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THE LIMITATIONS OF LAW PERTAINING TO  
INCEST CASES.

OBSERVATIONS OF THE CONFINES INHERENT IN THE CURRENT  
CRIMINAL JURISDICTION OF THE COUNTY COURT OF VICTORIA,  
WHICH MAY LIMIT JUSTICE FOR THE VICTIMS OF INCEST, AND  
THE RESULTANT EQUIVOCAL FOOTING OF SOCIAL POLICY IN  
THIS ARENA.

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The limitations of law  
pertaining to incest cases :  
observations of the confines

Except where due acknowledgement of other material has been made in the thesis, this thesis comprises my own original work and it has not been submitted previously for examination at this or at any other university.



Freda Charlotte Minas  
29 January 1997

## ABSTRACT

The crime of incest is rendered invisible in the 1990's under the all-embracing label of "child abuse", where the public eye is alerted to grave cases of physical abuse, by a media hungry for sensationalism. Likewise, incest is effaced amid the current outrage over the deviant outsider - typically perceived as the paedophile.

It is the very nature of the sphere in which incest is committed, which makes the crime 'hermetic'. The view that the patriarchal family is somehow sacrosanct, and the debate over the public/private dichotomy relating to child protection, adjoin to further obscure this iniquity. In addition to this, the perpetrators of incest frequently deny, minimise or rationalise their crime, hence making the legal sphere the only legitimate area of redress for victims.

However, the law attempts to deal with these private moral perplexities in the objective and constrained manner representative of the court system. This may not be reconcilable with just outcomes.

Social policy's footing in this arena appears to be equivocal, due to the inherent confines of the legal system. But the legal system, and in particular the court arena, can be made more equitable, by being flexible and amenable to innovation, through the embodiment of other areas of expertise. Instead of being self-referential, the legal system should be more accommodating of other esteemed knowledges, in the name of justice.

## IN APPRECIATION

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## **BREAKDOWN OF CASES OBSERVED**

The Cases referred to are as follows:

Case 1      Trial A      Trial B.

Case 2      Trial A.      Trial B.

Case 3.      Trial.

Plea 1

Plea 2.

Plea 3.

## OUTLINE OF CASES

### CASE 1

This case involved two of the accused's natural daughters aged 13 and 9. The abuse had been going on for about five years and was only reported after the older of these daughters<sup>1</sup> confided in a school friend, who convinced her that she should tell the school principal. Both daughters gave evidence to the effect that their father had threatened them that if they told of the abuse, their mother would get angry and hit them, or that she would leave home. The abuse had occurred when the mother was at work, early in the morning.

On the video screen, both these daughters came across as very honest and credible witnesses. When the 13 year old was cross-examined by the Defence, who suggested that she had merely copied a scenario of abuse told to her by a friend, her poignant reply was simply - it is my story.

This case was severed into two separate trials (one for each daughter involved) and spanned a period of three weeks (including legal argument).

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<sup>1</sup> There were three daughters and one son in this family; it appeared that the eldest daughter and the son were not victims of the father's sexual abuse.

CASE 1.TRIAL A.Prohibition of Publication order in place.

<u>Expert witness used by the Crown during the trial.</u>	Forensic specialist doctor.
<u>Victim:-</u>	natural daughter - 13 years old at the time of the trial.
<u>Abuse</u>	since the age of 9 years
<u>Closed-circuit television used for child's evidence.</u>	
<u>Mother supportive of daughter.</u>	
<u>10 counts<sup>2</sup> of sexual assault (including vaginal penetration, anal penetration and indecent assault).</u>	
<u>Duration of Trial:</u>	approximately two and a half weeks (including legal argument)
<u>Verdict:-</u>	found guilty on 7 counts.
<u>Sentencing:</u>	yet to be sentenced. Plea and further plea have been attempted.

Three experts were available at the further plea stage, but the court required the experts to give oral evidence, due to decided differences in their opinions of the accused's mental state of health.

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<sup>2</sup> Only counts definable by place and date can be brought to trial in incest cases. It is often difficult for a child to remember dates and places, especially when the abuse has occurred frequently, over a long period of time; hence, often only a small number of the actual offences committed are brought to trial.

CASE 1TRIAL B.Prohibition of Publication Order in place

Expert witness used by the Crown during the trial. Police forensic physician.

Victim:- natural daughter - 9 years at the time of the trial.

Abuse:- since 5 years of age.

Closed-circuit television used for child's evidence.

Mother:- supportive of daughter

2 counts of sexual assault (vaginal and anal penetration)

Duration of trial:- 3 days  
(including legal argument).

Verdict:- found guilty of both counts.

Sentencing:- still to come (see Outline of Cases Trial A p. ix SENTENCING) The accused will be sentenced on guilty counts for both trials at the one time.

POSTSCRIPT

I spoke to the O.P.P. (Office of Public Prosecutions) solicitor in October, who told me that it still may be some time until the sentencing for this case comes up, as only one of the four reports required by the court had arrived as yet (see Ch 5. pp. 52-53.

EXPERTS' REPORTS TO BE CONSIDERED FOR  
USE AT THE PLEA AND SENTENCING STAGE).

## CASE 2

This case, at the outset, had involved two stepdaughters and two natural daughters (now adult women), plus two other complainants who were more distantly related to the accused. The only trials that actually proceeded concerned the eldest stepdaughter of the accused.

It was alleged that the accused had sexually abused these stepdaughters and natural daughters for many years. The victims gave evidence that they had been told not to tell of the abuse, as they would either not be believed, or would be blamed for what had occurred<sup>3</sup> However, at one stage, three of the accused's daughters went to the police, in a country area where they lived at the time, to report the abuse;<sup>4</sup> sadly, this was to no avail, as both the accused's and his wife's denials were believed. The accused was found guilty of incest with his eldest stepdaughter only, when she was approximately 14 years of age and sentenced to 18 months jail.<sup>5</sup>

The victim whose case went to trial in 1996 was extremely distressed throughout the whole process. It was revealed that she had given birth to the accused's child when she was only 16 years of age; her daughter was told about her paternity for the first time as the case went to court. The court also learned that the other three daughters had become

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<sup>3</sup> At the age of 9, the eldest stepdaughter had been raped by her stepfather and then taken to hospital by him the next day (at his wife's request) with serious bleeding and extensive internal injuries. The accused had sat the child on his knee while she was asked what had happened; the story that her stepfather told her to relate, was that she had fallen on a stick.

<sup>4</sup> The eldest stepdaughter was not involved in this reporting.

<sup>5</sup> The accused's sister reported the incest to the authorities at this time.

alcoholics as a result of the abuse, and that it was through one daughter's disclosure of the abuse at a counselling session, that the incest was reported again after so many years.

The trial of the first victim was severed into two separate trials; the case spanned a period of approximately 12 weeks (including legal argument).

CASE 2TRIAL AProhibition of Publication Order

<u>Expert witnesses:- used by the Crown during the trial.</u>	report from deceased surgeon.  two forensic specialist doctors
<u>Whiteboard</u>	used in this trial.
<u>Victim:-</u>	stepdaughter of the accused - in her thirties at the time of the trial.
<u>Abuse:-</u>	since the age of 9 or earlier. (lived with stepfather since the age of 4-5 years).
<u>Mother:-</u>	not supportive of daughter
<u>1 count:-</u>	of sexual assault (vaginal penetration) when victim was aged 9 years.
<u>Duration of trial:-</u>	3 weeks (including legal argument)
<u>Verdict:-</u>	found guilty
<u>Sentencing:-</u>	to take place at conclusion of all trials.

CASE 2TRIAL B.Explanation of the letter referred to in this trial.

A letter produced in evidence by the Defence, played a pivotal role in this trial. This letter was written by the eldest stepdaughter to her stepfather, after she had been sent to live with relatives in the country, following the accused's prior conviction for incest involving this particular stepdaughter. The victim was approximately 14 years of age at the time.

The letter expressed love for the accused and hatred towards "the world". It also referred to the stepfather's anger about the victim not being permitted to go to the beach with him; the victim appeared to take responsibility for this permission not being granted, and her separation from the accused. Hence, her eagerness to reassure her stepfather of her love for him.

This letter was subsequently referred to by the trial judge as a 'love letter', although the crucial evidence presented by the expert witness revealed that the letter should more properly be read as the child's expression of her need to accommodate the incest, by placating her stepfather and assuming the dramatic role of lover (expressed in a childlike manner in the letter), thereby sharing the blame or guilt in order to be closer to the accused. The expert also spoke of the "inappropriate sexualization" of a young incest victim, who learns to view and express 'love' as it has been shown to her.

It was advanced by the expert, that the victim's ardent attempts to show her love for the accused were accentuated by the fact that her life was devoid of a truly nurturing mother figure.

## CASE 2

### TRIAL B.

#### Prohibition of Publication Order.

Expert Witness used by the Crown during the trial

a specialist psychiatrist.

Victim:-

stepdaughter, as in Trial A

Abuse:-

as in Trial A

Mother:-

not supportive of daughter

5 counts of sexual assault (including incest and indecent assault).

Duration of trial:-

4 weeks, 2 days  
(including legal argument)

Verdict:-

found guilty on one count.

Sentencing:-

it was postponed at this stage as there was a proposed third trial involving three complainants.

## CASE 2

Proposed Trial C:- this did not eventuate.

Legal argument for proposed third trial.

3 Complainants

1 stepdaughter

2 natural daughters

Crown            applied for joint trial

Application    for joint trials was granted, after the judge was satisfied that there was no joint concoction amongst the victims.

Mother:-        not supportive of daughters.

2 other complainants in this case, but the Crown decided not to proceed with these charges. (These complainants were not daughters or stepdaughters - they were, it appeared, cousins or distant cousins.)

At this stage - the accused pleaded guilty to 10 counts of sexual assault relating to the proposed 3rd trial.

10 counts:-        include vaginal penetration, anal penetration and indecent assault.

Sentencing for Case 2

- 18 years with a minimum of 10 years.
- the accused was sentenced as a "serious sexual offender" (see Ch 5 p.79 SENTENCING ACT 1991).

Postscript

I have since learned that the Defence will appeal against the sentence in this case.

### CASE 3

This case involved the fifteen year old stepdaughter of the accused. The abuse had gone on for about eight years, even though over the last couple of years, the stepdaughter had been living with her grandmother. The victim gave evidence that threats, about not being believed and punishment from her mother, had been used against her by her stepfather in the event that she divulged the abuse. Prior to this case going to trial, the victim had withdrawn her complaint concerning the abuse once, and had then decided to go ahead with the allegations; it appeared that threats were made by the accused concerning the family's financial welfare when the allegations were first made.

The victim's mother did not appear to be supportive of her daughter; and her young half-brother was called by the Defence to testify against his sister. Her only allies appeared to be two faithful school friends and an ageing, resolute, grandmother, who all gave evidence for the prosecution.

## CASE 3 TRIAL

### No Prohibition of Publication Order

same judge as in Plea 2.

Expert witness  
used during this trial:-

Forensic Gynaecologist  
(also used in Case 2 Trial A).

Victim:-

stepdaughter of the accused - 15 years of age at the time of the trial.

Abuse:-

since the age of 7 years, or earlier.  
(The stepfather had been the victim's father-figure since she was 3 years of age.)

Closed-circuit television

used for victim's evidence.

Mother:-

not supportive of daughter

2 counts

of sexual assault  
(one of vaginal penetration and one of indecent assault).

Duration of Trial:-

approx. 1 week.

Verdict:-

the accused was found guilty on one count.

Sentencing:-

postponed pending psychiatric report  
ordered by the judge.

## Plea 1

This case was to be a trial, but at the last minute, the accused decided to plead guilty to all charges. The victim here, who was 19 years of age at the time of the trial, was the natural daughter of the accused. The abuse had commenced when the victim was 9 years of age or younger, and had continued for approximately 8 years. The abuse had occurred when the son, who experienced nightmares, would go to his parents' bed seeking comfort; as a result, the father would go to his daughter's room.

The mother in this case was fully supportive of her daughter, and had left the husband, taking her children with her, as soon as she knew of the abuse.

The accused read out an emotional letter in court, as a form of apology, but it spoke rather more of his own sense of loss than of his daughter's.

Victim:- natural daughter of accused - approximately 19 years of age at the time of this plea.

Abuse:- since the age of 9 years, or younger.

Mother:- supportive of daughter

14 counts of sexual assault (including vaginal penetration, anal penetration, and indecent assault).

Duration of Plea. 2 days.

Sentencing:- 8 years 3 months imprisonment with a non-parole period of 6 years. sentenced as a "serious sexual offender". (see Ch 5 p79 SENTENCING ACT 1991).

## Plea 2

This plea involved the natural 15 year old daughter of the accused. The abuse had started when the victim was 8 years of age and had continued for about 7 years. The accused had also committed an indecent act in front of two young boys at a church camp, showing that his sexual deviance went beyond the confines of his family. It was therefore put by the Crown that he was indeed a threat to the community at large. (See Ch 5. pp 73-74 A TREATING PSYCHOLOGIST AS EXPERT WITNESS)

In this case, the accused's viewing of his daughter's police interview, after his initial interview, had prompted his admission of guilt at his second interview. The mother was supportive of her daughter in this case.

The judge was the same as in Case 3 trial.

Victim:- natural daughter - approximately 15 years of age at the time of this plea.

Abuse:- since 8 years of age.

Mother:- supportive of daughter.

9 counts including incest, gross indecency and indecent act.

The accused was shown a videotape of his daughter's interview at the police station, before being interviewed for a second time.

Duration Plea:- 1 day.

Sentencing:- 5 years 8 months imprisonment with a 4 year non-parole period  
 - the accused could not be sentenced as a "serious sexual offender", because only one count fitted this category.  
 (i.e. there was only one charge of incest, see Appendix to Ch 1 pp 20-21)

### Plea 3

This plea involved the stepdaughter of the accused who was approximately 18 years of age at the time of the plea. The victim was intellectually disabled, and had the mental capacity of a child some years younger. The abuse started when the victim was 16 years of age, and had occurred frequently over a 2 year period. The accused's claim that the relationship was a consensual one was not accepted by the court (see Appendix to Ch 1 p.21). However, the perpetrator's remorse was given full credence, and certainly helped in reducing the accused's sentence considerably.

Victim:- Approximately 18 years at the time of the plea.

Abuse:- started when the victim was 16 years of age (however, the victim was intellectually disabled, hence her mental capacity was that of a child some years younger).

Mother:- appeared to be supportive of her daughter, but had attempted to stay with the accused after the abuse was reported; the daughter was sent away to a friend's house in the country at this time.

24 counts of sexual assault (including vaginal penetration, oral penetration and digital penetration).

Duration of Plea:- 2 mornings.

Sentencing:- 4 years imprisonment with a minimum of 20 months (all sentences to be served concurrently. see Ch 5. pp.79-80 Footnote 94).

(The Defence barrister had initially indicated his intention to cross-examine the victim in this case. Under these circumstances the Crown was going to request that the victim give evidence via closed-circuit television. None of the above eventuated.)

## CHAPTER ONE

### A Review of the Legal System and the Shifting Perceptions of the Crime of Incest.

#### THE CRUCIAL ROLE OF THE CRIMINAL COURT

A criminal court may be perceived by many in the community as being the last resort in solving a 'social problem'. But in cases of incest, this court may well be the only valid option when the crime is eventually revealed; hence, it needs to provide an equitable recourse. Melton (1987 in Bussey 1992, p.83) claims that, "the court proceeding can have beneficial outcomes for the child" because "children, like adults, often have strong feelings regarding their victimization ... court proceedings [being] the only way that the victims can legally seek retribution against the perpetrator." Melton further points out that "older children in particular often have a strong sense of social responsibility ..." (Bussey 1992, p.83).

Incest is almost always hidden by the perpetrator, the victim, who is generally subjected to threats, and by the family; it is shrouded by a defensive and ignorant community and, at the very point of the crime's redress, it is obscured by an autonomous and rigid system of law.

It has been argued that abuse within one's family is "the single most significant producer of psychological problems" (a paediatric specialist on Four Corners, Masters 1996); therefore the question of how best to address the problem of the most hidden of abuses - incest - is relevant in society today. If perpetrators can be exposed, and would-be perpetrators deterred

through the court system, and if the community can be made answerable for the previous cover-up of this crime, then maybe the damage sustained by today's victims might be prevented in future generations.

#### THE EXIGENT NEED TO ACCEPT EXPERT EVIDENCE

In order to advance true justice, as opposed to bare stringent law, the criminal jurisdiction of the County Court must accept, more readily, other pertinent expert<sup>1</sup> knowledges into its arena. These knowledges will serve to enhance the understanding of the judiciary, counsellors and jury. There is merit in Justice Hentley's argument that expert evidence "...is itself a compendious way of expanding experience, theory being, if sound, the condensation and refinement of many minds." (Bates 1985 p.229).

In one incest case brought to trial in 1996 (see Outline of Cases - Case 2, Trials A and B, pp.xiii-xv ) four expert witnesses had a monumental effect on the outcome of the trial. This collection of experts consisted of two doctors who specialized in forensic medicine pertaining to cases of child sexual abuse, and two psychiatrists. One of the latter appeared in court and gave evidence about incest victims, and the other examined the perpetrator, and forwarded a report to the court. In the case of the psychiatrist who gave evidence, the judge deemed that only a fraction of her expert evidence

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<sup>1</sup> The term expert, as used in the court context, refers to evidence from professionals with expertise in areas that are pertinent to the particular case in question. It appears that certain expert witnesses are more readily accepted into the court arena than others, their credentials being cautiously scrutinized in order to ascertain whether their opinion evidence is of merit to the case.

should be admissible in front of a jury<sup>2</sup> However, while this exclusion of expert evidence weakened the Crown's case considerably, the judge had, in fact, heard all the evidence ,hence his 'education' was expanded to the extent that his attitude appeared to have changed dramatically by the closing stages of the trial (see Ch 5 Case 2 pp 63-64 THE EVIDENCE ALLOWED IN FRONT OF A JURY, and p.67, THE SENTENCING). The law is a select and requisite area of expertise, therefore, an expansion of education for the judiciary is crucial to a just legal system. The judiciary can be 'educated' through the acceptance of other essential fields of knowledge and the on-going formal education of judges, by exposure to relevant literature and compulsory study seminars (see Ch. 6. pp 83-84, THE CALL FOR A BETTER INFORMED JUDICIARY).

