

Without fear or favour? Trends and possibilities in the Canadian approach to expert human behaviour evidence

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Abstract In *R v Lavallee* and *R v Mohan*, the Supreme Court of Canada established a test for the admissibility of expert evidence which is somewhat different from that used in other common law jurisdictions. Over the course of several more recent decisions, the court has expressed an increasingly sceptical attitude towards expert evidence of human behaviour. Collectively, these cases have left the state of Canadian law unclear. Canadian commentators also disagree about how best to navigate a path between the Scylla of uncritical reliance on expert evidence and the Charybdis of leaving discriminatory legal reasoning undisturbed. This article describes two proposals for reforming the Canadian approach to expert evidence and suggests that only one has the potential to move expert evidence jurisprudence beyond its current impasse.

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1. Introduction

Canadian courts have struggled over the past 15 years or so with the question of when and on what terms to admit expert human behaviour evidence in criminal trials. The question has come squarely before the Supreme Court of Canada on at least five occasions since 1990 and the Court has twice¹ seen fit to clarify the test for admissibility that was originally spelled out in its decision in *R v Mohan*.² In both cases, the apparent effect of the court's clarification of the *Mohan* test was to raise the threshold of admissibility for expert human behaviour evidence. The Canadian debate about expert opinion evidence shares features with similar debates in England, Australia and the United States of America. The problems and solutions that have arisen in Canada also manifest important differences: in part because of the influence of the Canadian Charter of Rights and Freedoms and the effect of an activist approach to judicial decision-making on the part of the Supreme Court of Canada.

The increasingly sceptical approach that has been adopted by Canadian courts toward expert human behaviour evidence in recent years reflects uncertainty about when and on what terms law should venture into other fields of knowledge. In particular, judges and commentators differ on the subjects of how best to assess the value of expert evidence and how to guard against being misled by experts who are partisan or insufficiently qualified. In the wake of the 1990 decision *R v Lavallee*,³ the Supreme Court of Canada and Canadian commentators have tended to focus on the risks presented to the judicial process by expert evidence. Experts are increasingly constructed in Canada as dangerous to the jury and the legal process—cases where expert evidence is excluded focus on the risk of misleading the jury with the 'aura of infallibility' surrounding expertise and on the danger that the jury will abdicate its fact finding responsibilities to experts. The result is that the purposes for which expert human behaviour evidence may be admitted in Canadian criminal trials are now somewhat unclear.

Arguably, Canada's jurisprudential confusion about the proper place of expert human behaviour evidence in criminal trials is symptomatic of a perceived tension between the need to ensure that expert evidence is sufficiently reliable to assist the court, and the drive to counter discrimination within legal decision-making using lessons gleaned from social science. This tension manifests itself in the Canadian debate over the utility of adopting admissibility criteria based on outmoded conceptions of science. To some influential commentators, most

1 In *R v D (D)* [2000] 2 SCR 275 and again in *R v J (L.J)* [2000] 2 SCR 600.

2 [1994] 2 SCR 9.

3 [1990] 1 SCR 852.

notably Alan Gold,⁴ adopting ‘scientific method’ as the touchstone for admissibility seems to offer the promise of a reliable means of distinguishing between good and bad empirical research. To adopt this approach, however, would be to ignore some important lessons from the philosophy and sociology of science. In this article, I suggest that the focus on the ‘danger’ of expert witnesses and the resultant flight to a parodied conception of scientific method risks authorising an over-zealous and misinformed application of the judicial gatekeeping role in relation to expert evidence. Among other dangers, this has the potential to result in the exclusion of evidence that can counter negative myths and stereotypes about disadvantaged groups. I conclude by suggesting that the apparent tension between the Canadian courts’ twin goals of ensuring reliability and countering discrimination might be more productively explored, if not necessarily resolved, by adopting two refinements to the *Mohan* test. These refinements are adapted from a proposal put forward by Boyle and MacCrimmon.⁵ First, the purposive approach to the admissibility of expert opinion evidence that was first advanced by the Supreme Court in *R v Lavallee*⁶ encourages a rigorous attitude to expert evidence without falling into the trap of judging one type of expertise by standards best suited to another. Secondly, it seems equitable to pay closer attention to the effects of excluding particular types of expert evidence from the trial process.

Before explaining the ways in which Canadian jurisprudence differs from its American and certain Commonwealth counterparts, I must include a note about terminology. In this article, ‘expert human behaviour evidence,’ means expert evidence adduced by psychiatrists, psychologists, sociologists and other ‘soft scientists’ about human behaviour and the motivations underpinning that behaviour. The term includes evidence that is commonly referred to in Canada as ‘social framework evidence’⁷—such as expert evidence that is adduced to identify and counter stereotypes about the behaviour and decision-making patterns of

4 See especially Alan D. Gold, *Expert Evidence in Criminal Law: The Scientific Approach* (Irwin Law: Toronto, 2003).

5 Christine Boyle and Marilyn MacCrimmon, ‘To Serve the Cause of Justice: Disciplining Fact Determination’ (2001) *Windsor Yearbook of Access to Justice* 55 at 56–7.

6 Above n. 3.

7 Mosteller prefers the term ‘group character’ to describe this type of evidence, in order to distance it from Monahan and Walker’s paradigm for social framework evidence. See Robert P. Mosteller, ‘Syndromes and Politics in Criminal Trials and Evidence Law’ (1996) 46 *Duke Law Journal* 461 at 462. Two key articles by Monahan and Walker are Laurens Walker and John Monahan, ‘Social Frameworks, A New Use of Social Science in Law’ (1987) 73 *Virginia Law Review* 559; and John Monahan and Laurens Walker, ‘Social Authority: Obtaining, Evaluating and Establishing Social Science in Law’ (1986) 134 *University of Pennsylvania Law Review* 477. I agree with Mosteller that the method of admitting social framework evidence should not be limited in the ways Monahan and Walker suggest, but have chosen to use the more usual term to avoid confusion.

battered women⁸ or about the implication of racism in the criminalisation of young African–Canadian men⁹ or about how (not) to distinguish between truthful and falsified allegations of child sex abuse.¹⁰ It also embraces ‘psy-evidence’ (both psychiatric and psychological), which may be led to explain why a particular defendant is more or less likely to have committed a particular crime,¹¹ or to confirm that a sexual assault complainant’s behaviour is consistent with that of a person who has been assaulted.¹²

The particular example of human behaviour evidence to which I periodically return in this article is that of battered woman syndrome. ‘Battered woman syndrome’ is a contested term within the relevant literature, because of the concern that it perpetuates a stereotypical image of ‘the battered woman’ that does more harm than good.¹³ Battered woman syndrome has been criticised by feminist commentators for pathologising women—constructing a story of battered women as psychologically disordered and abnormally dependent.¹⁴ I have (hesitantly) chosen to use the phrase because it highlights the physical nature of the abusive relationship, the gendered pattern of violence, and the fact that the psychological effects identified as part of the syndrome form a group or aggregation of symptoms.¹⁵ Battered woman syndrome is a sub-category of post traumatic stress disorder. Empirical research suggests that ‘distinctive patterns characterize some batterers’ behaviour before, during and after episodes of physical violence against their intimate partners’.¹⁶ Some, but not all, battering relationships exhibit a ‘cycle of violence’ which includes a tension-building phase, an acute battering phase, and a stage in which the batterer often appears contrite or remorseful. Long periods of time may lapse between battering episodes.¹⁷ These

8 See, e.g. above n. 3.

9 For example, *R v S (RD)* [1997] 3 SCR 484.

10 For example, *R v D (D)* [2000] 2 SCR 275.

11 For example, *R v Mohan* [1994] 2 SCR 9; *R v J (J-L)* [2000] 2 SCR 600.

12 For example, *R v Burns* [1994] 1 SCR 656.

13 Shaffer’s study of Canadian cases suggests that this is a significant concern. Martha Shaffer, ‘The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after *R v Lavallee*’ (1997) 47 *University of Toronto Law Journal* 1. See also US Department of Justice, *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials* (National Institute of Justice, US Department of Justice, May 1996).

14 For example, Isabel Grant, ‘The “Syndromization” of Women’s Experience’ at 51 in Donna Martinson *et al.*, ‘A Forum on *Lavallee v R*: Women and Self Defence’ (1991) 25 *University of British Columbia Law Review* 23; Katherine O’Donovan, ‘Law’s Knowledge: The Judge, the Expert, the Battered Woman, and Her Syndrome’ (1993) 20:4 *Journal of Law and Society* 427.

15 US Department of Justice, above n. 13 at 5.

16 *Ibid.* at 6.

17 Jacquelyn C. Campbell *et al.*, ‘Relationship Status of Battered Women over Time’ (1994) 9 *Journal of Family Violence* 99.

patterns provide context that helps to explain how some women respond to battering relationships. For example, a pattern in which violence occurs suddenly 'can help to explain why a battered woman might reasonably believe there was little time to seek help' and a departure from an established pattern may suggest increased danger.¹⁸

Battered woman *syndrome* refers specifically to the psychological effects on a woman of living within a battering relationship. '[D]omestic violence is associated with a wide range of traumatic responses' on the part of the victim including traumatic stress reactions and apparently excessive responses to any perception of danger.¹⁹ These seemingly excessive reactions may stem from one of two causes. First, in many cases, a woman understands her partner's cycle of violence sufficiently well to perceive real danger when others might not. Secondly, and less commonly, a woman who has been physically abused might perceive danger in a situation in which no danger exists, because her fear is triggered by some similarity with a situation in which she has been battered before. In this case, her fear is real although the danger may not be.²⁰ Distinguishing between these two scenarios is difficult, of course, if the precipitating factor for the woman's fear is the battering partner's behaviour or demeanour.

Battered woman syndrome illuminates many of the points that I discuss because it is a theory that has relevantly been presented in criminal cases in Canada, England and Australia for different purposes and with different results.²¹ The fact that some commentators deny the validity of battered woman syndrome²² is also relevant to my discussion—I do not propose to resolve that controversy in this article, but I do tentatively suggest how courts might understand and engage with disagreement within expert communities. I am not primarily concerned here with so-called 'hard scientists', such as forensic DNA laboratories or accident reconstruction engineers, although given the ubiquitous comparisons between hard and soft science²³ it will be necessary for me to touch on this type of evidence

18 Above n. 13 at 7.

19 Ibid. at 10.

20 Ibid. at 11–12.

21 Studies conducted in Canada and the USA suggest that expert evidence that a defendant was affected by battered woman syndrome does not, by any means, always result in acquittal or leniency. See, e.g. Shaffer, above n. 13; Department of Justice, above n. 13.

