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Family violence experts in the criminal court: the need to fill the void

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This paper describes the role of family violence expert evidence and argues for the need for adequately trained and experienced specialists to provide that evidence within the criminal jurisdiction of the District Court and High Court in Aotearoa New Zealand. Court processes for the criminal jurisdiction were reviewed to consider the roles and the requirements of expert witnesses in cases of family violence. Given the lack of expert witness training in Aotearoa New Zealand, components of best practice in other jurisdictions, including examples of international expert witness skills and knowledge were sought. Unique skills and experience are necessary for an accurate description of a history of family violence. Experience working with survivors and offenders provides an understanding of the nature and dynamics of violence experienced within a relationship and allows experts to address myths and misconceptions, particularly in relation to the effective nature of the current family violence safety system. Without a contemporary, comprehensive understanding of family violence across police prosecution, judges and lawyers, expert evidence from trained and experienced specialists is required. To enhance the educative role of family violence expert evidence, such evidence should be called by the Court.

Key words: criminal court; expert testimony; family violence.

Introduction

The rates of violence against women by an intimate partner in New Zealand have been highlighted as being amongst the highest in the Organisation for Economic Cooperation

and Development (OECD).¹ Yet, despite this unenviable reputation, there continues to be a lack of understanding of the nature and impacts of family violence² amongst those who are charged with responding to it.

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¹OECD Stat, 'Gender, Institutions and Development Database 2014' (2014) <<https://stats.oecd.org/index.aspx?datasetcode=GIDDB2014>> accessed 19 June 2020.

²Within this paper, family violence captures intimate partner violence, child abuse and neglect and intrafamilial violence, which includes violence by a child on their parent, and violence between siblings, and wider family members (cousins, uncles, aunts, grandparents, etc). While this paper primarily focuses on heterosexual intimate partner violence, this a reflection of the work that has been undertaken by the FVDRC to understand this type of violence. However, it is the view of the committee that family violence experts will be of use to understand the nature and context of the whole variety of violence between individuals in familial relationships.

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For a number of years, the Family Violence Death Review Committee (FVDRC)³ has been calling on the police and Family and criminal courts⁴ to move away from considering incidents of violence as discrete, isolated acts and towards understanding family violence as a pattern of harm.⁵

Types of criminal cases where family violence experts would be useful

Calls to develop an understanding of violence as a pattern of behaviour have been built into practice and legislation by the adoption of family violence flags in the police National Intelligence Application⁶ and the enactment of

³The FVDRC is a Mortality Review Committee, appointed under section 59E of the *New Zealand Public Health and Disability Act 2000* by the Health Quality & Safety Commission (HQSC). The provisions of Schedule 5 to the Act apply in relation to the Committee (s 59E of the Act). The Committee is a 'statutory advisor' to HQSC and is hosted by HQSC. The role of the Committee is to independently review and report to HQSC on family violence deaths, with a view to reducing deaths and to supporting continuous quality improvement <<https://www.hqsc.govt.nz/our-programmes/mrc/fvdr/about-us/terms-of-reference/>> accessed 3 December 2020.

⁴Strictly speaking, there is no 'criminal court' in Aotearoa New Zealand, but a criminal jurisdiction of the District and High Courts. However, for brevity, the criminal jurisdiction of the District and High Courts will be referred to as the criminal court throughout this paper.

⁵Family Violence Death Review Committee, 'Third Annual Report: December 2011 to December 2012' (Health Quality & Safety Commission, Wellington 2013).

⁶The National Intelligence Application (NIA) is a database used by the police to manage information needed to support operational policing. The database holds records about offences and incidents reported to police as well as intelligence notings. Records contain 'entities' such as vehicles, people and locations, which in turn can be linked to each other. While most information visible in NIA is entered and maintained by police staff, some data are owned and managed by other agencies and are only visible to police employees through NIA (eg, vehicle registration information, which is owned and managed by the New Zealand Transport Agency, and criminal history information, which is owned and managed by the Ministry of Justice) <<https://fyi.org.nz/request/5057-nia-system>> accessed 3 December 2020.

Section 16A of the *Criminal Procedure Act 2011*. S 16A allows the specification that an offence is family violence at any time 'after a charging document is filed and before the delivery of the verdict or decision of the court'.⁷ Further, if the defendant is convicted of an offence, even if the charging document does not specify that the offence is a family violence offence, the court 'may enter in the permanent court record of the proceeding a specification that the conviction is for a family violence offence'.⁸ Family violence offences are those defined as an offence against any enactment (including the *Family Violence Act 2018*) and involving family violence as defined by s 9 of the *Family Violence Act 2018*, which includes understanding family violence as a pattern of behaviour.⁹ An exception to s 16A of the *Criminal Procedure Act 2011* are category 4 offences,¹⁰ where section 133 of the *Criminal Procedure Act 2011* specifies that there is no power to amend the charge.¹¹ The effective identification of family violence offences provides an opportunity to ensure that appropriate rehabilitation programmes are offered to offenders, defensive behaviours by victims are recognised,¹² 'red flags' are identified within the evidence presented and sufficient consideration is given to the safety of victims.¹³

⁷*Criminal Procedure Act 2011*, s 16A(2).

⁸*Criminal Procedure Act 2011*, s 16A(4).

⁹<<http://www.legislation.govt.nz/act/public/2018/0046/latest/LMS112966.html#LMS112966>> accessed 3 December 2020.

¹⁰Category 4 offences are those defined under Schedule 1 of the *Criminal Procedures Act 2011* and include (as it relates to family violence): Infanticide, Manslaughter, Murder and Attempted Murder <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360716.html?search=sw_096be8ed81a1264_category_25_se&p=1#DLM3360716> accessed 3 December 2011.

¹¹<<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360222.html>> accessed 7 October 2020.

¹²S Tarrant, 'Self-defence against Intimate Partner Violence: Let's Do the Work to See It' (2018) 43(1) *The University of Western Australia Law Review* 196–220 <http://www.law.uwa.edu.au/_data/assets/pdf_file/0004/3090577/CHAPTER-12.pdf>

¹³*Sentencing Act 2002*, s 123B.

While the legislative provisions exist to identify family violence in criminal offences, there is a risk that without adequate training or advice, the opportunity to accurately identify an offence as family violence may be missed. Within this paper, we will argue that family violence expert evidence should be considered in criminal cases where a familial relationship exists (as defined in s 12 of the *Family Violence Act 2018*) between the victim and offender and where there is the potential (but not certainty) to identify the offence as family violence.