#### THE FLUCTUATIONS OF THE PERCEPTIONS OF INCEST OVER TIME.

Public perceptions of the crime of incest have oscillated over time. Sigmund Freud's 'discovery' of the crime in 1896 infuriated his colleagues and caused Freud an uneasy questioning regarding the morality of some of his friends, and even his own family. Hence, Freud quickly obscured his 'discovery' of incest under the mask of fantasy. (Goddard 1990, p.37). Again in the 1980's, the large scale 'discovery' of incest in Cleveland, across the social scale, led to anger towards those who uncovered the abuse, rather than towards the perpetrators (Campbell 1988). The taboo surrounding

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<sup>2</sup> The evidence which the trial judge deemed inadmissible in front of a jury concerned a seemingly affectionate letter written by the victim to the accused (see Outline of Cases, Case 2, Trial B p xv; and Ch. 5. pp 59-60 including Footnote 57. THE USE OF THE EXPERT WITNESS TO RE-ESTABLISH A VICTIM'S CREDIBILITY). Taken at face value, this piece of evidence may well have appeared inconsistent with the 'truth' about the alleged sexual abuse in question. However, the expert psychiatric witness offered compelling reasons for a victim of incestuous abuse writing such a letter. The judge's reason for omitting this crucial evidence was based on his belief that members of a jury, would through their own experiences, have acquired sufficient knowledge to deliberate on this matter. The trial judge allowed in a limited amount of evidence relating to another apparent inconsistency concerning the victim's failure to protect her own daughter from the accused.

incest, which serves to conceal this heinous crime, needs to be broken by the crime's exposure in court, and by media campaigns such as 'Operation Paradox (August 1996)<sup>3</sup>

While the perceptions about the crime of incest are dependent on societal taboos and values, they are also subject to concepts like medicalization and movements such as Feminism (Ch.1.pp10-11 FEMINIST THEORY REGARDING INCEST) As early as 1946, Professor John Caffey, a paediatric radiologist at Columbia University, initiated the medicalization of child physical abuse, when he observed bone fractures of "unspecified origin" (Geach 1983, p.41); this medicalization led to a significant uncovering of child physical abuse. However, the medical diagnostic test used in Cleveland, was, in fact, the perceived reason for the controversy surrounding the events which took place there (Campbell 1988, p.55); this particular medical test did not provide the conclusive evidence of the x-ray. Today, a common misconception is that there will be medical evidence of abuse with incest victims. In Case 1, the court learned from a medical expert that this is not the case and, in fact, would be the exception, rather than the rule. (See Outline of Cases, Case 1 p.viii-x; Ch 5, Case 1, Trial A pp.49-51, THE FORENSIC DOCTOR AS EXPERT; THE FORENSIC DOCTOR AS AN EXPERT WITNESS IN FRONT OF THE JURY; and Trial A, p.51, THE POLICE SURGEON AS AN EXPERT). The mother in the above case gave evidence in court that she had taken her young daughter (Trial A) to a general practitioner, when the child had told her of the abuse. The doctor examined the child and finding no physical signs of abuse, promptly sent her home to the abusive father with a then somewhat sceptical mother. It would thus appear that only the true

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<sup>3</sup> "Operation Paradox" was a phone-in television campaign with the slogan: "how do the perpetrators of child sexual abuse silence their victims?"

expert <sup>4</sup> is armed with the knowledge required to deal with children who are the victims of incest.

Incest is an insidious crime, which does not sit easily with ignorant and defensive societal perceptions, possibly steeped in myths about child and male sexuality and obdurate views regarding the sanctity of the patriarchal family, based on 'the ideal'. Also, according to Erickson, McEnvoy & Colucci (1984), sexual abuse, unlike most physical abuse, tends to be premediated and hence cannot be excused by what may be a common community perception of spontaneous reaction to allurements.

The crime of incest has been interpreted in various ways. It has been seen as a problem of health - inbreeding; but this interpretation "constructs and relies upon an image of incest as sexual intercourse between a man and a fertile woman ..." who are "blood relatives" (Bell 1993, p.130), and is not analogous to the contemporary understanding of the crime as child sexual abuse "committed ... by trusted family members" (Bennett 1991) when the adult "uses power or authority over a child to involve the child in sexual activity" (Health and Community Services 1995). It is interesting to note that early Victorian legislation (Crimes Act 1891) already acknowledged a broad definition of incest, which included step-daughters as well as lineal descendants; this was not applicable in some other Australian states, or in England (Bavin-Mizzi 1995, p.96). The definition of the offence was further expanded in Victoria under the Crimes (Sexual Offences) Act 1991, to include de facto father figures.

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<sup>4</sup> It seems that members of the medical profession need further education on the subject of incest. It appears that the above-mentioned medical practitioner would only have met his obligation under the Policy of Mandatory Reporting of Child Abuse (1993) to report the abuse if physical signs had been visible.

Another interpretation of incest relates to its perception as a family problem, rather than an individual crime. Under this “family systems mode”, it is believed that the network of family relationships allows the incest to take place and continue (Ch 5 Plea 3 p.78. Footnote 91 FACTORS CONSIDERED BY THE JUDGE WHEN SENTENCING). Glaser and Frosh (1988) argue that this approach creates an erroneous dichotomy between extra and intra familial child sexual abuse; this appears to be aligned to a prevalent community perception which casts the ‘true’ criminal as the stranger lurking on the street corner, the perverted school master, or the scout leader. This perception of paedophiles as, “calculating evil ... adults who prey on children ...” outside the protective family walls and the answer to the problem being “vigilance by parents and the community” (Editorial, Herald Sun 5/4/96), incorporates the view that the paedophile is not a family member. The media further promotes the image of the extrafamilial child molester by the 1996 headlines:

SCHOOLS, CLERGY IN CHILD SEX INQUIRY.

(Meade 3/4/96).

PRIVATE SCHOOL HEAD GUILTY OF INDECENT ACTS.

(Donovan 1996).

DIPLOMAT CHARGED WITH SEX OFFENCE.

(Murdoch 1996).

LUNCH-HOUR CHILD SEX-FIEND JAILED.

(Giles 1996).

#### THE MEDIA'S ROLE IN CAPTURING PUBLIC AWARENESS OF CHILD SEXUAL ASSAULT.

While the agenda-setting function of the media is an important one, Anthony Downs argues that the media's “issue-attention cycle” is short-lived (Nelson 1984, p.51), due to the absence of a vital link between

professional and mass media so “extraordinarily important in initiating and sustaining mass media, and thus community interest in child abuse”. (Nelson 1984, p.130). However, the issue of the ‘paedophile priest’ is still high on the media agenda, due in part to the Catholic church’s failure to take responsibility for its sexually abusive clergy members. The statement of regret, released by the Australian Catholic Bishops Conference, was not an apology and stopped well short of an acceptance of blame. (Four Corners 29/7/96).

It is significant that incest, the most cloistered form of paedophilia, never really found a place on the current media agenda, and remains perceived, Bavin-Mizzi claims, in her history of sexual violence in early Victoria, as it was in the 1880’s - an “isolated and aberrant incident, not a manifestation of a serious social problem” (Bavin-Mizzi 1995, p.119). It is important to note here, that the very absence of the media in County Court incest cases poses fundamental questions concerning the media’s agenda-setting function. On the one hand, this lack of media exposure serves to protect the victim’s privacy; on the other hand, a crucial step in gaining public and political attention is absent, to the detriment of those who might be prey to the crime of incest (see Ch 6, pp 84-85 JUDICIAL DISCRETION).

The policy of mandatory reporting of child abuse was introduced in Victoria in 1993. It was a policy instigated by media coverage of public and political panic following the tragic death of Daniel Valerio. Because the policy’s implementation was directly related to a case of appalling physical abuse, the image of this type of abuse was sustained in the community’s mind, to the extent that the issue of child sexual abuse was overlooked. However, the mass media does have an important role to play in

highlighting the issue of child sexual assault in the minds of community members. As Calvert (1992, p.39) states "...the impact of mass media campaigns..." form "...one part of a long-term strategy aimed at preventing child abuse."

#### AN ATTEMPT TO ATTAIN POLITICAL ENLIGHTENMENT OF CHILD SEXUAL ASSAULT

In 1995, an attempt was made by the Crime Prevention Committee to highlight the issue of incest and child sexual abuse in general through the 'professional' media, by the publication of the comprehensive report COMBATING CHILD SEXUAL ASSAULT (Crime Prevention Committee 1995). The report called for "...a long-term commitment from the government of the day, the education system and the wider community," and "above all ... a change in public attitude to recognize the magnitude of child sexual assault and the personal, social, economic and financial impact of this abhorrent crime." (Crime Prevention Committee 1995, p.318).

However, the Kennett Government's response to the report was short and apathetic, rejecting most of the Committee's recommendations, on the grounds that they would "require substantial resources and a rearrangement of existing resources" (Government's Response to the Parliamentary Crime Prevention Committee Inquiry, May 1995). In 1996, Mr Ken Smith (former Chairman of the Committee) 'intensified pressure on the State Government ... to reconsider its rejection of key recommendations ...'(Johnson 1996). But once more, it seems that what has been revealed about the important issue of child sexual abuse has been minimized by the incongruity of a government willing to embark on an expensive inquiry (the nine-member committee travelled overseas at an approximate cost of \$50,000, to gather information and advice) (Smith 1996), yet shirking the

responsibility for the implementation of the significant recommendations.

#### INCEST: AN ABUSIVE PRACTICE

It is imperative that incest, subject to taboo, is seen as a problem of abuse. David Thorpe states that from the 1960's onwards, "the cruelty era was over" having "been superseded by 'abuse', something which was medically if not legally definable" (Thorpe 1994, p.11). Vikki Bell (1993) likewise argues that incest has been differentiated as an abusive practice and established as a social problem which needs to be uncovered and measured. Miller (1990) further emphasizes the exposure of such injustices as paramount in deterring their recurrence.

#### A CALL FOR COMMUNITY EDUCATION ON THE ISSUE OF INCEST

In relation to incest, an important statistic emerges from David Thorpe's research on sexual offenders: it appears that natural fathers form the largest single group responsible for sexual offences against children:- 30.8% (Thorpe 1994). Maybe the general public should be exposed to statistics like the above more often, in an attempt to educate them, so that victims of incest will not shrink from revealing the crime for fear that community ignorance will result in disbelief. A brief class survey which I took on the issue of incest and the criminal justice system, divulged a lack of knowledge about the issues, reflective of a shortfall in the level of community exposure and education on this problem, and maybe a denial which Hunt (1996) describes as springing "from receiving information that contradicts our belief or understanding."

Looking back to nineteenth century Australia, it is acknowledged that:

"as today, the act of incest was fundamentally different

from rape and carnal knowledge” in that “incest cases qualify the picture of ‘Home Sweet Home’ and constitute a treacherous guide to the way in which some families actually behave ....”

(Bavin-Mizzi 1995, p.95).

#### EARLY LEGISLATION PERTAINING TO THE CRIME OF INCEST

In England, from the 1850's onwards, 'sexuality' was entering into parliamentary debate (e.g. The CONTAGIOUS DISEASES ACTS of the 1860's). In 1885, the CRIMINAL LAW AMENDMENT ACT extended legal regulation in areas concerning prostitution and indecency; there was also a growing concern about incest at this time. However, incest was perceived in terms of socio-economic conditions and, paradoxically, as a threat to the 'normal' middle-class family. Finally, in 1908, incest was criminalized under the INCEST ACT (Mort 1987). The Victorian CRIMES ACT saw the crime of incest become a statutory offence as early as 1891, but incest was perceived, as it was in England, as being a working-class crime due to overcrowded living conditions.

#### FEMINIST THEORY REGARDING INCEST

The feminist claim is that incest should be understood in the context of a society in which men are able to wield power over women and children in a sexualised manner (Bell 1993, Introduction) Feminist theory's starting point has been with victims' own experiences, which has led to careful consideration of pivotal questions about victims and offenders. (Family Violence Professional Education Taskforce 1991). In fact, Miles (1990) argues that it is likely that feminist jurisprudence “will be the source of continuing scrutiny of assumptions that lie behind the laws relating to sex

and crime and for further changes to those laws.”

While feminist theory has allowed for a re-examination of traditional explanations for incest, the arguments of feminists who contend that incest stems essentially from societal attitudes towards sexuality and power (e.g. reported in Bell 1993, p.11) can be criticized for losing sight of the issue of the responsibility of the individual perpetrator. Studies have indicated that the perpetrators of incest come ‘... from all walks of life, all backgrounds, all races and all cultures’ (Meade 1996, 27-28 April), and while they are predominantly male and do exercise power, gender issues alone do not explain why some men offend and others do not.

#### IMPORTANT CONSIDERATIONS SURROUNDING SENTENCING IN INCEST CASES

The literature surrounding the issues of leniency and uniformity in sentencing<sup>5</sup> is pertinent to my research, as the sentencing outcomes of incest cases may symbolize a restitution of justice. Sentencing legislation, introduced in Victoria in 1991, effectively lengthened sentences for “serious sexual offenders” (SENTENCING ACT 1991. S.3. p8 & Ch 5 pp.79-80). Despite this legislation, the judiciary is perceived to be showing leniency by delivering inappropriately short sentences. The Attorney General, Jan Wade’s call for the general public’s input concerning this issue seems somewhat misguided, in the light of a lack of community

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<sup>5</sup> The sentencing stage of a court case occurs after the guilt of an accused has been established by a guilty verdict, or a plea of guilty (either at a separate plea that does not proceed to trial, or during a trial where an accused changes his plea to guilty). Prior to the judge passing sentence, there is a pre-sentencing stage of a court case, referred to as the plea stage, where mitigating circumstances concerning the accused are considered, and victim impact statements are presented to the judge. If all the pertinent issues cannot be addressed at this stage (e.g. the court may be awaiting reports concerning the accused from expert witnesses), then the case will be adjourned and a further plea will eventuate at a later stage.

knowledge on the topic of sentencing. In the AUSTRALIAN LAW JOURNAL (February 1996) the Honourable Sir Guy Green (former Chief Justice of Tasmania) argues that it is doubtful whether the public, in fact, have a view on the issue of uniformity in sentencing, and if a community attitude does exist, it may well be based on ignorance, not cogent understanding. This issue of a community attitude had received vehement press coverage in August 1996. The Victorian State Government's sentencing questionnaire has been called "... a misconceived approach to gauging community attitudes to justice ..." (Grace 1996). The survey has been criticized at two levels; at one level the community's lack of informed opinion has been challenged, while at the other level, the use of the HERALD SUN as the vehicle for the survey's transmission to the public has been seen as contentious - HERALD SUN readers being described by the chief executive of Roy Morgan Research, Ms Michele Levine, as "... a subset of Victorians" (Milburn 1996). There does, however, appear to be a need for a comprehensive inquiry into our sentencing laws which have "become so complicated" that it is "now easier for a convicted person on appeal to get a more lenient sentence on technical grounds" (Conroy 1996).

One of the most influential issues applicable to sentencing today is the concept of community expectations. Patrick Devlin argues that:

"the law exists for the protection of society. It does not discharge its function by protecting the individual ... the law must protect also the institutions and the community of ideas, political and moral ..."

(Devlin 1965, p.22).

The presiding judges in all the court cases I have observed have mentioned, a number of times, the concept of community expectations in relation to sentencing (see Ch 4 p.38, THE ORIGIN OF THE COURT SYSTEM and Ch 5 p.72, footnote 74). Hence the following claim that “punishment and retribution have a place in sentencing as they serve to mark and reinforce basic, yet important, social values” (Henderson 1994, p.761) appears valid. An inappropriately short sentence in a case of intrafamilial child sexual abuse may well be read as a devaluing of the child’s rights, credibility and respect.

#### TREATMENT: THE FORGOTTEN ACCOMPANIMENT TO SENTENCING

In an article in AUSTRALIAN PSYCHOLOGIST, David Indermaur identifies one of the major problems in sentencing sexual offenders, which is that, “many offenders continue to see themselves as victims and feel hostile towards the criminal justice system for ‘persecuting’ them” (Indermaur 1994, p.140). While treatment programs within the prison system remain voluntary, the worst offenders, who have ‘neutralised’ their guilt by a ‘victim mentality’, will continue to refuse treatment. Indermaur’s survey of offenders exhibited the unexpected result that 57% of offenders were in favour of compulsory treatment programs (Indermaur 1994, p.143), thus highlighting perhaps the need for enforced treatment, along with custody and control. This idea would seem to be aligned with Michel Foucault’s view that “...the powers of judicial bodies ... extend beyond the sentence ...” (Silverman 1989, p.83). During the course of my observations in court, I have not seen a judge recommend that an offender enter into a treatment program, even though this recourse remains available to the judiciary. The reason for this may well relate to the apparently scant current treatment

mechanism within Victoria's prison system<sup>6</sup>. Interestingly, treatment was not mentioned *per se* in the State Government's sentencing survey<sup>7</sup> (HERALD SUN August 1st, 1996), indicating its low profile on the political as well as the judicial agenda and thus dictating a depreciated public awareness of this option.

