



CPS

**The Use of
Expert Witness Testimony
in the
Prosecution of
Domestic Violence**

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Use of Expert Witness Testimony in the Prosecution of Domestic Violence

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Message from the Director of Public Prosecutions

I would like to take this opportunity to welcome the attached report on the potential use of expert witness testimony in the prosecution of domestic violence cases.

The emphasis is on adducing expert evidence about the dynamics and the effects of domestic violence, rather than evidence specific to the individual victim. The purpose of adducing such evidence is to level the playing field, so that a tribunal is able to evaluate properly the evidence presented – including an assessment as to the factual credibility of the account given by the victim – without making erroneous assumptions or working from a fundamentally flawed basis. For example: *“it can’t be that serious, otherwise she wouldn’t have stayed.”*

It may be that the average person, whether a juror, judge or magistrate, is unfamiliar with the complex dynamics of domestic violence. Expert evidence may debunk the myths and stereotypes, so that a tribunal can reach an informed decision, which is fair to the facts.

It is important to understand that an expert would not be called to bolster the personal credibility of a witness. Rather the purpose would be to provide a context against which the witness account could be assessed. Clearly, not all domestic violence cases would require such evidence. But this report clarifies those which might – and considers who might qualify as an expert witness, the remit of such an expert and the foundational requirements for introducing such evidence.

The potential use of this type of material is part of a programme of initiatives being considered to improve the effective prosecution of domestic violence cases.

Ken Macdonald QC
Director of Public Prosecutions

March 2004

Use of Expert Witness Testimony in the Prosecution of Domestic Violence¹

1. Foreword

“By negating the power of myth, expert testimony clears the way for fact-finders to deliberate regarding the actual facts of the case and the logical conclusions that flow from such facts, rather than focusing upon the falsehoods created when the evidence is viewed through the distorting lens of myth.” (See page 11)

The potential use of expert witnesses by the Crown Prosecution Service within domestic violence cases is explored within this report as part of a programme of initiatives being considered to improve the effective prosecution of domestic violence cases. Expert witnesses would be only one tool within a much larger toolbox being considered. Other tools include effective evidence gathering, the use of victim advocates, training across the Criminal Justice System.

The use of expert testimony in the prosecution of domestic violence cases aims at “levelling the playing field” so that the fact-finder can properly evaluate the evidence and credibility of the victim², rather than on the basis of erroneous assumptions. The dynamics of domestic violence need to be understood by jurors, magistrates and judges for them to evaluate the evidence presented before them.

This document proposes that expert testimony is relevant and appropriate in domestic violence cases to:

- Inform fact finders of commonly-known characteristics of abuse victims so that they can compare the behaviour of the victim with that profile;
- Reduce the likelihood that the jury will develop negative feelings against the victim based on myths and misunderstandings;
- Enable the fact-finders to examine the facts without interference of bias or emotion;
- Challenge the plausibility of the victim’s account at trial, not to bolster the victim’s own personal qualities of truth-telling or falsehood;
- Explain why victims retract and give the fact-finder reason to assess in-court retractions;
- Assist the fact-finder to evaluate credibility, not to enhance that credibility.

Expert testimony would not be appropriate for use in cases where the only other evidence available would be insufficient to satisfy the test of a realistic prospect of conviction. Although expert witnesses may be of use in a range of circumstances related to domestic violence cases, this document specifically refers to the use of expert domestic violence testimony for the prosecution of cases, rather than the defence.

¹ This document summarizes a report drafted by Professor Susan Edwards (The Law School, University of Buckingham) regarding the use of expert witness testimony in the prosecution of domestic violence. The Crown Prosecution Service is grateful to its partner in this project, Standing Together, and the Home Office Crime Reduction Programme for the funding that made this study possible.

² Throughout the report the term “victim” is used for all victims of domestic violence, irrespective of gender and sexuality. However as the majority of reported DV victims are women, examples are given using the female pronoun throughout the report and the majority of myths referred to, relate to female victims.

This report addresses the principle of the admissibility of expert testimony and its legal foundation. The practicalities within the UK of developing a pool of experts, all of whom had training on presenting expert evidence, their consistency, standards and accreditation would be addressed once the principles were agreed.

“It is the abuse to which she had been subjected which is beyond the understanding of a jury. Expert witness testimony is required in domestic violence cases because average people do not understand domestic violence.” (See page 23)

2. Introduction

‘Stopping domestic violence and bringing perpetrators to justice must ... be a priority for our society. We are determined to play our part by prosecuting cases effectively.’³

Use of expert witness testimony in the prosecution of domestic violence can assist the Crown Prosecution Service in fulfilling its obligation to prosecute domestic violence crimes effectively.⁴ This document explores the use of expert witness testimony in the prosecution of domestic violence and recommends that such evidence be offered in prosecuting certain types of domestic violence cases. Specifically, this document explores four issues in detail:

- (1) What Cases Call for Expert Testimony? (Section 3)
- (2) Who is Qualified to Testify as an Expert? (Section 4)
- (3) What are the Foundational Requirements of Expert Testimony? (Section 5)
- (4) What Issues Should the Expert Address? (Section 6)

2.1 Similarities Between English and United States Expert Witness Law

Before exploring these substantive issues, we will briefly note the relevance of United States law regarding the use of expert witness testimony. Prosecutors throughout the United States have successfully used expert witness testimony in the prosecution of domestic violence for well over a decade. In some U.S. jurisdictions, the introduction of domestic violence expert testimony on behalf of the prosecution has become routine where victims recant and/or request that charges be dismissed.⁵ Since the fundamental principles regarding admissibility

³ Crown Prosecution Service, *Policy for Prosecuting Cases of Domestic Violence* (Policy Directorate: Nov 2001) [hereinafter ‘CPS DV Policy’] §1.5 at p.3.

Note that words placed within square brackets within quotations throughout this document are not part of the original quote, but have been added to enhance clarity and contextualize the quote within this document.

⁴ The obligation to prosecute crime effectively is reflected in the *Code for Crown Prosecutors* §1.1 at <http://www.cps.gov.uk/Home/CodeForCrownProsecutors/introduction.htm> (last visited 23 July 2003). Further, this obligation is enshrined within Article 1 of the European Convention on Human Rights and Fundamental Freedoms [hereinafter the Convention], which imposes a positive obligation on Parties to provide effective remedies for the violation of rights under the Convention, including violations of the right to life (Art. 2), prohibition of torture (Art. 3), and the right to liberty and security (Art. 5). The positive obligation to effectively prosecute domestic violence was specifically recognized in *A v. The United Kingdom*, wherein the Court ruled that “the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.” *A v. The United Kingdom* (1999) 27 E.H.R.R. 611 ECHR. Note that interference with the right to private and family life, protected under Art. 8, is permissible under Art. 8(2), which provides that Parties may infringe on such privacy for “the prevention of disorder or crime, for the protection of health or morals, or for the necessary and proportionate protection of the rights and freedoms of others.” E.C.H.R. Art. 8(2). The Convention is made applicable to the domestic criminal law of England and Wales under the Human Rights Act of 1998.

of expert testimony under English law are substantively similar to those applicable in the United States, legal precedent from the U.S. may provide persuasive authority in English courts.

The fundamental principles regarding the admissibility of expert testimony in both England/Wales and the United States are as follows:

	England and Wales	United States
Principle Regarding the Need for Expert Testimony	'Expert witness testimony is admissible to furnish the court with... information which is likely to be outside the experience and knowledge of a judge or jury.' ⁶	Expert witness testimony is admissible 'if...specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.' ⁷
Principle Regarding the Qualifications of Expert	Qualifications as an expert 'may have been acquired through study, training or experience.' ⁸	An expert witness 'may qualify as an expert by knowledge, skill, experience, training, or education.' ⁹
Principles Regarding Foundation of Expert Testimony	An expert may fortify his opinion by referring not only to any relevant research, tests or experiments which he has personally carried out ... but also to works of authority ... comprising part of the general body of knowledge falling within the [expert's] field of expertise. ¹⁰	Expert testimony must (1) be based upon sufficient facts or data, (2) be the product of reliable principles and methods, and (3) the expert must have applied such principles and methods reliably to the facts of the case. ¹¹

⁵ Such jurisdictions include the state of California, as well as specific counties, cities or districts within Connecticut, Colorado, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, Oklahoma, Tennessee, and Washington State. Other jurisdictions within Florida, Illinois, Iowa, New York, and Texas also admit expert witness testimony in the prosecution of domestic violence. However the practice has not yet become routine in all states. Information regarding U.S. jurisdictional practices is based upon a review of the appellate caselaw and communications with the American Bar Association's Domestic Violence email listserv members, including Professor Nancy Lemon (law professor at University of California at Berkeley and author of the leading textbook, *Domestic Violence and the Law*), Evan Stark (domestic violence expert whose prosecution testimony was specifically approved of by the Connecticut Supreme Court in *State v. Borrelli*, 629 A.2d 1105 (Conn. 1993)), Nancy Lynn Robertson (Staff Attorney and Public Policy Coordinator, Iowa Coalition Against Domestic Violence), Anne Munch (attorney and project director for the Colorado-based Ending Violence Against Women Project), Michelle Ghetti (professor of criminal law, evidence and criminal procedure, Southern University Law School), Van Caldwell, and David Lansner (domestic violence attorney, New York). Copies of personal electronic correspondence on file with the author. California, Oklahoma and Nevada have enacted specific statutes providing for the admission of domestic violence expert testimony in the prosecution of domestic violence. See West's Cal. Ann. Evid. Code §1107 (eff. Jan 1994); 22 Oklahoma Stat. Ann. § 40.7 (eff. Sept. 1992); Nev. Rev. Stat. §48.061 (eff. as amended Oct. 2002).

⁶ I.H. Dennis, *The Law of Evidence* (Sweet & Maxwell 1999) [hereinafter '*Dennis*, Evidence'] at p. 660, citing *R v. Turner*, [1975] 1 All. ER 70.

⁷ United States Federal Rules of Evidence §702 [hereinafter '*FRE*'].

⁸ A. Keane, *The Modern Law of Evidence* 5th Ed. (Buttersworth 2000) [hereinafter Keane, *Evidence*] at pp.503-504. See also, Dennis, *Evidence* at p. 662: "[T]he essential questions are whether study and experience will give a witness's opinion an authority which the opinion of one not so qualified will lack, and (if so) whether the witness in question is [skilled and has an adequate knowledge], quoting *R. v. Silverlock* [1894] 2 QB 766.

⁹ FRE §7.02.

¹⁰ Keane, *Evidence* at p.506.

¹¹ FRE §7.02.

In light of the similarities between the fundamental principles of law regarding expert witness testimony in England and the United States, Crown Prosecutors may benefit from knowledge of relevant U.S. caselaw when seeking to use expert witness testimony in the prosecution of domestic violence.¹²

2.2 Differences Between English and United States Expert Witness Law

Despite their fundamental similarities, there are two notable differences between English and United States expert witness law. One difference between the two regards 'ultimate issue' testimony. Under the United States' Federal Rules of Evidence (adopted in many jurisdictions in the U.S.¹³), expert witnesses testimony may speak directly to the ultimate issue to be decided by the trier of fact, provided that the following two conditions are met: (1) that the testimony is offered in the form of an opinion or inference, and (2) the testimony does not bear on the mental state or condition of the defendant in a criminal case.¹⁴ Under English law, the general common law rule against expert testimony regarding the ultimate issue remains a potential limitation on expert testimony. However, in determining the extent (if any) to which the ultimate issue testimony may limit expert testimony in England and Wales, it is important to note the following passage, noted in Archbold's Criminal Pleading, Evidence and Practice (2003): 'An expert is now permitted to give his opinion on what has been called "the ultimate issue", but the judge should make it clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide.'¹⁵

Another notable difference between expert witness laws in England/Wales as compared to the United States pertains to the foundational requirements of expert testimony. In the U.S., foundational requirements tend to be interpreted more narrowly, requiring that the witness' field of expertise be quite well established and well recognized in the relevant professional community prior to admission of expert testimony pertaining to that field.¹⁶ The

¹² In both England/Wales and United States, judges are granted wide discretion in ruling upon the need for expert testimony in any given case, the appropriate qualifications that must be held by the expert, and the foundational requirements underlying the expert's testimony. "At common law, it is for the judge to decide in each case whether the issue is one which is suitable for opinion evidence." Lord Justice Auld, Review of the Criminal Courts of England and Wales [hereinafter, 'The Auld Report'] at §133. See generally, J.A. Andrews & M. Hirst, Criminal Evidence 3rd Ed. (Sweet & Maxwell 1997) [hereinafter 'Andrews & Hirst, Evidence'] at pp. 730, 739 and Weinstein, Evidence: Cases and Materials 9th Ed. (Foundation Press 1997).

¹³ 38 States that have adopted the Federal Rules of Evidence in whole or in part, include: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming. See Cornell Legal Information Institute at <http://www.law.cornell.edu/uniform/evidence.html> (last visited 26 July 2003).

¹⁴ FRE §704.

¹⁵ Further note earlier commentaries suggesting that the 'ultimate issue' rule remains in force in English law 'more in name than in practice.' Andrews & Hirst, Evidence at pp. 743-744; but compare, Keane, Evidence at pp. 507-509. See also §5.2 below, exploring the 'ultimate issue' rule in more detail.