The gap that currently exists

Expert evidence is required to explain the social phenomena of family violence to fact finders. Within family violence criminal cases, an expert witness may provide information relevant to:

- Proving or disproving the substantive elements of certain offences, for example, the impact of non-fatal strangulation, or the pattern of violence that exists to warrant the classification of an offence as that of ‘family violence’
- The relevance of particular defences, in particular self-defence in cases of primary victims held to account for murdering their violent partner¹⁴
- Understanding causality to more effectively represent the reality of the victim
- Understanding the range of victim responses and differentiating these from pathological responses
- Understanding the realities of family violence so that the process of the proceedings is not overwhelming for the victims of family violence – how evidence is obtained, how questions are asked of victims who give evidence and the places that people sit in the court¹⁵

- Conditions of sentences where there is the potential for rehabilitative solutions to be offered to prevent further violence, as well as understanding aggravating factors in family violence
- Consideration of the limitations of bail and sentencing decisions to keep a primary victim safe

Within s 25 of the *Evidence Act 2006*, expert evidence is permitted to be given within a criminal trial on the basis that it will provide ‘substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding’ (s 25(1)).

The *Evidence Act 2006* requires that an expert ‘has specialised knowledge or skill based on training, study, or experience’. However, given the relative youth of the family violence research field,¹⁶ and the fact that there are no recognised family violence qualifications in Aotearoa New Zealand, there needs to be an acknowledgement that an understanding of the nature and dynamics of family violence will continue to evolve for the foreseeable future. As such, it is important that experts can establish and document a track record of on-going learning.

This paper provides a description of the role of family violence expert evidence and an argument for the need for adequately trained

¹⁶Family violence research and policy developments, and in particular, research into intimate partner violence (which accounts for 50% of family violence homicides in Aotearoa New Zealand) can trace their origins to the violence against women and feminist movements. Htun and Weldon (2012) have described the role of strong feminist movements in promoting the policy agenda to address violence against women since the mid-1970s. However, it was not until the 1990s that many countries sought to make violence against women in intimate relationships illegal. Indeed, initial research concerning violence in Aotearoa New Zealand was not published until the 1990s <<https://nzfvc.org.nz/?q=timeline-category/research>> accessed 3 December 2020. M Htun and SL Weldon, ‘The Civic Origins of Progressive Policy Change: Combating Violence against Women in Global Perspective, 1975–2005’ (2012) 106(3) *American Political Science Review* 548–69.

¹⁴Tarrant (n 12) 196–220.

¹⁵J Braithwaite, ‘Restorative Justice and Therapeutic Jurisprudence’ (2002) 38 *Criminal Law Bulletin* 244.

and experienced specialists to provide that evidence. It is an acknowledgement that a full and comprehensive understanding of family violence is useful for both prosecuting and defending family violence criminal hearings, that there is a need to be alert to the controversies that continue to exist within the family violence field and to be aware of the broad spectrum of cases that are presented before the criminal court, where family violence may be a factor. To enhance the educative role of family violence expert evidence, such evidence should be called by the court.

Methods

The criminal court process was reviewed to consider the roles and the requirements of expert witnesses in cases of family violence in the Aotearoa New Zealand context. Given the lack of expert witness training in Aotearoa New Zealand, we sought to identify components of best practice in other jurisdictions, including examples of international expert witness skills and knowledge. Professional bodies for psychology and psychiatry, as existing providers of expert evidence in the courts for mental disorder, were contacted within the United Kingdom, Canada and Australia to establish whether there were any requirements for those professionals to be considered competent providers of expert evidence in family violence to the courts. In particular, any skills and knowledge development in the field of family violence provided to expert witnesses within the psychiatry and psychology professions was reviewed to determine if this could be extrapolated to expert witnesses outside these professions. In addition, a brief review of the literature on the skills and experience of family violence expert witnesses was conducted to determine the experience required to be an effective family violence expert witness and the requirements and frequencies of retraining.

Consultation was undertaken with the New Zealand Institute for Judicial

Studies¹⁷ to understand existing work in this area, and whether consideration had been given to developing a Code of Conduct for Expert Witnesses that would apply across all courts. As the Institute for Judicial Studies promotes judicial excellence through an understanding of the wider social context, it was anticipated that it would be responsible for any initiatives to up-skill judges and improve criminal court processes.

Schedule 5 of the *Public Health and Disability Act 2000* limits the use of information gathered for the purposes of carrying out the FVDRC's functions. The only exception to this is where the information is produced in such a way that it does not identify any particular individual (Clause 5, Schedule 5). As such, compound stories (in which a number of cases have been combined to de-identify individual characteristics) and publicly available commentaries have been drawn on to illustrate points made throughout this paper.

Findings

Expert witnesses and court reports in the court process

While there may be legislative requirements that outline basic criminal court processes,¹⁸ the unconscious bias of individual judges¹⁹ and the differing training and perspectives of

¹⁷The Institute for Judicial Studies was established in July 1998. It is the professional development arm of the New Zealand judiciary and provides education programmes and resources which: support judges in the ongoing development of their judicial careers; promote judicial excellence; foster an awareness of developments in the law, its social context and judicial administration. Central to the context within which judges work is their independence from the other arms of the state. The initiative of the judiciary to develop education through the Institute of Judicial Studies recognises that education fosters responsible decision making without compromising judicial independence <<https://www.ijs.govt.nz/home.asp>> accessed 11 August 2020.

¹⁸District Court Rules 2014, Family Court Rules 2002, High Court Rules 2016.

¹⁹JJ Rachlinski and others, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84(3) *Notre Dame Law Review* 1195–246.

expert witnesses can result in inconsistent systems and practices across both family and criminal courts. While expert evidence is expected to be clear and objective, with the multiplicity of players in the courtroom process, experts may consciously or unconsciously conceal violence, obscure and mitigate offenders' responsibility, conceal victims' resistance and blame and pathologise victims.²⁰

Section 25 of the *Evidence Act 2006* requires that the provision of expert evidence enables the courts to obtain substantial help from the opinion, furthering the understanding of other evidence presented. Court reports provide an opportunity for an expert-informed opinion to be presented to the courts and may be either privately commissioned or court ordered.²¹ However, such reports may also be disregarded by those who commissioned them. Judges and juries are not bound by the opinion or recommendations of experts in presented reports.²² For sufficient weight to be applied to court reports or expert testimony provided by family violence experts, clear articulation of the specialist knowledge beyond that which juries and judges are currently expected to possess is required.²³

²⁰L Coates and A Wade, 'Language and Violence: Analysis of Four Discursive Operations' (2007) 22 *Journal of Family Violence* 511–22.

²¹Section 27, *Sentencing Act 2002*.

²²For example, *Lichtwark v R* [2014] NZCA 112 at [30].

²³It has been argued that the State [prosecution services] should have an accurate, current understanding of family violence, and the use of expert evidence absolves the State [prosecution services] of that requirement, treating family violence as an adjudicative fact and creating a problem for self defence cases where women have been entrapped by a violent partner (Douglas, Darrant and Tolmie, 2020). However, it is the view of the current authors that the construction of family violence evidence as social framework evidence (Tyson, 2020) is an evolutionary process as knowledge and understanding of family violence develops. Until social framework evidence is accepted, the provision of expert evidence reduces the risks of miscarriages of justice.