#### THE DILEMMAS INHERENT IN THE 'PROTECTION' SYSTEM FOR OFFENDERS.

Problems are created under the present system of 'protection' for child sexual offenders when perpetrators are incarcerated together (e.g. at Sale prison), because: "the prison makes possible, even encourages, the organization of a milieu of delinquents, loyal to one another, hierarchized, ready to aid and abet any future criminal act" (Foucault in Rabinow 1991, p.228). However, another problem arises when child sexual offenders are isolated within a mainstream jail; for a 'victim' mentality may be created or accentuated, sustaining a denial of guilt. The problems inherent in the above systems can only become more acute with the present lack of available treatment for these offenders.

#### TREATMENT IN THE JUVENILE JUSTICE ARENA

In contrast to the above void in the adult prison system, in the juvenile justice arena attempts are being made to treat adolescent sex offenders. Fay Burstin reports on a new rehabilitation program for male offenders called THE MALE ADOLESCENT PROGRAM FOR POSITIVE SEXUALITY (M.A.P.P.S.) run by the juvenile justice branch of Health and Community Services. The program "aims for early intervention and treatment of sexually abusive

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<sup>6</sup> While the SEXUAL THERAPY UNIT, once part of Pentridge, was being re-built at Ararat during 1996, there were no facilities for treating sexual offenders.

<sup>7</sup> Reference was made to rehabilitating the offender as a possible consideration in sentencing.

behaviour before it becomes ingrained” (Burstin 1996). The program is critical in an attempt to address the recidivism rate of this type of crime, especially in light of Burstin’s (1996) revelation that “80 per cent of repeat adult sex offenders, such as rapists and paedophiles, began sex offending during adolescence.” However, it appears that grave misunderstandings may arise in the community about the subject of treatment, and it is important that these are dispelled. In the video MEN WHO MOLEST (Loeterman 1985), a therapist argues that even when treatment is undertaken by child sex offenders, its effect is short-term and needs to be on-going, because paedophilia is not curable.

#### THE EXPERT WITNESS’ CRITICAL ROLE IN THE EXECUTION OF JUSTICE

The expert witness is often crucial to the delivery of justice in the trial process. Bulkley (1986, p.64), in reference to the U.S.A., states that:

‘with greater frequency, courts ... are addressing the admissibility of expert testimony on the dynamics of child sexual abuse (or the sexually abused child syndrome), issues relating to a child’s competency and credibility and offender characteristics.’

However, while this was occurring 10 years ago in the U.S.A, in Victoria today, the expert appears to have only just gained a somewhat restrained entry into the court system.(see Ch.5 below) It seems that as early as 1554 (Buckley v Rice Thomas) in England, Justice Saunders commented that, “if matters arise in our laws which concern other sciences and faculties we commonly call for the aid of that science or faculty which it concerns, which is an honourable and commendable thing” (Bates 1985, p.219). Yet

controversy appears to continually surround this issue of the expert in the court arena. In Queensland (R.V. McEndoo 1980), a judge stated that, “expert witnesses ought not to usurp the function of the jury (Bates 1985, p.226). In a similar vein to this argument, a judge in a 1996 trial, which I observed, was reluctant to admit expert evidence, on the grounds that the jury should be able to reach a decision based on their everyday knowledge of life. But whose everyday understanding of life touches on the crime of incest? (see Ch1 pp.2-3 THE EXIGENT NEED TO ACCEPT EXPERT ADVICE; and footnote2; Outline of Cases Case 2 Trial B pp.xiv-xv & Ch 5 pp56-62 EVEN GREATER EXPERTISE USED TO ADD COGENCY TO THE FIRST EXPERT’S EVIDENCE; THE BREAKING DOWN OF COURT CONFINES; THE IMPORTANCE OF LANGUAGE; THE RARE CASE OF AN INJURY IN AN INCEST TRIAL; THE USE OF THE EXPERT WITNESS TO RE-ESTABLISH A VICTIM’S CREDIBILITY; CRUCIAL ERUDITION EXCLUDED).

#### THE PSYCHOLOGIST - EXPERT FOR THE DEFENCE

The expert used most commonly by the Defence is the psychologist. Questionable advice in an article by Hazelkorn and Harbrecht titled, Incest: How Psychology can Help the Defense, centres around the psychological aspects of incest as a ‘family dysfunction’ problem (see Ch 1 p5, THE FLUCTUATIONS OF THE PERCEPTIONS OF INCEST OVER TIME;& Ch 5, pp.72-73 THE EXPERT’S OPINION OF THE PERPETRATOR AND HIS CRIMES), and suggests to the Defence counsel that, “control of the terminology is like control of the arsenal and may be as important to victory as either the facts or the law.” Their advice relates to the avoidance of terms like “rape”, “sodomy” or “child molesting” (Hazelkorn and Harbrecht 1988, p.4.) Psychologists are used by the Defence at the pre-sentencing stage of the court proceedings, and a concern regarding their credibility seems to reside in their constant use of

exonerating factors concerning the perpetrator, relating to lower than average intelligence and inadequate upbringing.<sup>8</sup>

#### THE ABSENCE OF SOCIAL WORKERS AS EXPERT WITNESSES

While observing incest cases in the County Court, the question arose as to why social workers appeared to be absent from this sphere. In one instance when a social worker was called to give evidence, it was deemed to be inadmissible in front of a jury, due to its hearsay nature, and thus disregarded (see Ch5 Case 1, Trial A pp48-49, THE SOCIAL WORKER AS AN EXPERT). It would appear that, “even when the professional status of social workers is recognized, lawyers may place social workers (and psychologists) as having very uncertain expertise” (Charlesworth, Turner and Foreman 1990, p.8). Jan Breckenridge states that for social workers “the problem arises when evidence from clinical interviews is used to attempt to establish a legal truth” (Breckenridge 1995, p.39), as the legal truth is a stringent one, thus imposing limitations on outside areas of expertise.

#### THE ROLE OF “AMICUS CURIAE”

Beyond the expert witness lies the, as yet, obscure role of “amicus curiae” (Roxon and Walker 1994). If used, it would allow an independent body of knowledge into the court arena, which would provide contextual information and aid in decision-making (see Ch 5, p.65 Case 2 Trial B). The “amicus curiae” procedure involves the presentation of a written brief to

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<sup>8</sup> Such exonerating factors were put forward in court by the Defence psychologist, in Case 1 Plea 1 and Plea 2. In case 1, mention was made of such factors by the Defence barrister, who indicated that they would be advanced by an expert at the pre-sentencing stage. In Plea 3, immaturity was suggested as an exonerating factor. The Trial of Case 3 has not yet reached the pre-sentencing stage.

the court from outside bodies or organizations. (e.g. The Western Region Centre Against Sexual Assault. WESTCASA.) In cases of incest, contextual fabric, which is so significant, is often missing, due to the stringency of court procedures; hence the use of “amicus curiae” would be beneficial to those seeking justice.

#### JUDICIAL INTERVENTION

Another way in which the trial process can reflect justice more effectively is through judicial intervention. In the AUSTRALIAN LAW JOURNAL, the Honourable Mr Justice D.A. Ipp (Supreme Court of Western Australia) maintains that judicial intervention is “the product of ideological and social change” (Ipp 1995, p.365). Ipp argues that community attitudes, which until the latter half of the 20th century accepted the notion of a detached judge, have now changed so that “judicial responsibility is no longer seen as a function of state power; nor as a function of the prestige and independence of the judiciary itself” (Ipp 1995, p.366) Hence it would appear that social change can help unlock the confining court arena, so that justice is more attainable.

#### CHILDREN'S RIGHTS AND CHILDREN'S EVIDENCE

The question of children's rights is pertinent to the incest case where, “the criminal trial is concerned with the rights of the defendant not the welfare of the victim” (Smart 1989, p.59). Great advancements have been made in the arena of children's evidence, which can now be given via a closed-circuit television system; hence the child witness no longer has to

endure the trauma of the courtroom (see Ch 4 pp.39-40 THE USE OF CLOSED-CIRCUIT TELEVISION). However, the new V.A.T.E. system of video and audio taping evidence is meeting with a great deal of opposition; its use requires rigorous training of specialized police who would need to have expertise in evidentiary requirements, in order to question child witnesses (Meadows 1995; see also Ch 4 p.41 THE V.A.T.E. PILOT PROJECT).

#### THE ANTICIPATION OF A DYNAMIC SYSTEM OF LAW

The WESTERN AUSTRALIAN CHILD SEXUAL ABUSE TASK FORCE (1987, pp1-2) noted that, "...child sexual abuse differs from other forms of abuse in its aetiology, the planned nature of the act, its criminal status, its impact on all family members and its long-term effects on all individuals involved" (FAMILY VIOLENCE PROFESSIONAL EDUCATION TASKFORCE 1991, p.221). The peculiarity of individual incest cases is salient as well. Thus, a judgment of the court is the product of a process of trial in a particular set of circumstances ..." (Mowatt 1994, p.124). These circumstances include the characteristics of this particular crime genre as well as those of the individual incest case. James Mowatt argues that the scientific "chaos theory" is also applicable to law, in that the theory's two principles, that of "extreme sensitivity to initial conditions and recursion", are consistent with an evolutionary system of law. This is indicative of a system which is, "...somewhat erratic and contingent" (Mowatt 1994, p.124), but also healthy, in that it is progressive rather than inert.

While each case's circumstances are unique, the judicial process can be improved in the light of experience and learning. This literature review indicates the need for consideration of whether, and how, the judiciary accommodates or mediates new knowledge to enhance the justice system in cases of incest.

## Appendix to Chapter 1.

The following constitutes the legal definition of incest, under the Crimes Act 1958 (amended in 1991).

### S 44 Incest

- (1) A person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her child or other lineal descendant or his or her step-child.

Penalty: Level 2 imprisonment (20 years).

- (2) A person must not take part in an act of sexual penetration with a person under the age of 18 whom he or she knows to be the child or other lineal descendant or the step-child of his or her de facto spouse.

Penalty: Level 2 imprisonment (20 years).

- (3) A person who is aged 18 or older must not take part in an act of sexual penetration with a person whom he or she knows to be his or her father or mother or other lineal ancestor or his or her step-father or step-mother.

Penalty: Level 6 imprisonment (seven and a half years)

- (4) A person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her sister, half-sister, brother or half-brother.

Penalty: Level 6 imprisonment (seven and a half years)

- (5) Consent is not a defence to a charge under this section.

- (6) It is a defence to a charge under this section for a person charged to prove that he or she took part under the coercion of the other person
- (7) In all proceedings for offences under this section (except under sub-section (21) it shall be presumed in the absence of evidence to the contrary -
- (a) that the accused knew that he or she was related to the other person in the way alleged; and
  - (b) that people who are reputed to be related to each other in a particular way are in fact related in that way.

## CHAPTER TWO

### Method

The method of the research involved a literature review and 'participant observation', in the County Court of Victoria. Interestingly, Dan Fitzgerald's statement that, "the media on behalf of a demanding public watches the outcomes but rarely the process" (Fitzgerald 1995) of court cases, is true only in part regarding incest cases; here, neither the outcome nor the process is commonly observed. I have been watching the intricate court process and taking detailed notes, in the hope of gaining some insight into how the immutable court system can become penetrable in the interests of social justice.

There are a range of behaviours described under the umbrella term 'participant observation'. The position I have taken would be most fittingly described as an 'observer as participant'; my primary role has been to observe, but I have also been a 'participant', in that I needed to be accepted and included in this unique court sphere, in order to carry out my research.

My examination of the County Court arena has consisted of observing three cases which proceeded to trial (five trials in all) and three separate pleas. (See Breakdown of Cases Observed - p.vii ) I have combined my observations in court with informal, unstructured interviews (talks) with barristers, solicitors and other court personnel; I have also

interviewed a County Court judge, on two occasions, who volunteered his assistance. These conversations have aided my understanding of what has been observed first-hand in court, through the confirmation or comparison of information. I have also spoken on the telephone, at length, and on numerous occasions, to the solicitor in charge of the Sexual Offences Section at the Office of Public Prosecutions (O.P.P.). In addition, I have had a long and interesting telephone conversation with Mr Ken Smith (M.P.), the former chairman of the CRIME PREVENTION COMMITTEE.

As part of my research, I have written down, on a weekly basis, the number of incest cases which reached the County Court during the period between January 15th 1996 and November 1st 1996.<sup>9</sup> I recorded 34 incest cases during this time; an estimate of 3.7 cases per month. These figures, of course, have no relationship to the actual prevalence of the crime; crime statistics are always dependent on reporting rates and the perception of the 'problem' as a crime.<sup>10</sup>

Tim May (1995, p.112) argues that the method of 'participant observation' leads to inductive research; in contrast to deductive research. Through observation, understanding is generated and problems are actually discovered during the course of the research; hence, flexibility is an essential requirement. Towards the end of 1995, I decided to take my first look at an incest case in the County Court; I was only able to sit in on parts of this trial, and I realized at this stage, that in order to research this topic effectively using the 'participant observation' method, it would be necessary

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<sup>9</sup> I was able to find out these weekly numbers by telephoning the solicitor in charge of the Sexual Offences Section of the O.P.P. Office.

<sup>10</sup> Many cases of incest are never reported, or reported years after the crimes took place. Also, cases of incest may be dealt with outside the criminal court arena.

to observe the cases in their entirety (including preliminary legal arguments). I became aware that only by doing this would I be able to reflect on the numerous aspects involved in the legal system, which affect outcomes. In 1996, after observing my first full trial <sup>11</sup> I also recognized that to gain an adequate view of the process involved in these particular court cases, I would need to observe more than one case.

In order to appreciate fully the legal process involved in incest cases brought to the criminal court, Gary Bouma's view that, "while you are collecting and recording your data it is essential to pay careful attention to detail in observation" (Bouma 1993, p.147), appears valid. By taking comprehensive notes in court, I was able to review the detailed data at a later date, and from this select the salient information.

To research the process, and hence the confines of the County Court, it is essential to 'participate' in the particular social setting, by observing social relations, in order to understand actions and meanings within the context of that particular social milieu. May (1995 Chapter 7) claims that the method of 'participant observation' is least likely to lead to researchers imposing their own reality on the setting involved. Following on from this, May argues that the understanding of the researcher will actually be enhanced by examining how he or she is affected by the distinctive social setting. Also, reactions to the observer's presence may accentuate certain social attitudes, which will be significant to the research project. During the first complete trial that I observed, the Defence barrister objected to my presence, after the Crown prosecutor had asked the judge for special

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<sup>11</sup> This trial commenced late in 1995.

permission for me to remain in court during the 'closed'<sup>12</sup> stage of the trial. Fortunately, the objection was overruled by the trial judge.

I have sensed during the period of my observations in court, that maybe my continuous presence, as a social researcher, in this arena, has some measure of effect on the judge in particular, and hence on the outcome of the trial. This is something that I would never have anticipated at the outset of my research, and a perception which is inexplicable for the most part. It appears to be related to the notion of scrutiny from 'the community', in the name of justice; this serves to promote the belief in the need for a watch over the court arena, from outside fields of knowledge. As Gibbons (1994, p.195) states, "the price of justice, like freedom, is eternal vigilance."

It is important for the researcher to experience (albeit second-hand) the rigor and uneasiness of the court environment that victims are exposed to; once inside the courtroom, somehow the inner 'reality' of the court milieu takes over, curbing outside realities. The above concept of the court's internal 'reality' appears to be associated with its power to define what occurs within its precinct, and the acceptance of the court's utmost authority. (See also Chapter 4, p.44..THE COURT REALITY).

Using the method of 'participant observation', the researcher is able to observe variables and may discover a relationship between them, but he or she cannot infer causality. The judges, juries and counsellors could all be considered as variables in incest cases. However, the most influential variable would appear to be the presiding judge, due to the ascendancy of judicial discretion.

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<sup>12</sup> The judge has the discretionary power to 'close' the court when a child is giving evidence via closed-circuit television.

One of the reasons I chose the 'participant observation' method of research, was because I felt the need to use non-intrusive techniques for researching this particularly sensitive topic. I did not wish to interview victims, who had already been re-traumatized numerous times through questioning. In David Finkelhor's Boston survey, parents were interviewed about the victimization of their children. However, the results of this survey suggested that parents were either reluctant to tell, or they did not know about the abuse. (Finkelhor 1986, p.139). In cases of incest, the mother, too, has often been betrayed by the perpetrator, and it would not be appropriate to subject her to further trauma.

On the subject of data collection, material collected from surveys or media reports would be essentially hearsay in nature, and thus could well be out of context. A glaring example of the above was presented in *THE AGE* (Donovan 1996), when one of the trials I had researched was reported on, at the sentencing stage. The contextual basis of the case was absent from the brief summary which constituted the report; hence my faith in the 'participant observation' method of research, in the search for 'truth'. This particular case was at least brought to the public's attention to some degree, by the reporter's presence. It appears that after their initial preclusion, reporters do not often return to observe the outcome of incest cases; the inception of the trial is, perhaps, pertinent for the exigency of media reporting.

A longitudinal study of incest cases in the County Court might reveal that there are appreciable differences over time, as incremental changes do appear to be occurring in the court sphere, regarding the use of crucial expert evidence, the reception of children's evidence, and judicial

intervention. However, the constraints of time would rule out this option for the purpose of a minor thesis.

Language has a critical role in the court arena. Maley (1994, p.11) states that, “language is medium, process and product in the various arenas of the law where legal texts, spoken or written, are generated in the service of regulating social behaviour”. Thus it is imperative for the social researcher to become familiar with this distinctive court discourse, in order to interpret meanings from the court milieu. Counsels’ actual vocal delivery is influential in this arena, as spoken language can convey a compelling argument to a judge and/or jury. Language interpretation also includes bodily gestures and facial expressions, which in turn can be affected by the physical and psychological constraints of the court itself.

