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Defense of Consent. *State v. Allewalt*, 308 Md. 89,
517 A.2d 741 (1986)

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CASENOTES

CRIMINAL LAW — EVIDENCE — EXPERT TESTIMONY THAT RAPE VICTIM SUFFERED POST TRAUMATIC STRESS DISORDER IS ADMISSIBLE TO REBUT A DEFENSE OF CONSENT. *State v. Allewalt*, 308 Md. 89, 517 A.2d 741 (1986).

A defendant accused of raping his girlfriend's mother claimed that he was seduced, thereby raising the defense of consent.¹ The state rebutted this defense by introducing expert testimony from a psychiatrist. The psychiatrist testified that, based upon his diagnosis, the victim suffered from "post traumatic stress disorder" (PTSD), and that, based upon the history furnished to him by the complainant, he believed the disorder was caused by the rape. The Circuit Court of Maryland for Baltimore County ruled that the testimony was admissible because PTSD is accepted generally within the scientific community and "would be helpful to the jury in its determination as to whether the sexual intercourse was consensual."² The jury found the defendant guilty of second degree rape.³ The Court of Special Appeals of Maryland reversed the conviction and remanded for a new trial, holding that PTSD testimony is inadmissible to prove nonconsent in a criminal rape trial because the testimony's prejudicial effect outweighs its probative value.⁴ The Court of Appeals of Maryland reversed the judgment of the court of special appeals, holding that the trial court did not abuse its discretion in admitting the PTSD testimony.⁵

1. *State v. Allewalt*, 308 Md. 89, 91, 517 A.2d 741, 742 (1986).

2. Record at 4-35 to 36.

3. *Allewalt*, 308 Md. at 97, 517 A.2d at 745. The jury also found defendant guilty of fourth degree sexual offense and common law assault. *Id.*

4. *Allewalt v. State*, 61 Md. App. 503, 516, 487 A.2d 664, 670 (1985).

5. *Id.* at 516, 487 A.2d at 670.

For two reasons, the *Allewalt* facts did not present an ideal case to test the admissibility of PTSD testimony in a criminal rape trial. First, prior to the alleged rape, a psychiatric counselor diagnosed the complainant as being depressed. *Id.* at 507, 487 A.2d at 665. This depression apparently was caused by her recent separation from her husband and her daughter's second pregnancy. *Id.* Some authorities, however, suggest that a reliable diagnosis of PTSD can be made even when the patient suffers from a general nervous disorder because PTSD symptoms are sufficiently distinguishable as to allow a determination of PTSD despite the presence of the other symptoms. See A. BURGESS & L. HOLSTROM, RAPE: VICTIM OF CRISIS 37, 47 n.2 (1974) (PTSD symptoms are different in rape victims with prior mental illness than in rape victims without prior mental illness, both in terms of intensity and duration.); Atkeson, Calhoun, Resick, & Ellis, *Victims of Rape: Repeated Assessment of Depressive Symptoms*, 50 CONSULTING & CLINICAL PSYCHOLOGY 96, 101 (1982) (rape victims with a history of psychological problems recover more slowly from depressive symptoms); Bassuk, *A Crisis Theory Perspective on Rape* reprinted in MCCOMBIE, THE RAPE CRISIS INTERVENTION HANDBOOK 124, 126 (1980) (preexisting psychopathology is important to determine the success of recovery).

Second, ample physical evidence of force was present in *Allewalt* which could have justified exclusion of the PTSD testimony as cumulative and a waste of time. See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its proba-

PTSD is a psychiatric and emotional disorder recognized by the American Psychiatric Association (APA).⁶ According to the APA, symptoms of the disorder include re-experiencing the traumatic event through thoughts and dreams, numbing of emotional responses, hyper-alertness, abnormal startle response, sleep disturbance, memory loss, inability to concentrate, and avoidance of activities reminiscent of the stressful incident.⁷ The symptoms may emerge immediately after the traumatic experience or after a latency period.⁸

PTSD is caused by a variety of traumatic events, including military combat, bombing, torture, death camps, airplane crashes, floods, earthquakes, assault, or rape.⁹ The event causing the symptoms is generally outside the range of common experiences such as simple bereavement, chronic illness, business loss, or marital conflict.¹⁰ Because the symptoms can be caused by any number of different traumatic events, the patient's explanation generally is required to ascertain the cause of PTSD.¹¹

When rape is the traumatic event causing the symptoms, some psychiatrists refer to the disorder as "rape trauma syndrome" (RTS). This terminology was used first in 1974 by the researchers Burgess and Holmstrom. These researchers described RTS as having two phases: an initial acute phase characterized by fear, anger, and self-blame; and a long term reorganization phase, beginning two or three weeks later, characterized by nightmares and phobias.¹² In subsequent studies other researchers have identified the same rape trauma symptoms.¹³ Some researchers be-

tive value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); see also MARYLAND TRIAL JUDGES HANDBOOK § 4-701(c) ("[R]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of . . . undue delay, waste of time or needless presentation of cumulative evidence.").

6. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236-37 (3d ed. 1980).

7. *Id.* at 238.

8. *Id.* at 237.

9. *Id.* at 236.

10. *Id.*

11. See *Id.* at 236-37 (listing various traumas that can cause PTSD, but not identifying various types or subclasses of PTSD caused by specific traumas).

PTSD does not appear to have reached a level of sophistication that allows for the identification of the cause of the PTSD. Several studies indicate that there is no clearly identifiable set of symptoms in rape victims. See, e.g., T. McCAHILL, THE AFTERMATH OF RAPE 75 (1979) ("Clearly the concept of a typical rape victim has no place within the context of post rape adjustment."); Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. PSYCHIATRY 408, 409 (1976) ("Each rape victim responds to and integrates the experience differently depending on her age, life situation, the circumstances of the rape, her specific personality style, and the responses of those from whom she seeks support."). Thus, it does not appear that the symptoms of PTSD arising from rape are sufficiently distinguishable as to allow the diagnosing psychiatrist to identify rape as the cause of the disorder absent some statement by the victim identifying rape as the cause.