The value of accurate expertise

Unlike the Family Court,²⁴ there are no guidelines for the production of specialist reports for the criminal court. As with cultural reports:

No explanatory framework exists, no booklet for offenders/whānau to inform them of the intent of the section or how to procure one, no guidelines for court practitioners, nor any mandatory judicial instruction to account for a report's content during their deliberations.²⁵

While case law exists describing who can be an expert and when expert evidence is admissible, the corollary of judges and lawyers not being expected to be experts in family violence is the acknowledgement that family violence experts may not always be knowledgeable in the workings of the criminal court. As such, it is important that judges and lawyers have an understanding of the limits of expert witness or report writer knowledge,²⁶ as well as the potential for family violence experts to add substantive, specialist knowledge to the trial process. For example, concepts specific to family violence will differ from psychological (behavioural disorders) or psychiatric (mental health conditions) concepts and cannot be covered through psychological or psychiatric reports. Family violence experts draw on an understanding of the entire relationship history (or history of the immediate family in the context of intra-familial violence²⁷ and child abuse

²⁴Family Court Practice Note (2018) Specialist Report Writers. At [6.1] <<https://www.justice.govt.nz/assets/Documents/Publications/specialist-report-writers-practice-note-20180709.pdf>> accessed 22 June 2020.

²⁵TJ Oakley, 'A Critical Analysis of Section 27 of the Sentencing Act (2002)' (Thesis, Master of Social Sciences (MSocSc), The University of Waikato, Hamilton, New Zealand 2020) 105 <<https://hdl.handle.net/10289/13583>>

²⁶Family Court Practice Note (n 24) at [6.2].

²⁷Family Violence Death Review Committee, 'Fifth Report Data: January 2009 to December 2015' (Family Violence Death Review Committee, Wellington 2017).

and neglect²⁸), rather than an understanding of the context of the specific event or disorder history. Therefore, reports written by family violence experts provide guidance on the specific nuances of family violence. For example:

- Rather than asking why she did not leave, they seek to understand the actions she has taken in the past to try to stop the violence, the response she has received from helping agencies, and the impact that these experiences may have had on her current behaviour.²⁹
- Understanding her realistic options for support – has he isolated her from her family, rupturing relationships and increasing dependence on him? Does she have an independent source of income that she can access? Who had control over the household resources? What are the responses of wider family members? Do they endorse his violence or expect her to stay?
- What does safety look like for her?³⁰

As highlighted in s 9 of the *Family Violence Act 2018*, the nature and dynamics of family violence can vary between relationships. Where there is increased complexity in the offending, there may be very little

experience or expertise by the court decision maker and, therefore, a lack of awareness of the type of evidence or investigation necessary to understand the dynamics of the relationship. For example:

- Was it ‘just’ psychological abuse? He threatened her animals, would destroy the children’s toys, damaged property, controlled the finances, refused to help with the children, isolated her from her family, and convinced her that his behaviour was all her fault. While he never physically abused her, she never had the resources and freedom available to be able to leave. Outside the relationship, he was charming and a pillar of the community.
- Does the Court understand intimate partner sexual violence and reproductive coercion? Does she have full control over her use of contraception and decisions concerning pregnancy status?³¹ Is she forced into engaging in sexual intercourse? Is she expected to engage in sexual activities she finds degrading or humiliating? Has she sought out pregnancy terminations as a result of being forced into sexual intercourse?³²
- How is the entanglement of intimate partner violence and child abuse and neglect understood by the Court? Is there a continued perpetration of a parenting double standard which includes low parental expectations of men while women are held to account

²⁸Family Violence Death Review Committee, ‘Fifth Report: January 2014 to December 2015’ (Family Violence Death Review Committee, Wellington 2016).

²⁹J Short and others, ‘Thinking Differently: Reframing Family Violence Responsiveness in the Mental Health and Addictions Health Care Context’ (2019) 28 *International Journal of Mental Health Nursing* 1209–19.

³⁰Family Violence Death Review Committee, ‘Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence’. Appendix to J Tolmie and others, ‘Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence’ (2018) *NZ Law Review* 181–218 <<https://www.hqsc.govt.nz/assets/FVDRC/Publications/FVDRC-entrapment-appendix-Aug-2018.pdf>> accessed 29 June 2020.

³¹L Tarzia, ‘How Can We Improve the Health Systems Response to Reproductive Coercion in the Australian Context? Safer Families Centre of Research Excellence Discussion Paper #1’ (2018) Safer Families Centre of Research Excellence Discussion Paper Series <<https://www.saferfamilies.org.au/discuss/>>

³²ME Bagwell-Gray and others, ‘Intimate Partner Sexual Violence: A Review of Terms, Definitions, and Prevalence’ (2015) 16(3) *Trauma, Violence, & Abuse* 316–335 <<https://doi.org/10.1177/1524838014557290>>

for failing to protect their child from his violence?³³

If expert testimony on the dynamics of family violence is not available to the court, there is the potential for a miscarriage of justice. If incomplete information is available to examine, or discount, the potential for family violence (for example, Box 1), there is the potential for incorrect decision making.

Box 1.

Sentencing note of Hinton J from *R v DOUTHETT* [2019] NZHC 2214 [29 August 2019]

Michael Edward Douthett pleaded guilty to one count of murder and one count of dangerous driving. The events were outlined by Justice Hinton at [2] as *tragic, you murdered your wife Patricia Wallis... and then set out, but failed, to kill yourself.*

In reaching her sentencing decision, Justice Hinton drew on four expert psychiatric reports outlining Major Depressive Disorder. At [39] and [44], Justice Hinton concluded that the mental illness was a causative factor in the offending. Although at [39] there was an acknowledgement of the complexity of the relationship:

[39] I consider that in this case your mental illness was causative of your offending. I realise the situation is more complex than that, noting particularly Trish's sisters' statements. But I consider, as Mark and others have said, that without your mental illness, you would not have killed Trish. Your mental illness in no way excuses your offending, but it should be taken into account in assessing the MPI, rather than be taken into account in mitigation.

[44] Your mental illness did more than form the backdrop for your offending; it was a root cause of your conduct.

Justice Hinton also indicated that the actions appeared to be *out of character* (at [48]).

However, Justice Hinton acknowledged the Victim Impact Statement of Patricia's sister's Barbara and Rosie. At [14] Barbara indicated

that Michael was controlling and that she was concerned he would kill Patricia. This important contextual information that described the nature of the relationship between Michael and Patricia raises an alternative causation. It highlights that the mental illness may not have been *causative* in the offending, but rather associated with it, and that causation could have existed within the wider environment of patrilineal misogyny within the rural community and a sense of entitlement.³⁴

How would a family violence expert have added to this case?

