

***“You Must Remember This ...”***  
**The Law of Recovered Memory  
in Canada**

**by**

**Jodi Lynne Libbey**

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A thesis submitted in conformity with the requirements for the degree of  
Master of Laws

Graduate Department of Law  
University of Toronto

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**ABSTRACT**

“Recovered memory” refers to memories which are rendered unavailable to consciousness for a period of time, and later recovered or returned. In the legal context it is used to refer to memories of historical child sexual abuse. This thesis concerns the interface between psychology and law on the issue of recovered memory. It demonstrates how existing psychological concepts and theories of memory inform and determine how science approaches, analyses, and ultimately pronounces on the validity of new concepts and theories in the same field, such as those surrounding recovered memory. Similarly, it examines the law’s note historical orientation to memory, particularly as it contributes to the law’s approach to recovered memory revealed in the evidential issues identified in the case law by this thesis. In addition, the thesis illuminates the correspondence, or lack thereof, between psychological theories of memory and both legal conceptions and expectations of memory.

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## **INTRODUCTION**

In the past ten years, allegations of recovered memory of childhood sexual abuse have become more common in Canadian courtrooms. Although the issue of recovered memory in Canada has not taken on the epic proportions it has in the United States, it has nonetheless become a significant issue for both psychology and the law. The concept of recovered memory presents some unique challenges to the law, directly implicating legal concepts and assumptions about memory, and the rules based upon these assumptions.

Reactions from the courts have varied from outright disbelief to cautious acceptance. Frequently, expert evidence from psychologists has been sought on how to approach such claims. Specifically, the law has attempted to address the reliability of recovered memory in general and in relation to specific complaints. Unfortunately, the prosecution and defence approaches have reflected the division between clinicians and experimental psychologists; and mimicked the recovered memory and false memory positions in the debate.

Although the law must seek information and instruction from science regarding recovered memory, it cannot allow itself to be subsumed or dictated by it. This thesis maintains that the law must embrace a pragmatic approach to recovered memory. The recollections of alleged survivors of childhood sexual abuse, like normal memories, should be scrutinised and assessed for their reliability along with all the other evidence presented in a given case. At present

we are incapable of establishing the accuracy or inaccuracy of any kind of memory, let alone memories which are claimed to be recovered, and so we must remind ourselves that the ultimate issue is whether the trier of fact is convinced, beyond a reasonable doubt, that the alleged sexual abuse did in fact occur. It is the aim of this thesis to examine the attitude and assumptions of the law regarding memory, and to consider how recovered memory challenges and relates to these assumptions.

At its heart, the issue concerns memory and what we do and do not know about it. Although we experience memory everyday and are intimately acquainted with both its power and fallibility, we generally take memory for granted. We simply assume that our memory is sufficiently able to perform the functions we require of it. We don't often turn our attention to how memory works, or why and how it doesn't work.

The first chapter of this thesis is a brief examination of some psychological theories and concepts of memory. It is intended to provide a general understanding of how memory is understood to operate. From this introduction to the psychology of memory, chapter two embarks upon a consideration of the law's view of memory, and its ability to contribute (in the form of testimonial evidence) to the law's search for the truth and the resolution of legal conflicts. In considering how the law perceives or expects memory to work, the chapter examines two different kinds of evidence – eyewitness identification evidence and children's evidence – which legally have presented

difficult issues regarding memory. The chapter looks at how the law has responded to these issues and how it assesses the evidence provided by: (1) eyewitnesses, whose memories have traditionally been considered reliable; and (2) children, whose memories have traditionally been presumed unreliable. This review provides the basis for a contextual analysis of the modern challenge, presented by allegations of childhood sexual abuse based on recovered memory. Questions about the reliability of memory are not new; its fallibility has always been in question when a witness gives their account of an event. It is essential that any inquiry concerning recovered memory should not be held in isolation from the way in which the law has traditionally viewed memory and assessed testimony.

Chapter Three is a distillation of the recovered memory position in the current controversy. Its basic premise is that traumatic memory of childhood sexual abuse can be rendered inaccessible to the consciousness, and later ‘recovered’ or returned to consciousness. The chapter traces the evolution of the concept of recovered memory as well as the various mechanisms, such as repression and dissociation, which are used to describe and explain the phenomenon of recovered memory.

The fourth chapter outlines the false memory argument which is premised upon the notion that memory is both highly fallible and suggestible. Moreover, false memory supporters contend that it is exactly this suggestibility which puts into question memories recovered within a therapeutic context. The false memory

position also asserts that the whole theory of recovered memory rests on clinical intuition, rather than empirical evidence. To conclude the chapter a recovered memory reply addresses some of the issues and concerns raised by false memory theory.

The fifth and final chapter surveys reported cases based upon allegations of recovered memory of childhood sexual abuse in Canada. Although the chapter is predominantly concerned with the criminal prosecution of such allegations, both criminal and civil cases will be used to identify and explore the legal and evidential issues which have arisen in the context of such cases. These issues include problems of proof, such as corroboration, prior consistent statements, similar fact evidence and hearsay exceptions, as well as issues concerning expert psychological testimony, and problems identified with memories recovered during therapy and the techniques employed in the therapeutic context. Finally, the use of false memory as a defence to allegations of recovered memory is also examined. The chapter concludes with a general overview of the approach developed by courts when adjudicating claims based on recovered memory of childhood sexual abuse.

Finally, a note relating to terminology. The terms bantered about in the debate recovered memory/ false memory debate have become overly infused with political meaning and are therefore often misleading and inflammatory. For this reason, although it is used in much of the literature, I have not applied the “syndrome” label to either recovered memory or false memory, because it

presumptively infers scientific legitimacy where that legitimacy needs to be established.<sup>1</sup> Many other terms have also become politically tagged during the course of the debate; for example, ‘recovered’ memory tends to imply that such memory is ‘exhumed’ from unconsciousness in a preserved and accurate form. I prefer the term ‘traumatic’ memory, as it does not involve this inference. Moreover, false memory is also a misleading and unsatisfactory term, both generally and when specifically invoked in relation to recovered memory.<sup>2</sup> However, these terms are difficult to escape as they form the common parlance of the debate.

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<sup>1</sup> The controversy has spurred at least one author to note that it is plagued by “syndromitis” or “the arbitrary invention of quasi-medical categories to suit almost any deviation from what is perceived as the norm.” : Steven Rose, “Syndromitis, false or repressed memories?” in *Memory in Dispute*, Valerie Sinason, ed. (London: H. Karnac Books Ltd., 1998) at 120.

<sup>2</sup> “Most paradigms seem to suggest that ‘true’ and ‘false’ are naive or misleading labels when applied to memory, which tends toward a mixture of the accurate and inaccurate.” Kenneth Pope & Laura Brown, *Recovered Memories of Abuse: Assessment, Therapy, Forensics* (Washington, DC: American Psychological Association, 1996) at 11.



# **CHAPTER 1      PSYCHOLOGY & MEMORY**

## **INTRODUCTION**

The term “memory” is used interchangeably to refer to both the *content* and *experience* of remembering; “[m]emory, defined most broadly, is an individual’s entire mental store of information and the set of processes that allow the individual to recall and use that information when needed.”<sup>3</sup> Memory has been further defined as the capacity to:

1. selectively represent (in one or more memory systems) information that uniquely characterizes a discrete experience,
2. retain that information in an organized way within existing memory structures, and
3. reproduce some or all aspects of that information at some future point in time under certain conditions.<sup>4</sup>

Memory can be divided into four distinct processes: one, the perception or acquisition of perceptual information; two, the encoding or “process of transforming physical stimulus energies impinging on the senses of an observer into memory codes;”<sup>5</sup> three, the storage of encoded material which is thought to be organised according to verbal and/ or visual imagery,<sup>6</sup> or alternatively the encoded meaning of the linguistic or pictorial messages; and four, the retrieval of the encoded information which often involves communication of the memory.

Therefore, memory is the product of the quality and quantity of our ability to

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<sup>3</sup> Peter Gray, *Psychology*, 2d ed. (New York: Worth Publishers, 1994) at 327 [emphasis omitted].

<sup>4</sup> Daniel Brown, Alan Schefflin & D. Corydon Hammond, *Memory, Trauma Treatment, and the Law* (New York: W.W. Norton & Company, 1998) at 66.

<sup>5</sup> A. Daniel Yarmey, *The Psychology of Eyewitness Testimony* (New York: The Free Press, 1979) at 58.

<sup>6</sup> *Ibid.* at 66.

perceive, encode, store and retrieve information about our past experiences and learned knowledge.

The purpose of this chapter is to provide a brief overview of the concepts and theories employed by psychologists in their discussions of memory. To begin there is an outline of the categories or types of memory which have been identified, the two leading theories of how memory works, as well as how and why remembering and forgetting are hypothesised to occur. These concepts form the background, and are explicitly referred to by both sides of the recovered memory/ false memory controversy. In turn, these concepts and theories are often appropriated, and sometimes misappropriated, by the law when it articulates evidential rules regarding memory.

## A. DIFFERENT TYPES OF MEMORY

The science of memory has identified various types of memory, alternatively conceived of as different memory processes or tasks within a unitary system of memory, or as different systems of memory altogether.<sup>7</sup> Arguably these dichotomous distinctions may be nothing more than heuristic categories. However they serve to provide a point of reference of how memory is conceived to work and how scientists approach the study of memory.

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<sup>7</sup> John Gardiner & Rosalind Java, "Recognising and Remembering," in *Theories of Memory*, Alan Collins, Susan Gathercole, Martin Conway & Peter Morris, eds. (Hove, UK: Lawrence Erlbaum Associates, 1993) at 163.

A primary distinction is made between short-term and long-term memory. Short-term memory, also known as working memory, is thought to act as an active buffer or processor of both incoming sensory information from the present environment and information retrieved from the past which has been summoned for current use. Short-term memory is hypothesised to have a very limited capacity to store information as opposed to long-term memory which appears to have an infinite storage capacity. However, unlike short-term memory which actively processes information, “the long-term memory store is passive (a repository of information).”<sup>8</sup> Therefore, according to the processes of memory mentioned before, perceived information enters short-term memory, is encoded into long-term memory for prolonged storage, and must then be retrieved from long-term memory and returned to short-term memory for active use.

Memory scientists also distinguish between declarative and procedural memory. *Declarative* memory refers to a conscious awareness of facts we are capable of articulating. *Procedural* or *behavioural* memory, however, is identified with unconscious skills, habits, emotional responses, reflex actions, and conditioned responses, or the things “we just know how to do.” This distinction was initially noted in amnesic patients who retained their procedural memory of how to perform certain tasks and skills, but whose declarative memory abilities were impaired.<sup>9</sup>

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<sup>8</sup> Gray, *supra* note 3 at 333.

<sup>9</sup> Marcia Johnson & William Hirst, “MEM: Memory Subsystems as Processes,” in Collins, Gathercole, Conway & Morris, *supra* note 7 at 266.

Declarative memory is also subdivided into *episodic* memory, “the knowledge of specific, time-dated events one has experienced,” and *semantic* memory, the “memory for information not tied mentally to a particular event or episode in one’s life. It includes knowledge of word meanings (which is one definition of *semantics*) plus all the myriad facts and ideas that constitute one’s general understanding of the world.”<sup>10</sup> Moreover, episodic memory is related to *autobiographical* memory, that is “our personal narrative of who we are and what has happened to us, as well as our knowledge of how to do what we do.”<sup>11</sup>

In addition, psychologists have created the categories of *explicit* and *implicit* memory. In general, these types of memory are differentiated according to the types of recall tests (where the subject is asked to remember something) tending to elicit certain types of information:

At the heart of this distinction [is] whether the test instructions emphasise the conscious recollection or remembering of some prior study list, in which case the task is explicit, or whether the test instructions make no mention of the study list, or else require subjects to disregard their conscious recollection of it, in which case the task is implicit.<sup>12</sup>

Another approach to this distinction:

...contrasts memory in reflective mode, as an object, with memory in operational mode, as a device. Explicit tests engage memory in a reflective mode because the instructions specify conscious recollection or remembering. Implicit tests engage memory in operational mode because memory is used as a device for the accomplishment of some task that is nominally unconnected with conscious recollection. Memory in reflective mode relies more on intentional processes. Memory in operational mode relies more on automatic processes.<sup>13</sup>

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<sup>10</sup> Gray, *supra* note 3 at 359[emphasis in original].

<sup>11</sup> Pope & Brown, *supra* note 2 at 32.

<sup>12</sup> Gardiner & Java, *supra* note 7 at 165.

<sup>13</sup> *Ibid.* at 167.

Explicit memory is often identified with declarative memory; while implicit memory is associated with procedural memory, however, “the distinctions in types of memory – even the terminology – are currently in flux...the terms explicit and implicit generally refer to a distinction between the ways in which memories are accessed, while the terms declarative and procedural generally distinguish the kind of information stored.”<sup>14</sup>

## B. THE FAILURE OF MEMORY - FORGETTING

In the study of memory, scientists have been preoccupied with the issue of forgetting or memory failure. According to the well accepted phenomenon of infantile amnesia, humans generally do not recall experiences which occur before the age of two and in some cases up until the age of six. However, it is believed that as we grow and learn our memories are enhanced as we adopt new and more efficient strategies of encoding, storing, and recalling information. They question whether it is caused by complications during perception, encoding, storage or retrieval:

What happens, over time, to cause forgetting? Is information lost *from* the long-term memory store, like a book that has disintegrated or been stolen from the library? Or is it lost *in* the long-term store like a book that has been misnumbered or misshelved?<sup>15</sup>

Moreover, memory scientists are exploring whether a memory for an event or experience is stored and retrieved as a single, comprehensive unit or whether the constituent elements of a memory are stored individually:

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<sup>14</sup> Jennifer Freyd, *Betrayal Trauma: The Logic of Forgetting Childhood Abuse* (Cambridge: Harvard University Press, 1996) at 96 [emphasis in original].

<sup>15</sup> Gray, *supra* note 3 at 350 [emphasis in original].

Much evidence suggests that for a given memory there are multiple individual components which are stored separately and activated simultaneously. This is in contrast to a model in which memories are relatively fixed and are either retrieved intact or not retrieved at all. Different elements may be invoked at different times; extraneous material may be invoked as well and incorporated into the memory.<sup>16</sup>

The findings from these and many other queries inform the following three general theories offered to elucidate the phenomenon of forgetting.

