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A U S T R A L I A



Jury views of psychological expert evidence about child sexual abuse

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Legal background

After recommendations by 3 Law Reform Commissions in 2005, s 79(2) was inserted as an exception to the opinion rule (s 76) which permits the admission of expert opinion evidence about children's behaviour and reactions to CSA to bolster a child's credibility in a CSA trial (s108C).

Rationale: “expert opinion evidence on child development and behaviour ... can in certain cases be important evidence in assisting the tribunal of fact **to assess other evidence** or to **prevent inappropriate reasoning processes** based on **misconceived notions** about children and their behaviour” (ALRC, NSWLRC & VLRC, 2005, [9.155]).

Very little case law on s79(2); anecdotally it appears the section is under-utilised in practice.

Section 79(2)

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
- (2) To avoid doubt, and without limiting subsection (1):
 - (a) a reference in that subsection to specialised knowledge **includes a reference to specialised knowledge of child development and child behaviour** (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and
 - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
 - (i) **the development and behaviour of children generally,**
 - (ii) **the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.**

Scope of s79(2)

- The wording of s79(2) suggests that the section is limited to admitting research evidence about the general behaviours of children/victims of CSA
- rather than clinical, diagnostic evidence from an expert who has interviewed the child
- **However:** a HC case on the application of s79(1) (*HG v R* (1997) 197 CLR 414, at 428) suggested that an expert will also be able to give his/her opinion about whether the child's behaviour is consistent with having been sexually abused as alleged.
- For this reason, we investigated the impact of both research and clinical expert evidence in a CSA trial given the documented extent of jurors/laypeople's misconceptions about children and CSA.

The study

- Professionally-acted video-trial, 45-55 mins long
- Opening and closing addresses by legal counsel
- EIC and X-X of 13 year old complainant
- EIC and X-X of complainant's grandmother
- No evidence from defendant
- Summing-up with standard judicial directions

Compared three different experimental groups:

- Control (no expert witness)
- Experimental/research expert (psychologist): EIC and X-X
- Clinical expert (psychologist): EIC and X-X

Educative intervention by expert witness:

- Exposure to an expert witness will increase CSA Knowledge compared to no expert (control group)
- The clinical psychologist will have a greater educative impact than the experimental psychologist.

Case facts

- One count of sexual intercourse.
- **The complainant:** testified that, aged 12, she had been reading a book when her grandfather entered the lounge room, bent over and stroked her leg, then the outside of her vagina before penetrating her with his finger.
- On her way to the lounge room, the grandmother heard her granddaughter cry out : “Stop it, it hurts”. When she entered the room, she saw that the complainant’s pants were down and the defendant was doing up the belt on his pants.
- The complainant ran to her grandmother, crying, and reported the sexual assault.
- **Defence:** argued that the grandmother had coached her granddaughter as a form of revenge for the defendant’s extra-marital affair.

Expert evidence

Research expert: summarized empirical findings on counter-intuitive behaviors of sexually abused children, developmental aspects of children's memory, their reliability in reporting sexual abuse and suggestibility when questioned by adults. **Did not interview the child.**

Clinical expert: gave the same evidence but in addition, interviewed the child and stated that the complainant's behaviour *was consistent with that of a sexually abused child.*

Participants

- 671 jurors who reported for jury duty in the District and Supreme Courts of NSW
- They were either excused from jury duty or not empanelled and released
- 59% men, 41% women
- Aged 18 - 70 years
- Most held a university degree (63.1%), 16.2% had a tertiary level diploma, 6.9% had a trade certificate, 10.5% finished high school, and 3.4% reported fewer than 12 years of formal education.
- English was the first language for 84.7%.
- Most were parents or a guardian of a child (53%).