There was significant emphasis placed on understanding the mental health history of the defendant. However, a similar emphasis was not placed on understanding the pattern of behaviour throughout the relationship and how this may have established alternative causal pathways.

Was there a pattern of behaviour over the duration of the relationship?

Was there an indication of primary victim / predominant aggressor roles within the relationship, even in the absence of reported physical violence? Could he have engaged in coercive, controlling behaviour over the duration of the relationship?

What did this look like for Patricia?

What impact would it have likely had on her ability to separate?

Two of the victim impact statements highlighted concerns for the safety of the deceased (at [14] and [15]).

The purposes of sentencing, as outlined in the *Sentencing Act* (2002, s 7(1)) are:

- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
- (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
- (c) to provide for the interests of the victim of the offence; or
- (d) to provide reparation for harm done by the offending; or
- (e) to denounce the conduct in which the offender was involved; or
- (f) to deter the offender or other persons from committing the same or a similar offence; or
- (g) to protect the community from the offender; or

³³C Murphy and others, *Policy and Practice Implications: Child Maltreatment, Intimate Partner Violence and Parenting* (Auckland, New Zealand: New Zealand Family Violence Clearinghouse, The University of Auckland 2013).

³⁴W DeKeseredy and others, 'Thinking Critically about Rural Gender Relations: Toward a Rural Masculinity Crisis / Male Peer Support Model of Separation / Divorce Sexual Assault' (2007) 15 *Critical Criminology* 295–311.

- (h) to assist in the offender's rehabilitation and reintegration
 (i) a combination of 2 or more of the purposes in paragraphs (a) to (h)³⁵

A family violence expert may have been able to identify red flags as presented, including: the presence of a gun on the property; recent separation; threatened or attempted suicide; controlling behaviour.

Without this information, Justice Hinton relied on a lack of previous convictions (as detailed in the pre-sentencing report) and the testimony of the offender's children to determine that the actions were out of character. However, a family violence expert may have been able to identify the on-going pattern of harm that was evident, enabling the court to hold the offender accountable for the harm done to the victim, promote a sense of responsibility, and recommend rehabilitative options. Outside of this, the understanding of causation was limited to one of individual pathology. There is substantial evidence in the literature highlighting that emotional and psychological functioning is often unrelated to criminal behaviour.³⁶ It is possible to experience mental health disorders and be an intimate partner violence perpetrator, as well as experiencing mental health disorders without being an intimate partner violence perpetrator. While a history of intimate partner violence may be a strong predictor of future intimate partner violence, previous convictions, on their own, are a poor predictor of risk of violent criminal behaviour.^{37,38}

Court reports or expert witness testimony from family violence specialists can also provide an opportunity for tackling myths, understanding a victim's behaviour in the context of

³⁵Section 7(2) notes: 'To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to'. In lay terms, this means that the judge is able to choose which of the purposes of sentencing are drawn on for a particular case.

³⁶Resource note 10.3 from DA Andrews and others, *Psychology of Criminal Conduct* (Elsevier Science & Technology 2010) 341.

³⁷Family Violence Death Review Committee, 'Fifth Report: January 2014 to December 2015' (Family Violence Death Review Committee, Wellington 2016).

³⁸Chapter 10: 'Prediction of Criminal Behaviour and Classification of Offenders' in Andrews and others (n 36) 299–344.

explaining the impact of the abuse, the limitations of the wider family violence safety response system and the compounding operations of structural inequity. As described by Ferraro and Busch-Armendariz (2009).

A skilled expert witness answers in ways that underscore the complex dynamics of an abusive relationship, including issues of power and control, and without pathologising the survivor ... experts should be able to explain the controversies within the body of research and demonstrate awareness of all significant positions on these issues. (page 4)³⁹

Within the adversarial system, upon which Aotearoa New Zealand's criminal court system is based, 'truth' does not exist. Instead, judges and juries are charged with the responsibility of fact-finding. A judge will direct juries on the issues of law and the legal principles they must apply to the facts as they have been established by the evidence presented.⁴⁰ In their review of the impacts of the adversarial system on expert witnesses and the potential to generate bias in expert evidence, the Irish Law Reform Commission suggested (amongst other options) a single joint or court appointed expert.⁴¹ Through a review of international practices of single (jointly appointed by both parties) or court appointed experts, the Commission considered that the single joint appointed model was more favourable as it allowed the retention of the adversarial nature of the court. However, the Commission advocated against the appointment of a single expert in criminal cases, as

the constitutional right to a fair trial would likely be interpreted as necessitating the

³⁹KJ Ferraro and NB Busch-Armendariz, 'The Use of Expert Testimony on Intimate Partner Violence' (2009) <https://vawnet.org/sites/default/files/materials/files/2016-09/AR_ExpertTestimony.pdf> accessed 12 May 2020.

⁴⁰B Turner, 'Expert Opinion in Court: A Comparison of Approaches' in Wiley Encyclopedia of Forensic Science 2009. DOI: 10.1002/9780470061589

⁴¹The Law Reform Commission, 'Consultation Paper: Expert Evidence' (2008) <https://www.lawreform.ie/_fileupload/consultation%20papers/cpexpertevidence.pdf> accessed 4 December 2020.

ability of each party to present their own evidence and the right to present evidence contrary to that put forward by the single expert.⁴²

Contradictory or dated expert witness testimony or reports can have the effect of confusing those they are intended to enlighten and underscore the need for experts to maintain current knowledge of the development of research. In contrast to the adversarial system, a strong argument could be made for an inquisitorial approach for family violence expert evidence – to search for the ‘truth’ based around an exhaustive analysis of the evidence.⁴³ However, in both the adversarial and inquisitorial systems, there is a need for prosecution, defence lawyers and/or judges to have a sufficient understanding of family violence to be alert to the potential for it to exist and to seek out the expert evidence to provide clarity concerning the behaviour leading up to the criminal offence.

Clear, current understandings of the impact of violence can help to explain counter-intuitive behaviour, as is displayed in the excerpt from the findings of Justice Palmer (Box 2).⁴⁴

Box 2.

JUDGMENT OF PALMER J (Bail – redacted for publication)

[1] On Friday 21 February 2020, a jury found Ms Karen Ruddelle not guilty of the murder of Mr Joseph Ngapera but, by a majority, guilty of his manslaughter.

When deciding to grant Ms Ruddelle bail to her home, Justice Palmer (in [3]) noted the impact of social entrapment on Ms Ruddelle’s life.

[3] Ms Ruddelle offered expert evidence from Ms Rachel Smith about cumulative social entrapment, of women experiencing intimate partner violence, in an ongoing pattern of harm with inadequate safety options. Ms Smith gave evidence of how overall patterns of coercive control, not just physical violence, can play out in a variety of ways across women’s lives.