Two conventional paradigms, trace decay theory and interference, have been employed to outline how forgetting may occur:

The typical explanation in cognitive psychology for why forgetting occurs does not assume that forgetting is motivated. Instead the traditional focus has been on decay and interference as reasons for forgetting. *Decay* is the passive and gradual erosion of information in short-term and sensory memory. If information is not actively maintained, it dissipates rapidly...The evidence for decay in long-term memory is less clear. Instead it appears that *interference* can account for most decay-like loss of information in long-term memory. Interference has classically been divided into two categories: proactive and retroactive. Proactive interference occurs when memories and existing knowledge interfere with the creation of new memories...Retroactive interference occurs when newly acquired information interferes with the retrieval of old information.<sup>17</sup>

More recently, retrieval cue theories, "maintain[ing] that the ability to retrieve information depends on the availability of appropriate cues (reminders),"<sup>18</sup> have been developed to account for forgetting. These theories emphasise the difference between recall and recognition; recall involves the retrieval of information directly from memory. Recognition, on the other hand, is more indirect. It involves the identification or acknowledgement of a piece of information as corresponding with information previously stored in memory. For example, if you

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<sup>16</sup> Julia Golier, Rachel Yehuda & Steven Southwick, "Memory and Posttraumatic Stress Disorder," in *Trauma and Memory: Clinical and Legal Controversies*, Paul Appelbaum, Lisa Uyehara and Mark Elin, eds. (New York: Oxford University Press, 1997) 225 at 234.

<sup>17</sup> Freyd, *supra* note 14 at 112 [emphasis in original].

<sup>18</sup> Gray, *supra* note 3 at 350.

were given a list of words, and later asked to recount them, this would be a test of your recall. However, if you were asked to choose the words from that list appearing amongst words on another list, this would be a test of recognition. Retrieval cues, which you may recognise as part of a given memory, may help locate or trigger the recall of other parts of memory for that event.

### C. THE ACCURACY OF MEMORY

Another concern of scientists who study memory is the accuracy of memory. Historically, psychology has endorsed two dominant paradigms according to “whether or not a memory representation actually corresponds in any veridical way to the actual external stimulus event for which it has been created.”<sup>19</sup> However, this immediately raises the following question:

[If] there can be no correspondence between memory and remembered event because there is no single valid interpretation of the original event; if reality itself is elusive, slippery, forever beyond our grasp, and appearing differently according to our position – then what sense is there in the question of whether a memory is true or false?<sup>20</sup>

However, the solipsist aspect of this question is well beyond the scope of this thesis. In order to continue, we must assume that it is possible to sufficiently determine objective facts, according to the way we understand things to happen and the facts remembered by the participants. This is a fundamental assumption made in law, and indeed in everyday life, and will not be challenged in this thesis.

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<sup>19</sup> Brown, Scheflin & Hammond, *supra* note 4 at 66.

<sup>20</sup> Phil Mollon, *Remembering Trauma: A Psychotherapist's Guide to Memory and Illusion* (West Sussex, England: John Wiley & Sons, 1998) at 13-14.

## TRACE THEORY

The trace theory of memory posits that memory acts like a tape or video-recorder which is capable of replaying “a more or less exact copy of an event.”<sup>21</sup> This account of memory also accords with the “conceptualiz[ation] [of] memory as the records of sensory experiences etched onto the mind, which was regarded as a *tabula rasa*, or blank tablet. These memory traces were thought to be more or less permanent.”<sup>22</sup> This theory often likens memory to a computer, creating, storing and retrieving files methodically and efficiently. Unfortunately, such an analogy is misleading as to memory’s proficiency and accuracy. As we all know from personal experience, human memory is not capable of recalling memories at the simple push of a mental button. However, although the scientific community has long since abandoned this theory of memory, “[t]he idea that the mind is like a video camera, passively recording the scenery and storing tapes in a vast storage bin, hangs on with a dogged persistence in popular parlance, perhaps in part because it seems to appeal to common sense (which also seemed to suggest that the sun revolves around the earth and that the earth is flat).”<sup>23</sup>

## CONSTRUCTIVIST THEORY

Constructivists advocate that memory recall is not a passive and neutral process but an active, reconstructive process resulting in a fictionalised version of the original event:

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<sup>21</sup> Brown, Scheflin & Hammond, *supra* note 4 at 21.

<sup>22</sup> Yarmey, *supra* note 5 at 3.

<sup>23</sup> Pope & Brown, *supra* note 2 at 30.

Remembering is not just a process of retrieving traces that were laid down during the original encoding; instead, it is an active, inferential process guided by a person's general knowledge about the world. When you hear a story or experience an event, your mind encodes into long-term memory only some parts of the available information. Later, when you try to recount the story or event, you retrieve the encoded fragments and fill in the gaps through your logic and knowledge, which tell you what must have happened even if you can't quite remember it. With repeated retelling, it becomes harder to distinguish what was present in the original encoding from what was added later. Thus, memory of the story or experience is not a simple readout of the original information, but a *construction* built and rebuilt from various sources of information. Our ability to construct the past is adaptive because it allows us to make sense of our incompletely encoded experiences. But the process can also lead to distortions.<sup>24</sup>

This more realistic view of memory's ability to disgorge an account of a past event or experience, not only recognises problems of reconstruction and recall, it also accepts that “[m]emory is no more comprehensive than perception, and it is arguably less comprehensive, if by ‘less’ we mean a discrepancy between external and internal reality. Memory is limited by perception, and is further limited by distortions caused in the storage and retrieval of information.”<sup>25</sup>

A more moderate strain of this theory, known as the partial constructivist or reconstructivist view, also asserts that memory is a constructive process but it is much more temperate in its emphasis on the amount of fiction generated during recall. On this view, “memories are understood to be amalgamations of both *historical truth* and *narrative truth* – of what actually happened and the subjective interpretations, fantasies and contextual determinations surrounding an occurrence and its recall.”<sup>26</sup> The difference between the constructivists and partial constructivists can be characterised as the difference between construction and

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<sup>24</sup> Gray, *supra* note 3 at 354-55 [emphasis in original].

<sup>25</sup> Freyd, *supra* note 14 at 82.

<sup>26</sup> Howard Levine, “Psychoanalysis, Reconstruction, and the Recovery of Memory,” in Appelbaum, Uyehara & Elin, *supra* note 16, 293 at 303 [emphasis in original].

reconstruction; the former infer that memories are largely constructed, that is each time memories are manufactured from new materials during each apparent ‘recall’; whereas the latter contend that memories are rebuilt or reassembled largely from materials contained in the original structure. Basically, the moderate view, which is the currently accepted theory of the accuracy of memory recall, maintains that “[w]hile each successive recall may preserve the gist of the memory, some portion of the details will inevitably be different on each occasion.”<sup>27</sup>

## CONCLUSION

The preceding outline of memory from the psychological perspective, although brief, is intended as an introduction to the psychological approach to memory. However, “[w]hilst frameworks for memory are necessary to organise our understanding and to give direction to theory and research, it may not be possible to generate a single framework which adequately captures the multiple facets of memory.”<sup>28</sup> Therefore the purpose of the preceding discussion is only to provide a conceptual starting point for understanding the scientific and legal controversy surrounding recovered memory. The next chapter will examine how the law has turned to psychology for explanations of how memory works, and for guidance on how to approach memory in the context of testimonial evidence.

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<sup>27</sup> Brown, Scheflin & Hammond, *supra* note 4 at 21.

<sup>28</sup> Mollon, *supra* note 20 at 40.

These scientific theories, which may or may not accord with legal principles and rules regarding memory, suggest that there is “difficulty in knowing what originally was stored in memory compared to the materials reconstructed or refabricated in an individual’s recall. A person’s redintegration of events from his or her past will contain factual truth, inferences, and conclusions of what ‘probably’ must have happened.”<sup>29</sup> This conclusion has important legal ramifications, which will be examined in the next chapter and throughout this thesis.

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<sup>29</sup> Yarmey, *supra* note 5 at 55.



## **CHAPTER 2      LAW & MEMORY**

### **INTRODUCTION**

Trials, like memory, are reconstructive. When recreating a past event, the court calls upon witnesses to give their recollection of what they saw, heard, or otherwise experienced. The testimony of witnesses, along with physical evidence, form the two main classes of evidence upon which triers of fact determine the guilt or innocence of the accused. This chapter will discuss how memory, in the form of testimonial evidence, has been regarded by the law in general and specifically with reference to the issues involved in eyewitness and children's memory. It will compare and contrast the law's position on these memory issues with psychological findings:

To date, the scientific literature on witness memory has not been a driving force behind the legal system's assumptions, procedures, and decisions regarding witness testimony. In part, this is probably because scientific research on witness testimony is relatively recent when compared to how long the legal system has relied on memory testimony from witnesses.<sup>30</sup>

It is not surprising therefore, to find that the law may be premised upon common misconceptions of how memory functions.

#### **A. THE SEARCH FOR TRUTH**

Criminal litigation, in both jurisprudence and popular discourse, is portrayed as a search for truth. The law's purpose is to attempt to ascertain the true facts of the matter in dispute, or "what really happened." The Supreme Court

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<sup>30</sup> Gary Wells, "Scientific Study of Witness Memory: Implications for Public and Legal Policy" (1995) 1 Psychol., Pub. Pol. & L. 726 at 730.

of Canada has alternately described this search as: “the ultimate goal”,<sup>31</sup> “the essential principle of every criminal trial”;<sup>32</sup> and “the principal aim of our adversarial trial process”.<sup>33</sup> Moreover, the Court has asserted that, “[t]he ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth. In a criminal trial the search for truth is undertaken to determine whether the accused before the court is, beyond a reasonable doubt, guilty of the crime with which he is charged.”<sup>34</sup> However, it must be acknowledged that this search for truth is somewhat circumscribed, as it can only be gleaned from relevant evidence properly admitted into trial:

[In] the threshold inquiry into relevancy, basic principles of the law of evidence embody an inclusionary policy, namely, that any item of evidence which, as a matter of common sense, logic or human experience, has any tendency to prove a fact in issue ought, *prima facie*, to be admitted to assist in the discovery of truth because the cumulative effect of such evidence may be sufficient to prove a fact in issue.<sup>35</sup>

Evidential rules govern the truth-seeking process and define the parameters of fact-finding. However, truth is not the only value at play in our criminal justice system:

While the objective of the judicial process is the attainment of truth...the principles of fundamental justice require that the criminal process be a fair one. It must enable the trier of fact to “get at the truth and properly and fairly dispose of the case” while at the same time providing the accused with the opportunity to make full answer and defence.<sup>36</sup>

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<sup>31</sup> *R. v. O'Connor*, [1995] 4 S.C.R. 411 at 439 per Lamer C.J. and Sopinka J.

<sup>32</sup> *R. v. B.(G.)*, [1999] S.C.J. No.29 at para.37, per Bastarache J.

<sup>33</sup> *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536 at 575, per L'Heureux-Dubé J.

<sup>34</sup> *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at 1206, per Cory J.

<sup>35</sup> *R. v. Corbett*, [1988] 1 S.C.R. 670 at 720, per La Forest J.

<sup>36</sup> *R. v. Levogiannis*, [1993] 4 S.C.R. 474 at 486, per L'Heureux-Dubé J.

Therefore, the notion of fairness often underlies exclusionary rules which may be viewed as thwarting the court in this objective. On this point it has been commented:

The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. Such a result may follow from the law's deliberate policy.<sup>37</sup>

Pragmatically speaking, the search for truth might be more realistically discussed in terms of "the goal of accurate fact determination."<sup>38</sup> It must be recognised that, because we will never know all the facts about an alleged past event, our judgments are necessarily based on "the superior probabilities of truth,"<sup>39</sup> or sufficient factual certainty (i.e. beyond a reasonable doubt), in favour of a particular version of a past event.

## B. TESTIMONIAL EVIDENCE

Our courts have traditionally relied on the testimony of witnesses as a source of facts, for "[i]n the common law world, the accepted wisdom is that the truth will come out through a public adversarial process during which witnesses are required to tell their "story" through answers to questions put to them by the

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<sup>37</sup> Justice S. Freedman, "Admissions and Confessions," in Roger Salhany and Robert Carter, *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972) 95 at 99.

<sup>38</sup> Marilyn MacCrimmon, "Developments in the Law of Evidence: The 1991-92 Term: Truth, Fairness and Equality" (1993) 4 Sup. Ct. L. Rev. 225 at 226.

<sup>39</sup> Earl Thomas, "Cross-examination and Rehabilitation of Witnesses" [1965] Defense Law Journal 246 at 249. This point has further been explained as, "[p]resent knowledge about past facts is possible but because it is based on incomplete knowledge establishing the truth about the past is typically a matter of probabilities." : John Jackson, "Evidence: Legal Perspective," in *Handbook of Psychology in Legal Contexts*, Ray Bull & David Carson, eds. (West Sussex: John Wiley & Sons, 1995) at 169.

competing parties.”<sup>40</sup> Further, the memory of those witnesses is relied upon to provide accurate, or sufficiently accurate, recollections so that the ‘truth’ or the ‘facts’ can be ascertained in order to arrive at proper judgment:

The memory of individual witnesses, as it is reported in the courtroom, is the largest fact-substance of juridical decisions. It is frequently intended as the vehicle for the accurate reconstruction of the past events which form the subject matter of litigation. A presumption may generally be said to exist that the memory upon which a person bases his testimony is reliable. A random person, given accurate initial perception, will, in the ordinary course of events, reflect a memory competent to serve most of the purposes for which it is demanded.<sup>41</sup>

However, anyone who has spent any time in a courtroom, and has had the opportunity to observe two witnesses testify to different versions of the same event, knows that witnesses may not be as accurate as the law might expect. Further, there is little to guide the trier of fact on the matter of whether a given witness, and his or her recollections, are accurate or not. In the courtroom, “[s]tandards of memory accuracy and reliability are implicit and non-specific, and are presumably reflected in the common sense experience and impressionistic judgments of judge and jury.”<sup>42</sup> In directing triers of fact on how to assess the credibility and reliability, or perceived accuracy of witnesses, the Supreme Court has endorsed a rather generic and unhelpful instruction to the jury:

In deciding what the facts are in this [and other] case[s] you will be the sole judges of the truthfulness of the witnesses and of the weight to be given to the testimony of each of them. In deciding whether a witness is worthy of belief you should bring your own *common everyday experience* to such matters. *Simply, in effect, exercise your good common sense.* I tell you that you are entitled to believe all of the evidence given by a witness, part of that evidence or none of it. In determining whether to believe that witness you should consider such things as his or her ability and opportunity to observe, his appearance or her appearance in the manner while testifying before you, his or her power of recollection, any interest, bias or prejudice that he or she may have, any

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<sup>40</sup> *R. v. Toten* (1993), 83 C.C.C. (3d) 5 (Ont.C.A.) at 16, per Doherty J.A.