Procedures

334 deliberating and 325 non-deliberating jurors were randomly assigned to one of the 3 experimental conditions:

- **Control group:** no expert
 - **Research group:** specialized CSA knowledge presented by an experimental/research psychologist
 - **Clinical group:** specialized CSA knowledge presented by a clinical psychologist who interviewed the complainant
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- 32 juries (8-12 jurors per jury)
 - Juries chose foreperson, deliberated to unanimous or a majority verdict
 - Deliberations: 12-87 mins

Juror views: general comments

- Jurors struggled with how to interpret the expert's evidence, and how much weight to give it
- Juries varied considerably in the amount of time spent discussing the expert's evidence; from less than a minute to more than ½ hour
- Clinical expert generated more delib than research expert
- Jurors used expert's evid for a credibility purpose
- Applied the same amount of skepticism to the expert's evidence as other witnesses' evidence

Basic premise for most jurors encapsulated below:

J1: as a juror ... you give benefit of the doubt, unless there's expert, sort of, evidence, or things like that. ... **Either work on the evidence, or you work on gut feeling, that's the choice you've got.** (S5J3)

What jurors want ...

Is a “valuable” (that is, definitive) expert opinion...

J8: an expert opinion - it's probably my view - anyone's got an expert opinion. ... Anyone's got an expert opinion if you're in that particular trade. ... But whether **it's a valuable expert opinion.**

J10: It's his job to give his expert opinion as a clinician, which he did, so I can't personally discount that. ...

J8: Yes, that's - that's the bit I don't agree.

J1: I don't agree it supported the events. ...

J10: **Because he kept an open mind of other possibilities.**

(S5J3; hung jury)

Use of research expert's evidence Charles Sturt University

Some juries wondered why the research expert hadn't interviewed the complainant; as a result most jurors dismissed the evidence. For example, in S4J1:

- J1: I mean anything the expert said you take **with a grain of salt** because nothing's a blanket rule for everyone anyway. Like even if there's 1% chance they might do that, they might be the 1%. ...
- J5: I thought it was interesting that **the expert hadn't actually spoken to the girl** either. ...
- J3: It was going on past research. ...
- J2: And **that research was neither here nor there** either. I mean it didn't prove anything and it didn't disprove anything.
- J12: **It makes it harder.**

(voted NG)

Research expert (contd)

- J6: Well, ... they brought in an expert on research and research is based on ... collecting about 100-200 research studies and then, you know, apply Pareto's law, 80-20, but then it's not specific about her case and **they didn't even bring in the person who interviewed her ...** .
- J1: It bothered me too that ... he'd never interviewed her ... **and he could deliver no verdict as to whether any of that applied to this case**, so it was all like an umbrella view of how sexually abused people behave. (S4J7; voted NG)
- J?:** And also the psychologist, **he did not interview her at all**, not at all. Whatever he commented is just based on research work ... which is general
- J?: It was **generalisations**.
- J?: On the basis of the **general research, you can't say beyond doubt that yes, it happened or not**.
- (S4J10; audio, no juror no's; NG)

Both Research and Clinical evidence

Many juries referred to the expert's evidence when discussing ambiguities in other trial evidence; for example in S4J6:

- J2: There's definitely **a few inaccuracies** [in the complainant's evidence], but ... the expert ... he was saying **that's normal** for those little details to not be too accurate, so do we get too caught up in the concerns of ...
- J6: No because she would have been – fear would make you-- ...
- J5: I find it **odd that they were in the same house** but the fact that they were, and she was still taken to school by him, **but the psychologist said that sort of behaviour is quite normal**, and you do read that is normal for kids to still remain close.
(voted NG).

Clinical expert

Different jurors gave the expert evidence greater or lesser weight; but even with the clinical expert opinion most jurors were unconvinced:

J5: ..., I think what he [the psychologist] had to say, yeah, it was valid, it really just shows that there is inconsistency and everyone reacts differently so hence I'm not sure if it adds for or against ... **For me it's not going to be a decider.** ... some of what he said, it's hard to know whether she's exhibiting or did exhibit any of those behaviours, but I think overall for me **I have to put the psychologist aside with what he said.**

(S5J8;voted G)

J1: And even with the expert ..., **they can find somebody who will say what they want** and how they want the story to go. If you were on the other side I'm sure you could also find somebody who could persuade you on what Bridget said.

(S5J10; voted NG)

Compared to this juror ...

