged not to have resisted enough because her screams had not been heard. She and the rapist were both stoned to death. If a virgin was raped outside the walls of the city where her screams could not be heard she was judged blameless. She was compelled to marry the rapist who would have to pay her father compensation. If she was betrothed to someone else the rapist would be stoned to death for violating another man's property (Brownmiller, 1986). Talmudic law and Biblical tradition held that women and children were the property of the husband and father. Rape of wife or daughter was seen as theft and the husband or father was paid compensation. In the case of a daughter compensation could include marriage to

¹¹⁶ Davies qualifies her observation by adding that legal theory is the province of not all men, only educated white men (Davies, 2002).

the rapist (Haines, 1985). Under British law, from Elizabeth I's time until 1840, rape was punishable by death. Legal historians have found, however, that there were very few convictions as rapists were usually allowed to make amends by marrying the victim (Rotherham, 1982).¹¹⁷

The Development of Sexual Assault Laws

Sexual assault discourse and laws reflect the perceptions of the men who developed them. It has been seen how the words of Hale J in the seventeenth century continue to impact on the legal discourse of today (see Introduction). Hale J's questioning of the veracity of rape allegations was reinforced by early nineteenth century medical and legal discourse. The beliefs that female orgasm could not occur during rape and an orgasm was necessary for a woman to become pregnant were incorporated into medical and legal knowledge (Bourke, 2007). As prominent doctors and lawyers insisted it was almost impossible to rape a resisting woman, 1830s medical jurisprudence textbooks began to include the phrase it is 'impossible to sheath a sword into a vibrating scabbard' (Bourke, 2007:24).

Gender was a significant factor in the way children who alleged CSA were treated in court. Cross examinations of girl complainants would rigorously test their evidence and endeavour to establish their 'sexual innocence or precocity' or 'any evidence of delinquency' (Jackson, 1999:23). The scrutiny of boy complainants was far more cursory. Members of the Royal College of Surgeons questioned whether the rape of a child was even possible. When some doctors began informing working-class mothers about the risk of venereal disease to their children, Dr Michael Ryan railed against them in *A Manual of Medical Jurisprudence* (1831), arguing that 'purulent' vaginal secretions were what might be expected amongst 'grimy children' (Ryan, 1831, cited in Bourke, 2007:30).¹¹⁸ He argued that the children could easily be made to accuse an innocent

¹¹⁷ An example of a woman being forced to marry her rapist, in Aotearoa/New Zealand towards the end of the nineteenth century, is cited in *Broadsheet* by Joan Rotherham. The woman was a member of Rotherham's Grandmother's family (Rotherham, 1982:18).

¹¹⁸ Syphilis was recognized from the middle of the nineteenth century and gonorrhoea was identified in 1879 but doctors misdiagnosed them well into the twentieth century. As late as 1940 it was being

man of rape. Ryan's statements upheld a discourse that related false allegations to class position and Jackson notes that 'levels of virtue or viciousness were related to class position; poverty and dirt created the corrupt liar' (Jackson, 1999:228).

Mothers were frequently alleged to be implicated in child complainants' allegations. *The Students' Hand-Book of Forensic Medicine and Medical Police* (1883) cautioned doctors about the risk of substantiating a false claim of CSA when a child's vagina might have been dilated (probably by a scheming mother) (*The Students' Hand-Book*, 1883, cited in Bourke, 2007:30). An influential Birmingham police doctor, Lawson Tait, warned other doctors of 'the malice of persons, always women, who practically get up the cases or provoke them' (Tait, 1894, cited in Jackson, 1999:227). He claimed that CSA complainants were generally 'virulent little minxes', 'chits' and 'dirty little wretches' and the worst liars were 'children from the lowest class of population' (Tait, 1894, cited in Jackson, 1999:228). From 1884 onwards the "National Society for the Prevention of Cruelty to Children" (NSPCC) lobbied in support of child complainants.¹¹⁹ Together with feminists and Social Purity activists, the NSPCC opposed the contemporary medico-legal views and argued that although children's evidence might have to be treated differently from adult evidence it was just as valid (Jackson, 1999).

The American textbook *Medical Jurisprudence, Forensic Medicine, and Toxicology* (1894) carried a section entitled 'Can a Woman be Violated Against Her Will?'. The authors concluded that 'a fully matured woman, in full possession of her faculties, cannot be raped, contrary to her desire, by a single man' (*Medical Jurisprudence*, 1894, cited in Bourke, 2007:25). They advised lawyers that if there were only slight traces of a struggle on the woman's body she had failed to use her full strength to defend herself. They also suggested that serious injuries to a woman's genitals could be explained as

suggested that redness or irritation of a child's genitals were probably due to threadworm and not to abuse (Bourke, 2007).

¹¹⁹ The NSPCC defined indecent assault in gender specific terms – it always referred to it as being committed by men against young girls. The abuse of girls was seen to be much more common than that of boys. In a sample of witness depositions from the Middlesex Sessions between 1870 and 1914 Jackson found that 93 percent of cases involved girl victims (Jackson, 1999).

horse-riding injuries, vulvitis or gangrene.¹²⁰ In 1897 a New York doctor noted that pubescent girls who came from 'neurotic stock' frequently made rape allegations and, in 1900, American neurologist Bernard Sachs (1858-1944) claimed there was a link between hysteria and false charges of rape (Bourke, 2007:33). By the beginning of the twentieth century there was a general belief among doctors that accusations of a sexual nature were one of the main symptoms of hysteria. In his book *America's Sex and Marriage Problems* (1928), William Robinson¹²¹ claims that women who make rape accusations are 'degenerate'. In his words they are 'hysterical, psychopathic, notoriety-seeking or simply vicious' (Robinson, 1928, cited in Bourke, 2007:34).

Nineteenth century feminists, inspired by Josephine Butler's stand against the double standard of the Contagious Diseases Acts, worked to have these Acts repealed. After repeal was achieved many feminists joined the Social Purity Alliance and focused on the prevention of CSA and the elimination of prostitution.

Feminist Challenges to the Law

A major nineteenth century feminist campaign was against the Contagious Diseases Acts that became law in Britain in 1864, 1866 and 1869.¹²² The Acts allowed the compulsory detention, examination and treatment for venereal disease of women who were suspected of prostitution. They were enforced in eleven garrison towns, military stations, and naval seaports. The 1864 Act stated an infected woman could be detained in a hospital for three months. The 1867 Act extended this period and after the 1869 Act it became a year (Jeffries, 1985; Barry, 1995; Phillips, 2004). Josephine Butler led a

¹²⁰ The authors of *Medical Jurisprudence, Forensic Medicine, and Toxicology* remind their readers of a case fifty years earlier when a boy was accused of raping a four year old girl. Nine days after the alleged assault the girl died of inflammation of the vulva. The defence showed that at about the same time several other young girls died of inflammation of the vulva and concluded there must be an epidemic of vulvitis rather than an epidemic of sexual violence (Bourke, 2007).

¹²¹ William Robinson was President of the Medical Board and Chief of the Department of Genito-Urinary Diseases and Dermatology at the Bronx Hospital in New York (Bourke, 2007).

¹²² During the French Revolution venereal diseases were so widespread that the effectiveness of the military was often undermined. The French sought to prevent disease without inhibiting soldiers' access to prostitutes. In 1802 a dispensary was established for prostitutes to be examined twice weekly. Subsequently the French began regulating all brothels and prostitutes and the policy spread across Europe. It officially was seen as a mechanism for controlling venereal disease while unofficially it legitimated prostitution (Barry, 1995:92).

campaign against the double standard of these Acts on the grounds they enforced the abuse of women to protect the health of the men who had infected them in the first place. Butler and her colleagues protested that the examinations were an infringement of women's civil rights. To campaign successfully women had to learn to speak publicly about sensitive topics that previously had been 'taboo' (Jeffreys, 1985:7). Aotearoa/New Zealand passed contagious diseases legislation in 1869 and, although feminists campaigned against it, the legislation was not repealed until 1910 (Macdonald, 1986; Tennant, 1992; Wilson, 1992; Coleman, 2008).

After the repeal of the Contagious Diseases Acts in 1886, British feminists played an important part in shaping the direction of the Social Purity movement. Prevention of sexual abuses of girls and the elimination of prostitution became the movement's primary aims. Among its legislative successes in Britain were: the raising of the age of consent to sixteen; the criminalization of incest;¹²³ the modification of the defence of 'reasonable belief' that the child was older; and the extension from three months to a year of the period during which a complaint could be made (Hooper, 1997:339).

At the beginning of the twentieth century feminist campaigns focused public attention on the male bias of the criminal justice system. British feminists protested that the sexual abuse of girls was not taken seriously by the courts. The sentences given to offenders were inadequate and were less severe than those given when the offences were against boys or were minor offences against property.¹²⁴ Feminists asked

Is a boy more valuable than a girl? Is the girl so much less rigorously protected? Or is the wickedness of the crime judged on some scale which does not consider the harm inflicted? And if so, why should the fixing of that scale lie exclusively with men? (*Votes for Women* 1915, cited in Jeffreys, 1985:59).

¹²³ The Punishment of Incest Act 1908 was limited to blood relatives and did not include stepfathers or men in positions of authority such as guardians, schoolmasters or priests (Hooper, 1997:339).

¹²⁴ Jeffries compares three 1916 cases: those of a nineteen year old man convicted of indecently assaulting girls of eight and nine years who received a sentence of three months hard labour; of a sixty-four year old pastor convicted of assaulting a boy who received five years penal servitude; and of a 'coster' who stole four coats who received twelve months hard labour (Jeffreys, 1985:58).

The legal profession objected to any procedural changes being made and refused to allow women police and doctors to be involved in CSA cases claiming that, to do so, would bias the system against defendants (Hooper, 1997).

The Social Purity movement focused on law reform to deter and deal with CSA and emphasized the right of adult women to refuse unwanted sex. The construction of 'normal male sexuality' was cited by feminists as the problem that underpinned rape and CSA (Hooper, 1997:344). However, after the First World War, the ascendance of powerful discourses of sexology and social hygiene combined with medical discourse to ensure feminist views were marginalized.

The medical profession's construction of the "abnormal" sexual offender enabled diagnosis and treatment. Doctors' claims that their analysis did not affect the offender's criminal responsibility effectively divided CSA campaigners. The development of "sex education" emphasized responsible motherhood and moved public concern away from the actual incidents of CSA to a focus on behavior that was indicative of its consequences. Strategies were implemented to reform promiscuous girls and prevent venereal disease and unmarried motherhood. The control of young women rather than the abuse of them by men became the primary purpose of the social hygiene movement (Hooper, 1997). The inconsistency between the legal definition of CSA as a crime and the medical definition of it as an individual's abnormal pathology was not resolved. Suggestions for changes to court proceedings that included the relaxation of corroboration rules and a 'tribunal system of questioning' were dismissed and after 1935, there was little political activity in the area of CSA in English speaking Western jurisdictions, until the 1970s (Hooper, 1997:344-5).

Sexual Assault Myths

The laws of evidence in all sexual assault cases have been, and continue to be, of particular interest to feminists because of the difficulties associated with prosecutions. Feminists have identified "myths" that dominate societal views about rape. The most persistent myths assume that: rapists are evil, mentally deranged strangers; women

who are raped secretly want it to happen and enjoy it when it does; women who say “no” really mean “yes”; most rapes are assumed to be spontaneous and occur because the woman has been deliberately provocative; and it is taken for granted that a woman who has had intercourse outside of marriage, or does not have a good reputation, cannot be raped (Griffiths, 1982). These mythic depictions of women wanting and provoking rape successfully remove the responsibility for rape from men to women.¹²⁵

The law has failed to acknowledge that these are myths and that they serve to protect male defendants at the expense of female victims (Brownmiller, 1975/1986; Griffiths, 1982; McDonald 1994; Childs & Ellison, 2000; Cossins, 2001; Rait, 2004; Bourke, 2007). Modified versions of the same myths apply in CSA cases. Children are said to lie, to fabricate, to be provocative and not to know the difference between fantasy and reality. It is frequently, and incorrectly, believed of child witnesses that: they understand adult language and concepts and are able to respond accordingly; most CSA is perpetrated by people unknown to the child; all CSA victims will hate the perpetrator; all CSA victims will protest; all CSA victims will disclose the abuse to a trusted adult immediately; the first disclosure is the only true disclosure; an incorrect memory of one aspect of an event means everything else is incorrect, and if there is no medical evidence in a case where rape has been alleged it did not happen. In addition to these misconceptions, closed circuit television is said to create less stress and therefore a child witness is more likely to lie and it is also alleged to interfere with communication in court (Hamlin, 1997). Blackwell, who studied the beliefs of jurors, claims defence counsel in CSA cases frequently resort deliberately to misconceptions such as these as part of their cross examination strategy (Blackwell, 2007).

Evidence

The field of evidence is no other than the field of knowledge (Bentham, 1810, cited in Childs & Ellison, 2000:2).

¹²⁵ Prior to 1977 defence counsel was able to ask a rape complainant personal questions such as, whether she was a virgin, how many men she had had intercourse with, when she had had intercourse with them and sometimes whether she had enjoyed it (Rotherham, 1982:19).

Evidence is something we rely on every day, whether it is in terms of our own relationship with the world, or our interpretation of the statements and actions of others. Evidence is information that is likely to persuade people to believe that something is 'more or less likely to be true' (Childs & Ellison, 2000:1). Childs and Ellison point out questions of evidence, proof and judgments about probability are as relevant to daily living as they are to academic inquiry and the law. This section examines the construction of evidence and the court processes. Factors that prevent CSA complainants from bringing cases to court are discussed, the admissibility of expert evidence is outlined, and the potential problems associated with psychiatric and psychological expert evidence are identified.