¹⁶ See generally, Frye v. United States, 293 F. 1013 (1923) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579. Frye established a high foundational threshold for the admission of expert testimony, but Daubert (which was decided after the Federal Rules of Evidence came into effect) was meant to overrule Frye's stringent requirements. Yet, many jurisdictions continue to apply a Frye-like standard in areas of scientific knowledge, psychology, sociology, and psychiatry, where newly evolving theories are common. But compare, Donaldson v. Central Illinois Public Service Co., 767 N.E.2d 314 (Ill. 2002), where the state of Illinois (an uncoded evidentiary jurisdiction) rejected the 'Frye-plus' standard and adopted a more relaxed foundational rule that is more consistent with English law.

foundational requirements regarding expert testimony seem to be somewhat more relaxed in England/Wales.¹⁷ Under English law, expert testimony regarding a given field is admissible where it is “sufficiently well-established to pass the ordinary tests of relevance and reliability.”¹⁸ This principle was exemplified in the case of Dallagher, where the technique of ear print comparison was admitted into evidence through the use of expert testimony despite being a relatively new scientific identification technique.¹⁹ In approving of this new use of expert testimony, Kennedy, LJ specifically concurred with the trial judge’s comment in Stockwell,²⁰ which expressed the view that “one should not set one’s face against fresh developments, provided that they have a proper foundation.”²¹

To the extent that fundamental principles of English and United States law regarding expert witness testimony differ slightly, these differences do not affect the potential use of expert witness testimony within the UK. In light of the essential similarities between the laws, and the fact that the United States is the only common law jurisdiction in which the use of expert witness testimony in the prosecution of domestic violence has been reported in the appellate caselaw,²² the United States’ case law will be examined and commented on, as it pertains to the issues explored in this document.

3. What Cases Call for Expert Testimony?²³

The idea of using a domestic violence expert witness at trial is often viewed by prosecutors as difficult, as they assume that expert witness testimony will be inadmissible because of the Turner case²⁴. Expert witness testimony is a simple method of enabling judges, juries (or panels of magistrates) to better understand the evidence presented in any given case. “English law, it seems, has always been prepared to accept the opinions and conclusions of experts in matters which require specialized knowledge or training and which the judge and

¹⁷ See §4, *et seq.* below, exploring the issue of expert testimony foundational requirements in greater detail.

¹⁸ R v. Dallagher [2003] 1 Cr. App. R. 12 [2002] EWCA Crim 1903 CA (Crim Div) (reversed on other grounds).

¹⁹ Although there was an appeal, neither the appeal nor the eventual outcome undermined or challenged the use of expert witness or the science – the prosecution declined to proceed with the case for other reasons.

²⁰ R. v Stockwell (1993) 97 Cr App R 260.

²¹ Dallagher [2003] 1 Cr. App. R. 12. See also, Campbell v. News Group Newspapers Ltd [2002] E.M.L.R. 43 [2002] EWCA Civ 1143 CA, approving of the introduction of lip reading expert testimony regarding the interpretation of an allegedly dubbed videotape.

²² Use of expert witness testimony in the prosecution of domestic violence has not yet been widely pursued outside of the United States. As such, there are no reported cases regarding the admissibility of such evidence in Australia, New Zealand or Canada.

²³ The phrase “cases that call for expert testimony”, refers to certain types of domestic violence prosecutions that would benefit from the introduction of expert evidence (i.e., statements or live testimony) on the topic of domestic violence. Expert testimony on more traditional topics has been introduced in many types of prosecutions, including domestic violence prosecutions. For example, it is common for medical experts to testify regarding the victim’s cause and manner of death in homicide cases, and also regarding the type, severity, and likely cause of a victim’s injuries in cases alleging assault. That type of expert testimony is different from the type under discussion in this document. Our focus herein relates to the use of witnesses who are *experts in the field of domestic violence*. Such testimony does not establish an element of the offence directly, as medical testimony does. Rather, domestic violence expert testimony serves two different purposes, both of which will be explored in this section.

²⁴ R v. Turner, [1975] 1 All. ER 70.

jury cannot be expected to possess.”²⁵ Expert evidence can also be useful to support prosecution applications, e.g. Section 23 CJAct.

It is suggested that the following types of cases call for expert testimony on the topic of domestic violence²⁶:

Cases	Fact finder's view:
• Cases where the victim retracts prior statements;	• If she does not want to proceed why should we?
• Cases where the victim minimizes the severity of the defendant's crime;	• It can't have happened as X says, so why is she lying? Better/safer/right to acquit.
• Cases where the victim has made inconsistent statements regarding defendant's crime;	• She is either lying or too unreliable to be a witness.
• Cases where the victim refuses to testify against the defendant;	• She must really love him and it is her relationship.
• Cases where the victim goes missing prior to trial;	• It is obviously of no significance to her or she does not want to do anything so why should we?
• Cases where the victim withdraws support for the prosecution; and states she does not want him to be remanded or imprisoned	• It can't be that serious or she would want him prosecuted/imprisoned.
• Cases where the victim remains in a relationship with the defendant;	• What is the point of us dealing with him if she only goes back to him – why won't she leave? • It's a waste of court time.
• Cases where there are diversity/equality issues regarding the victim and/or the relationship. ²⁷	• It's part of their culture and we shouldn't interfere; • The offender usually is her carer, he must have got fed up with all the pressure; • In gay relationships they like it rough;
• Cases where there are complex other problems	• It's because of the drugs/alcohol/mental illness.

²⁵ A.A.S. Zuckerman, The Principles of Criminal Evidence (Oxford University Press 1989) [hereinafter 'Zuckerman, Evidence'] at p.62.

²⁶ The following examples involve the prosecution of defendants who are domestic abusers and do not involve the defence of those who have killed their abusers. Expert testimony in UK regarding domestic violence is commonly introduced on behalf of those defendants who have killed their abusers and who then claim Battered Women's Syndrome as a defense to murder. That type of expert testimony is different from the type under discussion in this document. Our focus herein relates to the use of domestic violence expert witnesses *on behalf of the prosecution* – not on behalf of the defence.

²⁷ Such equality issues include, but are not limited to, cases involving gay, lesbian, bisexual or transgender victims and/or defendants, racial, religious or other cultural issues which may impact the fact finder's ability to assess the victim's response to the abuse, cases involving disabled victims, male victims, victims with criminal convictions, victims with precarious or illegal immigration status, victims who are prostituted or otherwise sexually exploited, and cases involving homeless, drug-addicted or mentally ill victims.

Ethnicity & culture:

Although the following case is a defence case the use of expert witnesses in relation to issues of ethnicity and culture is illustrated:

"In the case of Zoora Shah an expert in trans-cultural psychiatry explained that her inability to tell the truth at her original trial stemmed from her fear of shame, dishonour and other cultural constraints." Southall Black Sisters

Another example:

"Women are seen as male property,...there have been a number of reports of rapes, mutilation and torture...murders of women in similar situations have been known to occur..." – indicating a potential threat to any woman who behaves in a similar manner.

"(Such) violence though illegal, under Indian law would be regarded as quite reasonable and legitimate and as such it would receive the sanction of the family and the community".

Dr Amrit Wilson, author of "Finding a Voice – Asian Women in Britain"

Cases call for expert testimony because they raise particular issues that are beyond the understanding and experience of the average juror and that negatively impact the fact finder's ability to impartially evaluate the evidence presented at trial. Generally speaking, issues that give rise to the need for domestic violence expert testimony include:

- (1) *issues relating to popular myths regarding domestic violence; and/or*
- (2) *issues relating to the victim's perplexing behaviour.*

3.1 Using Expert Testimony to Dispel Myths

"In spite of, or because of, increased public awareness of domestic violence, jurors come to a trial with assumptions and preconceptions about crimes of domestic violence, perpetrators, and victims. Jurors may expect victims and [defendants] to fit certain stereotypes and may have certain expectations regarding a battered woman's behaviour in a battering situation."²⁸ When stereotypes and misperceptions infect the deliberation process in domestic violence criminal trials, judges, jurors [or magistrates] often conclude that the abuse did not occur or, at very least, that the victim does not consider the abuse serious enough to warrant intervention by the criminal justice system.²⁹ These conclusions are almost always wrong. The reason why these erroneous assumptions remain so prevalent in our society is the power of popular myths surrounding domestic violence. "In the law, mythology operates almost as powerfully as legal precedent in inhibiting change ... Myth is the triumph of belief over reality, depending for its survival not on evidence but on constant reiteration."³⁰

²⁸ P.F. Mangum, "Reconceptualizing Battered Women's Syndrome Evidence: Prosecution Use of Expert Testimony on Battering", 19 Third World L. J. 610 –619 (1999) [hereinafter 'Mangum, Reconceptualizing'].

²⁹ A similar dynamic regarding the power of myths was documented in the prosecution of rape cases. See, L. Kelly, *A Research Review on the Reporting, Investigation and Prosecution of Rape Cases*, Commissioned by Her Majesty's Crown Prosecution Service Inspectorate (Published, April 2002) [hereinafter 'Kelly, Rape'].

³⁰ H. Kennedy, *Eve Was Framed: Women and British Justice* at 32 (London: Vintage 1992), cited at Kelly, Rape at 4.

Some popular myths regarding domestic violence include the following³¹:

Myth: *'Domestic violence is only perpetrated by a strong man against a weak woman.'*

Fact: Relative physical strength or weakness is not the issue – power and control are. Far from being a powerless victim, a woman involved in a violent relationship often displays enormous resources of strength in the way she learns to live with fear, navigate unpredictability, and intuit her partner's moods to protect herself and her children.

Myth: *'If it was really serious she would come to court to provide evidence'*

Fact: Withdrawing support for the prosecution of her abuser she may see as her safest short-term choice in a context of many difficult choices. She may perceive it as the only way of keeping herself and her children safe.

Myth: *'It can't be that bad or she'd leave.'*

Fact: There are many practical reasons why women stay; they may be afraid of the repercussions if they attempt to leave, they may be afraid of becoming homeless, they may worry about losing their children. They may fear poverty and isolation. Additionally, women stay in violent relationships for emotional reasons ranging from love to terror. Some women return to their partners because they believe that their partner will change and the abuse will end.

Sociological and psychological research studies regarding jury deliberations establish that the effects of domestic violence upon victims are often beyond the understanding and experience of the jury.³² When the fact finder is unable to understand the complex and counter-intuitive dynamics of domestic violence, this void in understanding is often filled with the power of myth. "To the average juror, untutored in the psychological dynamics of domestic violence, [a] victim's vacillating behaviour toward the defendant – in particular, [her] back and forth attempts to end the relationship – might ... seem counterintuitive and might even ... suggest that [the victim's] version of events was inherently unreliable and unworthy of belief."³³

³¹ The phrasings of these two myths are adapted from information provided by Greater London Domestic Violence Project and available on the ivillage.co.uk and Milton-Keynes Council websites (last visited 18 May 2003). See Appendix 1: *Domestic Violence Myths* for a more comprehensive list including these as well as additional myths.

³² See generally, Mary Dodge and Edith Greene, 'Juror and Expert Conceptions of Battered Women', 6 *Violence and Victims* 271 (1991) (examining domestic violence myths by studying the beliefs of 141 jurors as compared to the body of knowledge accepted by domestic violence experts; demonstrating that jurors had limited knowledge regarding the actual reactions of abuse victims and frequently embraced domestic violence myths; and concluding that "scientific findings concerning battered women are ... often beyond the ken of the jury."); Neil J. Vidmar & Regina A. Schuller, 'Juries and Expert Evidence: Social Framework Testimony', 52 *Law & Contemp. Probs.* 133 174 (1989) (providing a literature review of scientific studies regarding myths commonly held by jurors regarding domestic violence; concluding that expert testimony "can be helpful to juries ... [and] that jurors' use of the evidence is largely confined to the legally appropriate functions it is intended to serve"; and further noting that although "the vast bulk of the studies [reviewed] involve simulations (i.e., mock juries). ... Studies that involved actual jurors were generally consistent with the results of the simulated jury studies.") Greene, et al, 'Jurors Knowledge of Battered Women', 4 *J. of Fam. Viol.* 105 (1989); Cheryl Edwards, 'Public Opinion on Domestic Violence: A Review of the New Jersey Survey', 10 *Response* 6 (1987); Charles P. Ewing & Moss Aubrey, 'Battered Women and Public Opinion Some Realities About the Myth', 2 *J. Fam. Violence* 257 (1987) (demonstrating that jurors frequently accept myths regarding domestic violence; concluding that expert testimony is helpful in dispelling such myths). Note that the studies cited herein are based on research conducted with jurors and potential jurors in the USA. No sociological or psychological research regarding the impact of domestic violence myths on juries in the UK is available.

³³ *Commonwealth v. Goetzendanner*, 679 NE2d 240 (1997).

Replacing supposition and myth with evidence and fact enhances the search for truth and respects the function of the jury system. As such, it is important for prosecutors to be in a position to inform the judge, jury (or magistrates) about the dynamics of domestic violence whenever the facts of the case suggest that a lack of knowledge or the power of myth may be an issue.