12. See Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

13. See, e.g., E. HILBERMAN, THE RAPE VICTIM 33-40 (1976); Atkeson, Calhoun,

lieve they can distinguish true rapes from false claims on the basis of RTS symptoms,¹⁴ but the prevailing view apparently is that a psychiatrist can determine only whether a patient suffers PTSD, not necessarily whether rape caused the PTSD.¹⁵

Courts accept PTSD testimony for various purposes. For example, courts accept PTSD testimony from Vietnam war veterans seeking acquittal, probation, or reduced sentences in criminal prosecutions.¹⁶ Both the Veterans Administration and the APA recognize PTSD as a viable defense in court for those purposes.¹⁷ Additionally, courts accept PTSD testimony to assess the full measure of damages in personal injury actions. For example, in personal injury suits arising from traumatic industrial accidents, courts permit expert testimony that a plaintiff suffered shock trauma to determine damages for emotional and psychological injury.¹⁸ Courts also allow PTSD testimony in civil rape cases, where the testimony is entered not to prove that a rape occurred, but only to assess damages once a rape has been proven.¹⁹ In criminal rape trials, however,

Resick, & Ellis, *supra* note 5, at 98-101; Bassuk, *supra* note 5, at 124-29; Kilpatrick, Veronen, & Resick, *The Aftermath of Rape: Recent Empirical Findings*, 49 AM. J. ORTHO. 658 (1978); Notman & Nadelson, *supra* note 11, at 409-12; Resick, *The Trauma of Rape and the Criminal Justice System*, THE JUSTICE SYSTEM, Spring 1984, at 52; S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM 215-31 (1979).

14. See DePaul, *The Rape Trauma Syndrome: New Weapon for Prosecutors*, NAT'L L. J., Oct. 28, 1985, at 1.

15. See *supra* note 11 and accompanying text.

16. See *United States v. Burgess*, 691 F.2d 1146, 1148 (4th Cir. 1982) (allowing testimony that defendant suffers from post traumatic stress — "Vietnam Vet" — disorder to prove diminished capacity at time of crime); *People v. Galvan*, 156 Cal. App. 3d 144, 202 Cal. Rptr. 594 (1984) (remanding criminal conviction case of Vietnam veteran to trial court to determine whether veteran should be placed in newly established PTSD treatment program rather than prison).

17. See Smith, *Post Traumatic Stress Disorder*, 20 TRIALS 99 (1984).

18. Courts first accepted expert testimony that a plaintiff suffered shock trauma in industrial injury cases where plaintiffs sought damages for emotional and psychological injuries caused by traumatic, life endangering accidents. See, e.g., *Harris Coal Mining Co. v. Indus. Comm'n of Ill.*, 323 Ill. 880, 146 N.E. 543 (1925) (awarding damages for neurosis caused by electrical shock); *United States Fuel Co. v. Indus. Comm'n of Ill.*, 313 Ill. 590, 145 N.E. 122 (1924) (awarding damages for psychosomatic illness caused by industrial accident); *Porter v. Horace Williams Co.*, 9 So. 2d 60 (La. Ct. App. 1942) (awarding damages for physical injuries caused by shock of injury); *Wright v. Louisiana Gas & Fuel Co.*, 140 So. 713 (La. App. 1932) (awarding damages for psychosomatic illness caused by fall); *Thompson v. Railway Express Agency*, 241 Mo. App. 683, 236 S.W.2d 36 (1951) (would have awarded damages for psychoneurosis if causal connection to accident was proven by clear medical evidence).

19. See, e.g., *Redmond v. Baxley*, 475 F. Supp. 1111, 1122 (E.D. Mich. 1979) (allowing expert to testify about "the medical ramifications of rape trauma" in civil rights action against prison officials arising from homosexual rape of an inmate); *Division of Corrections v. Wynn*, 438 So. 2d 446, 448 (Fla. Dist. Ct. App. 1983) (admitting RTS testimony to ascertain damages for rape); *Alphonso v. Charity Hosp.*, 413 So. 2d 982, 986-87 (La. Ct. App. 1982) (awarding damages on basis of PTSD); *White v. Violent Crimes Compensation Bd.*, 76 N.J. 368, 388, 388 A.2d 206, 216 (1978) (determining that RTS was "crime-induced incapacity" and allowing filing of claims

where the testimony is always entered to prove that a rape occurred,²⁰ the testimony has received a mixed reception. Of the nine states to consider the question, six have allowed the testimony²¹ — three have not.²²

for duration of syndrome by tolling statute of limitations); *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 687-88, 268 S.E.2d 855, 861 (1980) (permitting RTS testimony to prove that sexual assault had permanent psychological effects); *Skaria v. State*, 110 Misc. 2d 711, 715-16, 442 N.Y.S.2d 838, 841-42 (N.Y. Ct. Cl. 1981) (allowing RTS testimony to prove damages in suit against state for rape in state-owned residential unit). In one civil case, however, PTSD testimony was allowed to prove the rape itself. *Terrio v. McDonough*, 16 Mass. App. Ct. 163, 176, 450 N.E.2d 190, 198 (1983) (admitting RTS testimony in civil sexual assault action to show nonconsent because the syndrome is a recognized medical disorder).