Ms Smith’s testimony noted that it was not just the impact of her violent partner’s behaviours that resulted in Ms Ruddelle experiencing social entrapment, but that the impact of these behaviours was magnified by the indifference of powerful institutions to the victim’s suffering, and further aggravated by the structural inequities of gender, class and racism. Evidence was provided to support this in Justice Palmer’s judgement at [2](a):

(ii) Police call-outs in which Ms Ruddelle documented threats to kill and seriously injure, the responses to which did nothing to reduce his use of violence, despite previous convictions of violence against previous partners;

(iii) A non-fatal strangulation that highlighted the potential for him to be able to kill her, reinforcing his threats;

(iv) Safety strategies put in place by specialist services that were not operational when Ms Ruddelle sought to employ them.

Indeed, evidence suggests that it is the indifference of institutions to which victims turn to for help that results in women becoming entrapped rather than misguided beliefs.⁴⁵ Social entrapment requires a wider understanding of the power of institutions to support her help-seeking (or not), as well as the experience of multiple, intersecting forms of inequities on limiting the options available to her. Further,

An account of the facts using an entrapment framework ... endeavours to express the manner in which the abuse operates strategically and over time to close down the victim’s/survivor’s resistance because, at some point, the repetitive use of violence makes continued overt resistance too costly for the victim/survivor.

Acknowledging the victim’s/survivor’s resistance exposes the full extent of the violence used by the perpetrator, but it also:

... removes blame because the account of the individual’s resistance shows that she or he did not ‘put up with it’ or ‘let it happen’. It acknowledges their countless efforts to maintain their dignity.^{46,47}

⁴²Law Reform Commission (n 41).

⁴³Law Reform Commission (n 41).

⁴⁴*R v Ruddelle* [2020] NZHC 272 [26 February 2020].

⁴⁵J Tolmie and others, ‘Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence’ (2018) *New Zealand Law Review* 181–217.

⁴⁶N Todd, A Wade and M Renoux, ‘Coming to Terms with Violence and Resistance’ (2004) 148–159. DOI:10.1007/978-1-4419-8975-8_9

⁴⁷S Tarrant, J Tolmie and G Giudice, *Transforming Legal Understandings of Intimate Partner Violence (Research Report 03/2019)* (ANROWS, Sydney, NSW 2019) 45.

Following this judgement, the defence sought out family violence expert Professor Denise Wilson to construct a detailed cultural report under s 27 of the *Sentencing Act*. The report referenced relevant robust academic literature to provide a comprehensive account of how the combination of Ms Ruddelle's early life experiences, lack of support from relevant agencies and the coercive controlling nature of her violent partner combined to place her in a position of social entrapment.⁴⁸ The report was inquisitorial, whereby evidence was weighed against relevant literature to establish a realistic account of the defendant's experiences and behaviour.

Appropriately qualified experts and appropriate qualifications

Timeframes for writing court reports are variable, although where not mandated by law, guidelines recommend 6–8 weeks.^{49,50} However, the pool of people available for writing reports is shallow, leading to waiting lists and compressed timeframes.⁵¹

Currently in Aotearoa New Zealand, the shortage of report writers is exacerbated by

‘a lack of support and consultation from the Judiciary and the Ministry of Justice and that the risk and complexities of report writing ... [are] very damaging’.⁵²

⁴⁸*R v Ruddelle* [2020] NZHC 1983 [7 August 2020].

⁴⁹Family Court Practice Note (n 24).

⁵⁰Of note is that, where the defendant has been remanded in custody or detained in hospital (or secure facility) for the purposes of assessment, that assessment must occur within 14 days (s 38(2)(b) and (c) *Criminal Procedure (Mentally Impaired Persons) Act 2003*). The period for which a person may be detained under an order made under section 38(2)(b) or (c) may, from time to time, be extended with the consent of the person or the person's guardian, but the total period of detention under the order may not exceed 30 days (s 40).

⁵¹J Pryor and E Major, *Review of Family Court: The Views of Family Court Professionals* (Roy McKenzie Centre for the Study of Families, School of Psychology, Victoria University of Wellington 2012).

⁵²M Henaghan, ‘Reform Is in the Air’ (2019) *International Survey of Family Law* 225–238.

As highlighted above, while guidelines are provided for specialist report writers for the Family Court, similar guidelines are not available for the criminal court. While guidelines may be drawn from case law, the accessibility of this for specialist report writers is questionable and leads to the review of successful reports to provide a template for subsequent reports.⁵³ Indeed, even those that exist for the Family Court are limited in their applicability to family violence expertise. For example, while psychologists are required to show a general knowledge of family violence and how it impacts on children and adults,⁵⁴ there is no detail concerning how this knowledge is assessed or whether it is kept up to date. In contrast, the UK General Medical Council provides guidance on *Acting as a Witness in Legal Proceedings*.⁵⁵ These guidelines are specific concerning how expert witnesses must be clear about the limits of their knowledge and hold responsibility for checking the information that is provided. Expert witnesses whose approach is deemed to be reckless, incompetent or otherwise deficient can face GMC investigation and disciplinary action.⁵⁶

Similarly, the Royal Australian & New Zealand College of Psychiatrists (RANZCP) has produced professional practice guidelines for members who are preparing reports in

⁵³For example, Chapter 10: ‘Writing Court Reports in Psychiatry and the Law’ in WJ Brookbanks and A Simpson (eds), (LexisNexis, Wellington, New Zealand 2007).

⁵⁴Family Court Practice Note (n 24).

⁵⁵<https://www.gmc-uk.org/-/media/documents/gmc-guidance-for-doctors-acting-as-a-witness-in-legal-proceedings_pdf-58832681.pdf?la=en&hash=DC63C652FAFACF8D94A5550E79C19F9020823493> accessed 22 June 2020.

⁵⁶Doctors Defence Service (UK), ‘Expert Witness Doctors Can be Subject to GMC Misconduct Proceedings’ (2017) <<https://doctorsdefenceservice.com/doctors-who-act-as-expert-witnesses-may-be-subject-to-gmc-mpts-misconduct-proceedings/>> accessed 4 December 2020.

medico-legal or forensic contexts.⁵⁷ This guideline establishes a basic standard of practice and outlines the role of the psychiatrist when responding to a referral request for a report, along with best practice in conducting independent medical examinations, report writing and adherence to appropriate professional standards. However, there is no detail concerning how expert knowledge is assessed or kept up to date, nor does the guideline specifically address family violence.

