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A trial lawyer fighting for freedom one client at a time

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### Rape Trauma Gibberish

Expert testimony, we are taught, is intended to assist juries in deciding difficult factual issues. We permit the opinion testimony of folks who know things the rest of us don't because of their education, skill, training or experience, thus, a doctor on disease, or an electrician on circuitry. We let trial judges separate the reliable from the unreliable forms of expert testimony.

At least that's the mantra.

But when in applying these general principals our courts seem less committed to reliability than they do to outcomes. This is especially so in sex assault cases, where almost anything goes when it comes to expertise about why some alleged victims disclose their tales of woe so long after the fact, or piecemeal, one sordid allegation at a time. In trade talk, these are called delayed disclosures or incremental disclosures, both are part of the more general gibberish known as rape trauma syndrome.

Such testimony typically takes the following form:

A counselor who spends significant time talking to folks complaining about sexual assault takes the stand. She describes how such complainants behave, their shame, their reluctance to speak out, their often delayed decision to talk about their ordeal at all. Then they are asked general questions about how sexual assault victims as a class behave. A jury is invited to match the general description the expert provided to the testimony of the complaining witness at trial. The prosecution takes pains to make sure the expert never meets the complaining witness, and sits back awaiting the jury's "aha" moment when the expert's opinion about how a sexual assault victim behaves matches the exact behavior of the complaining witness. The testimony is a latex glove, fitting any hand.

Such testimony is offered to bolster, indirectly, of course, the testimony of the complainant at trial.

Is this expert testimony? The courts say yes because most of us, thankfully, have no experience as victims of assault. But neither, frankly, do the counselors testifying about rape trauma syndrome. These experts are merely reporting on what they have seen: the true experts, those actually assaulted, don't testify.

I draw this distinction for an important reason. Counselors testifying about rape trauma syndrome make no effort to do what we ask jurors to do: ascertain whether the complainant is telling the truth or not. Therapists, by definition, build alliances with their patients, lowering inhibitions for patients to say anything old thing at all, on the theory that talking about feelings, whether those feelings are based in the reality the rest of us share or not, is good for the psyche. Just why we permit impressions gleaned in this bizarre confessional to form a baseline against which the credibility of folks in the criminal justice system is to be gauged is beyond me.

Put another way, we permit these counselors to testify relying upon a self-validating control group. We know and accept that individuals falsely confess to crimes. And we know that individuals falsely report crimes, too. In the absence of any independent corroboration it's simply silly to permit a counselor to testify that all patients who complain of abuse behave in a characteristic way without knowing whether the complaints themselves are true, or fabricated. This is the very definition of junk science.

Or is it?

The federal courts require the courts to hold hearings to determine whether expert testimony based on science, experience or skill is reliable. Among the variables a court considers is whether the expert's conclusions can be tested, whether their methods are peer reviewed, what error rates are and are not acceptable, and whether the methods by which conclusions are reached are accepted in relevant scientific communities.

In Connecticut, by contrast to the federal courts, only "scientists" are so tested in preliminary hearings, the courts don't exercise gatekeeping functions regarding expertise based on experience or skill. Rape trauma experts, the court concludes, aren't scientists. Hence no preliminary hearing is required. The counselors get their opinions, you see, from experience. In

#### About Norm Pattis

Norm Pattis is a Connecticut based trial lawyer focused on high stakes criminal cases and civil right violations. He is a veteran of more than 100 jury trials, many resulting in acquittals for people charged with serious crimes, multi-million dollar civil rights and discrimination verdicts, and scores of cases favorably settled.

#### Personal Website

[www.normpattis.com](http://www.normpattis.com)



#### Law Firm Website

[www.pattislawfirm.com](http://www.pattislawfirm.com)



“I believe that the state is a necessary fiction and that failing to combat it is the first step toward tyranny.”

– Norm Pattis

other words, they report their conclusions based on a self-validating control group -- the universe of complainants, whether their claims are true, false or exaggerated.

So we permit uncorroborated claims to serve as the bench mark for juries to use in deciding whether a complainant is, in fact, a victim. It makes no sense as a matter of intellectual hygiene, although it makes perfect sense insofar as law is merely politics by sophisticated means, in this instance serving our latest idol, the victim, in whose name any old testimony will do.