Lord Maugham once claimed that, “the object of the legal trial is the ascertainment of truth” (Carroll 1994 p.306). But it would appear that quite often the trial system in the County Court does not attain this ideal. Hence, social research, in this unique arena, should attempt to reveal how the shared social concept of justice can be more effectively achieved.

[The impressions and experiences I have gained from the observation of several lengthy trials are encapsulated in the following poem and description of one day in court. These accounts are presented to convey some sense of the impact of the unfamiliar formality of the court upon an everyday member of the public. Consideration of the processes and recurrent themes in the hearing of the cases follows in subsequent chapters.]

## POSTSCRIPT

### PERSONAL IMPRESSIONS OF THE 'ASCENT' TO COURT

#### APPREHENSIONS - 10 am

A foyer alive with  
wigs, robes and busy feet,  
Clients trailing behind,  
still out on the street, UPSET,  
Smoking the last cigarette.

A lift full of bodies  
who dare not speak,  
For fear of retribution,  
they must be discrete, WITHOUT A NAME,  
Until the court 'game'.

A room of rigor  
austere and cold,  
A crime to deplore,  
revealed, AT LAST,  
But can 'the trial' redeem the past?

(Freda C Minas 1996)

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A DAY IN THE COUNTY COURT OF VICTORIA - 1996

It is 10.10 am and in the corridor outside the courtroom, the Crown solicitor is talking to me about some of the personal aspects of the case, pertaining to the victims' lives. I am grateful for this information, as it helps transfer the case from the rigid court arena to the sphere of the outside world. (See Ch.2. p.25 and Ch 4. p. 44. THE COURT REALITY).

The case has been split into two separate trials at this point (with one or more trials to follow). Today the judge will charge the jury in the second trial. But the members of the jury have no idea of the existence or the result of a trial that immediately preceded this one. They are not permitted to know that the accused was found guilty of a brutal and incestuous rape of a young step-daughter;<sup>13</sup> they are kept in the dark about the results of pertinent D.N.A. evidence, regarding the paternity of a child born to the victim as a young teenager.<sup>14</sup> As I reflect on the above, the court tipstave, whose attire consists of an official green suit (see Ch 4 p.40 footnote 24), unlocks one door to the court and takes the jury through to the juryroom. The court is subsequently unlocked for others involved in the case.

I take my usual position at the back of the court. The Defence barrister has

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<sup>13</sup> This separate trial consisted of one count of incest, which the judge decided should stand alone. The judge's decision was based, in part, on the fact that, after much legal argument, he was allowing into evidence a prior conviction of incest, which had occurred after the first charge of incest.

<sup>14</sup> The forensic D.N.A. evidence of a blood sample from the accused was excluded from the trial, due to the fact that it was obtained by means of a misrepresentation of the law by the police officer concerned. It appeared that the police officer had told the accused that he would obtain a magistrate's court order, if the accused refused to cooperate; this was seen as a form of enforcement rather than voluntary cooperation.

to complete his address to the jury this morning, before the judge's charge. It appears to be a tactical advantage that the Defence always addresses the jury last, and this is enhanced by this address being completed today, far removed from the Crown's address of the morning before.<sup>15</sup> The Defence barrister repeatedly tells the jury that their own life experiences should provide them with the knowledge that people lie; but they would need contextual information and all the facts in order to come to such a conclusion, being implied by the Defence. Earlier in the trial, the judge's decision to omit a large part of an expert witness' evidence had been based, in part, on an assumption relating again to individuals' experiences (see Ch 1. p. 3 footnote 2; Outline of Cases, Case 2 Trial B pp xiv-xv and Ch5 pp 59-62 THE USE OF THE EXPERT WITNESS TO RE-ESTABLISH A VICTIM'S CREDIBILITY and CRUCIAL ERUDITION EXCLUDED)

Soon after 11am, the judge sums up the case and gives his charge to the jury. the members of the jury are told that they are the judges of the facts in the trial. However, in view of the omission of the expert witness' evidence, they do not have all the facts before them. (see Ch. 2.

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<sup>15</sup> I was informed by the Crown prosecutor that there was a time when the Defence forfeited the right to address the jury last, if the accused gave evidence. The order of presenting evidence in a criminal trial is as follows:

The Crown presents evidence first (in the form of witnesses and exhibits)

This is cross-examined by the Defence.

The Crown can then re-examine the witness.

The Defence then presents evidence (in the form of witnesses and exhibits)

This is cross-examined by the Crown.

The Defence can then re-examine the witness.

p.29 footnotes 1 & 2; 13 & 14 and Ch 1 p.3 footnote 2 ). The judge makes an emphatic point to the jury, that the accused, who was called as a witness in this trial, may well be under a far greater strain than any other witness. I reflect that this proposition was also stressed in Trial A of Case 2, as it was (albeit rather less forcefully) by a different judge in a previous trial.<sup>16</sup> This pronouncement seems uncalled-for; what about the strain on the victim? Strain, in fact, permeates the austere, yet almost regal, court atmosphere (Ch 4 p.38-39 THE GRAND RIGOR OF THE COUNTY COURT), especially today as the trial nears conclusion. The Crown solicitor and barrister, in this case, are noticeably dedicated to the 'truth', going to the utmost and proper lengths to reveal this 'truth'.<sup>17</sup> They show great empathy for the victims, an empathy that they have passed on to me through their helpful, informal conversations about the circumstances of the case. Even the demeanor of the legal Counsel, in and outside the courtroom, reflects an humane solicitude regarding the outcome of the case; this genuine concern for the victims appears more pronounced on the part of the Counsel for the Crown, in this case, than I have observed in the other cases pertaining to my research. I contemplate the element of chance (i.e. regarding legal Counsel assigned to a case) that accounts for one of the variables

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<sup>16</sup> This occurred in the trial of Case 3.

<sup>17</sup> Their use of the expert psychiatric witness is an example of this (Ch 5 pp59-62, THE USE OF THE EXPERT WITNESS TO RE-ESTABLISH A VICTIM'S CREDIBILITY and CRUCIAL ERUDITION EXCLUDED).

in court cases, which affects how victims are treated throughout the trial and may even affect the outcome of the trial; a more diligent and compassionate lawyer will be more likely to present the best possible case.

In his summing-up, the judge chooses not to summarize the expert evidence which has been given to this trial. He refers to the expert witnesses as scientific witnesses, which constitutes an interesting nuance of language that appears to devalue the importance of this evidence somewhat, by making it seem more remote.<sup>18</sup>

The jury members look tense. It would appear that the summaries from both Counsels, followed by the judge's charge may have confounded the issues for them. They ask for a short break, which is granted by the trial judge.

I feel quite accustomed to being in court now, after observing this particular case for almost two months. I feel anxious, however, about the outcome of the trial; this apprehension is heightened by the fact that I have

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<sup>18</sup> The word 'scientific' could well denote knowledge beyond that necessary for the jury's proper judgement in this case, given the judge's direction to the jury that it was their everyday experiences that would equip them with the understanding to be the 'judges' at this trial. On the other hand, the word 'expert' could signify someone who assists the jury with their everyday understanding.

been exposed to a great deal of evidence that the jury has not heard.

It is 3pm before the judge completes his charge to the jury. They are sent to the juryroom to consider their verdict until 5pm, when the court will be adjourned for the day. But they 'buzz'<sup>19</sup> frequently with questions about issues that concern them. They ask why a D.N.A. test wasn't done and are told only to concern themselves with the issues before them (see Ch 2, p 29 and Footnote 14) It may be that they perceive the discrepancies in the case; however, their questions will, for the most part, remain unanswered.

As another day of the trial has come to an end, I contemplate that everyone involved must surely carry away with them the unresolved issues and anxieties of the case until its resolution - and long afterwards.

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<sup>19</sup> There is a buzzer in the juryroom which can be heard in the courtroom by the tipstave, who remains in charge of the jury and relays the jury's request for information on to the judge's associate; the court is then called back into session for the judge to hear and respond to the jury's question.

## CHAPTER THREE

### The Legislation Pertaining to the Crime of Incest

#### THE FUNCTION OF LEGISLATION

The function of legislation is directive, in that it imposes obligations and bestows rights. In order to achieve its requisite independent status, legislative composition needs to be decontextualised and impersonal. But modern legislative writing is also made flexible by the use of subjective terms such as “reasonable” and “wilful”, which allows for judicial discretion (Maley 1994).

John Stewart (1995) argues that there should be a predominantly moral basis for legislation, as opposed to an economically or socially expedient one. However, in order for moral principles to be effective in legislation, Stewart claims that there needs to be more support from all sectors of the community, thus strengthening acknowledged societal principles.

As regards the crime of incest, Vikki Bell claims that “the emerging legislation does not so much respond to a reality as define that reality through its decisions about what will constitute incest in law.” (Bell 1993, p.182). The beneficial effect of this constitution, Bell argues, is that further debate arises as a result of the esteemed status of legal discourse.

## THE ADVOCATORY ROLE OF LEGISLATION IN RELATION TO THE RIGHTS OF THE CHILD

The moral rights of children involve their right to live without sexual abuse from adults. However, because of their dependence on adults, children require protection from those adults who are abusive, through legislation; this requirement stems from the social desire to ensure that abusive adults are constrained. Legislation which protects children's natural rights can possess controlling, prohibiting or punitive functions.

### THE MEDIA'S "AGENDA-SETTING FUNCTION"

The media plays a consequential role in the forming and amending of legislation. In 1993 in Victoria, the CHILDREN'S AND YOUNG PERSONS ACT (1989) was amended to embrace the policy of mandatory reporting of child abuse, by certain professionals (including doctors and teachers), introduced at this time by the Kennett Government, following an intense media campaign. (See Ch 1 pp6-8, THE MEDIA'S ROLE IN CAPTURING PUBLIC AWARENESS OF CHILD SEXUAL ASSAULT).

More recently, after wide media exposure of the sexual exploitation of overseas children by Australians, the CHILD SEX TOURISM ACT became law in 1994. Under this law, Australians who are accused of the sexual abuse of children in overseas countries, can be tried and punished in Australia.<sup>20</sup>

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<sup>20</sup> The maximum penalty for these crimes is 16 years imprisonment.

RECENT LEGISLATION PERTINENT TO THE CRIME OF INCEST

If legislation is indicative of concern and action regarding sexual offences against children, then Victoria could not be said to have been complacent in recent years. Since 1991, there has been a spate of legislation passed which, among other functions, directly affects incest cases in the County Court of Victoria. These are as follows:-

SENTENCING ACT 1991 (with a "serious sexual offender provision).  
 CRIMES (SEXUAL OFFENCES) ACT 1991.  
 CORRECTIONS (REMISSIONS) ACT 1993.  
 SENTENCING (AMENDMENT) ACT 1993.  
 CHILDREN AND YOUNG PERSONS (FURTHER AMENDMENT)  
 ACT 1993.  
 CRIMES (CRIMINAL TRIALS)ACT 1993.  
 SENTENCING (VICTIM IMPACT STATEMENT) ACT 1994.

OTHER LEGISLATION RELEVANT TO INCEST CASES

There are a number of other Acts which are applicable to incest cases, these include the following:-

CRIMES ACT 1958.  
 COUNTY COURT ACT 1958.  
 EVIDENCE ACT 1958.  
 CRIMINAL COMPENSATION TRIBUNAL (from Criminal Injuries  
 Compensation) ACT 1983.

A SURVEY USED TO AFFECT CHANGE TO LEGISLATION

Further changes to Victoria's sentencing laws appear imminent, after the controversial sentencing survey issued to the community by the Attorney-General, Jan Wade, on August 1st 1996 (State Government of Victoria

1996, see Ch 1, p.11-13 IMPORTANT CONSIDERATIONS SURROUNDING SENTENCING IN INCEST CASES). The survey outlined one case scenario of incest, but this case study was under the heading of rape, hence nowhere in the survey did the public address the real issue of incest as a distinct crime, with its own disparate features highly relevant to any questions concerning sentencing; yet the legal definition of the crime of incest (see Appendix to Ch 1. pp.20-21) is influential in shaping the statutory process. In addition, the survey allowed for only a limited range of sentencing options, with no mention of any incorporation of treatment or appropriate and crucial prohibitions.

If legislation is to reflect community attitudes regarding the crime of incest, then it is essential that the community is an informed one. The required information can be delivered through our education system at all levels, in both work and community leisure environments, and by responsible media coverage.

## CHAPTER FOUR

### The Court Milieu

#### THE ORIGIN OF THE COURT SYSTEM

“The medieval idea of a court was centred on the idea of the king surrounded by his courtiers making decisions for the good of the kingdom.” (Young 1995, p. 393). Even though in today’s society people increasingly look to the courts for individual protection, the ancient idea of safeguarding the State and its citizens against criminal behaviour of deviant individuals is still an integral part of our legal system. All of the presiding judges in the cases in which I have been a participant observer have pointedly drawn attention to the concept of community expectations and safety, particularly at the sentencing stage.

#### THE GRAND RIGOUR OF THE COUNTY COURT

The County Court milieu presents to the participant a curious mix of pomp and austerity; it is a stern grandeur that an observer can become accustomed to.<sup>21</sup> Yet for a first-time chief-witness (especially a child or adolescent) in an incest case, the court environment must be daunting. The rhetoric punctuated by total silence, the theatricality of the courtroom, and the demeanour of the Defence and judge must surely all serve to intensify the intimidation of the incest victim. Hence, the introduction of courtroom

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<sup>21</sup> Because of the many months I spent in the County Court, I became accustomed to the rigour of the court environment (see Ch 2 pp29-33 A DAY IN THE COUNTY COURT OF VICTORIA - 1996). This sense of an abatement of my initial tension was also assisted by factors such as the friendliness of the Crown counsel and by the interest taken in my research by one presiding judge.

modifications such as the use of closed-circuit television for child witnesses in sex offence cases, would appear to be a constructive initiative to facilitate justice for the less powerful child involved (Ch 1 pp.18.-19 CHILDREN'S RIGHTS AND CHILDREN'S EVIDENCE).

#### THE USE OF CLOSED-CIRCUIT TELEVISION

Closed-circuit television was used for the giving of the victim's evidence in Case 1, Trials A and B, in the trial of Case 3, and the possibility of its use was alluded to in Plea 3. (see Outline of Cases, pp ix,-x & xxi). In all the incest cases that I have attended, evidence has been presented by the child victims that they have been under the perpetrator's threat not to divulge the abuse. Because of this, a child may find it difficult to speak of the perpetrator's actions in his presence. Hence, the use of the closed-circuit television allows for the child to be both seen and heard in court, without the possible psychological restraints imposed by the accused being present.

One of the arguments against the use of closed-circuit television for the giving of children's evidence, is that this "...may deprive the jury of some cues to the witness' demeanour and thereby infringe upon the defendant's right to a jury trial" (Melton in bussey 1992, p.82). Even though subjectively, the jury might think it more legitimate if the child witness appears in court in person,<sup>22</sup> this point of view does not seem valid, as the victim's true demeanour would undoubtedly be distorted by occupying the same space as his or her tormenter.

Another possible argument against the reception of evidence via closed-

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<sup>22</sup> The Crown prosecutor in one of the trials I observed, told me that it "looks better" for the Crown case, if the child witness is able to appear in court in person.

circuit television is the jury's possible inclination to infer guilt from the procedure of separating the child witness from the accused (Melton in Bussey 1992). But this disposition is countered by the trial judge's sombre warning against such an inference being drawn.<sup>23</sup>

#### THE USE OF A SCREEN

Yet another modification that can be implemented in the courtroom for child witnesses, is the one-way vision screen. Using this device, the jury, judge and counsel can see the child, but the child is blocked off from the accused. I witnessed a screen being used in a case I attended in 1995 (see Ch 2 pp 23-24). Bussey (1992) argues that this method of receiving a child's evidence may be preferable to the use of closed-circuit television, because it allays the jury's doubts about interference to the child's evidence, that may occur out of the camera's range. However, this argument would appear to be unfounded in the context of the County Court of Victoria, where it is the usual practice for only the court tipstave<sup>24</sup> to be in the video room with the child witness.<sup>25</sup>

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<sup>23</sup> The judges in the cases that I observed, where closed-circuit television was used, all gave such a warning to the jury.

<sup>24</sup> There is one tipstave assigned to each court, who acts as the court caretaker for the duration of the trial (his jobs include locking and unlocking the court, calling the witnesses and taking care of the jury).

<sup>25</sup> In the trial of Case 3, a volunteer support worker was supposed to be in the room with the victim, but she failed to arrive on time, therefore the tipstave was alone with the child (volunteer support workers could be a cause for concern in this area of evidence giving, due to their non-professional status in the court arena see Ch 4 pp42-43 ).

#### THE V.A.T.E. PILOT PROJECT

There would appear to be some substance to scepticism surrounding the use of the new V.A.T.E. system for receiving children's evidence in court (see Ch 1, pp.18-19. CHILDREN'S RIGHTS AND CHILDREN'S EVIDENCE). Under this system, the child's evidence-in-chief would be taken outside the court arena by specially trained members of the police force and a video of this evidence would be played in court. This raises problems for the Crown whose power may well be diminished by not having the benefit of a lawyer leading the evidence-in-chief. Also, the Defence's cross-examination would take place via the closed-circuit television system, thus, according to Magistrate Jennifer Coate, favouring the Defence, because they are able to view the video tape prior to it being shown in court (Meadows 1995), and thus prepare a meticulous cross-examination.

#### VIDEOS TO ASSIST CHILD WITNESSES

Two videos and a workbook have been produced in Western Australia by Michael O'Rourke and Aardvark Productions (for "Childright Incorporated") to assist children required to give evidence in court (Community Services Victoria Pack 1992). It would appear imperative that the professionals involved in court proceedings enhance the child witness' preparation for the harrowing experience of court by use of such videos and written material.