<sup>41</sup> Robert Redmount, “The Psychological Basis of Evidence Practices: Memory” (1959-60) 50 J. Crim. L., C. & P.S. 249 at 249.

<sup>42</sup> *Ibid.* at 250.

inconsistencies in the testimony and the reasonableness of that testimony ought to be considered by you when considering the light of all the evidence in the case. You are not obliged to accept any part of the evidence of a witness just because there has been no denial of it.<sup>43</sup>

Thus, issues relating to the normal functioning and fallibility of memory are consigned to the determination of the jury, in the belief that jury is already sufficiently cognisant them.

Theoretically, the law's general approach to memory is captured in the concept of testimonial competence which determines whether a witness will be heard by the court. Competency, assessed at the time of trial, addresses the witness's capacity to (1) observe the event in question, (2) record their observations of that event, (3) recall those observations when asked to do so in court, and (4) effectively communicate those observations at that time.<sup>44</sup> In addition, competency also concerns whether the witness can appreciate the duty to tell the truth. Although conceptually it operates as an initial threshold to testimony, practically speaking, it rarely receives much attention because competency is presumed unless otherwise challenged. In general, the way in which the law approaches the issue of competency reflects "the common-sense belief that testimony will be correct as long as the witness is mentally normal and has the intention of telling the truth."<sup>45</sup> For the most part, competency is tested only with respect to certain kinds of witnesses, such as children. As the Supreme Court has stated, "[t]he policy behind s.16 [of the *Canada Evidence Act*] is to

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<sup>43</sup> *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 747, per Cory J. quoting the trial judge [emphasis added].

<sup>44</sup> *Canada Evidence Act*, R.S.C. 1985, c. C-5, s.16.

ensure that witnesses who take the stand are able and *likely* to be telling the truth. The section renders certain potential witnesses incompetent to give testimony because the law doubts their testimonial ability to enhance the search for truth.”<sup>46</sup> However, the law gives but a cursory consideration of the potential reliability and accuracy of the memory of ‘normal’ and therefore unchallenged witnesses.

Here the law is not concerned with the potentially perjurious witness, but the truthful witness who may, inadvertently, provide inaccurate testimony:

The vast majority of testimonial errors - and every trial lawyer knows they are numerous - are those of the average, normal honest man, errors unknown to the witness and wholly unintentional, represented in the great body of testimony which is *subjectively* accurate but *objectively* false.<sup>47</sup>

Psychology cautions that in addition to perceptual inaccuracies, “[w]itnesses may distort their memory at the time of their original observations of an incident, or distortions may occur later at the time of trial, or both. In any event, memory is not an exact replica of the original perceptions and is influenced by a number of factors.”<sup>48</sup> Unfortunately, this is often exacerbated because the law often regards the credibility of witnesses as synonymous with the reliability of their recollections. This problem can be addressed by understanding a distinction between credibility and reliability. Further, the law must rely on certain safeguards to test the accuracy of witness recollections, chief among these is cross-examination.

<sup>45</sup> Brian Clifford, “Towards a more Realistic Appraisal of the Psychology of Testimony,” in *Psychology in Legal Contexts: Applications and Limitations*, Sally Lloyd-Bostock, ed. (Hong Kong: The Macmillan Press, 1981) 19 at 20.

<sup>46</sup> *R. v. Hawkins*, [1996] 3 S.C.R. 1043 at 1117, per Major J. [emphasis added].

<sup>47</sup> Dillard Gardner, “The Perception and Memory of Witnesses” (1933) 18 Cornell L.Q. 391 at 391 [emphasis in original].

### **C. SEEKING TRUTH/ TESTING MEMORY: CROSS-EXAMINATION AND THE RULE AGAINST HEARSAY**

While the testimony of witnesses is considered a primary source of evidence in criminal trials, cross-examination is heralded as an important, if not the sole, instrument available to test the truth or accuracy of facts contained within such testimony:

[No] safeguard for testing the value of human statements is comparable to that furnished by cross-examination...it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.<sup>49</sup>

The law recognises that objective truth may be discoverable only in theory and that human beings, while not intending to deceive, may nevertheless be in error in their perceptions and recollections. As the Supreme Court commented in *R. v. Osolin*:

There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of testimony. ... Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity.<sup>50</sup>

Further, in that case as well as *R. v. Seaboyer*,<sup>51</sup> the Supreme Court held that the search for truth and a fair trial are predicated upon a defendant's right of cross-examination (derived from the right to a fair trial and to make full answer and

<sup>48</sup> Yarmey, *supra* note 5 at 63.

<sup>49</sup> John Henry Wigmore, *Evidence in Trials at Common Law*, vol.V, rev. James Chadbourn (Boston: Little, Brown & Co., 1974), at 32, §1367. See also John W. Strong, gen. ed., *McCormick on Evidence*, v. 2, 4th ed. (St. Paul: West Publishing, 1992) at 120, where he states: "The witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was meant to explore. The reasons for this change of face, whether forgetfulness, carelessness, pity, terror or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false."

<sup>50</sup> [1993] 4 S.C.R. 595 at 663, per Cory J.

<sup>51</sup> [1991] 2 S.C.R. 577.

defence contained in ss.7 and 11(d) of the *Charter*<sup>52</sup>). However, the court stressed that cross-examination is not an absolute right and that at times it must give way to other values and rights.<sup>53</sup>

The clearest example of these other rights are often revealed in exceptions to the rule against hearsay. This rule has been defined as:

Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered as proof of their truth or as proof of assertions implicit therein.<sup>54</sup>

Therefore hearsay, as an inferior form of evidence, is rejected primarily because there is no opportunity to cross-examine the author of the statement:

The right to cross-examine is of the greatest importance to the integrity of the factfinding process and is the keystone of both the hearsay rule and the right of confrontation. Blunt though it may be for the discovery of subconscious distortion, cross-examination is the principal legal instrument for testing the accuracy of a witness's perception, memory, and communication. By means of cross-examination the witness may be required to explain ambiguous, unclear, or inconsistent testimony; personality traits that influence cognitive functioning may be disclosed; the effect of the witness's mental set at the time of the perception, possible suggestive influences, and numerous other factors which affect a witness's mental processes may be investigated. Obviously, a witness who testifies to hearsay can usually provide the trier of fact with none of the same information.<sup>55</sup>

However, the law realises that evidence in the form of direct oral testimony may not always be possible. Therefore, exceptions to the hearsay rule have been recognised by the courts. This is justified where the benefits of being able to cross-examine the author of the statement, are displaced by "the criteria of

<sup>52</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

<sup>53</sup> For a more comprehensive discussion of *Osolin* and *Seaboyer* on the matters of truth and fairness see Paul Perell, "Section 7 of the Charter, the Adversary System, the Fair Trial, and Truth" (1997) 19 Advocates' Q. 393.

<sup>54</sup> John Sopinka, Sidney Lederman & Alan Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 173.

necessity and reliability [and where these] are satisfied, the lack of testing by cross-examination goes to weight, not admissibility, and a properly cautioned jury should be able to evaluate the evidence on that basis.”<sup>56</sup> These exceptions have become increasingly more acceptable as the law has adopted a more inclusionary approach, “[s]ince it is generally a better policy to decide disputes upon the basis of evidence, even of questionable reliability, than on the burden of proof, it is logical to resolve the issue of admissibility by viewing the need for hearsay evidence in something of an inverse ratio to the circumstantial probability of its trustworthiness.”<sup>57</sup>

Touted as “the greatest touchstone of truth ever devised,”<sup>58</sup> what is cross-examination and how does it extract facts contributing to ascertaining the truth? In cross-examination leading questions are used, which in effect suggest the answer to the question desired by the examiner. In a sense, the cross-examiner often reconstructs the facts and poses them to the witness for their acknowledgement or denial:

The law assumes that reports are more likely to be true and accurate when witnesses are cross-examined on broad issues including counsel’s presentation of alternative explanations of what was observed. Suggested answers from counsel are not considered as biasing recall, but rather are seen as tests of the veracity and validity of memory. In fact, cross-examiners seldom ask questions regarding information which is not already known by them. Furthermore, they

<sup>55</sup> I. Daniel Stewart, Jr., “Perception, Memory, and Hearsay: A Criticism of Present Law and The Proposed Federal Rules of Evidence” [1970] Utah L. Rev. 1 at 22.

<sup>56</sup> *R. v. Smith*, [1992] 2 S.C.R. 915 at 935, per Lamer C.J., discussing *R. v. Khan* [1990] 2 S.C.R. 531, which allowed the admission of a child’s hearsay statement tendered by her mother in court. Moreover, in *R. v. Potvin*, [1989] 1 S.C.R. 525, the court allowed the testimony of a witness given at the preliminary inquiry to be admitted at trial, pursuant to s.643(1) of the Criminal Code, finding that the hearsay rule had been satisfied as the defendant had an opportunity to cross-examine the witness during the preliminary inquiry.

<sup>57</sup> Stewart, *supra* note 55 at 23.

<sup>58</sup> Thomas, *supra* note 39 at 247.

are reasonably sure that their knowledge will be confirmed by the questioned witness...If a witness gives an 'inappropriate' observation, meaning that it runs counter to the theory of the examiner, the witness may be accused of lying or distortion.<sup>59</sup>

The witness's responses and reactions to a version of events which conflicts with his or her testimony are regarded as the key to determining which version is more likely to be correct. On its own, cross-examination is no more fruitful than examination-in-chief. On this subject psychological studies have reviewed the effectiveness of the two types questioning and found:

Forced memory (answers to questions) is less accurate than natural recall (free narration), but the interrogatory covers a much greater range and brings out much information that the narrative does not yield, the increase in range bringing a resulting loss in accuracy due to the 'forcing of the memory'.<sup>60</sup>

In balancing accuracy and completeness, while at the same time testing the witness's recollection, and given the frailties of memory, therefore the adversarial method may in fact be the most effective mechanism for approximating objective truth.

#### **D. EYEWITNESS MEMORY**

With the advent of near conclusive physical evidence in the form of D.N.A. testing, it has become possible to show, to the same degree of proof, that eyewitnesses can be surprisingly unreliable in spite of their confidence and credibility. Psychological studies have also shown the fallibility of eyewitness identifications, and have further demonstrated that such fallibility is nevertheless ignored by lay persons, who as triers of fact are highly persuaded by this kind of

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<sup>59</sup> Yarmey, *supra* note 5 at 190-91.

testimony. Moreover, it appears that the law does not adequately instruct triers of fact on the fallibility of eyewitness testimony, but instead provides a nominal warning and encourages them to employ common sense assumptions when assessing the credibility of eyewitnesses and the reliability of their recollections.<sup>61</sup>

### THE LAW AND EYEWITNESS EVIDENCE

Arguably, the law itself places no inherent premium on the evidence given by eyewitnesses to the events in question.<sup>62</sup> In fact, the Supreme Court has repeatedly stated that the Crown is under no obligation to call certain witnesses to provide testimony in a given case, including complainants.<sup>63</sup> In addition, the law does not seem to make any qualitative distinction between the evidence of witnesses who have directly observed events and other witnesses who have not had that opportunity. The Crown need only adduce witness testimony deemed “essential to the narrative,” which the Supreme Court has defined as:

mean[ing] no more and no less than that the Crown has to put forward enough witnesses so that the essential elements of the crime could be adequately proven. Hence, if the Crown decided not to call a witness it risked failing to meet the burden of proof incumbent on it and losing the case.<sup>64</sup>

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<sup>60</sup> Gardner, *supra* note 47 at 404. See also Yarmey, *supra* note 5 at 194, who similarly asserts that “free narrative [as used in direct examination] is more accurate whereas testimonial interrogation [typically employed by cross-examiners] is more complete.”

<sup>61</sup> Arguably, many lay persons subscribe to the trace theory of memory, discussed in Chapter One, and believe that eyewitnesses have access to a mental video replay of the event.

<sup>62</sup> Although some sixty years ago, in *R. v. Wu*, [1934] S.C.R. 609 at 621, per Lamont J., the Supreme Court felt that the Crown, as an officer of the court, had a duty to call all eyewitnesses it was aware of so that the jury could then decide “which of the witnesses they will believe and how much of the testimony of each they will accept.”

<sup>63</sup> *Lemay v. The King*, [1952] 1 S.C.R. 232, *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Cook*, [1997] 1 S.C.R. 1113. However, if the defence is forced to call such witnesses they lose the opportunity to cross-examine them, a result which the Supreme Court addressed in *Cook* at 1133, holding that cross-examination may not be necessary for a fair trial.

<sup>64</sup> *R. v. Cook*, *ibid.* at 1128, per L’Heureux-Dubé, referring to *R. v. Yebes*, *ibid.* at 190-91.

However, regardless of whether or not the law favourably distinguishes eyewitness testimony from that of other witnesses, eyewitness testimony is particularly persuasive to the trier of fact. Lay persons appear to believe that an eyewitness to a crime would be in the best position to identify who committed the crime, and therefore such testimony can be extremely influential, if not dispositive, in the outcome of such cases. It appears that the law is cognisant of this fact:

The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identification.<sup>65</sup>

#### **MISTAKEN ASSUMPTIONS REGARDING EYEWITNESSES**

Psychological studies of eyewitness identification variables have found that lay persons, as triers of fact, generally believe that certain factors are indicative of the accuracy or inaccuracy of eyewitness testimony. A few of these factors include: the witness's confidence in their recollection; the amount of detail contained in the recollection;<sup>66</sup> the age of the witness;<sup>67</sup> as well as any discreditation of the witness usually occurring during cross-examination.<sup>68</sup> Moreover, triers of fact are often encouraged in their erroneous assumptions by

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<sup>65</sup> *R. v. Atfield* (1983), 25 Alta. L.R. (2d) 97 at 98-99, per Belzil J., quoted with approval by the British Columbia Court of Appeal in *R. v. Morris* (1998) 14 C.R. (5th) 353 at 360-61.

<sup>66</sup> Research has also shown "that people are more convinced by prosecution witness testimony that contains specific details, even if these details are unrelated to the description of the suspect [or the crime itself]...suggest[ing] that people assume that those who remember trivial details possess better memories in general and hence are more credible.": Kipling Williams, Elizabeth Loftus & Kenneth Deffenbacher, "Eyewitness Evidence and Beliefs," in *Handbook of Psychology and Law*, Dorothy Kagehiro & William Laufer, eds. (New York: Springer-Verlag, 1992) at 153.