20. Because a prosecutrix does not receive money damages in a criminal rape trial, PTSD testimony is only entered in criminal rape trials to corroborate the prosecutrix' allegation of rape. No such corroboration of rape by an expert or other witness was necessary to convict for rape at common law. See 7 WIGMORE ON EVIDENCE § 2061, at 451 (Chadbourn rev. ed. 1978). Many states, however, have adopted a formal requirement of corroboration. See, e.g., *State v. Pilcher*, 158 N.W.2d 631 (Iowa 1968); *State v. Thompson*, 198 Neb. 48, 251 N.W.2d 387 (1977); *People v. Moore*, 23 N.Y.2d 565, 297 N.Y.S.2d 944, 245 N.E.2d 710, cert. denied, 394 U.S. 1006 (1969). Even in states with no formal corroboration requirement, courts rarely convict absent a modicum of circumstantial evidence. See *United States v. Wiley*, 492 F.2d 547, 554 (D.C. Cir. 1974) (Bazelon, C.J., concurring) (studies suggest defendant is unlikely to be convicted on the uncorroborated testimony of the complainant even in those jurisdictions that do not require corroboration); see also Hibley, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309 (1972) (sufficient proof of rape in majority of cases dependent upon corroborative evidence); O'Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution*, 18 SANTA CLARA L. REV. 119, 127 (1978) (despite absence of corroboration requirement, little chance of conviction without corroboration of victim's testimony); Ross, *The Overlooked Expert in Rape Prosecutions*, 14 U. TOL. L. REV. 707, 710 (1983) (where there is no corroborating evidence, jurors will convict in only 7 percent of rape cases). Maryland has no formal corroboration requirement. See *Green v. State*, 243 Md. 75, 220 A.2d 131 (1966). Where circumstantial evidence is lacking, however, a conviction in Maryland may be reversed. See *Craig v. State*, 214 Md. 546, 136 A.2d 243 (1957).

The difficulties of producing the requisite corroborating evidence are increased where there is no physical evidence of rape. If there is no physical evidence of rape, the prosecutor may have serious difficulty persuading the jury that any crime occurred. See Comment, *Scientific Evidence in Rape Prosecutions*, 48 U. MO. K.C.L. REV. 216, 220 (1980). Because rape victims often will not struggle due to fear of death or serious bodily injury, many rape victims exhibit no physical injuries. Tonn, *The Admissibility of Rape Trauma Syndrome in Indiana*, 17 IND. L. REV. 1143, 1146 n.25 (citing studies where percentage of rape victims exhibiting physical injuries ranged from 10.6% to 63%).

21. See *State v. Huey*, 145 Ariz. 59, 699 P.2d 1290 (1985) (en banc); *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984); *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *State v. Liddell*, — Mont. —, 685 P.2d 918 (1984); *State v. Whitman*, 16 Ohio App. 3d 246, 475 N.E.2d 486 (1984); *People v. Stull*, 127 Mich. App. 14, 338 N.W.2d 403 (1983); *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978). In *Stull* and *LeBrun*, the testimony of the expert was not presented in terms of PTSD or RTS, but the issue of admissibility was the same as in the other cases inasmuch as the expert testified that the complainant's psychological profile was consistent with that of rape victims in order to assist the state in proving rape.
22. See *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984) (en banc) *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982) (en banc); *State v. McGee*,

Despite the judicial split on the admissibility of PTSD testimony in criminal rape trials, commentators agree that expert psychological testimony should be admissible to corroborate a complainant's allegation of nonconsent.²³

In determining whether PTSD testimony is admissible in a criminal rape trial, courts generally make three inquiries, either implicitly or expressly. First, the broad inquiry is whether the probative value of the PTSD testimony outweighs its prejudicial effect.²⁴ Second, courts in-

324 N.W.2d 232 (Minn. 1982) (en banc) (companion case to *Saldana*); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc).

23. See 7 WIGMORE ON EVIDENCE, *supra* note 20, § 2061, at 464 ("in the light of modern psychology, this technical rule of corroboration seems but a crude and childish measure Better to inculcate the resort to an expert scientific analysis of the particular [complaining] witness' mentality, as the true measure of enlightenment."); see also Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 469 (1985); Ross, *supra* note 20, at 732-34; Tonn, *supra* note 20, at 1165-66 (1984); Wilk, *Expert Testimony on Rape Trauma Syndrome*, 33 AM. U.L. REV. 417, 461-62 (1984).
24. *Compare People v. Bledsoe*, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984) (en banc) (PTSD testimony "unfairly prejudices" the defendant) (quoting *Saldana*); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982) (en banc) ("such testimony is of no help to the jury and produces an extreme danger of unfair prejudice"); *State v. McGee*, 324 N.W.2d 232, 233 (Minn. 1982) (en banc) (same); *State v. Taylor*, 663 S.W.2d 234, 241 (Mo. 1984) (en banc) ("the peril of prejudice and confusion resulting from the opinion testimony substantially outweighs any probative value that it might have") with *State v. Huey*, 145 Ariz. 59, 63, 699 P.2d 1290, 1294 (1985) (en banc) (the testimony is admissible to aid the jury; it does not invade the province of the jury because the expert is subject to cross-examination and the jury then determines what weight the evidence is to receive); *State v. Marks*, 231 Kan. 645, 654, 647 P.2d 1291, 1299 (1982) (the syndrome is detectable and reliable as evidence and does not invade the province of the jury); *State v. Liddell*, — Mont. —, 685 P.2d 918, 923 ("Any relevant evidence which tends to support the existence or nonexistence of a fact in issue can only aid the jury determination, not mislead and confuse."); *State v. Whitman*, 16 Ohio App. 3d 246, 247, 475 N.E.2d 486, 488 (1984) ("the probative value of this testimony clearly outweighs the prejudicial impact").