For the most part the rules of evidence in Anglo-American jurisdictions are based on a 'body of judge made law from the eighteenth and nineteenth centuries overlaid in some cases with statutory reforms of the twentieth and twenty-first centuries' (Childs & Ellison, 2000:4). During a legal process, the court must establish the facts on which a case is to be determined. The facts presented to the court are what the judge rules admissible after a pre-hearing assessment of counsels' constructions of their cases. Information that could be significant to a case may not be put before a jury at all. Evidence law governs the types of evidence that are admissible and the judge decides on the admissibility of particular evidence. It is the jury that determines how much 'weight' to attach to evidence once it is admitted (Midson, 2003:1).

While in pre-modern times it was thought that 'God would ensure victory to the righteous', today it is all powerful "objective" lawyers who have "truth" on their side who are likely to win the verdict they seek in adversarial trials (Nicolson, 2000:17). Lawyers construct their cases for presentation to the court and, during the process of a trial, evidence that contradicts that construction will, where possible, be strenuously objected to. Murphy provides an example of such a process:

A judge asks counsel arguing against the admissibility of certain evidence 'Am I not to hear the truth?' only to be told 'No Your Lordship is to hear the evidence' (Murphy, 1985:1).

During the 1970s, traditional evidence construction was challenged by a discourse of “new evidence” and a wide range of issues that hitherto had not been considered relevant were subsequently included in court cases. Among these inclusions was the evidence of psychologists. Donald Nicolson argues, however, that though the ‘transportation has been modernized’, ‘the destination remains the same’¹²⁶ (Nicolson, 1994:727-728).

Evidence in Child Sexual Abuse Cases

The estimated prevalence rate of CSA has not been reflected in disclosure rates, criminal reporting rates and conviction rates. Jullich comments that this could be indicative of a ‘conspiracy of silence’ but it could also indicate that victims have not wanted to disclose their CSA – particularly those who had a pre-existing relationship with the offender (Jullich, 2001:345). She questions whether some victims may be affected by the “Stockholm Syndrome”.¹²⁷

The absence of witnesses and physical evidence on which to ground a complaint is frequently a problem for the prosecution in CSA cases. A child complainant may not be believed because of the time that has elapsed between the event and the child’s disclosure. The affection a child has for the defendant can mislead and there may be a lack of understanding of the need to take the age of the child into consideration and not treat her/his evidence as if it were that of an adult. In their submission to the Evidence Bill 2005, Blackwell and Seymour supported the abandonment of s 23G but argued that expert psychological evidence should be available to the courts to educate and inform on CSA issues. They believe a more appropriate mechanism than s 23G is needed.

¹²⁶ Legal academic Nicola Lacey agrees with Nicolson. She says movements such as ‘law in context’, ‘socio-legal studies’ and ‘critical legal studies’ have begun to reshape the approach to legal education but the orientation of most courses in law remains a broadly positivist one (Lacey, 1998:4).

¹²⁷ The Stockholm Syndrome describes the behavior of kidnap victims who become sympathetic to their captors. After six days in captivity in a bank in 1973, in Stockholm, Sweden, several kidnap victims actually resisted rescue attempts, and afterwards refused to testify against their captors (<http://ask.yahoo.com/20030324.html>).

Expert Evidence

It is clear that expert opinion is not the mere conjecture, surmise or speculation of the expert: it is his (sic) judgment on a matter of fact; it differs from ordinary evidence on matters of fact in that it is not based on the untutored senses or on the observations of the average man (sic), but on specialised training, experience out of the common, and/or theoretical information of a recondite kind (Kenny, 1983:199) (emphasis added).

Expert witnesses are so-named because they are considered to be experts in their field. Kenny articulates the distinction the law makes between the opinion of an average person and that of an expert. It is generally only expert witnesses who are allowed to provide “opinion evidence” in court. Expert opinion evidence is evidence of a ‘scientific nature’ which is deemed to be outside the knowledge or experience of the judge and jury (Rait and Zeedyk, 2000:19). The legal fraternity has not always welcomed the admission of expert evidence. In 1873 Sir George Jessel, the Master of the Rolls, said of expert evidence

In matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence was given upon oath, in point of fact the person knows that he cannot be indicted for perjury, because it is only evidence as to a matter of opinion...but that is not all. Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him. Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias...Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you (Jessel J, 1873, cited in Freckleton, 2007:232).¹²⁸

Jessel J understood the bias created by the power of an employing counsel over an employee witness but he would not have perceived the bias created by the power in gender relations. He was no doubt proud of the “detachment” and “impartiality” he believed he exercised in his adjudications. It is unlikely he would have accepted that before he even began to deliberate on a case ‘a whole mess of laws – social, political,

¹²⁸ The Master of the Rolls is the second most senior judge (after the Lord Chief Justice) in England and Wales. Until 1958 the Master of Rolls was the custodian of the ‘Rolls and Records of the Chancery of England’. Today the Master of the Rolls is the presiding officer of the Civil Division of the Court of Appeal and since 2005 has been known as the Head of Civil Justice (<http://www.answers.com/topic/master-of-the-rolls>).

sexual, intellectual (etc) conventions, laws of thought, laws of language and other personal constraints' would have already shaped the way he would interpret the issues and decide on his cases (Davies, 2002:350).

Psychiatric and Psychological Expert Evidence

Nineteenth century, male dominated, medico-legal constructions of rape questioned or denied its reality and associated rape allegations with hysteria and degeneration. It has been noted earlier in this chapter that these medical theories negating sexual violence and the credibility of women have been absorbed into legal discourse. Taylor claims that medicine and psychiatry have denigrated women and girl-children on the basis of their "femaleness" and, in court, a girl-child alleging sexual assault is perceived to be 'just as dangerous and just as non-credible as her adult counterpart' (Taylor, 2004:4). After analyzing transcripts of intrafamilial CSA trials in Victoria, Australia, Taylor urges caution in respect of both psychiatric and psychological expert testimony. She accepts expert evidence can prevent attacks on complainants for delayed disclosure and behavior that the defense considers inconsistent with allegations. She also sees a need for juries to be briefed on the issues that are specific to CSA. However, as many psychiatrists and psychologists 'tend to pathologize victim suffering, as though their emotional distress and trauma is located intrinsically rather than caused by external factors – that is, the abuse', she recommends critical consideration of expert psychiatric and psychological testimony (Taylor, 2004:294).

The relationship between psychology and the law differs from that of psychiatry and the law and is not always a comfortable one. In 1908 German psychologist Hugo Münsterberg¹²⁹ (1863-1916) published a book entitled *On the Witness Stand*. Münsterberg urged judges and lawyers to utilize the findings of experimental psychologists, particularly 'in testing the reliability of witness memory and suspect consciousness of guilt' (Rait and Zeedyk, 2000:18). Wigmore J (see Introduction) objected to such evidence on the basis that psychology had not gained acceptance as a

¹²⁹ Hugo Münsterberg had been a student of the pioneering psychologist, Wilhelm Wundt (see Chapter Five) (Rait and Zeedyk, 2000:185, note 4).

science. He argued that the 'proof process in court' could be reduced to logical principles and function with the 'formulaic precision of a science' (Wigmore J, 1908, cited in Rait and Zeedyk, 2000:18). However, despite the discomfort that remains in some quarters, psychology has now gained a clear foothold in the courts of many jurisdictions.

The Admission of Expert Evidence

The 'general acceptance standard' originated in the 1923 case of *Frye v United States* in which evidence about a polygraph test was disallowed. The court said in its judgment

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs (*Frye v United States*, 1923:1014, cited in Rait and Zeedyk, 2000:20).

After 1923, the general acceptance standard or 'Frye rule' became the basis on which to evaluate the reliability of scientific evidence in many Western jurisdictions (Rait and Zeedyk, 2000:20). However, problems arose over where the boundaries lay between expert knowledge and everyday experience and there were disagreements over what level of scientific study should be accepted. In 1993 the United States Supreme Court considering the case of *Daubert v Merrell Dow Pharmaceuticals* issued a set of four guidelines for the purpose of determining the appropriate standard for admitting expert scientific testimony. These guidelines have come to be regarded as the new standard

Is the theory or technique testable, or has it been tested? Has the theory or technique been subjected to peer review and publication? In the case of a particular technique, what is the known or potential rate of error? What is the degree of acceptance in the scientific community of the theory or technique? (Rait and Zeedyk, 2000:21-22).

The *Daubert* standards have been criticized for being too general and, in some instances, have been rejected in preference for the general acceptance standard. Nevertheless, they have re-confirmed the importance the court places on scientific methods and reliability (Rait and Zeedyk, 2000). However, a strict application of the

Daubert standards would exclude most of the currently admissible psychological expert evidence because generally it is based on clinical experience rather than theories which have been rigorously tested. This has created a controversy (see Chapter Five) that McDonald maintains could be resolved if the judge and jury were informed as to whether expert psychological evidence was “scientific” or “specialized”¹³⁰ as this would enable them to ‘properly weight’ it (McDonald, 1998:79).

The Evidence Act 2006

The Evidence Act 2006 became law in August 2007 making s 23G redundant. This section summarizes some critical legal comment on the Evidence Act 2006 in relation to sexual assault complaints and the Government’s consideration of alternatives to the adversarial system for adjudicating sexual assault cases.

Retired Appeal Court Judge and sexual assault law reform campaigner, E.W. Thomas claims the authors of the Evidence Act 2006 have taken a generally ‘conservative view of the law of evidence’ (Thomas J, 2008:169). He argues this is most evident in the Act’s treatment of sexual cases where ‘Trends which would appear to have been moving to redress the balance’ (of the disadvantage experienced by sexual assault complainants) have been ‘arrested’ (Thomas J, 2008:169). High profile police sexual assault cases in Aotearoa/New Zealand sparked public outrage when a complainant’s sexual behavior was seen to be relevant to the court but an accused’s rape conviction was not. In response to a call for an overhaul of the criminal justice system to address the problems faced by sexual assault complainants, several prominent lawyers concede that the system is ‘fundamentally flawed’ (Spratt, 2007:24). Colin Withnall QC thinks the ‘European inquisitorial model’ could be a ‘fairer alternative’ (Withnall, cited in Spratt, 2007:24). Withnall comments that the adversarial legal system

is not a search for truth. It’s a question of putting forward the best case on the material you have within the ethical constraints. It’s a bit devious (Withnall, cited in Spratt, 2007:24).

¹³⁰ McDonald envisages that specialized evidence would be based on ‘experience, observation and skill’ (McDonald, 1998:79).

Criminal lawyer Susan Hughes believes 'talk of truth is utterly unhelpful' (Hughes cited in Spratt, 2007:25). She maintains that

Truth is a ridiculous concept. The better question is whether there is sufficient evidence to properly convict before someone's convicted (Hughes, cited in Spratt, 2007:25).

Withnall, Hughes and law lecturer Scott Optican all agree the system's flaws are not caused by an inherent fault in the adversarial system but are due to inadequate resourcing (Spratt, 2007). Optican argues that inadequate resourcing is problematic when the system depends on 'the parties having equal footing to be fair' (Optican, cited in Spratt, 2007:27). However, he does see a lot of good things in the adversarial system. He claims

It's a free market approach to justice where supposedly equally matched adversaries play on the same field and the best player wins on the day. The goal is that through a clash of evidence and parties the truth will come out (Optican, cited in Spratt, 2007:25).

Optican claims that although the interrogation of victims can be 'deeply traumatic', it is 'necessary to protect the defendant' because his 'liberty is on the line' (Optican, cited in Spratt, 2007:25). McDonald does not agree. She concedes there have been some improvements made but argues they have not gone far enough. She points out that a complainant's sexual history with the accused may still be explored by the defence without the judge's leave and this, in her view, can be 'prejudicial or irrelevant' (McDonald, cited in Spratt, 2007:26). McDonald claims women are disadvantaged because there is no requirement for a judge to explain what constitutes consent.¹³¹ She and Taylor are concerned that during the court process the complainant is 'merely a witness' and has no legal representation of her own (McDonald, cited in Spratt, 2007:26; Taylor, 2004:295). Thomas J and Human Rights Commissioner Joy Liddicoat are critical of a law that allows an accused to avoid any scrutiny of his character or prior convictions by not taking the stand.¹³² Liddicoat cites a recent law change in the United

¹³¹ If a victim was intoxicated for example, she would have been unable to consent.

¹³² S 33 of the Evidence Act 2006 says 'In a criminal proceeding, no person other than the defendant or the defendant's counsel or the Judge may comment on the fact the defendant did not give evidence at his or her trial (s 33, Evidence Act 2006). Blackwell's investigation of 137 cases of CSA shows that 42.3% of defendants gave evidence at the trial (Blackwell, 2007:241).

Kingdom that allows a jury to presume what an accused's reluctance to answer questions under oath might mean and she questions whether 'the right to silence' is appropriate in sexual abuse cases (Liddicoat, cited in Spratt, 2007:26). She believes a provision for comments on the complainant's behavior by "neutral" expert witnesses, especially in historical cases, would be appropriate. She argues that a complainant's behavior may be typical for a trauma victim but the defence will use it against her (Liddicoat, cited in Spratt, 2007:26).

An Inquisitorial System

The 2005 Justice and Electoral Committee Report on the Ellis petitions recommended that the Justice and Electoral Committee of the next parliament examine the 'inquisitorial-type' hearing process employed by the Family Court to see if it might be a better way of determining CSA cases (Justice and Electoral Committee, 2005:12). The current Government is investigating the possibility of introducing an inquisitorial system for the adjudication of sexual assault cases. As noted Simon Power went to Europe in June 2010, to gather information but to date no decision has been made.