<sup>67</sup> Please see the discussion regarding child witnesses in the following section.

<sup>68</sup> Williams, Loftus & Deffenbacher, *supra* note 66 at 152.

lawyers, in the questions that they put to such witnesses, and by judges who instruct jurors to rely on their common sense to assess the credibility of witnesses,<sup>69</sup> and who may specifically refer to their own similar assumptions in charging the jury.

Partly to facilitate the trier of fact's evaluation of eyewitness testimony, the United States Supreme Court has listed five witness factors the trier of fact should consider:

1. opportunity of witness to view (day/night, distance, time duration);
2. the witness's degree of attention;
3. the accuracy of the witness's description of the perpetrator given prior to the identification;
4. the witness's level of certainty; and
5. the length of time that has elapsed from the time of the crime to the identification.<sup>70</sup>

Canadian trial judges have referred to similar factors, for example, "length of observation, the distance from which the observation was made, whether there were visual obstructions, the lighting conditions, whether a witness had a good memory, the time between observation and identification, and the ability of a witness to describe [physical] features [of the accused]."<sup>71</sup> Oddly enough, psychological studies have drawn quite different conclusions:

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<sup>69</sup> See *supra* note 43.

<sup>70</sup> *Neil v. Biggers*, 409 US 188 (1972) at 199, endorsed in *Manson v. Braithwaite* 432 US 98 (1977) at 114-116.

<sup>71</sup> *R. v. Bardales* (1995), 101 C.C.C. (3d) 289 (B.C.C.A.) at 293, per Macfarlane J.A., quoting with approval the trial judge's charge to the jury. The decision was affirmed by the Supreme Court: (1996), 107 C.C.C. (3d) 194.

In summary, aspects of eyewitness testimony are poor indicators of identification accuracy. A large body of studies have demonstrated that accuracy, completeness, and congruence of prior descriptions of the perpetrator are weakly related to identification accuracy. Memory for details is inversely (though weakly) related to identification accuracy. Consistency of testimony (of crime details and person descriptions) is unrelated to identification accuracy. Confidence in ability to identify a perpetrator is unrelated, but confidence in having made a correct identification is modestly associated with identification accuracy... Overall, aspects of the eyewitness's testimony should not be used to evaluate the accuracy of the eyewitness's identification.<sup>72</sup>

In sum, the factors which the law and triers of fact assume are indicative of eyewitness accuracy, have been found by psychology to have no or only insignificant correlation with eyewitness accuracy.<sup>73</sup>

### **LEGAL REINFORCEMENT OF EYEWITNESS CONFIDENCE**

Moreover, the legal system itself may contribute to a witness's false sense of confidence, reinforcing both accuracies and inaccuracies, due to the manner in which crimes are investigated and prosecuted. It has been noted that:

Confidence in memory is a social phenomenon, as well as a memory issue, and as such, is subject to social influence. After repeating the same story several times, one's confidence about the accuracy of the story increases. This is partly due to wanting to maintain consistency after publicly committing oneself to a specific rendition of what one witnessed. Social psychological research in cognitive dissonance informs us that asserting something publicly increases our belief in what we say and that the more important the consequences of such an assertion, the stronger our confidence will be.<sup>74</sup>

Therefore, witnesses who are questioned repeatedly during the investigation of a crime, and then again in preparation for trial (not to mention the number of times they are likely to recount their experience to family and friends), may become more confident in their recollection due to the repeated retelling and the inevitable

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<sup>72</sup> Brian Cutler & Steven Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge: Cambridge University Press, 1995) at 95-96.

<sup>73</sup> "[S]urveys of prospective jurors on three continents converge on the conclusion that they are insensitive to many of the factors that influence eye-witness memory." : Brian Cutler & Steven

result that the narrative will become more coherent. Moreover, “‘the feeling that ‘I was there so I should know’ may prompt eyewitnesses to fill in details they do not remember clearly or to overstate their confidence in their memories ... substantially attenuat[ing] the correlation of accuracy with confidence.’”<sup>75</sup> Of course, this unwarranted confidence is exactly what cross-examination is intended to target, but challenging the witness’s story at this point may be futile if pre-trial repetition has made the witness’s confidence unshakeable.

The combined frailties of eyewitness evidence and the inability of triers of fact to properly assess such evidence have caused some to suggest that “eyewitness testimony alone should not suffice to convict a criminal defendant. Such a remedy, however, is at best impractical. Even given the implicit dangers in allowing an eyewitness to testify when his memory of an event is blended with other events, *the merits of eyewitness testimony still greatly outweigh the risks.*”<sup>76</sup> Therefore, the law, at least at the trial stage, must necessarily take notice of psychology’s warnings of the problems associated with eyewitness evidence and establish appropriate safeguards. Thus far, two options have been suggested to educate triers of fact and make them more sensitive to the factors influencing the accuracy or inaccuracy of eyewitness testimony: (i) through judges’ instructions and (ii) through expert testimony on eyewitness identification.

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<sup>73</sup> Penrod, “Assessing the Accuracy of Eye-Witness Identifications” in Bull & Carson, *supra* note 39 at 207.

<sup>74</sup> Williams, Loftus & Deffenbacher, *supra* note 66 at 152-53.

<sup>75</sup> *Ibid.* at 153.

<sup>76</sup> Thomas Tomlinson, “Pattern-Based Memory and the Writing Used to Refresh” (1995) 73 Texas L.R. 1461 at 1477 [emphasis added].

## JUDGES' INSTRUCTIONS

As noted earlier, judges can and do provide jury instructions on these matters:

The cases are replete with warnings about the casual acceptance of identification evidence even when such identification is made by direct visual confrontation of the accused. By reason of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of "the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection".<sup>77</sup>

In the United States a model instruction, known as the *Telfaire* instruction, is employed to assist judges in directing jurors to pertinent factors to be considered in assessing the evidence of an eyewitness where identification of the defendant is at issue.<sup>78</sup> However, such instructions may not be effective because, as they come at the close of the case, jurors may have already concluded upon their acceptance of the eyewitness evidence in the case; and as these directions are included along with instructions regarding other aspects of the case, triers of fact may ignore or not appreciate the general warnings given about eyewitness identification. In addition, as judges are required to be impartial, they may not be able to adequately caution about certain aspects of evidence which may be significant in a given case. Finally, judges may simply not have the expertise or background to provide adequate instructions on these matters in any event.

## EXPERT EVIDENCE

How can expert psychological testimony assist triers of fact on issues of eyewitness identification? What kind of information could they impart?

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<sup>77</sup> *R. v. Burke* [1996] 1 S.C.R. 474 at 498, per Sopinka J. [references omitted].

<sup>78</sup> *United States v. Telfaire* 469 F.2d 552 (D.C.Cir. 1972) at 558-59.

In general, an expert might – if given sufficient latitude by the judge – briefly lecture the jury on the psychology of memory processes...The expert might explain the encoding, storage, and retrieval processes of memory and the factors that influence each. Encoding factors are those relating to the crime, the perpetrator, the crime environment, and the eyewitness. Storage factors are phenomena that occur between the crime and the identification test, and retrieval factors are those associated with the identification test itself.<sup>79</sup>

In addition, they could warn triers of fact that a witness's confidence in their identification does not attest to the accuracy of their identification. On this point, studies have indicated that “[j]uror reliance on witness confidence appears to be unaffected by traditional safeguards such as cross-examination and judges' instructions in eyewitness cases. Expert psychological testimony on the factors that influence eyewitness memory, in contrast, appears to reduce juror reliance on confidence and enhance use of other factors known to affect memory.”<sup>80</sup>

There are some concerns, however, which seem to be true of expert evidence in general, that litigation would become more expensive and result in a “battle of experts” if such evidence was routinely admitted. Three more specific concerns of the possible effects of expert testimony on eyewitness identifications have also been voiced: (1) that jurors will become confused by the expert, thereby disregarding or misapplying his or her testimony; (2) that jurors may become sensitised to factors which do and do not influence witness accuracy; and (3) that jurors may simply become sceptical of witness testimony in general.<sup>81</sup> Moreover, expert testimony about the dangers of eyewitness identifications, likely tendered by the defence, would necessarily follow some time after the witness had testified.

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<sup>79</sup> Cutler & Penrod, *supra* note 72 at 213-16.

<sup>80</sup> Steven Penrod & Brian Cutler, “Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation” (1995) 1 Psychol., Pub. Pol. & L. 817 at 817.

Therefore, like judicial instructions, it may not be able to counteract the opinions formed by the trier of fact regarding the witness's credibility and the reliability of their identification. However, as it stands on its own, and is not buried along with directions on other issues in the case, it may have a better chance of providing assistance to triers of fact. Unfortunately, some judges may deplore this type of 'assistance': "the courts are overly eager to abdicate their fact-finding responsibilities to 'experts' in the field of the behavioural sciences. We are too quick to say that a particular witness possesses knowledge and experience going beyond that of the trier of fact without engaging in an analysis of the subject-matter of that expertise."<sup>82</sup>

Given that eyewitness testimony is ineradicable as a basis of prosecuting criminal acts, "the need for dealing with identification evidence with caution, particularly when the evidence depends on only one witness,"<sup>83</sup> is apparent. Moreover, it is obvious that both lawyers and judges need to be educated on these issues, and that where appropriate in the circumstances of the case, expert evidence on eyewitnesses should be welcomed.

## **E. CHILDREN'S MEMORY**

Another area where it is clear that both lawyers and judges need to be more informed is in relation to children as witnesses. The evidence of children has historically been regarded with suspicion, a view bolstered by early psychological

<sup>81</sup> Cutler & Penrod, *supra* note 72 at 216.

<sup>82</sup> *R. v. McIntosh* (1997), 35 O.R. (3d) 97 (C.A.) at 102, per Finlayson J.A.

<sup>83</sup> *R. v. Lucciano* (1998), 114 B.C.A.C. 151 at para. 5.

studies of child suggestibility.<sup>84</sup> Around the turn of the century, the Belgian psychologist Varendonck questioned:

When are we going to give up, in all civilised nations, listening to children in Courts of law?<sup>85</sup>

The distrust of children's testimony, discarded only too recently, was based on antiquated and in some cases outrageous assumptions:

[T]hey are not as good as adults as far as observing and reporting events is concerned; they are prone to fantasise about sexual matters; they are highly suggestible; they are relatively unable to distinguish reality from fantasy; and they are prone to confabulate.<sup>86</sup>

More recently, interest in the question of children's memory, and their ability to provide relevant and reliable testimony, has been spurred by the marked increase in the awareness and prosecution of child sexual abuse cases.<sup>87</sup> These cases have highlighted the unique problems of child witnesses and their differential treatment in court. Political motivation and pressure has grown from the problems in securing convictions, where those convictions play an integral role in reducing the incidence of this crime. Moreover, the traditional assumptions made by the law have been demystified by psychologists, and evidential rules regarding children's testimony have accordingly been amended to reflect the psychological findings, which indicate that such evidence is much more reliable than it was originally

<sup>84</sup> See Gail S. Goodman, "Children's Testimony in Historical Perspective" (1984) *J.Soc.Sci.* 9.

<sup>85</sup> J. Varendonck, "Les témoignages d'enfants dans un procès retentissant" (1911) 11 *Archives de Psychologie* 129, cited in James C. Robb & Lynda J. Kordyban, "The Child Witness: Reconciling the Irreconcilable" [1989] *Alta. L. Rev.* 327. Varendonck's study is discussed together with other twentieth century research in Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (Washington: American Psychological Association, 1995) c. 5.

<sup>86</sup> Andreas Kapardis, *Psychology and Law: A Critical Introduction* (Cambridge: Cambridge University Press, 1997) at 100 (citations omitted).

<sup>87</sup> The reasons for the interest in children's testimony are further discussed in Ceci & Bruck, *supra* note 85 at 64-65.

assumed. After a brief consideration of the historical mistrust of children by the courts, the conclusions of recent research into the development of memory in children and their impact on the law will be briefly examined. These conclusions shed light on the grounds of mistrust and indicate methods of allaying fears about children's testimony. Recent developments and the present state of the law are reviewed against this background.

### **HISTORICAL APPROACH**

In the past, children have been regarded by the law as incapable of providing accurate and reliable recollections.<sup>88</sup> Prior to recent amendment, Canadian federal and provincial statutes placed two major conditions on the reception of evidence from children. First, children "of tender years", that is, persons under the age of fourteen years,<sup>89</sup> must undergo an inquiry into their intelligence and understanding conducted by the presiding judge. This prerequisite, which remains in force, gives the court a discretion in determining whether the child's cognition is such that their evidence ought to be received. In addition, this inquiry also examines whether the child in question understands the nature of an oath, or at least the duty to tell the truth, in order that their evidence may be taken under oath or unsworn.

If the child is considered able to take the oath, his or her sworn evidence may be received. Under the common law, however, the child could not take

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<sup>88</sup> See *R. v. B.(G.)*, [1990] 2 S.C.R. 3 at 13-15, per Wilson J., for a historical overview of children's evidence.

the oath unless it was shown that he or she could understand “the nature and consequences of an oath,” as well as believe in God.<sup>90</sup> However, unsworn evidence could be received on conditions set out in s.16(1) of the *Canada Evidence Act*. Under that section, the presiding judge had to form the opinion that “the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.”

Second, no conviction could be entered which was based solely on the unsworn evidence of a child.<sup>91</sup> Corroboration was statutorily required. This requirement is perhaps the strongest indicator of the law’s historical mistrust of children as witnesses. Although this requirement has now been removed from the *Canada Evidence Act*, it remains in force today in some provincial statutes.<sup>92</sup>

A third condition, received from common law, required a judge to warn the jury about the dangers of convicting a defendant on the basis of a child’s uncorroborated evidence.<sup>93</sup> In affirming the rule in the 1961 Supreme Court decision in *R. v. Kendall*, Judson J., for the Court, set out its justification:

<sup>89</sup> *R. v. Brasier* (1779) 1 Leach 199, 168 E.R. 202; *R. v. Bannerman* (1966) 55 W.W.R. 257 (Man. C.A.), aff’d [1966] S.C.R. v. The age is now set out explicitly in the statute.

<sup>90</sup> *R. v. Brasier*, *ibid.*, applied in Canada in *R. v. Antrobus* (1946) 87 C.C.C. 118 (B.C.C.A.); the religious requirement was initially settled in *R. v. Bannerman*, *ibid.*, but not fully settled until the 1988 amendments.