#### THE WHITEBOARD USED TO ASSIST EDUCATION

The use of a whiteboard with an inbuilt copying facility can be an educational experience for all those present in court. When use was made of

a whiteboard, at the judge's request, in Trial A of Case 2 (see Ch 5 pp55-56 THE CRUCIAL EXPERT EVIDENCE FROM TWO FORENSIC DOCTORS), there was a brief reprieve in the formality of the court atmosphere, giving way to a climate of learning. The expert witness was permitted to leave the protocol of the witness box, and thus the court's attention was absorbed in the instruction materializing on the educational apparatus for a time.<sup>26</sup> The learning acquired in a particular courtroom through the expert witness' use of a whiteboard can, in turn, be passed on to other judges, by the presiding judge<sup>27</sup> and hopefully spread to the wider community (albeit in a limited way) via all persons present in court.<sup>28</sup> The potential for journalists to pass on such vital information to the wider community is not realized in incest cases because of the absence of the media ( Ch. 1 pp.6-8. THE MEDIA'S ROLE IN CAPTURING PUBLIC AWARENESS OF CHILD SEXUAL ASSAULT and Ch 5 pp56-62 EVEN GREATER EXPERTISE USED TO ADD COGENCY TO THE FIRST EXPERT'S EVIDENCE; THE BREAKING DOWN OF COURT CONFINES; THE IMPORTANCE OF LANGUAGE; THE RARE CASE OF AN INJURY IN AN INCEST TRIAL; THE USE OF THE EXPERT WITNESS TO RE-ESTABLISH A VICTIM'S CREDIBILITY; CRUCIAL ERUDITION EXCLUDED) during the course of the trial.

#### THE 'EXTRAS'

Apart from the key players<sup>29</sup> the court milieu encompasses a human

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<sup>26</sup> The whiteboard can be used by any witness, at the judge's request to help clarify issues.

<sup>27</sup> This transference of information could occur at a judges' conference, or on a more casual basis when judges discuss cases. I was told of a judges' conference which took place near the close of Case 2 and I assume that vital information would have been circulated by the presiding judge in that case (see Ch 5 pp 56-62 EVEN GREATER EXPERTISE USED TO ADD COGENCY TO THE FIRST EXPERT'S EVIDENCE; THE BREAKING DOWN OF COURT CONFINES; THE IMPORTANCE OF LANGUAGE; THE RARE CASE OF AN INJURY IN AN INCEST TRIAL; THE USE OF THE EXPERT WITNESS TO RE-ESTABLISH A VICTIM'S CREDIBILITY; CRUCIAL ERUDITION EXCLUDED).

<sup>28</sup> While jury members are only permitted to discuss the details of a case with one another, what knowledge they may glean from the expert witness regarding medical facts or salient theories can, it is hoped, be dispersed, even in a minor way, throughout the community.

<sup>29</sup> The key players include the judge, legal counsel, the jury, the prosecutrix, and the defendant.

element of 'extras' in any said County Court case. One component of this element is a volunteer support group for witnesses, made up mainly of judges', lawyers' and doctors'<sup>30</sup> wives, who unintentionally, at times, impede the course of the law by their ignorance of the rigorous confines of court process. One example of this was when a volunteer conversed with a jury member in a lift, resulting in the entire jury being discharged and the trial having to be recommenced. One of the volunteers' most beneficial roles appears to be that of supporting victims and their families and other witnesses, while they await court appearances. I have observed a volunteer support worker familiarize a child with the inside of a courtroom, prior to the child's appearance there as a witness. Volunteers also sit inside the court to support witnesses when they give their evidence.

Other components of this human element include the judge's associate, the court tipstave,<sup>31</sup> security police, the accused's security guard, the police informant, interpreters, relatives of the victim and the accused, the sound recorder, students,<sup>32</sup> the general public, and reporters. The latter two categories are, it seems, generally absent in incest cases. When members of the general public have entered the courtroom, in incest cases that I have attended, they have been dissuaded from remaining in court by the presiding judge.<sup>33</sup> Journalists are often prohibited from reporting on

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<sup>30</sup> There are small waiting rooms where victims and their families can wait, until they are called to appear in court; the volunteers make tea and coffee for those who need it, and assist with the care of the children involved.

<sup>31</sup> See Ch 2 pp.29-33, A DAY IN THE COUNTY COURT OF VICTORIA -1996; and CH 4. P.40 Footnote 24.

<sup>32</sup> In the cases I observed, the presence of other students was infrequent and when they did attend a court case, they did not observe the case for more than a few days.

<sup>33</sup> On at least two occasions I have seen adults enter the courtroom with children, and the presiding judge has told them the case is not a suitable one for their observation.

a substantial part of an incest trial (see Ch 1 pp6-8 THE MEDIA'S ROLE IN CAPTURING PUBLIC AWARENESS OF CHILD SEXUAL ASSAULT, Ch 2. p.26 and Ch.6 pp.84-86 JUDICIAL DISCRETION) and hence are generally only seen, if at all, at the sentencing stage of a trial.<sup>34</sup> Twice during the course of my research in the County Court, I have been asked, with negative connotations, whether I was a reporter.<sup>35</sup>

#### THE COURT REALITY

The County Court milieu is indeed a scene of sombre finesse. The very perceived autonomy of the legal system, helps to create a distinctive 'reality' which becomes all-encompassing for those involved in the court case (see Ch. 2, p.25).

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<sup>34</sup> The long duration of some incest trials may also be a deterrent to journalists.

<sup>35</sup> These enquiries came from a judge's associate in one instance, and from a victim's mother in the other.

## **CHAPTER FIVE**

### **WHO'S AN EXPERT?**

“...they were often utterly at a loss, they did not have any right understanding of human relations, since they were confined ... to the workings of their judicial system, whereas in such cases a knowledge of human nature itself was indispensable.”

(Kafka 1963, p.133)

The crime of incest evokes an emotive response from society on the one hand, yet it is also shrouded by a denial which makes the crime inherently resistant to discussion and inquiry. Hence the use of the expert witness in the County Court is crucial, in order to shed the necessary light on the complexity of incest cases. The use of the expert witness in incest cases must be evaluated, taking into account the legal constraints imposed by the County Court, the worth of the particular disciplinary knowledge involved, and the influence of societal values.

### THE EXPERT WITNESS

The evidence of the expert witness (see Ch 1 p.2. THE EXIGENT NEED TO ACCEPT EXPERT ADVICE, footnote 1) is, in most cases, “opinion evidence”<sup>36</sup> rather than evidence of fact. Although opinion evidence is generally excluded from a trial, it is nevertheless allowed, through the medium of the expert witness, or his or her written report, in the hope that certain ‘truths’ will be established. The knowledge that the expert brings to court should “... aid the trier of fact in resolving an issue or reaching a decision.” (Bulkley, 1986 p.64).

Three prerequisites for the admission of expert evidence were expounded by the judge in Case 2, Trial B<sup>37</sup> These were that:-

- 1) opinions were on questions that are the subject of a field of expert knowledge.
- 2) the expert witness was a qualified expert in the field.
- 3) the matters to which the expert would refer would be outside the knowledge and experience of the jury.

It is imperative that the expert witness meets this stringent criteria, so that superfluous use of experts does not take place in court.

Expert witnesses are also used at the pre-sentencing stage of a court case, by the Defence, to bring to light certain factors that may have contributed to the accused’s sexual criminal activity.

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<sup>36</sup> Bates states that “opinion” refers to “... influences drawn by witnesses from facts which they have observed” (Bates 1985, p.219).

<sup>37</sup> These prerequisites were outlined after legal argument (not in front of the jury), when the judge ruled on the admission of expert psychiatric evidence for the Crown.

In reviewing the validity of the use of expert witnesses, it would appear that these factors, relevant as they may be, should not be used to exonerate the perpetrator (see Ch 1, p.16. THE PSYCHOLOGIST - EXPERT FOR THE DEFENCE), but rather as mitigating elements which could be taken into consideration by the sentencing judge. One of Australia's leading psychiatrists, Dr Allen Bartholomew,<sup>38</sup> once called for "psychiatrists to be removed from courtrooms because of their 'highly suspect' ability to make a reliable diagnosis." (Ryan 1996, p.28). At the pre-sentencing stage of Case 1, the subjective nature of expert evidence was illuminated by the conflicting diagnoses of the experts involved. (see Ch 5, Case 1, pp.52-53. EXPERTS' REPORTS TO BE CONSIDERED FOR USE AT THE PLEA AND SENTENCING STAGE). It is not, however, in this precinct of the court case that expert evidence is most crucial. Expert evidence is critical at the trial stage, in front of the jury, to inform and to expurgate myths. Hence, the experts used at this vital juncture need to be able to demonstrate their expertise through reputation, experience and qualifications.

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<sup>38</sup> Dr Allen Bartholomew is renowned in psychiatric circles worldwide, for his extensive experience in the assessment and treatment of mentally-ill criminals. Until 1985 he was a psychiatrist at Pentridge Prison (Ryan 1996, p.28).

**EXPERT WITNESSES USED DURING THE CASES OBSERVED  
IN THE COUNTY COURT.**

**The Use of Expert Witnesses in Case 1, Trial A.**

THE SOCIAL WORKER AS AN EXPERT

During the legal argument of Case 1, Trial A, involving the 13 year old natural daughter of the accused, (see Outline of Cases ppviii-ix), an attempt was made by the Crown to admit evidence of a significant conversation between a social worker and the accused (see Ch 1 p.17.THE ABSENCE OF SOCIAL WORKERS AS EXPERT WITNESSES). As well as the problems presented by the hearsay character of this evidence, it appeared that legal constraints were not taken into account by the social worker, when she elicited what could have been construed as an acknowledgement of guilt. The judge referred to the fact that the accused had been given no warnings about the conversation being used as evidence, but more to the point, the social worker did not have the necessary expertise to evoke such an admission. The social worker's disbelief and indignation at the judge's decision not to admit this evidence was understandable; however, the court's justification for the omission seemed to be based on a lack of confidence in a social worker's assessment of parties, formed from interviews "...without the opportunity to test the credit in depth of people ... in court" (Bates 1985, p.230).

Jan Breckenridge (1995, p.34) argues that there is a "... legal view of social work as largely discretionary, resulting in a questioning of the validity ... of assessments ...", while the law asserts "scientificity" and claims to deal with "notions of truth ...". If one of the goals of social work is to enhance social functioning, then there is a need for social workers to be well versed in the law. Furthermore, it would appear imperative that both the legal and social work professions aim to comprehend the affiliation necessary between the disciplines.

#### THE FORENSIC DOCTOR AS EXPERT

The second person who was to be considered as an expert witness in this trial was a female doctor who had specialized in forensic medicine for 14 years; both her qualifications and experience were scrutinized by the judge. She was questioned on "voir dire"<sup>39</sup> about the examining doctor's notes<sup>40</sup> and about physical findings relating to intrafamilial child sexual abuse cases in general. The expertise of the forensic doctor was crucial in this legal setting, in order to eliminate the ambiguity inherent in the examining doctor's report that was before the court, which stated only that there were no abnormal physical findings. What the court needed to know was that physical abnormalities are rare, and not the norm, in these particular cases. The expert's statement of there being only 3-4 children out of every 100 who show physical signs of abuse, was significant to these proceedings. Interestingly, it is not only the legal profession and the jury, representative of the general public, who appear to be unaware of the absence of physical signs in incest cases. A general practitioner, who

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<sup>39</sup> A "voir dire" is used to determine the admissibility of evidence to be presented before a jury.

<sup>40</sup> The victim underwent a medical examination by a police surgeon, at the time that the sexual abuse was reported to the police.

examined the victim in Trial A, apparently saw the absence of physical signs as being indicative of there having been no abuse (see Ch 1, pp 3-6. THE FLUCTUATION OF THE PERCEPTIONS OF INCEST OVER TIME).

The expert used in this case was able to point out the important differences between the sexual assault of a child by a stranger and sexual assault by a close relative. She informed the court that a close relative will nearly always 'prepare' the child for the abuse, being careful not to cause injury or leave other physical signs of abuse (this will also generally be the case with an abuser who is in a 'carer' role. e.g. a priest or a teacher). On the other hand, the stranger, who usually makes no preparation, will often cause significant physical damage to the child. Hence this expert had elucidated the importance of perceiving the crime of incest as being different from other types of child sexual assault, in order to procure a fair outcome in court.

The expert's role in the dispelling of myths (see Ch 5, pp 46-47 THE EXPERT WITNESS) was visible in this case. When the defence barrister cited some quite out-of-date <sup>41</sup> material on child sexual abuse, from a medical text, the said expert refuted the content with words to the effect that:- we've come a long way since then. Other knowledges pertinent to incest cases in the legal arena, must be constantly and expertly updated.

#### THE FORENSIC DOCTOR AS AN EXPERT WITNESS IN FRONT OF THE JURY

The forensic doctor was permitted to give expert evidence in the presence of the jury at this trial, and prior to this being given, the Crown

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<sup>41</sup> This material was from a 1960's medical text

prosecutor, through questioning, was able to demonstrate the doctor's expertise to the jury,<sup>42</sup> However, the expert's evidence was limited to her assertion that only 3-4 out of every 100 sexually abused children show any physical signs of abnormality, and the additional statement that even in these cases, the signs may not be connected with the abuse. The jury did not learn about significant differences between the crime of incest and other child sexual offences (see Ch 5, pp 49-50. THE FORENSIC DOCTOR AS EXPERT).

#### THE POLICE SURGEON AS AN EXPERT

The notes of the police surgeon who had examined the victim, had seemed incomplete and hence incongruous (see Ch 5, pp.49-50. THE FORENSIC DOCTOR AS AN EXPERT) until the forensic doctor had imparted her expert knowledge to the court. The police surgeon was then called as a witness in front of the jury, and was able to shed further light on the absence of physical signs in this case, by his revelation that children often heal rapidly and completely, if injury has occurred.

Often more than one expert is used in a trial, and this appears to be vital for the communication of valid expert information within the trial process<sup>43</sup> (see also Outline of Cases, Case 2, Trial A p.xiii. EXPERT WITNESSES USED BY THE CROWN DURING THE TRIAL).

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<sup>42</sup> Once again, the forensic doctor's qualifications and experience were elicited in court and emphasis was placed on the fact that she saw an average of 200 pre-pubescent children per year.

<sup>43</sup> More than one expert may be used to confirm a fact or theory, or to dispute certain expert knowledge that is before the court.

## The sole expert used in Case 1 Trial B

### THE POLICE SURGEON ALONE USED AS AN EXPERT

In Trial B, relating to another daughter of the accused, and with a different 12-member jury, only the examining police surgeon was called as an expert witness. This doctor, who again found no physical signs of abuse, was able to explain to the jury that this was not unusual in incest cases, and to inform them about the rapid healing in children who have been injured.

But the jury was deprived of the vital expert knowledge regarding actual numbers of children who do not show physical signs of abuse, that the forensic doctor had related to the jury in Trial A. Also, they too (as was the case in Trial A) were not told about the important dissimilarities between incest and other types of child sexual assault.<sup>44</sup> In effect, the jury was left to contemplate the report of a doctor's examination, which neither confirmed nor denied the child's allegations of sexual abuse. The expert evidence of the forensic specialist used in Trial A, would have lent significant weight to the examining doctor's evidence about the healing process in children, and the not unusual phenomenon of an absence of physical signs.<sup>45</sup>

### EXPERTS' REPORTS TO BE CONSIDERED FOR USE AT THE PLEA AND SENTENCING STAGE.

At the plea and sentencing stage directly after the trials (see Ch 1, pp 11-13  
 IMPORTANT CONSIDERATION SURROUNDING SENTENCING IN INCEST CASES &

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<sup>44</sup> In this trial, the Crown decided not to seek admission of this evidence.

<sup>45</sup> It was almost as if, because the court had heard the evidence of the forensic doctor at Trial A, the court was armed with this vital information in Trial B; however, the court was an altered court, in that it had a new jury which had not heard the above evidence.

footnote 5), reports of two experts were to be considered, one by a psychiatrist and the other by a psychologist. The psychologist stated in his report that in his opinion the accused man should be in psychiatric care, rather than prison. However, the judge was not satisfied with this assessment, arguing that a psychologist, not being a medical doctor, has limited expertise in advancing such a recommendation.

Under the Sentencing Act (1991), the judge was able to order reports from the appropriate experts which were to be obtained by the Director General of Corrections. At the further plea stage (See Ch.1.pp11-13 IMPORTANT CONSIDERATIONS SURROUNDING SENTENCING IN INCEST CASES & footnote 5), five months later, the reports before the court from three experts differed markedly; hence, the presiding judge stated that he was not in a position to make findings based on these reports. Consequently, the judge decided that oral evidence would be required from the experts (at a later date). It was the judge's opinion that the experts should have had the benefit of reading one another's reports before they were presented to the court. But maybe such conferring would detract from the objective nature of each individual report. However, a process of statement/rejoinder may have enabled the expert witness to identify where there were explanations for conflicting views.

The report of yet another expert was ordered by the Defence just prior to the adjournment of Case 1. This expert was a doctor who had actually treated the accused for anxiety and depression (see Outline of Cases, Case1, p.x, Postscript).

## Expert evidence allowed in Case 2 Trial A.

### EXPERT EVIDENCE TO BE CONSIDERED IN THIS CASE

The first piece of expert evidence that was appraised in Trial A of Case 2 was a doctor's medical report,<sup>46</sup> which dated back some 27 years. The Defence objected to the use of this report, emphasizing the time factor, which meant that the doctor concerned could not give evidence, as he had since died. In expressing a view on the use of such documented evidence of a deceased witness, Lord Roskill<sup>47</sup> argued, that it is not necessarily unfair that a witness is unavailable, as "... this risk is inherent in all litigation and all arbitrations. Even at an early date a witness may die or become unavailable for some other reason and documents may be destroyed." In light of this, it is Lord Roskill's view that "every tribunal must do its best with the material placed before it" (lpp 1995, p.374).