The 1990 amendments to the Evidence Act 1908 were an attempt to reduce the disadvantage CSA complainants experience in the current adversarial system, where the emphasis is on winning the case rather than dispensing justice. The prohibition of judges' warnings and the provision of expert witnesses incurred particular condemnation and this chapter concludes by revisiting the debates that ensued.

Conclusion

The law is generally associated with integrity and morality but this association is a fallacy. The law is not impartial. CSA and adult sexual assault complainants cannot rely on legal remedies. They are disadvantaged by the gendered nature of the liberal humanist epistemology on which the law is based. The embedded myths cast them as temptresses, seducers or liars. CSA complainants are further disadvantaged because they are children participating in an adult process where frequently their evidence is considered as if it were that of adults. The debates provoked by the 1990 amendments

to the Evidence Act 1908 can be understood in the light of the competing historical, political and gendered discourses that surround the issue of CSA.

In post-Enlightenment British legal discourse, claims that sexual assault complaints are likely to be false can be traced back to Hale J in the seventeenth century. Until 1990 Hale J's words were constantly reiterated in judges' warnings to juries. Although judges' warnings have been prohibited the discourse they were informed by has constantly been re-articulated in the media publicity generated by opponents of the amendments – in particular s 23G.

Always controversial s 23G, making provision for an expert witness to testify in a CSA case, was abandoned in 2007. The evidence s 23G expert witnesses could present was limited but it did provide, what was perceived to be, authoritative support for the complainant. Opponents argued that expert evidence presented under s 23G was not scientific and simply the opinion of the witness and in this assertion they were correct. Constructions of science and expert evidence are based in the liberal humanist epistemology that assumes a neutral subject investigating universal truths with fixed meanings. However in the adversarial courtroom the acceptance of evidence depends not on “truth” but on which counsel's construction of the facts convinces the jury. The power of the discourse that a counsel's construction upholds will play a significant part in the jury's decision. The media scrutiny of the Ellis case exposed the plurality of expert evidence and in so doing it also exposed the fallacy of the liberal humanist notion of scientific objectivity.

For nearly seventeen years opponents of s 23G constantly re-articulated the historic precedent embedded in law, that CSA allegations are likely to be false. The power of this myth and its acceptance as cultural and legal knowledge evidences the gendered nature of liberal humanist epistemologies. It demonstrates clearly the relationship between gendered power and what is accepted as knowledge. In light of the ubiquity and potency of this discourse together with the disadvantages experienced by CSA complainants and the limitations placed on s 23G expert evidence, the allegation that s

23G was responsible for the convictions of Ellis and hundreds of others, is simply unsustainable. The s 23G debates incorporated strong denials of the law's inherent bias against CSA complainants and a resistance to making the court processes a little easier and hopefully a little fairer for them. Explicit in the discourse of false allegations is a concern for the well-being of allegedly abusive men and a lack of compassion for the children they abuse. The gendered nature of the law ensures it is not a law of all.

The next chapter will identify the people and events that have contributed to the development of the discipline of psychiatry. The debates within psychiatry about the origins of mental illness and the mid-twentieth century impact of psychopharmacology on the discipline are discussed as a backdrop to exploring the relationship between psychiatry and law and the provision of expert testimony by psychiatrists.

Chapter Four

Psychiatry

Psychiatrists are fully qualified physicians (medical doctors) who specialize in treating people defined as having psychiatric problems...Psychotherapists¹³³ are a very broad group which includes anyone helping people with problems by talking with them...Psychologists are educated in graduate schools of psychology rather than medical schools and they receive a PhD rather than an M.D. Clinical psychologists are given training that overlaps with psychiatrists, and they often receive much more intensive training in psychotherapy than do psychiatrists...Psychoanalysis is a form of psychotherapy founded and developed by Sigmund Freud and taught in his independently franchised institutes (Breggin, 1991:1-2).

In the second half of the eighteenth century, the fear of madness grew at the same rate as the dread of unreason, and for that reason these twin obsessions constantly reinforced each other. And just as the imaginary forces that accompanied unreason seemed to break loose, there came a deluge of concerns about the possible ravages of madness (Foucault, 1961/2009:362).

Under s 23G of the Evidence Act 1908 a psychiatrist or a psychologist, experienced in the treatment of sexually abused children, could provide expert evidence in a child sexual abuse (CSA) case. Although their approaches to human problems and mental illness are different psychiatry and psychology are frequently confused. As medical doctors, psychiatrists are able to prescribe drugs, to hospitalize people and to treat them against their will. Contrary to a popular belief, Sigmund Freud was not a psychiatrist and nor was he the ‘father of psychiatry’ (Breggin, 1991:2); Peter Breggin¹³⁴ points out psychiatry had existed for many years before Freud. Psychiatry’s focus is the diagnosis and treatment of a wide range of mental illnesses and before the end of the eighteenth century it did not exist as a discipline. Mental illness, known as “madness” or “insanity” prior to the twentieth century, has always been a part of humankind and the

¹³³ Psychotherapy is a broad grouping that includes anyone helping people with problems by talking with them. Today psychotherapy is not frequently practised by psychiatrists, in fact some leaders in the field want to eliminate it from the basic psychiatric training programmes. In some instances this has already occurred (Breggin, 1991).

¹³⁴ Psychiatrist, psychotherapist and author of *Toxic Psychiatry*, Peter Breggin claims psychiatry has been largely hostile to Freud’s teachings. Freud did not become a psychiatrist and warned his colleagues to beware of the medical profession (Breggin, 1991:2). Nevertheless various forms of the psychoanalytic theories originated by Freud continue to influence Western psychiatry and culture today (Ussher, 1991).

care of the insane has been written about since the time of the Ancient Greeks (Shorter, 1997).

Today the criminal justice system is reliant on psychiatrists' court reports and expert testimony. Although the evidence of psychiatrists is seen to be vital to the resolution of a variety of cases no area of medical practice has proved to be as 'consistently controversial' as the forensic role of psychiatry (Freckleton, 2007:229).

This chapter identifies some of the people and events that have contributed to the development of psychiatry as a discipline. Psychiatry's relationship with the law and the provision of expert psychiatric testimony in CSA cases is examined. The chapter also identifies competing discourses within psychiatry about the origins of mental illness: to what extent can it be attributed to biological causes as opposed to social and environmental factors? Consideration of these issues and the emphasis psychiatry currently places on pharmaceuticals, are necessary for an understanding of the controversies that expert psychiatric evidence frequently provokes.

Significant Influences and Issues in the Development of Psychiatry

This section outlines some of the ways in which mental illness has been perceived and dealt with since the Ancient Greeks. It identifies the beginnings of modern psychiatry in the nineteenth century and its subsequent professionalization. Developed by men, psychiatry has an interesting (and disturbing) history in respect to its professional perception of women. The historical connections made (by men) between women's sexuality and their mental instability are summarized and the origins of the Freudian notion that women and children fantasize about sex with their parents is examined.

Historically there have been many theories about the causes of mental illness. The Ancient Babylonians, Egyptians and Hebrews believed emotional disturbances were caused by evil spirits and made up incantations that would ward them off. Ancient

Greek physician Hippocrates (460 - 375BC)¹³⁵ and his colleagues, however, worked on the assumption that all diseases have a natural cause rather than a supernatural one. They challenged those who perceived epilepsy to be a visitation from a devil or an evil spirit and argued it might be the result of a disease of the brain. Hippocrates believed that observation of the patient by a doctor is a vital aspect of care. He and his colleagues argued for the work of doctors to be kept separate from that of priests (<http://www.historylearningsite.co.uk/hippocrates.htm>). Hippocrates identified only two states of madness – mania and melancholia (Ussher, 1991). While most of the Greek thinkers and doctors were sympathetic to people with emotional disturbances, one influential individual, Celsus (25BC-AD50), advocated punitive treatments and traces of these survived through the ages and into the twentieth century (Murray, 1983; <http://www.historylearningsite.co.uk/hippocrates.htm>).

The persecution of witches in the Middle Ages was based on beliefs that linked women's sexuality to madness and badness together with allegations that some women were consorting with demons. At the time the power of the rule of celibacy that had been a mainstay of the medieval church, was declining. Women's "temptations" and "seductions" were blamed for the collapse of feudalism and, as a consequence, sexuality, womanhood and witchcraft became synonymous (Ussher, 1991). The Catholic Church approved and provided guidelines for the detection and punishment of witches in the *Malleus Maleficarum* (1487-1489). It noted that 'all witchcraft comes from carnal lust which in women is insatiable' (*Malleus Maleficarum* 1487 cited in Ussher, 1991:49). It has subsequently been established that many of the women who were persecuted as witches suffered from mental illnesses (Murray, 1983). By the eighteenth century the witch trials had ceased but with the rise of science, "madness", "hysteria" or "insanity" replaced "witch" as a label that was applied to "deviant" women (Ussher, 1991).

¹³⁵ Hippocrates' name is still associated with medicine today. All newly qualified doctors take what is called the 'Hippocratic Oath'. Some see Hippocrates as the 'father of modern medicine' even though he died in 375BC (<http://www.historylearningsite.co.uk/hippocrates.htm>).

In Paris, in 1656 Louis XIV, who in 1682 would abolish the death penalty for witches in France (Murray, 1983:289), established two public institutions for 'the sick, the criminal, the homeless and the insane' – the 'Bicetre' for men and the 'Salpetriere' for women (Shorter, 1997:6). By the late nineteenth century, these institutions housed just the insane and were known for the brutal treatment that was meted out to them. In the small states of Central Europe the state, the church and local communities shared the care of the insane in asylums, almshouses and jails. The conditions were usually filthy and inmates were often caged, flogged or kept in chains. Jane Ussher notes that

Prior to the 'enlightenment', the mad were seen to be closer to animals, their loss of reason resulting in the very loss of their humanity. Consequently, the mad deserved no better treatment than that meted out to a bad or difficult dog (Ussher, 1991:65).

The Beginnings of Modern Psychiatry

Most histories of modern psychiatry begin with Philippe Pinel (1745-1826). Following the French Revolution in 1789, Pinel went to Paris and took charge of the Bicetre in 1793, and the Salpetriere in 1795. Against advice he released the patients in both institutions from their chains. In 1801 he wrote *A Treatise on Insanity* in which he identified 'hereditary predisposition' among what he believed were causes of insanity (Murray, 1983:290). He classified four kinds of insanity: mania, melancholia, dementia and idiocy. Pinel advised against restraints (unless absolutely necessary) and against punishment and exorcism. He employed bathing, mild purgatives and opium as physical treatments and was one of the first psychiatrists to keep thorough case histories and statistics. Pinel was the first of many French psychiatrists who examined the notion of emotional trauma as a cause of insanity. However, by the mid nineteenth century, the main trend in 'orthodox psychiatric circles' was that insanity had some 'physiological origin of an as yet undetermined nature' (Murray, 1983:291). The insanity brought about by tertiary syphilis served to confirm this belief.¹³⁶ Insanity, many psychiatrists contended, should be treated as if it were a physical illness (Murray, 1983).

Medical historian Edward Shorter identifies Emil Kraepelin (1856-1926) as the central figure in the history of modern psychiatry. Kraepelin studied for a short time under

¹³⁶ Tertiary syphilis is also known as the 'General Paralysis of the Insane'.

pioneer psychologist Wilhelm Wundt (see Chapter Five). Although he believed the cause of 'dementia praecox' (schizophrenia) was biological and coined the term 'psychopathic predisposition', Kraepelin did not agree that all insanity had a physiological cause (Shorter, 1997:106). He was part of a revolt within psychiatry against biological theories and rather than cause he was interested in outcome. He studied and kept records of the course of his patients' illnesses over years and differentiated diseases on the basis of the outcomes he observed (Shorter, 1997). Kraepelin was the first person to make a distinction between a "psychotic" and a "neurotic" illness.¹³⁷ He also categorized different forms of dementia praecox and distinguished the manic-depressive psychoses as a separate category (Murray, 1983).

The Professionalization of Psychiatry

Nineteenth century orthodox psychiatry continued to emphasize biological and genetic components of mental illness but added that these illnesses get worse as they pass from one generation to the next causing progressive degeneration in families and populations. It was French psychiatrist Benedict-Augustin Morel who 'launched the concept of degeneration on its historical trajectory' in 1857 (Shorter, 1997:94). He claimed, for example, that what might begin as maternal tuberculosis might end three or four generations later as dementia and sterility. From his position at the Illenau Asylum in Baden, Germany, Viennese professor of psychiatry, Richard von Kraft-Ebbing (1840-1902) amplified and promoted the 'Morelian doctrine' and in 1879 wrote a textbook that became the 'German bible' for degeneration theory¹³⁸ (Shorter, 1997:96). Shorter claims that by the time Kraft-Ebbing wrote *Psychopathia Sexualis* in 1886 he was 'seeing degeneration literally under the bed' and cites one of Kraft-Ebbing's colleagues

¹³⁷ These terms are now outdated but they were employed until late in the twentieth century. Psychosis frequently features perceptual disturbances while neurosis does not. An individual with a neurotic (exogenous) depression will brighten and respond when visited by friends and family but revert to a depressed state when they are gone. An individual suffering from a psychotic (endogenous) depression does not respond to visitors (or any positive stimuli) and remains depressed.