Domestic violence myths are pervasive, relentless and destructive to the fact-finder's ability to examine the factual evidence at trial rationally and impartially. This fact has been recognized in the United States, where courts frequently admit expert witness testimony in the prosecution of domestic violence in order to negate the power of myth. "General testimony by an expert on the tendency of domestic violence victims to recant is necessary to disabuse the jury of a commonly held misperception – that victims of crimes will not normally lie to protect the perpetrator."³⁴

An example of myth-dispelling expert evidence can be seen in the New Jersey case of Frost, where expert testimony was admitted to negate the negative inference which arose from the victim having remained with the defendant the day following the alleged assault:

"Having heard that [the victim] spent the entire day with defendant, the jury quite properly could have concluded – *based on the misconception that battered women are free to leave* – that, if [the victim] had indeed been assaulted that day, she would have immediately called for help. It required expert testimony to assist the jury in understanding, not whether [the victim] was a credible witness on the witness stand, but whether her conduct on [the day of the battery] was consistent with the pattern and profile of a battered woman."³⁵

The use of expert testimony at trial to dispel myths regarding domestic violence has long been accepted in jurisdictions that admit expert witness testimony regarding Battered Women's Syndrome (hereinafter, "BWS")³⁶. As the Canadian Supreme Court noted in Lavallee, expert testimony may be admitted to address "[t]he obvious question..., 'if the violence was so intolerable, why did the [victim] not leave [the defendant] long ago?' This question...plays on the popular myth...that a woman who says she was battered yet stayed with her abuser was either not as badly beaten as she claimed or else she liked it."³⁷ Although Lavallee involved an alleged "battered" woman's claim of *defence* to the charge of murder, the court's reasoning is entirely relevant to the use of myth-dispelling expert testimony in the prosecution of domestic violence.

³⁴ People v. Salinas, 131 Cal.Rptr.2d 313 (Cal.App. 2003).

³⁵ State v. Frost, 577 A2d 1282 (N.J. 1990) (emphasis added). Although this is an example of rebuttal evidence.

³⁶ BWS has been a recognized body of knowledge regarding the effects of domestic violence on female victims that has been adopted in many jurisdictions throughout the world as a defence for victims who kill their abusers. However the use of testimony regarding BWS has been seen as a shorthand explanation to the dynamics of domestic violence and battered women's experiences and has been criticised as imprecise and misleading. Specific problems with BWS are addressed later in paragraph 6.2.

³⁷ R. v. Lavallee (1990) 55 CCC (3d) 97 (Canadian Supreme Court). See also, M. MacCrimmon, 'The Social Construction of Reality and the Rules of Evidence' 25 U. Brit. Colum. L.Rev. 36 (1991), cited in Redmayne, Evidence at p. 185.

Indeed, the power of myth may be greater in cases where the victim withdraws support for the prosecution as compared to cases where a victim-defendant claims BWS. Over the last decade, society has learnt a great deal regarding BWS through the newspapers, television and other popular media. When an abused woman strikes out against her abuser, the average juror is more likely to understand the fact that she may have had few other options to save her life (or at least that she may have felt that she had few other options to save her life). The criminal justice system's well-known historical neglect of domestic violence cases provides the context in which juries understand and accept the BWS. However, in light of recent changes in the criminal justice system's response to domestic violence, and its progressive willingness to prosecute cases without the victim's support³⁸, juries may be less likely to understand why a victim would withdraw support from the prosecution. Since popular culture has taught juries that 'the system' does not protect domestic violence victims, juries are likely to become confused and accept myths when confronted with a victim being offered support yet seeming uncooperative.

In the absence of expert testimony, the insidious power of myth threatens to limit or destroy the jury's ability to engage in clear-headed, rational analysis of the facts before them. By negating the power of myth, expert testimony clears the way for fact-finders to deliberate regarding the *actual facts* of the case and the logical conclusions that flow from such facts, rather than focusing upon the falsehoods created when the evidence is viewed through the distorting lens of myth.

3.2 Using Expert Testimony to Explain the Victim's Behaviour

Domestic violence victims frequently engage in behaviour that may appear inconsistent with claims that they have suffered abuse. It is not at all uncommon for a victim to remain in an intimate relationship with the defendant despite ongoing abuse, make inconsistent statements regarding the nature of her injuries, ask that charges against the defendant be dismissed, or refuse to testify against the defendant. Such circumstances can result in one of two unfavourable consequences for the prosecution: (1) the fact finder may believe the victim's denial of abuse and acquit the defendant, or (2) the fact finder may disbelieve the victim's denial, but hold negative feelings against the victim for having lied under oath.

Testimony regarding the effects of domestic violence on victims can be a key tool in avoiding the risk that judges, juries, or magistrates will believe victims' in-court retractions and acquit defendants in such cases. "[E]xpert testimony is particularly important for evaluating credibility when the victim's actions in court do not comport with the jury's expectations."³⁹ Even where the victim is unwilling or unable to assist in the prosecution of the defendant, the prosecution can, nonetheless, effectively prosecute domestic violence cases, enhance victim safety and increase defendant accountability.

Expert testimony of this sort has long been admitted in the United States to assist the jury in understanding the ostensibly "bizarre" behaviour of victims who recant prior statements of

³⁸ See CPS DV Policy.

³⁹ Paula Finley Mangum, "Reconceptualizing Battered Women's Syndrome Evidence: Prosecution Use of Expert Testimony on Battering", 19 Third World L. J. 610 -619 (1999).

abuse and testify on behalf of the defendants.⁴⁰ For example, in Arcoren, a federal court of appeals recognized the risk that a jury would be “puzzled” by the victim’s retraction at trial. In order to assist the jury in understanding the victim’s behaviour, the court allowed a domestic violence expert witness to testify at trial on behalf of the prosecution. The court recognized that a jury “would have great difficulty in determining which version” of the victims “story it should believe” and therefore, the case called for expert witness testimony.⁴¹

Similarly, in Borrelli, the Supreme Court of Connecticut approved of the use of expert testimony in the prosecution of domestic violence where the purpose of the testimony to explain the victim’s recantation and give the fact finder reason to disbelieve her in-court retraction:

“Before the jury, the victim testified that she had not been abused ... The victim testified that she had made up the statement [alleging abuse] in order to get her husband into drug treatment. The state [properly] offered a different explanation [by way of expert testimony], one beyond the knowledge and understanding of the average juror – that her statement was true, and the victim’s recantation was a pattern of typical behaviour consistent with battered women’s syndrome.”⁴²

The fact that an uncooperative victim’s behaviour is outside the experience and knowledge of a jury is widely recognized in the U.S. courts. In Whisenant, a Texas court recently noted, “expert testimony ... is useful and admissible in abuse cases to describe commonly-known characteristics of abuse victims and to compare the victim’s behavior to that profile. By implication, lay persons do not have sufficient specialized knowledge or training to make this determination.”⁴³

Based upon the fundamental principles of expert evidence law, applicable in both England and the United States⁴⁴, there are strong grounds favouring the prosecution’s use of expert testimony to explain the victim’s behaviour if she withdraws support for the prosecution. As discussed above, such testimony would be primarily useful because it reduces the likelihood that a jury will automatically believe a victim’s denial of abuse. As discussed below, such testimony would be secondarily useful because it reduces the likelihood that the jury will develop negative feelings against the victim.

Frequently, when a victim denies the abuse while testifying in court, the jury will become angry or disgusted with her for having lied under oath. Quite simply, juries consist of people – and people don’t like being lied to. Moreover, when the victim denies the abuse in court, the prosecutor must treat the victim as a hostile witness and attempt to demonstrate that she

⁴⁰ Arcoren v United States, 929 F2d 1235 (8th Cir. 1991).

⁴¹ Id.

⁴² State v Borrelli, 629 A.2d 1105 (Conn. 1993), as cited in, Clare Dalton and Elizabeth M. Schneider, Battered Women and The Law (Foundation Press 2001).

⁴³ Whisenant v. State, 2003 WL 1090504 (Tex.App. 2003).

⁴⁴ See §2.1 above.

is lying. In establishing that a domestic violence victim has testified falsely, the prosecutor can easily be viewed as taking a negative attitude toward the victim, and this appearance will often encourage similar negativity in the finder of fact. Such hostile feelings towards the victim can interfere with the jury's ability to render a fair and impartial verdict. As such, it is crucially important for the jury to hear evidence from a domestic violence expert who can explain the reasons why victims are frequently unable to support the prosecution. Only by understanding the reasons *why* victims frequently retract their statements can the jurors set aside any negative feelings they have developed against the victim and examine the facts without the interference of bias or emotion.

There are many reasons why victims testify falsely at trial and are otherwise unsupportive of the prosecution – but the primary motivation is fear⁴⁵: fear of suffering further violence in retaliation for having testified against the defendant; fear of experiencing alienation from family or friends who support the defendant and put pressure on the victim not to testify; fear of the defendant losing his job as a result of criminal penalties stemming from the prosecution, which may render the victim financially unable to care for her children; fear of being viewed as a 'bad-wife' or a 'vindictive spouse' for having told the truth about the domestic abuse she has suffered; fear of destroying her husband or partner's reputation in his business or religious community.⁴⁶

Victims' fear of retaliation is well justified. Testifying against the defendant often necessitates leaving the abusive relationship – an act that dramatically increases the victim's risk of serious injury or death at the hands of the defendant. As the Home Office has recognized, "[w]omen who are separating from their partner are at much higher risk of domestic violence ... The BCS (1999) found that 22% of separated women were assaulted in the previous year by their partners or ex-partners."⁴⁷ By asking a domestic violence victim to testify on behalf of the prosecution, she is being asked to risk her life and the lives of her children. In a recent Metropolitan police review of domestic violence murders, in 76% of cases the victim was killed after they had terminated the relationship.

"[P]rosecution may put a victim or children at risk of further violence ... The act of leaving does not make the victim safe. Research shows that victims are most at risk of being subjected to further violence when they are on the point of seeking help of leaving. ... [T]he majority of 'domestic' assaults occur after the victim has left the abuser."⁴⁸

Without the assistance of an expert witness who presents clear, truthful information about the dynamics of domestic violence and its impact on victims, the jury may fail to understand the tremendous pressure placed on victims to remain in the abusive relationship and protect the defendant. In failing to understand *why* victims testify falsely, judges, juries [or

⁴⁵ "Why victims of domestic violence withdraw charges made against the perpetrator – A qualitative study" Devon Domestic Violence Partnership, 2003

⁴⁶ See Appendix 2, *50 Reasons Why Domestic Violence Victims Withdraw Support for Prosecutions*.

⁴⁷ Walby, S. and Myhill, A., 'Reducing Domestic Violence ... What Works? Assessing and Managing the Risk of Domestic Violence', Police and Reducing Crime Briefing Note, Home Office (January 2000).

⁴⁸ CPS "Guidance on Prosecuting Cases of Domestic Violence" (2001) at p. 4. Such attacks have been coined 'separation assaults' in the United States. See, M. Mahoney, 'Legal Images of Battered Women', 90 Mich. L. Rev. 1 (1991).

magistrates] will likely be unable to evaluate all of the evidence in the case properly and impartially.

3.3 Cases that Do Not Call for Expert Testimony

The prosecution may not introduce expert witness testimony designed solely to bolster the credibility of a witness who testifies on behalf of the Crown, unless the defendant has directly challenged that witness' credibility and the expert testimony is closely tailored to meeting that challenge.⁴⁹ In Grimmond, the prosecution presented testimony from two child sexual assault victims. Both children testified consistently with the prosecution's theory of the case at trial. However, the evidence showed that the children had initially disclosed the sexual abuse in several stages, rather than immediately reporting all of the offences at the time of making their first disclosure. Following the victims' testimony, the prosecution offered expert witness testimony to bolster the victims' credibility. The prosecution sought to establish (by way of expert testimony) that the children's method of disclosure was typical of children who have been sexually abused. The Court ruled that the reason for the children's multiple and partial disclosures of abuse was not beyond the understanding and experience of the average juror. Thus, use of expert testimony to explain this issue was viewed merely as a ploy to bolster the credibility of the prosecution's witnesses: "The [expert] witness and the report which she had compiled was plainly designed to bolster the credibility of the complainers. That was an issue for the jury themselves and not for any expert witness ..."⁵⁰

The court's ruling in Grimmond was based upon the perceived attempt by the prosecution "to elicit an expert opinion [on] the matter of the credibility of witnesses".⁵¹ Such outright, direct bolstering of a cooperative witness's credibility overstepped the bounds of admissibility and reached into the prohibited practice of "oath helping".⁵² In this sense, Grimmond can be understood as a caution for prosecutors seeking to introduce expert witness testimony in domestic violence cases.

The lesson to be learned from the Grimmond case may be understood as follows: *If the sole purpose of the proffered expert testimony is to bolster the credibility of a cooperative victim who testifies consistently with the Crown's theory of the case, such expert testimony will not likely be admitted.* However, it should be noted that the rule against 'oath helping' is not a significant obstacle in seeking to introduce expert witness testimony in domestic violence cases. Indeed, a similar prohibition exists in many U.S. jurisdictions, yet despite this rule, expert witness testimony is readily and frequently admitted *in those cases that call for such testimony*. For example, in the case of Christel, a Michigan court refused to admit expert testimony for the prosecution in a domestic violence trial where the victim did not delay

⁴⁹ HM Advocate v. Grimmond, [2002] S.L.T. 508 CA (Crim Div) (NI).

⁵⁰ Id.

⁵¹ Note that the court's perception may have been in error, in light of the prosecution's explicit agreement not to elicit testimony from the expert directly regarding the boys' credibility. Id.

⁵² See, R. v. Robinson [1994] 98 Cr. App. R. 370 CA (Crim Div). "It may ... be open to the Crown to rebut by expert evidence ... [and to establish] that a prosecution witness is unreliable ... If such evidence is admitted, great care would need to be taken to restrict the expert opinion to meeting the specific challenge and not to allow it to extend to 'oath-helping'."

reporting the incident, did not recant or minimize her reports of the defendant's abuse, and did not remain in a relationship with the defendant.⁵³ In other words, there was nothing in the facts of the case that gave rise to concerns regarding the power of myth, nor was there anything 'puzzling' about the victim's behaviour that was beyond the jury's understanding. As such, the expert testimony was inadmissible.