The probative value - prejudicial effect balancing test is a traditional test for the admissibility of evidence. See 6 WIGMORE ON EVIDENCE, *supra* note 20, § 1864, at 643 (confusion of issue and undue prejudice as grounds for exclusion); FED. R. EVID. 403 (excluding even relevant evidence if it presents danger of unfair prejudice, confuses the issue, misleads the jury, or wastes time).

Maryland courts apply the probative value versus prejudicial effect balancing test. See, e.g., *Reid v. State*, 305 Md. 9, 501 A.2d 436 (1985) (probative value of photographs of murder victim not outweighed by prejudicial effect); *Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976) (probative value that high percent of detective's arrests lead to convictions outweighed by prejudicial effect); *Blondes v. Hayes*, 29 Md. App. 663, 350 A.2d 163 (1976) (plaintiff-buyer of business seeking refund of purchase price on theory of seller misrepresentation could not testify that purchase money was money recovered for daughter's brain damage and was invested on daughter's behalf because probative value of such testimony is outweighed by its prejudicial effect). Maryland has not codified the rule, but it is included in the MARYLAND TRIAL JUDGES HANDBOOK ON EVIDENCE § 4-701(c) ("Relevant evidence may be excluded if its probative value is substantially outweighed by the dan-

quire whether PTSD is accepted generally in the scientific community.²⁵ Courts which find that the testimony is generally accepted invariably find that its probative value outweighs its prejudicial effect.²⁶ Courts which

ger of (1) unfair prejudice, or (2) confusion of issues or misleading the jury, or (3) undue delay, waste of time or needless presentation of cumulative evidence.”).

25. *Compare Saldana*, 324 N.W.2d at 229 (“Rape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred.”); *McGee*, 324 N.W.2d at 233 (adopting *Saldana* rationale); *Taylor*, 663 S.W.2d at 240 (“Dr. Amanat’s statements that the prosecutrix suffered from rape trauma syndrome and that she had been raped are not sufficiently based on a scientific technique.”); *Bledsoe*, 36 Cal.3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 459 (rape trauma syndrome is not relied upon in the scientific community to prove that a rape occurred) with *Huey*, 145 Ariz. at 63, 699 P.2d at 1294 (rape trauma syndrome is “generally accepted”) (quoting *Marks*); *Marks*, 231 Kan. at 654, 647 P.2d at 1299 (“An examination of the [scientific] literature clearly demonstrates that the so-called ‘rape trauma syndrome’ is generally accepted to be a common reaction to sexual assault.”); *Liddell*, — Mont. at —, 685 P.2d at 923 (although rape trauma syndrome is a relatively new psychiatric development, “the presence of rape trauma syndrome is detectable and reliable as evidence that a forcible assault took place”) (quoting *Marks*); *Whitman*, 16 Ohio App. 3d at 247, 475 N.E.2d at 488 (“review of the handbooks, journals, and textbooks . . . successfully rebut the defendant’s claim of a lack of a scientific foundation . . .”).

The general acceptance test was first set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), where the United States Court of Appeals for the District of Columbia held that expert testimony is only admissible if the methodology or concept in question is accepted generally within the scientific community. The *Frye* test has come under increasing attack in recent years, however, because it serves to exclude novel, but apparently reliable, scientific procedures. Consequently four of the federal circuits have rejected the *Frye* test. See *United States v. Downing*, 753 F.2d 1224, 1238-39 (3d Cir. 1985) (general acceptance rejected as an independent controlling standard); *Ferebee v. Chevron Chem.*, 736 F.2d 1529, 1535-36 (D.C. Cir. 1984) (novel inference is admissible under Maryland law if methodology upon which it is based is generally accepted); *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977) (neither newness nor lack of absolute certainty in scientific test suffices to render it inadmissible; usefulness is criterion); *United States v. Baller*, 519 F.2d 466 (4th Cir. 1975) (general acceptance rejected and replaced with relevance test). At least five states also have relaxed the *Frye* test or rejected it altogether. See *Coppolino v. State*, 223 So.2d 68 (Fla. Dist. Ct. App. 1968) (methodology must meet *Frye* test “or must be shown to have passed from stage of experimentation and uncertainty to that of reasonable demonstrability”), *cert. denied*, 399 U.S. 927 (1970); *State v. Williams*, 388 A.2d 500 (Me. 1978) (relevance and helpfulness, not general acceptance, is the standard); *State v. Dorsey*, 87 N.M. 323, 532 P.2d 912, *aff’d*, 88 N.M. 184, 539 P.2d 204 (1975) (*Frye* rejected; relevance and helpfulness is the test); *People v. Daniels*, 102 Misc. 2d 540, 422 N.Y.S.2d 832 (Sup. Ct. 1979) (*Frye* rejected; substantive probative value is proper test); *Phillips v. Jackson*, 615 P.2d 1228, 1234 (Utah 1980) (admissibility not governed solely by general acceptance; test that has passed from experimental stage may be admissible if its reliability is reasonably demonstrable).

Maryland courts also apply the *Frye* standard. *Reed v. State*, 283 Md. 374, 381, 391 A.2d 364, 368 (1978) (“[I]f a new scientific technique’s validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then the expert testimony based upon its validity cannot be admitted into evidence.”). *But cf. Ferebee*, 736 F.2d at 1535-36 (novel inference is admissible under Maryland law if methodology upon which it is based is accepted generally).