22 For example, Gold, above n. 4; David L. Faigman, 'Battered Women Syndrome: A Legal and Empirical Dissent' (1986) 72 *Virginia Law Review* 619.

23 A Canadian example of such a comparison can be found in Gold, above n. 4 especially at 25, where the author argues that DNA evidence stands apart from many forms of psy-science (psychology, psychiatry, etc.) as a 'paradigm for proper expert evidence'.

(without conceding that any bright line actually separates ‘hard’ from ‘soft’ science).

2. The debate about expert opinion evidence: a survey of international trends

It is frequently observed that expert opinion evidence represents an exception to the general rule that witnesses may only testify about facts, in order to leave the task of drawing inferences to the trier of fact. This exception is predicated on the basis that some matters lie beyond the learning and common sense of the average fact finder:

[I]f matters arise in our laws which concern other sciences and faculties we commonly call for the aid of that science or faculty which it concerns, which is an honourable and commendable thing for thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them.²⁴

The scope of the exception has been anxiously debated within most Anglo-American jurisdictions in the past quarter century. The contours of that debate have varied between countries. Most starkly, the controversy in America has focused on the use of ‘junk science’ in civil litigation, while the debate in England, Canada and Australia has tended to revolve around the uses of expert evidence in criminal law.²⁵ In this section, I survey some of these trends and highlight the different approaches that courts and law reform agencies have adopted to resolve the threats which experts are perceived to pose to the adversarial system.

In the United States of America, popular concern about the use of ‘junk science’ by plaintiffs in mass tort actions led to calls for a reform of evidence laws in the early 1990s. The concern about junk science is integral to a *perception* that the American system of civil litigation provides an opportunity for unscrupulous plaintiffs and their lawyers to hit the proverbial jackpot via access to disproportionately large damages awards for misfortunes such as spilt coffee, rear-end collisions or birth

24 *Buckley v Rice Thomas* (1554) 75 ER 182 at 191 cited by Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence*, 2nd edn (Cavendish Publishing: Sydney, 2004) 231.

25 Like most generalisations, this one is oversimplified. For example, the debate over the validity of repressed memory syndrome has been as vigorous in the United States as anywhere and the theory of battered woman syndrome originated in America. The hyperbole usually associated with American concerns about junk science is also extended to human behaviour evidence—see Margaret Hagan, *Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of American Justice* (Regan Books: New York, 1997). My intention is simply to observe the existence of different *trends* in the various countries I discuss in this section.

defects that may have been caused by inadequately tested pharmaceutical drugs. In his 1991 book *Galileo's Revenge*, Huber argued that 'junk science' possesses unwarranted authority in the US legal system and that career expert witnesses are paid to substantiate legal claims that have no scientific merit—providing duplicitous plaintiffs with access to unmeritorious damages awards.²⁶ Huber's assertions have been systematically challenged by American law and society scholars, who have pointed to the substantial rates of attrition between documented injuries and the number of cases litigated, and to the cultural and economic causes of that attrition, in order to counter the sense that tort litigation provides a quick and easy way to get rich.²⁷ Despite this, Haltom and McCann demonstrate that fear of a litigious society carries a discursive power within American popular culture that comes from its 'normative appeal to responsible, disciplined, nonlitigious individuals who constitute the imagined "moral community" of America'.²⁸ American jurists have responded to these fears in recent years by tightening the rules relating to the admissibility of expert opinion evidence.

Most notably, the US Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals Inc.*²⁹ (which ostensibly turned around a point of statutory interpretation) seemed to respond to Huber *et al.*'s critique by establishing a set of guidelines to assist trial courts to determine whether expert scientific evidence was sufficiently relevant and reliable³⁰ to warrant admission. The court's guidelines adopted scientific method as the touchstone of reliability, while acknowledging that rules of evidence are designed 'not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes'.³¹

26 Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books: New York, 1991). Huber attracted his supporters (e.g. David Bernstein, 'Junk Science in the United States and the Commonwealth' (1996) 21 *Yale Journal of International Law* 123 and his detractors (e.g. Kenneth J. Chesebro, 'Galileo's Retort: Peter Huber's Junk Scholarship' (1993) 42 *American University Law Review* 1637.)

27 See the survey of published research that constitutes Chapter 3 of William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (University of Chicago Press: Chicago, 2004) 73–110. Similar arguments have also been made and countered in criminal law—see, e.g., Mosteller, above n. 7.

28 *Ibid.* at 266. Emphasis in original.

29 (1993) 509 US 579.

30 The majority explained that 'reliable' means *scientifically valid* in this context. *Ibid.* at 590.

31 *Ibid.* at 597.

The decision in *Daubert* seemed to take the US Supreme Court a long way toward privileging established scientific knowledge and scientific reasoning over other forms of knowledge in the courtroom.³² This effect was somewhat compounded by the US Supreme Court's later affirmation that the basic structure of its reasoning in *Daubert* also applied to judges who were faced with the task of deciding whether to admit non-scientific expert evidence under the Federal Rules of Evidence. It is important to observe, however, that the court went to considerable lengths to emphasise the flexibility of its guidelines and that it clearly regarded the ultimate question to be one of reliability, judged in the manner most appropriate to the evidence in question.³³ In the wake of *Daubert* and *Kumho*, it seems to have become more difficult to persuade US judges to admit expert human behaviour evidence.³⁴ This effect can partly be ascribed to the Supreme Court's decision to privilege concepts of scientific validity over other *indicia* of reliability, and partly to the fact that the Supreme Court's judgment encouraged trial courts to adopt a robust gatekeeping role in relation to expert opinion evidence. I will return to both of these aspects of the US trends below.

As I have already noted, controversy over the role of expert opinion evidence in Commonwealth countries tends to centre on criminal trials rather than tort law. The reasons for this difference warrant greater analysis than I can provide in this article, but it seems likely that it is partly explained by the almost total absence of seemingly excessive damages awards in tort cases. This difference may be driven by the fact that judges, rather than juries, quantify damages in tort cases in Commonwealth countries. The Commonwealth practice of establishing Royal Commissions to investigate certain notorious wrongful convictions also contributes to a popular focus on the dangers of forensic

32 Margaret G. Farrell, 'Daubert v Merrell Dow Pharmaceuticals Inc: Epistemology and Legal Process' (1994) 15 *Cardozo Law Review* 2183; Susan Haack, 'An Epistemologist in the Bramble Bush: At the Supreme Court with Mr Joiner' (2001) 1 *Journal of Philosophy, Science and Law* (online journal: www.psljournal.com).

33 *Kumho Tire Co. v Carmichael* (1999) 526 US 127 at 141.

34 See the cases cited by Bernstein, above n. 26 at 137-8, and those described by Jane Goodman-Delahunty, 'Forensic Psychological Expertise in the Wake of *Daubert*' (1997) 21 *Law and Human Behavior* 121. It is difficult to state conclusively that expert human behaviour is more frequently excluded post-*Daubert* because of a dearth of empirical investigation: Peter H. Wingate and George C. Thornton III, 'Industrial/Organizational Psychology and the Federal Judiciary: Expert Witness Testimony and the *Daubert* Standards' (2004) 28 *Law and Human Behavior* 97 at 98.

science.³⁵ Widely reported controversies over the reliability of expert human behaviour evidence about battered woman syndrome, rape trauma syndrome and recovered memory syndrome (although not unique to Commonwealth countries) have probably also contributed to the perception that the stakes of getting expert knowledge right are highest in criminal law.³⁶

In England and Australia, courts and law reform bodies have continued to resist the option of relying on scientific criteria as a means of deciding whether to admit expert opinion evidence.³⁷ While a ripple passed through Commonwealth countries after *Daubert* and *Kumho*,³⁸ superior courts in England and Australia declined to follow the path blazed by the US Supreme Court. Most recently, the

35 The highest profile failures of expert opinion evidence in Australia, Canada and England tend to emerge from inquiries into apparently wrongful convictions. The Birmingham Six and the Guildford Four provide examples of the phenomenon in England. See Gary Edmond, 'Constructing Miscarriages of Justice: Misunderstanding Scientific Evidence in High Profile Criminal Appeals' (2002) 22 *Oxford Journal of Legal Studies* 53 for an analysis of the discursive effects of Royal Commissions. The use of Royal Commissions of Inquiry in England has been eclipsed to some extent by the Criminal Cases Review Commission and the English Court of Appeal's power to rehear appeals that are referred to the court by that body—e.g., the cases of *R v Clark* (No. 2) [2003] EWCA Crim 1020 and *R v Cannings* (No. 2) [2004] EWCA Crim 01—but these cases are still closely followed and keenly reported by the English (and international) media. The most famous Australian example is the case of Lindy Chamberlain. See Justice T. R. Morling, *Report of the Royal Commission of Inquiry into Chamberlain Convictions* (Australian Government Printing Service: Darwin, 1987). In Canada, see *The Commission on Proceedings Involving Guy Paul Morin* (Ontario Ministry of the Attorney-General: Toronto, 1998).

36 The widespread use of innocence projects in the United States and the role of the National Research Council in preparing reports about forensic science have also drawn attention to the role of forensic science in criminal proceedings in that country. The debate around science in the courtroom in the United States, however, tends to follow the contours first established in the context of civil litigation.

37 In relation to England, see *R v Luttrell* [2004] EWCA Crim 1344 at [32], *per* Rose LJ adopting the rule in *R v Bonython* (1984) 38 SASR 45 at 46, *per* King CJ. A note about the effect of this case can be found in Rosemary Pattenden (ed.), 'Noticeboard—Expert Evidence—United Kingdom, Australia, United States' (2004) 8 E & P 248. In Australia, the leading case is *HG v The Queen* (1999) 197 CLR 414. See also Australian Law Reform Commission *et al.*, *Uniform Evidence Law* (Australian Government Printing Service: 2006), for a helpful description of the current state of Australian statutory and common law regarding expert opinion evidence at paras. 9.25–9.171.

38 For example, Stephen J. Odgers and James T. Richardson, 'Keeping Bad Science Out of the Courtroom—Changes in American and Australian Expert Evidence Law' (1995) 18 *University of New South Wales Law Journal* 108–30; Gary Edmond and David Mercer, 'Keeping "Junk" History, Philosophy and Sociology of Science out of the Courtroom: Problems with the Reception of *Daubert v Merrell Dow Pharmaceuticals Inc*' (1997) 20 *University of New South Wales Law Journal* 48; Helen Reece, 'Editor's Introduction' to Helen Reece (ed.), *Law and Science: Current Legal Issues 1998* (Oxford University Press: Oxford, 1998) (and several other chapters in that collection); Paul Roberts, 'Tyres with a "Y": An English Perspective on *Kuhmo Tire* and its Implications for the Availability of Expert Evidence' (1999) International Commentary on Evidence (available at www.law.qub.ac.uk/ice/papers/expert1.html, accessed 28 July 2006); Gold, above n. 4.