### THE EXHAUSTIVE MEASURES TAKEN BEFORE THE COURT'S ACCEPTANCE OF THE MEDICAL REPORT

The Crown had enlisted the help of two medical experts<sup>48</sup> to peruse the deceased doctor's report, and subsequently give evidence in relation to this report. One of the above experts had actually known and worked with this surgeon, and was therefore used to comment on his competence and his

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<sup>46</sup> This report contained the treating surgeon's comprehensive post-operative notes, relating to the young woman victim, who had undergone extensive "repair" surgery as a result of the alleged sexual assault, and whose blood loss due to her injuries was considerable (requiring transfusion). It also contained a letter expressing the surgeon's concerns about the child's injuries and her welfare. The surgeon alerted the police to the possibility of intrafamilial sexual abuse in this case, and they subsequently visited the child's home to question her parents (abuse was denied). The surgeon further recommended that the victim not return home immediately after her hospital admission (the duration of which was approximately three weeks). The child herself was reluctant to leave hospital.

<sup>47</sup> In the case of Paal Wilson & Co A/S V. Partenreederei Hannah Blumenthal

<sup>48</sup> One of these experts also gave evidence in Case 1, Trial A.

prowess regarding report writing. These two experts were examined on “voir dire” before being allowed to give evidence in front of the jury.<sup>49</sup>

The Defence requested that the surgeon’s death certificate be produced in court (a not unusual step), but its insistence on the elderly surgeon’s wife’s appearance in court seemed uncalled-for and insensitive. This frail lady, who was well into her eighties, was required to give evidence both on “voir dire” and in front of the jury.<sup>50</sup> What Justice D.A. Ipp refers to as “...unnecessary time-wasting in placing evidence before the court ...” (Ipp 1995, p.365) could have been avoided by judicial intervention.

An assistant hospital records administrator was also called to court, to transport the records to court, and to read out the surgeon’s report on “voir dire” and in front of the jury.<sup>51</sup>

#### THE CRUCIAL EXPERT EVIDENCE FROM TWO FORENSIC DOCTORS

Two doctors who had examined the surgeon’s report at this trial were both forensic experts, who were also used to give vital evidence regarding the injuries sustained by the victim in this case. However, they were not permitted to divulge information contained in the report which concerned the treating doctor’s suspicions about the victim’s injuries, or about the fact that the child was not returned home after her hospital admission, having

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<sup>49</sup> A “voir dire” is a hearing by the judge, either at the beginning of the trial proper, or during the course of the trial proper, but in the jury’s absence. It is conducted to resolve certain issues relating to admissibility of evidence, competence of witnesses in general, and in the case of expert witnesses, their expertise. Following a “voir dire”, the judge delivers his decision, and the reasons for that decision, to the court, before the trial.

<sup>50</sup> This appeared to be a delay tactic on the Defence’s part.

<sup>51</sup> This is the procedure followed when official records are used in court.

been placed into care for some months.<sup>52</sup> (see Outline of Cases, Case 2, p.xi. footnote 3 and Ch 5 p.54. EXPERT EVIDENCE TO BE CONSIDERED IN THIS CASE. and footnote 46).

The first expert called by the Crown was a forensic gynaecologist who spoke before the court of her extensive experience with children, teenagers and young women who had been raped, and their families. This witness had prepared a diagram of the damage described in the deceased surgeon's report. But the judge promoted the jury's understanding even further, by sending for a whiteboard to be used by the expert, thus creating a poignant image of the injuries in the minds of the jury members (see Ch.4, p.41-42 THE WHITEBOARD USED TO ASSIST EDUCATION). This expert's statement that the features of accidental injury were not to be seen in this diagram, and therefore the likelihood of these injuries being accidental was extremely slim, was a crucial one, as it imparted to the jury medical knowledge beyond their everyday understanding of this topic.

#### EVEN GREATER EXPERTISE USED TO ADD COGENCY TO THE FIRST EXPERT'S EVIDENCE.

The Defence objected to evidence relating to injuries in this case, being given by a second expert. However, the Crown's response was that this expert possessed even greater expertise in the area of forensic medicine, than the first expert. This expertise included working in forensic medicine for 14 years, being acting director of forensic medicine with the Victorian Police for two and a half years, the training of other doctors in sexual abuse work, and being an honorary lecturer in forensic medicine. The said expert had brought to court prepared notes about the possible causes of

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<sup>52</sup> The two forensic doctors who had been questioned on "voir dire" first, were told specifically not to mention these entries in the doctor's report.

the type of injury that was seen in this case. She was asked to define “blunt instrument” and “trauma”, terms which the jury members would have certainly been familiar with, but which required definition in the context of a sexual abuse case. Her emphatic statement that, in her opinion, the injuries sustained by the victim were due to assault and not exploratory behaviour,<sup>53</sup> added further weight to the first expert’s assertion about the unlikelihood of accidental injury in this case. The second expert spoke most convincingly to the jury, and her distinguished expertise was demonstrated in the court arena by her competent manner and her professionalism, which were conveyed by her coherent explanation of complex issues to the court.

#### THE BREAKING DOWN OF COURT CONFINES

It was notable that neither of the above forensic experts was willing to be constrained by the court discourse of a yes/no response. They extended their answers to allow for context at all times, often to the annoyance of the presiding judge. Since an expert witness is called to elucidate subject matter that is outside a jury’s knowledge, he or she should be permitted to do so with minimal restriction. Also a yes/no answer does not allow for the reframing of inappropriate questions.

#### THE IMPORTANCE OF LANGUAGE

In summing up the case for the jury, the presiding judge appeared to be remiss in failing to go over the expert witnesses’ evidence. He referred to the expert witnesses as ‘scientific’ witnesses, thus somehow distancing their knowledge in the minds of the jury members, through the use of language which stressed technical competence alone, rather than

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<sup>53</sup> The Defence had suggested that the injuries could have occurred through the child’s exploratory behaviour.

suggesting an erudition which encompassed social and communicative abilities as well (see Ch 2 Postscript pp.29-33.. A DAY IN THE COUNTY COURT OF VICTORIA - 1996, including Footnote 18)

#### THE RARE CASE OF INJURY IN AN INCEST TRIAL.

This particular trial illuminated the fact that, in common perception, it is easier to associate abuse with trauma (in this case established as significant trauma) than it is to comprehend the sexual abuse of incest as being generally associated with no physical signs. Trial A of Case 2 was the only case seen during my research where physical injury was apparent, and this horrific injury was not permitted to be used as proof of further incestuous assault in Trial B,<sup>54</sup> involving the same victim, as it was thought to be too prejudicial to the accused, but the probative value of this evidence would seem to have been critical in the pursuit of justice.<sup>55</sup> This appeared to be a case of a 'fair' trial for the accused versus justice.

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<sup>54</sup> The accused was found guilty of the count of incest in Trial A.

<sup>55</sup> The trial judge must weigh up the prejudicial nature of evidence, to the accused, against its probative value in the delivery of justice. In doing so in this case, the judge listened to exhaustive argument by the Crown and the Defence; however, in the end, it is judicial discretion which prevails (see Ch6 pp84-86 JUDICIAL DISCRETION; and Ch 5 p 60 Footnote 59).

## The Crown's Attempt to Utilize Exceptional Expert Evidence

### Case 2, Trial B.

#### THE USE OF THE EXPERT WITNESS TO RE-ESTABLISH A VICTIM'S CREDIBILITY.

During Trial B of Case 2, two significant uses of the expert witness were demonstrated, when the Crown attempted to rehabilitate the victim's credibility, and at the same time provide vital information to the court, by calling a psychiatrist to give expert evidence about seeming inconsistencies in the victim's behaviour, relating to a letter and her failure to protect her children (see Ch 1 p.3 footnote 2; and Outline of Cases, p xiv Case 2 Trial B, EXPLANATION OF THE LETTER REFERRED TO IN THIS TRIAL). On the surface, and to the untrained eye, the victim's credibility appeared to have been destroyed by the above.

The expert witness used in this trial proclaimed her extensive expertise to the court, which included forensic psychiatry, post-graduate qualifications in child and adolescent psychiatry, being a senior lecturer in the field and her undertaking of a delegate's position in South Africa.

The importance of the detailed evidence given by the expert on "voir dire" (see Ch 5, p.55, footnote 49), regarding both the letter and the failure to protect was manifest. However, the trial judge allowed very little of this substantial evidence to be heard in front of the jury, claiming that they should be able to draw their own conclusions about the 'incongruous'

evidence, based on their individual experiences, and knowledge.<sup>56</sup> The above claim appeared highly questionable.<sup>57</sup> The judge endorsed his assertion further, by claiming that the jury was representative of a good cross-section of the community's female population.<sup>58</sup>(This particular jury consisted of only 3 females, whose occupations were as follows: nurse, waitress and secretary; hence the above statement appeared open to dispute.)

#### CRUCIAL ERUDITION EXCLUDED

The above-mentioned psychiatrist's expert evidence was sustained by theory regarding a syndrome known as the accommodation syndrome<sup>59</sup> (a) and (b). Yet from the outset of this trial, the presiding judge was opposed to the reception of vital information regarding such a syndrome in court. In fact, very soon after the expert witness first entered the courtroom, the judge claimed that most psychiatrists had not actually seen cases of the "accommodation syndrome"; rather, they had merely read about it. However, the expert stated that she had considerable clinical experience of such cases, as well as having read extensively on the topic from the huge body of literature which has been in existence since the 1980's.

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<sup>56</sup> At the trial's inception, the jury members are told by the judge that they are the judges of the facts, but they are also asked to be arbiters of complex social issues.

<sup>57</sup> The trial judge made naive assumptions regarding the letter, relating it to love and hence trivializing the abuse; he was also noticeably astounded that a failure to protect is common among incest victims. Therefore, it is difficult to ascertain on what possible grounds the judge based his conjecture, that the jury would possess the requisite knowledge concerning a case of such a complex nature. I considered myself to be in a similar situation as the jury members regarding this expert knowledge, and I would have found it most difficult to make a valid judgement without such information.

<sup>58</sup> In the HERALD SUN (October 21st), in an article headed "Judges urge jurors revamp", it was stated that "County Court judges have suggested widespread changes to jury service to achieve more representative jurors" (Wilkinson 1996). The Judges' Law Reform Committee has recommended the inclusion of many of the categories of people currently ineligible for jury duty (e.g. ministers of religion, government shorthand-writers and people employed by Community Services within the past ten years), or those automatically entitled to be excused (e.g. doctors, dentists, pharmacists, teachers and pilots).

<sup>59</sup> (a) A "syndrome" was defined by Dr Allen Bartholomew in a 1994 incest trial as "...a correlation of features" as opposed to an illness (Bartholomew 1994 p528)

(b) The expert witness for the Crown in this trial informed the court that the "accommodation syndrome" comes under the umbrella label of a complex syndrome called the "post-traumatic stress syndrome".

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The psychiatrist told the court, albeit without the jury present, about the incest victim's need to minimize the abuse and to placate the abuser. She spoke of a distortion in the child's behaviour, which represented an adaptive response to a maladaptive situation. The expert's discourse on the "accommodation syndrome" was lengthy and informative. It included factors consistent with the severity of the syndrome that were relevant to the case at hand.<sup>60</sup> Yet the judge persisted with his antagonistic attitude towards this vital evidence. When the expert was asked by the Crown if the general public would be aware of such a syndrome, the presiding judge interrupted the expert's attempted reply, asserting that, of course, they would not know of this syndrome. He appeared determined that their ignorance should prevail, asking with annoyance why the jury needed to be presented with a theory. But the explanation here was contingent on theory (see Ch 1 pp.2-3 THE EXIGENT NEED TO ACCEPT EXPERT EVIDENCE).

The evidence of the expert witness covered complex and pertinent issues. The trial judge himself looked bewildered and said that he failed to understand, a number of times during the expert's disquisition. Even at the conclusion of the psychiatrist's adept explanation concerning the said syndrome, the trial judge exhibited a grossly inadequate comprehension of the theory covered, by advancing three possible outcomes of incestuous abuse for the victims, as a summary of his 'understanding'. The judge contended that, 1). abuse could take over a victim's life; 2). the victim could come to enjoy it; or 3). a victim could shrug off the abuse and get on with her life.

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<sup>60</sup> These factors included the severity of the abuse, the early age at which it commenced, its repetitive nature and a poverty of nurturing shown by the child's mother.

In this trial, the stark reality of exhibit 1, the 'love' <sup>61</sup> letter, stood as a piece of damning evidence for the victim, on its own. It deserved the crucial explanation from the Crown's expert witness, yet the jury were presented with exhibit 1, devoid of interpretation (see Ch 1 p.3, footnote 2; and Outline of Cases, Case 2, Trial B, p.xiv EXPLANATION OF THE LETTER REFERRED TO IN THIS TRIAL).

The trial judge's final objection to the Crown's expert evidence took on two forms. Firstly, he claimed that sworn testimony of expert theorizing was no substitute for a victim's own reasons for her actions. Secondly, the judge asserted that an expert (either a psychiatrist or a psychologist) who had seen the victim should have been called as a witness to rehabilitate the victim's credibility. But the Crown prosecutor indicated that she did not think such evidence would be admissible.<sup>62</sup> Also, the victim who had concealed the abuse over a period of many years, had never seen a psychiatrist or psychologist. The full disclosure of the crime had only occurred on the platform of the County Court.

#### THE DEFENCE'S EXPERT WITNESS

As in Trial A of this case, a second expert was called, but not in this instance to substantiate the expert evidence already given. The Defence had called its own expert in an attempt to dispute the Crown's expert evidence.

The Defence's witness admitted to there being an increasingly large volume of literature surrounding the "accommodation syndrome". But he claimed that the level of education in the community on the topic of incest

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<sup>61</sup> The trial judge spoke of this letter in these terms during the course of the trial.

<sup>62</sup> Hearsay evidence of this nature is not usually admissible, although the trial judge here indicated that he would have allowed such evidence. Also, it can be allowed if both the Crown and the Defence consent to this.

was at a high level. However, this appeared to be a broad statement which was in contrast to the previous expert's reference to a press article which asserted that the community is loath to hear about child sexual abuse.

The Defence expert was called to give evidence in the absence of the jury, just as the Crown's expert had been. He stated his expertise in the field of forensic psychiatry and his experience as a consultant to the Children's Court and as a psychiatrist at Pentridge in the past.

#### EVIDENCE RELATING TO A FAILURE TO PROTECT SINGLED OUT BY THE JUDGE

The trial judge appeared to see only the entrustment by the victim of her children to a perpetrator, as a strange phenomenon, stating that ordinary people would not accept this. He therefore allowed in expert evidence relating to this occurrence alone. But the letter was left to speak for itself, as it were, entirely devoid of context. This jury did not know about the incestuous rape of the victim as a nine year old, which had distorted her world.<sup>63</sup>

#### THE EVIDENCE ALLOWED IN FRONT OF THE JURY

The Crown prosecutor attempted to provide evidence relating to the "accommodation syndrome" in the presence of the jury. But at the very mention of the syndrome, the trial judge sent the jury out, claiming that the 'condition'<sup>64</sup> was irrelevant; he further added that the victim would no

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<sup>63</sup> The Crown's expert witness explained that a child perceives love as how they are shown it; hence in these types of cases, the child will equate sex with love. The psychiatrist stated that the younger the child and the greater the severity of the act of abuse, the greater the distortion of his or her perception.

<sup>64</sup> When the Defence asked the Crown's expert earlier, if the "accommodation syndrome" was a disorder, she replied that it was a phenomena, rather than a disorder which often denotes that a cure may be possible.

longer have the 'condition' in her thirties. The Crown case had been severely undermined by the judge's decision only to admit a minute portion of their expert's evidence.<sup>65</sup> On the other hand, the Defence's expert witness advanced four scenarios, in order of prevalence, relating to cases of an incest victim's failure to protect her children. He spoke of a usual stringent protection, followed by some degree of leniency where the abuse had stopped, then a failure to protect in cases where the daughter does not see herself as a victim, and in the least prevalent of cases a failure to protect would be the result of severe abuse.<sup>66</sup>

#### THE VERDICT

The jury's numerous questions suggested they were searching for contextual evidence, that would assist them in making sense of the events presented, and thus arriving at a verdict. One such question the jury asked was why no D.N.A. tests had been conducted in relation to a charge of incest, which had resulted in pregnancy; the response they received from the judge was misleading and bewildering.<sup>67</sup> In fact, the jury received very little contextual evidence during this trial. Their verdict was "guilty" only on one of the five charges. Then, just before the jury was dismissed, the judge told them of the preceding trial and its verdict of guilty, plus the sexual assault of another young girl a few years prior to the initial abuse of his eldest step-daughter. The jury looked stunned. They left the court with heads bowed - apparently any faith in their verdict shattered.

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<sup>65</sup> The expert was only permitted to state that a failure to protect her children is not unusual in cases of this nature.

<sup>66</sup> The trial judge had deprived the jury of the knowledge that this case involved severe abuse, by separating the case into two trials in its early stages.

<sup>67</sup> The judge told the jury not to concern themselves with evidence that was not before them.