<sup>91</sup> *Canada Evidence Act*, s.16(2) and *Criminal Code*, s.586. Unsworn evidence was allowed under s.16; previously, a child could not give evidence unless sworn.

<sup>92</sup> In the Canadian provinces, the requirement of corroboration has been repealed in Ontario, where the statute explicitly abrogates the rule (*Evidence Act*, R.S.O. 1996, c.E-23, s.18); as well as in British Columbia and Saskatchewan. It is still in force in Alberta (*Alberta Evidence Act*, R.S.A. 1980 c.A-21, s.20(2)); New Brunswick (*Evidence Act*, R.S.N.B. c.74, s.24(2)); Northwest Territories (*Evidence Act*, R.S.N.W.T. 1988, c.E-8, s.19); and in the Yukon (*Evidence Act*, R.S.Y. 1986, c.57, s.16). The requirement was never enacted in Prince Edward Island.

<sup>93</sup> *R. v. Kendall*, [1962] S.C.R. 469.

The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand the questions put and frame intelligent answers. 4. His moral responsibility.<sup>94</sup>

This condition was eventually abrogated by the Supreme Court in *R. v. W.(R.)*<sup>95</sup> (discussed below), and a prohibition on mandatory warnings was enacted in 1993 as s.659 of the *Criminal Code*. The applicable rule is now that set out in *R. v. Vetrovec*.<sup>96</sup> *R. v. Vetrovec* related to corroboration warnings in general, holding that the need for a warning is not dependent on the class of witness but must be given if warranted by the circumstances of the case. However, failure to give a warning, where one is warranted, remains a ground of appeal.

In order to understand the new approach to children as witnesses, it is necessary to review some of the conclusions of recent studies relating to the development of memory function in children.

#### **PSYCHOLOGICAL DEVELOPMENTS**

The key to understanding how to deal with children's evidence is to appreciate the development of a child's intelligence. Research has shown that while there are some differences between children and adults in the operation of memory, these differences indicate that children ought to be understood as developing adults and not presumed to be deficient or untrustworthy.

Every child is naturally at a different stage, and the stage a particular child is at necessarily affects the manner in which he or she perceives and processes

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<sup>94</sup> *Ibid.* at 477.

<sup>95</sup> [1992] 2 S.C.R. 122.

information from the environment. The following is a brief examination of the psychological approach to children which considers in turn: one, the perception of events and information; two, the encoding and recall of information; three, the effect of suggestion on children's memory; and four, the unique difficulties which children experience as witnesses.

**(i) PERCEPTION AND UNDERSTANDING**

First and foremost, because of their comparatively limited knowledge and understanding of the world, children do not perceive and process information in the same way as adults. A child may recognise only a red car where an adult would notice a red hatchback or a red Corvette. This necessarily affects the way in which information is encoded for recall, which in turn affects what is able to be recalled on demand.

Second, the amount of information which a child can perceive and register, in a memory of an event or series of events, advances with age. As a child matures, the ability to record details for later recall becomes more sophisticated.

Third, children are in the process of developing a sense of the passage of time. This includes the passage of minutes and hours as well as the passage of months and even years, and can be of particular difficulty in relation to both adult and child witnesses testifying to events which occurred a number of years earlier.

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<sup>96</sup> [1982] 1 S.C.R. 811.

When giving evidence, events of importance in a case must often be tied to significant events in the child's life, such as birthday parties and other festive celebrations, visits, trips, school years, and other locators which can be fixed in time by other evidence, if necessary.<sup>97</sup> A sense of time is estimated to develop at the age of ten years.<sup>98</sup>

Fourth, children *are* capable of distinguishing fantasy from reality. What further puts the lie to this fallacy is the fact that children are unlikely to fantasise about matters which end up in court and are usually incapable of doing so due to lack of experience; “[t]he cognitive and imaginative capacities of young children simply do not enable them to fantasize about sexual episodes, particularly in ... explicit detail”.<sup>99</sup>

#### **(ii) ENCODING AND RECALL OF MEMORIES**

The encoding of memories, as they move from short-term memory to long-term memory, is also understood to be much less effective in children than it is in adults.<sup>100</sup> Encoding strategies, the ways in which the brain categorises and files the memories, commence with the selection of the salient aspects of an event. Whether a detail is considered salient and therefore encoded will depend on the maturity of the child.

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<sup>97</sup> Susan C. Potts, “The Child Witness and the Search for Truth” (1993) 17 (2) *Prov. Judges J.* 17 at 19.

<sup>98</sup> Ontario Law Reform Commission, *Report on Child Witnesses* (Toronto: Ontario Law Reform Commission, 1991) at 17.

<sup>99</sup> *Ibid.* at 13.

<sup>100</sup> Ceci & Bruck, *supra* note 85 at 255.

In one study children were interviewed about important events, including a visit to the doctor, and the following findings reported:

[T]here were significant age differences in children's immediate and delayed recall .... [A]s the delay intervals increased, there was notable forgetting among the youngest children; they were increasingly inaccurate ... [However, s]even-year-olds did not show impairment until a delay of between 6 and 12 weeks  
<sup>101</sup>  
....

Therefore, interviews conducted shortly after an incident has occurred are likely to be more complete than those conducted at later dates. Based on this finding, videotaped interviews with a child may be admissible where the recorded interview took place "within a reasonable time" of the incident.<sup>102</sup> The inference here is that the child's recall is likely to be more complete and therefore more accurate as an overall picture of what occurred.

The way in which children recall events also develops as they mature. Encoding strategies dictate the way memory can be accessed, and the information contained within retrieved, and form part of both the recording and recalling of events. Furthermore, knowledge of cause and effect assists in recalling the memory in the correct order:

The amount and structure of knowledge can lead to different inferences about witnessed events. Usually, increased knowledge facilitates accurate recall (although not invariably). For example, children's memory for events that transpired during a doctor's visit is related to their knowledge of the types of activities that usually occur in a doctor's office ... Another example of this principle is provided by a recent study of pre-school children's recall of a fire

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<sup>101</sup> *Ibid.* at 71-72, discussing research published in P.A. Ornstein, L.R. Shapiro, P.A. Clubb & A. Follmer, "The Influence of Prior Knowledge on Children's Memory for Salient Medical Experiences," in N. Stein, P.A. Ornstein, C.J. Brainerd & B. Traversky, eds., *Memory for everyday and emotional events* (Hillsdale, N.J.: Erlbaum, in press).

<sup>102</sup> See Lucy S. McGough, *Child Witnesses: fragile voices in the American legal system* (New Haven: Yale University Press, 1994) c. 9. The arguments on video recording for this and other reasons are also discussed in Ceci & Bruck, *supra* note 85 at 248ff.

drill at their day care<sup>103</sup> ... In this study, very young pre-schoolers, but not older ones, erroneously recollected some of the events because of their lack of understanding of the causal structure of the event. For instance, younger children recollected that they first left the building and then heard the fire drill.<sup>104</sup>

Moreover, psychological studies suggest that the difficulties that children experience in recall can also be a matter of linguistic development and understanding, rather than simply attributable to memory. At the simplest level, a child may not be able to articulate what happened. Drawings or acting out events can circumvent this problem. At a more complex level, it will affect the operation of the child's memory. If a child is asked a question in a way which does not correspond with the child's understanding of an event, the child will not be able to recall as completely as when asked a question which reflects the way the child would have thought about an incident when it occurred. However, it is also an issue of how children reference and attempt to retrieve memories. Studies in the United States have shown that children are able to recall more completely if they receive "cues", either by the use of background questions or by revisiting the scene.<sup>105</sup> Therefore, it would seem that investigators and examiners need to be careful or cognisant of the way they frame questions to a child witness, in order to elicit the desired information.

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<sup>103</sup> D.B. Pillemer, M.L. Picariello & J.C. Pruitt, "Very Long-term Memories of a Salient Event" (1994) 8 *Appl. Cog. Psychol.* 95, cited in Ceci & Bruck, *ibid.*

<sup>104</sup> Ceci & Bruck, *ibid.* at 254. This concerns the constructive or reconstructive nature of memory discussed in Chapter One.

<sup>105</sup> Kapardis, *supra* note 86 at 103.

### (iii) SUGGESTIBILITY AND INTERVIEWING TECHNIQUES

One of the strongest allegations made against children as witnesses is that they are extremely suggestible. The implication is that if an adult strongly suggests that something happened, the child will believe that it did. Psychological research on this matter is somewhat ambivalent, indicating that although children may be misled, particularly by aggressive, leading questioning, they may in fact be only marginally more suggestible than adults.<sup>106</sup> Again, the younger the child, the more suggestible he or she may be.

The most effective suggestions achieved in psychological studies seems to be to convince subjects (incorrectly) that minor extraneous events took place during a major event; but not that the major event did or did not take place. Research conducted in 1995 showed that misleading questions in interviews could lead some children to mistake which of two doctors gave them shots, and whether or not minor checks (e.g. of nose and ears) took place.<sup>107</sup> However, in other studies, children, particularly younger children, responded to questions of a sexual nature with horror, embarrassment and amusement:

[B]oth Ornstein and Goodman<sup>108</sup> have commented on the behaviors of children when they are asked misleading or silly questions. In defense of the position that children cannot be easily led to make false allegations about "sexual" events, they note that the children often laughed at these questions, refusing to take them seriously. .... [A]t times their answers to some of the interviewers'

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<sup>106</sup> This is discussed at length in Ceci & Bruck, *supra* note 85, particularly c. 9-17.

<sup>107</sup> M. Bruck, S.J. Ceci, E. Francoeur, & A. Renick, "I hardly cried when I got my shot!": Influencing children's reports about a visit to their pediatrician" (1995) 66 *Child Development* 193-208, cited in Ceci & Bruck, *supra* note 85 at 75.

<sup>108</sup> Ornstein, Shapiro, Clubb & Follmer, *supra* note 101. Gail Goodman, "Commentary: On Stress and Accuracy in Research on Children's Testimony", in J. Dorts, ed., *The Suggestibility of Children's Recollections* (Washington D.C.: American Psychological Association, 1991) 77-82.

"abuse questions" seem playful, and at times they seem horrified that an adult would even ask such questions.<sup>109</sup>

It is not therefore clear what conclusions can be drawn about children's suggestibility in relation to allegations of sexual abuse. Current research is focussing more on the structure of interviewing techniques and the effect on children's memory of particular methods of asking questions and discussing events, to determine the extent, if any, to which suggestibility is a factor in the recollections of children.

#### **(iv) DIFFICULTIES EXPERIENCED BY THE CHILD WITNESS**

The problems experienced by children in remembering events are further exacerbated by the conditions of testifying. The solemnity of the courtroom, isolation in the witness-box, presence of the accused, and the attention of a number of adults often combine to make giving evidence a stressful experience for the child. This in turn can interfere with the child's comprehension and recall.

A further factor in children's testimony is the fact that children may not be able to understand the same forms or phrasing of questions as adults. Depending on their age, they may lack the confidence to explain their confusion or to ask the interrogator to rephrase, resulting at best in silence or a response of "I don't know". These responses are, in an adult, considered as undermining credibility. Moreover, some children will incorrectly assent to questions because they simply

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<sup>109</sup> Ceci & Bruck, *supra* note 85 at 72.

do not understand them,<sup>110</sup> rather than risk embarrassing themselves, the interrogator, or both. Researchers have, however, concluded that coaching a child to indicate when she does not understand a question can be effective.<sup>111</sup> Finally, when recounting memories, just as it is when recording, children may not appreciate the importance of details which are nevertheless within recall. In the courtroom this can result in potentially embarrassing omissions. Studies have shown that such omissions can be rectified by alternative and innovative questioning, such as asking the child to recount the events backwards, or through the imaginary eyes of a third party.<sup>112</sup>

#### **A FURTHER CONSIDERATION - LIES**

Finally, unrelated to memory at all, it must also be remembered that children, like adults, may lie for particular reasons. In studies, these reasons have included (i) helping an adult avoid "getting into trouble"; (ii) because they were told it was part of a game; (iii) to avoid punishment; (iv) for personal reward; and (v) to avoid embarrassment.<sup>113</sup> Research is still being conducted into the question of children's motivations to tell the truth.<sup>114</sup> Some studies have suggested that younger children may be less likely to lie than adults because they believe the

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<sup>110</sup> *Ibid.* at 257-58.

<sup>111</sup> *Ibid.* at 120.

<sup>112</sup> These techniques were successfully implemented in a United States study: Ronald P. Fisher & R. Edward Geiselman, *Evaluation and Field Implementation of the Cognitive Interview* (Final Report for National Institute of Justice, 1987), cited in Potts, *supra* note 97 at 21.

<sup>113</sup> A series of studies is discussed in Ceci & Bruck, *supra* note 85 at 262-266.

<sup>114</sup> One 1996 study indicated that children aged 7 to 9 seemed to perceive telling the truth in court as a way to avoid punishment, whereas children aged 11 to 13 seemed to appreciate the importance of upholding the laws and rules of society. Kapardis, *supra* note 86 at 95-96.

judge will know; adults are more cynical.<sup>115</sup> However, as the focus of this thesis is memory this point will not be taken any further.

#### **A LEGAL RE-APPRAISAL OF CHILDREN'S EVIDENCE**

The divergence between the conclusions of psychology in relation to children's memory and the approach of the law was recognised and formalised in a report to Parliament in 1984, known as the Badgley Report.<sup>116</sup> The simple effect of the report was to suggest that the evidence of children was much more reliable than the law allowed, and recommended amendments to the law of evidence to reflect this. Courts and legislatures in England, the United States, Australia and New Zealand, as well as in Canada, have taken steps to rectify the law's approach to children as witnesses, and to assist in reducing the problems associated with the way they had been expected to testify. Other reports, both federal and provincial, have followed.

Among the statutory amendments brought about as a result of the Report were several which concern this thesis. The requirement that a child's unsworn evidence be corroborated was repealed from federal statutes.<sup>117</sup> A new s.16 was inserted into the *Canada Evidence Act*, requiring that witnesses under fourteen be examined to determine whether the witness understands the nature of an oath or

<sup>115</sup> Ontario Law Reform Commission, *supra* note 98 at 17.

<sup>116</sup> *Report of the Committee on Sexual Offences Against Children and Adolescents* (Ottawa: Supply & Services Canada, 1984). The Report was followed in 1990 by a further report recommending similar legal changes: *Reaching for Solutions: The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada* (Ottawa: Health & Welfare Canada, 1990).