¹³⁸ Von Kraft-Ebbing's textbook *Lehrbuch der Psychiatrie* (1879) states '(In degenerates) it is specially frequent for sexual functioning to be abnormal, in so far as there is either no sexual drive at all, or it is abnormally strong, manifesting itself explosively and seeking satisfaction impulsively, or abnormally early, stirring already in early childhood and leading to masturbation. Or it may appear perversely meaning that the kind of satisfaction is not orientated to reproduction' (von Kraft Ebbing, 1879, cited in Shorter, 1997:96).

who said of him 'He was a man who was gifted in literary terms, yet scientifically and critically he was incapable to the point of feeble-mindedness' (Benedikt, 1886, cited in Shorter, 1997:96). Shorter also argues *Psychopathia Sexualis* is a 'classic example of psychiatry run off the rails' (Shorter, 1997:96). After 1933 degeneration theory was officially included in Nazi ideology and Shorter believes that psychiatry, particularly German psychiatry, must take a 'partial responsibility' for the World War II Holocaust (Shorter, 1997:99). He points out it was the notion of biological degenerates that underpinned a belief in the need for racial hygiene that drove the Nazi political forces and destroyed millions of people's lives.

The connection between sexuality and insanity can be traced through history but it was during the nineteenth century that this connection was legitimated as a form of illness. At this time masturbation, illegitimate pregnancy, homosexuality, frigidity, promiscuity and nymphomania were all declared to be pathological. In 1873 British psychiatrist Henry Maudsley noted that

The irritation of the ovaries or uterus is sometimes the direct occasion of nymphomania – a disease in which the most chaste and modest woman is transformed into a raging fury of lust (Maudsley, 1873, cited in Ussher, 1991:72).

In nineteenth century Britain "femininity" was viewed as passive, virginal and sexually innocent. Women who did not conform to this view could be treated as insane and locked up. In some instances a clitoridectomy was performed to cure a woman's "unnatural" sexuality. This treatment was always controversial and its use was not widespread but it was nevertheless 'inflicted upon many women' (Ussher, 1991:73).

Hysteria

Throughout most of its medical history hysteria has been associated with women (Showalter, 1998). Its name comes from "hystera", the Greek word for uterus. Hysteria was first discussed by Hippocrates but it was not until the late eighteenth and the nineteenth century that it became significant as a professional diagnosis. The professionalization of medicine gave male physicians and psychiatrists the power to identify symptoms and define conditions. They defined hysteria as a problem that most

often affected women and in his *Commentaries on insanity* (1828) G. Burrows expresses an early nineteenth century view of it

Nervous susceptible women between puberty and thirty years of age, and clearly the single more than the married, are most frequently visited by hysteria; and such constitutions have always a greater aptitude to strong mental emotions, which on repetition, will superinduce mental derangement (Burrows, 1828, cited in Ussher, 1991:74).

Nineteenth century science associated hysteria and madness with menarche, menstruation, pregnancy and the menopause. The womb was said to wander about the female body acting like a sponge and sucking the 'life-energy or intellect from vulnerable women' (Ussher, 1991:74). Women's 'energy could be spared for the intellect only at the expense of the womb' and education would 'disqualify' women from their 'true vocation, the nurturance of the coming race and the governance of well-ordered, healthy and happy homes' (Fitch, 1890, cited in Ussher, 1991:75). *The Home Handbook of Domestic Hygiene and Rational Medicine*, first published in 1888 by American medical practitioner J.J. Kellogg,¹³⁹ says of hysteria

It almost always occurs in women and most frequently between the ages of 15 and 25. In rare instances it affects men as well as women. We have met a few cases of this kind. The most common causes are sexual excesses, novel reading, perverted habits of thought and idleness. It occurs most frequently among young ladies who have been reared in luxury and who have never learned self control, but who have had every whim and fancy gratified until self-gratification has come to be their greatest aim in life. It is a notable fact that hysteria rarely or never happens among the women of uncivilized nations. It is stated that before the war, the disease was unknown among negro women of the South, though it has occasionally been met with since emancipation (Kellogg, 1888/1900:1107).

For well over a century medical discourse surrounding hysteria has been contested by feminists. Hysteria was regularly discussed in medical circles of the 1880s and 1890s when feminist activism, "The New Woman" and a 'crisis in gender' were also common topics (Showalter, 1997:49). Showalter notes that these discussions coincided with the 'pseudoscientific discourses of race degeneration' that opposed women's admittance to universities and the professions. The degenerationists believed feminism was a form of

¹³⁹ Among other things Dr Kellogg was a member of the British Gynaecological Society, the International Periodical Congress of Gynaecologists and Obstetricians, the American Association of Obstetricians and Gynecologists and the British and American Associations for the Advancement of Science.

degeneration and that the education of women led to a decline in marriage, a fall in the birth rate and to women cultivating their brains but neglecting their bodies. Doctors viewed hysterical women as ‘closet feminists’ who had been reprogrammed into traditional roles. At the same time politicians were attacking feminist activists and accusing them of being ‘closet hysterics’ who needed treatment rather than rights (Showalter, 1997:49). Many nineteenth century reformers blamed the excessive consumption of alcohol for sexual violence and physician Havelock Ellis believed that drunkenness and degeneracy were inextricably linked. He therefore saw sexual violence as ‘simply one expression of infirmity’ (Bourke, 2007:129).

Jean-Martin Charcot (1825 – 1893), was well known for his valuable contributions to neuropathology.¹⁴⁰ However, according to Shorter, Charcot’s theories about hysteria were based on his belief in the biological and genetic origins of mental illness and turned out to be ‘nothing more than an artifact of suggestion’ (Shorter, 1997:85). Charcot was put in charge of the Salpêtrière in 1862 and from October 1885 to February 1886 Freud studied there under him. Hysteria, in Charcot’s view, was an inherited disease of the nervous system and began in the ovaries of women and the testicles of men.¹⁴¹ Charcot invented an ‘ovarian compressor’ – ‘a heavy leather and metal belt strapped onto the patient and often left for as long as three days’ (Showalter, 1997:33). This “treatment” proved useless as did the compression of his male patients’ testicles. Under Charcot’s directorship the percentage of women at the Salpêtrière who were diagnosed with hysteria rose from one percent in 1841 to seventeen percent in 1883. Elsewhere hysteria was rare and some doctors suspected Charcot was ‘creating iatrogenic illness or indeed, creating hysteria’ (Showalter, 1997:31).

In the late 1870s Charcot introduced twice weekly lecture-demonstrations in the Salpêtrière’s amphitheatre where he would talk about his patients and imitate their

¹⁴⁰ For example Charcot linked anatomical changes to clinical symptoms in multiple sclerosis (Shorter, 1997:85) and differentiated it from Parkinson’s disease. He defined the symptoms of poliomyelitis, mapped out the spinal forms of neurosyphilis and described the pathology of amyotrophic lateral sclerosis (Showalter, 1997:32-33).

¹⁴¹ Charcot diagnosed and treated at least ninety men for hysteria but about ten times that number of women were diagnosed and treated (Showalter, 1997:33).

behaviours. Hypnotism had been discredited but Charcot made it fashionable again by claiming that the capacity to be hypnotized was a sign of hysteria. He put women he had diagnosed with hysteria on display at his lecture-demonstrations for his interns to hypnotize. As Charcot's fame spread these events could be attended by as many as five hundred people (Showalter, 1997:31). Showalter notes

The old hospital was an ideal environment for the manufacture and marketing of hysterias, and Charcot made it an up-to-date "temple of science". By the end of the nineteenth century, the Salpêtrière had become one of the sights of the city, a three-star attraction on any serious visitor's tour (Showalter, 1997:32).

There is varying opinion of the contribution of Charcot's work to the discipline of psychiatry.¹⁴² After he died in 1893 his fame rapidly declined. There was a "backlash" against his theories and some of his interns suggested he had coached his patients in their performances (Showalter, 1997:37). However as Charcot's popularity was waning his ex-pupil, Freud, was working with a colleague Joseph Breuer (1842-1925) on a new explanation of hysteria.

Psychoanalysis

Charcot had believed in a biological origin of hysteria. Contrary to Charcot's belief Freud and Breuer argued that all hysteria, female and male, has its origins in some sort of trauma and they used hypnosis to assist the recollection of early childhood memories. Freud became convinced that CSA was a cause of hysteria and outlined this view in a paper he presented to the Viennese Society of Psychiatry and Neurology in April 1896. Freud argued that

Infantile sexual experiences are the fundamental precondition for hysteria, are, as it were, the disposition for it and that it is they which create the hysterical symptoms, but that they do not do so immediately, but remain without effect to begin with and only exercise a pathogenic action later, when they have been aroused after puberty in the form of unconscious memories (Freud, 1896/1985:280).

¹⁴² Showalter argues that Charcot began with the intention of making 'objective scientific discoveries' about hysteria but ended up with a 'rigid model, a theoretical cage into which he squeezed all his patients' (Showalter, 1997:36). Elisabeth Young-Bruehl, who edited *Freud on Women* and wrote a biography of Anna Freud, claims that Charcot's 'superb descriptive work had...defined hysteria as a distinct psychological disease with a hereditary base' (Young-Bruehl, 2002:3). According to Murray, Charcot's 'dabbling' with hypnosis and hysteria 'detracts from his greatness as a neurologist' (Murray, 1983:296) and Shorter alleges Charcot's theories about hysteria were a 'complete disaster' that French psychiatry was still recovering from at the time of World War II (Shorter, 1997:85).

Freud's paper was not well received and by late 1897 his famous change of mind had taken place. To avoid collegial disapproval Freud decided that rather than CSA, it was sexual fantasies about their parents that his patients were referring to. He called the fantasies 'their unconscious Oedipal desires'¹⁴³ (Showalter, 1997:40). Freud based his Oedipus theory on self-analysis. According to a colleague Freud said he remembered being aroused when, as a child, he saw his mother naked. What Freud wrote at the time was that it was possible he could have seen his mother naked during a long train journey and if this had happened he might have been sexually aroused. During recent debates about "memory", Freud's memory of his naked mother has been interpreted by many as a 'false memory' (Webster, 1995:513).

Freud's change of mind, his self-analysis and his Oedipus theory have always been controversial. Psychiatrist Judith Herman claims that:

At the moment that Freud turned his back on his female patients and denied the truth of their experience he forfeited his ambition to understand the female neurosis. Freud went on to elaborate the dominant psychology of modern times. It is a psychology of men (Herman, 1982:9-10).

Breggin describes Freud's Oedipus theory as a 'monument to the extremes to which men will go to blame even small children for the passion that men themselves so often indulge irresponsibly' (Breggin, 1991:337).

In 1980 psychoanalyst Jeffrey Masson was the Projects Director of the Freud Archives. He made several discoveries in Freud's personal library including early letters about the sexual seduction of children. Masson noted a pattern of omission of such discussions in the published literature by or about Freud and in August 1981 he caused a furore when he reported his discoveries in the *New York Times* and suggested there had been a cover up of this material. Subsequently Masson was dismissed from the Freud Archives and he was violently assaulted (Breggin, 1991; Showalter, 1998). He believes he threatened more than Freud's image; he challenged the 'psychoanalyst's habitual

¹⁴³ Showalter argues that Freud relied on cultural myths about femininity and masculinity to shape his interpretation of hysteria and that had the case study of 'Dora' that he published been 'Dorian' 'the history of psychoanalysis might look very different' (Showalter, 1997:44).

pattern of invalidating the personal or subjective viewpoint of the patient'¹⁴⁴ (Breggin, 1991:338). Breggin claims that both psychoanalysis and psychiatry in general, were founded on the betrayal of women and children. He believes that Masson's revelations prove Freud betrayed women and children but, like many other male betrayers, he became a 'fabulously honoured' man (Breggin, 1991:338). Loyal disciple of her father, Anna Freud later wrote to Masson saying 'Keeping up the seduction theory would mean to abandon the Oedipus complex and with it the whole importance of phantasy life, conscious or unconscious phantasy. In fact I think there would have been no psychoanalysis afterwards' (Anna Freud, cited in Leahy, 1997:237).

Freud did note that there were occasions when memories of childhood seductions were found to relate to actual events but his Oedipus theory provided a way of explaining away such allegations and undermining the credibility of child complainants. Consequently, according to Richard Webster, through most of the twentieth century the psychoanalytic profession caused 'untold harm' as a result of its tendency to treat recollections of incest as 'fantasies' (Webster, 1995:513).

The Monopoly of Medicine over Madness

A professional status gave psychiatrists authority. This section outlines events from the end nineteenth century to the present day that have maintained the 'monopoly of medicine over madness' (Ussher, 1991:98).

When the nineteenth century concluded the institutionalization of the insane was an accepted part of Western society. Between the 1890s and 1960s the Freudian psychoanalytic movement made 'deep inroads' into psychiatry, a discipline that had hitherto been dominated by theories citing the biological origins of insanity (Shorter, 1997:154). A tremendous struggle ensued and temporarily the psychoanalytic movement won the day simply because it opened the way for psychiatrists to set up in private practice. During the early decades of the twentieth century, psychiatry divided

¹⁴⁴ This is when a client means one thing but the therapist draws on concepts like the "unconscious" or "projection" to show the client that s/he means something else (Breggin, 1991:338).

itself between huge asylums that housed increasing numbers of people with 'disorders of the brain and mind' (to whom psychiatry had little or nothing to offer in terms of treatments that might help them), and clinics for wealthy people who did not suffer from a disorder but who wished to enhance their 'self insight' (Shorter, 1997:190).

Despite the incursion of psychoanalysis into psychiatric practice, beliefs in genetic and biological causes of madness were still dominant in twentieth century psychiatric discourse. Ussher cites Sir James Barr, President of the British Medical Association who said in 1912

Nature...weeds out those who have not got the innate power of recovery from disease and by means of the tubercle bacillus and other pathogenic organisms she frequently does this before the reproductive age, so that a check is put on the multiplication of idiots and the feeble minded. Nature's methods are thus of advantage to the race rather than the individual (Barr, 1912, cited in Ussher, 1991:130).

It was theories similar to Barr's that were employed by the Nazis to justify the slaughter and incarceration of millions of people that were deemed to be feeble minded. The Nazis argued this was necessary to protect the race from being invaded by the 'gene of madness' (Ussher, 1991:131). Ussher claims the notion that madness could be bred into the population was included in a psychiatric textbook as recently as 1947.