26. See *Marks*, 231 Kan. 645, 647 P.2d 1291; *Liddell*, — Mont. —, 685 P.2d 918; *Whitman*, 16 Ohio App. 3d 246, 475 N.E.2d 486; *Huey*, 145 Ariz. 59, 699 P.2d 1290.

find that the testimony is not accepted generally invariably reach the opposite conclusion and exclude the evidence as unduly prejudicial on the theory that the jury erroneously will conclude that the expert is presenting a conclusion of scientific fact.²⁷ Third, courts consider the content of the testimony. If the expert merely states that the complainant exhibits PTSD symptoms, the testimony usually passes the general acceptance test, its probative value outweighs its prejudicial effect, and it is admitted into evidence.²⁸ If the expert supplements that diagnosis with an opinion that the symptoms were caused by rape, the testimony usually fails the general acceptance test, its prejudicial effect outweighs its probative value, and it is not admitted into evidence.²⁹ Therefore, the fundamental inquiry is on the content of the testimony.

Case law supports this assessment of content as the germane factor. Among the eleven cases that involved the admissibility of PTSD in a criminal rape trial, seven allowed the testimony— four did not.³⁰ Of the seven cases that allowed the testimony, only one involved an opinion of rape.³¹ Of the four cases that rejected the testimony, two cases involved an opinion of rape.³² Thus, where the expert opines that there was rape

27. See *Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450; *Saldana*, 324 N.W.2d 227; *McGee*, 324 N.W.2d 233; *Taylor*, 663 S.W.2d 234.

28. See *supra* notes 24 & 25.

29. *Id.* As stated by the Supreme Court of Kansas in *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984) "the common thread" in cases where PTSD testimony was rejected is that the expert stated that "he believed the victim was telling the truth in stating she was raped . . ." *McQuillen*, 236 Kan. at 169-70, 689 P.2d at 828.

30. See *supra* notes 21 & 22.

31. Compare *McQuillen*, 236 Kan. at 171, 689 P.2d at 829 (holding that the trial court erred in excluding RTS testimony because "the expert may testify that the patient/victim does possess and exhibit the emotional and psychological trauma consistent with rape trauma syndrome"); *Marks*, 231 Kan. at 653, 647 P.2d at 1299 (allowing testimony that expert thought that complainant had been the victim of "a frightening assault, an attack" and that she was suffering from the post-traumatic stress disorder known as rape trauma syndrome); *Whitman*, 16 Ohio App.3d at 247, 475 N.E.2d at 488 (allowing testimony of post-shock reactions of rape victim); *People v. Stull*, 127 Mich. App. 14, 19, 338 N.W.2d 403, 406 (1983) (allowing testimony that expert "saw nothing in complainant consistent with the profile of a rape victim"); *Huey*, 145 Ariz. at 62, 699 P.2d at 1293 (allowing testimony that victim's mental state was consistent with the experience the complainant described to expert); *State v. LeBrun*, 37 Or. App. 411, 415-16, 587 P.2d 1044, 1047 (1978) (allowing testimony that the victim's emotional state comported with "what most of the women [sexual abuse victims] that come to the hospital are reacting like") with *Liddell*, — Mont. at —, 685 P.2d at 922 (allowing testimony that "rape caused this post-traumatic stress syndrome in the victim").

32. Compare *Bledsoe*, 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460 (disallowing testimony that complainant suffered from rape trauma syndrome); *McGee*, 324 N.W.2d at 234 (Wahl, J., dissenting) ("Dr. Springrose did not testify, as did the expert witness in *Saldana*, as to whether, in his opinion, the rape actually occurred. Rather, he discussed some of the complainant's psychological symptoms after the alleged rape and stated that he found these symptoms to be consistent with rape trauma syndrome. Such evidence is probative on the issue of consent and thus helpful to the jury . . .") with *Saldana*, 324 N.W.2d at 229 (the expert stated "that she definitely believed Fuller was a victim of sexual assault and rape"); *Taylor*, 663

there is a significantly greater likelihood of exclusion.

Several cases specifically illustrate the importance courts place on the content of the testimony. In *State v. McQuillen*,³³ the Supreme Court of Kansas permitted the testimony because the expert stated only that the complainant possessed symptoms consistent with RTS without stating that the disorder was the result of rape.³⁴ In *State v. Taylor*,³⁵ the Supreme Court of Missouri rejected the expert's opinion that the complainant was raped, but stated in dicta that an expert could testify "that the prosecutrix' symptoms were consistent with a traumatic experience — even a stressful sexual experience."³⁶ In *People v. Stull*,³⁷ the Court of Appeals of Michigan permitted testimony that the complainant's symptoms were not inconsistent with the profile of a rape victim, emphasizing that the expert did not express an opinion as to whether the complainant had been raped.³⁸ In *People v. Bledsoe*,³⁹ the Supreme Court of California rejected the testimony, not because the expert stated that rape caused the disorder, which he did not, but because the expert stated that the complainant suffered from "rape trauma syndrome."⁴⁰ The court found that "use of this terminology is likely to mislead the jury into inferring that such a classification reflects a scientific judgment that the witness was, in fact, raped."⁴¹ Absent the use of this terminology, it appears the *Bledsoe* court would have permitted the diagnosis of PTSD: "We hasten to add that nothing in this opinion is intended to imply that evidence of the emotional and psychological trauma that a complaining witness suffers after an alleged rape is inadmissible in a rape prosecution."⁴²

Courts disfavor PTSD causation opinion for several reasons. PTSD symptoms are not reliable proof of rape because the disorder can be observed following any severe trauma.⁴³ Additionally, the psychiatric community uses PTSD diagnosis not to prove rape, but only for purposes of therapy;⁴⁴ any suggestion by an expert that the complainant was raped, based solely on the presence of rape trauma symptoms, unfairly

S.W.2d at 237 (the expert testified "that the victim was not fantasizing when she described the rape").

33. 236 Kan. 161, 689 P.2d 822 (1984).

34. *McQuillen*, 236 Kan. at 171, 689 P.2d at 829 ("He never stated that the victim was raped or that the stress which caused her disorder was the result of a rape. . . . The expert may testify that the patient/victim does possess and exhibit the emotional and psychological trauma consistent with rape trauma syndrome.").