<sup>117</sup> For the provincial statutes, which have and have not made similar amendments, see note 92 *supra*.

affirmation, and whether the witness is able to communicate the evidence. If the witness cannot be sworn but is able to communicate the evidence, the witness must promise to tell the truth. Unsworn evidence is therefore allowed on the basis of ability to communicate the evidence.<sup>118</sup> Second, alternate ways for children to give their evidence were put in place. These are discussed in further detail below. The mandatory warning to triers of fact, to the effect that care be taken in convicting on the uncorroborated evidence of a child, was abrogated by s.659 of the *Criminal Code*. Other proposals, such as reform of the hearsay rule, have not been enacted.<sup>119</sup> However, as discussed below exceptions have developed at common law.

The attitude of the courts toward child witnesses has followed the lead of the legislature. In a series of decisions, the Supreme Court of Canada has reinforced the conclusion that children's memory and testimony permits much more reliability than previously thought. First, the Court has recognised the problems faced by children in the courtroom:

[In *R. v. W.(R.)*] McLachlin J. acknowledged that the peculiar perspectives of children can affect their recollection of events and that the presence of inconsistencies, especially those related to peripheral matters, should be assessed in context. A skilful cross-examination is almost certain to confuse a child, even if she is telling the truth. That confusion can lead to inconsistencies in her testimony.<sup>120</sup>

This recognition by our leading court has set the tone for a new approach to the reception of children's evidence.

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<sup>118</sup> The amendment has been criticised on the grounds that there is effectively no distinction between sworn and unsworn evidence. See Ontario Law Reform Commission, *supra* note 98 at 33.

<sup>119</sup> Although, in comparison, some 27 states in the United States have enacted special exceptions relating to children.

Second, the Court has confirmed that there need be no corroboration of a child's unsworn evidence. In *R. v. W.(R.)*, the defendant's appeal against conviction had been allowed by the Court of Appeal of Ontario on the grounds that the evidence of the three young female complainants was unconfirmed.<sup>121</sup> In allowing the Crown appeal to the Supreme Court, and restoring the conviction, McLachlin J. stated:

The law affecting the evidence of children has undergone two major changes in recent years. The first is removal of the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution. Thus, for example, the requirement that a child's evidence be corroborated has been removed. ... The repeal ... does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults.

...

The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. ... Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection.<sup>122</sup>

Third, the Court has indicated that warnings to the jury of the dangers of convicting on the basis of a child's evidence are no longer mandatory, but may still be used where the judge considers them appropriate.<sup>123</sup> Whether or not a warning ought to have been given remains a question of law and can form the basis of an appeal. No particular phraseology is required.

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<sup>120</sup> *R. v. F.(C.)* [1997] 3 S.C.R. 1183 at 1205 per Cory J.

<sup>121</sup> *Supra* note 95 at 128.

<sup>122</sup> *Ibid.* at 132-33.

<sup>123</sup> *R. v. W.(R.)*, *ibid.*; *R. v. Vetrovec*, *supra* note 96 at 831, per Dickson J. (as he then was).

Fourth, the inquiry into the capacity of the child remains largely unchanged. The court must still only determine capacity and cognition. As with adult witnesses, no inquiry need be made as to the witness's capacity at the time the incident occurred. McLachlin J. recognised this in *R. v. Marquard*:

It is necessary to explore in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court. .... It is not necessary to determine in advance that the child perceived and recollects the very events at issue in the trial as a condition of ruling that her evidence be received. That is not required of adult witnesses, and should not be required for children.<sup>124</sup>

For the most part, the major concern of such inquiries is whether the particular child understands the duty to tell the truth when testifying.

Fifth, the court has in one instance gone so far as to create an exception to the hearsay rule in order to admit the testimony of a child. The exception, set out in *R. v. Khan*,<sup>125</sup> allows hearsay evidence of a child's statement where it is reasonably necessary and reliability can be inferred from the circumstances of the statement. This comes close to allowing surrogate evidence. The court allowed hearsay evidence of a child's statement of what had occurred as told to her mother where the child had been ruled incompetent to testify. This exception has since been extended to other witnesses and is not limited to children.

With these changes in mind, the ways in which children can be accommodated in the courtroom will be briefly outlined, followed by a discussion of the issue of expert evidence.

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<sup>124</sup> [1993] 4 S.C.R. 223 at 236-237, per McLachlin J.

<sup>125</sup> *Supra* note 56.

### **NOVEL MEANS OF ACCOMMODATING CHILDREN AS WITNESSES**

As previously noted, a number of factors in the environment of the courtroom may affect the completeness and accuracy of the testimony of children. They relate to memory only inasmuch as the environment affects the ability of the recall function of memory, although this is considered a serious problem:

There is a growing realization that a legal system which exacerbates rather than minimizes the anxiety of a child, may be responsible for incoherent or incomplete testimony.<sup>126</sup>

Much of the courtroom pressure experienced by a child is part of the environment intended to bring home to all witnesses the necessity to tell the truth and the solemnity of the situation. The stresses of the environment include the following:

- (i) the presence of the defendant, who has a right to confront witnesses;<sup>127</sup>
- (ii) examination and cross-examination by lawyers (with consequent problems of communication and understanding);<sup>128</sup> and
- (iii) the presence of other strangers.

These pressures can be overwhelming to a child and affect him or her to the detriment of the child's testimony.

Solutions recommended and enacted following various reports include allowing evidence-in-chief to be given by way of previously recorded videotaped

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<sup>126</sup> Ontario Law Reform Commission, *supra* note 98 at 5.

<sup>127</sup> Inferred from the *Charter of Rights and Freedoms*, s.7; U.S. Const amend. VI. Courts have found that the right is not infringed by the solutions set out here. See *R. v. M.E.R.* (1989), 49 C.C.C. (3d) 475 (N.S. S.C.).

<sup>128</sup> "Many social workers and psychologists contend that the adversarial system is responsible for the short or long term psychological damage suffered by children as a result of testifying in court." Ontario Law Reform Commission, *supra* note 98 at 71.

interview;<sup>129</sup> allowing the witness to give evidence by video link (sometimes one-way only);<sup>130</sup> or allowing the witness to give evidence from behind a screen.<sup>131</sup> Cross-examination may even be limited or regulated.<sup>132</sup> Simple measures such as clearing the courtroom and allowing a loved one or favourite toy to be near or in the witness-box have been effective.<sup>133</sup> Not unimportantly, preliminary studies suggest that the effects of these measures on the interests of defendants may be benign. Two studies using mock juries, in the United States and in England, concluded that there was no discernible effect on the verdict of removing the child physically from the courtroom, or using a videotape of the child's evidence. Data in one actually suggested that it may reduce the likelihood of a guilty verdict.<sup>134</sup>

#### **PSYCHOLOGICAL EXPERTS AND THE CHILD WITNESS**

The law must also address the prejudices of the jury, which reflect in part the erroneous assumptions on which the law was previously based. The defence will often attack the evidence by building on those prejudices, bringing into question the child's ability to recall correctly, undermining the child's credibility by questioning his or her ability to tell fantasy from reality, and so forth. In these instances, whether the matter has been raised by the defence or not, the court must

<sup>129</sup> *Criminal Code*, R.S.C. 1985, c.C-46, s.715.1. Note that the child must still give evidence at trial, adopting the contents of the videotaped statement and is then subject to cross-examination. In some jurisdictions arrangements may be made for the child's evidence, including cross-examination, to be videotaped in advance of trial and the tape played instead of requiring the child to be present.

<sup>130</sup> *Criminal Code*, R.S.C. 1985, c.C-46, s.486(2.1).

<sup>131</sup> *Criminal Code*, R.S.C. 1985, c.C-46, s.486(2.1).

<sup>132</sup> Under s.18.6 of the *Ontario Evidence Act*, R.S.O. 1990, c.E-23, the court may altogether prohibit cross-examination of a child witness or provide alternate means of putting questions to the child witness.

<sup>133</sup> Ontario Law Reform Commission, *supra* note 98 at 92.

determine whether expert evidence ought to be allowed where the prosecution seeks to rehabilitate or reinforce the child's testimony (e.g. by calling evidence as to the efficacy of children's memory or the reasons for delayed reporting) or where the defence seeks to undermine the child's testimony (e.g. by calling evidence as to the fallibility and suggestibility of children's memory). In many cases, if left unchecked, it can become a "battle of experts".

Moreover, the use of expert evidence in these circumstances may unnecessarily confuse what are otherwise clear questions of credibility. The solution appears to require no more than an assessment of utility. Thus, where the case has not raised difficult scientific issues there is likely to be little need for expert evidence. In qualifying an expert, which will be discussed more thoroughly in Chapter Five, the two critical questions are whether the opinion to be given by the expert is accepted by the scientific community, and whether the evidence would be of assistance to the trier of fact.<sup>135</sup> While expert evidence on children's memories and recall can therefore be extremely useful to the trier of fact, the expert must not give evidence on the ultimate issue of whether or not the child is being truthful and accurate.<sup>136</sup>

The law's new found inclusionary approach to children's evidence is an obvious and necessary step forward in prosecuting cases of child sexual abuse. The law has made great efforts to apprehend and the unwarranted distrust of

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<sup>134</sup> Kapardis, *supra* note 86 at 99.

<sup>135</sup> *R. v. Mohan*, [1994] 2 S.C.R. 9.

<sup>136</sup> *Ibid.*; *R. v. Burns*, [1994] 1 S.C.R. 656.

children as witnesses. What has replaced it is not a complete trust in children, but the common sense approach advocated by Wigmore almost 60 years ago:

A rational view of the peculiarities of child nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure the a priori degree of untrustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible ... is futile and unprofitable. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other hand the rooted ingenuousness of children and their tendency to speak straightforwardly what is on their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth.<sup>137</sup>

However, it is clear that no justifiable generalisations can be made about the testimony of children. There are simply too many dynamic factors involved in determining whether a child's memory of an event is reliable or not. Each potential witness must be considered individually, with the understanding that he or she may provide accurate and reliable evidence. However, these are child witnesses, and their ability to testify coherently and comprehensively should not be subjected to the standards of credibility to which adult witnesses are exposed.

## CONCLUSION

It is clear that it is not at all conducive to group witnesses into discrete classes, such as eyewitnesses, children, and even recovered memory complainants, and then apply generalisations about memory to all members of the class. Generalisations must only be employed as a basis for investigating each individual witness rather than directly drawing conclusions about the reliability of the witness's evidence:

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<sup>137</sup> John Henry Wigmore, *Wigmore on Evidence*, 3d ed. (Boston: Little, Brown, 1940), discussing *Hughes v. R. Co.* 65 Mich. 10, 31 N.W. 605 (1887), cited in Ceci & Bruck, *supra* note 85 at 48.

The logic beneath this is readily apparent: if the trial process is a search for the truth, then misplaced assumptions about human behaviour which drive the trier of fact to draw incorrect inferences from the evidence must be unmasked if this process is not to be subverted rather than furthered.<sup>138</sup>

The same applies to assumptions about memory; the “courts should recognise that memory is not an entity, and should recognise that one part may be accurate, another inaccurate.”<sup>139</sup> Like eyewitness and children’s memory, the recovered memory/ false memory controversy is currently presenting a challenge to the law. In answering that challenge, the law must determine which of the conclusions of psychology it will accommodate. Although “[m]emory in both law and knowledge is uncertain, [the] law can be made to conform to the knowledge of memory with greater fairness and precision than it has so far demonstrated.”<sup>140</sup>

The next two chapters sketch out the contours of the recovered memory and false memory positions. When considering the merits of the two views, it should be kept in mind that the law, like memory, is reconstructive. Although the law strives for the ideal of, or searches for, historical truth, in reality it will always fall short of that ideal. Ultimately it must “reconstruct” the event or events in question by piecing together the testimony of various witnesses with their personal narrative truths, the various forms of physical evidence, and expert evidence. The law, like memory, must also infer details to construct a

<sup>138</sup> *R. v. Marquard*, *supra* note 124 at 265-266, per L’Heureux-Dubé J., referring to the use of expert evidence to explain to the trier of fact the normal responses of children to certain types of situations.

<sup>139</sup> Gardner, *supra* note 47 at 407.

<sup>140</sup> Redmount, *supra* note 41 at 264.

comprehensive narrative of a past event upon which guilt or innocence can be found.



## **CHAPTER 3 RECOVERED (TRAUMATIC) MEMORY**

### **INTRODUCTION**

There are essentially two sides to the recovered memory/ false memory debate. This chapter will outline the repressed/recovered memory position, which argues that certain memories may become inaccessible to consciousness for a period of time and later recovered.<sup>141</sup> The false memory position, which argues the other side of the debate, will be discussed in Chapter 3.

I begin by discussing the Freudian origins of the theory of repression and how the concept has developed into its present form. I also look at dissociation, the main alternative explanation for how memory may become inaccessible, which threatens to displace repression as the dominant paradigm. Although consideration of these and other defence mechanisms is an important part of the debate, the preoccupation with the way in which memories become inaccessible has moved the focus away from the phenomenon of recovered memory itself. The question is not *how* memories may become inaccessible but whether in fact they *do* become inaccessible.

Resolving this question is initially a matter of labels and definitions. The terms “repressed”, “recovered”, and “false” are too emotive to be useful – in part due to their particular uses and partisan alignments. Therefore in this chapter I will sometimes employ the term “traumatic memory” to denote memory related to

traumatic events. The question then becomes whether traumatic memory functions differently from “normal” memory.

### A. THE ORIGINS OF REPRESSION - FREUD

Contrary to the implications of the current legal and psychological controversy concerning recovered memories, repression is not a novel concept. It was first made popular by Sigmund Freud in the early part of this century when he postulated that adult psychopathology originated in childhood or premature sexual experiences. According to Freud, the mind of the individual would repress memories of these traumatic encounters in an attempt to control the overwhelming anxiety accompanying such experiences.<sup>142</sup> Freud conceived of repression as a *defense* mechanism, which he alternatively referred to as “amnesia” and “unconsciously motivated forgetting,” and which he described as follows:

*...the essence of repression lies simply in turning something away, and keeping it at a distance, from the conscious...<sup>143</sup>*

The repressed memories would then become manifested as psychological and physical symptoms in adulthood. To treat or alleviate these symptoms, Freud

<sup>141</sup> I will be limiting my discussion to cognitive theories of memory although neurobiological differences have been noted between normal memory and traumatic memory.

<sup>142</sup> Sigmund Freud, *On Psychopathology: Inhibitions, Symptoms and Anxiety and Other Works*, Angela Richards, ed., James Strachey, trans. (London: Penguin Books, 1993) at 77, 214. For a brief outline of the historical development of the theory of repression, see Brett Khar, “The Psychoanalytic Concept of Repression: Historical and Empirical Perspectives,” in Sinason, *supra* note 1, at 51.