In an effort to emulate the status of general medicine, and to benefit psychiatrists, the "disease-centred model" was adopted by twentieth century psychiatrists. Physical treatments for insanity are based on the longstanding, but unproven, notion that treating the body can cure the mind (Moncrieff, 2009).

Physical Treatments

Psychiatric experimentation in search of a physical cure for psychosis increased during the 1920s and 1930s. Supporters of the notion that physical treatments could relieve insanity were encouraged in 1927 when Julius von Wagner-Jauregg (1857-1940) won

the Nobel Prize for his work on neurosyphilis (Shorter, 1997:194).¹⁴⁵ Treatments devised included drug therapy,¹⁴⁶ sleep therapy, insulin shock therapy, electro convulsive therapy (ECT), and lobotomy (Ussher, 1991). Apart from ECT these treatments are no longer in use. Although controversy about the use of ECT contributed to the formation of the anti-psychiatry movement in the 1960s (see page 127), it continues to be administered in cases of major endogenous depression and mania (Shorter, 1997). According to Shorter, ECT helped the discipline of psychiatry to become independent of neurology and flourish in its own right.¹⁴⁷ The anti-psychiatry movement and governments' need to cut costs contributed to the shutting down of asylums but it was the developments in psychopharmacology that were most significant in their demise.

De-institutionalization, Psychopharmacology, and Diagnosis

The development of the major tranquilizer chlorpromazine¹⁴⁸ enabled the biochemical model to become the foundation for a radical change in policy that saw psychiatric care move from asylums into communities. The biochemical model assumes, although there is no confirming evidence, mental illness is caused by a chemical imbalance in the brain and the imbalance can be corrected by the administration of drugs (Breggin, 1991; Moncreiff, 2009). De-institutionalization began in America and Europe in the mid twentieth century. In Aotearoa/New Zealand the number of people being treated in institutions peaked in the 1940s and then began to decline. Within a decade it had halved (Stacey, 1988). Insanity or madness became known as mental illness¹⁴⁹ and

¹⁴⁵ von Wagner-Jauregg produced a series of febrile attacks in patients with neurosyphilis by injecting them with malaria and this treatment resulted in the gradual disappearance of symptoms (Shorter, 1997:194).

¹⁴⁶ Drugs such as opium, morphine, chloral, bromide, veronal and barbitol were used (Appignanesi, 2009:510).

¹⁴⁷ Shorter cites New York psychiatrist Louis Casamajor who commented in 1943 that 'One may question whether shock treatments do any good to the patients but there can be no doubt they have done an enormous amount of good to psychiatry' (Casamajor, 1943, cited in Shorter, 1997:224).

¹⁴⁸ Major tranquilizers may also be called antipsychotic or neuroleptic drugs.

¹⁴⁹ The most significant international agreement relating to mental illness is the United Nations Principles for Protection of Persons with Mental Illness and the Improvement for Mental Health Care. It defines mental illness as: 'A disturbance of thought, mood, volition, perception, orientation or memory which impairs judgment or behaviour to a significant extent.' (Brookbanks and Simpson, 2007:43). Severe mental illness is defined as: 'A substantial disturbance of thought, mood, volition, perception, orientation

“de-institutionalization programmes” were established to assist the transition of inmates from the asylums into “community care”.

Despite its side effects,¹⁵⁰ chlorpromazine has been seen by psychiatrists and the pharmaceutical companies that produce it, as one of the ‘great psychiatric drug successes’ (Appignanesi, 2009:511). Chlorpromazine was licensed for production in America in 1954 and in the first year of sale its manufacturers enjoyed profits of some \$75 million (ibid).

Critics of long term neuroleptic drug administration allege that ‘physical strait-jackets were replaced by chemical constraints’ (Ussher, 1991:123) or that ‘chemical lobotomy’ replaced ‘surgical lobotomy’ (Breggin, 1991:56). The move to community “care” has been described as a transition from ‘segregation in the asylum to neglect and misery in the community’ (Busfield, 1986 cited in Ussher, 1991:123, note 2).

Psychiatry’s involvement in psychotherapy decreased as the discipline became increasingly committed to the biochemical model and the provision of medication. The development of minor tranquilizers, in particular the benzodiazapines, also impacted dramatically on the practice of psychiatry. The anti-depressant “Librium” was introduced in 1957 and during the 1960s it became the ‘number one prescription drug in the United States’ (Shorter, 1997:317). In 1969 it was surpassed by “Valium” famously hailed by the rock group The Rolling Stones as “Mother’s Little Helper”¹⁵¹ (Appignanesi, 2009:512). Benzodiazapines were soon found to be addictive and frequently caused the anxiety people want to escape from to become worse than it was before treatment began (Shorter, 1997).

or memory which seriously impairs judgment or capacity to recognize or appreciate reality or which disturbs behavior’ (2007:43).

¹⁵⁰ Chlorpromazine is a phenothiazine and long term administration of all phenothiazines produce irreversible, involuntary, repetitive movements (tardive dyskinesia) together with changes in posture and gait. Antiparkinsonian drugs are prescribed alongside phenothiazines to alleviate their side effects.

¹⁵¹ Appignanesi notes that at the height of its popularity 2.3 billion valium tablets might be sold ‘in a good year’ (Appignanesi, 2009:512). Valium became the antidote for women suffering from what Betty Friedan called ‘The Problem that Has No Name’ (Friedan, 1963:13). The problem was later known as “suburban neurosis”.

Today psychiatric diagnoses are based on accounts of patients' behavior and experiences during a clinical interview rather than the sort of physical investigations employed in general medicine. There are two manuals that are widely used for diagnostic purposes: the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and the World Health Organization's *International Classification of Diseases* (ICD). Since the publication of the DSM-I in 1952, the DSM has been under constant revision. When it was first published in 1994 the DSM-IV listed 297 disorders. A revised version of the DSM-IV is currently (2010) in use and the DSM-V is expected to be released in May 2013 (<http://www.psych.org/MainMenu/Research/DSMIV/DS>). The ICD is currently in its tenth edition (ICD-10). These manuals both use detailed checklists but there are differences in the detail. Consistency in diagnosis is further complicated by the use of various less widely used diagnostic systems (Bentall, 2009). Richard Bentall cites British psychiatrist Ian Brockington who, when discussing contemporary approaches to psychiatric diagnosis, complains that confusion about diagnosis has been replaced by 'a babble of precise but different formulations of the same concept' (Brockington, cited in Bentall, 2009:100).

In the courts of Aotearoa/New Zealand psychiatric expert witnesses most commonly refer to the DSM. However medical academics Graham Mellsop & Shailesh Kumar (2007) express some reservations about the validity of diagnoses based on the DSM. They contend that disagreements about diagnoses among psychiatrists frustrated the American health insurance industry and the development of the DSM III was focused particularly on streamlining diagnosis to fulfill the industry's requirements. In doing so, Mellsop and Kumar claim, agreement between clinicians was gained at 'some cost' to valid diagnoses (Mellsop & Kumar, 2007:96).

During the last decades of the twentieth century psychiatric diagnoses became increasingly manipulated by the advertising promotions of pharmaceutical

companies.¹⁵² Sales of Librium and then Valium had shown these companies that large amounts of money could be made from psychopharmaceuticals. Valium had been promoted as a treatment for anxiety and, in turn, doctors had diagnosed anxiety because a drug existed to treat it (Shorter, 1997). Prozac, also a benzodiazepine,¹⁵³ was first marketed in 1988. It was promoted as a treatment for “depression” and by the 1990s Prozac had become a household word. Prescriptions of Prozac were not limited to people with mental illnesses. To the general population it ‘promised’ a ‘problem free personality’ and weight loss. Prozac quickly became the ‘panacea for coping with life’s problems’ (Shorter, 1997:323). Shorter claims that ‘just as Valium had assuaged a nation beset by anxiety’, Prozac ‘produced a pattern of disorder the drug was capable of treating’ (1997:323). In 2000 Prozac earned its parent company \$2.6 billion. It has been suggested that Prozac can make people ‘better than well’ (Appignanesi, 2009:533). By 1990 Prozac had become the drug most commonly prescribed by psychiatrists despite the controversy that arose when the manufacturers were accused of concealing the fact that during trials Prozac had caused some people to become suicidal (Shorter, 1997; Appignanesi, 2009).

Lecturer in Mental Health Sciences and co-founder of the ‘Critical Psychiatry Network’ in the United Kingdom, Joanna Moncreiff, claims there is no evidence to support the notion that psychiatric drugs correct underlying chemical imbalances but this has been promoted by the pharmaceutical industry and psychiatric profession because of the benefits it accrues for them. Moncreiff cites this as an example of the way in which vested interests and the political environment can ‘distort knowledge, in this case successfully deluding most of society for over half a century’ (Moncreiff, 2009:13). Moncreiff’s observations validate critiques of psychiatry that preceded them.

¹⁵² According to Associated Press, 2 September 2009, the pharmaceutical company Pfizer, described as a ‘repeat offender’, has recently been fined \$2.3 billion for unlawful prescription drug promotions. This is the largest fine ever to be imposed on a pharmaceutical company for misleading drug promotions (http://www.msnbc.com/id/32657347/ns/business-us_business/).

¹⁵³ Prozac has fewer side effects than its predecessors and people taking it lose weight rather than put it on (Shorter, 1997:323).

Challenges to Psychiatry

This section focuses on challenges to psychiatry that have been made during the last fifty years. Following the critiques from within psychiatry itself during the 1960s are those of feminists who argue that to expose the fallacies of psychiatry a gender analysis is required.

The Anti-psychiatry Movement

The anti-psychiatry movement in the 1960s was part of a general attack on science and its challenges came primarily from within the profession itself.¹⁵⁴ Some psychiatrists began raising questions about the appropriateness of particular treatments and the medicalization of people's troubles (Appignanesi, 2009). Psychiatrist Thomas Szasz argues against biological or genetic causes and opines that madness had been erroneously termed mental illness when in reality it is simply 'problems in living', (Szasz, 1961, cited in Ussher, 1991:131). Szasz claims madness had been labelled an illness to enable the medical profession to legitimate its authority. Psychiatrist R.D. Laing determined not to do to a patient anything that he would not want done to himself. Laing objected to treating people physically when no evidence of physical pathology existed. Initially believing schizophrenia is produced by families, he later decided it is a state of 'hyper-sanity' (Appignanesi, 2009:411).

In his article 'On being sane in insane places', published in *Science*, in 1972, American psychologist David Rosenham reports on an experiment he conducted. Rosenham wanted to test the objectivity of psychiatrists' judgments. He and seven others¹⁵⁵ presented themselves in unkempt states at a number of psychiatric facilities and complained of hearing voices. After admission they told staff the voices had gone and they behaved normally. All but one¹⁵⁶ was diagnosed as schizophrenic and the pseudo-

¹⁵⁴ Advocacy and patients' groups that protested about the treatments meted out to people by psychiatrists would form later (Appignanesi, 2009:396).

¹⁵⁵ The 'pseudo-patients' included two psychologists, a graduate student, a paediatrician, a psychiatrist, a painter and a housewife (Bentall, 2009:67).

¹⁵⁶ Although s/he exhibited the same symptoms as the others one was diagnosed as 'manic depressive' (Appignanesi, 2009:400).

patients were detained for periods of between seven and fifty-two days. Only the other inmates recognized the researchers were not genuine patients (Bentall, 2009:67; Appignanesi, 2009:400).

Feminist critics of psychiatry agree with the anti-psychiatry movement's argument that madness is not an illness but are critical that the role of gender has been overlooked in their analyses. Feminists argue that even when the anti-psychiatry psychiatrists examine the case studies of women, gender is not considered a significant factor.¹⁵⁷

Feminist Critiques of Psychiatry

Feminist critics of psychiatry claim mental illness is a social construction that has its origins in misogynistic principles. Medical theories that are based on biological origins of mental illness are rejected and the construction of mental illness is seen to contribute to the maintenance of women's subordinate position. In *Women and Madness* (1972) pioneering feminist psychologist Phyllis Chesler argues that male creativity is generally valued and 'eccentricities, cruelties and emotional infantilism are usually overlooked, forgiven or "expected"' (Chesler, 1972:31, note**). Chesler claims that severe disturbances in men are not necessarily viewed as abnormal or deemed to require psychiatric treatment. Of women, she says

Most twentieth-century women who are psychiatrically labeled, privately treated, and publicly hospitalized are not mad...they may be deeply unhappy, self-destructive, economically powerless, and sexually impotent – but as women they're supposed to be (Chesler, 1972:25).

Ussher agrees with Chesler that the concept of madness has been used to control women historically and adds that 'what is *mad* within patriarchy is that which is at odds with the dictates of the patriarch' (Ussher, 1991:170). Chesler and Ussher cite the Cartesian dualism of femininity and masculinity as crucial to the construction of madness. Women who do not conform to accepted (male) prescriptions of femininity risk being categorized as mad. Masculinity is valued in men but women who engage in

¹⁵⁷ In fact misogyny is inherent within the analyses of the anti-psychiatry psychiatrists. For example Laing's argument that madness evolved within the family invariably places the blame with the mother (Ussher, 1991:161).

masculine behaviours risk being categorized as mad as do men who engage in feminine behavior (Ussher, 1991). According to Ussher women's mental illness is seen by many feminists as the result of their position in society and their subjective experiences of their gendered identity - not as the result of their biology. She argues that if biology has a role in women's mental instability it is because of a 'phallogocentric discourse which positions the woman as Other, not because of an inherent weakness or lack of ability' (Ussher, 1991:206).