35. 663 S.W.2d 234 (Mo. 1984) (en banc).

36. *Taylor*, 663 S.W.2d at 241.

37. 127 Mich. App. 14, 338 N.W.2d 403 (1983).

38. *Stull*, 127 Mich. App. at 19, 338 N.W.2d at 406.

39. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984) (en banc).

40. *Id.* at 251 n.14, 681 P.2d at 301 n.14, 203 Cal. Rptr. at 460 n.14.

41. *Id.*

42. *Id.* at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460.

43. See *Saldana*, 324 N.W.2d at 229 (the disorder can be observed following any severe trauma); *McGee*, 324 N.W.2d at 232 (adopting *Saldana* rationale); *Taylor*, 663 S.W.2d at 240 (trauma syndrome could result from a number of stressful situations).

44. See *Bledsoe*, 36 Cal. Rptr. at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460; *Saldana*,

prejudices the defendant.⁴⁵ Consequently, the jury might rely unduly on the psychiatrist's testimony, thus relinquishing its role as the ultimate factfinder.⁴⁶

Some researchers maintain, however, that the danger of undue jury reliance on expert testimony is more theoretical than actual. Studies indicate that the jury will not relinquish its decision-making power because it realizes its importance and the responsibility it owes to the court and the community.⁴⁷ Furthermore, jurors convict as often as judges in cases where expert testimony is presented.⁴⁸ Additionally, some courts note that the danger of undue jury reliance in cases involving PTSD testimony can be minimized by a variety of safeguards. The defendant can cross-examine the prosecution's expert witness,⁴⁹ call his own opposing experts,⁵⁰ and request limiting instructions that PTSD symptoms are only circumstantial evidence of rape, not definitive scientific proof of rape.⁵¹ Finally, the court can require that the expert use the more generic terminology "post traumatic stress disorder" rather than "rape trauma syndrome," thereby avoiding the impression that the complainant's symptoms could have been caused only by rape.⁵²

324 N.W.2d at 230 (RTS is not a fact-finding tool, but a therapeutic tool useful in counseling); *McGee*, 324 N.W.2d at 232 (adopting *Saldana* rationale).

45. See *supra* note 24.

46. See *Bledsoe*, 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460 (quoting *Saldana*); *Saldana*, 324 N.W.2d at 230 (the testimony unduly prejudices the defendant "by creating an aura of special reliability and trustworthiness"); *McGee*, 324 N.W.2d at 232 (adopting *Saldana* rationale); *Taylor*, 663 S.W.2d at 241 ("There is a risk that the jury will regard the expert's opinion that a victim suffers from rape trauma syndrome resulting from a forcible assault as dispositive on the issue of consent.").

47. R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 170 (1967).

48. H. KALVERN & H. ZIESEL, *THE AMERICAN JURY* 139 (1971).

49. See *Huey*, 145 Ariz. at 63, 699 P.2d at 1294 ("This testimony would not invade the province of the jury. The expert would be subject to cross-examination and the jury could then determine what weight the evidence is to receive."); *Marks*, 231 Kan. at 654, 647 P.2d at 1299 (the testimony does not invade the province of the jury because the expert is "subject to cross-examination and the jury is left to determine its weight"); *Liddell*, 685 P.2d at 923 ("skilled direct and cross-examination of an expert in this area can assist the jury in determining whether, in fact, the victim consented to the act").

50. The *Saldana* court feared that the trial could turn into "a battle of the experts." *Saldana*, 324 N.W.2d at 230. This problem is avoidable. The trial judge, at his discretion, can limit the number of experts. See *Wilk*, *supra* note 23, at 456. In practice, it is unlikely that both sides will present so many experts with conflicting views that the jury will be confused. See H. KALVERN & H. ZIESEL, *supra* note 48, at 139.

51. See *Weiner v. State*, 55 Md. App. 548, 559, 464 A.2d 1096, 1103 (1983) ("We recognize that the law frequently permits the jury to hear evidence admitted for a limited purpose and presumes that the jury will follow a given instruction."); see also MARYLAND TRIAL JUDGES' BENCHBOOK ON EVIDENCE 10 (1984) ("When evidence is admissible only for a limited purpose . . . on request the court should instruct the jury that the evidence may be considered only for the permissible purpose.").

52. See *Bledsoe*, 36 Cal. 3d at 251 n.14, 681 P.2d at 301 n.14, 203 Cal. Rptr. at 460 n.14;

In Maryland, PTSD diagnostic testimony has been allowed, but, prior to *Allewalt*, no court had occasion to consider whether an expert may opine as to the cause of PTSD. In *Wilson v. Jackson*,⁵³ the court of special appeals stated that a psychiatrist could testify that an individual suffers from PTSD.⁵⁴ In *Wilson*, a policeman was subject to a civil rights action for failing to exercise due care.⁵⁵ The defense entered testimony from a doctor of clinical social work regarding the officer's illness due to a previous traumatic experience. The court held that the testimony was admissible because the expert did not state whether the defendant actually had PTSD. The court stated that "an opinion as to ultimate fact, whether or not the accused . . . [suffers from a 'mental disease or defect'] . . . must be made by a medically trained psychiatrist in order to be admissible in evidence."⁵⁶

Although PTSD testimony was not at issue, the court of appeals in *Beahm v. Shortall*⁵⁷ stated that a physician may express his opinion regarding the cause of an injury, aside from diagnosing the injury itself.⁵⁸ The court permitted a doctor to testify not only about the nature of the plaintiff's lower back injury, but also that the injury was caused by an automobile accident.⁵⁹ Although not mandatory, the court added that a physician may state that his conclusion as to cause was derived in part by the plaintiff's own statements.⁶⁰

In *State v. Allewalt*,⁶¹ the Court of Appeals of Maryland, in a case of first impression, held that an expert may testify not only that a rape complainant exhibited symptoms of PTSD, but also that the symptoms were caused by rape.⁶² The court found that the probative value of the testi-

Taylor, 663 S.W.2d at 240 (expressing disapproval of "rape trauma syndrome" terminology because that terminology creates a misimpression that there is a scientific judgment that the complainant was, in fact, raped).