<sup>143</sup> Sigmund Freud, *Repression (1915)*, in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, James Strachey, ed., vol. XIV (London: The Hogarth Press, 1957) at 147 [emphasis in original].

believed that one simply had to make “the unconscious conscious,”<sup>144</sup> and bring about the return of the repressed. And such was the birth of psychoanalysis.<sup>145</sup>

Ironically perhaps, later in his career Freud revised his theory,<sup>146</sup> now commonly referred to as the seduction theory, declaring that repressed material pertained not to childhood sexual experiences as he had originally thought, but to “memorialized childhood fantasies and wishes which, being unacceptable to the more mature child, the child repressed.”<sup>147</sup> Having embodied each of the positions in the current controversy, Freud is often cited in the recovered memory/ false memory literature: by recovered memory advocates who herald him as the father of repression and the one who brought the issue of childhood sexual abuse to society’s attention; and by false memory supporters who, although they hold him out as a bit of a fraud, nevertheless favourably remark upon his recantation that his patients’ alleged “remembrances” were a construct of fantasy rather than reality.

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<sup>144</sup> Levine, *supra* note 46 at 301.

<sup>145</sup> Sigmund Freud, “Further Remarks on the Neuropsychoses of Defense,” in *The Standard Edition of the Complete Psychological Works Of Sigmund Freud*, James Strachey, ed., vol.III (London: Hogarth Press, 1956) 159 at 170.

<sup>146</sup> Interestingly some commentators have speculated that Freud revised the seduction theory, not because he sincerely believed that his patients suffered from repressed childhood sexual fantasies rather than repressed childhood sexual trauma, but because he could not brave the overwhelming professional and societal pressure which his theory incited. For a more detailed account of these speculations, see J.M. Masson, *The Assault on Truth: Freud’s Suppression of the Seduction Theory* (New York: Farrar, Straus & Giroux, 1984).

<sup>147</sup> Robert Galatzer-Levy, “Psychoanalysis, Memory, and Trauma,” in Appelbaum, Uyehara & Elin, *supra* note 16, 138 at 140.

## B. REPRESSED/ RECOVERED MEMORY

Repressed/recovered memory, also known as *delayed recall*, must be distinguished from *delayed disclosure*. Delayed disclosure occurs when a victim, although having a continuous memory of sexual abuse experienced as a child, refrains from disclosing the abuse until long after the abuse has ceased. Victims may delay disclosure for reasons including shame, fear, guilt, a failure to appreciate the harm inflicted upon them, or a failure to understand and avail themselves of the avenues of redress for such harm. Repression, or delayed recall, is the theory that some memories, such as those relating to childhood traumatic experiences, may be rendered inaccessible to the conscious mind for an indeterminate period of time and later recovered or returned to consciousness. By analogy, it involves “a process of selective amnesia in which the brain snips out certain traumatic events and stores the edited pieces in a special, inaccessible memory ‘drawer’.”<sup>148</sup>

The general concept of repressed/recovered memory involves the acceptance of three separate yet interrelated propositions:

First there is the *reality of the event*, that is, whether the recollection corresponds, in at least a general sense, to an actual event or set of events. Second, there is the *reality of the forgetting*, that is whether the individual was in fact unaware of the existence of the memory prior to the recollection experience. Third, there is the *reality of the recovery experience*, that is, whether the individual had a phenomenological experience of remembering incidents of sexual abuse of which they were previously unaware.<sup>149</sup>

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<sup>148</sup> Elizabeth Loftus & Katherine Ketchum, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (New York: St. Martin's Press, 1994) at 215.

<sup>149</sup> Jonathan Schooler, Miriam Bendiksen & Zara Ambadar, “Taking the Middle Line: Can We Accommodate Both Fabricated and Recovered Memories of Sexual Abuse?,” in *Recovered Memories and False Memories*, Martin Conway, ed. ( New York: Oxford University Press, 1997) 251 at 260 [emphasis in original].

Unfortunately, however, the term “repression” has not been limited to this meaning. It has been used to refer to alternative mechanisms which are thought to be the cause of the removal or segregation of anxiety-inducing memories from consciousness. In turn, other terms, which may simply be alternate labels for repression or alternate mechanisms, are also used interchangeably in the literature to refer to repression. These terms include amnesia, delayed recall, denial, disavowal, dissociation and dissociative amnesia, forgetting, psychogenic amnesia and “splitting”. Further, there are a number of psychological disorders which are thought to result from the operation of these mechanisms on the psyche. The following is a brief discussion of the prominent mechanisms and disorders encountered in the repressed/recovered memory literature.

#### **DISSOCIATION AND DISSOCIATIVE AMNESIA**

Dissociation, made popular by Freud’s contemporary Pierre Janet, appears to be displacing repression as the dominant paradigm in the repressed/recovered memory debate. Sometimes described as a “splitting of consciousness” or “the mind’s partitioning itself into two separate systems of consciousness,”<sup>150</sup> dissociation is defined as:

[a] defensive disruption in the normally occurring connection among feelings, thoughts, behaviours, and memories that is consciously or unconsciously invoked to reduce psychological stress during and after traumatic episodes...<sup>151</sup>

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<sup>150</sup> Murray Bilmes, “Repression, Dissociation, Memory,” in *Construction and Reconstruction of Memory: Dilemmas of Childhood Sexual Abuse*, Charlotte Prozan, ed. (Northvale, New Jersey: Jason Aronson, 1997) 21 at 29.

<sup>151</sup> Christine Courtois, “Delayed Memories of Child Sexual Abuse: Critique of the Controversy and Clinical Guidelines,” in Conway, *supra* note 149, 206 at 215.

Conceptually, repression severs traumatic material from consciousness and deposits it in the unconscious; whereas dissociation is a division of consciousness that allows traumatic material to be stored in one consciousness unbeknownst to the other (or others):

Repressive defenses aim to keep objectionable ideas from awareness altogether. Splitting defenses keep ideas available to consciousness but alter their meaning by changing their connections to other conscious ideas.<sup>152</sup>

Paralleling the repression theory, dissociated material is thought to reappear in the form of physical and psychological symptoms.<sup>153</sup> However, it is theoretically distinguished from repression because dissociation is understood to be able to occur both *during* and after trauma. According to the theory of repression, memories are made inaccessible only after the trauma has occurred. Conceptually, memories encoded while an individual is dissociating during trauma may be quite different from those memories which are dissociated from conscious recollection after trauma has taken place.

Dissociation is divided into several different types:

*Primary dissociation* is the splitting of the experience of overwhelming threat into somatosensory fragments which are not integrated into personal memory and identity. This fragmentation occurs in the context of an altered state of consciousness. Once a person has entered a traumatised state of mind, further disintegration of elements of personal experience may occur. This *secondary dissociation* may involve a separation between observing ego and experiencing ego, resulting in depersonalisation and derealisation – the person may experience mentally ‘leaving’ his or her body and observing it from a distance. In this state the person may be protected from the full impact of his or her potential pain and is thus a kind of natural anaesthesia. *Tertiary dissociation* occurs when the traumatised [person] develops complex and distinct ego states, each with a particular identity, cognitive, affective and behavioural; there may

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<sup>152</sup> Galatzer-Levy, *supra* note 147 at 146.

<sup>153</sup> Richard Kluft, “The Argument for the Reality of Delayed Recall of Trauma,” in Appelbaum, Uyehara & Elin, *supra* note 16, 25 at 43.

be varying degrees of awareness between ego states – what is known or experienced in one ego state may or may not be in another ego state.<sup>154</sup>

Primary and secondary dissociation are linked with dissociative amnesia, defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), as the “inability to recall important personal information, usually of a traumatic or stressful nature, that is too important to be explained by ordinary forgetfulness.”<sup>155</sup> Tertiary dissociation is identified with dissociative identity disorder (DID), formerly known as multiple personality disorder (MPD), where “a multiplicity of consciousnesses” with distinct personalities or identities are believed to be created within one person.<sup>156</sup> It is this extreme form of dissociative disorder which has been noted to occur frequently in individuals severely traumatised as young children.<sup>157</sup>

### **POST-TRAUMATIC STRESS DISORDER (PTSD)**

The symptoms of recovered memory complainants are often similar to those of post-traumatic stress disorder, and hence confused with the disorder. PTSD is defined by the DSM-IV as:

The development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.<sup>158</sup>

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<sup>154</sup> Mollon, *supra* note 20 at 75-76 [emphasis in original].

<sup>155</sup> *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington, DC: American Psychiatric Association, 1994).

<sup>156</sup> Mollon, *supra* note 20 at 76.

<sup>157</sup> *Diagnostic and Statistical Manual*, *supra* note 155.

<sup>158</sup> *Ibid.*

The individual's reaction to the traumatic event, characterised by "intense fear, helplessness or horror," is a significant element in the composition of the trauma.<sup>159</sup> Post-traumatic stress disorder has been identified in individuals who have been the victims of or exposed to "rape or assault, military combat, natural and manufactured disasters (airplane crashes, auto accidents, industrial accidents) and deliberate violence (torture, or death camps)."<sup>160</sup> In fact, "[f]or most of the twentieth century, it was the study of combat veterans that led to the development of a body of knowledge about traumatic disorders," which has contributed to the legitimacy of the disorder in victims of childhood sexual abuse.<sup>161</sup>

Post-traumatic stress disorder entails two seemingly contradictory symptoms related to memory function – the reliving or re-experiencing of the trauma and the marked inability to recall some or all of the trauma:<sup>162</sup>

Clinically observed data suggest that exposure to trauma often has two kinds of effects on memory for the traumatic event- ...[one], intrusive hypernesia for the trauma in the form of *flashbacks*, which can be described as brief dissociative episodes during which the trauma is reexperienced in sensorimotor form or as intrusive cognitive recollections....[and two], is the presence of disruptions in memory or even a complete nonorganic posttraumatic amnesia in which, for some period of time, all or part of the traumatic event is unavailable to recollection or is recalled in a fragmentary and vague manner.<sup>163</sup>

The intrusions are believed to represent "[t]he traumatic moment becom[ing] encoded in an abnormal form of memory, which breaks spontaneously into consciousness, both as flashbacks during waking states and as traumatic

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<sup>159</sup> *Ibid.*

<sup>160</sup> Harold Kaplan & Benjamin Suddock, *Comprehensive Textbook of Psychiatry*, v. 1, 5th ed. (Baltimore: Williams & Wilkins, 1989) at 1001-2.

<sup>161</sup> Judith Herman, *Trauma and Recovery* (New York: BasicBooks, 1997) at 28 and 32.

<sup>162</sup> Golier, Yehuda & Southwick, *supra* note 16 at 225-29.

<sup>163</sup> Pope & Brown, *supra* note 2 at 54 [emphasis in original].

nightmares during sleep.”<sup>164</sup> Due to the presence of flashbacks and its usual pattern of only partial amnesia, “the ‘amnesia’ associated with PTSD causes distress because the patient is aware that he or she has lost information.”<sup>165</sup> Although post-traumatic stress disorder may be distinguished from repressed/recovered memories, it is highly relevant to the current controversy because the disruptions of memory associated with it seem to result from the invocation of the same defense mechanisms as those which are believed to contribute to repressed/recovered memory.

### C. SEPARATING THE MECHANISM(S) FROM THE PHENOMENON

Although theories about the type of mechanism that may be at work in rendering memory of trauma inaccessible are germane to the recovered memory/false memory debate, “the issue of mechanism can and should be differentiated from the question of whether this class of experience occurs at all.”<sup>166</sup> Further, “[a]t a very minimum, we cannot argue against the possibility of recovered memory experiences on the basis that there is no existing way to explain them.”<sup>167</sup> What now needs to occur in the current debate is the separation of the mechanism(s) from the *phenomenon* of traumatic memory.

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<sup>164</sup> Herman, *supra* note 161 at 37.

<sup>165</sup> Golier, Yehuda & Southwick, *supra* note 16 at 228.

<sup>166</sup> Jonathan Schooler, “Seeking the Core: The Issues and Evidence Surrounding Recovered Accounts of Sexual Trauma” in *The Recovered Memory/ False Memory Debate*, Kathy Pedzek & William Banks, eds. (San Diego: Academic Press, 1996) 279 at 281.

<sup>167</sup> *Ibid.* at 289.

Most theories of memory and most memory research have been concerned with, developed, and applied to theories of *normal* memory. In contrast, *traumatic* memory is a theory which proposes that memories of traumatic experiences are encoded, processed, stored, and retrieved differently from those of normal memory. Therefore, the principles and conclusions arrived at in studies of normal memory cannot be validly abstracted to memory for trauma. Moreover:

The study of traumatic memories questions four basic notions about the nature of memory that have been shown to occur in the laboratory studies of scientists who look at memories of ordinary events: (1) that memory is flexible and integrated with other life experiences, (2) that memory generally is present in consciousness in a continuous and uninterrupted fashion, (3) that memory always disintegrates in accuracy over time, and (4) that memory is primarily declarative, i.e., that people can generally articulate what they know in words and symbols.<sup>168</sup>

Prior to examining the theoretical framework of traumatic memory, it is both useful and necessary to begin with a working definition of trauma. As noted above, “trauma” is an event in which the individual has experienced, witnessed or been confronted with an event or events that involved actual or threatened death, or serious injury, or threat to the physical integrity of the self or others.<sup>169</sup> However, trauma is not merely a physical experience but a psychological one with both objective and subjective elements. Its primary significance is found in “the ways in which a given individual subjectively experiences and tries to make sense out of whatever it is that has happened to them.”<sup>170</sup> A psychoanalytic definition of trauma, therefore, would focus on those “events whose intensity is such that the person is overwhelmed to the point of not functioning in any

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<sup>168</sup> Bessel van der Kolk, “Traumatic Memories,” in Appelbaum, Uyehara & Elin, *supra* note 16, 243 at 245.

ordinary psychological mode...[a definition encompassing] not only the event but also the subject's *response* to that event.”<sup>171</sup>

Trauma itself can be subdivided to take into account qualitative and quantitative differences that may be seen as having differential effects upon memory. For example, Lenore Terr has devised a “typology of trauma,” which separates trauma into one of two types. Type I trauma is defined by a single traumatic occurrence characterised by “unanticipated shock,” which she asserts is more likely to be recalled; type II trauma concerns repetitive or multiple traumatic events, the anticipation of which allows defensive mechanisms to be invoked in response and which may therefore render recall more unlikely.<sup>172</sup>

Another distinction can be made between group trauma or trauma which is endured with others, and trauma which is suffered by the individual alone. This latter category may prove to be a very significant distinction because those unable to verbalise their traumatic experiences do not consolidate memories of the trauma. Moreover, “[g]iven that thinking and talking about a past event constitutes a powerful means for enhancing subsequent recall of that event, it follows that events that are not thought about or talked about will not derive the

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<sup>169</sup> Taken from the section on post-traumatic stress disorder in the *Diagnostic and Statistical Manual*, *supra* note 155.