Australian Law Reform Commission has recommended that Australian evidence law retain its broad common law test for the admissibility of expert opinion evidence, as that test has been incorporated under s. 79 of the Evidence Act 1995 (Cth).³⁹ In both Australia and England, courts have adopted a two-part test that seeks to determine: first, whether the expert evidence relates to matters about which ordinary persons are unable to ‘form a sound judgment’ without the assistance of the expert (variously called the necessity or helpfulness test); and secondly, whether the expert is drawing on ‘special knowledge or experience ... which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience’ (the reliability test).⁴⁰ At least in Australia, the reliability test is distinguished from the *Frye* ‘general acceptance test’⁴¹ that ruled US jurisprudence before *Daubert* because the court will admit an opinion based on an organised body of knowledge even if that opinion does not attract widespread acceptance within the expert’s peer group:

Provided the judge is satisfied that there is a field of expert knowledge ... it is no objection to the reception of the evidence of an expert within that field that the views which he puts forward do not command general acceptance by other experts in the field.⁴²

The necessity or helpfulness test has a particular twist in the context of human behaviour evidence. In *R v Turner*,⁴³ the English Court of Appeal held that expert psychiatric and psychological evidence was only admissible when the evidence related to a recognised mental illness:

An expert’s opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by

39 Australian Law Reform Commission, above n. 37 at para. 9.43. Carol A. G. Jones provides an introduction to the historical divergence between English and American jurisprudence in Chapter 3 of *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press: Oxford, 1994).

40 *R v Bonython* (1984) 38 SASR 45.

41 *Frye v United States* (1923) 54 App DC 46.

42 *R v Johnson* (1994) 75 A Crim R 522 at 535. Nonetheless, Zeedyk and Raitt argue that the general acceptance test implicitly operates as a measure of reliability in Commonwealth countries: M. Suzanne Zeedyk and Fiona E. Raitt, ‘Psychological Evidence in the Courtroom: Critical Reflections on the General Acceptance Standard’ (1998) 8 *Journal of Community & Applied Social Psychology* 23.

43 [1975] QB 834.

that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does. ... Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.⁴⁴

In this decision, the court drew a firm distinction between mental illness, which was judged likely to be outside juror experience, and so-called 'normal' behaviour, in relation to which the court assumed that 'patterns of behaviour are essentially transparent and thus within the knowledge and experience of jurors'.⁴⁵ The court's concern was that human behaviour experts have a strong potential to usurp the function of the fact finder and that a jury faced with a difficult decision about credibility might abdicate its responsibilities to an impressive-sounding witness. The judgment does not exclude the possibility that human behaviour evidence might assist courts but concludes: 'we are firmly of the opinion that psychiatry has not yet become a satisfactory substitute for the common sense of juries or magistrates on matters within their experience of life'.⁴⁶

The application of the *Turner* rule to a variety of types of expert human behaviour evidence has been criticised by feminist commentators in particular, on the basis that matters such as what constitutes a 'normal' reaction to sexual abuse are not likely to fit within the experience of an average juror. These commentators suggest that providing the jury with information about specialised research in these fields *will* assist jurors to undertake an informed assessment of the facts.⁴⁷ The High Court of Australia disapproved of the distinction between normal mental states and mental illness in *Murphy v The Queen*, holding that the two-part necessity and reliability test applied to expert evidence about normal human behaviour just as it did to evidence about the effects of mental abnormality or

44 [1975] QB 834 at 841.

45 Fiona E. Raitt, 'Expert Evidence as Context: Historical Patterns and Contemporary Attitudes in the Prosecution of Sexual Offences' (2004) 12 *Feminist Legal Studies* 234 at 235.

46 *R v Turner* [1975] QB 834 at 843. The rule in *Turner* was confirmed and clarified in *R v Pinfold and MacKenney* [2003] EWCA Crim 3646. In this later case, the Court of Appeal arguably moved slightly away from the strict requirement that only a diagnosis of mental illness could found psy-evidence about credibility, in favour of the (slightly relaxed but still stringent) requirement that the psy-evidence relate at the very least to a severe personality disorder. See Paul Roberts, 'Towards the Principled Reception of Expert Evidence of Witness Credibility in Criminal Trials' (2004) 8 E & P 215 especially at 230.

47 Raitt, above n. 45 at 236. See also Donna Martinson *et al.*, 'A Forum on *Lavallee v R*: Women and Self Defence' (1991) 25 *University of British Columbia Law Review* 23.

illness.⁴⁸ In Scotland, the Vulnerable Witnesses (Scotland) Act 2004 reversed the effect of *Turner* on Scottish evidence law in the context of child sexual abuse.⁴⁹

In England, then, there is significant judicial resistance to the idea that human behaviour experts can assist fact finders in any circumstances but those which relate to mental abnormality. This resistance is not by any means unique to England⁵⁰ but the *Turner* rule is unusual insofar as it spells out a belief (that jurors are experts in normal human behaviour) which often remains implicit in Commonwealth jurisprudence. For example, women who had suffered chronic domestic violence found it difficult to adduce expert psychological evidence about the effect of this violence on their daily lives before experts coined a syndrome—battered woman syndrome—to identify patterns in the psychological responses of women to domestic abuse. Evidence about the effects of battered woman syndrome is admissible in England under the *Turner* rule⁵¹ because it helps the jury to understand the ‘abnormal human behaviour’ of a battered woman—but this is contingent on the existence of a specific ‘pathological condition ... recognised in medical science’.⁵² If battered woman syndrome were framed differently, as a reasonable and normal response to an atmosphere of physical and emotional violence, it might not be admitted under *Turner*. However, it is also arguable that evidence about a ‘normal’ human response to domestic violence might not satisfy the apparently less stringent test employed in Australia. Lawyers in that jurisdiction have relied on battered woman syndrome to introduce evidence about the effects of domestic violence.⁵³ Perhaps this is a pragmatic recognition that the test for admissibility (necessity plus the requirement that the evidence draw on an organised body of knowledge) is most easily satisfied by demonstrating that the expertise relates to the study of *abnormality*. Despite the statements made by the High Court of Australia in *Murphy* and the critique of battered woman syndrome offered by Kirby J in *Osland*,⁵⁴ the safer road to admissibility seems to be to point to abnormal human behaviour.

In the introduction, I suggested that expert human behaviour evidence can serve one or both of two functions. First, it can constitute what Canadians call ‘social

48 *Murphy v The Queen* (1989) 167 CLR 94 at para. 45, per Mason CJ and Toohey J, Deane J and Dawson J apparently agreeing on this point; compare Brennan J at para. 8.

49 Raitt, above n. 45 at 241.

50 For Canadian examples, see *R v D (D)* [2000] 2 SCR 275 (discussed below) and David M. Paciocco, ‘Coping with Expert Evidence about Human Behaviour’ (1999) 25 *Queen’s Law Journal* 305.

51 *R v Thornton (No. 2)* [1996] 2 All ER 1023.

52 *R v Ahluwalia* [1992] 4 All ER 889 at 898.

53 For example, *Osland v The Queen* [1998] HCA 75.

54 *Ibid.* at paras. 158–69, McHugh J agreeing.

framework evidence’—that is, it can help to identify and counter stereotypes. The second function is more individual—it serves to establish that a particular person is more or less likely to have behaved in a particular way. The first role is largely unknown to Australian and English law. For example, in *R v Thornton (No. 2)*, evidence about battered woman syndrome was adduced to show that the defendant had suffered a sudden and temporary loss of self-control, and that a reasonable woman in her position would similarly have lost control; but not to challenge myths or stereotypes about the behaviour and mental state of battered women more generally. As the battered woman syndrome cases demonstrate, however, the distinction between the social framework within which a person operates and the individual person’s response to that framework is unstable and perhaps even somewhat incoherent. Thornton’s ‘sudden and temporary loss of self-control’ was, according to the theory of battered woman syndrome, inextricably linked to her belief that escaping her husband’s violence was not a viable possibility. For the purposes of this article, I separate these two functions of expert human behaviour evidence in order to make the point that Canadian courts have at times been more ready than their English or Australian counterparts to allow expert evidence to be adduced to counter negative stereotypes.

3. The Canadian approach to expert opinion evidence

Since 1990, Canadian courts have carved a somewhat different path through the wilderness of expert opinion evidence. In this section, I review the trends within Canadian case law from *R v Lavallee*,⁵⁵ which manifested a liberal approach to expert human behaviour evidence; to *R v D (D)*⁵⁶ and *R v J (J-L)*,⁵⁷ where the Supreme Court of Canada seemed to raise the threshold of admissibility for this evidence well above that which it had previously stipulated.

The high-tide mark in the Supreme Court of Canada’s liberal approach to the admissibility of expert evidence came with the 1990 decision in *R v Lavallee*. In this case, the court held that expert human behaviour evidence is admissible in several circumstances and for different purposes. First, the evidence can help the fact finder to draw inferences in circumstances where commonly held myths or stereotypes may otherwise lead the fact finder to form mistaken conclusions about the defendant’s behaviour. Secondly, the evidence may assist the fact finder in assessing the defendant’s state of mind and the reasonableness of her

55 [1990] 1 SCR 852.

56 [2000] 2 SCR 275.

57 [2000] 2 SCR 600.

actions.⁵⁸ Finally, the evidence may prompt a clarification or change in the common law. *Lavallee* also confirmed the potential applicability of the defence of self-defence to the situation of a battered woman who kills her husband. Permitting expert opinion evidence about the effect of battered woman syndrome on the defendant's actions and perceptions, the SCC held that the reasonableness of *Lavallee's* actions must be judged in light of 'what the accused reasonably perceived, given her situation and experience'. This situation and experience included *Lavallee's* status as a battered woman and the knowledge and constraints that accompanied this status.

The idea that expert opinion evidence might prompt a change in the law is a relatively radical departure from English and Australian jurisprudence. In England, the Lord Chief Justice rejected the idea of changing the law relating to the defence of provocation in the context of domestic violence on the grounds that previous decisions were binding:

unless we are convinced that they were wholly wrong. Where a particular principle of law has been reaffirmed so many times [as the test for provocation] and applied so generally over such a long period, it must be a matter for Parliament to consider any change.⁵⁹

Similarly, in *Osland*, the High Court of Australia resisted the appellant's invitation to change the 'settled' law relating to provocation and self-defence in order to make those defences more accessible to battered women.⁶⁰ The Supreme Court of Canada's implicit acceptance that 'reasonableness' has traditionally been a gendered concept that must be amended by incorporating women's perspectives into the law was also groundbreaking.⁶¹

Lavallee was treated to a mixed reaction within academic and judicial circles. The case was cautiously welcomed by feminist scholars in criminal and evidence law.⁶² MacCrimmon praised the decision for moving away from a reliance on unreflective common sense to interpret human behaviour and toward an

58 Broadly speaking, and subject in England to the rider that the defendant's state of mind be abnormal, this is the purpose for which evidence of battered woman syndrome may be admitted in England and Australia.