53. 66 Md. App. 744, 505 A.2d 913 (1986).

54. *Id.* at 752, 505 A.2d at 917.

55. *Id.* at 747-48, 505 A.2d at 914.

56. *Id.* at 752, 505 A.2d at 917 (quoting *Saul v. State*, 6 Md. App. 540, 549-50, 252 A.2d 282, 286-87 (1969), *aff'd*, 258 Md. 100, 265 A.2d 178 (1970)).

57. 279 Md. 321, 368 A.2d 1005 (1977).

58. *Id.* at 327, 368 A.2d at 1009.

59. *Id.* at 329, 368 A.2d at 1010. The court stated, however, that it was error for the trial court to admit the doctor's testimony as to the subjective symptoms related to him by the patient without the limiting instruction that the testimony was only to show the basis of the doctor's conclusions. *Id.*

60. *Id.* at 327, 368 A.2d at 100. The court stated that the physician may present his "medical conclusions" and may present the "history and subjective symptoms" received from the patient which provide the basis for the conclusions. *Id.* The *Beahm* opinion in no way indicates that the former is conditional upon the latter. *See id.*

61. 308 Md. 89, 517 A.2d 741 (1986).

62. *Id.* at 100, 517 A.2d at 747 ("Dr. Spodak was acting well within the field of his special training and experience not only when he made the diagnosis but [also] . . . when he opined that the trauma was the rape described by the patient.").

In a concurring opinion, Judge McAuliffe agreed that the testimony should be admissible in rape prosecutions, but opined that an expert should not be permitted to state whether the complainant in question suffered from PTSD. *Id.* at 125, 517 A.2d at 759 (McAuliffe, J., concurring). According to Judge McAuliffe, the expert

mony outweighed its prejudicial effect.⁶³ In finding that the diagnostic testimony was admissible, the court stated that “[t]here is no issue in this case over the fact that psychiatrists and psychologists recognize PTSD as an anxiety disorder.”⁶⁴ In finding that the causation testimony was admissible, the court relied on *Beahm v. Shortall*, which allows for a physician to express his opinion as to the cause of an injury.⁶⁵

Regarding the diagnostic testimony, *Allewalt* is consistent with the majority view and prior Maryland case law. The court adopted a recognized approach leading to an expected result. The court considered, as have others, whether a diagnosis of PTSD is accepted generally in the scientific community as a reliable indication of trauma.⁶⁶ The *Allewalt* court joined the majority view in holding that PTSD testimony is accepted generally in the scientific community. Consequently, the court’s acceptance of the testimony was both logical and predictable. Addition-

should describe PTSD, list the type of traumas that cause the disorder, and discuss any temporal limitations on the cause-effect relationship, without expressing a conclusion as to whether the complainant actually suffered from the disorder. *Id.* at 126, 517 A.2d at 760. The reason the expert should not be permitted to state whether the complainant had PTSD, Judge McAuliffe explained, was because the expert must assume the existence of a traumatic event in order to make a diagnosis of PTSD. *Id.* at 126-27, 517 A.2d at 760.

Judge Eldridge filed a lengthy dissenting opinion, in which he was joined by Judge Cole. *Id.* at 111, 517 A.2d at 752, (Eldridge, J., dissenting). According to the dissent, PTSD should be excluded in rape prosecutions because it does not meet the *Frye-Reed* general acceptance test. *Id.* at 111, 517 A.2d at 752. The dissent found additionally that the testimony’s “minimal” probative value is “drastically outweighed” by the danger of unfair prejudice and confusion of the issues, and that the expert in *Allewalt* “impermissibly invaded the province of the jury by expressing an opinion about the credibility of the complaining witness’s testimony.” *Id.*

The *Allewalt* majority, concurrence, and dissent appear to accept the defense’s argument that the *Allewalt* expert expressed the opinion that the complainant was raped. Study of the record, however, does not support this conclusion. The expert did state that he was unaware of any other trauma the complainant had undergone that could have caused the PTSD, and also that rape could have caused the condition to the exclusion of all other possibilities. Record at 4-31. Such testimony falls short of an opinion that rape caused the complainant’s distress. Indeed, the record reveals that the expert did not feel qualified to draw that conclusion. The expert clearly stated: “*But to say in fact that she was raped, I am not sure that I feel qualified to do that.*” *Id.* (emphasis added).

63. *State v. Allewalt*, 308 Md. 89, 102-03, 517 A.2d 741, 747-48 (finding fault with the opinion of the intermediate appellate court that the testimony’s prejudicial effect outweighed its probative value).

64. *Id.* at 99, 517 A.2d at 746.

65. *Id.* at 98-99, 517 A.2d at 745-46. The court stated:

Dr. Spodak’s opinion that the PTSD which he diagnosed in Mrs. Lemon was caused by the rape which she described is as evidentially reliable as an opinion by an orthopedist who has been engaged only to testify ascribing a plaintiff’s subjective complaints of low back pain to soft tissue injury resulting from an automobile accident described in the history given by the plaintiff. Maryland evidence law recognizes such medical opinions to be competent on and relevant to the issue of causation in addition to the fact of bodily harm.

Id.