J4... I found that the **psychologist helped put a fence around the typical behaviour so that it gave us a base point** to assess and therefore ... we could ... understand why some of the behaviours were displayed, not necessarily agree with all of them but ... in the sense of understanding why ... children might react in certain ways. ... **I think it needs to be taken into consideration when you are actually coming to a conclusion because I think it actually gives you a starting point** ... and I think from that ... I can base my evidence on the fact that that's a point of reference only and then you use the evidence that was put in front of you to then measure it against the point of reference. ... **when the psychologist came on he helped put the fence around it more whereas the defence I felt was just confusing the child** ... by leading questions. and basically almost saying what the psychologist had been saying about the inconsistencies with the child. by leading. and therefore I didn't feel that that lent to the situation because the child was very confused.

(S5J8; voted G).

Clinical vs research expert

The clinical expert generated much **more deliberation** about how to use the his evidence, in particular, his opinion regarding the complainant and its reliability.

For example in S5J3 (hung jury):

J6: The clinical psychologist, to me, backed up her credibility by saying, "Yes, it's possible, and that's likely to happen.

J7: I think his professional opinion I would trust.

But:

J1: I don't agree it supported the events. ...

J10: They discredited him as an expert. ...

J4: But I don't think he has given a definite opinion. ... well, I can trust his integrity as a witness, but I cannot just blindly agree with him on this assessment.

Experimental vs. clinical psychologist: More agreement

- Should have simplified;
- Went into more detail than necessary;
- Was hard to understand;
- Used a lot of technical language.

Recommended improvements to expert evidence:

Experimental psychologist: 28%; clinical psychologist: 26%

- Probability of certain behaviours;
- Visual aids, power-point slides, photographs;
- Concrete examples, evidence from other cases, research findings;
- Simpler language;
- Experimental psychologist: interview the child, evidence bearing on this case

Limitations of the study

- Only one set of case facts studied
- Deliberation was necessarily truncated *cf* real trial
- Jurors were aware it was a simulated case
- Doubts which arose during deliberation were more influential on verdicts than the expert evidence
- Although expert evidence increased juror knowledge about CSA, juries did not rely on this information in coming to a verdict.

Persistence and magnification of some misconceptions

- Gaps between expert information and case facts
- Reinforcement by the defence in cross-examination



Attorney Qs and case outcomes

Stolzenberg & Lyon, 2013

Analysed transcripts of 72 CSA trials in LA County.

On average, 4 interviews per child before prosecution.

Does trial questioning of children predict outcomes?

- Close to zero questions about grooming.
- Both P and D asked mostly Y/N questions.
- P twice as likely to ask child about reasons for disclosure or nondisclosure, but few Qs overall (can report reliably).
- D ask about content of prior disclosures (to 5 persons) to impeach with inconsistencies.
- No age developmental sensitivity, same Qs to all ages.
- **No significant predictors of acquittal based on questions asked on direct or cross examination.**

Analyses of closing arguments

Stolzenberg & Lyon 2014

Analysed 189/309 trial transcripts in LA County

- 17% acquittal rate (73% of study sample + mistrials)
- 88% suspects knew victims; 82% multiple abuse acts
- Most charges did not involve force: 77%
 - 48% alleged genital or anal penetration;
 - 23% genital contact;
 - 29% exhibition or fondling
- Complainants <14 years at event; <18 yrs at trial

Most common defence:

- Credibility Qs, false report
 - Susceptibility to influential adult with motive
 - Inconsistencies
- **Fewer than 10% mentioned expert evidence in closing**



Predictors of convictions in jury trials

Blackwell & Seymour 2014

Based on prosecutor surveys in 137 NZ trials.