AMICUS CURIAE

In trials like the above, where the admission of supportive expert knowledge is so important, it may be judicious for the court to receive additional contextual information in the form of “amicus curiae” (Roxon and Walker 1994; see Ch 1 p.17-18 THE ROLE OF “AMICUS CURIAE”). This information would be independent of the erudition presented in court by expert witnesses engaged by Counsel. Our adversary system sets the Crown and Defence in opposition, even as regards expert knowledge crucial to a just outcome in a particular case. Rosen (1972) argues that “the primary goal of the advocate is, after all, to achieve a favourable legal decision even at the expense of empirical truth” (in Henderson 1994 p.760). “Empirical truth” is often arrived at through sound theorizing, which is supported by facts.

THE PROPOSED THIRD TRIAL AVERTED BY A PLEA OF GUILTY TO CERTAIN CHARGES.

The trial judge in Case 2, ruled in favour of a joint trial for the proposed third trial (see Outline of Cases pp.xvi; PROPOSED TRIAL C). He stated that the jury would need the ‘full picture’ in order to deliver a valid judgement on the facts. However, by the separation of Trials A and B, the juries concerned were not presented with anything like a complete picture of events, and the jury in the proposed third trial would have been kept in ignorance of the sexual abuse of the victim in Trials A and B.

At this stage, the accused pleaded guilty to certain charges brought against him in the presentment of the proposed third trial.

### EXPERT WITNESSES AT THE SENTENCING STAGE

At the pre-sentencing stage of Case 2, the Defence barrister indicated that he had obtained a psychological report of the perpetrator. But the trial judge ordered an independent psychiatric report as a matter of urgency, and the case stood adjourned pending this report.

### THE FORENSIC PSYCHIATRIST'S REPORT

A report was supplied to the court some weeks later, by a forensic psychiatrist; her presence was not required in court. This report showed a denial of the crimes and hence no remorse on the perpetrator's part,<sup>68</sup> which is not unusual in incest cases (see Abstract p.iii). Because of this denial, the expert argued that the perpetrator was untreatable and that he remained a menace.

### THE PSYCHOLOGIST'S REPORT

After the presentation of the psychiatrist's report, the psychologist's report that followed assumed a different stance, for the most part. It spoke of a deprived childhood in terms of parental presence. But the judge did not see this as an absolving feature, indicating that thousands of people are in a similar position, but they do not abuse their children. The trial judge emphasized the fact that the psychologist had also been left with the impression that the perpetrator was denying guilt; he had observed distress in the accused, but there was no mention of remorse.<sup>69</sup> At this point, the

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<sup>68</sup> This was even after the accused had pleaded guilty to some of the charges as noted in Ch.5, p.65p. THE PROPOSED THIRD TRIAL AVERTED BY A PLEA OF GUILTY TO CERTAIN CHARGES).

<sup>69</sup> The accused told the psychologist that he was upset with his step-daughter's attitude at this point in time (i.e. for reporting the abuse).

Defence made the somewhat remarkable announcement that the accused was willing to be re-assessed.<sup>70</sup>

### THE SENTENCING

By the time the sentencing stage of Case 2 was reached, the trial judge's attitude towards the expert evidence in Trial B, appeared to have undergone a metamorphosis (see Ch 1 pp.2-3 THE EXIGENT NEED TO ACCEPT EXPERT EVIDENCE). Rather than perceiving the letter, written by the victim and presented in evidence by the Defence in an attempt to discredit her, as a product of a girl in love, and further, not seeming to find this unusual (see Ch 1 p.3 footnote 2), the judge now attributed blame to the accused for distorting a child's innocent world. Hence, it would seem that the presiding judge had come to accept the female psychiatrist's interpretation of the effect of abuse on the victim, such that the victim's world had been distorted. Therefore, the salience of the detailed expert evidence presented to the judge in Trial B could not be underestimated. However, the snippets of such understanding accorded the jury <sup>71</sup> were totally inadequate for their informed appreciation of its significance in a legitimate adjudication.

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<sup>70</sup> This was suggestive of contrivance on the part of the Defence, to get the answers to both experts' questions right, so that their reports could be rendered less damning.

<sup>71</sup> The jury is not present in court at the sentencing stage of the trial; the jury is discharged immediately after it delivers its verdict.

## The Minimal Use of Expert Evidence in the Case 3 Trial

### THE EXPERT WITNESS FOR THE CROWN

The expert witness used by the Crown at this trial was the same forensic gynaecologist who was called to give evidence in Trial A of Case 2. However, in this case, she was also the doctor who had examined the victim. Physical signs of a stretch injury were observed by the expert, and she told the court that this injury had been sustained by a blunt object. The gynaecologist had taken photographs at the time of the physical examination, but these were not used in the court case. The trial judge allowed the expert witness to read, in front of the jury, from notes that she had taken, regarding the examination, but certain parts of this statement were excluded at the judge's direction. Also, some information regarding physical injuries in children, that this witness had prepared for court and offered to the judge for his perusal, was rejected by the trial judge (see Ch 6 p84, THE CALL FOR A BETTER INFORMED JUDICIARY).

The evidence of the Crown's expert witness appeared to be downplayed in this particular trial. Any significance it did represent for the jury may well have been undermined by its apparently forgotten status at the closing stages of the trial. Neither the opposing barristers nor the judge made any reference to this evidence in their addresses to the jury. It would seem that the significance of an expert's testimony is far greater when it is confirmed, or even contested by a second expert. (See Ch.5, Case 1 Trial A, pp.49-51 THE FORENSIC DOCTOR AS AN EXPERT; THE FORENSIC DOCTOR AS AN EXPERT WITNESS IN FRONT OF THE JURY; THE POLICE SURGEON AS AN EXPERT. CASE 2,

TRIAL A, pp.54-57: EXPERT EVIDENCE TO BE CONSIDERED IN THIS CASE; THE EXHAUSTIVE MEASURES TAKEN BEFORE THE COURT'S ACCEPTANCE OF A MEDICAL REPORT; THE CRUCIAL EXPERT EVIDENCE FROM TWO FORENSIC DOCTORS; EVEN GREATER EXPERTISE USED TO ADD COGENCY TO THE FIRST EXPERT'S EVIDENCE; THE BREAKING DOWN OF COURT CONFINES. and Case 2, Trial B pp.59-64: THE USE OF THE EXPERT WITNESS TO RE-ESTABLISH A VICTIM'S CREDIBILITY; CRUCIAL ERUDITION EXCLUDED; THE DEFENCE EXPERT WITNESS; EVIDENCE RELATING TO A FAILURE TO PROTECT SINGLED OUT BY THE JUDGE; THE EVIDENCE ALLOWED IN FRONT OF THE JURY).

#### AN 'EXPERT' FOR THE DEFENCE

The Defence called the accused's general practitioner as a witness. However, her evidence was merely hearsay evidence in that she was only able to report what the accused had told her, and therefore could hardly be classified as true expert evidence.<sup>72</sup> It was akin to the 'expert' evidence of the social worker, which was deemed inadmissible in Trial A of Case 1 (see Ch 5 pp.48-49. THE SOCIAL WORKER AS AN EXPERT)

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<sup>72</sup> This evidence was expert only insofar as the person reporting what the accused had told her was a person who saw the accused on a professional level. However, the general practitioner was not expert in the sense of being experienced in a particular field of knowledge.

EXPERTS' REPORTS CALLED FOR AT PRE-SENTENCING STAGE.

At the pre-sentencing stage of this trial, where mitigating evidence for the accused is considered by the judge before he delivers his sentence, the Defence barrister requested that the judge order a psychiatric report and a medical report for the accused. It appeared that the above were ordered, as the accused had been seeing a psychiatrist for some years, and he had suffered possible heart problems during the course of the trial, while appearing in the witness stand.

The sentencing of this case is yet to come, pending the requisite reports.

The following observations involve three separate Pleas in the County Court of Victoria. A Plea consists of the plea of guilty by the accused, followed by the pre-sentencing and the sentencing stages of the case. The expert witnesses used at the pre-sentencing stage are generally experts for the Defence, who advance mitigating factors for the accused that may influence the judge's sentencing decisions.

## The Experts Used by The Defence in Plea 1.

### A PRISON CHAPLAIN AS 'EXPERT' WITNESS

The first 'expert' witness called in this plea was a prison chaplain, who had recent contact with the accused. However, her evidence appeared to be in the same hearsay category as the general practitioner's in the Trial of Case 3, and that of the social worker in Trial A of Case 1. (see Ch 5, p.69. .AN EXPERT FOR THE DEFENCE and Ch 5 p.48-49 THE SOCIAL WORKER AS AN EXPERT). The prison chaplain was only able to state her opinion that the accused was in a distressed state, and that he was experiencing grief because of his crime.

### A FORENSIC PSYCHOLOGIST CALLED BY THE DEFENCE

The next expert called by the Defence was a forensic psychologist. After communicating her qualifications and experience to the court, the psychologist spoke in some detail about various psychological tests that the accused had undergone at the Defence's request.<sup>73</sup> The only test result which was within normal limits was the fourth result (the other results being below normal, thus indicating a diminished ability/capacity), implying on the Defence's behalf that there were some grounds for mitigation in this case. A test for depression, in particular, seems erroneous, in these cases, as depression would be a likely aftermath of acknowledging these crimes and the resultant consequences, and the almost certain prospect of a prison

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<sup>73</sup> There were four tests involved here. The first test was similar to an I.Q. test, but designed for people with language difficulties. The second test measured levels of depression. The third test was a memory test, and the fourth measured figuring and recall, plus organizational skills.

sentence.<sup>74</sup>

#### A HISTORY OF FAMILIAL VIOLENCE

The above-mentioned forensic psychologist pointed to what she viewed as significant in the accused's background, in relation to the crimes he himself had committed. He had experienced physical violence from his parents, and the accused's father had had an incestuous relationship with a daughter.

#### THE EXPERT'S OPINION OF THE PERPETRATOR AND HIS CRIMES

The evidence of the psychologist at this plea was lengthy. In her opinion, the accused did not understand the effects of the crimes on his daughter. The psychologist also argued that the perpetrator was not able to comprehend the boundaries that he had gone beyond, within the family. The expert stated that she did not believe that the accused would be a future threat to the community, because he had separated from his family. The psychologist went a step further in claiming that in her opinion paedophilia was not something to worry about in this case. But the crime of incest that the accused had committed over many years, and from when his daughter was a young child (see Outline of Cases, Plea 1 p.xix) was, by definition, paedophilia.<sup>75</sup> Also, on the question of the accused not being a future threat because of severance from his family, it remains unclear how

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<sup>74</sup> In cases I have observed where the Defence barrister and/or the expert witness used by the Defence have suggested that a prison sentence may not be the appropriate outcome of the criminal proceedings, the presiding judge concerned has always asserted that it is naive for the Defence to believe that the perpetrator will not have to serve a prison sentence (see Ch 5 Plea 2 p 74 A TREATING PSYCHOLOGIST AS EXPERT WITNESS).

<sup>75</sup> The Oxford dictionary definition of paedophilia is a "sexual desire directed towards children" (Allen 1990, p.855) However, the public mind, influenced by the media, may well equate the term "paedophilia" with the sexual exploitation of children by non-family members. It appeared in this case, that the psychologist had also used the term "paedophilia" in a limited sense.

anyone could go so far as to assert this; the accused could quite well start, or join, another family in the future.

The expert's view that the accused was in need of treatment and education, appeared to be a valid one. In light of the perpetrator's seeming lack of comprehension about the effects of the crime on his daughter (see Ch 5 p.72-73 THE EXPERT'S OPINION OF THE PERPETRATOR AND HIS CRIMES), education relating to the concept of societal expectations and family roles would appear essential for the accused's rehabilitation.

Also the judge's recommendation for treatment <sup>76</sup> in this case, would have been, it seems, beneficial, as the accused was no longer denying his crimes.<sup>77</sup>

#### THE JUDGE HEEDS TWO OF THE MITIGATING FACTORS EMPHASIZED BY THE EXPERT

Prior to pronouncing his sentence, the presiding judge mentioned the accused's family background in the summary of mitigating factors he had taken into consideration. He also stressed the psychologist's claim that the accused would be unlikely to offend again, as he would remain apart from his family in the future.<sup>78</sup> However, the above mitigating elements did not appear to carry substantial weight in terms of the actual sentence handed down by the presiding judge. The perpetrator received a jail sentence of

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<sup>76</sup> Even if the court perceives available treatment as deficient, the judge's recommendation for treatment could well represent a poignant statement that at least displays a recognition that the problem of incest is a complex one which requires addressing and inquiry (see Ch 1 pp 13-15 on treatment).

<sup>77</sup> In this case, the accused had fled overseas initially, to escape prosecution and even on his self-initiated return to Australia, he had denied committing the charges that involved penetration. The case was therefore to proceed to a full trial, but at the time this was to commence, the accused pleaded guilty to all charges.

<sup>78</sup> This claim, based on a sole expert's opinion, appears difficult to justify.

eight years and three months, with a non-parole period of six years (see Outline of Cases Plea 1. p.xix, SENTENCING).

### A Treating Psychologist used by The Defence as the Expert Witness in Plea 2.

#### A TREATING PSYCHOLOGIST AS EXPERT WITNESS

The expert witness used by the Defence in this plea was a psychologist who had both assessed and treated the accused.<sup>79</sup> Early on in the giving of his evidence, the expert indicated that it may be appropriate for the accused not to receive a jail sentence. However, the judge told the psychologist, in no uncertain terms, that he was naive if he thought the accused would not go to jail, and added that the community was outraged at the lenient sentencing of sexual offenders (see Ch 1, pp.11-13, IMPORTANT CONSIDERATIONS SURROUNDING SENTENCING IN INCEST CASES, and Ch 4 p.38, THE ORIGIN OF THE COURT SYSTEM; and Ch 5, Plea 1 p.72, footnote 74). It was also brought to the court's notice, by the Crown, that the accused had committed an indecent act in front of two children, apart from the sexual abuse of his daughter (see Outline of Cases, Plea 2, p.xx). But highlighting this incident, the Crown appeared to be advocating a pronounced need for the perpetrator's incarceration, on the grounds of the community's protection, in the broader sense.<sup>80</sup>

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<sup>79</sup> The psychologist was the director of a sexual treatment centre.

<sup>80</sup> In three of the six court cases I observed, it has either been alleged or established that the perpetrators concerned had committed sexual offences outside the family, as well as the crimes of incest.

## THE TREATMENT

The treatment that had been undergone by the perpetrator in this case was aimed at changing his behaviour. He had been treated for a period of 10 months, on roughly a weekly basis. The psychologist claimed that the 'normal' treatment period required for sexual offenders was five months and hence argued that the accused's period of treatment was extensive. But it is debatable whether such short-term treatment can really help in the long-term (see Ch 1 pp.14-15 TREATMENT IN THE JUVENILE JUSTICE ARENA). In the case in question, the sexual assault went on for six years or more and hence it is questionable whether 10 months of therapy could effect attitudinal, motivational and behavioural changes.<sup>81</sup>

The said treatment made use of a behaviour maintenance manual, in which the accused wrote down ways to deal with his sexual feelings. This manual was to be used on a continuing basis, and turned to in times of crisis; thus its use was reliant upon the accused's willingness and ability to perceive a crisis. In this case, the accused may well not have possessed the ability to reflect on his own behaviour, or to identify a crisis. The expert admitted that the accused needed coaching with the use of his manual,<sup>82</sup> which would imply that he would require continuing help from the psychologist. The expert explained to the court that use had been made of an external supervisor, being the pastor at the accused's church. This supervisor for the accused, appeared to be a positive step in the treatment regime, but it would seem that its value would be contingent on its

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<sup>81</sup> Likewise, in all the court cases I have observed, the sexual abuse has occurred over many years.

<sup>82</sup> The psychologist stated that the accused had a much lower than average intelligence (see Ch 5 Plea 2 p.76 EXPLANATION FOR THE ACCUSED'S BEHAVIOUR, GIVEN BY THE EXPERT)

association with therapy from a professional. The expert witness claimed that his treatment is currently the best on offer in Australia, or anywhere in the world. If this claim is true, then treatment worldwide would appear to be glaringly inadequate, and in need of urgent attention.<sup>83</sup> (see Ch 1 pp.13-14, TREATMENT, THE FORGOTTEN ACCOMPANIMENT TO SENTENCING; THE DILEMMAS OF THE 'PROTECTION' SYSTEM.

#### EXPLANATION FOR THE ACCUSED'S BEHAVIOUR, GIVEN BY THE EXPERT

The psychologist offered an explanation for the accused's actions involving three precursors. Firstly, he stated that the accused had a much lower than average intelligence, claiming that 89% of the Australian population would be more intelligent.<sup>84</sup> Secondly, the accused sexual victimization<sup>85</sup> by his own father as a child, was seen as a contributing factor in his sexual abuse of his daughter. Also, the accused had been raped at the age of 18.

#### THE EXPERT'S EVIDENCE TAKEN INTO ACCOUNT AT THE TIME OF SENTENCING.

The presiding judge at this plea considered the expert's evidence regarding the accused's low level of intelligence, and the sexual assaults he had endured, as mitigating factors in this case. The psychologist had

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<sup>83</sup> It seems that the above treatment regime would only be likely to succeed for perpetrators who were actively seeking to modify their behaviour, and, further, they would need to have the ability to do so.

<sup>84</sup> A lower than average intelligence was also said to be a contributing factor in the perpetrator's crimes in Plea 1 and Case 1 (see Ch 1, p.16-17 THE PSYCHOLOGIST-EXPERT FOR THE DEFENCE and Ch 5 p.71, A FORENSIC PSYCHOLOGIST CALLED BY THE DEFENCE)

<sup>85</sup> The perpetrator had been sexually abused by his father at about nine years of age.

also emphasized the accused's remorse for his crimes and the judge saw this as a favourable element to be taken into consideration at the sentencing stage.<sup>86</sup>

### **Two Psychologists used as Expert Witnesses by The Defence in Plea 3**

#### COUNSELLOR - PSYCHOLOGIST AS AN EXPERT WITNESS

There were two expert witnesses used by the Defence in this plea, the first being a counsellor-psychologist from the Defence Forces. He had written a report about the accused, on which he was questioned. This expert had also been supplied with a copy of a second expert's report, and he commented that he did not disagree with anything specifically that was contained in that report.