In contrast, where the facts of the case do give rise to concerns regarding the power of myth or raise 'puzzling' issues regarding the victim's behaviour, the rule against 'oath helping' is not a barrier to the admission of domestic violence expert testimony. For example, if a victim makes conflicting statements regarding the abuse (i.e. sometimes admitting that the abuse occurred and sometimes denying the abuse), expert witness testimony will likely be admissible to assist the jury in evaluating this conflicting evidence. In such cases, the purpose of the expert testimony is *not* to bolster the victim's credibility, but rather, the purpose of the expert testimony is to assist the fact finder in assessing conflicting pieces of evidence.

Finally, in deciding whether a given case calls for expert testimony, it is important to keep in mind the distinction between two different types of credibility: personal credibility and factual credibility.

"There is, of course, a distinction between evidence going to the credibility of [the victim's] account and evidence going to the credibility of [the victim as a person] ... Factual credibility ... [relates to the jury's] assessment of the prior probability of the [victim's] assertion or the plausibility of her account ... [whereas] personal credibility ... [relates to the jury's] assessment of the general veracity of the witness, which may be challenged by evidence that witness has poor memory, is a liar, or experiences habitual intoxication, or lacks other capacities for truth telling."⁵⁴

The prohibition against 'oath helping' in English law is a prohibition against bolstering the *personal credibility* of a witness whose personal credibility has not been attacked. It is this type of evidence to which the court in Grimmond objected:

"[E]vidence of facts affecting the *credibility of a witness* [is] generally inadmissible, not because the facts [are] irrelevant, but because it [is] inexpedient to spend time on the investigation of collateral issues ... The assessment of the *credibility of a witness* [is] a matter for the jury themselves, using their own common sense and experience of human nature and affairs. It [is] not a matter of expertise for a skilled witness."⁵⁵

Thus, if the defendant attacks the *factual credibility* of a witness (or if the victim raises the issue of factual credibility by making inconsistent statements, retracting or minimizing while in the witness box), the prosecution may *not* respond with expert testimony designed to bolster the victim's *personal credibility*. Expert witnesses will not be allowed to testify that

⁵³ People v. Christel, 537 N.W.2d 194 (Mich. 1995).

⁵⁴ M. Redmayne, Expert Evidence and Criminal Justice (Oxford University Press 2001) [hereinafter, 'Redmayne, Expert'] at pp. 145-6, 162.

⁵⁵ Grimmond, [2002] S.L.T. 508 CA (Crim Div) (NI) (emphasis added).

victims of domestic violence are generally truthful, or that a particular victim is a credible witness.

Rather, expert testimony must be geared toward enabling the fact finder to understand and judge properly the *factual credibility* of the testimony offered at trial. For example, if the victim testifies that her injuries were caused by an accidental fall – thereby retracting her prior allegations that the defendant pushed her down a flight of stairs – expert testimony regarding domestic violence should be geared towards challenging the factual credibility of her in-court testimony. The prosecution should seek to use expert testimony in such cases in order to *challenge* the “plausibility of her account” at trial, not to *bolster* the victim’s own personal qualities of truth-telling or falsehood.⁵⁶

4. Who is Qualified to Testify as an Expert?

Once a prosecutor has determined that a given case calls for expert testimony the next step in using domestic violence expert witness testimony is to identify an appropriately qualified domestic violence expert. What sorts of study, training and experience make a witness qualified to testify as a domestic violence expert? This section explores the answer to this question, explores general principles regarding expert qualifications, provides specific information regarding individuals who have been deemed qualified to present evidence regarding domestic violence in the trial and appellate courts of England and Wales, and cautions prosecutors against choosing to lead testimony from certain categories of domestic violence expert witnesses.

4.1 General Principles of Expert Qualifications

Whether, in any particular case, a witness is qualified to give expert evidence is a matter to be decided by the judge. The competence of an expert witness is governed by the common law, but trial courts are granted wide discretion in make such determinations.⁵⁷ The common law regarding expert witness qualifications in England and Wales is grounded in the 1894 case of Silverlock,⁵⁸ which has, more recently, been reaffirmed in the case of Robb.⁵⁹ The general rule is that an expert’s competence or skill may stem from formal study, training, experience, or both. However, the crucial question to keep in mind when assessing expert witness qualification is: “*In what field is this witness being offered as an expert?*” For, it is axiomatic that a witness who qualifies as an expert in one field may not qualify as an expert in another field. For example, police officers with special training are deemed to possess expertise in the field of automobile accident reconstruction⁶⁰, but are not qualified to testify as voice recognition experts.⁶¹ The question of expert qualifications, therefore,

⁵⁶ Id. at p. 162.

⁵⁷ See generally, The Auld Report at §130.

⁵⁸ R v. Silverlock [1894] 2 QB 766.

⁵⁹ R v. Robb [1991] 93 Cr App R 161.

⁶⁰ R v. Wood [1998] 2 Cr. App. R.(S.) 234 CA (Crim Div); R v. Murphy [1980] QB 434, CA. See also, Keane, Evidence at p. 503-504.

⁶¹ See, Robb [1991] 93 Cr App R 161.

cannot adequately be addressed acontextually. For that reason, we will explore the question of expert witness qualifications in the context of witnesses who are offered as experts for the purpose(s) of dispelling domestic violence myths and explaining the behaviour of victims of domestic violence.

4.2 Who Can Testify as a Domestic Violence Expert?

In the United States, witnesses with many types of qualifications have been allowed to testify as domestic violence experts on behalf of the prosecution. Experts ranging from the victim's treating psychologist⁶², non-treating psychotherapists⁶³, social workers⁶⁴, licensed marriage therapists⁶⁵, academics with specialized knowledge of domestic violence⁶⁶, law enforcement domestic violence counsellors⁶⁷, battered women shelter workers⁶⁸, and trained police officers⁶⁹ have all been accepted as expert witnesses on the topic of domestic violence.

In England, a number of witnesses have been deemed qualified to testify as domestic violence experts in both civil and criminal courts. In civil cases, the Safe Contact Project in London is worthy of note. This project, a joint effort between the London-based Child and Family Court Advisory and Support Service (CAFCASS), the Coram Child Contact Service, and the Domestic Violence Intervention Project, provides expert testimony for use in the course of civil litigation taking place within the Inner London Family Proceedings Court and some county courts around London. The experts made available through the Safe Contact Project assist the courts in decision-making about child-contact in cases where domestic violence has occurred.

In English criminal proceedings, the first reported appellate case specifically approving of domestic violence expert witnesses testimony within the trial court proceedings was R. v. Emery.⁷⁰ In light of its landmark role in English law, it is worth exploring this case in some depth. In Emery, a mother was charged with the offence of cruelty to a child for failing to protect her child from the child's father. The mother claimed the duress as defence, alleging that the child's father "had routinely and severely abused not only [the child] but herself. She said that she had been unable to act to protect her daughter, because of the fear in which she held [the father]."⁷¹

⁶² State v. Grecinger, 569 N.W.2d 189 (Minn. 1997).

⁶³ Whisenant v. State, 2003 WL 1090504 (Tex.App. 2003); Nixon v. United States, 728 A.2d 582 (D.C. 1999); Arcoren v. United States, 929 F.2d 1235 (8th Cir. 1991).

⁶⁴ State v. Ciskie, 751 P.2d 1165 (WA 1988).

⁶⁵ People v. Wu, 2003 WL 125019 (Cal.App. 2003).

⁶⁶ State v. Borrelli, 629 A.2d 1105 (Conn. 1993).

⁶⁷ People v. Williams, 78 Cal. App. 4th 1118 (CA 2000).

⁶⁸ People v. Goodsell, 2003 WL 1558219 (Mich. App. 2003); State v. Clark, 926 P.2d 194 (Haw. 1996); State v. Frost, 577 A.2d 1282 (N.J. 1990).

⁶⁹ People v. Botley, 2003 WL 1154200 (CA 2003); State v. Hoskie, 813 A.2d 136 (Conn. 2003).

⁷⁰ R v Emery [1993] 14 Cr.App.R (S) 394.

⁷¹ Id. at p. 395.

On behalf of the mother, the court permitted two witnesses to testify as experts on the issue of domestic violence. One expert's qualifications include his study, training and experience as a "psychiatrist who specialises in response to serious trauma of various kinds, including domestic violence." The other's qualifications include her study, training and experience as a licensed "psychologist who [at the time of trial] had some 13 years' experience working with abused women." Moreover, the expert was the Director of Women's Refuge, one of England's largest domestic violence charities.

The experts testified on behalf of the defence regarding the effects of "prolonged serious violence and abuse, particularly of a woman by her partner."⁷² These effects were said to include "an inability to resist or stand up to her abuser, a flat hopelessness, coupled with a dependence on the abuser, which makes her unable to leave, unable to seek help and suffer from feelings of guilt." Additionally, the defence experts were allowed to testify that domestic violence victims often excuse and minimize the violence in order to cope.⁷³

To counter the testimony offered by defence experts, the court also permitted an expert to testify on behalf of the prosecution. The prosecution expert's qualifications included the fact that he was a psychiatrist with considerable experience in domestic violence. The substance of the prosecution expert's testimony was that, although the child's father abused Ms. Emery, this abuse did not "undermine [the mother's] autonomy and independence of action."⁷⁴

Based upon the precedent set in Emery, it appears likely that similarly qualified experts would be deemed qualified by the courts to testify regarding both domestic violence generally (i.e., dispelling myths) and the impact domestic violence has upon its victims (i.e., explaining the behaviour of victims).

More recently, in the case of R. v. Smith, the Court of Appeal affirmed admission of testimony by two domestic violence experts on behalf of a murder defendant.⁷⁵ In Smith, two experts offered evidence in support of Ms. Smith's diminished responsibility plea, testifying at trial that she 'suffered learned helplessness arising from Battered Woman Syndrome and that there was substantial impairment of responsibility by reason of the consequential distortion of her thinking.'⁷⁶ The Appellate Court not only commented approvingly regarding the admission of such testimony, but also further expanded the scope of domestic violence expert evidence in this case, by admitting such evidence on appeal regarding the alternative defence of provocation.⁷⁷

⁷² Id.

⁷³ Id.

⁷⁴ The prosecution expert's testimony was apparently persuasive to the jury, and they rejected Ms. Emery's defence of duress.

⁷⁵ R. v. Smith [2002] EWCA Crim 2671.

⁷⁶ Smith at pars. 15-16.

⁷⁷ At trial, the jury rejected Ms. Smith's diminished responsibility plea, despite the admission of expert testimony regarding BWS offered by the defence. On appeal, the court noted that the defence expert could have linked Ms. Smith's symptoms of BWS to the issue of provocation but was not asked to do so during his trial testimony. However, after the same expert provided evidence linking BWS to the defence of provocation to the appellate court, the court found that the verdict might have been different if the jury had heard such evidence at trial. As such, the appellate court ruled that the murder conviction was unsafe. Smith at pars. 40-41.

It is important to note that the list of qualified domestic violence expert witnesses in England in Wales is by no means limited to the witnesses specifically approved of in Emery and Smith. The exceptionality of these cases is due to the infrequency with which litigants have offered expert witness testimony on the topic of domestic violence in English courts during trial criminal court proceedings, and is not due to any legal barriers regarding the admission of expert testimony under English law. This point is emphasized by Ahluwalia, a case that is widely recognized as standing for the legal proposition that expert testimony regarding BWS is admissible in English criminal courts.⁷⁸ It is notable that, at both the trial and appellate level in Ahluwalia, “there was no medical or other evidence before the judge and jury, and none even from the appellant, to suggest that [Ms. Ahluwalia] suffered from a post-traumatic stress disorder, or ‘Battered Woman Syndrome’ or any other specific condition.”⁷⁹ The defendant’s failure to present such evidence leaves the case of Ahluwalia in a precarious position as legal precedent for the admission of BWS; for this legal strategy was not even attempted in the underlying case. Despite this oddity, “it seems clear that, had expert evidence of ‘battered woman syndrome’ been put before the court [in Ahluwalia], it would have been permitted.”⁸⁰

In addition to the trial court testimony offered by experts in Emery, and Smith, domestic violence expert evidence in the form of written reports offered on behalf of criminal defendants have also been admitted by English appellate courts.⁸¹ For example, an expert report authored by a consultant forensic psychiatrist was admitted in the case of R. v. Gardner, wherein the expert opined that ‘the unremitting physical and verbal attacks on Mrs. Gardner led to a cumulative state of exhaustion, hopelessness, helplessness and depression, these features being characteristic of what has been described as a battered woman syndrome.’⁸² Similarly, in the case of R. v. Thornton⁸³, the Appellate Court admitted written reports regarding domestic violence authored by two expert witnesses (both of whom gave evidence at trial but presumably did not directly address BWS in the trial court proceedings), and further admitted a statement regarding domestic violence from another expert. The latter expert statement was available at the first appeal but inexplicably ‘was not put in the forefront of the appellant’s case’. Finally, an expert regarding domestic violence was admitted as fresh evidence on appeal in the case of R. v. Muscroft, wherein the expert

⁷⁸ R. Ahluwalia, [1993] 96 Cr. App. R. 133 CA (Crim Div). Compare R. v. Smith (Morgan) [2001] 1 AC 146, where the House of Lords approvingly characterized the ruling in Ahluwalia as follows: ‘characteristics relating to the “mental state or personality of an individual” such as the fact that a battered wife was suffering from post-traumatic stress disorder, could be taken into account’ in judging a defendant’s plea of provocation. Smith (Morgan) at 170. Note, however, that in addressing this issue in Ahluwalia, Taylor L. did not specifically approve BWS evidence as relevant to the defendant’s characteristics for the purpose of mounting a provocation defence; rather, he only mentioned this issue briefly in the following dicta: ‘[h]ad the evidence which has now been put before this court [i.e. evidence re BWS] been adduced before the trial judge, different considerations may have applied’ in assessing its relevance to the defendant’s provocation plea. Ahluwalia at 141.