A combination of any 3 of the following 9 features:

- Child under 12 years
- Propensity evidence
- Contemporary statement to another
- Penile penetration
- Multiple complainants
- More than 4 charges
- Partial admission (e.g., masturbation)
- Positive medical/DNA evidence
- Witness to actual offending

Predictors of convictions (NZ)

Three strongest predictors of conviction:

- DNA evidence/medical evidence
- A witness to the offending (rare; 88% of trials had none)
- Similar fact (propensity) evidence

US Study showed forensic evidence rare (11%), but increased convictions 5-fold

- 92% of defence lawyers used 'myths' as proof child was lying, e.g., child did not report alleged offences straight away, or still had a close relationship with their abuser, or had retracted their allegation.
- 79% of defence lawyers accused child of lying.
- Defence lawyers asked confusing and misleading Qs



Five predictors of acquittals

Lyon & Stolzenberg 2015

- After abuse, def in contact with child: 46%
- D character witness against child: 46%
- D hearsay witness re: child's statements: 39%
- D character witness against P witness
close to child (2/3 times the mother): 39%
- Defendant not charged with force: 27%

Credibility of complainant and persons close to complainant are key issues



Jury difficulties with word v. word Charles Sturt University

Freckelton et al, 2016

•**Historical abuse, 9 charges:**

The main thing that the jury had to get clear in its head was that a **person’s testimony counts as evidence**. That you don’t necessarily have to have photographs or physical evidence. At the beginning, there was a lot of debate around that. In this type of situation, when it’s **predominantly two people who know what happened** and there isn’t a lot to corroborate that, it took a while for people to get their heads around that, because they were **very conscious of the beyond reasonable doubt issue** (Juror 9, 6B)

	Trial 6A	Trial 6B by video
Days	5	6
Deliberation	2 days	10 hours
Verdict	9 counts , hung	Count 1: acquitted; 2-9: convicted
Juror IV	2	6
Other IV	J, P, D, E	J, P, D, E
Juror surveys	5	9
Single expert	Psychiatrist, generalist plus 1 interview	



Study of juror CSA knowledge

Goodman-Delahunty, Cossins & Martschuk, 2016

- Recruited 1,931 dismissed jurors at NSW Courts, age 18-85 years, average 44 years of age. Three-fifths had a university degree.
- Read 18 CSA statements, indicated agree-disagree, mid-point = uncertainty, don't know
- Some jurors have far more accurate CSA knowledge than others. Most answered fewer than 9/18 correctly. e.g., knew 'stranger-danger' less of a threat than someone close to child.
- Implications for how lawyers present their cases

What jurors know (58% or more)

Facts about child sexual abuse	Error	Unsure	Correct
Delayed report does not mean falsity	8	13	79
Victims may continue to spend time with abusers	8	15	77
More detail with more interviews is not falsehood	7	21	72
Inconsistencies do not mean falsity	8	20	72
High confidence does not mean reliability	8	21	71
Abuser likely a friend/family member	16	15	70
A change in report does not mean falsity	10	26	64
Recall at age 7-8 years as accurate as adults	13	22	64
Tears while testifying does not mean reliable	15	27	58

Error rates low: 8-16%; uncertainty 13-27%

What jurors don't know (46% or more)

Facts about child sexual abuse	Error	Unsure	Correct
An abused child may not display strong emotions	48	31	21
An abused child will not avoid the abuser	43	30	27
Children rarely falsely report for revenge	26	43	31
It is not easy to manipulate ages 7-8 to falsely report	26	39	35
It is not easy to coach children to make false reports	24	38	38
Repeated open Qs are unlikely to produce falsehood	17	40	43
Victims do not respond to abuse in the same way	17	39	45
A medical exam rarely confirms abuse	29	25	45
An abused child may not cry for help/try to escape	20	26	54

Errors by 20-48%; uncertainty 25-43%

Factors predictive of verdicts

Goodman-Delahunty, Cossins, Martschuk 2016

Nine statements with more error and uncertainty contained 2 factors:

- **Impact of Sexual Abuse on Children**
 - Children's reactions and behaviours (e.g., A sexually abused child typically cries out for help and tries to escape; A medical exam almost always shows abuse)
- **Contextual Influences on Report**
 - Reliability (e.g., Children are easily coached to make false claims; A child sometimes makes false claims to get back at an adult)
- Tested 2 versions of trial, strong and weak facts, 1712 NSW jurors.
- Factors predict mock jurors' verdicts independently of case strength.
- Factors correlated with ratings of the complainant's credibility ($r = .23$).
 - Predict complainant credibility and verdict
 - Jurors who answer more questions correctly convict
 - Further refined topics for more useful expert evidence

Presence/absence of symptoms

Lyon & Koehler, 1996

- **Errors in inferences** from presence/absence of CSA symptoms as indicators of abuse/nonabuse:
- **Typicality alone is not probative:** how common a symptom is *not* the same as its relevance to prove abuse/nonabuse.
Absence of very common features can be indicators of nonabuse.
- **Relative frequency in abused/nonabused children is:**
Uncommon symptoms can be the most probative.
Absence is unhelpful as indicator of nonabuse.