59 *R v Ahluwalia* [1992] 4 All ER 889 at 896. This finding is discussed by O'Donovan, above n. 14 at 428-9.

60 [1998] HCA 75.

61 See also *R v Malott* [1998] 1 SCR 123 at para. 37, per L'Heureux-Dubé J (McLachlin J agreeing).

62 See, e.g., Martinson *et al.*, above n. 47.

acknowledgement that ‘common sense’ may perpetuate stereotypical thinking and limit the possibility of understanding the actions of those who are unlike us.⁶³ As I have foreshadowed, feminist commentators also expressed some reservations about *Lavallee*—for example MacCrimmon and Grant both suggested that the concept of ‘learned helplessness’ pathologised women and that the court’s reliance on expert witnesses risked disqualifying the experience of women.⁶⁴ The concerns expressed by feminists were very different from those voiced by other commentators. Some Canadian evidence law scholars criticised *Lavallee* on the basis that the complicated purpose of admission rules established in that case created difficulties for the jury.⁶⁵ Others went further, suggesting that expert psychiatric evidence on battered woman syndrome was unreliable and unscientific—‘a prime example of survival by precedent’—and that the decision in *Lavallee* was ‘not the court’s finest hour’.⁶⁶ More moderately, some commentators raised concerns that the neither the Supreme Court of Canada nor the trial court had subjected battered woman syndrome to a thorough analysis of its reliability or generalisability.⁶⁷ Similarly, some commentators questioned the court’s ability to take appropriate judicial notice of what matters were likely to be the subject of myths or stereotypes.⁶⁸ Trial judges appear to have been more at ease. Justice Lederman of the Ontario Supreme Court suggests that after *Lavallee*, trial courts embraced human behaviour evidence ‘to dispel myths and provide insight into behavioural characteristics’.⁶⁹

The post-*Lavallee* trend toward a more liberal use of expert human behaviour evidence was somewhat curtailed by the Supreme Court of Canada’s decision in *R v Mohan*.⁷⁰ This change of emphasis may be attributed to many factors. Between

63 Marilyn MacCrimmon, ‘The Social Construction of Reality and the Rules of Evidence’ at 36 in Martinson *et al.*, above n. 47.

64 *Ibid.*

65 For example, John Sopinka *et al.*, *The Law of Evidence in Canada* (LexisNexis Butterworths: Markham, Ontario, 1999) 655–6.

66 Gold, above n. 4 at 145, 161.

67 For example, Paul Roberts, ‘Expert Evidence in Canadian Criminal Proceedings’ in Helen Reece (ed.), *Law and Science: Current Legal Issues 1998* (Oxford University Press: Oxford, 1998) 175–220 at 198.

68 John Norris and Marlys Edwardh, ‘Myths, Hidden Facts and Common Sense: Expert Opinion Evidence and the Assessment of Credibility’ (1995) 38 *Criminal Law Quarterly* 73 at 96–7; Roberts, above n. 67 at 200.

69 Sidney L. Lederman, ‘Judges as Gatekeepers: The Admissibility of Scientific Evidence Based on Novel Theories’ in Joost Blom and Helene Dumont (eds.), *Science, Truth and Justice* (Editions Themis: Montreal, 2000) at 237. See also Alan W. Mewett and Peter J. Sankoff, *Witnesses* (Carswell: Toronto, 1991) ch. 10, 10–19 and Paciocco, above n. 50 at 307; and compare *R v McIntosh* (1997) 35 OR (3d) 97 with *R v Chisholm* [1997] OJ 1819.

70 [1994] 2 SCR 9.

1990 and 1994, the ‘junk science’ debate really took hold in the United States of America and the decision in *Lavallee* may well have spurred Canadian academics into engaging more fully with the vigorous debate that had then been taking place for some time in the United States.⁷¹ At the very least, it can be observed that when the Supreme Court of Canada came to hear *Mohan*, it did so in a climate in which its decision in *Lavallee* had been criticised by some commentators as unscientific and in which the United States had started down a path toward a more self-consciously ‘scientific approach’ to assessing the admissibility of expert evidence.

There are also important differences between the fact situations, empirical reach and proposed uses of the expert evidence with which the court was presented in *Lavallee* and *Mohan*. In *Lavallee*, as we have seen, the expert evidence was adduced by the defence for several purposes. These purposes ranged from social framework evidence (using the theory of battered woman syndrome to dispel myths about battered women) to evidence that *Lavallee* herself suffered identifiable psychological effects from being battered by her partner.⁷² The defence expert’s evidence made liberal reference to the literature in the field, including extensive empirical research conducted by other researchers. *Mohan* concerned the alleged sexual assault of four girls, aged between 13 and 16, by their family doctor. The defence expert proposed to testify that the offences with which the accused was charged could only have been committed by a ‘limited and unusual group of individuals’ and that the accused did not belong to that class because he did not possess the relevant characteristics.⁷³ The expert was a psychiatrist who had treated three individuals with the characteristics he put forward, but he did not refer to any empirical research or literature in support of his claims. He also testified that he could only diagnose an individual as a member of the relevant class after he or she had committed an overt act that establishes the existence of specific traits.⁷⁴ The question of whether such acts had occurred was, of course, the very issue before the court in the accused’s

71 The US Supreme Court’s decision in *Daubert* was greeted with calls by Canadian academics for a similar approach to be adopted in Canada. One continuing advocate of this position is Gold, above n. 4.

72 *R v Lavallee* [1990] 1 SCR 852. A summary of the myths that may be dispelled by expert evidence about battered woman syndrome appears at para. 60.

73 *R v Mohan* [1994] 2 SCR 9 at para. 4.

74 *Ibid.* at para. 10.

trial.⁷⁵ The putative evidence was ruled inadmissible by the trial judge. The Supreme Court of Canada agreed with the trial judge's ruling because the evidential record did not support the contention that the alleged offences would only be committed by members of a distinctive group with identifiable characteristics. In particular, the expert provided no basis on which the court could determine that there was a standardised psychological profile or that the profiles the expert had used were sufficiently reliable to be helpful to the court. It appears from a comparison of the two judgments that the evidence offered by the defence expert in *Lavallee* was simply far more thorough, carefully reasoned, and grounded in empirical research than that presented in *Mohan*.

Faced in *Mohan* with expert testimony that appeared to have serious shortcomings, it is unsurprising that the Supreme Court of Canada took the opportunity to clarify the requirements for admissibility. The judgment of the court was delivered by Sopinka J, who held that:

[A]dmission of expert evidence depends on the application of the following criteria:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule; [and]
- (d) a properly qualified expert.⁷⁶

Sopinka J defined the relevance inquiry as entailing two dimensions. First, the expert evidence must possess what is frequently called logical relevance to a material issue,⁷⁷ that is, it must be related to a fact in issue in a way that tends to

75 This makes the evidence more important in the context of the case as a whole because it approaches the ultimate issue (*ibid.* at para. 28), but also because the expert's evidence was premised on the assumption that the accused was telling the truth when he denied the accusations made against him. This was a case in which the jury was tasked with weighing the accused's credibility against that of the complainants and there was apparently no other specific evidence to support the assumption that the accused was telling the truth. There existed a very real risk that the premise on which the evidence was based would have been overlooked by a jury faced with the task of deciding what weight to accord to the expert evidence—in fact, one could go further and question whether the evidence had significant probative value in light of its very real limitations. In *Lavallee*, by contrast, there was ample documentary and testimonial evidence that *Lavallee* was battered by her partner, and the question addressed by the psychiatrist was the likely effect of that abuse.

76 *R v Mohan* [1994] 2 SCR 9 at para. 17.

77 See, e.g., Robert J. Currie, 'The Contextualised Court: Litigating "Culture" in Canada' (2005) 9 E & P 73–109 at 80.

prove or disprove that fact. Secondly, relevance includes the probative value/prejudicial effect determination—what Sopinka J referred to as a ‘cost benefit analysis’ in terms of its impact on the trial process.⁷⁸

The necessity criterion has proven to be the most troublesome limb of the *Mohan* test. Sopinka J gave some guidance to explain his use of the term ‘necessity’. Most pertinently:

The word ‘helpful’ is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary *in the sense that it provide information ‘which is likely to be outside the experience and knowledge of a judge or jury’ ...*⁷⁹

Sopinka J explained that knowledge might be outside the jury’s knowledge and experience if: it is technical in nature; if ordinary persons are unlikely to form a correct judgment unassisted by special knowledge; or if the evidence relates to an area not understood by the average person (citing *Lavallee* as an example). There is plainly some overlap between these areas of ‘necessity’, but two key observations can be made about this aspect of the *Mohan* test. First, the court contemplated that ‘necessity’ comes in different guises—both technical (from what angle was the gun fired?) and social (why didn’t she leave?). Secondly, Sopinka J considered the necessity inquiry to be a contextual one, the outcome of which should be influenced by the extent to which the evidence approached an ultimate issue, and by the potential of the evidence to distort the fact-finding process and to usurp the function of the trier of fact.

Sopinka J indicated that novel scientific evidence would be subject to special scrutiny to determine whether the evidence ‘meets a basic threshold of reliability and is *essential* in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert’.⁸⁰ It is notable that the criterion of reliability was only specified in relation to novel scientific

78 *R v Mohan* [1994] 2 SCR 9 at para. 18. Compare Roberts, above n. 67 at 178–9. While Roberts suggests that the *Mohan* test is largely a restatement of the probative value/prejudicial effect test, coupled with an analysis of the application of other exclusionary rules, I read Sopinka J’s judgment as subsuming the probative value/prejudicial effect test within the criterion of ‘relevance’; thereby leaving other work to be done by the criterion of necessity. I agree with Roberts (at 180–3) that the meaning of ‘necessity’ was left somewhat opaque in *Mohan*, but as I will discuss, the later decisions of *D (D)* and *J (J-L)* have clarified the criterion.

79 *R v Mohan* [1994] 2 SCR 9 at para. 22, emphasis added; citations omitted.