⁷⁹ R. v. Ahluwalia, [1992] 4 All E.R. 889.

⁸⁰ Andrew M. Colman, *Equivocal Rulings on Expert Psychological and Psychiatric Evidence: Turning a Muddle into a Nonsense*, [1996] Crim. L.R. 88-95.

⁸¹ In such cases (discussed below), the experts’ evidence was not adduced at trial but was instead admitted as ‘fresh evidence’ on appeal pursuant to §23(1) of the Criminal Appeal Act 1968.

⁸² R. v. Gardner [1993] 14 Cr. App. R. (S.) 364 CA (Crim Div) at 367.

⁸³ R. v. Thornton [1996] 2 Cr. App. R. 108.

opined that Ms. Muscroft's inability to disclose the abuse she had suffered was consistent with symptoms of BWS.⁸⁴

In reviewing the qualifications of experts whose evidence regarding domestic violence has been admitted in English trial and appellate courts, it appears that proffered experts have generally possessed traditional qualifications in medical and/or scientific fields (i.e. university degrees, authorship of texts, etc.). However, nothing in the English caselaw indicates that *only* such traditional qualifications will suffice. Rather, the general rule regarding expert witness qualifications remains applicable and thus any study, training or experience will suffice, providing that it renders the expert witness qualified to provide authoritative evidence on an issue that is outside the knowledge of the average juror.⁸⁵ Therefore, as the introduction of domestic violence expert witness testimony becomes more common within English courts, there is every reason to believe that the specialized knowledge obtained through training and experience (such as that acquired by domestic violence refuge workers and police officers) will qualify these witnesses to testify, in appropriate cases, as domestic violence experts in the prosecution of abusers.

4.3 Who Should *Not* Be Used as an Expert?

Safety and confidentiality are important issues to consider in choosing a domestic violence expert witness. Every prosecution choice, including the choice of domestic violence expert witnesses, should be undertaken with an eye towards protecting and enhancing the safety, security and dignity of the victim and her children.⁸⁶

In deciding whom to call as a domestic violence expert witness, prosecutors must prioritize victim safety.⁸⁷ For example, if a local women's refuge worker is used as an expert witness, in a situation where a domestic violence victim withdraws support for the prosecution and against her wishes, this may lose the trust between the victim and the refuge. The victim may then possibly feel unable to turn to the refuge in the future when seeking to escape a violent episode.⁸⁸ In this situation it may not be advisable, so in order to avoid placing victims and their children at further risk it is advisable to use experts from other geographical areas.

Another risk in choosing an appropriate domestic violence expert is the issue of confidentiality. Counsellors, psychologists, psychiatrists, medical doctors and domestic violence advocates all owe a duty of confidentiality to the victim.⁸⁹ Additionally, mediators

⁸⁴ *R. v. Muscroft* 2001 WL 332202 CA (Crim Div).

⁸⁵ Keane, *Evidence* at pp.503-504, Dennis, *Evidence* at p. 662. See also FN 6 above.

⁸⁶ *CPS DV Policy* §§1.3 and 1.14.

⁸⁷ See generally, *CPS DV Policy* §§1.3 and 1.14.

⁸⁸ Additional concerns regarding the use of local refuge workers as expert witnesses extend to the risk of alienating women other than the victim at issue in the prosecution, thereby jeopardizing the confidence victims of domestic violence have in their local refuge.

⁸⁹ R.G. Toulson, C.M. Phipps, *Confidentiality* (Sweet & Maxwell 1996) at p. 180, specifically discussing counseling services.

and marriage therapists owe a general duty of confidentiality to both parties.⁹⁰ So although their expert testimony would be used to raise general issues in relation to the domestic violence dynamics and NOT to address issues in relation to the victim in the case, to ensure independence and avoid bias, as well as protect confidentiality, staff working with the victim should not be used.

5. What are the Foundational Requirements of DV Expert Testimony?

Prior to calling an expert witness to testify on behalf of the prosecution in a domestic violence trial, certain foundational requirements must be established. Substantively, in order to use expert testimony at trial, the prosecution must establish a foundation for the relevance of the testimony. The two ways in which a prosecutor should establish the foundational relevance of expert witness testimony in domestic violence cases have already been discussed – by establishing either (1) that the expert testimony is required to dispel myths, and/or (2) that the expert testimony is required to explain the victim's behaviour.⁹¹ In this section, two further substantive foundational issues regarding domestic violence expert testimony will be discussed: (1) whether the prosecution must prove that the victim suffered a history of domestic violence, and (2) whether the prosecution must prove that the victim is or was suffering from a mental illness. It will conclude that the prosecution need *not* prove either of the two substantive foundational issues discussed in this section.

5.1 Prior History of Domestic Abuse Not Required

In using domestic violence expert testimony to dispel myths and/or explain the perplexing behaviour of victims who withdraw support for the prosecution, the prosecution need not establish that the victim has suffered a history of abuse.⁹² A common objection to the prosecution's use of expert testimony is that such testimony is only relevant where the prosecution proves that the victim in fact suffers from BWS or has experienced repeated abuse. However, most cases that have considered this issue have determined that no such foundational requirement exists.⁹³ As noted by the California Appellate Court in Williams, there is no reason to allow a defendant to "get one free episode of domestic violence before [allowing] evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator."⁹⁴

In California, the caselaw regarding the issue of prior abuse foundational requirements has recently undergone a transition. Previously, the case of Gomez stood for the proposition that testimony regarding the effects of domestic violence (specifically, BWS) cannot be admitted without evidence that the victim suffered multiple previous attacks by the defendant.

⁹⁰ Theodoropoulos v. Theodoropoulos [1963] 3 W.L.R. 354.

⁹¹ See §§3.1 and 3.2.

⁹² See People v. Williams, 78 Cal.App.4th 1118 (2000) and progeny.

⁹³ See Williams, and progeny, including *inter alia*, People v. McClure, 2003 WL 21143334 (Cal.App. 2 Dist. 2003), People v. Salinas, 131 Cal.Rptr.2d 313 (2003), People v. Campos, 2002 WL 749200 (Cal. App. 2nd Dist. 2002), People v. Martinez, 2002 WL 557335 (Cal. App. 2nd Dist. 2002), Dillard v. Roe, 244 F.3d 758 (9th Cir. 2001).

⁹⁴ Williams, 78 Cal.App.4th at 1129.

However, in Williams, the California Appellate Court challenged the ruling in Gomez and held that one episode of abuse – the episode upon which the instant charges are based – would suffice to establish a foundation for the introduction of domestic violence expert testimony. Subsequent courts have favoured the approach taken in Williams: “We find the reasoning of Williams persuasive. By ruling that a single violent incident can never trigger BWS without evidence of other abuse, the Gomez court usurped the trial court’s authority to determine relevancy on a case by case basis.”⁹⁵

This issue was also addressed in depth and rejected by the New York Supreme Court in Ellis. The court rejected the defendant’s foundational objection on the basis that, under the facts of that case, the prosecution had demonstrated ample foundation for the introduction of expert testimony regarding domestic violence:

“[T]he defendant contends that the People have not laid a proper foundation for the introduction of this evidence because the complainant has never been determined to be a battered woman by an expert nor is there evidence before the jury that she suffers from this condition ... [We reject this argument] ... [T]he People have met their burden of laying a proper foundation for the introduction of [domestic violence] expert testimony. They presented evidence of characteristics of the three stages in the cycle of violence associated with [domestic violence]. With respect to the “tension building” stage, there is evidence ... of “discipline and physical abuse in the past” which “can also be viewed as evidence of isolation since it tends to show [the defendant] did not kindly approve of [the victim] being able to come and go as she pleased.” [Also] [t]here was evidence of criticism of her housekeeping by the defendant [and e]vidence of the complainant’s passivity [toward the defendant]. Concerning the “explosion” or violent stage, there is evidence of physical violence and injuries suffered by the complainant. Regarding the “honeymoon” ... stage, there is evidence of the defendant’s efforts to make amends by having the apartment painted and repaired and buying new furniture to get the complainant to return to him. [Finally] [o]ther factors characteristic of [the] behaviour [of victims of domestic violence], present here, was (sic.) the evidence that the complainant blamed herself for causing the incidents and that the complainant minimized or denied the severity of the violence. Based on the above this court concludes that the necessary foundation has been laid.”⁹⁶

It should be noted that in Ellis, the foundational requirements for presenting domestic violence expert testimony were easily met by *extensive* evidence regarding the defendant’s power and control over the victim and the cycle of violence in their relationship. However, as the bulk of California caselaw demonstrates, it is not incumbent on the prosecution to demonstrate such substantial foundational evidence. Indeed, it is not even incumbent on the prosecution to prove *any* prior instances of abuse aside from the instance at issue in the criminal proceedings.

⁹⁵ People v. Brown, 2003 WL 190790 (Cal. App. 2nd Dist. 2003). This issue is presently on appeal to the California Supreme Court in the Brown case.

⁹⁶ People v. Ellis, 170 Misc. 2d 945(N.Y. 1996).

5.2 Proof of Mental Illness Not Required: The (Ir)relevance of Turner

The 1975 case of Turner is an important legal precedent in English law regarding the admissibility of expert witness testimony.⁹⁷ The main ruling in Turner states, “[w]here triers of fact can form their own opinions without the assistance of an expert ... the opinion evidence of an expert is inadmissible because unnecessary.”⁹⁸ Taken at face value, Turner’s rule is nothing more complicated than a simple restatement of the general rule that expert witness testimony is admissible only to furnish the court with information that is likely to be outside the experience and knowledge of a judge or jury.

However, the dicta in Turner suggests that its significance extends beyond a mere restatement of accepted law. In rejecting the defendants plea of provocation, Lawton, J. said: “Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.” Based on this dictum, it is sometimes suggested that expert witnesses may only testify regarding a witness’ mental state where that witness suffers from a mental illness. This view, however, has been rejected in caselaw and leading academic commentary.⁹⁹

In the twenty-eight years since Turner was decided, the power of Lawton, J.’s dicta has diminished significantly. More recent cases have observed that “[t]he law [regarding admissibility of expert testimony] is in a state of development ... There may well be other mental conditions about which a jury might require expert assistance in order to understand and evaluate their effect on the issues in a case.”¹⁰⁰ The development of law in this area is well exemplified by in the case of Emery, where the court allowed expert testimony regarding the effects of domestic violence from three separate witnesses, despite the fact that the witness at issue had not been diagnosed with a mental illness. As Taylor, L. noted in Emery when commenting upon the relevance of Turner: “[T]his case was not, in our judgment, one which fell within that category to which [the Turner court referred].”¹⁰¹ Rather, the Emery court noted that expert testimony may be admitted where “[t]he abuse alleged [is] in excess of the stresses and strains of life well understood by the average person.”

This issue is the key to understanding the relevance of Turner and its progeny: *Expert witness testimony is admissible in prosecuting domestic violence because, although domestic violence victims are indeed ‘ordinary folk’, the abuse to which they have been subjected ‘exceeds the stresses and strains of life well understood by the average person.’* In other words, the victim’s mental state is not to be understood as “mentally ill” or otherwise beyond the understanding of a jury. Rather, it is the abuse to which she had been subjected which is beyond the understanding of a jury. *Expert witness testimony is required in domestic violence cases because average people do not understand domestic violence.*¹⁰²

⁹⁷ R. v. Turner, [1975] 1 All. ER 70.

⁹⁸ Keane, Evidence at p. 499 citing Turner, [1975] 1 All. ER 70.⁹⁹ “[M]any decisions reflect the view that expertise is only called for in the case of a person suffering from a mental illness, a view which, it is submitted, is unnecessarily inflexible.” Keane, Evidence at 500, citing R. v. Strudwick [1993] Cr App R 326 CA.

¹⁰⁰ R. v. Strudwick [1993] Cr App R 326 at 332, CA.

¹⁰¹ Emery, [1993] 14 Cr. App. R. (S.) at 397.

¹⁰² See §2.1, FN 28 above, citing sociological and psychological research regarding juries’ poor understanding of domestic violence.

Average jurors – both men and women – believe myths about domestic violence. Average jurors – draw incorrect inferences based on victims' behaviour. These barriers to understanding destroy the ability of jurors to examine the evidence presented at trial rationally and fairly. Thus, expert testimony is required (and is admissible precisely because) it enables the jury to understand abuse that exceeds the stresses and strains of life well understood by the average person.

6. What Issues Should the Expert Witness Raise?

Once a prosecutor has determined that a given case calls for expert testimony and he or she has identified an appropriately qualified domestic violence expert, what sort of questions can and should be asked of this expert when he or she is called to testify as a witness? This section explores the answer to this questions, provides examples of the appropriate substance of domestic violence expert testimony¹⁰³, and cautions prosecutors against eliciting certain types of testimony from domestic violence expert witnesses.