The Medical Council of New Zealand underscores the importance of acting as a witness in litigation or formal proceedings: 'be honest in all your spoken and written statements. Make clear the limits of your knowledge or competence'.⁵⁸ The conduct of medical professionals is assessed by The Health Practitioners Disciplinary Tribunal, the Council's Professional Conduct Committees and the Health and Disability Commissioner against the Council's Good Medical Practice and the RANZCP Code of Ethics.⁵⁹

In the United Kingdom the Royal College of Psychiatrists further extend the work of the GMC and underscores the importance of psychiatrists querying their own ability to respond to questions asked of them in court, especially in relation to family cases and in the safeguarding of children and young people.

It is not unusual for courts of any sort to ask doctors questions that are outside their expertise and more properly the province of a different expert witness. Psychiatrists giving evidence need to be clear what role they are performing in court, and be prepared respectfully to advise the court

that the question would be more properly addressed to another expert, or that it is outside their area of skill or knowledge.⁶⁰

This raises at least two issues with respect to family violence experts within the criminal court: (1) that the court understands the qualifications, skills and experience necessary to fulfil the role of a family violence expert; and (2) that the criminal court is aware of when a family violence expert may be required. In other words, to seek expertise requires an understanding of the issue under investigation and areas of knowledge that an expert may contribute.

The High Court Rules⁶¹ currently only apply to civil courts in Aotearoa New Zealand. Yet these rules provide guidance on considering the qualifications of the expert witness and the completeness of their testimony. The High Court Rules also allow for a Duty to Confer where there are differences of opinion between expert witnesses to resolve such differences. In their review of the *Evidence Act 2006*, The Law Commission expressed the view that the High Court Rules should also apply to the criminal court and it is the experience of the authors that some forensic mental health assessors have voluntarily included these in their expert witness reports for the criminal court.

While 'expertise' may be based on formal qualifications, there are few family-violence specific qualifications available in Aotearoa New Zealand. As highlighted by the Royal College of Psychiatrists, there has to be clarity around a specialist's 'area of expertise'.

An expert can testify to a body of knowledge and experience that is sufficiently organised and recognised; of which the court or jury members would

⁵⁷The Royal Australian & New Zealand College of Psychiatrists, 'Professional Practice Guideline 11: Developing Reports and Conducting Independent Medical Examinations in Medico-Legal Settings' November 2020.

⁵⁸The Medical Council of New Zealand, 'Good Medical Practice' (Medical Council of New Zealand December 2016).

⁵⁹The Royal Australian & New Zealand College of Psychiatrists, *Code of Ethics* (5th edn, RANZCP, Melbourne Australia 2018).

⁶⁰Keith Rix, Nigel Eastman and Gwen Adshead, 'Responsibilities of Psychiatrists Who Provide Expert Opinion to Courts and Tribunals' (College Report CR193 September 2015) 12.

⁶¹Section 26(1). The Code is recognised by r 9.43 of the High Court Rules 2016 and r 9.34 of the District Court Rules 2014.

not have knowledge or experience; and that will be of assistance to the court. An expert has sufficient knowledge of the subject acquired by study or experience; they may have professional qualifications in their subject, but professional qualification does not necessarily confer 'expert' status. The test is one of 'skill'. Skill is often acquired by study and the acquisition of professional qualifications, but it can also be acquired by experience alone, which amounts to repeated contact with the subject in the course of the expert's work. And such skill has to be paired with reasoning ability sufficient to inform the court or tribunal.⁶²

When applied to family violence experts, the Royal College of Psychiatrists definition of expertise extends beyond what would be achievable for many psychiatrists by requiring 'repeated contact with the subject in the course of the expert's work' and 'reasoning ability sufficient to inform the court'. Such a specialist understanding requires specialist training and ongoing engagement with family violence dynamics and literature in a critical and informed manner. Because of the usefulness of observations and experience, refuge workers and other such helping agencies are considered ideal for providing expert witness testimony. However, practical knowledge needs to be supplemented with an understanding of current literature to provide additional substance to the testimony, address controversies and be able to respond to counterpoints. Where there is a lack of formal training for family violence specialists, there cannot be expected to be agreed standards of knowledge, nor an expectation of participation in core courses.

In a discussion on how to introduce expert evidence into sexual violence and domestic violence cases, the US Office on Violence Against Women has suggested a series of questions to understand practical and theoretical experience in responding to intimate

partner violence.⁶³ The questions acknowledge the importance of practical experience as well as theoretical understanding of intimate partner violence and highlight the willingness for expert witnesses to act for both the prosecution and the defence. This final point accentuates their role as providing an informed opinion to the courts.

Reviews of skills and training required for expert witnesses have identified that key concerns described by judges and lawyers include: the abandonment of objectivity; dubious validity or reliability; and conflicts amongst experts.⁶⁴ To avoid these, it is necessary for experts to be adequately prepared and their testimony to be grounded in an established body of knowledge.⁶⁵ Osthoff and Maguigan (2005) believe that family violence experts should be able to provide an understanding of the complex dynamics of abuse perpetrated within a relationship without pathologising the survivor.^{66 67} Such an understanding could include concepts such as power and control, coercive control, social entrapment and violence as a pattern of behaviour (see Box 3). In contrast, dated notions such as 'battered woman

⁶³J Long, 'Introducing Expert Testimony to Explain Victim Behaviour in Sexual and Domestic Violence Prosecutions' (American Prosecutors Research Institute 2007) 61–63 <<https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=1040>> accessed 12 May 2020.

⁶⁴MT Johnson, C Krafka and JS Cecil, 'Expert Testimony in Federal Civil Trials: A Preliminary Analysis' (2000) <<https://www.fjc.gov/sites/default/files/2012/ExpTesti.pdf>> accessed 14 May 2020.

⁶⁵KJ Ferraro and NB Busch-Armendariz, 'The Use of Expert Testimony on Intimate Partner Violence' (2009) <https://vawnet.org/sites/default/files/materials/files/2016-09/AR_ExpertTestimony.pdf> accessed 12 May 2020.

⁶⁶S Osthoff and H Maguigan, 'Testimony on Battering and its Effects' in DR Loseke, RJ Gelles and MM Cavanaugh (eds), *Current Controversies on Family Violence* (Sage Publications, Thousand Oaks, CA 2005) 225–40.

⁶⁷Indeed, given the association between mental health and addiction problems and family violence, it is equally important that family violence experts are able to recognise when pathology does exist.

⁶²Rix, Eastman and Adshead (n 60) 7.

syndrome' that pathologise the woman imply that all women respond to violence in the same way,⁶⁸ irrespective of the racial and socio-economic disparities that they experience.⁶⁹ Substantiating contemporary understandings by referencing relevant material and providing an awareness of conflicting positions on contentious issues (backed up by an evidence-based position on such issues) provides weight to the value of expert witness testimony or report writing. **Supplementary Appendix 1** proposes a framework for establishing that a person can be considered a 'family violence expert' for the purposes of presenting to criminal cases, as drawn from relevant case law and the principles outlined in this paper.