80 *Ibid.* at para. 28.

evidence,⁸¹ although in their textbook Sopinka *et al.* suggest that since *Mohan* was decided, courts have tended to apply a criterion of reliability more generally.⁸² Some commentators have suggested that there is no clear distinction between the rule that expert evidence be necessary and the rule that novel expert evidence be essential⁸³ and it is certainly apparent from Sopinka J's judgment that these concepts lie along a continuum. However, once Sopinka J's further remarks on the meaning of 'necessity' are factored into the equation, it seems that there is some difference between the two tests. For established scientific theories, it is enough that the jury are 'unlikely' to form a correct conclusion or that the evidence relates to an area that they will not otherwise understand. The difficulty, of course, lies in the detail—what constitutes 'novel scientific evidence'? Sopinka J gave no guidance on this point, but two possible answers come to mind. One is that any expert evidence that is based on theories or methodologies that do not command general acceptance in the relevant field should be considered novel (a variation of the US *Frye* general acceptance test). This gives rise to familiar difficulties, including the question of how to define the field in which the expert claims expertise. For battered woman syndrome, for example, the expert community may be as large as all therapists and research psychologists or as small as all specialist clinicians who work regularly with abused women. An alternative, and the one that Canadian trial courts appear to have adopted without a great deal of thought, is to regard expert evidence that has been accepted by a superior court to be established and expert evidence that has been questioned by a superior court or that is being introduced for the first time as novel. This precedent-based approach to expert evidence has its own problems. It does not account for the fact that, as knowledge changes, previously accepted theories might be disproved or disfavoured within expert communities. It also draws a somewhat artificial distinction between established forms of expert opinion evidence, which may never have fulfilled the criterion of being essential to the case, and novel forms, which must now clear a higher hurdle in their quest to become part of law's authorised corpus of knowledges. The remaining criteria—that the expert be properly qualified, and that no exclusionary rule operate in relation to the evidence—are sufficiently similar to those that operate elsewhere in the Commonwealth to pass unremarked for present purposes.

The *Mohan* criteria did not adopt overtly scientific criteria as the touchstone of expertise and in this respect the Supreme Court of Canada resisted the temptation to follow the US Supreme Court down the path of privileging scientific knowledge

81 See Christine Boyle, Marilyn MacCrimmon and Dianne Martin, *The Law of Evidence: Fact Finding, Fairness and Advocacy* (Emond Montgomery: Toronto, 1999) 630.

82 Above n. 65 at 97.

83 For example, Roberts, above n. 67.

by adopting scientific tests of validity for law's purposes. Notwithstanding this decision to avoid privileging scientific knowledge, *Mohan* envisaged an enlarged role for trial judges in relation to expert evidence. Where courts had previously relied on cross-examination, the use of counter-experts and jury directions as means of controlling the influence of expert evidence,⁸⁴ they were now enjoined to undertake a far more comprehensive consideration of proposed expert evidence before allowing it to go to the trier of fact. While some commentators suggest that *Mohan* constitutes a restatement of principles that were already implicit within Commonwealth common law,⁸⁵ Lederman sees *Mohan* as a stark turning point in the Canadian judicial attitude to expert evidence, particularly expert human behaviour evidence. Lederman suggests that many trial judges are over-enthusiastic about their roles as gatekeepers and that trial courts are at risk of paying insufficient regard to jurors' ability to use common sense and discernment in their approach to expert evidence. In his terms, the risk that experts will usurp the jurors' role in adjudication is being replaced by a risk that trial judges will use the gatekeeper function to the same end.⁸⁶ Lederman's status as a trial judge in Ontario lends weight to his argument that trial courts perceived a change to Canadian evidence law as a result of *Mohan*. Arguably, however, the Supreme Court of Canada's decisions in *R v D (D)* and *R v J (J-L)* took Canadian jurisprudence much further down the road towards a sceptical approach to human behaviour evidence.

Characteristically, both *D (D)* and *J (J-L)* related to the admission of expert human behaviour evidence. In *D (D)*, the prosecution sought to adduce expert evidence to the effect that the timing of a child's complaint of sexual assault 'does not help to diagnose whether it is true or fabricated'.⁸⁷ The expert had not interviewed the child complainant, and did not seek to link his testimony to the instant case. The defence maintained that the child's delay in reporting the alleged abuse should be taken by the jury as evidence of fabrication. The majority of the Supreme Court of Canada held that the proffered expert evidence did not satisfy the necessity criterion stipulated in *Mohan*. Major J held that the 'content of the expert evidence ... was not *unique or scientifically puzzling*, but was rather the proper subject for a simple jury instruction'.⁸⁸ This decision amounts to a finding that the expert in this case did not offer the court any knowledge (or 'expertise') that could not be obtained via the processes of judicial notice and statutory interpretation. Adverting to the generic dangers of expert evidence (such as the risk of misleading

84 Lederman, above n. 69 at 221.

85 For example, Roberts, above n. 67.

86 Ibid.

87 *R v D (D)* [2000] 2 SCR 275 at para. 25, per McLachlin CJC. See also at para. 59, per Major J.

88 Ibid. at para. 58. (Emphasis supplied.)

the jury and the difficulty of cross-examining the expert witness), Major J held that expert evidence should only be admitted in ‘exceptional cases’.⁸⁹

Major J’s judgment in *D(D)* appears to create a double bind for judges and lawyers who are faced with the task of deciding whether evidentiary information should be introduced through an expert or by judicial direction. In *R v S (RD)*,⁹⁰ L’Heureux-Dubé J and McLachlin CJC (Cory and Iacobucci JJ concurring) both suggested that expert evidence would have been an appropriate means of introducing the idea that police officers tend to overreact in certain situations, particularly when dealing with non-white offenders. Major J in dissent criticised the trial judge for taking judicial notice of this tendency instead of relying on evidence. Similarly in *R v Find*, McLachlin CJC emphasised that courts must not take judicial notice of assumptions that ‘are not established beyond reasonable dispute, or documented with indisputable accuracy’.⁹¹ The fact that the defence in *D(D)* suggested that a delay in reporting indicated fabrication on the part of the complainant seems to indicate that the proposition was at least arguable. Judicial uncertainty whether judicial notice may be taken of matters such as a battered woman’s reluctance to inform the authorities is further evidenced by the case of *R v KB*,⁹² in which the Yukon Court of Appeal dismissed an appeal from a man’s conviction for assault and threats to kill. The complainant was the man’s common law wife, who made the complaint to a RCMP officer during a dispute over access to a child. The trial judge stated that he took ‘judicial notice’ of the fact that victims of domestic violence rarely inform police, frequently return to their abuser, and other matters. He preferred the complainant’s evidence to the defendant’s allegation that the complaints were fabricated. The Yukon Court of Appeal dismissed the defendant’s appeal from his conviction, finding that the judge was not using the phrase ‘judicial notice’ ‘in its ordinary sense’ (which would have constituted reversible error), but that he used the phrase simply to indicate that he would not accept the defendant’s contentions about the complainant’s credibility in the absence of proof. If Major J’s holding in *D (D)* is taken to heart, those who arguably have most to gain from social context evidence—that is, members of marginalised social groups—risk falling between two stools, where neither expert evidence nor judicial notice comes to their assistance.

McLachlin CJC wrote a dissenting judgment in *D (D)*, joined by L’Heureux-Dubé and Gonthier JJ. In relation to necessity, McLachlin CJC held that ‘there was ample

89 [2000] 2 SCR 275 at para. 51.

90 [1997] 3 SCR 484.

91 [2001] 1 SCR 863 at para. 59.

92 [2004] YKCA 13.

foundation for the trial judge's conclusion that [the expert witness's] evidence went beyond the ordinary knowledge and expertise of the jury'.⁹³ Numerous cases were cited to support the proposition that children's reactions to abuse might be outside the experience of ordinary people. McLachlin CJC further insisted that a jury instruction would not have substituted for the expert evidence because the expert witness explained the incidence and possible reasons for delay in greater detail than it would have been possible for the judge to do.⁹⁴

The majority's decision in *D (D)* seems to have elevated the necessity standard beyond that which was envisaged by Sopinka J in *Mohan* and, correspondingly, to have diminished the range of circumstances in which the law recognises the utility of expert assistance. Recall Sopinka J's admonition in *Mohan* that he 'would not judge necessity by too high a standard'.⁹⁵ *Lavallee* was cited for the proposition that, while expert evidence must be more than merely helpful, it is enough for non-novel evidence that it goes beyond the experience of the ordinary juror. Yet, the majority's decision in *D (D)* appears to conflate the distinction between what is 'necessary' and what is 'essential'—a conflation perhaps inevitable given the admittedly confusing nature of the necessary/essential dichotomy. It is of greater concern that *D (D)* appears to have undermined the Supreme Court of Canada's unanimous reasoning in *Lavallee*. Lederman suggested before *D (D)* was decided that the necessity criterion posed the greatest hurdle to human behaviour evidence post-*Mohan*.⁹⁶ Mewett and Sankoff observe that trial courts should be extremely wary about admitting expert evidence about battered woman syndrome after *D (D)*, even though the majority in *D (D)* did not refer to *Lavallee*.⁹⁷ In fact, a survey of post-2000 provincial Court of Appeal judgments suggests that battered woman syndrome is alive and well in Canadian trial courts.⁹⁸

The concern that arises from the Supreme Court of Canada's apparent retreat from its reasoning in *Lavallee* is not really about a change in trial practice or the possibility that the court has changed its mind. It has more to do with the incoherent state of the law after *D (D)*. On the one hand, the idea that expert opinion evidence can and should be used to counter myths and stereotypes seems to have captured the imagination of trial judges. On the other, a majority of the Supreme Court of Canada now cleaves to the view that expert evidence should

93 [2004] YKCA 13 at para. 24.

94 *Ibid.* at para. 31.

95 [1994] 2 SCR 9 at para. 21.

96 *Above* n. 69.

97 *Above* n. 69 at 10–30.

98 For example, *R v Nagra* [2005] OJ 3074 (Quicklaw); *BM v British Columbia (Attorney-General)* 2004 BCCA 402; *R v Reid* (2003) 65 OR (3d) 723.

only be used in ‘exceptional cases’, and only when it is necessary (for reasons of technicality or complexity) for the relevant information to be adduced by an expert. Read literally, this appears to exclude much of the social framework evidence that Canadian courts have begun to rely upon. As *R v KB* demonstrates, for example, psychiatric experts are called upon to explain battered woman syndrome to fact finders not because its theoretical premises are particularly complicated, but because its empirical findings are not so notorious or well known that they can properly form the subject of judicial notice.

