

False

Therapists are the targets

In February 1992, a private, non-profit corporation called the False Memory Syndrome Foundation was created. If the principals behind this Foundation have their way, those who counsel, treat and litigate on behalf of sexual abuse victims may soon find themselves very much on the defensive.

"False Memory Syndrome" (FMS) is a term coined by the Foundation to describe a psychological condition in which a patient is purportedly convinced by her therapist that she was a victim of childhood sexual abuse that actually never happened.

The Foundation claims that psychotherapists regularly reconstruct and reinterpret the childhood memories of adult females in order to create a "sex abuse industry". As a result, too many innocent adults are charged and convicted of sex crimes against children, sex crimes that did not occur.



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Memory

in new sexual assault defence theory

Syndrome:

BY SUSAN M. VELLA

FMS has not yet been accepted as a defence to criminal charges, but that is certainly a Foundation goal. A second ambition is to silence those psycho-therapists who the Foundation claims are abusing the legal system.

The Foundation claims that adult survivors of childhood sexual abuse cannot have repressed memories for a decade or more because the incidents alleged would have been so traumatic that they could not have been repressed in the first place, or that they would have been triggered much earlier. Hence, if decade-delayed memory recovery occurs during the course of therapy, the memory recovered must be a fictional truth planted in the patient's mind by the therapist for his or her own financial gain.

Put so simply, the Foundation's approach has a certain appeal. But the matter is not simple. What is lacking in the Foundation's analysis is a balanced picture of the likelihood of someone falsely accusing a parent or a trusted person of childhood sexual abuse through the recklessness or maliciousness of a psycho-therapist.

Clinical studies have already concluded that false claims of childhood sexual abuse are demonstrably rare.

Accordingly, say those psychiatrists opposing "false memory syndrome", false memories of childhood trauma are likely to be equally rare.

The consensus of researchers in the field is that false complaints by children are in the 2-8% range of reported cases. In fact, retractions of true complaints are far more common, especially when the victim is insufficiently protected after disclosure and therefore succumbs to intimidation by the perpetrator or other family members who feel that they must preserve secrecy.

Apparently, only one study has been conducted directly addressing whether repressed memories of childhood sexual abuse could be verified by independent corroborative evidence. In that study, 53 self-identified survivors of sexual abuse who recalled repressed memories of sexual abuse were asked to find independent corroborative evidence of their claims. Seventy-four percent were able to find such evidence.

Furthermore, partial or complete amnesia from childhood trauma is well-documented, contrary to the Foundation's claims. In a follow-up study of 200 adults who had been treated as children for sexual abuse, Linda Meyer Williams of the Family Violence Research Laboratory in New Hampshire,

found that one in three did not recall the experiences that had been documented in their hospital records 20 years prior.

Interestingly, the Foundation's stereotype of a likely victim of false memory syndrome is exclusively female. This gender-biased stereotype is reminiscent of a former stereotype which used to inform our evidentiary rules requiring corroborative evidence in childhood sexual assault cases. In his 1940 textbook on evidence, John Wigmore made the following comments:

"Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men."

The law of evidence has evolved beyond this blatant stereotype of women but the Foundation may not have kept pace. It goes so far as to recommend that accused parents sue their children's therapist for injunctive relief and damages on the grounds that the therapist is engaging in malpractice and deliberately interfering with the parental relationship with his child.

Counselling third party claims against survivors' therapists accomplishes three goals:

- it disrupts the on-going treatment of the survivor at a time when therapy is most crucial (i.e., while the litigation proceeds);
- it provides a financial disincentive to therapists taking on patients where repressed memories of childhood sexual abuse are at issue; and
- it hampers the effectiveness of therapy by requiring therapists to seek independent corroborative evidence of childhood sexual abuse before they can consider that possibility seriously.

In effect, the Foundation is advocating litigation, not to seek redress, but to discourage therapists from diagnosing childhood sexual abuse when repressed memories are released dur-

Le Syndrome de la mémoire fictive

La Fondation du syndrome de la mémoire fictive, une corporation à but non lucratif, a vu le jour en février 1992. Pour les avocats des victimes d'agression sexuelle, voilà une bien mauvaise nouvelle...

Le Syndrome de la mémoire fictive (SMF) apparaît lorsqu'un thérapeute réussit à convaincre une patiente qu'elle a subi une agression sexuelle au cours de son enfance, alors qu'en réalité, cette agression n'a jamais eu lieu.

La Fondation prétend que l'interprétation donnée par des psychothérapeutes aux souvenirs d'enfance de femmes adultes a créé une « industrie de l'agression sexuelle » et permis de condamner un certain nombre d'innocents.

La Fondation poursuit un objectif double : faire accepter le SMF comme argument de défense, et réduire au silence les psychiatres qui, aux dires de la Fondation, abusent du système judiciaire.

Des recherches ont cependant démontré que les plaintes mensongères ne représentent que de 2 à 8% des cas rapportés. De fait, il arrive beaucoup plus fréquem-

ment que des plaintes fondées soient retirées parce que la victime succombe aux pressions et à l'intimidation?

Dans la seule étude portant sur des souvenirs refoulés d'agression sexuelle durant l'enfance, on a demandé à 53 « victimes » de prouver l'exactitude de leurs allégations. Soixante-quatorze pour cent d'entre elles ont réussi!

De fait, invoquer le SMF n'aboutit qu'à perturber le traitement de la victime à un moment critique, à augmenter les coûts et à réduire l'efficacité de l'intervention en obligeant le thérapeute à rechercher un témoin indépendant de l'agression. Les arguments de la Fondation ne se fondent sur aucune information scientifique, et proviennent d'un groupe de personnes qui ont tout intérêt à promouvoir le SMF : les parents accusés.