The first expert claimed that the chances of the accused re-offending were not high. He also spoke of the accused's 'naivety', a point which both the judge and the Crown questioned.<sup>87</sup>

When the expert implied that a jail sentence would not be appropriate for the accused, the judge told him emphatically that it would be naive to believe that this type of crime could avoid a jail term. (The judges in Pleas 1 and 2 had expressed similar views).<sup>88</sup>

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<sup>86</sup> The accused here showed remorse, it seemed, after seeing a video-taped interview of his daughter informing the police of the abuse. This would appear to be a worthwhile strategy to employ in all reported incest cases.

<sup>87</sup> The presiding judge asked how naivety squared with being in a position of some authority in the house. The Crown prosecutor questioned how naivety could be aligned with 14 years in the Armed Services.

<sup>88</sup> See Ch 1 pp 11-13 IMPORTANT CONSIDERATIONS SURROUNDING SENTENCING IN INCEST CASES and Ch 4. p.38 THE ORIGIN OF THE COURT SYSTEM and Ch 5 Plea 1 p 72 Footnote 74 and Ch 5 Plea 2 p.74 A TREATING PSYCHOLOGIST AS EXPERT WITNESS.

### A SECOND PSYCHOLOGIST AS EXPERT WITNESS

The second expert witness who appeared for the Defence was also a psychologist and he agreed with the first expert's view that the accused was unlikely to reoffend.<sup>89</sup> He also claimed that there was no sign of paedophilia in the accused; but this was surely a questionable claim similar to that in Plea 1 (see Ch 5 Plea 1, p.72-73 THE EXPERT'S OPINION OF THE PERPETRATOR AND HIS CRIMES and Footnote 75).

This psychologist stated that the accused was immature, claiming that this immaturity had been a dominant contributing factor in his committing the crime of incest.<sup>90</sup>

### FACTORS CONSIDERED BY THE JUDGE WHEN SENTENCING

When considering the expert witnesses' evidence at the time of sentencing, the presiding judge did not accept the second expert's proposition that a dominant wife was in part to blame for the accused's crimes.<sup>91</sup> The judge asserted that, rather, the above (if true) highlighted the accused's propensity for exploitative behaviour.

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<sup>89</sup> The accused in this case had sexually abused his step-daughter who was 16 years of age, but whose intellect was that of a 10 year old (her I.Q. was assessed as being in the bottom 2% of the population).

<sup>90</sup> Immaturity appears to be 'one step up' from below average intelligence and hence used in a similar manner as an extenuating circumstance for an accused.

<sup>91</sup> Incest is perceived by some psychologists as a 'family problem', where family dynamics are blamed for the crime (Ch 1 pp 3-6 THE FLUCTUATION OF THE PERCEPTION OF INCEST OVER TIME).

The presiding judge stressed his view of incest, by quoting from an unreported case, where the judge concerned had spoken of the crime of incest as being particularly erosive of human relationships. Regarding the case at hand, the judge pointed to the victim's action of changing her name by deed poll as a clear example of this erosive effect.<sup>92</sup>

The judge appeared to give full credence to the expert witness' view that it was unlikely that the accused in this case, would re-offend, and hence he was not considered to be a danger to the community. Because of this and other mitigating factors,<sup>93</sup> the judge, in effect, turned what would have been a lengthy prison sentence into what could be seen as a lenient sentence. The judge ordered that all sentences would be served concurrently, and not cumulatively. The accused qualified as a "serious sexual offender" having been "... convicted of two or more sexual offences for each of which he or she has been sentenced to a term of imprisonment or detention in a youth training centre ..." (SENTENCING ACT 1991 S3 P.8). This meant that normally (unless directed by the judge, as was the case here) the sentences would have been served cumulatively.<sup>94</sup>

<sup>92</sup> The victim had changed her surname by deed poll to that of the accused and the Defence had suggested that this was a sign that the victim was 'in love' with the accused. The 'love letter' in Case 2, Trial B, was another example of this destructive effect.

<sup>93</sup> The mitigating factors that the judge took into account here were a plea of guilty from the outset, the accused's loss of money that he would have received from his time in the Armed Services, the loss of his career, and poor job prospects in the future. (Interestingly, apart from the plea of guilty, these were all personal costs to the accused.)

<sup>94</sup> Table of Sentences in Plea 3.

Sentence Received

Counts	1. 6mths	11. 12mths	21. 18mths	
	2. 2yrs	12. 3yrs	22. 3yrs	
	3. 18mths	13. 18mths	23. 18mths	4 years with a 20 month minimum.
	4. 2yrs	14. 2yrs	24. 3yrs.	
	5. 12mths	15. 18mths		
	6. 4yrs	16. 3yrs		
	7. 2yrs	17. 18mths		
	8. 3yrs	18. 2yrs		
	9. 4yrs	19. 12 mths		
	10. 3yrs	20. 3yrs		

The above counts included vaginal penetration, oral penetration and digital penetration.

The role of the expert witness as a bearer of vital knowledge, at the trial stage of an incest case, can be invaluable. However, there was a sense of reluctance conveyed by a number of the presiding judges, concerning the admission of this noticeably pivotal opinion evidence, which I observed during the course of my research. Donald Horowitz argues that “a legal fact ...has a static quality ...” whereas “social facts, by contrast, involve patterns of behaviour ... that are therefore not necessarily immutable” (Horowitz 1977, p.275). Horowitz recognizes that it would be an extremely difficult task for the law to continually monitor social changes, therefore it would appear expedient for the law to be more accommodating of the erudition advanced by the expert witness in the incest trial.<sup>95</sup>

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<sup>95</sup> I was told by one of the Crown solicitors, that there must be a sufficient nexus to link the expert opinion evidence to the case in hand, for a judge to allow such evidence in. Also, I was informed that a judge is not supposed to be in fear of the appellate court, but he must exercise caution in admitting expert opinion evidence in respect to its relevance, probative value and prejudicial weight. In effect, the inherent discretion regarding the admission of such evidence lies with the presiding judge (see Ch 5 p .58 footnote 55).

## CHAPTER SIX

### The Crucial Factor - The Judiciary

#### RESTORING THE BALANCE

The law has been characterized as the impartial arbiter between individuals who are both equal and free (Kerruish 1992). But the victims of incest, who have their cases heard in the County Court, have experienced neither equality nor freedom in their daily lives, due to the sexual assault that they have endured. It is therefore imperative that the judiciary is equipped with the requisite knowledge, and be free from restrictive biases, in order that they can help restore the equilibrium between victim and perpetrator, and hence conduct a fair trial.

#### THE JUDGE'S DUTY TO A SPECIAL CLASS OF WITNESS

While the use of new technology in the courtroom, like closed-circuit television, has assisted in promoting a more equitable trial by recognizing the vulnerability of the child witness, the presiding judge, too, has a responsibility to this category of witness. John Gibbons (1994, p.205) argues that:

“children who have been frightened into silence about things they do not comprehend, and may not even have the language to describe, represent a special population that demands specialized approaches.”

Only one of the three judges in the trials that I observed, spoke with a sense of understanding and caring to the victims (see Outline of Cases, Case 1, Trials A and B ppviii-x). For example, the presiding judge in the above-mentioned trials intervened during Counsel's questioning of both these victims, to ensure that they understood the questions that were being asked.<sup>96</sup>

#### THE EXPANSION OF JUDICIAL INTERVENTION

Judicial intervention has been described as "the product of ideological and social change (lpp 1995, p.365; also Ch 1 p.18, JUDICIAL INTERVENTION). The courts are increasingly being recognized as insititutions pertaining to the people, hence there is the "... heightened expectation that judges will intervene in order to achieve justice" (lpp 1995, p.366).

A presiding judge can intervene in a number of other areas apart from assisting a child witness. His intervention may be opportune when the opposing Counsels' competence is unequal; in such instances the judge can guide an incompetent legal counsellor, by suggesting ways of advancing his or her case. The presiding judge can also put a stop to deliberate delay tactics on the part of either counsel, thus arresting an obstruction to justice.

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<sup>96</sup> The presiding judge assisted in this way at each victim's separate trial.

While judicial intervention may be critical in averting injustice (which may occur in an unfair trial) to a victim of the crime of incest, such as an interposition by a judge, it must also be perceived as addressing iniquities to the community as a whole. In fairness to public interest, it is important that judicial intervention allows for the promotion of sufficiently extensive expert knowledge within the court system; hence further education of the judiciary is vital (see Ch 1 pp.2-3 THE EXIGENT NEED TO ACCEPT EXPERT EVIDENCE). One way in which this education could eventuate would be through an increase in the use of written evidence, including theoretical material, alongside oral evidence from experts. The judiciary would have more time to absorb and appreciate this important information when read privately, away from the adversary precinct of the courtroom. In the Trial of Case 3, the presiding judge refused, without sufficient reasons given, to read important information provided by an expert witness (see Ch 5, Case 3 Trial, pp.68-69 THE EXPERT WITNESS FOR THE CROWN), thus demonstrating an instance of judicial power overriding judicial wisdom.

It has also been suggested that timely judicial intervention may require special skills, thus calling for “greater judicial specialisation” (Ipp 1995, p.384). This specialisation process would involve not only the experience of presiding over a particular genre of criminal trial,<sup>97</sup> but also the acquisition of specific knowledge pertaining to the issues involved, in conjunction with the realization of the importance of informative expert evidence in the court arena.

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<sup>97</sup> The County Court judges would certainly have seen an increasing number of incest and other sexual assault cases reaching their jurisdiction in recent years.

Anne Thacker, a Melbourne barrister, has noted that:

“Judges in Australia are given no formal training, in sharp contrast to some other countries,”... and further that: “... the Australian Institute of Judicial Administration has initiated setting-up an awareness program to assist judges to understand how sex bias can be recognized and reduced in their deliberation” (Thacker 1993 p.91).

#### JUDICIAL DISCRETION

One of the ways that flexibility in the law is achieved, is through modern legislation’s use of subjective terms like ‘reasonable’ and ‘wilful’; these terms furnish judges with one form of judicial discretion (Maley 1994). Judicial discretion is also exhibited by the judge’s power in directing court proceedings, and by judicial interpretation of legal terms such as ‘probative’ and ‘prejudicial’ (see Ch 5, Case 2, Trial A p58, footnote 55). One of the first locations in an incest trial where the judge’s discretion is exercised, is the point at which either separate or joint trials are permitted. In an article in THE AGE, entitled “Police hit child sex law”, it was stated that:

“police claim their strongest cases involving multiple victims have been effectively sabotaged when the defendant is granted separate trials”, and further that, “the Office of the Director of Public Prosecutions has dropped a large number of child sex cases ...” where this has occurred (Silvester 1996 p.2).

In both cases that I have observed involving more than one daughter, separate trials were granted by the trial judge involved, thus depriving the jury of vital contextual information. The Attorney-General, Jan Wade, is said to be “considering legislation that may make it tougher for people charged to be granted separate trials” (Silvester 1996, p.2).

Another area of the trial where judicial discretion comes into play, concerns the prohibition of publication of the court proceedings. It appears that two important considerations must be appraised here, being undue hardship caused to a victim through publication; and secondly, exposure of the crime in the interests of justice. The County Court judge who graciously volunteered to be interviewed, stated that he valued hardship to the victim as a pertinent criterion in deciding to prohibit publication of a case.<sup>98</sup> On the other hand, the judge stated that in cases where he was aware that the victim did not want this prohibition, he would refrain from passing such an order, in the interests of justice, in terms of social awareness of the crime of incest.

At the point of sentencing, the prudent exercising of judicial discretion is crucial to ensuring that the perpetrator receives an appropriate punishment. The Honourable Sir Guy Green wrote that “it is the nature of the judicial power to sentence that its exercise is governed by the circumstances of each case ...” (Green 1996, p.118). But after my period of observation in the the County Court, the question arises of whether judicial subjectivity involving personal beliefs and biases plays a dominant role over judicial discretion driven by discernment and understanding (see Ch 5, Plea 3, pp.78-80, FACTORS CONSIDERED BY THE JUDGE WHEN SENTENCING).

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<sup>98</sup> This is done under the county court act 1958. (See Ch 3. p.36.)

Wan Wells claims that judges:

“... search for truth rather than argument; for principle, rather than a passing inclination,” and “for sound judgment and true perspective rather than superficiality and distortion” (Wells 1991, p.73).

However, if this view is to be justified, then there must be an acknowledgement by the judiciary of the exigent need to admit expert knowledge into the court arena (see Ch 5, Case 2, Trial B, p59-60 including Footnote 57 THE USE OF THE EXPERT WITNESS TO RE-ESTABLISH A VICTIM'S CREDIBILITY).

## CONCLUSION

This thesis has examined the administration of justice in six cases of alleged incest. In all cases, the defendant was either found guilty of, or pleaded guilty to, some or all charges. The variation in the handling of these cases during the judicial process would suggest the element of chance immanent in judicial discretion, particularly concerning the admission of expert informative evidence.

The law purports to being just, autonomous and coherent. However, Carol Smart (1984; 1989 in Bell 1993) suggests that it should be understood as a complex and paradoxical institution. Hence, it is to be anticipated that this very complexity should allow for a merging of the knowledges pertinent to the crime of incest, at the site of judgement according to the law, in order for justice to prevail in this domain.

The contradiction and intricacy inherent in the law, is reflected in James Mowatt's (1994) argument that the scientific 'chaos theory' is also applicable here (see Ch 1 p.19, THE ANTICIPATION OF A DYNAMIC SYSTEM OF LAW). Thus a dynamic rather than static system of law is far from impervious to pertinent outside erudition. If the law is to be responsible to community expectations regarding the court's handling of incest, then the community should be made aware of the integral salient issues. The most effective way of obtaining this information, would appear to be through diligent scrutiny of court cases of this genre, by social researchers and politicians. Few members of the community would currently be aware of the critical role of

the expert witness in incest cases. It seems erroneous for the general public to criticize case outcomes, when they are ignorant of the complicated processes involved (see Ch 2 p.22 and pp.24-25). The outcomes can only be legitimately criticized in the light of the law's tendency to exclude other relevant spheres of knowledge from its arena.

“The condemnation of child sexual abuse upholds both the taboo which is placed upon incest and which is integral to most societies, and the basic rights of children to protection from abuse”  
(Henderson 1994, p.761).

In order for this condemnation of incest, designated a crime by society, to be given utmost force, criminal prosecution should serve as a symbol to victims that society will act as their protector and an advocate for their rights and welfare (Bulkley 1989). Bussey (1992, p.85) argues further, that “successful prosecution of the perpetrators of child sexual abuse may be one important factor in reducing this crime.” In light of the above claims, it is imperative that the public and judicious representation of the County Court, for the private moral crime of incest, is a fully cognizant arena for the prosecution of this crime.

If expert evidence is a crucial factor in the enlightenment of the court sphere, then perhaps inquisition should play a more eminent role in our adversary legal system, which while helping to “... clarify many issues ... only seems to obfuscate behavioural issues.” (Horowitz 1977 p.279).

It is the County Court's ethical duty to give valid voice to the otherwise silenced victims of incest.

## APPENDIX TO THESIS

### Events which have taken place after the completion of my research period.

#### Regarding Case 2. (Result per phone)

The Appeal for Case 2 resulted in the "head" sentence of 18 years being reduced by about two years. However, the minimum sentence of 10 years remained the same. This Appeal was upheld on a technicality.

All victims in the above case received the maximum criminal compensation payment of \$20,000. The mother of these women received no monetary compensation.

#### Regarding Case 3. (Result per phone).

The perpetrator in Case 3 was sentenced to 4 years imprisonment with a minimum of 2 1/2 years

Regarding Case 1. (I was able to attend this further Plea, but not the sentencing of Case 1 - result per phone.)

Two expert witnesses (both psychologists) gave evidence at a further plea, prior to the sentencing in this case. However, they did not appear to clarify issues such as the accused's propensity for re-offending, or the precise nature of his alleged mental disorder.

The presiding judge referred frequently to a psychiatrist's written report that had been presented to the court, and which emphasized the

accused's denial of the crimes and hence the high risk of his re-offending (see Ch.5 p.52-53..EXPERT'S REPORTS TO BE CONSIDERED FOR USE AT THE PLEA AND SENTENCING STAGE). Nevertheless, the judge appeared to agree with one of the above psychologist's view, that the accused would be unlikely to be a high threat to the community, because his crimes had been committed within the family unit.

The Crown prosecutor pointed out that the accused was also facing allegations of sexual assault on three adult females, outside the family, and alluded to the possibility of the accused entering or starting another family. However, the presiding judge did not seem to be swayed in his opinion by these factors.

The presiding judges in Plea 1 and Plea 3 had also communicated similar opinions concerning the perceived low risk factor to the community of the perpetrators in these cases, based on the assumption that, as the crimes were intrafamilial, and the perpetrators concerned were likely to remain separated from their families, then the risk to the community would be minimal. This appears to be a highly contentious viewpoint (see Ch 5 Plea 1 pp 72-73 including Footnote 75.THE EXPERT'S OPINION OF THE PERPETRATOR AND HIS CRIMES; and Plea 3. pp.78-80 FACTORS CONSIDERED BY THE JUDGE WHEN SENTENCING).

The perpetrator in this case was sentenced as a "serious sexual offender" (on the incest counts involved) to 9 years imprisonment with a minimum of 6 years (see Ch 5. p.79. FACTORS CONSIDERED BY THE JUDGE WHEN SENTENCING).

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