The last Supreme Court decision worth considering in detail in *R v J (J-L)*.⁹⁹ This decision provides an interesting example of the judiciary’s difficulties in coming to terms with the risks and benefits of allowing experts into the courtroom. In *J (J-L)* the defendant sought to adduce evidence to the effect that the offences with which he was charged could only have been committed by a serious sexual deviant, and that he did not fit the profile of such an offender. The expert’s evidence was based on techniques that had been used to treat sexual offenders but the extension of the technique to the (‘diagnostic’) function of placing an individual within the class of serious sexual offenders was novel.

The court’s unanimous judgment was delivered by Binnie J, who identified this case as an example of the ‘controversy about the need to draw the line properly between the role of the expert and the role of the court’.¹⁰⁰ Binnie J held that the distinctive group described by the expert witness (‘serious sexual deviant’) was vague and that the expert had not demonstrated that offences of the relevant type would almost always be committed by people having the characteristics of the indicative group. Additionally, the reliability of the expert’s tests was impugned by the absence of test protocols and their high error rate. On the one hand, the court emphasised both the danger that expertise will be over-valued by the jury and the difficulty of cross-examining experts. On the other, the court did not hesitate to adopt criteria commonly employed within science (test protocols and error rates) to critique the reliability of the evidence proffered in the instant case. Six years after the Supreme Court of Canada declined to follow the US Supreme Court down the path of championing scientific validity as the determinant of admissibility, Binnie J held that the *Daubert* guidelines should be used by a trial judge faced with the question of whether or not to admit novel scientific evidence. That Binnie J made no mention of the US Supreme Court’s later decision in *Kumho* leaves room to doubt whether the Supreme Court of Canada intended to endorse the extension of the *Daubert* guidelines beyond scientific evidence strictly so-called.

99 [2000] 2 SCR 600.

100 *Ibid.* at para. 26.

The better view is almost certainly that *Kumho*, and its corresponding confirmation that the *Daubert* guidelines were intended to be used flexibly, is also now relevant to the determination of whether novel expert evidence should be admitted in Canadian courts.

Emphasising the importance of a case-by-case analysis of admissibility arguably allows the Supreme Court of Canada to retain its ambivalence about what knowledge constitutes expertise, especially in the field of expert human behaviour evidence. *J (J-L)* demonstrates how carefully the court scrutinises social science that it flags as ‘novel’ but also how jealously the courts guard their own territory (of assessing the credibility of witnesses and of deciding the ultimate issue) when they perceive that territory as being impinged on by experts from other disciplines. In this case, the court relied on the possibility that the trier of fact would be excessively impressed by the scientific raiments in which the evidence was clothed, while using the tools of science to criticise the methodology on which the evidence was based. It seems that inadmissible expert evidence tends to be characterised in one of two ways—either as so obvious that it is not necessary (as *per* the majority in *D (D)*) or as unreliable because the methodology or theory is shaky (as in *J (J-L)*). In either case, the exaggerated influence of this evidence on triers of fact is also emphasised. The lack of reliability on which the exclusion was based in *J (J-L)* is interesting because, in protecting law’s own boundaries, the Supreme Court of Canada has demonstrated a willingness for judges to become social scientists. While the court was almost certainly right to exclude the evidence in this case, it could have done so simply on the basis that the evidence failed to satisfy ordinary criteria of relevance and admissibility. Its high error rate and the vagueness of the distinctive group together implied that the expert could not assist the jury to determine whether the defendant fit a particular psychological profile. The court’s decision to roam beyond the immediate failings of the evidence in this case suggests that it continues to experience a profound ambivalence about when and on what terms it should venture into other fields of knowledge. As we shall see in the next section, that ambivalence is reflected within the Canadian commentary on expert evidence.

4. Expertise and the construction of knowledge within Canadian case law

Boyle and MacCrimmon describe law as a discipline that has its ‘own methods of framing and solving problems’ and its own debates about ‘what counts as knowledge’.¹⁰¹ The rules governing the admissibility of expert evidence are key to these

101 Christine Boyle and Marilyn MacCrimmon, ‘To Serve the Cause of Justice: Disciplining Fact Determination’ (2001) *Windsor Yearbook of Access to Justice* 55 at 56–7.

knowledge debates because they determine law's relation to other professional discourses. On the one hand, courts should not be too ready to accept expert evidence uncritically: 'it is dangerous to assume that we can escape discriminatory reasoning or human failings by stepping outside law and into another discipline'.¹⁰² All of the systemic inequalities that plague law—unequal access to expertise and material resources, institutional biases towards the status quo, discriminatory yardsticks—can also be found in other disciplines. On the other hand, an approach which 'reserves scepticism for other disciplines' is asymmetric because it assumes that the practices, rules and logic on which the criminal justice system is based effectively quarantine the criminal process from bias and stereotypic thinking.¹⁰³

In this section, I review two Canadian proposals that attempt to navigate a path between the Scylla of uncritical reliance on expert evidence and the Charybdis of leaving discriminatory legal reasoning undisturbed. The uncertainty created by the Supreme Court of Canada's interventions has generated a large and varied body of literature on this question. Gold's championing of the scientific method and Boyle and MacCrimmon's notion of replacement reasoning are worth exploring for two reasons. First, in terms of practical law reform proposals, these authors consider how Canadian trial practice might be altered. Secondly, their work is cited by judges and other commentators.¹⁰⁴ Having considered these two proposals, I indicate why Boyle and MacCrimmon's approach is to be preferred. The Canadian test for admissibility of expert evidence should be reframed to be responsive to the nature of the evidence being adduced and the purpose for which it is adduced. I argue, further, that the test should be supplemented with a criterion that considers the likely effect of excluding the relevant evidence.

102 Boyle *et al.*, above n. 81. Roberts makes a similar point, particularly in relation to feminist and other socially progressive forms of expert evidence; above n. 67 at 197–8.

103 Above n. 101 at 81.

104 Canadian courts are perhaps more ready than most to cite academic literature—certainly, they do so more often than occurs in my home jurisdiction, Australia. Some examples of cases that cite Alan Gold's writing are: *R v Hynes* [2001] 3 SCR 623; *R v Robinson* [1996] 1 SCR 683; *R v Burlingham* [1995] 2 SCR 206; and *R v Rogers* [2005] BCJ 1580, BC Court of Appeal, online: Quicklaw. Cases in which Boyle and/or MacCrimmon are cited include *LLA v AB* [1995] 4 SCR 536; *R v Stone* [1999] 2 SCR 290; and *R v Ewanchuck* [1999] 1 SCR 330. Gold, above n. 4 is also cited in the latest supplement to a leading Canadian evidence law textbook: John Sopinka, Sidney Lederman and Alan Bryant, *The Law of Evidence in Canada*, 2nd edn Supplement (LexisNexis Butterworths: Markham, Ontario, 2004) 98.

(a) Scientific method: the Gold Standard for Admissibility

According to Alan Gold:

The scientific method is the process by which scientists, collectively and over time, endeavour to construct an accurate (i.e. reliable, consistent, and nonarbitrary) representation of the world. It is simply the gold standard for knowledge.¹⁰⁵

One seemingly attractive means of striking a balance between excessive isolation and over-reliance on potentially suspect expert ‘knowledge’ is to adopt scientific notions of validity as a touchstone for the admissibility of expert opinion evidence.¹⁰⁶ The admissibility test stipulated by the US Supreme Court in *Daubert* provides an example of this idea in motion, at least in relation to ‘scientific evidence’. The majority explained that:

in order to qualify as ‘scientific knowledge’, an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e. ‘good grounds,’ based on what is known. In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.¹⁰⁷

I have already noted that the US Supreme Court later held that the fundamental reasoning that underpinned its decision in *Daubert* also applied to other (non-scientific) types of expert evidence. Notwithstanding this extension of basic principles, the court went to great lengths in both *Daubert* and *Kumho* to emphasise the flexible and context-specific nature of the admissibility inquiry that it expected trial judges to undertake. In *Kumho*, Breyer J held that:

we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue. ... [A] trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony. (Emphasis supplied)¹⁰⁸

105 Gold, above n. 4 at 79.

106 Advocates of this approach include Gold, above n. 4; Bernstein, above n. 26 and Paciocco, above n. 50.

107 *Daubert v Merrell Dow Pharmaceuticals Inc.* (1993) 503 US 579 at 590.

108 *Kumho Tire Co. v Carmichael* (1999) 526 US 137 at 150, 152.

Daubert was not intended to be applied mechanically, but must be responsive to the nature of the evidence being adduced. Despite the US Supreme Court's efforts to emphasise the case-by-case nature of the admissibility decision, Gold interprets the *Daubert* and *Kumho* decisions to have 'expressly adopted the scientific method as the standard for all opinion evidence in U.S. federal courts'.¹⁰⁹ Gold relies on Binnie J's approving reference to *Daubert* to suggest that 'this [adoption of scientific method] has now essentially been echoed by the Supreme Court of Canada in *[J(L)]*'.¹¹⁰ Gold argues that scientific procedures are 'demonstrably the only valid and reliable formulations that can consistently save the justice system' from poor-quality expert evidence.¹¹¹ He proposes that the process of qualifying experts should include consideration of the following questions: (a) is the expert scientifically literate?; (b) does the expert know and appreciate the scientific method?; and (c) is the expert aware of logical reasoning? Experts who fail any one of these tests should not be permitted to testify because failing to meet these standards 'virtually guarantees the presence of junk science'.¹¹²

In this section, I argue against adopting Gold's notion of 'scientific' reliability and his proposed test of expertise, on three grounds. First, it is now widely agreed among philosophers and sociologists of science that there is simply no such thing as 'the scientific method'.¹¹³ Gold advances a parodied vision of science that would, if it were imported into evidence law, produce more confusion than clarification. Secondly, the focus on yardsticks derived from the natural sciences as measures of reliability privileges certain forms of expertise (so-called 'hard science' such as DNA) over other forms of knowing, including the social science that has been heavily relied on by feminists and other commentators in the 'quest for context' to counter rigid evidentiary rules.¹¹⁴ Thirdly, Gold's test does not distinguish between the many purposes for which expert evidence is adduced in criminal proceedings.

Neither scientists nor anyone else has yet found a failsafe method for ensuring that today's accepted wisdom expresses a timeless truth, or even necessarily an advance on yesterday's ideas:

109 Gold, above n. 4 at 23.

110 Ibid.

111 Ibid. at 17.

112 Ibid. at 231.

113 Susan Haack reviews the history and demise of the notion of scientific method in *Defending Science Within Reason: Between Scientism and Cynicism* (Prometheus Books: Amherst, New York, 2003) 19–24, 250–5.