Breggin observes that women are abused and humiliated in all social institutions whether they are religious, fraternal, business, academic or governmental. The practices of psychiatry and therapy mirror the oppression and systematic treatment of women that takes place in all organizations. However, the relationship between women and psychiatry has an 'especially insidious quality' in that it is the institution mandated to respond to 'personal helplessness and failure' (Breggin, 1991:325). The vulnerability of the women who come to the attention of psychiatrists is exacerbated by their feelings of low self esteem, failure and humiliation. The administration of addictive prescription drugs may compound their problems rather than alleviate them. Moncrieff questions how the myth of the psychiatric/pharmaceutical biochemical model has been accepted as valid knowledge and argues this acceptance is a demonstration of the relationship between knowledge and power (Moncrieff, 2009).

Psychiatry and Sexual Assault

The development of medico-legal discourse has been outlined in Chapter Three. Until the latter decades of the twentieth century psychiatrists considered social problems like rape, incest and abuse should be dealt with by social workers, the police and politicians. In-depth coverage of rape and incest seldom appeared in psychiatric and psychoanalytic literature until the 1980s. Between 1920 and 1986 there were only nineteen articles that mentioned either sexual abuse or incest in English language psychoanalytic journals (Appignanesi, 2009). The rate of father-daughter incest cited in the *Comprehensive Textbook of Psychiatry* (1976) was 'one in a million' (Freedman, Kaplan and Saddock 1976, cited in Appignanesi, 2009:480). In their *Handbook of*

Psychiatry (1974) Philip Solomon and Vernon Patch state that incest in adulthood is caused by unresolved, dominant 'oedipal incestuous strivings' and rapists often have a low IQ or organic brain disease (Solomon and Patch, 1974:294-295). They say of paedophilia that

Occasionally, adolescent "victims" may be actively seductive, and since they may also appear older than their true age, the act may not strictly be a deviation. Maladjusted adolescent girls have been known to get many relatively normal men (sometimes their own fathers or brothers) into sexual and legal trouble' (Solomon and Patch, 1974:291-292).

The influence of Freudian discourse on these texts is evident but during the time they were being produced women who were not afraid to challenge their findings were entering medical schools (Appignanesi, 2009). Nevertheless Taylor, who has studied the trial process of number of CSA cases, claims that psychiatry is a 'pseudo-scientific tool' that has been used to vilify women and cites, as an example of a theory that has come to be accepted as knowledge, Freud's seduction/fantasy theory (Taylor, 2004:5). Freud's belief that women and children tend to fantasize and fabricate allegations of sexual assault is reinforced by the association between women's sexuality and madness. The previous chapter showed how this association was a feature in the development of medicine and has been absorbed into legal discourse. If corroborative evidence of an assault should exist, it is frequently seen to be the provocative behavior of the complainant that brought about the assault. Either way the complainant is seen to be at fault and is constructed as "mad" or "bad" or both by the courts (Taylor, 2004)..

In court CSA complainants are disadvantaged by the assumption that the law and psychiatry provide 'objective, incorruptible knowledge' about humankind (Taylor, 2004:4). This chapter concludes by considering the notion of objective, incorruptible psychiatric knowledge.

Conclusion

Too often, psychiatrists are perceived as obligatory but unwelcome invitees, possessed of an unethical propensity to tailor their views to the party which has brought them to the forensic banquet (Freckleton, 2007:230).

Rather than seeking justice the legal process is about constructing cases and winning them. The evidence of psychiatrists providing expert testimony must fit the counsel's construction of the case and it must be taken from an acknowledged body of knowledge. It has been seen, however, that psychiatry is not a science. Its relationship with pharmaceutical companies confirms Taylor's description of it as a pseudo-scientific tool.

Expert psychiatric evidence was a significant feature of the Ellis case. Zelas's 23G evidence contributed to the successful prosecution case although contradictory evidence was presented by defence expert Le Page. Subsequently, protestations on behalf of Ellis have made "injustice" a household word. The strong and ongoing reaction against the Ellis verdict and s 23G can be seen as part of a concerted effort to ensure the re-assertion of the power of the medico-legal discourses of false allegations. Speaking directly to Ellis following the jury's verdicts the Judge said '...Unlike almost all of those who have publicly feasted off this case by expressing their opinions, the jury actually saw and heard each of the children...The jury disbelieved you. They believed the children, and I agree with that assessment' (Williamson J, cited in Bander, 1997:105). Taylor points out that the history of medico-legal understanding of rape and CSA 'is a history of both shameful neglect and deliberate contempt for the reality of such abuse' (Taylor, 2004:2). The successful prosecution of Ellis was a critical event – in this case the children's evidence was heard. Generally the voices of vulnerable children are silenced with or without a provision for an expert witness.

The next chapter will outline the development of the discipline of psychology and its origins in philosophy. The influence of Freudian seduction theory on the construction of psychological theories will be explored as will the CSA memory debates within the discipline and the interaction of psychology with the law in CSA cases.

Chapter Five

Psychology

Psychology has nothing to say about what women are really like, what they really need and what they want, essentially because psychology does not know (Weissten, 1973 cited in Ussher, 1991:160).

Women are caught in the voyeuristic gaze, caught as fragmented objects of desire. Castrated and castigated, we are cut off from our own experiences, from any positive representations, and forced to live through images as pervasive as they are powerful. We may be seduced by the images, but they are also powerful instruments of destruction. They destroy a woman's identity, her autonomy, and her freedom. Strong words but justified (Ussher, 1991:268).

Psychology is the study of behavior and mental processes. It asks: 'what motivates human behavior? what explanations can be given for behavior? how do we come to understand the world around us? what distinguishes humans from animals?' (Raitt and Zeedyk, 2000:37). The development of the discipline of psychology has been dominated by men as historically women were excluded from its institutions. Feminist critics contend that the subject matter of mainstream psychology and its methodologies are gender-biased. There are divisions within the discipline but mainstream research psychologists would claim that by employing "impartial", decontextualised, empirical methods they are able to discover "truths" that can be generalized. These psychologists maintain their "objectivity" provides a 'stable criterion' by which behavior can be measured and evaluated (Raitt and Zeedyk, 2000:7).

The word "psychology" is derived from the Greek words "psyche" meaning soul and "logia" meaning study of. Claiming mathematics as the tool of all sciences in explaining psychology's relationship with other sciences, George Shouksmith¹⁵⁸ positions psychology between medicine and anthropology, noting that it overlaps with the biological sciences (physiology, biology and medicine) and the social sciences (anthropology, sociology, human geography, economics and politics) (Shouksmith, 1979).

¹⁵⁸ George Shouksmith is a former head of the Department of Psychology at Massey University.

Unlike psychiatrists, who are educated in medical schools, psychologists are educated in university schools of psychology. Clinical psychologists undertake a postgraduate training in mental health facilities that overlaps with psychiatrists. An area of difference is that the training clinical psychologists receive in psychotherapy¹⁵⁹ is more intensive than that of psychiatrists (Breggin, 1991). This chapter will chart significant contributions to the development of the discipline of psychology, psychology's relationship with the law and the role of psychologists as expert witnesses in child sexual abuse (CSA) trials. A fundamental division within psychology that has been exacerbated by debates concerning the validity or falsity of recovered memory claims in CSA cases will be examined.

The next section will summarize some of the historical factors that have influenced the development of psychology. The theoretical and methodological innovations of some influential contributors to psychology's development will be identified and the historical origins of divisions that exist within the discipline, which are pertinent to the s 23G debates, outlined.

Historical Ideas that Contributed to the Psychology of Today

Psychology can be traced back to 600BC when the notion of a "soul" was the basis of many beliefs and superstitions¹⁶⁰ (Murray, 1983). Aristotle wrote about the images that sensations from the outer world leave in our minds and suggested the mind reasons by relating one mental image to another (Shouksmith, 1979). The Ancient Greek physician Hippocrates (460 - 375BC) anticipated the present scientific discourse by over two millennia when he advocated a scientific analysis for both physical and psychological problems in 430BC (Ussher, 1991).

The nineteenth century is considered significant in the transformation of psychology from a philosophical to a 'natural-scientific enterprise' but Thomas Teo is mindful of the

¹⁵⁹ Clinical psychologists follow what they call a 'scientist-practitioner model' in therapy (Ussher, 1991).

¹⁶⁰ The importance of the soul to the Italian Catholic Church that dominated Europe prior to the Enlightenment is discussed in Chapter Two.

'plurality of philosophical discourses' that continue to influence discussions of experimental psychology (Teo, 2005:39-40). During the first half of the nineteenth century German philosophers, who considered psychology to be part of philosophy, laid the foundations for its development. Their thinking was dominated by the ideas of the Ancient Greeks¹⁶¹ and by theology and the 'psychologies' of the then contemporary theorists¹⁶² (2005:41).

Hermann von Helmholtz (1821-1894) argued there is no difference between philosophy and natural science and physiological researcher Johannes Müller (1801-1858) claimed the 'nature of the senses determines perception' which led him to support Kant's theory that the mind determines knowledge (Teo, 2005:59). However, from the mid-nineteenth century these views were over-ridden by the psychologists who wanted the status that being a science conferred. Consequently, for over one hundred years psychology has claimed to be a science because, according to Thomas Leahey

First, human beings are part of the natural world, so it seems reasonable that natural science should encompass them. Second, by the nineteenth century, when scientific psychology was founded, the authority of science was growing daily, and it seemed no discipline could be respectable were it not a science. Finally, and this was especially true in the United States, scientific status was important to making plausible professional psychology's pretensions to social control. Only a discipline that was a science could claim to control behavior, and thus contribute to planned social and personal reform. Thus, although mentalists defined psychology as the science of conscious experience and behaviorists defined it as the science of behavior, they agreed that psychology was, or at least ought to be, a science (Leahey, 1994:25).

The complicated history of psychology is frequently over-simplified by the omission or diminishment of the role "introspection"¹⁶³ has played. Most histories concentrate on psychology's "scientific", empirical methods that are seen to be superior to the introspective approaches adopted by philosophers. These histories generally fail to

¹⁶¹ The German philosophers were particularly influenced by the ideas of Aristotle (Teo, 2005:41).

¹⁶² Contemporary theories before 1850 included those of Immanuel Kant (1724-1804), Johann Friedrich Herbart (1776-1841) and Rudolph Hemann Lotze (1817-1881) (Teo, 2005:39).

¹⁶³ Introspection is the examination of one's own thoughts and feelings. It emphasizes the parallels between an awareness of one's mental processes and an awareness of what is external to those processes. Locke called it 'reflection' and Kant called it 'inner sense' (Bullock and Stallybrass, 1978:318-319).

mention the “anti-positivistic” movement that has been operating within psychology since its establishment and was particularly active during the late nineteenth century (Raitt and Zeedyk, 2000:37-38).

Psychology and Science

Johann Friedrich Herbart (1776-1841) has been described as ‘one of the giants’ of nineteenth century philosophy, psychology and education (Teo, 2005:51). As early as 1824, in his book *Psychology as Science*, Herbart claimed that psychology is different from the other empirical sciences because pure empiricism in psychology is impossible. He pointed out that, unlike the natural sciences, psychology is not able to show concrete examples of its theories because human beings’ inner experiences are an ‘aggregation of contradictions’ and their mental life is in a state of ‘permanent change’ (Herbart, 1824 cited in Teo, 2005:52). Herbart did not believe psychologists could carry out research without bringing their own history and experiences into the process and contaminating the results. In his view there were no ‘general’ facts in psychology, rather facts could only be found in ‘momentary conditions of individuals’ (2005:53). Herbart argued that it was not possible to establish whether the dualism of mind and body was real. He thought the soul’s ideas were the ‘true subject of consciousness’ and these ideas could disturb each other or be in balance or in motion (Herbart, 1825 cited in Teo, 2005:54). His objective was to represent the processes of human consciousness in mathematical equations in a ‘completely rational way based on experience, metaphysics and mathematics’ so that psychology would resemble natural science (Teo, 2005: 54).

A New Psychology

It was Wilhelm Wundt (1832-1920) who made possible the establishment of the independent departments of psychology in universities (Murray, 1983). Psychology for Wundt was research and was almost exclusively confined to the laboratory. He concentrated on the study of ‘the sensory processes, perception, simple learning, and memory’ (Kimble, Garmerzy & Zigler, 1980:2). Wundt was impressed with Herbart’s theories but questioned the assumptions on which Herbart had based his mathematics.

He began his career as a medical doctor and then studied physiology. His experience as a research assistant led him to believe that humans should be studied like other animals such as rats and monkeys. Wundt wanted to develop a new science - a 'new "psychology"' by broadening observations to include society, childhood, and animals (Murray, 1983:175). The opening of his laboratory of psychology in 1879 in Leipzig, Germany is generally viewed as the beginning of psychology's development as a scientific study of "man".¹⁶⁴ Wundt employed a method of experimental introspection to study the minds of "normal" human adults and eventually rejected the existence of the unconscious. The need to be able to exactly duplicate his findings limited his area of experimental introspection to the simplest mental processes.¹⁶⁵ His combined use of positivist and introspective methods has linked Wundt with the anti-positivistic movement that has operated within psychology since its inception. The fact that his support for a dual approach has been 'largely eliminated' from psychology's official history demonstrates, according to Raitt and Zeedyk, 'the inherently political nature of knowledge making (Raitt and Zeedyk, 2000:186). Wundt is described as 'the "father" of experimental psychology' (Teo, 2005:40) and 'the father of behaviourism' (Orlov, 2007:221).