Symptom	Abused children	Nonabused children
Nightmares	Frequent : 41%	Frequent : 42%
Erythema (redness)	Most common	Equally common
Masturbation	Infrequent : 10%	Almost none > 1%
STD	>5%	None



“Consistent with abuse”

Because inferences depend on relative not absolute frequencies, expert testimony that a symptom is “**consistent with abuse**” works for both prosecution and defence.

e.g., Physical evidence of abuse. Most abuse does not involve acts sufficient to cause physical damage to the child’s body. After 24 hours, unlikely to be physical evidence (Parkinson, 2015).

Defence: “Abused children have physical signs, so absence of signs = no abuse”

Prosecutor: “Many abused children have normal genitalia.”

“Consistent with abuse” does not establish or mean “proof of abuse.”

Jurors got this.

- Lyon and Koehler (1996) recommended avoiding this term in expert evidence.



What is counter-intuitive?

“He likes to be florid in his descriptions, that’s not necessarily a bad quality, he likes to elaborate ... he’s very determined to **reduce everything to layman’s language** to get his opinion across

And really, that demonstrates why **this whole issue of this particular area of expert evidence really isn’t expert evidence**. Because ultimately, they give it in layman’s language, that they’re speaking of layman’s concepts that layman understand. **It’s not a science that needs to be interpreted for a jury** with ‘x squared plus y squared equals.’ It’s not physics. It’s not chemistry. **It’s not a different language.**” (Defence counsel, Trial 13).

“I don't think it is counterintuitive. ... I think issues of **delay and inconsistent behaviour** are matters that people deal with every day in their lives. And I don't think the studies back up in an empirical fashion at all, what a number of these alleged experts opine to.” (Defence counsel, Trial 13).



Generalist expert failure

Psychiatrist, a researcher, generalist perspective:

- “We did not find the expert evidence definitive,” (Juror A).
- “He confirmed that the reaction from the complainant was legitimate as far as standard reaction goes for that sort of scenario. What the gentleman told us was textbook. That’s great, that’s good for background knowledge, but **that’s not evidence**.... Generally everyone said it would have been good if this gentleman **actually spoke to this girl**,” (Juror X).
- “The expert testimony was **actually a total waste of time**. It wasn’t really relevant. It would have been better off having someone who’d actually spoken to her--you know, who knew what her demeanour was at the time. But it was just a generalisation of what you could expect a victim to, to be like after an attack. It was just generalisation. There was **nothing to do with the case**” (Juror H).

Generalist evidence can ‘backfire’

The expert had explained that a high proportion of abuse victims themselves become abusers. In fact, the jury wanted to know if the defendant was an abuse victim as this would have indicated that he was more prone to become an abuser, and therefore, the complainant’s evidence warranted more credit. The jury sent a Q to court: “Will we hear evidence or will we be told about whether the accused man was a victim of childhood sexual abuse himself?” (Trial 6A, Hung jury).

The expert stated that many victims want to wash themselves after being sexually assaulted. “She hadn’t showered when the doctor seen her three hours later. ... Considering she vomited, you know, get rid of these clothes that have, that’s got vomit on them, but she was still dressed in the same clothes when the doctor seen her.” (Trial 13, acquitted).