114 Raitt, above n. 45 at 237.

Nor is there any 'scientific method' guaranteeing that at each step, science adds a new truth, eliminates a falsehood, gets closer to the truth, or becomes more empirically adequate. Scientific inquiry is fallible, its progress ragged and uneven. At some times and in some areas, it may stagnate or even regress; and where there is progress, it may be any of these kinds, or it may be a matter of devising a better instrument, a better computing technique, a better vocabulary, etc.¹¹⁵

Haack argues that scientific inquiry cannot be codified into a single 'method'. It is, instead, rather like any other form of inquiry, 'only more so'. Science has successfully developed statistical, mathematical and inferential techniques, but there is still substantial scope for personal inquiry and judgement, coupled with communication and negotiation, in any scientific endeavour.¹¹⁶ To the extent that Haack can be read to mean that science is a more successful form of inquiry than others (in the sense that it is more capable of accessing truth), I resist her claim that science is 'more so'. In fact, I believe that social sciences, particularly those which focus on human behaviour, provide us with very different insights from those of the physical, or even natural, sciences—although there are areas of overlap—and that these insights have the capacity to make an enormous contribution to understanding our (very human) world. Despite my reservation, Haack's efforts to debunk the notion of science as a wholly separate form of reasoning are helpful. They allow us to see that the state of science is often difficult to judge in the moment, and that invoking scientific method to authenticate a particular piece of evidence does not necessarily guarantee that the evidence is correct. As Haack says, 'There is no method of inference, no "scientific method", exclusive to science and guaranteed to produce true, probably true, more nearly true, or more empirically adequate results'.¹¹⁷ This observation is perhaps especially apposite in relation to the science that interacts with law, because 'courts ... conduct the bulk of their scientific inquiries at the frontiers of scientific knowledge, where claims are uncertain, contested and fluid'.¹¹⁸ It is possible, even common, for scientists to have legitimate differences of opinion and for conflicting opinions to be equally 'valid' in the sense that each is based on sound principles and supported by evidence.¹¹⁹

115 Haack, above n. 32 at 3.

116 Haack, above n. 113, ch. 4.

117 Ibid. at 24.

118 Sheila Jasanoff, *Science at the Bar: Law, Science and Technology in America* (Harvard University Press: Cambridge MA, 1995) 210. See also Paul Roberts, 'Science in the Criminal Process' (1994) 14 *Oxford Journal of Legal Studies* 469.

119 Lederman, above n. 69 at 227. See also Haack, above n. 113 at 69–88.

The dangers inherent in adopting a caricatured notion of science within law are heightened by the nature of forensic science as a practical application of theories and techniques that may themselves be in flux. Roberts and Willmore's Bristol Study of the preparation and use of scientific evidence in criminal cases provides an object lesson in the discretionary nature of forensic science. Roberts suggests that forensic science is ordered according to the institutional and organisational demands of the case rather than according to either scientific principles or criminal justice policy.¹²⁰ In the course of interviewing key actors and examining the documents and procedures employed by those actors, Roberts and Willmore found that expert reports tended to suppress the 'selectivity and uncertainty which characterizes earlier stages in the production of forensic science evaluation'.¹²¹ The more formulaic the approach adopted to judging the processes by which forensic scientists reach their conclusions, the greater the risk that scientists will comply with the letter and not the spirit of the admissibility inquiry. This must, of course, be balanced against the recognition that it is neither feasible nor desirable to 'reinvent the wheel' every time a piece of routine forensic evidence is introduced during a criminal trial.

To summarise, the trouble with the term 'scientific method' is that it makes what scientists do appear more homogenous and mechanical than it really is—thereby stripping the contingent and contestable aspects of scientific decision-making out of the popular understanding of science. Gold's use of 'scientific method', as a label for a type of expertise, is a poor substitute for inquiring into the particular activity, theories and techniques on which the evidence is based. In focusing on the scientist, rather than the evidence, and in importing a misconceived idea of science into law, Gold's approach misses the point of the admissibility inquiry. In short, Gold is reaching for an illusory ideal rather than considering how best to deal with the more compromised and ragged reality that is the practice of all science.

My second reservation about Gold's proposal is that, when one scratches the surface of his call to use 'scientific method' as the test for admissibility, one sees that he wishes to judge all types of expertise by a yardstick that is most applicable to the physical and natural sciences. Because other forms of knowledge do not easily fit within hard science's paradigms, they tend to be devalued and therefore risk being excluded regardless of their potential to offer insights to the judicial process. Gold lists the 'fundamental activities' that comprise 'science'. His list

120 Roberts, above n. 118.

121 Ibid at 484. See also Jennifer Mnookin, 'Fingerprint Evidence in an Age of DNA Profiling' (2002) 67 *Brooklyn Law Review* 13.

includes factors such as testing ‘hypotheses under controlled, repeatable conditions’; ‘observing the results of such testing, recording them unambiguously, and interpreting them logically and clearly’; and ‘actively seeking criticism from fellow participants in the endeavour called “science”’.¹²² Each of these activities fits some types of expertise better than others. For example, when one is studying a human population, as did Lenore Walker when testing her hypotheses about battered woman syndrome, it is impossible to ensure that the sample is controlled in the same way as the samples used in molecular biology are controlled.¹²³ Nor is it necessary, for most purposes, to do so: when Walker concludes on the basis of her study of battered women¹²⁴ that battered women frequently experience a sense that they are powerless to escape their abuser, she is not making any claim about the normal psychological relationship between women and their partners, or about men and their partners, or any other group.¹²⁵ Walker’s research is subject to that limitation, and it should not be used to make claims about women who are not battered, or about men. It would, however, be short-sighted to conclude that Walker’s research has no potential to assist courts simply on the basis that she was unable to use protocols that were developed and are employed within another field, for different purposes.

It is perhaps not coincidental that embracing the scientific method as the touchstone for admissibility would have the effect of excluding much of the human behaviour and social context evidence that has been relied upon by feminist Canadian lawyers and interveners in recent years. As Nyman and Boyle put it, ‘inaccurate fact finding may not be an equal-opportunity phenomenon’.¹²⁶ The scientific method provides evidence law scholars who are uneasy about the trend toward admitting ‘context evidence’ with a vocabulary by which to impugn the

122 Gold, above n. 4 at 80.

123 Compare the description of Walker’s research in Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (Harper and Row: New York, 1989) at 42–100 with the description of research conducted by Seymour Benzer during the 1950s on the relationship between genes and proteins contained in Horace Freeland Judson, *The Eighth Day of Creation: The Makers of the Revolution in Biology* (Simon and Schuster: New York, 1979) 271–6. Benzer collected mutant strains of *E. coli* bacteria and made tens of thousands of crosses between them over generations of bacterial growth.

124 Walker defines a battered woman as one who has been through the battering cycle at least twice: above n. 123 at 35.

125 A similar argument was made about the dangers of extrapolating from research about the ‘psychological processes of watching or reading heterosexual pornography’ to those of watching or reading homosexual pornography by an expert in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* (1996) 18 BCLR (3d) 241. See Christopher Nowlin, ‘Should any Court Accept the ‘Social Authority’ Paradigm?’ (2001) 14 *Canadian Journal of Law and Jurisprudence* 55 at 63–4.

126 Jesse Nyman and Christine Boyle, ‘Finding Facts Fairly in Roberts and Zuckerman’s *Criminal Evidence*’ (2005) 2 *International Commentary on Evidence* 3.

reliability of that evidence.¹²⁷ Much of this social framework evidence does not meet Gold's criteria—largely because it is developed within a different institutional context, for different purposes, from those of physical sciences.¹²⁸ A more equitable and useful approach would be for trial judges to invest the time necessary to assess the success and utility of expert opinion evidence according to whether the methodology and theory underpinning the evidence is congruent with the demands of the discipline from which the expert hails.¹²⁹ I will return to this suggestion below.

Finally, Gold's proposed test for admissibility does not reflect the fact that expert evidence is introduced in criminal trials for a range of purposes, and that some of these purposes present greater risks to the judicial process than do others. 'Purpose' has a number of dimensions and should not be interpreted narrowly in this context. For example: expert evidence may come more or less close to resolving the ultimate issue for the jury;¹³⁰ it may rehabilitate the credibility of a witness whose truthfulness has been impugned, or it may serve to bolster that credibility;¹³¹ it may provide important contextual information by which a jury can judge the reasonableness or otherwise of the defendant's actions;¹³² and so on. Since these purposes may overlap, the distinctions I have drawn cannot be categorical. The moment when a witness's credibility is attacked, and the line between restoring and bolstering that credibility, are often difficult to discern, for example.¹³³

To similar effect, the danger presented by expert evidence being adduced for a particular purpose depends to a considerable extent on the other evidence presented in the case. For example, in *Lavallee* the expert diagnosed Lavallee as a woman who was suffering psychological effects from a history of being battered by her partner. The fact that Lavallee had been physically injured numerous times by her partner was supported by independent evidence—hospital records, eyewitness accounts, and so on—that was before the jury. To the extent that the expert's opinion was diagnostic, it was based partly on evidence that the jury could assess. Care should be taken to distinguish between relying on battered woman syndrome to identify an individual as a battered woman and using the

127 See, e.g., Paciocco, above n. 50 at 313.

128 Christopher Nowlin, 'Should Any Court Accept the "Social Authority" Paradigm?' (2001) 14 *Canadian Journal of Law and Jurisprudence* 55.

129 This is *not* the same as the social authority paradigm suggested by Monahan and Walker (1986) above n. 7; see Nowlin, above n. 128 for a critique of this proposal.

130 Sopinka *et al.*, above n. 104 at 144–5.

131 Mosteller, above n. 7 at 464.

132 *R v Lavallee* [1990] 1 SCR 852. See also Mosteller, above n. 7 at 472–8.

133 See also Mosteller, above n. 7 at 472.

theory of battered woman syndrome to explain the psychological effects of battering in circumstances where a woman is known to have been physically abused by her partner.¹³⁴ By contrast, in *Mohan*, the expert purported to diagnose Mohan as a person who did not fit the category of people who would commit an offence such as the one with which he was charged. Aside from the competing testimony of the complainants, on the one hand, and the accused, on the other, there appears to have been no other evidence by which the jury could consider the reasonableness of the expert's conclusion that Mohan must be innocent. There are sound reasons why the *Mohan* test affords some room for a trial judge to distinguish between the purposes for which evidence is introduced. On certain occasions expert evidence plays a more decisive role in the trier of fact's reasoning than on others. Gold's test, by contrast, would exclude all expert evidence that does not meet his criteria, regardless of the purpose for which the evidence is adduced.