6.1 The Substance of Domestic Violence Expert Witness Testimony

Domestic violence expert witness testimony constitutes relevant evidence on behalf of the prosecution when it enables the fact finder to evaluate the other evidence presented at trial free from the obscuring influence of popular myth and confusion regarding perplexing victim behaviour. In order to fulfil its purpose, expert testimony should describe, in general terms, the dynamics of domestic violence, dispel common myths regarding domestic violence, and/or explain puzzling victim behaviour in light of the expert body of knowledge regarding domestic violence. In one example of expert testimony that has been specifically approved in the caselaw, a licensed clinical social worker and director of a domestic abuse centre testified as follows:

'[A]bout 80 percent of the time a woman who has been 'initially assaulted' by a boyfriend, husband or lover will recant, change or minimize her story. This recanting does not happen only after there has been a continuing pattern of abuse. In fact, depending on the severity of the incident, it is more likely to occur after a first incident. ... [T]he woman will tend to minimize and deny the incident. The woman will engage in self-blame and sort of reconstruct ... the incident, especially if the relationship is going to continue. It's the most common [reaction] of anybody who's been victimized in an intimate relationship.'¹⁰⁴

Such testimony assists the finder of fact in understanding why victims of domestic violence frequently recant, change and/or minimize their reports of abuse. General testimony of this sort can assist the jury in discarding popular myths regarding domestic violence and

¹⁰³ See Appendix 3: *Sample Examination-in-Chief of Domestic Violence Expert Witnesses by the Prosecution*.

¹⁰⁴ This quote is taken from the testimony of Gail Pincus in the trial of Daniel R. Gomez, reported at *People v. Gomez*, 72 Cal.App.4th 405, 411-412 (1999) (internal punctuation omitted). In the *Gomez* appeal, Pincus' testimony was deemed irrelevant because the prosecution failed to lay any foundation establishing that the defendant had previously abused the victim. However, this ruling was subsequently challenged in the later case of *People v. Williams*, 78 Cal.App.4th 1118 (2000), where the Court ruled that evidence of prior abuse is *not* a foundational requirement for the admission of domestic violence expert testimony. (See §5.1, above.) In *Williams*, the Court specifically approved of this passage from Pincus' testimony in *Gomez*, quoted above. *Williams*, 78 Cal.App.4th at 1129.

understanding evidence regarding the victim's perplexing behaviour in the specific case at issue.

The relevance of such testimony exists irrespective of whether the expert offers specific opinions regarding the particular case at issue.¹⁰⁵ In using domestic violence expert testimony for the purpose of dispelling myths and explaining perplexing victim behaviour, the expert's opinions need not be phrased in terms that are specific to the victim, defendant or relationship at issue.¹⁰⁶ There is no need for the expert to have interviewed the victim, the defendant, or any witnesses; nor is there any need for the expert to have arrived at a diagnosis of the victim or defendant. Indeed, there is no need for the expert to have reviewed any information regarding the specific case at issue.¹⁰⁷

For example, in the case of People v. Hernandez, the prosecution led evidence from Gail Pincus, the same expert who testified in the Gomez trial, cited above.¹⁰⁸ Pincus testimony was offered in general terms 'to educate' the jurors about the dynamics of domestic violence. Pincus had never met the specific victim in that case, did not read any documentation regarding that specific case, nor did she form any opinion regarding the defendant's guilt or whether the victim actually suffered the effects of having been abused.

'[Rather], Pincus testified about why a battered woman stays in an abusive relationship, protects the abuser and frequently does not report abuse. She described the cycle of violence in domestic abuse. [Pincus described the first phase where] an abuser begins to emotionally abuse [the victim]..., isolate [the victim] from her friends and family ..., [and] exert economic control [over the victim] ... [Pincus further explained that], [b]ecause of the abuser's isolation and control of the victim, she begins to believe his criticism and takes responsibility for his anger and the problems in their relationship. [In

¹⁰⁵ Where domestic violence expert witness testimony is introduced on behalf of criminal defendants in England, the expert is typically a psychiatrist or psychologist who offers the opinion that the specific defendant at issue in fact suffered from BWS, and that her BWS symptoms, either alone or in combination with mental disorders such as depression or post-traumatic stress syndrome, diminished the defendant's responsibility for the offence and/or that her BWS should be taken into account as one of the characteristics of the 'reasonable person' test of the provocation defence. See generally Ahluwalia, [1992] 4 All E.R. 889, and R. v Muscroft [2001] EWCA Crim 604 wherein evidence of the defendants' BWS was deemed relevant to their plea of diminished responsibility. (But see FN 74 above, discussing the ruling in Ahluwalia.) See also, Gardner, [1993] 14 Cr. App. R. (S.) 364, Thornton [1996] 2 Cr. App. R. 108, and Smith, [2002] EWCA Crim 2671, wherein evidence of the defendants' BWS (alone or in combination with other mental or personality disorders) were deemed to constitute characteristics relevant to the defendants' plea of provocation.

¹⁰⁶ For example, an expert need not testify that the specific victim at issue in fact suffers from the effects of domestic violence, that the defendant in fact exhibits typical characteristics of an abuser, that the relationship between the defendant and victim is in fact abusive or violent, nor that the defendant at issue actually committed the offence with which he has been charged. Indeed, such testimony would likely violate 'ultimate issue' rule, which remains in effect under the law of England and Wales. See Andrews & Hirst, Evidence at pp. 743-744; Keane, Evidence at pp. 507-509, §1.2 above and §5.2 below, discussing the 'ultimate issue' rule in more detail.

¹⁰⁷ It may, however, be preferable to provide experts with a thumbnail sketch of the specific myths or perplexing victim behaviours that are likely to arise as issues in the case, so that the expert avoids testifying about issues that would likely be deemed irrelevant in that particular case. For example, in a case involving a heterosexual, English-native couple, it would be unnecessary and irrelevant for the expert to testify regarding domestic violence in gay/lesbian relationships, and/or to discuss how a victim's illegal or precarious immigration status may be exploited in the context of domestic violence. As with all forms of evidence, basic rules of relevance remain applicable. Admissibility of expert testimony in England is grounded in the 'ordinary tests of relevance and reliability.' Dallagher, [2003] 1 Cr.App.R. 12 (reversed on other grounds).

¹⁰⁸ People v. Hernandez, 2003 WL 123135 (Cal. App. 2 Dist. 2003) and Gomez, 72 Cal.App.4th 405. See also FN 107 above.

describing the second phase, Pincus testified that the] abuser minimizes or denies his conduct and blames the victim. He is so successful that he convinces the victim to... doubt herself and adopt his version of the relationship. Because of the isolation, she has no one from whom to obtain another view. The third phase begins with pushing, shoving, hair pulling and spitting, and [often] escalates to closed fists, kicks, choking, and threats with weapons. When physical violence begins, the woman's initial reaction is that this behavior is unacceptable. Battered women leave their abusers an average of five to seven times before permanently leaving. [Pincus testified that because] [b]atterers are afraid of jail, of people finding out what goes on behind closed doors, and of his victim leaving ... he swings into a "hooking-back phase," where he does everything he can to regain control over the woman. He may cry, beg, tell her he loves her, tell her she cannot survive without him, and promise never to do it again. He says whatever the woman wants to hear to "hook her back" in the relationship ... While batterers are engaging in this conduct, [Pincus testified that] the victim [frequently] ... doubts her own reality, blames herself and makes excuses for the batterer's actions.'¹⁰⁹

In addition to this general testimony regarding the dynamics of domestic violence, 'Pincus testified in response to numerous hypothetical questions incorporating various aspects of [the specific victim's] conduct'¹¹⁰, so that the jury was better able to understand why the victim in that case engaged in minimisation and denial.

Simply put, general testimony regarding the domestic violence aids the fact finder in properly evaluating evidence in the specific case at issue. An enhanced understanding of the dynamics of domestic violence, which is provided by means of domestic violence expert testimony, enables fact finders to discern myth from reality and to understand otherwise inexplicably perplexing victim behaviour in the specific case at issue. For this reason, 'general' testimony regarding domestic violence possesses a sufficient nexus of relevance to specific prosecution cases.

Another example of testimony that has been approvingly cited in the appellate caselaw was offered by a Sheriff department's domestic violence counsellor, whose testimony explained the dynamics of victim retraction and the reasons why victims frequently withdraw support from the prosecution.¹¹¹

"A: It's been my experience that if you can reach a victim within 24 to 48 hours after the incident has occurred they're far more likely to tell the truth. That's based on my experience with doing the enhanced response team with the Sheriff's Department.

Given time and consideration, they have had contact with the abuser after that fact, perhaps the abuser's family has called them or their own family has called them to talk them into changing their story. If they have had time to think about

¹⁰⁹ Hernandez, 2003 WL 123135 at 3.

¹¹⁰ *Id.* at 4.

¹¹¹ People v. Williams, 78 Cal. App. 4th 1118 (2000).

the ramifications. If they don't work, they might not have a way to put food on the table or keep the roof over their head. The longer they have to sit with that, the more likely it is that they would become more recalcitrant.

Q. And do you find when they are removed from that contact with, as you describe, possibly the abuser or the abuser's family, that cut-off is made, they tend to be honest about what's happened or still recalcitrant once they have been separated from that situation?

A. Much more likely to be honest.

Q. Now you're not saying every battered woman tells the truth all the time, are you?

A. Nope.

Q. In fact, don't they lie on occasion?

A. Yes, they do.

Q. And you find, based on the statement that you just made, that they're more likely to be honest after the separation or 24 to 48 hours after the incident?

A. Yes.

Q. And while they're-do women, in your experience, go, back to their abusers?

A. Do they go back? Yes, they do.

Q. Why do they go back, based on your training and experience?

A. Because they love them, they're not sure how they can survive on their own, pressure from family and friends, or because [their] children want to be with their father."

The witness in the above example did not possess traditionally 'impressive' expert witness qualifications. She was not a psychiatrist, psychologist, professor, published author, or executive director of a national charity. Rather, she was simply a person who had specialized knowledge regarding domestic violence based upon her training and experience. In this simple way, the prosecution was able to explain the victim's behaviour, thereby enabling the jury to see the facts of the case more clearly, and increasing the likelihood that the defendant, who battered his wife repeatedly in the head, face and body with a metal board while at home with their 4-year old child, will be held accountable for his violence.¹¹²

6.2 What issues the Expert Witness Should *Not* Address

Since the relevance of expert witness testimony in domestic violence prosecutions does not bear upon the mental state of the victim,¹¹³ there is little reason to present expert testimony

¹¹² *People v. Williams*, 78 Cal. App. 4th 1118 (2000) (reversed on other grounds).

¹¹³ See §5.2 above.

in terms of BWS evidence¹¹⁴. BWS is a recognized body of knowledge regarding the effects of domestic violence on female victims that has been adopted in many jurisdictions throughout the world as a defence for victims who kill their abusers.¹¹⁵ The use of testimony regarding BWS as a “shorthand explanation to the dynamics of domestic violence and battered women’s experiences... is imprecise and misleading.”¹¹⁶ Specific problems with BWS include the following:

- * While it is a useful model to explain some behaviour that might be exhibited by the woman as to why she may recant and/or become a hostile witness, it does not explain them all;
- * It locates the problem of domestic violence with the victim and not the defendant; and
- *The model used is limited in its relation to the experiences of Asian, Black, disabled people and lesbians, as it is built around a largely white heterosexual female construct.¹¹⁷

Furthermore, recall that the purpose of expert witness testimony in domestic violence prosecutions is to dispel myths and put victim behaviour in context – and not to diagnose the victim’s mental state.¹¹⁸ Thus, the question of whether the victim suffers from BWS is simply not a relevant issue.¹¹⁹

Another area that may raise issues regarding expert witness testimony is the presentation of any opinion or conclusion regarding the ‘ultimate issue’ to be determined by the fact finder. The common law rule against ‘ultimate issue’ testimony stems from a fear that if such testimony were allowed, ‘trial by expert’ might supplant ‘trial by jury.’¹²⁰ In the view of

¹¹⁴ However it is recognized that in cases where women are being prosecuted for violence towards their partner, especially murder, within a domestic violence scenario, the mental health state of the woman may need to be included at an individual level, rather than a generic approach re all victims. In this scenario the term “BWS” would still be problematic in its pathologising description of domestic violence victims and the use of the concept of Post Traumatic Stress Disorder may be more appropriate.

¹¹⁵ See generally, Lenore Walker, *The Battered Woman Syndrome* 2nd edition (Springer 2000). BWS testimony has been recognized as problematic insofar as it depicts a conceptually contradictory understanding of women’s reactions to domestic violence, and focuses its analysis almost exclusively on the reactions of primarily white, able-bodied, heterosexual women to extreme and prolonged abuse. A. Coughlin, “Excusing Women” 82 Cal. L. Rev. 1 (1994).

¹¹⁶ Paula Finley Mangum, “Reconceptualizing Battered Women’s Syndrome Evidence: Prosecution Use of Expert Testimony on Battering”, 19 Third World L. J. 610 –619 (1999).

¹¹⁷ L. Gouldbourne, CPS Equality and Diversity Unit; memorandum to Susan Edwards (December 2002). On file with the author.

¹¹⁸ See § 5.2 above.

¹¹⁹ Moreover, seeking to establish that the victim suffers from BWS will merely encourage defence objections in cases where there is no evidence of prior abuse. See discussion at §5.1 above.