Le recours au Syndrome de la mémoire fictive pourrait même, dans le contexte social actuel, provoquer un ressac à l'endroit des adultes victimes d'agression sexuelle durant leur enfance. Les avocats feraient mieux de s'informer avant d'invoquer un « diagnostic » médical qui n'a pas encore reçu l'aval des associations professionnelles compétentes.

ing the course of therapy. However, at Common Law, it is at least doubtful that a cause of action exists which would recognize a third party claim against the plaintiff's therapist at the suit of the defendant parents. For example, in 1991, the England's Court of Appeal expressly rejected as a tort the claim of unlawful interference with parental rights. The American common law position, however, is much more ambiguous.

Furthermore, the power of psycho-therapy to impose this elaborate form of mind control is not substantiated. One must remember that psycho-therapy is not a form of coercive interrogation, and it is improper for the Foundation to make that comparison. The power imbalance between patient and therapist is generally not nearly extreme enough to impose this form of mind manipulation.

Despite its clinical ring, the so-called false memory syndrome appears to be a theory created by those seeking to defend accused child molesters. For a trial judge, false memory syndrome offers a potentially attractive theory for finding an accused innocent.

Rather than having to suggest that the victim/complainant is lying, the judge need merely point to the "criminally negligent" therapist for having created a false memory in the patient. This is facilitated by the FMS Foundation's proponents stated belief that an adult survivor honestly believes her memory of childhood sexual abuse to represent the truth because of her therapist's brainwashing techniques.

Upon closer examination, the "facts" surrounding "false memory syndrome" do not hold up to scrutiny. The Foundation makes unproven analogies to support the assertion that children who are sexually abused can never repress memories of that abuse for any significant length of time. For example, it claims as evidence the fact that there are no accounts of repressed memories among Holocaust survivors. Whether this is true or not, there is a crucial distinction between incest and Holocaust survivors: the latter were not abused by persons in a special relationship of trust.

Second, the Foundation relies on implausible extensions of "logic" to support its theory. For example, the Foundation writes:

"Just because a person recovers vivid memories of abuse by space aliens does not mean that space aliens have invaded our planet. Just because someone recovers vivid memories of past lives does not establish the reality of such lives. Just because someone recovers memories of abuse during some sort of therapy does not mean that it really happened."

Through such comparisons, the Foundation trivializes the experiences of incest survivors. It also fails to acknowledge the many obstacles — legal, emotional and financial — already confronting adult survivors of childhood sexual assault seeking to vindicate themselves in our criminal and civil justice systems.

The Foundation fails to acknowledge the many technical legal barriers facing an adult survivor of sexual abuse in her quest for justice. Most provinces, including Ontario, have a statute of limitations which may prohibit a survivor from launching a civil law suit alleging sexual assault after a certain fixed time period. Notwithstanding the recent Supreme Court of Canada decision rendered in *(K)M. v. (H)M.*, (1992) 3S.C.R. 3, and its more liberal application of the doctrine of reasonable discoverability to postpone the operation of these limitation

periods, there are still potential time-related defences. For example: what if the child's case was brought before the criminal court several years earlier and a plea of guilty was entered? Will the doctrine of reasonable discoverability still apply to postpone the commencement of limitation period to the now adult survivor's psycho-therapy?

Even if the survivor is not barred in this way from launching a suit, she bears the burden of proof; she must demonstrate on a balance of probabilities that she was abused by the defendant, often in circumstances where there is no eye-witness. Adverse inferences may also be drawn against a survivor by the usual difficulty she may have in recalling exact dates and full particulars of each incident of childhood sexual abuse. Furthermore, law suits are prohibitively expensive for survivors, who may have suffered career impediments as a result of the childhood trauma.

While the Foundation attempts to endow the statistics and conclusions with an aura of authenticity and relia-

bility, it nonetheless admits that these are based on surveys "comprising of a record of the story that people tell us, [and] and that we have no way of verifying the stories". It appears that the Foundation is relying on information that comes from people with a vested interest in advancing the merits of a "false memory syndrome" defence: accused parents.

In addition, the "false memory syndrome" has yet to be classified as a medical or psychiatric diagnosis in either Canada or the United States. It will take substantial clinical studies before the medical community can characterize this alleged condition as medically valid on an individual basis, much less a "syndrome" which connotes a wide-spread phenomenon.

The allegations of ulterior motive made against survivors' therapists can be turned against false memory syndrome proponents. The very establishment of a Foundation by psychiatric academics with chapters throughout the United States, and now certain Canadian provinces, mail-in information kits, and counter-offensive litiga-

tion strategies suggests that advocates of the theories are seeking to carve out a niche for themselves as experts in the "syndrome".

Those seeking judicial acceptance of the FMS Foundation's chief argument have received cold comfort from the Supreme Court of Canada. *(K)M. v. (H)M.* In accepting the plaintiff's long-repressed allegations of childhood sexual abuse, the court relied on the doctrine of reasonable discoverability, and implicitly accepted the validity and credibility of the plaintiff's repressed memory. In fact, challenges surrounding the accuracy of memory are nothing new to the legal system and advocates alike.

Legal advocates must not misuse the justice system to perpetrate a social backlash against survivors of childhood sexual abuse. We have a duty to educate ourselves before we advocate a medical "diagnosis" which has yet to be recognized as such by the relevant professional associations in Canada. •

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