Treating expert failure

Medical doctor examined child at hospital

- “The expert made little attempt to ask the complainant about her version of events, and then relate this information to the injuries that the expert observed on the complainant’s body. This would take a lot of the heat out of aspects of cross-examination of the complainant” (Defence, Trial13)
- “She didn't give us the impression that she understood the serious nature of what had occurred. She was supposed to have applied evidence to prove the man guilty, but I'm afraid that failed dismally. And she just created more doubts. I mean the girl didn't want to be examined, and the psychiatrist said perhaps she wouldn't want to be examined, but if we'd known a bit more... If the girl had said, 'Well, I'm hurt and I don't want to be hurt. I'm hurting and all the rest of it and I don't want to be hurt more,' that might have held up a bit more, but no one went down that track.” (Juror L, Trial 13).

Treating non-expert

A treating clinician in sexual assault trial was unaware he was an expert witness. He said the questions asked by the barristers were undermining what he said.

- “They asked me all these open- ended questions about the disorder, so they obviously considered me an expert, but I wasn’t considering myself an expert. It was confusing.”
- “Do you think that the court, or somebody, had a responsibility to me to explain to me, first off that I was an expert witness, and what was expected, not of me in the case, but what is expected of me as an expert witness?”

The absence of a rebuttal expert Charles Sturt University

- We thought there would be **something that would contradict him**, or that from two angles, you either bring someone else in who would give a different account of how things work, and therefore **provide some doubt** in the jury's mind, or secondly, **some better questioning** of him, to really, to again maybe discredit some of the things he was saying. But **that didn't happen** (Juror 10, Trial 6B, conviction).
- The issue we had as a jury was there was specific evidence we felt should have been put forward or additional expert evidence that should have been brought forward, but wasn't, or we were surprised it wasn't, and we didn't then ask why it wasn't. ... There was other things **we felt that expert evidence should have been brought** into this trial, and then they weren't, and **we felt was probably a poor defence.**" (Trial 13, acquittal).

Absence of cross-exam of prosecution expert

“What this expert does, probably as a result of experience, is give a very brief report, and then the bulk of his evidence comes out in cross examination. Defence counsel well knew that, because of prior experience, and did not cross examine him” (Prosecutor, Trial 13).

Defence counsel regarded the expert in Trial 13 as “a thorough gentleman, but he’s a particularly difficult witness to cross-examine. He will never allow himself to be confined to yes or no answers. Even if he is forced to give a yes or no answer, he will say to the judge, ‘But I’ve something relevant to add, your Honour.’ He was waiting for me to ask him questions.

“Since the defence didn’t raise any questions, it indicated to us that it wasn’t a major benefit to the prosecution” (Juror 1, Trial 13).

But, the defence was rated as poor.



Whose expert?

- Defence experts are rare. Our field study of 55 Australian criminal trials showed the prosecution often called multiple experts. In only one third of the cases was there a defence expert.
- One experienced expert said he used to do defence work, now is called only, by the prosecution.
- Jurors may view the experts who appear as neutral, court-appointed:

“He wasn’t described as the expert for the prosecution. He was just described as an ‘expert witness,’ and the prosecution got to ask him questions, as did the defence. And so, I don’t think people viewed him as being on either side. They just viewed him as having expressed an opinion, and both counsel had an appropriate chance to lead him down whatever path they wanted. I thought he was quite independent which is what he’s meant to be.” (Juror 9, Trial 6).

Whose expert?

“The defence was trying to create reasonable doubt, and he certainly did that, by pointing to the fact that, by pointing out all the possible scenarios of behaviour. .. He talked about hysteria and privacy, and not wanting to be touched, and he talked about how some people will tell everybody, and some people won't tell a soul. So he went across the whole gamut of possibilities, and I daresay we - the defence -- expected us to fit this lass's behaviour into one of those scenarios.” (Juror L, Trial 13).

**Generalist was perceived as an expert for the defence,
not the prosecution**

Undue deference to experts

Jury instruction effectively curtails that.

- One juror who worked in the health industry said he was with doctors all the time, and the expert “just seems like a normal sort of doctor” (Juror 6, Trial 6D).
- “For the younger members of the jury, the expert evidence was more important. ... But for those of us that had lived a bit longer, I think probably not so much. Well, life experience and watching people behave. and thinking about how you'd behave in that situation, too. It gave the non-experts some language to express it to each other better. And confirmed in our mind the possibilities (Juror L, Trial 13).



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