Behaviourism

Behaviourism began as a reaction against the use of introspection in psychology. The concept of consciousness is rejected as behaviourists favour studies of behavior that can be objectively measured. Its development made animal psychology a focus for experimental research. Behaviourism came to prominence in 1913 with the publication in *Psychological Review* of American animal psychologist John B. Watson's (1878-1958) article 'Psychology as the Behaviorist Views It'.¹⁶⁶ Watson rejected introspection

¹⁶⁴ At this time Charles Darwin (1809-1882) had outlined his theory of evolution in *The Origin of Species by Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life* (1859). Darwin went on revising his book until its sixth edition was published in 1872. At the same time the work of Polish monk Gregor Mendel (1822-1884) was filling some gaps that Darwin could not explain but Mendel was ignored until 1900. Mendel's work subsequently became the 'foundation of modern genetics' (Leahey, 1997:169-70).

¹⁶⁵ For an overview of Wundt's methods see Murray, 1983; Leahey, 1997; Teo, 2005.

¹⁶⁶ In 1943 a group of 'eminent psychologists' rated this article as the most important ever published in the *Psychological Review* (Leahey, 1997:324).

because, he argued, it could not answer the most basic questions about the psychology of human consciousness and the methods it required were not those of the natural sciences. Introspective methods were therefore, according to Watson, unscientific. He claimed that even the most complex behavior patterns could be analyzed or reduced into 'simpler elements' (Murray, 1983:258). He stressed, for example, that Russian physiologist Ivan Pavlov's (1849-1936) 'conditioned reflexes' were elements in his 'system'¹⁶⁷ (1983:258).

After the First World War logical positivism became a worldwide movement and the aim of its adherents was to unify science in 'one grand scheme of investigation' (Leahey, 1997:335). Behavioural psychologists adopted the language and methods of the logical positivists and by 1930 behaviourism, which became known as 'behaviouralism', was well established as the 'dominant view point in experimental psychology' (1997:333). However, while researchers were legitimating positivist behaviouralism as scientific psychology, clinical psychologists were investigating how to assist people in dealing with their mental suffering. In the mid-1940s the return home of traumatized soldiers after the Second World War saw a growth in demand for therapeutic clinical psychology (1997:377). The divergence between researchers and clinical psychologists exacerbated the already existing division within the discipline and it has been a significant factor in some of the debates concerning s 23G expert evidence in CSA cases.

Psychoanalysis

Freud's basic view was that every woman was a square peg trying to fit into a round hole. It did not occur to him that it might be less destructive to change the shape of the hole rather than knock all the corners off. The 'cured' patient is actually brainwashed, a walking automaton, as good as dead. The corners have been knocked off and the woman accepts her own castration, acknowledges herself inferior, ceases to envy the penis and accepts the passive role of femininity (Figes, 1970:147-148).

¹⁶⁷ Pavlov received the Nobel Prize for his research on dog salivation in relation to stimuli that became associated with food (Leahey, 1997:307).

As was noted in the previous chapter, psychoanalysis is a form of psychotherapy. Freud was not a psychologist but as the founder of psychoanalysis his name became almost synonymous with psychology during the twentieth century. A medical practitioner, Freud was interested in neurology and nervous disorders. His theories were about how and why “abnormal” behaviour occurs. While studying under Charcot, at the Salpêtrière in 1885, he became interested in Charcot’s theories on hysteria and the use of hypnotism to treat it. Freud was also interested in the notion of the “unconscious” that had played an important part in Herbart’s work. The idea that conversation could help alleviate mental suffering was not new but Freud was the first physician to ‘study systematically and formalize psychological interventions’ and one of the first physicians to treat the mentally ill humanely and in a non-invasive way (Ussher, 1991:109-110). He and his colleague Breuer listened to their troubled, predominantly middle class, female clients and took their stories seriously (Showalter, 1998). Collaborating to write *Studies on Hysteria* (1895), Freud and Breuer believed that hysterical symptoms were likely to originate from unconscious traumatic memories and the symptoms could be alleviated by catharsis (Murray, 1983).

Breuer discontinued his association with Freud in 1894, when he disagreed with Freud’s theory that many of the problems his female patients were experiencing originated from CSA. Freud’s theory became known as his “seduction theory” and was not well received by other colleagues. For example, Kraft-Ebbing called it a ‘scientific fairytale’ (Leahy, 1997:236) and Viennese psychiatrist Emil Raimann (1872-1949) accused Freud of persuading compliant and easily suggestible young women to say anything he wanted them to. Raimann argued that in Viennese working class families there was ‘plenty of sexual contact, even incest, but no hysteria’ (Shorter, 1997:150). Opposition from colleagues led Freud to change his mind. Later he used the term “repression” for the “mechanism” whereby unpleasant memories are pushed down into the subconscious (Murray, 1983).

Freud saw women as ‘sexually, psychologically and intellectually immature’ and ‘unable to tell the difference between fantasy and reality’ (Julich, 2001:45). He argued that they

are biologically disadvantaged because of their lack of a penis and this lack is realized at the Oedipus stage of development (Ussher, 1991:110). His depiction of women as 'deficient men' has given psychology concepts such as 'penis envy' and 'women's fantasies about their fathers' (Julich, 2001:45). Freudian psychoanalysis is important today because of its historical significance and because of the 'penetration' of many Freudian ideas into popular discourse (Ussher, 1991:110). It holds particular significance in this thesis as concepts such as "fantasy", "false memory", and "repression", that have featured in the debates surrounding s 23G, originate from Freud's seduction theory.

Challenges to Psychology

The entry of women into psychology

During the nineteenth and early twentieth centuries the majority of women were prevented from pursuing academic careers and those who did study psychology frequently faced institutional discrimination.¹⁶⁸ Consequently the early development of psychology was almost completely dominated by men. In recent years psychology textbooks have begun to incorporate women into the history of psychology but the early history of women's contributions to the discipline remains fragmentary (Teo, 2005). Feminist initiatives during the last three decades of the twentieth century resulted in a significant increase in the numbers of women being admitted to universities. For feminist students of psychology the 'positivistic scientific' model adopted by mainstream psychology created epistemological problems (Raitt and Zeedyk, 2000:38). Questions that they and others have raised, in respect of psychology's claims to objectivity and the production of truth, have posed challenges for the discipline.

Feminists in psychology have been committed to overcoming stereotypes and eliminating oppressive biases from the discipline. A feminist critique of science, *Reflections on gender and science*, by Evelyn Fox Keller identified a relationship between objectivity and masculinity and was critical of separation between the scientist

¹⁶⁸ Early women psychologists Margaret Floy Washburn (1871-1939), Christine Ladd-Franklin (1847-1930) and Mary Whiton Calkins (1863-1930) were prevented from becoming members of professional societies. Mary Whiton Calkins was an 'unofficial guest' at Harvard University which refused to grant her a PhD despite her innovative research being recommended by members of the discipline (Teo, 2005:114)

and the subject (Keller, 1985). Letitia Peplau and Eva Conrad proposed that feminism should be assimilated into traditional methodologies. This, they argued, would make all methods feminist and remove stereotypes and biases (Peplau & Conrad, 1989). Others have argued that psychology lacks relevance for women because empirically it is not sound (Ussher, 1991; Wilkinson, 1997; Raitt & Zeedyk, 2000). In one of the most influential feminist studies in the history of psychology *A Different Voice*, Carol Gilligan exposes the repeated exclusion of women from the 'critical-theory building studies of psychological research' (Gilligan, 1982/1993:1). The exclusion of women in the construction of psychological knowledge has resulted in an inherent male bias in the discipline's epistemological assumptions. These assumptions are also inherent in the law and when the two disciplines interact, as they do when psychological evidence is presented in CSA cases, these biases are strengthened (Raitt & Zeedyk, 2000).

Psychology and the Law

Today the relationship between psychology and the law is comprehensive but it is not always, and has not always been, perceived as satisfactory. When Münsterberg (1908) argued for the admission of experimental psychologists' findings in court, Wigmore responded that the methods used by Münsterberg and others for testing memory and consciousness were highly controversial. He argued 'there was a considerable body of opinion to the effect that specific methods [Münsterberg] had recommended were not sufficiently developed to be relied on by courts' (Wigmore, 1908, cited in Raitt and Zeedyk, 2000:18). In many jurisdictions today there is a trend towards greater admissibility of expert testimony but a recent 'Editorial' in the *NZLJ* alleges

little psychological evidence stands up to serious scrutiny. Psychologists have managed to con the system for years with nonsense such as "offender profiling" which has no scientific basis whatsoever. The fact is that psychology completely lacks a general theory of human behavior and the divisions between schools of psychology are as deep as arguments about whether the earth goes around the sun or vice versa (*NZLJ* Editorial, 2002:1).

The Evidence Act 2006 has dispensed with s 23G but psychologists are still employed by the courts to interpret human behavior in a variety of domains. The next section will

outline how divisions within psychology have been played out in the debates that have surrounded s 23G.

Divisions within Psychology

The deepest division in psychology is between researchers and clinicians. This division has its origins in the earlier debates over introspection and behaviourism. Responding to the *NZLJ* 'Editorial', Professor of Psychology Michael Corbalis describes psychology as a 'deeply divided discipline' that, until World War II, was dominated by academic psychologists (Corbalis, 2003:385). In 1949 the model for training what Corbalis describes as the 'so-called "scientist-practitioner"' was established and since that time, he claims, the scientists and the practitioners have 'gone their separate ways' (2003:385). Corbalis alleges this parting of ways has led to 'serious erosion in the scientific standards exercised by many practising psychologists' (2003:385). One area that is particularly contentious, and has featured in the s 23G debates, is that of "memory".

Memory

The s 23G debates included claims and counter-claims about whether it is possible to repress and later recover memories of childhood trauma. In 1995 ongoing disagreement among psychologists prompted the New Zealand Psychological Society to establish a working party to report on 'research and practice issues concerning Memory for Traumatic Childhood Events' (Corbalis, Pipe & McDougall, 1997:132). Among the working party's conclusions were

Traumatic experiences from childhood may be remembered in detail, partially forgotten, or even completely forgotten over long delays. Memories that have been forgotten, either partially or completely, may be retrieved given the appropriate conditions for recall.

and

Memories may be modified by experiences or exposure to information subsequent to events, and this is more likely for events that occurred a long time ago. Because of the risks of suggestions or coercion, procedures that are supposed to facilitate memory retrieval but that have not been evaluated should not be used for the purposes of memory retrieval in clinical contexts. Practitioners should be aware of their potential to influence their clients (Corbalis, Pipe & McDougall, 1997:143).

Corbalis cites the occasion, in 1998, when the American Psychological Association¹⁶⁹ set up a working party comprising three clinicians and three researchers, to establish guidelines on the nature and interpretation of memories of CSA. The two factions were unable to agree. Convinced that the solution is not to eliminate psychological testimony from CSA cases, Corbalis argues for a separation of good psychology (“good science”) from bad psychology (“bad science”) (Corbalis, 2003:388).

Research psychologist Johnathon Harper (2002) concurs with Corbalis when he argues it should be a researcher and not a clinician who performs the role of expert witness in a CSA case. According to Harper, clinicians are not scientists and their training and experience are ‘not related to scientific accuracy’ (Harper, 2002:113). Corbalis and Harper agree that Elizabeth Loftus is ‘probably the world’s foremost expert on the fallibility of memory’ (Corbalis, 2003:386). Harper cites Loftus’ (1989) claim that the value of an expert witness in court in CSA cases is to ensure that the judge and jury ‘understand how various environmental and internal factors operate to affect the perception and memory of witnesses’ (Loftus, 1989, cited in Harper, 2002:113). Loftus and Katherine Ketchum describe the differences of opinion in respect of memory as an ‘increasingly bitter and fractious’ controversy (Loftus & Ketchum, 1994:31).

Recovered Memory

Loftus & Ketchum argue that the notions of repressed and recovered memories are ‘purely hypothetical and essentially untestable’ and they are based on ‘unsubstantiated speculation and anecdotes that are impossible to confirm or deny’ (Loftus & Ketchum, 1994:31). According to Loftus and Ketchum, therapists who specialize in ‘recovered memory therapy’ have been accused of operating in a ‘neverland of fairy dust and mythic monsters’ and of being ‘woefully out of touch’ with modern research (1994:32).

The divisions among psychologists are not clear cut in the disputes about recovered memory. Some clinical psychologists support the false memory syndrome (FMS)

¹⁶⁹ The American Psychological Association is the largest psychological association in the world. Based in Washington DC it is the ‘scientific and professional’ organization that represents psychologists in the USA. It has 150,000 members (<http://www.apa.org/about/>).

advocates and some research psychologists oppose them. Feminists vigorously oppose FMS advocates' claims that recovered memories of CSA are likely to be false and they take particular issue with the allegation that many clinical psychologists and therapists regularly implant memories of CSA in their adult clients' memories.¹⁷⁰ Also in dispute is whether early traumatic memories of CSA can be forgotten but the 'symptomology of the events' can remain (Brandyberry & MacNair-Semands, 1998:1253).

Investigations into FMS carried out in the United Kingdom produced contradictory results. When the British Psychological Society set up a working party to investigate FMS in 1994 it found that most commonly memory recovery occurs prior to therapy. In contrast, the 1995 Royal College of Psychiatrists FMS working party concluded that memories usually, but not always, are recovered during the course of therapy (Raitt & Zeedyk, 2000:147).