Box 3

In *Becoming Better Helpers*, the FVDRC outlined the importance of language to provide a more accurate description of the violence women were experiencing.

The language policy makers and practitioners use redefines women's experiences of abuse, often minimising, disregarding or refuting the victim's version of events (page 27).⁷⁰

The following terms help to highlight the context in which the violence is taking place:

- power and control: an outcome of the use of multiple different strategies (including threats, intimidation, emotional abuse, isolation, minimising, economic abuse,

using children) to dominate an intimate partner⁷¹

- coercive control: a combination of the use of force or threats to intimidate or hurt victims and instil fear, and tactics designed to isolate the victim and foster their dependence on the abusive partner⁷²
- social entrapment:
 - the social isolation, fear and coercion the abusive partner's violence creates in the victim's life
 - the indifference of powerful institutions to the victim's suffering
 - the ways in which coercive control (and the indifference of powerful institutions) can be aggravated by the structural inequities of gender, class and racism⁷³
 - violence as a pattern of behaviour: there is a pattern of behaviours that can encompass multiple victims (adults and children) – past, current and future.⁷⁴

Becoming Better Helpers was based on an Interactional and Discursive View of Violence and Resistance proposed by Coates and Wade (2007). The analytic framework is centred on six tenets:

Interaction

1. Violence is social and unilateral: Violent behaviour is both social, in that it occurs in specific interactions comprised of at least two people, and unilateral, in that it entails actions by one individual against the will and well-being of another.
2. Violence is deliberate: The perpetrators of violence anticipate resistance from their victims and take specific steps to suppress and conceal it. Virtually all forms of violence and systems of oppression entail strategies designed specifically for the suppression of overt and covert resistance.
3. Resistance is ubiquitous: Whenever individuals are subjected to violence, they resist. Alongside each history of violence, there runs a parallel history of resistance. Victims of violence face the threat of further violence, from mild censure to extreme brutality, for any act of open defiance. Consequently, open defiance

⁶⁸M Gordon, 'Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women' in National Institute of Justice & National Institute of Mental Health, *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act* (NCJ Publication No. 160972, 1996) <www.ncjrs.gov/pdffiles/batter.pdf> accessed 23 June 2020.

⁶⁹J Tolmie and others, 'Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence' (2018) *New Zealand Law Review* 181–217.

⁷⁰D Wilson and others, 'Becoming Better Helpers: Rethinking Language to Move Beyond Simplistic Responses to Women Experiencing Intimate Partner Violence' (2015) 11(1) *Policy Quarterly* 25–31.

⁷¹ <<https://www.theduluthmodel.org/wheels/>> accessed 29 June 2020.

⁷²E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP 2007).

⁷³J Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, Boston 1999).

⁷⁴Family Violence Death Review Committee, 'Fifth Report: January 2014 to December 2015' (Family Violence Death Review Committee, Wellington 2016).

is the least common form of resistance.⁷⁵
Social Discourse

4. Misrepresentation: Misrepresentation is an ever-present feature of asymmetrical power relations⁷⁶ and personalized violence. In cases of violence, public appearances are often highly misleading and the risk of inadvertent collusion with the offender is high.

5. Fitting words to deeds: There are no impartial accounts. All accounts of violence influence the perception and treatment of victims and offenders. Where there is violence, the question of which words are fitted to which deeds is crucial.⁷⁷

6. Four discursive operations: Language can be used to conceal violence, obscure and mitigate offenders' responsibility, conceal victims' resistance, and blame and pathologize victims. Alternatively, language can be used to expose violence, clarify offenders' responsibility, elucidate and honour victims' resistance, and contest the blaming and pathologizing of victims.⁷⁸

The importance of language

Providing evidence that describes the observed patterns of violence in an intimate relationship provides a more accurate analysis of the violence perpetrated as well as actions of resistance.⁷⁹ The writing of Praxis International highlights how such evidence presented factually (describing observations and facts) rather than subjectively (through pathologising and diagnosing) can result in objective and clear documentation or testimony, which is less subject to attack from opposing lawyers and provides less conflict among experts.⁸⁰ However, the idea that expert witness testimony is objective may be, in itself, a myth. Coates and Wade (2007) have highlighted that the presentation of 'facts' as they are collated within

⁷⁵JC Scott, *Domination and the Arts of Resistance* (Yale University Press, New Haven, CT 1990).

⁷⁶Scott (n 75).

⁷⁷B Danet, "'Baby' or 'Fetus'? Language and the Construction of Reality in a Manslaughter Trial' (1980) 32 *Semiotica* 187–219, 189.

⁷⁸Coates and Wade (n 20) 513.

⁷⁹Tarrant, Tolmie and Giudice (n 47).

⁸⁰<<https://praxisinternational.org/wp-content/uploads/2016/02/BPSupp5CTrainingMemo-UseofExpertWitnessesinDomesticViolenceCases.pdf>>

statutory agency records may bring bias into the court process.

Even in comparatively safe and civil circumstances, language is far from a neutral medium of exchange: the practice of everyday life, from the most mundane to the most elevated pursuits, requires that all individuals participate to some degree in the 'politics of representation'.⁸¹

Indeed, 'objective' language can be minimising, mutualising and sanitising, obfuscating actual experiences of violence and playing into the account of the perpetrator. Box 4 provides an example of the misuse and use of accurate language, using observations and facts to provide more comprehensive understandings.

Box 4

Drawn from *Becoming Better Helpers* (pages 29 and 30, this case example is based on FVDRC death reviews with all identifying features changed).

Misuse of language – labelling and blaming

Rachel and Tim have a volatile relationship, which is characterised by lots of arguing, drinking and fighting. They both get physical. Last night there was a domestic incident and Rachel got hurt. While agencies are aware that Rachel can give as good as she can get, she is failing to protect her children from witnessing violence in their home. Rachel needs to leave Tim and stop drinking, so her kids can have a stable home environment that is violence free. Lots of agencies have been involved but Rachel keeps choosing to stay with Tim and continue drinking, rather than make the changes needed for her kids. Rachel needs to put her children needs over hers and her partner's.

Accurate language

Tim has a history known to multiple agencies of using coercive controlling behaviours towards Rachel, as well as his previous partners. Rachel and Tim have been in a relationship for ten years. Tim is 15 years older than Rachel; they met when Rachel was 16 and a young mother of her first child, Jason, who was conceived as the result of rape. Rachel has had two children, both daughters, with Tim.

⁸¹Coates and Wade (n 20) 512.