66. *See supra* note 24.

ally, the court's reasoning is consistent with the court of special appeals decision in *Wilson v. Jackson*,⁶⁷ holding that a psychiatrist may present his diagnosis of a mental disorder.⁶⁸

Regarding the causation portion of the testimony, however, the court adopted a novel approach to reach a novel result via its application of *Beahm v. Shortall*.⁶⁹ Other courts evaluated causation testimony under the general acceptance test, an approach usually leading to exclusion of the evidence on the ground that PTSD is not reliable proof of rape, only of trauma.⁷⁰ In *Allewalt*, however, the court relied upon *Beahm v. Shortall*, thereby avoiding the probable exclusion of the testimony under the general acceptance analysis.

In its application of *Beahm* to PTSD testimony, the court skillfully modified the *Beahm* holding to the special circumstances surrounding PTSD testimony. Although *Beahm* involved medical opinion regarding the cause of a physical injury, the *Allewalt* court applied it to psychiatric opinion regarding the cause of a mental disorder. More importantly, the *Beahm* court merely suggested that a physician *may* include in his causation testimony the "history and subjective symptoms received from the patient which provide the basis for the conclusions."⁷¹ In contrast, *Allewalt* appears to set forth a mandatory requirement that the expert explain that his opinion as to causation is derived, at least in part, from the complainant's own statement of cause.⁷²

This requirement is implicit in the court's reasoning. The court

67. 66 Md. App. 744, 505 A.2d 913 (1986).

68. *Id.* at 752, 505 A.2d at 917 (quoting *Saul v. State*, 6 Md. App. 540, 549-50, 252 A.2d 282, 286-87 (1969), *aff'd*, 258 Md. 100, 265 A.2d 178 (1970)).

69. 279 Md. 321, 368 A.2d 1005 (1977).

70. *See Bledsoe*, 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 459 (rape trauma syndrome is not relied on in the scientific community to prove that a rape occurred). *Saldana*, 324 N.W.2d at 229 ("Rape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape occurred."); *McGee*, 324 N.W.2d at 234 (adopting *Saldana* rationale); *Taylor*, 663 S.W.2d at 240 ("Dr. Amanat's statements that the prosecutrix suffered from rape trauma syndrome and that she had been raped are not sufficiently based on a scientific technique."). Presumably, these courts did not have case authority comparable to *Beahm* in their storehouse of precedent.

71. *Beahm*, 279 Md. 321, 327, 368 A.2d 1005, 1009.

72. The court implicitly set forth this requirement at several points in its discussion. In rejecting the holding of the intermediate appellate court that the expert's causation testimony was unduly prejudicial, the court stated that the holding of the intermediate court "ignores that Dr. Spodak's opinion that, based on the history, the stressor causing PTSD in Mrs. Lemon following June 25, 1983, was what she said was a rape occurring on that day." *Allewalt*, at 98, 368 A.2d at 745. Elsewhere the court emphasized that there was no undue prejudice because the expert "explained his opinion on causation by reference to the history obtained from Mrs. Lemon and by excluding other possible causes." *Id.* at 102, 368 A.2d at 747. Finally, toward the end of the opinion, the court reiterated that "[Dr. Spodak] did not claim that psychiatry could demonstrate conclusively that the cause of the PTSD was rape. He did claim the special knowledge and experience to be able to identify the cause of the PTSD by utilizing the history furnished by the patient" *Id.* at 103, 368 A.2d at 748.

stated that because the *Allewalt* expert "explained his opinion on causation by reference to the history obtained from Mrs. Lemon and by excluding other possible causes" the intermediate appellate court erred in finding undue prejudice.⁷³ The court also noted, "Having heard the evidence the jury still had to evaluate the credibility of Mrs. Lemon and of Dr. Spodak, and to evaluate what weight, if any, they would give his opinion."⁷⁴ Implicitly, the causation testimony would have been unduly prejudicial but for the psychiatrist's explanation that his opinion of cause was based partly on the witness's rendition of what had transpired.

By requiring the expert to explain the basis for his opinion of causation, the *Allewalt* court avoided the danger that the jury might conclude that the causation opinion is a statement of scientific fact. Unless the jury is informed that the expert's opinion on causation is derived from the complainant's own statements, the jury could conclude that science has resolved the factual controversy as to whether a rape occurred and that further deliberation is unnecessary. The *Allewalt* requirement of an explanation of the basis of the opinion of rape dilutes the prejudicial impact of the expert's opinion by allowing the jury to perceive that the opinion rests on the credibility of the complainant herself. Furthermore, the court effectively buttressed its acceptance of such testimony by noting that the expert did not use the terminology "rape trauma syndrome,"⁷⁵ that the expert carefully pointed out that severe traumas other than rape can cause PTSD,⁷⁶ and that the trial court used proper jury instructions.⁷⁷

In *Allewalt*, the court reached a well reasoned holding in regard to the admissibility of PTSD testimony in a criminal rape trial. The court's holding that the diagnostic portion of the testimony is admissible because it is accepted generally in the scientific community is sound, although not surprising. Of greater significance is the holding that an expert can state that the complainant's PTSD symptoms were caused by rape. In reaching that holding, the court skillfully accommodated the legitimate interests of both complainant and defendant. The complainant is allowed the benefit of this relevant opinion. The defendant is protected from any undue prejudice by the requirement that the expert explain that the basis of his opinion is the complainant's narrative. This careful accommodation of interests strikes a fine balance.

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73. *Id.* at 102, 517 A.2d at 747.

74. *Id.* at 103, 517 A.2d at 748.

75. *Id.* at 108, 517 A.2d at 751.

76. *Id.*

77. *Id.* at 103, 517 A.2d at 748. In *Allewalt* the trial judge instructed the jury that it "should give experts' testimony the weight and value you believe it should have. You are not required to accept any expert's opinion." *Id.*