(b) Boyle and MacCrimmon's replacement reasoning

Since everyone could agree that judges should neither over-use nor overvalue expert evidence about the social sciences, a central issue is the starting perspective. ... The more disciplined approach to the admissibility of expert opinion would be to be similarly sceptical about different forms of reasoning and not to reserve scepticism for information derived from other disciplines. Rejecting expert evidence via a high standard of validity, while having little or no standard of validity for replacement reasoning, could well raise concerns about open-mindedness.¹³⁵

Boyle and MacCrimmon agree with Gold that the use of expert evidence in criminal law carries 'undoubted dangers' of overvaluation and misuse.¹³⁶ They identify a trend within Canadian academic commentary to advocate keeping as much social science as possible out of the courts as a means of managing that danger.¹³⁷ In response to this trend, Boyle and MacCrimmon argue for a more considered appraisal of expert human behaviour evidence.¹³⁸ Their central contention is that 'self-consciousness about the consequences of exclusion of

134 Ibid. at 483-4.

135 Boyle and MacCrimmon, above n. 101 at 80-2.

136 Ibid. at 81.

137 Ibid. at 81 citing David M. Paciocco, 'Coping with Expert Evidence about Human Behaviour' (1999) 25 *Queen's Law Journal* 305. Gold, above n. 4 provides another example of this trend, but was of course published after Boyle and MacCrimmon's article.

138 Boyle and MacCrimmon, above n. 101 at 81-5.

expert evidence for a fair, egalitarian fact determination process' could lead to a more open stance toward social science evidence, without necessarily exacerbating the twin dangers of permitting poorly grounded opinions to enter the courtroom and of encouraging the trier of fact to abdicate difficult decisions to expert opinion. An approach which focuses on 'the use to which expert evidence is being put' would allow judges to differentiate between the (higher risk) uses of individual diagnosis ('this child was abused', 'this defendant does not fit the profile of a sex offender') and the (lower risk) uses of facilitating 'open-minded fact determination'.¹³⁹

One question that appears under-considered in the academic literature and case law regarding expert evidence is the extent to which courts should have regard to the effect of excluding certain types of expert evidence. In the quotation introducing this subsection, Boyle and MacCrimmon suggest that an approach which 'reserve[s] scepticism for other disciplines' is asymmetrical because it imposes a 'high standard of validity' on other disciplines but has 'little or no standard of validity for replacement reasoning'. This is a significant insight because it begins to investigate the balance between our knowledge that courts do not always successfully escape discriminatory reasoning and our fears that turning to other disciplines will encourage judges and juries to abdicate responsibility for difficult fact-finding decisions.

The 'replacement reasoning' most commonly advanced for expert human behaviour evidence is common sense, which is a 'largely unexamined and uncontrolled' element of the legal process.¹⁴⁰ Ward suggests that having resort to common-sense reasoning seems 'democratic and egalitarian', especially where the issues at stake are 'ultimately moral'.¹⁴¹ This argument, however, overlooks the Supreme Court of Canada's insight that common sense may be discriminatory.¹⁴² Boyle and MacCrimmon suggest that the Canadian Charter of Rights and Freedoms and, particularly, its equality values, 'present one of the most significant challenges' to the assumption that common sense is value-neutral. These authors identify a trend toward replacing 'a stance of value-neutrality' with 'an explicit egalitarian perspective'.¹⁴³ They suggest that a commitment to Charter

139 Above n. 101 at 81-5.

140 Ibid. at 82.

141 Tony Ward, 'Law's Truth, Lay Truth and Medical Science' in Helen Reece (ed.), *Law and Science: Current Legal Issues 1998* (Oxford University Press: Oxford, 1998) 243-64. Gold appears to adopt a similar view, above n. 4 at 163. Compare Mosteller, above n. 7 at 485-8.

142 *R v Lavallee* [1990] 1 SCR 852; see also Nyman and Boyle, above n. 126; Martinson *et al.*, above n. 47.

143 Above n. 101 at 82.

values is likely to permit evidence law to evolve towards a more egalitarian process of fact determination.

Boyle and MacCrimmon's proposed approach to expert evidence law strikes me as compelling. It would require courts applying the *Mohan* admissibility test to be self-conscious about the question of whose knowledge or world view grounds findings of fact.¹⁴⁴ The *Mohan* test might need to be reconstituted to provide that the determination of admissibility must proceed in light of the purpose for which the opinion is being introduced. For example, if the purpose of psychiatric evidence is diagnostic, in the sense that it directly proves or disproves a particular fact in issue, greater risk attaches to the evidence. In these circumstances, the assessment of necessity, in particular, should be more rigorous. Similarly, the more substantial the claim being made by the expert, the more demanding the standard of admissibility should be. Evidence that children may delay reporting abuse is different from a claim that children *often* or typically delay such reports, for example.

If the purpose of the evidence is to provide social framework information that will displace commonly held stereotypes, such as evidence about the psychological effects of battering, the evidence risks reinforcing knowledge that the fact finder already brings to the inquiry and thereby might be said to constitute an indirect form of oath-helping. Taking the idea of replacement reasoning seriously, however, social framework evidence has the potential to result in a fairer trial process by displacing the effect of unfounded and prejudicial assumptions about human behaviour or character types. Where the evidence is directed towards displacing stereotypic or discriminatory reasoning, the risk of redundancy in reinforcing what the fact finder already knows seems the lesser of two evils. Provided that the opinion does not directly address the personal characteristics or conduct of a particular witness or defendant, but simply explains behavioural or sociological patterns, the potential prejudicial effect of the expert opinion evidence is lower than it would be if the evidence were diagnostic and the necessity criterion specified in *Mohan* should correspondingly be relaxed.

As part of the determination of reliability, the purpose for which any expert evidence is being introduced should be compared to the purpose for which the relevant knowledge was produced. It is often observed, for example, that knowledge which is useful to clinical psychiatrists may not serve diagnostic purposes.¹⁴⁵ Courts should think as carefully as most social scientists do about

144 Above n. 101 at 61-2.

145 For example, this point was made in *R v J (J-L)* [2000] 2 SCR 600.

whether particular findings generated in a given context for particular purposes are generalisable to other contexts or for other purposes.¹⁴⁶ Courts should also take great care to ensure that triers of fact understand the evidence. Terms of art such as ‘compatible’ and ‘consistent’ are easily misunderstood by juries. To say that delay in reporting abuse is ‘consistent’ with non-fabrication, for example, means only that a delay in reporting does not exclude the possibility that the complainant is telling the truth. The obscurity of experts’ phraseology is often overlooked by lawyers and judges who may have had repeated opportunities to learn other disciplines’ jargon over the course of numerous cases.

Applied to battered woman syndrome, the reconstituted *Mohan* test might work in the following way. The court would begin by considering the purposes for which the evidence is adduced in the particular case. This could be one or more of the purposes set out in *Lavallee*. The judge would also need to examine the purpose for which the relevant empirical research was first conducted, and consider whether the uses of the evidence in the instant case are commensurate with that purpose. Perhaps the evidence should be admitted with a judicial warning or even excluded for certain purposes. Depending on the outcome of this inquiry, the necessity criterion should then be considered separately in relation to each of the purposes for which the evidence is to be admitted. The test for necessity should compare the benefits and risks of admitting the evidence with the benefits and risks of exclusion. Again, this may result in the exclusion of certain aspects of the evidence or in judicial directions about the use to which the evidence can be put.¹⁴⁷ Finally, regard should be had in relation to each proposed use to the likely effect of excluding the evidence, and to the question of whether the same or equivalent information may be introduced by other means.

5. Conclusion

An open-minded approach to determining the admissibility of expert evidence has been criticised by Paciocco as more likely than a scientific approach to lead to ‘dangerous, subtle and common bias’ and less likely to enable the court to secure ‘universal truths’.¹⁴⁸ While courts cannot necessarily escape the limitations of the criminal justice system by fleeing to other disciplines (as is assumed by some advocates of employing the ‘scientific method’ in law), nor can they overcome those limitations by refusing to admit alternative forms of knowledge. Law is a

146 See the account given by Nowlin, above n. 128 of the expert evidence given in the Little Sisters obscenity trial.

147 The remaining limbs of the *Mohan* test are not directly relevant to the present discussion and so I have omitted consideration of these limbs for now.

148 Paciocco, above n. 50 at 312; for similar criticisms, see Gold, above n. 4 at 213.

discipline with its own rules and its own reasoning, but those rules and that reasoning are partial and culturally contingent. To the extent that social science can encourage legal decision-makers to glimpse that partiality and contingency, it should be embraced. The trouble, as Paciocco would argue, is that it is hard to discern the line between social science evidence that illuminates the partiality of common sense or the discriminatory effect of legal rules, and evidence that tips the balance too far in favour of a particular interest group.¹⁴⁹

To argue that there is no such thing as a single orthodox scientific method, and that excluding social science evidence can perpetuate discriminatory reasoning within law, is not to say that all expert evidence should be admitted, and subjected to argument about weight and reliability. Rather, the case-by-case determination of admissibility should pay explicit regard to the purposes for which the evidence is being adduced and the purposes for which the techniques and data underlying the evidence were produced. Boyle and MacCrimmon's suggestion¹⁵⁰ that equality and the principles of human dignity provide a means of controlling (or 'disciplining') courts' engagements with other fields seems to offer the possibility of striking the right balance. It moves away from the belief that a (questionable) conception of scientific method provides the only means of excluding poor-quality expert evidence and avoids misplaced faith in common sense. Best of all, it opens up a new field of debate between these two polar extremes.

Would the egalitarian approach advocated by Boyle and MacCrimmon operate in a manner that was fairer to women and other disadvantaged groups? Boyle and MacCrimmon clearly contemplate a substantive equality approach to assessing the effect of replacement reasoning (as did the Supreme Court of Canada in *Lavallee*) but others could argue that 'equality' means sameness. 'Equality' is itself a contested term with ambiguous content. It is also far from clear that embracing replacement reasoning would overcome institutional disparities in access to knowledge.¹⁵¹ Despite these hesitations, I believe that Boyle and MacCrimmon's suggestion deserves greater attention within the literature regarding expert evidence than it has received. While paying attention to replacement reasoning will not guarantee the justice of legal outcomes in every case, it might enable Canadian judges to move beyond their fear of expert evidence toward an approach that allows courts to use expert knowledge about human behaviour on their own terms, for their own purposes.

149 Paciocco, above n. 50 at 12.

150 Above n. 101.

151 For a useful discussion of the differences between litigants' ability to 'attract evidence' and the reasons for those differences, see Mark Cooney, 'Evidence as Partisanship' extracted in Boyle, MacCrimmon and Martin, above n. 81 at 8-9.