Tim has strangled Rachel before to the point that she has lost consciousness, and he has threatened to kill her if she leaves him. Rachel's use of alcohol has increased over the years as a way of numbing and blocking out the abuse. Both her parents were alcohol-dependent. Rachel violently resists Tim's abuse. She has armed herself with a knife to try and stop him assaulting her. Last night Tim was verbally abusing and threatening to beat Jason for truanting from school. Rachel grabbed a broom and stood in front of Jason; she threatened to hit Tim with the broom if he approached them. Tim grabbed a bottle of wine and smashed it onto Rachel's head, causing her to fall to the ground. Tim then kicked Rachel repeatedly in her back and head. Jason was screaming and ran to his mother's aid. A neighbour heard Jason's screaming and called the police.

In the United Kingdom, there are now established requirements that experts in family cases will have appropriate knowledge; be active in the area of practice or have sufficient experience of the issues; have relevant qualifications; have received appropriate training; and be compliant with safeguarding requirements.⁸² As highlighted by Ellison below, experts can also provide a comprehensive account of the actions of victim/survivors, and how these actions are not “counterintuitive”.⁸³

Significantly, the explanations offered for complainants' behaviour are not tied to a medical or psycho-pathological model nor are they profile orientated. The expert draws instead on generalised social science data to provide a context against which a complainant's account can be more fairly assessed. Because of this the criteria for choosing an expert witness are markedly different ... a rape counsellor, a police officer or a social worker with relevant knowledge and experience. For example, in *State v Horne*, the 18-year-old complainant was kidnapped at gunpoint, subjected to a number of violent sexual acts and raped twice by the defendant in the back of a car. At trial, a police officer called by the defence was asked to

confirm that the complainant's initial report to the police made no mention of the complainant having been raped more than once by the defendant. The officer, who had interviewed more than 300 rape complainants, verified that this was the case but significantly added that this was not in itself unusual. When pressed further on this ... the officer was allowed to testify on the common tendency of rape victims to omit specific acts from their descriptions. Victims, the officer explained were often upset and 'reluctant to talk about everything that happened' ... victims are often embarrassed and 'have a very difficult time talking about something like this occurring to them shortly after. (page 257)⁸⁴

Appropriate cultural understandings are also important. Choate has underscored the re-traumatising impacts of using Western concepts to understand Indigenous experiences, especially in relation to matters of child protection.⁸⁵ Wilson and colleagues extend this further, highlighting the impact of system entrapment on wāhine Māori.⁸⁶ They describe four tenets of systemic entrapment, expanding on the concept of social entrapment defined by Tolmie and colleagues:

- Fear their tamariki will be removed for child protection concerns;⁸⁷
- Fear of encountering people who display prejudice, negative stereotyping and racist attitudes and behaviours that lead to disrespectful and ineffective responses and deficit-framing;

⁸⁴L Ellison, 'Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases' (2005) (9) *The International Journal Of Evidence & Proof* 239-68 <<https://www.rapecrisisscotland.org.uk/publications/ClosingTheCredibilityGap-Ellison.pdf>> accessed 14 May 2020.

⁸⁵<<http://www.reimaginingocialwork.nz/2019/10/the-expert-witness-as-cultural-oppressor/>> accessed 12 May 2020.

⁸⁶wāhine Māori translates as Maori women.

⁸⁷Tamariki translates as children.

⁸²Rix, Eastman and Adshead (n 60).

⁸³Rix, Eastman and Adshead (n 60).

- Encountering unhelpful and dismissive people who should be helping them; and
- Ineffective and unsuccessful access to the support they need.

‘We found systemic entrapment of wāhine to be a significant barrier in making it difficult for them to leave ... the significant role the family violence system plays in the entrapment of wāhine Māori ... simply continuing to ‘blame’ wāhine for their plight and their neglectful mothering is unacceptable. The social response wāhine receive when they approach services is a determiner of the outcome for them.⁸⁸ Importantly, the system does little to identify their strengths and the courage they possess to keep themselves and their tamariki safe amidst the adversity within and outside of their homes’.⁸⁹

Although not specifically addressing the need for culturally appropriate expert witnesses, Wilson and colleagues draw on the work of Schnitzler to ensure accurate representation of the experiences of all women:

The misrepresentation and underrepresentation of Indigenous women is deeply rooted in colonial ideals and will not be disassembled until our society adopts a decolonized mindset. ... Every woman who has been a victim of violence deserves to be heard and remembered in a meaningful way. They are worthy; they must be brought to the front page.⁹⁰

⁸⁸D Wilson and M Webber, ‘The People’s Report: Addressing Child Abuse and Domestic Violence’ (2014) <http://ndhadeliver.natlib.govt.nz/delivery/DeliveryManagerServlet?dps_pid=IE21610016&dps_custom_att_1=ilsdb>

⁸⁹D Wilson and others, *E Tū Wāhine, E Tū Whānau: Wāhine Māori Keeping Safe in Unsafe Relationships* (Taupua Waiora Māori Research Centre, Auckland, NZ 2019) 65.

⁹⁰L Schnitzler, ‘Bringing Her to the Front Page: An Analysis of Missing and Murdered Indigenous Women’s Representation in Canadian Media’ (2019) 3(1) *Ab-Original: Journal of Indigenous Studies and First Nations and First Peoples’ Cultures* 143–47 <<https://doi.org/10.5325/aboriginal.3.1.0143> pp 146>

Conclusion

This paper provides an overview of the place of family violence expert witnesses and report writers within the court system, and the skills and experience necessary for accurate testimony, as drawn from international literature and the work of the Family Violence Death Review Committee. Of note is the focus on experience in working with survivors and offenders to provide an understanding of the nature and dynamics of violence experienced within a relationship and address common myths and misconceptions, particularly in relation to the effective nature of the current family violence safety system.

At present, there is no formal training for family violence experts for the courts in Aotearoa New Zealand. Such training should supplement professional/practice-based experience and include:

1. An understanding of common myths and misconceptions
2. Historical and contemporary understandings of the nature and dynamics of family violence
3. An overview of current, relevant literature
4. How to present consistent, high quality, evidence in court reports and expert witness testimony.

Topic-specific knowledge should be supplemented with sessions providing an overview of the High Court Rules and court processes, and bestpractice guidance for report writing.

To address concerns about the need for contemporary knowledge, it is the view of the Family Violence Death Review Committee that experts in this field should be provided with refresher training to ensure they are aware of developments in the field. To address issues associated with experts providing evidence outside of their field of expertise, it is recommended that a licencing or accreditation system is formed that acknowledges previous experience (including service delivery), topic

area expertise, completion or delivery of recognised papers or qualifications (and on-going professional learning). Additional work is required to derive a consensus understanding of the components of a family violence qualification.

Without there being a contemporary, comprehensive understanding of family violence amongst judges, police prosecution and defence lawyers, expert evidence from trained and experienced specialists is required. To enhance the educative role of family violence expert evidence, such evidence should be called by the court in criminal cases considering offending by one family member against another. Consideration should be given to an inquisitorial approach to family violence expert evidence.

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