¹²⁰ Andrews & Hirst, *Evidence* at p. 742.

leading commentaries, however, the 'ultimate issue' prohibition no longer exists in English law.¹²¹

In any event, whether the rule against 'ultimate issue' testimony maintains legal force is of little consequence in seeking to use expert witness testimony in a domestic violence prosecution. Expert domestic violence testimony assists the "trier of fact" in understanding the dynamics of domestic violence generally, dispels myths held by fact-finder, and explains uncooperative victims' perplexing behaviour. As such, expert witness testimony need not be offered regarding the 'ultimate issue' (i.e., whether the defendant indeed battered the victim). Rather, expert testimony merely enables the fact finder to assess the evidence free from the power of myth and to reach a verdict on the 'ultimate issue' that reflects a rational, informed understanding of the dynamics of domestic violence.

7. Conclusion

*'We are determined to play our part in stopping domestic violence.'*¹²²

Prosecutors should take every opportunity "to use the law to save lives."¹²³ Use of expert witness testimony in the prosecution of domestic violence is, in one respect, simply another legal tool that can assist the Crown Prosecution Service in fulfilling its obligation to prosecute all offences effectively. In other respects, however, expert testimony is the key that may save lives and hold abusers accountable. For both of these reasons, the CPS should strongly consider implementing policies and procedures to encourage and facilitate the use of domestic violence expert witness testimony in the prosecution of cases that call for such evidence.

This document has explored the actual and potential use of expert witness testimony in the prosecution of domestic violence cases and recommended that such evidence be offered in appropriate cases. It has identified the types of cases that call for domestic violence expert testimony, the qualifications of domestic violence expert witnesses, the foundational requirements of domestic violence expert testimony, and the nature of testimony that should be elicited from domestic violence experts. In examining these issues, this document has concluded that such expert testimony could be accepted in English courts and, if admitted into evidence, would assist the CPS in fulfilling its pledge to prioritize victim safety and hold defendants accountable by effectively prosecuting domestic violence.

¹²¹ ARCHBOLD 2004, 10-66, page 1287, "an expert is now permitted to give his opinion on what has been called "the ultimate issue", but the judge should make it clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide. *R v Stockwell* 97 Cr.App.R 260, CA". See also Keane, Evidence at pp. 507-508, noting the prohibition against ultimate issue testimony has become largely irrelevant.

¹²² CPS DV Policy, §10.1.

¹²³ Sarah M. Buel, "50 Obstacles to Leaving: aka, Why Abuse Victims Stay" 28-OCT Colo. Law. 19 (1999).

Appendix 1

Domestic Violence Myths and Facts¹²⁴

Myth: *'Domestic violence is only perpetrated by a strong man against a weak woman.'*

Fact: Relative physical strength or weakness is not the issue – power and control are. Far from being a powerless victim, a woman involved in a violent relationship often displays enormous resources of strength in the way she learns to live with fear, navigate unpredictability, and intuit her partner's moods to protect herself and her children. Withdrawing support for the prosecution of her abuser is often one important way of keeping herself and her children safe.

Myth: *'It can't be that bad or she'd leave.'*

Fact: There are many practical reasons why women stay; they may be afraid of the repercussions if they attempt to leave, they may be afraid of becoming homeless, they may worry about losing their children. They may fear poverty and isolation. Additionally, women stay in violent relationships for emotional reasons ranging from love to terror. Some women return to their partners because they believe that their partner will change and the abuse will end.

Myth: *'She must ask for it, deserve it, or provoke it.'*

Fact: Often prolonged exposure to violence has the effect of making the woman believe that she deserves to be hurt. It can distort confidence and some women may start to rationalise their partner's behaviour. Women often blame themselves because they have been told consistently that the violence is their entire fault.

Myth: *'Domestic violence occurs only on council estates and is simply part of the general criminality bred by drugs, gangs, unemployment and deprivation.'*

Fact: Domestic Violence occurs in all economic, social and cultural groups. A north London study of over 400 men identified 20% of professional men admitted to hitting their partners; 17% of lower middle class men and 21% of working class men.

Myth: *'If it was really serious she would come to court to provide evidence.'*

Fact: Withdrawing support for the prosecution of her abuser she may see as her safest short-term choice in a context of many difficult choices. She may perceive it as the only way of keeping herself and her children safe. Research in Devon (2003) interviewing female victims found the most significant factors preventing the victim from prosecuting were fear of retaliation/actual violence before or after court/facing the offender in court/inappropriate "punishment or rehabilitation" of the offender.

¹²⁴ The phrasing of the following myths and facts are borrowed and/or adapted from Greater London Domestic Violence Project and/or following websites:

http://www.ivillage.co.uk/ivillageuk/dom/features/articles/0,10231,181901_182062,00.html (ivillage website);

<http://www.mkweb.co.uk/MKWomensAid/DisplayArticle.asp?ID=2966> (Milton-Keynes Council website);

<http://www.dvc.org.nz/myths.htm> (New Zealand Domestic Violence Center website); and

<http://www.gmdvp.org/pages/myth.html> (Gay Men's Domestic Violence website, Cambridge, Massachusetts).

Myth: *'If a woman is suffering she can simply leave her abuser.'*

Fact: Leaving an abusive relationship can be difficult to impossible due to many factors which keep domestic violence victims trapped with their abuser. Moreover, separation often increases the risk of violence faced by the victim.

Myth: *'A woman waives her rights when she remains with the abuser.'*

Fact: Women are entitled to live free from abuse and degradation, irrespective of whether they are able to leave their abuser. Laws against domestic violence apply to the defendant's behaviour, and the victim's right to be protected by the criminal law is not 'waived' because of the limitations placed on her possibilities of leaving the relationship.

Myth: *'Intervention is useless because women always return to the violent situation.'*

Fact: Leaving violent situations does not guarantee safety – a safety plan is needed, drawing on different agencies, whatever she does. Women are at most risk of life-threatening or fatal violence when they attempt to leave or have recently left their violent partner. (*Straus M. and Gelles R. 1988*). In the Canadian national survey, 35% of women reported increased violence from the violent partner after separation. (*Johnson H, Sacco V. Researching Violence against Women. Statistics Canada national Survey. Can.J. Criminology '95, July 281-304.*)

Research in London showed that 76% of domestic violence murder victims were killed after they had ended the relationship.

Myth: *'It will get better with time.'*

Fact: The longer the violence continues the more serious the violence becomes. The relationship will only get better once the man stops violent and controlling behaviour.

Myth: *'Women in violent relationships are uneducated.'*

Fact: The formal education of women in relationships with violent men ranges from no qualification to doctorate. A study in North London of 571 women found that 25% of professional women surveyed experienced domestic violence at some time during their life – 7% in the last year, compared with 30% of working class women – 10% in the last year. (*Mooney J. 1993*)

Myth: *'Women in violent relationships are crazy.'*

Fact: This myth focuses blame on women and negative personality characteristics. Perplexing behaviour is often adopted by some women in response to the violence and may be their best attempt to survive in a very difficult situation. Ongoing abuse can have a deleterious affect on women's mental health.

Myth: *'Drinking and substance abuse cause the violence.'*

Fact: Alcohol and other drug abuse do not cause violence but may act as a "trigger" and increase the severity of the abuse. It is often used as an excuse for violence. The British Crime Survey 1996 indicated that alcohol and drugs were less likely to be a factor in domestic violence than they were in other violent crimes (apart from muggings). Many

violent offenders do not abuse alcohol or drugs, or may not be violent when intoxicated. Violent offenders who abuse alcohol or drugs need to address both problems.

Myth: *'Religious men are not violent.'*

Fact: Men who have religious beliefs are just as likely as other men to be violent.

Myth: *'Violent men are unsuccessful and without resources to cope with the world.'*

Fact: Many violent men have educational, professional and work related resources and skills that they use very well outside the home (e.g. doctors, lawyers, politicians, etc.).

Myth: *'Black men are more violent to women because of their own experience of racist oppression and violence.'*

Fact: Black men obviously do face racism and may have had to defend themselves, historically, against racist attacks. However the statistics on domestic violence show that violence does not seem to be greater within any minority ethnic group.

Myth: *'Asian women are passive recipients of male dominated religions, conforming to harsh cultural traditions (which may include wife beating, maiming and killing).'*

Fact: Police statistics from one London borough, over ten years, indicated that the proportion of Asian women reporting violence directly correlated with the percentage of Asian women within the borough. Asian people are not one homogenous group – they vary in class, age, national origin, religion, sexuality, views and traditions in the same way as white people do.

Sexist, chauvinist and oppressive views do exist within all cultures and classes and need to be challenged for their oppressive nature irrespective of ethnicity. Research suggests that the basis of domestic violence is gender power relations, which are displayed in various ways within different cultures. Family honour (izzat) and shame (sharam) can play an important part in some Muslim families and limit women's ability to contact support.

Myth: *'Domestic violence is acceptable in some cultures and is therefore not criminal behaviour.'*

Fact: Domestic violence occurs in all cultures, religions, ethnic and racial groups. The criminal laws of England and Wales apply equally to all incidents of domestic violence and respect for cultural difference does not excuse domestic violence.

Myth: *'Violent men are not loving partners.'*

Fact: Many violent men are at times loving, sensitive and playful. It may be this side of his personality which attracted women to him initially and induces the woman to stay.

Myth: *'Violent men cannot control their violence.'*

Fact: Men often believe this, which enables them to avoid taking responsibility for their own behaviour. Violence is a tactic of choice – men choose who, when and where they abuse. Most men who are violent to their partners appear reasonable and "respectable" outside the family and do not assault other people.

Same sex relationships:

Myth: *'Domestic violence is more common in straight relationships than it is in lesbian or gay relationships.'*

Fact: There is no reason to assume that gay men and lesbians are less violent than heterosexual men and women. Research in UK within lesbian and gay relationships have indicated 25% lifetime abuse in lesbian relationships and 29% for gay men (compared with 25-33% in heterosexual relationships).

Myth: *'It isn't really violence when a same sex couple fights. It is just a "lover's quarrel" between equals.'*

Fact: This myth draws on our inability to see violence between two people of the same sex as a violent situation where one person is the victim. There is nothing equal or fair about domestic violence – it is based upon one person exercising power and control over another person. Dismissing domestic violence as "just a lover's quarrel" trivializes the violence and gives tacit consent for it to continue.

Myth: *'The abuser will always be butch, bigger, stronger. The victim will always be femme, smaller, weaker.'*

Fact: This myth grew out of what people think victims look like and unfortunately focuses on the narrow stereotype that gay and lesbian domestic violence is physical and strength related. This is simply not true. Size, weight, butchness, femmeness or any other physical attribute or role is not an indicator of whether or not a person will be a victim or an abuser. An abuser does not need to be 6'4" and built like a rugby player to smash your compact discs, destroy your clothing or tell everyone in your workplace that you are "really a queer."

Myth: *'Lesbian and gay domestic violence is sexual behaviour – a version of S & M. The victims actually like it.'*

Fact: Domestic violence is not sexual behavior – it is abuse, manipulation and control that is unwanted by the victim. Like victims of other crimes (including rape, mugging, terrorism harassment, assault and threats), victims of domestic violence do not enjoy the violence they experience. Its perpetuation permits trivialization and denial of the victim's cries for help.

Myth: *'Domestic violence occurs primarily among gay men and lesbians who hang out at bars, are poor, or from black and minority ethnic communities.'*

Fact: Domestic violence is a non-discriminatory phenomenon, in as much as abusers come from all walks of life, all ethnic groups, all socio-economic strata, whatever sexuality and all educational levels. This myth grows out of the higher visibility in social services that some groups have and the corresponding lower visibility that other groups have, giving the illusion that nourishes this false idea. Gay male and lesbian domestic violence does not adhere to cultural and economic boundaries. It occurs proportionally across all groupings and categories of people. No group is exempt.

Myth: *'Gay men's domestic violence is a "fight" and with lesbians it's just a "cat fight". Because both are the same gender, it is a fair fight between equals.'*

Fact: There is nothing fair about domestic violence. This myth draws on the inability or unwillingness of many people to look at violence between two people of the same gender, particularly men, as a violent situation where one person is clearly a victim. Many victims will attempt to defend themselves by fighting back. This does not make them abusers.

Appendix 2

50 Reasons Why Domestic Violence Victims Withdraw Support for Prosecutions¹²⁵

Lack of Resources and Access to Resources

Lack of financial resources prevents victim from leaving relationship

Lack of financial resources means that staying with defendant is in children's best interest

Lack of job skills prevents victim from supporting herself and her children

Lack of alternative home means that victim will be homeless if she leaves

Lack of access to transportation to escape

Lack of legal immigration status¹²⁶

Lack of basic life skills and illiteracy may keep victim trapped in abusive relationship

Lack of awareness of DV support services

Lack of awareness that domestic abuse is a criminal offence – especially true for immigrant/refugee women.

DV support services may not accommodate victim's disability

DV support services may not accommodate victims with substance or alcohol addiction

DV support services may not provide service to people of the victim's young age¹²⁷

DV support services may not accommodate victim's mental/physical illness

DV support services may be hostile or insensitive to victim's sexuality

DV support services may be insensitive to victim's ethnicity

DV support services are not provided near victim's rural area¹²⁸

Police and courts may not accommodate victim's disability

Police and courts may not accommodate victim's mental/physical illness

¹²⁵ In most cases, a victim who supports the prosecution of her abuser must be ready, willing and able to leave the relationship. Thus, the reasons why domestic violence victims withdraw support for prosecutions are identical in many respects to the reasons why domestic violence victims stay in abusive relationships. The following list is adapted from S. Buel, "50 Obstacles to Leaving, a.k.a., Why Abuse Victims Stay" 28-OCT Colo. Law. 19 (1999).