In an address to a group of Psychology Honours students, at Victoria University of Wellington,¹⁷¹ COSA co-founder Gordon Waugh, who is not a psychologist, claimed that 'decades of research have failed to produce credible scientific evidence of massive repression and pristine recovery of memories' (Waugh, 2000:9). Waugh further claimed that many men have been labelled 'child abuser' on the basis of 'conjecture, belief, assumption and opinion' that originate from recovered memory therapy (Waugh, 2000:9). Waugh's contentions in respect to scientific evidence of recovered memories are legitimated by those research psychologists who, according to Raitt & Zeedyk, are considered 'by themselves and others to be the guardians of contemporary explanations of memory' (Raitt & Zeedyk, 2000:146). These researchers insist that only the data produced by 'controlled, replicable, verifiable procedures' can be considered to be relevant to the debate (2000:147). Loftus & Ketchum consider that their work has helped create a new paradigm of memory in which, rather than a 'video-recorder model, in which memories are interpreted as the literal truth, a reconstructionist model, in which

¹⁷⁰ FMS advocates say therapists who implant memories of CSA are motivated by 'well-meaning naivete, greed, incompetence, and zealotry' (Pope, 1996:957).

¹⁷¹ Waugh's address was on 13 September 2000 at the invitation of Maryanne Garry (who studied memory in the United States under Elizabeth Loftus).

memories are understood as creative blendings of fact and fiction' is employed (Loftus & Ketchum, 1994:5). As early as 1899 Freud recognized that remembering is a reconstruction of an event (Fonargy & Target, 1997).

The issues surrounding memory have not been resolved although today it is widely accepted in psychology that memory is a construction of events rather than a replication or exact representation of them. Most psychologists also agree that there is scope for memories to be forgotten and subsequently remembered, however, many argue that until the reliability of recovered memories can be proven they should not be trusted (Raitt & Zeedyk, 2000:147-148).

Chapter Two outlined how the Enlightenment moved Western thinking away from beliefs in the supreme authority of God or king as producers of truth and knowledge and introduced the notion of a human subject that thinks for her/his self, discovers "truth" and produces knowledge. In turn poststructuralist thinking moves away from the Enlightenment perception of a subject/object dichotomy and challenges the objectivity of mainstream Western knowledge. Mainstream science is resistant to any re-examination of the nature of knowledge and are therefore resistant to poststructuralist theories. Feminists Raitt and Zydeek suggest that this is because after a thorough consideration of 'the dilemma of objectivity' it is no longer possible to feel certain about anything including 'the way the world is constructed and the place of one's self or one's discipline within it' (Raitt & Zeedyk, 2000:41).

Poststructuralism

It is the poststructuralist contention that social reality is constructed in language and it is therefore, through language that a subject's subjectivity and sense of self are constituted. A range of discursive practices (such as legal, political or economic)¹⁷² are constantly competing to dominate meaning and create frequent change, or fluidity, in a

¹⁷² Take, for example, the concept of CSA. Legislation, investigation and prosecution are legal discursive practices that involve CSA. Lobbying the government for or against particular legislation to deal with CSA is a political discursive practice and decisions involving the economic costs of CSA are economic and political discursive practices. The emphasis of each discursive field creates a slightly different subjective meaning of CSA.

subject's subjectivity (Weedon, 1987:21). It is clear, therefore, that poststructuralist theories have significant implications for psychology.

Many feminists hold the view that all research, including psychological research, is influenced by the social, cultural and moral assumptions of the time in which it is undertaken. Within such positions, the context in which knowledge is produced is inseparable from the content of that knowledge. Such a stance indicates clearly that the production of knowledge, including scientific knowledge, can never be de-politicized (Raitt & Zeedyk, 2000). The rise of poststructuralist theory during the last three decades has seen this position gain more adherents and therefore more authority.

Nicola Gavey elaborates the potential value of feminist poststructuralism to feminist psychologists. Arguing that feminist poststructuralism provides more satisfactory ways of theorizing gender and subjectivity, Gavey claims that

It not only gives credence to women's active resistance to patriarchal power (as well as our oppression by it), but it also offers promising ways of theorizing change – all of which are important to feminism (Gavey, 1989:472).

To demonstrate the use of a poststructuralist discourse analysis in psychology Gavey applies it to 'women's experiences of sexual coercion in heterosexual relationships' (Gavey, 1989:467). She deconstructs an interview with a woman by identifying its discursive patterns of meaning, its contradictions and its inconsistencies. Her analysis shows clearly how a woman who has been raped manages to blame herself and to worry about her rapist's feelings and sexual needs. Thus Gavey demonstrates how the woman invokes the powerful patriarchal discourses that women invite men's sexual advances and men are unable to control their sexual urges. However, psychology and the institutions of law are dominated by mainstream epistemologies that continue to employ the principles of Enlightenment thought. In this respect they remain resistant to a re-examination of the constructed and political nature of knowledge claims that underpin Gavey's analysis.

The growth of psychology was dominated by men but epistemological divisions appeared early in its development. These divisions, highlighted by the s 23G debates, are revisited in conclusion.

Conclusion

Divisions between clinical and research psychologists were exacerbated by s 23G's limitation that an expert witness must have experience in the professional treatment of sexually abused children. Research psychologists consider it is their investigations that produce the "true" knowledge of psychology. They are critical of clinical psychologists' ability to be objective. Research scientists are committed to the liberal humanist notion that knowledge is fixed and impartial truths can be discovered by a neutral investigator. They are committed to the "scientific objectivity" of positivism and resistant to a re-examination of the traditional epistemologies. In the nineteenth century (and ahead of his time), Herbart claimed that pure empiricism is impossible in psychology and that the mental life of human beings is in a state of permanent change. He did not believe psychologists could carry out research without bringing their own history and experiences into the process and contaminating the results. The gender bias implicit in traditional epistemologies confirms his belief.

Memory is an ongoing issue among psychologists. There is no known mechanism by which a person can forget and recover memories and the concepts of repressed, recovered and false memories are contested within psychology. Feminist commentators are in no doubt that the FMS debate is political and it is gendered. They are concerned that it is taking priority at the expense of the very real problem of CSA which is being neglected. FMS is not recognized as a psychological term but it has found its way into psychology text books, reference books, novels, research papers, the media and the courts. This infiltration of psychological texts is a demonstration of how a claim that has been created to protect allegedly abusive men can gain the status of "science".

Conclusion

This thesis was conceived to investigate the abandonment of s 23G after the Evidence Act 2006 became law in August 2007. The introduction of the amendments to the Evidence Act 1908 in 1990 provoked condemnation. Strong criticism was directed particularly at s 23G, the provision for expert witness evidence, and s 23H, the prohibition of judges' warnings. These amendments posed a challenge, not only to the established cultural and medico-legal myths that discredited child sexual abuse (CSA) complainants; they challenged the "objectivity" of the law. S 23G was vigorously contested for the nearly seventeen years that it was law.

Opponents of s 23G evidence called upon the authority of science to validate their claims that it destroyed the traditional safeguards protecting the reliability of evidence in CSA cases. They argued that as s 23G expert evidence was based on professional experience and, rather than scientific research, it was only the opinion of the witness. According to its opponents, scientifically invalid evidence given under s 23G was responsible for a multitude of injustices being perpetrated on many innocent accused. The opponents' claims were reinforced by the gendered liberal humanist epistemology that underpins them. They were constructed by the discourses of Hale J and nineteenth century medicine that have become embedded in legal jurisprudence. Freud's seduction theory, that is perceived to be knowledge, and sexual assault myths, that are perceived to be fact, add to the potency of the construction of the claims.

Prior to 1990, Hale J's words were made explicit in CSA cases when judges warned juries that special care must be taken when examining children's testimony. The prohibition on judges' warnings provided an opportunity for a public re-articulation of Hale J's discourse. During the nearly seventeen years it was law, and alongside this re-articulation of Hale J, opponents attacked s 23G evidence and the media circulated their statements revisiting the CSA myths and questioning the veracity of recovered memories of CSA. The abandonment of s 23G by the Evidence Act 2006 was not accompanied by the abandonment of the discourses that opposed it.

So what is the evidence in the expert witness debates? This thesis has argued against the generally believed but erroneous assumptions that expert psychiatric or psychological evidence is impartial and the court process in which an expert witness participates is neutral. The interaction between the discursive fields of law and psychiatry or law and psychology reinforce the inherent prejudices against CSA complainants that inform the discourses of both disciplines. The courts' demand that expert witnesses furnish "objective", proven, "scientific", psychiatric or psychological facts is a demand that is impossible to fulfill.

The strength of medico-legal discourses that deny CSA has been demonstrated through an examination of occasions when the incidence and impact of CSA have been exposed. The work of Tardieu, briefly Freud and of Ferenczi, was diminished by powerful professional discourses that discredited the authors and denied or minimized the problem. In recent years in Aotearoa/New Zealand child advocates Saphira and Lapsley have been vilified and Zelas and Vincent publicly humiliated.

Without physical evidence or corroboration and, in the face of the perpetrator's denials, child witnesses and adults recalling CSA frequently have difficulty convincing judges and juries that abuse did occur. The penetration into psychiatry, psychology and cultural mythology of Freudian discourse that construct the complainant as seducer, reinforces the perpetrator's denials. Freud's seduction theory is an example of a theory that has come to be accepted as knowledge professionally, and culturally.

Today's adversarial criminal justice system has been described by legal people who understand how it functions as fundamentally flawed, a bit devious, a game of words where the best player wins on the day and a free market approach to justice. Its focus on winning a case rather than producing a just verdict contradicts its association with integrity and morality.

The introduction of s23G was an attempt to make the court process easier for children alleging CSA. The limitations on s 23G evidence meant its influence on the outcome of a case would have been minimal. However, the presence of an authority figure testifying for the prosecution may have impressed some jury members.

S 23G has been dispensed with and has been described as unsuccessful (Blackwell, 2007). However the legacy of s 23G is that for nearly seventeen years the public debates that have surrounded it have constantly exposed the gendered nature of the traditional liberal humanist epistemologies that underpin Western culture and its institutions. S 23G's presence on the statute books and the controversy it generated meant that CSA maintained a high media profile. CSA is an unpalatable subject that most people would rather not hear about. S 23G provoked nearly seventeen years of debate and contributed to a process of educating many citizens about the issues associated with CSA.

Supportive evidence should be available in CSA cases. Presently the legal process is heavily weighted against child complainants. The distribution of information that familiarizes juries with the myths that abound about CSA would seem an appropriate beginning in redressing this situation. However, if the voices of these vulnerable children are going to be heard and acted upon, in a legal system that has ostensibly been set up to dispense justice, the inherent gender bias of liberal humanist epistemologies needs to be addressed.

This thesis has specifically considered the implications of the nature of evidence in expert witness debates in relation to the operation of s 23G in CSA cases. But the conclusions reached have wider implications beyond the rise and fall of s 23G and the passage of CSA cases through the courts.

The presentation of contradictory expert witness evidence in a court case is not an unusual event. Recently, when Auckland University graduate Blazej Kot was charged with murdering his wife in New York, prosecution and defence psychiatrists disagreed

about Kot's state of mind at the time of the murder (NZPA, 17 April 2010:A13). In the 2009 retrial of David Bain pathologists disagreed about whether or not his father, Robin, could have committed suicide and forensic scientists disagreed over whether bloodied footprints, found at the murder scene, were made by David or Robin Bain (NZPA, 20 May 2010:A4). When Chris Kahui was tried for murder, the evidence of medical experts estimating the timing of injuries to his children, Chris and Cru Kahui, was contradictory (*The Dominion Post*, 8 May 2008:A5). On trial for allegedly poisoning her ex-partner with acrylamide, more than twenty experts, most of them from overseas, gave evidence in the two trials of microbiologist Dr Vicky Calder. The first trial ended with a hung jury but Calder was acquitted at the second (<http://www.gikweb1.wordpress.com/profile/>). Following two hung juries, John Barlow was convicted for the murders of Eugene and Gene Thomas after a jury had deliberated for 27 hours. At Barlow's third trial the prosecution called an American Federal Bureau of Investigation expert who, using a technique called Comparative Bullet Lead Analysis, testified that the bullets recovered from the murder scene matched bullets in a box belonging to Barlow. Although this technique was later discredited, Barlow's appeals for a retrial were denied (<http://www.gikweb1.wordpress.com/profile/>).

Bearing in mind the observation of Bentham in 1810, that the field of evidence is no other than the field of knowledge, the conclusions of this thesis have wider implications than the evidential debates within the courts. It has been shown that traditional liberal humanist epistemologies underpin the constitution and generation of Western knowledge claims. The operation of gender power relations implicit in these epistemologies specifies what knowledge is, what knowledge claims are accepted, and who can be a knower. This thesis' examination of the historical constructions of debates that surrounded s 23G therefore, poses a challenge to the authenticity of traditional knowledge claims and the objectivity of science.

Appendix One

The Evidence Act 1908 Section 23G

23G. Expert witnesses

- (1) For the purposes of this section, a person is an expert witness if that person is –
 - (a) a medical practitioner holding a vocational registration in the speciality of psychiatry, practicing or having practiced in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or
 - (b) a psychologist registered under the Psychologists Act 1981, practicing or having practiced in the field of child psychology and with experience in the professional treatment of sexually abused children.
- (2) In any case to which this section applies, an expert witness may give evidence on the following matters:
 - (a) the intellectual attainment, mental capacity, 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) observation of the complainant giving evidence whether directly or on videotape:
 - (a) the general development level of children of the same age group as the complainant:
 - (b) 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.

(Evidence Act 1908:31-32).

Appendix Two

Evidence Act 2006 Section 25

25 Admissibility of expert opinion evidence

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
- (2) An opinion by an expert is not inadmissible simply because it is about –
 - (a) an ultimate issue to be determined in a proceeding; or
 - (b) a matter of common knowledge.
- (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.
- (4) If expert evidence about the sanity of a person is based in whole or in part on a statement that a person made to the expert about the person's state of mind, then –
 - (a) the statement of the person is admissible to establish the facts on which the expert's opinion is based; and
 - (b) neither the hearsay rule nor the previous consistent statements rule applies to evidence of the statement made by the person.
- (5) Subsection (3) is subject to subsection (4).

(Evidence Act 2006::22)

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