¹²⁶ 'Undocumented victims facing complex immigration problems if they leave are often forced to stay with the abusers ... Even those abusers without such power are often able to convince foreign-born victims that their residency status lies in the abusers' control.' Buel at p. 26.

¹²⁷ 'Teens, especially those pregnant and who are already parents, are at greater risk for abuse in their relationships than any other age group, yet are the least likely to either report or seek adult intervention. Some teens are fleeing abusive homes, becoming homeless and more vulnerable to dating violent, much older men. [The] combination [of] immaturity, no knowledge of resources, and low self-esteem factor into the teen victim's decision to stay with an abuser.' Buel at p. 25.

¹²⁸ 'Such victims may be more isolated and simply unable to access services due to lack of transport, or the needed services are distant and unable to provide outreach. In smaller communities, where most people know each other and have frequent contact, victims may be reluctant to reveal the abuse because such heightened scrutiny can cause them great embarrassment among their family and friends.' Buel at p. 24.

Police and courts may be hostile or insensitive to victim's sexuality

Police and courts may be hostile or insensitive to victim's ethnicity

Defendant's Behaviour

Defendant increases violence upon separation

Defendant has isolated victim from her family and friends

Defendant threatens victim with retaliation if she leaves

Defendant makes excuses and minimizes his violence

Defendant threatens to take the children if the victim leaves

Defendant threatens to harm the children if the victim leaves

Defendant tells victim that "she owes him"¹²⁹

Defendant tells victim that she is worthless and no other man will have her¹³⁰

Defendant tells victim the violence is her fault¹³¹

Defendant promises he will change

Defendant increases his substance or alcohol abuse when the victim tries to leave – or decreases it temporarily to lure back the victim.

Defendant threatens to commit suicide

Defendant begs and pleads for another chance

Other People's Behaviour

Family and friends have abandoned victim¹³²

Children pressure victim into staying

Family and friends pressures victim into staying

Family and friends make excuses and minimizes defendant's violence

Family's retaliation against victim upon separation

Family and friends blame victim for the violence

Police and courts treat victim unfairly

¹²⁹ A victim may feel indebted to her abuser 'because he has helped support and raise her children from a previous relationship. Additionally, a victim who is overweight or has mental health, medical, or other serious problems often appreciates that the abuser professes his love, despite the victim's perceived faults.' Buel at p. 21.

¹³⁰ 'Many abusers tell a victim, "You are so lucky I put up with you; certainly nobody else would," fueling the victim's low self-esteem and reinforcing her belief that she deserves no better than an abusive partner.' Buel at p. 21.

¹³¹ This reason is particularly relevant in cases where the victim has suffered previous abuse at the hands of a different abuser. 'Sometimes previously abused victims believe the abuser's accusation, "See, this is what you drive your men to do!" If the victim truly believes this, she will find it easier to blame herself for the abuse.' Buel at p. 24.

¹³² This phenomena is particularly common where well-intentioned family and friends attempt to encourage the victim to leave the abusive relationship by issuing ultimatums such as, 'if you don't leave him, we cannot continue to stand by and watch you get hurt' or, "if you go back to him again, don't come to us when he hits you again.'

Police and courts treat defendant unfairly¹³³

Religious community encourages victim to stay in relationship

Victim's Beliefs and/or Mental State

Victim may believe there is not a problem

Victim hopes that the violence will stop

Victim doesn't want to feel responsible for breaking up the family

Victim suffers from low self-esteem

Victim still loves defendant

Victim holds religious beliefs that prevent her leaving the marriage

Victim is ashamed and embarrassed by the abuse

Victim suffers from post-traumatic stress syndrome

¹³³ 'Issues of race and culture can impact the victim's decision because she may be more worried about how the police [and courts] will treat a minority ethnic man than she is about her safety. Minority ethnic victims report being forced to choose between gender and race in deciding whether to use the criminal justice system for relief. Most feel that their survival dictates siding with race ... In addition, staff in refuges and perpetrator programmes may fail to reflect the diversity of the communities they serve.' Buel at p. 20.

Appendix 3

Sample Examination-in-Chief of Domestic Violence Expert Witness by the Prosecution

(Adapted from the Los Angeles City Attorney's Office Domestic Violence Unit 1991)

I. Foundational and Introductory Questions

A. Occupation

1. Current Occupation

What is your current occupation?

How long have you been employed in that capacity?

Describe the responsibilities of your position.

How long has the organization/project been in existence?

What services does your organisation/project offer?

Do you supervise other employees?

Do you train staff?

What is the total number of staff?

2. Refuge Employment (if relevant)

How many contacts do you receive yearly from women identifying themselves as having experienced domestic violence?

How many crisis calls do you receive yearly?

How many residents in your refuge at one time?

How many residents yearly? Number of adults and number of children?

How long can residents stay?

Does your refuge offer any other services aside from emergency accommodation?

3. Counseling/Support Service (if relevant)

Are your services solely for victims of domestic violence?

Are your services solely for women?

How many persons does this project serve yearly?

4. Direct Contact with Victims

Do you have direct contact with domestic violence victims in your profession?

How many domestic violence victims do you come into contact with yearly?

How many years have you had direct contact with domestic violence victims?

What is the nature of your contact with domestic violence victims?

5. Victim Interviews

Do you or your project conduct interviews with victims of domestic violence?

Are interviews conducted with both crisis calls and directly with clients?

How long do such interviews last?

Approximately how many domestic violence victim interviews have you personally conducted?

6. Previous Occupation (if relevant)

What was your previous occupation?

What were your responsibilities?

How long did you perform those duties?

Did you have direct contact with victims of domestic violence in your prior occupation?

What was the nature of that contact?

(Review questions (1) through (5) above if relevant to previous occupation)

B. Education

What is the highest degree or qualification you have obtained?

From what institution(s) did you receive these degrees/qualifications?

What was your area of concentration?

Did you conduct any research relating to domestic violence during the course of your education?

C. Professional Affiliations

Do you belong to any professional affiliations in the area of domestic violence?

What is the nature and purpose of those organizations?

What is your role within these organizations?

Are you involved in any committee, policy or research work with any of these organisations?

If so, please describe the nature of your work.

D. Writings/Publications

Have you ever written any books, articles, or other documents regarding domestic violence?

Have any of your writings been published? If so, where, by whom?

Were any of your writings subjected to peer review prior to publication?

Can you describe for us what the term 'peer reviewed' means?

What percentage of your published work has been subjected to peer review prior to publication?

E. Training

1. Training Received

Have you received training regarding domestic violence?

Please describe the nature of the training you have received.

What entity or agency provided the training?

What specific issues were covered in the training?

How long did the training last?

Did you sit for an examination or evaluation following the training to assess your knowledge of domestic violence? What were your results?

2. Training Provided to Others

Have you ever conducted domestic violence trainings?

For whom did you conduct the training?

For what purpose were the trainings designed?

How many people attended the trainings?

How frequently do you conduct such trainings?

F. Conferences

Have you attended local, national or international conferences regarding domestic violence?

Who organised the conferences?

What was the purpose of the conferences?

When and where was the conferences held?

Did you attend any workshops specific to domestic violence issues?

Have you ever conducted any workshop or given any presentations at such conferences?

If so, what was the topic of your presentation? What information did you cover?

G. Previous Expert Testimony

Have you testified previously in court?

Approximately how many times have you testified in court?

Did you testify in criminal or civil proceedings, or both?

If criminal, did you testify for the defence or the prosecution?

H. Professional Compensation (if relevant)

In order to be here in court with us today, you have taken time away from engaging in your normal professional duties with _____ [name of project where expert employed], is that correct?

And you have also taken time away from your professional responsibilities in order to review materials relating to this case, in preparation for your testimony today?

You are, of course, entitled to be compensated for the time you have had taking time away from your professional duties in order to review those materials and to be here with us in court today, correct?

What is your standard rate of compensation for taking time away from your professional duties to serve as an expert witness for the court?

And are you being compensated at your standard rate by the CPS as well in this case?

I. Knowledge of Present Case

Have you reviewed any materials or documents relating to the case that brings us here today, R. v. _____ [defendant's name]?

What materials or documents have you reviewed?

Have you read the police report?

Have you interviewed the victim in this case?

Have you met the victim in this case?

J. Basis of Testimony and Opinions

Now I'm going to ask you a series of question regarding your area of expertise, domestic violence. Does the Court have your assurance that your testimony here today, including any opinions you may offer, is based on your study, training and experience regarding domestic violence?

II. Questions Regarding Domestic Violence Myths

A. Popular Domestic Violence Myths

In your presentations at conferences, trainings, or speeches to various groups, have you found the public to be very well informed about domestic violence?

What are some of the most common misconceptions you've encountered?

Are there any others that come to mind?

From your experience, have most people developed these misconceptions due to isolated experiences?

Do you find that most people believe domestic violence victims when they talk about violent incidents? Why is that?

Based on your study, training and experience, do most women who have been abused talk freely about their experiences of domestic violence?

Are you familiar with the common reaction of most people when they hear of a crime victim's experiences?

Are you familiar with the terms 'distancing', 'differentiation' and the 'Just World Theory'?

Can you apply those terms to your experiences with general public reactions to domestic violence?

B. Statistics

Can you provide us with an idea of the number of incidents of domestic violence in England and Wales yearly?

Do you have any statistics that reflect the rate of domestic violence in the [local area]?

Are domestic violence victims usually men or women?

Are perpetrators of domestic violence usually men or women?

Is domestic violence more prevalent in any one culture as compared to another?

Is domestic violence more prevalent in any one ethnicity as compared to another?

Is domestic violence more prevalent in any one class as compared to another?

Is domestic violence more prevalent in any one religion as compared to another?

Is domestic violence more prevalent in heterosexual relationships as compared to gay or lesbian relationships?

III. Questions Regarding Dynamics of Domestic Violence

A. Power and Control Wheel

Are you familiar with the phrase "Power and Control Wheel"?

Who first defined the Power and Control Wheel?

[Mark an enlarged Power and Control Wheel as an exhibit and post it so that the witness can refer to it and/or write on it and so that the jury can see it.]

Using Exhibit #___, can you please describe what the Power and Control Wheel is?

In your experience, have you personally observed the effects described by this theory?

Does every relationship exhibit every element of power and control listed on this wheel?

What are the effects on a victim who is subjected to power and control within a relationship?

B. Victim Minimization and Denial of Abuse

In your experience, is it common for domestic violence victims to minimize the violence they have experienced?

Do victims typically minimize the violence when talking with their families? Friends? Herself?

Why do victims react this way?

In your experience, do victims often deny the level of violence as the incident passes in time?

Have you personally observed victims having difficulty relating the actual facts of the violence they experienced?

Why do victims experience such difficulty?

If the victim continues in the relationship with the abuser, does that affect her ability to remember the level of the abuse or relate the details of the abuse?

Is it common for victims of domestic violence to completely deny the incident?

Why do victims often react this way?

From your experience, is it common for domestic violence victims to be reluctant to testify at trial against their abuser?

Why is testifying about the abuse so difficult for victims?

How does this minimization and denial relate to the Cycle of Violence?

C. Victim Continuing Relationship with Defendant

In your experience, is it common for domestic violence victims to remain in a relationship with their abuser?

Have you had experience with victims who continue to live with an abusive partner?

Is this a common situation?

Can you explain why women often choose to stay in abusive relationships?

D. Victims who have Experienced only one Incidence of Violence

Have you had experience working with women who have experienced only one episode of domestic violence?

Based on your study, training and experience, is it possible for only one violent incident to have an emotional impact on the victim?

Please describe the possible effects that one episode of violence may have on a victim.

Must the violence be repetitive and ongoing in order to have an emotional impact on the victim?

Can you relate your answer to the Power and Control Wheel?

Would victims who have suffered one incident of domestic violence also be likely to minimize or deny the level of violence experienced?

Would victims who have suffered one incident of domestic violence also be likely to be reluctant to testify against the person who abused them?

E. Perplexing Victim Demeanor

Assume the following facts: [describe victim's perplexing demeanor when the police arrived and/or while testifying (angry and argumentative or flat and unemotional)]

Are these facts consistent with someone who has experienced the level of violence I described earlier?

Is it common for domestic violence victims to be unable to describe the acts of violence they suffered?

Are you familiar with the term "flat response"?

Can you please define that term and apply it to the facts I've described?

Are you familiar with the term "piecemeal memory"?

Can you please define that term and apply it to the facts I've described?

Are you familiar with the term "delayed anger reaction"?

Can you please define that term and apply it to the facts I've described?

F. Miscellaneous Issues

Can you describe the relevance of culture in domestic violence?

Can you describe the relevance of economic class in domestic violence?

Can you describe the relevance of ethnicity in domestic violence?

Can you describe the relevance of sexuality in domestic violence?

IV. Hypothetical Questions

Please assume the following facts: [describe the relevant facts in evidence, including those facts that give rise to concerns about particular myths or perplexing victim behaviour]

In your opinion, are these facts consistent with a situation in which domestic violence has occurred?

In your opinion, are the actions of the victim in the hypothetical I explained consistent with the actions of someone who has experienced domestic violence?

Can you relate the Power and Control Wheel to the hypothetical situations I described?