<sup>170</sup> Levine, *supra* note 26 at 303.

<sup>171</sup> Galatzer-Levy, *supra* note 147 at 142 [emphasis added].

<sup>172</sup> Lenore Terr, *Unchained Memories: True Stories of Traumatic Memories, Lost and Found* (New York: BasicBooks, 1994) at 11, 28. Terr’s typology of trauma, was specifically developed with specific reference to the trauma of childhood sexual abuse, although conceptually at least it is easily applicable to other traumatic experiences.

usual mnemonic benefits of rehearsal.”<sup>173</sup> Specifically consider the isolation of child sexual abuse:

An important earmark of childhood abuse is the fact that it is secretive, private, often repetitive, and often occurs at the hand of a caregiver with whom the child is likely to need to maintain his or her attachment. As a result, the child is alone in dealing with the consequences of the abuse, knowing that it is likely to reoccur. And, because the perpetrator often denies that anything inappropriate has occurred, the child is forced to carry on an “otherwise normal” relationship with the perpetrator on a daily basis.<sup>174</sup>

The silence of a sexually abused child can be attributed to many diverse sources: the shame and guilt of being a “participant”; the tendency of abusers to threaten the child with violence to themselves or others to quash any inclinations the child may have to disclose the abuse; and perhaps most telling, is the fact that “children have fewer mental capacities to construct a coherent narrative out of traumatic events,” they frequently lack the knowledge, maturity, and self-possession to make sense of what is happening to them.<sup>175</sup> However, the point is not to merely emphasise the lack of opportunity to speak about traumatic experiences but the lack of opportunity to share them with others:

This theory [of shareability] depends on the consequences of the fact that humans depend heavily on the sharing of information. In essence, it proposes that through the process of information sharing we recode internal material to be discrete – stable across space and time – and hence more easily communicable... Shareability theory suggests that memory for never-discussed events is likely to be qualitatively different from memory of events that have been discussed.<sup>176</sup>

Thus, it is proposed that sharing such experiences with others, which requires them to be put into narrative form, may consolidate and fasten memories in consciousness in a manner which enhances the likelihood of their being recalled.

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<sup>173</sup> Daniel Schacter, Kenneth Norman & Wilma Koutstaal, “The Recovered Memories Debate: A Cognitive Neuroscience Perspective,” in Conway, *supra* note 149 at 66.

<sup>174</sup> Kathy Pedzek & William Banks, eds., “Introduction,” in *The Recovered Memory/ False Memory Debate* (San Diego: Academic Press, 1996) at 1.

<sup>175</sup> van der Kolk, *supra* note 168 at 250.

## BETRAYAL TRAUMA

As suggested by the title of her book, *Betrayal Trauma: The Logic of Forgetting Childhood Abuse*, Jennifer Freyd has developed a particular theory of traumatic memory which pertains to childhood sexual abuse committed by a primary caregiver. She posits that it is primarily the betrayal, defined as “the violation of implicit or explicit trust. The closer and more necessary the relationship, the greater the degree of betrayal,”<sup>177</sup> which forms the trauma of childhood sexual abuse. Further, she contends that the “forgetting” of such betrayals is a logical, “natural and inevitable reaction to childhood sexual abuse.”<sup>178</sup>

Betrayal trauma theory posits that under certain conditions betrayals necessitate a “betrayal blindness” in which the betrayed person does not have conscious awareness, or memory, of the betrayal. A theory of psychological response to trauma, betrayal trauma builds from the belief that the degree to which a trauma involves betrayal by another person significantly influences the traumatized individual’s cognitive encoding of the experience of trauma, the accessibility of the event to awareness, and the psychological as well as behavioral responses.<sup>179</sup>

For abused children forgetting is more than just a coping mechanism but a survival instinct which is overwhelmingly concerned with the preservation of their social and physical environment:

All of the abused child’s psychological adaptations serve the fundamental purpose of preserving her primary attachment to her parents in the face of daily evidence of their malice, helplessness, or indifference. To accomplish this purpose, the child resorts to a wide array of psychological defenses...The child victim prefers to believe that the abuse did not occur. In the service of this wish, she tries to keep it a secret from herself. The means she has at her disposal are frank denial, voluntary suppression of thoughts, and a legion of dissociative reactions.<sup>180</sup>

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<sup>176</sup> Freyd, *supra* note 14 at 108, 111.

<sup>177</sup> *Ibid.* at 9.

<sup>178</sup> *Ibid.* at 3-4.

<sup>179</sup> *Ibid.* at 9-10.

<sup>180</sup> Herman, *supra* note 161 at 102.

Freyd has proposed seven factors which contribute to a greater likelihood of amnesia in children who have experienced abuse:<sup>181</sup>

- (1) the abuse was perpetrated by a caregiver
- (2) the abuser explicitly demanded silence from the child
- (3) alternative realities in the environment, explained by Freyd as situations where the abuse context differed from the nonabuse context so that the child victim could maintain a sense of normalcy in the nonabuse context
- (4) the child was isolated during the abuse
- (5) the abuse occurred when the victim was at a relatively young age
- (6) the caregiver provided alternative reality-defining statements
- (7) the child did not discuss the abuse.

A similar theory, referred to as “child sexual abuse accommodation syndrome”, was devised by Roland Summit to explain how children react to sexual abuse. More specifically, the theory describes “the dilemma faced by children who have been abused when they attempt to communicate their experience to potential caregivers. They sometimes hesitate to disclose abuse, and even retract disclosures. The reasons for this relate to a child’s limited options for coping in the face of prevailing adult indifference and disbelief.”<sup>182</sup> He has outlined five stages of accommodation: (1) secrecy; (2) helplessness; (3) accommodation and entrapment; (4) delayed, conflicted and unconvincing

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<sup>181</sup> Freyd, *supra* note 14 at 140.

<sup>182</sup> *Ibid.* at 51.

disclosure; and (5) retraction.<sup>183</sup> While his theory is particularly concerned with retractions of abuse, it is pertinent to the current debate because it also “counteract[s] commonly held myths that sexually abused children would tell about the sexual abuse without delay and with consistency...and restore[s] the credibility of children whose natural reactions to sexual abuse are often used as a reason to disbelieve them.”<sup>184</sup>

#### **D. THE STUDY OF TRAUMATIC MEMORY**

The birth and maturation of the theory of traumatic memory has been denounced as a clinical product rather than a scientifically proven phenomenon. Studies of traumatic memory suffer from two inherent difficulties; they usually involve a retrospective research design and are limited by the obvious ethical implications involved in studying subjects exposed to trauma. Retrospective studies, that is, studies which work backward from “subjects [who] do not display amnesia at the time of index evaluation, but are believed to have experienced amnesia in the past,”<sup>185</sup> have generally been regarded as scientifically inferior to prospective studies regularly employed by normal memory researchers which identify “victims of a known past traumatic event, and then [assess] their memories at the time of evaluation.”<sup>186</sup>

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<sup>183</sup> Roland Summit, “The Child Sexual Abuse Accommodation Syndrome” (1983) 7 *Child Abuse and Neglect* 177 at 182.

<sup>184</sup> Freyd, *supra* note 14 at 51.

<sup>185</sup> Harrison Pope, Jr., James Hudson, J. Alexander Bodkin & Paul Olivia, “Questionable Validity of ‘Dissociative Amnesia’ in Trauma Victims: Evidence from Prospective Studies” (1998) 172 *Brit. J. of Psych.* 210 at 210.

<sup>186</sup> *Ibid.*

However, a prospective study which figures prominently in the recovered memory literature is the one published by Linda Meyer Williams. In her study, Williams interviewed 129 women seventeen years *after* they had been brought to the hospital with sexual abuse injuries as children.<sup>187</sup> The purpose of the Williams study was to discover whether the women suffered at the time of interview, or had suffered at any time prior to the interview, a failure to recall the abuse they were known to have experienced in childhood.<sup>188</sup> She found that 38% of those interviewed failed to recall the abuse, although they disclosed other similarly personal information.<sup>189</sup> Further, her findings led her to conclude that the failure to recall was strongly correlated to age at the time the abuse occurred, the type and amount of force used, and the number of times the abuse occurred. Bessel van der Kolk, a well-known traumatic memory researcher, has reinforced the general proposition that “[t]raumatic amnesias tend to be age and dose related: the younger the age at the time of the trauma, and the more prolonged the traumatic event, the greater likelihood of significant amnesia.”<sup>190</sup>

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<sup>187</sup> Linda Meyer Williams, “Recovered Memories of Abuse in Women with Documented Child Sexual Victimization Histories” (1995) 8 J. Traumatic Stress 629.

<sup>188</sup> Her study has been criticized by Pope, Hudson, Bodkin & Olivia, *supra* note 185 at 210. They contend that the Williams study suffers from three shortcomings: (1) one third of the documented abuse in her study involved only touching and fondling rather than genital trauma, which they assert may not be sufficiently memorable and therefore failure to recall such experiences could be accounted for by ordinary forgetfulness; (2) 10% of the subjects in her study were under the age of three at the time of the abusive incident which could be explained by infantile amnesia; and (3) those failures to recall which do not fall into the prior two categories could be validly rationalised as non-disclosures.

<sup>189</sup> However, Pope, Hudson, Bodkin & Olivia, *supra* note 185 at 213, contend that Williams’ conclusion that her subjects’ failure to recall abuse, was actually a failure to report (non-disclosure) precipitated by the researcher’s failure to ask her subjects directly about the abuse.

<sup>190</sup> van der Kolk, *supra* note 168 at 249.

## E. RECOVERY OF TRAUMATIC MEMORY

For present purposes, the most useful definition of a recovered memory is “the emergence of an apparent recollection of childhood sexual abuse of which the individual had no previous knowledge.”<sup>191</sup> The basic distinction in the recovery of memories of childhood sexual abuse is drawn between memories recovered outside of therapy and memories recovered within the therapeutic environment. In the latter category, further distinctions are made concerning the types of therapeutic techniques employed in the restoration of memory. In addition to methods of recovery, the manner in which traumatic memories return is also a significant consideration.

Outside of therapy, memories of childhood traumatic experiences may be spontaneously recalled or “triggered” by contact with stimuli that correspond to the original traumatic event, such as the abuser or someone associated with the abuser, the physical environment, the activity, and the invocation of emotions associated with the abuse. Two separate but related memory concepts have been offered to explain how and why these memories may return in this fashion – “encoding specificity” and “context-dependent memory”. Encoding specificity refers to the notion that “the probability of retrieving a memory is maximised when the retrieval conditions correspond to the encoding conditions.”<sup>192</sup> Context-

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<sup>191</sup> S. Brandon, J. Boakes, D. Glaser & R. Green, “Recovered Memories of Childhood Sexual Abuse: Implications of Clinical Practice” (1998) 172 Brit. J. of Psych. 296 at 297.

<sup>192</sup> Schooler, Bendiksen & Ambadar, *supra* note 149, at 280.

dependent memory refers to “associative links with affective states – that is, the internal state provides associative links to the stored information.”<sup>193</sup>

Alternatively, memories of childhood traumatic experiences may be recovered while an individual is undergoing therapy. However, it is important to note that individuals who have been sexually abused as children enter therapy with varying degrees of remembrance. They may have no, partial or total recall of their traumatic experiences. Adult victims may therefore seek therapy to help make sense of the memories that have re-emerged in their consciousness. However, for incidents where memories return largely during the course of therapy, recovered memory theorists stress that:

There are several good reasons for why real memories of abuse may arise in the context of therapy. Therapy may provide the first opportunity for the person to feel safe enough to remember the abuse; the therapist may be the first person to ask the client about the abuse; and the client may have sought therapy because of memories just beginning to emerge, which are causing emotional crisis without the explicit understanding of the source of the crisis.<sup>194</sup>

This point must be emphasised in defence against the attempts of false memory advocates to discredit memories arising in therapy, and particularly, attempts to condemn many of the techniques used by therapists in the recovery of memories of childhood sexual abuse. A description of these techniques and their criticisms will be discussed in detail in the next chapter.

Memories of traumatic events which are recovered after a period of inaccessibility may return in a manner quite unlike the recall of normal memory. Traumatic memories generally do not suddenly come flooding back; instead they

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<sup>193</sup> Freyd, *supra* note 14 at 105-6.

are often described as returning in a fragmentary fashion - in bits and pieces, over the course of days, weeks, months and even years. Moreover, they may be experienced as visual images, feelings and emotions, as well as bodily sensations that may be more intangible and somewhat insensible in comparison to normal memories. These memories, at least initially, may not have an accompanying narrative that is coherent and comprehensible. It has been suggested that "one reason why traumatic memories may be difficult to consciously recall in a narrative episodic form is that they were never stored in such a form in the first place."<sup>195</sup>

However, it is the perceived accuracy or inaccuracy of recovered memories of childhood sexual abuse which incites the most controversy. Some recovered memory supporters, including Bessel van der Kolk, Lenore Terr and Linda Myer Williams have advocated "that in some ways traumatic memories may be more accurate than non-traumatic memories, because of the nature of the memory stores for the two different sorts of memories. Traumatic memories, according to this viewpoint, are not reconstructed narratives as are most memories, but the reactivation of undistorted sensory and affective traces."<sup>196</sup> In a sense, they are asserting that traumatic memories are not subject to the reconstructive effects of the consciousness and social influences the consciousness is exposed to, but instead are "frozen" in the unconscious unless

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<sup>194</sup> *Ibid.* at 55.

<sup>195</sup> *Ibid.* at 101, referring to Bessel van der Kolk, "The Body Keeps the Score: Memory and the Evolving Psychobiology of Posttraumatic Stress" (1994) 1(5) *Harvard Review of Psychiatry* 253.

<sup>196</sup> *Ibid.*

and until they are recovered. However, this assertion is not universally endorsed by recovered memory advocates. In fact most would more moderately assert that while accurate reports are indeed possible the accuracy of allegations of recovered memories of childhood sexual abuse should be assessed individually.

## CONCLUSION

As the next chapter will outline, although false memory advocates frequently attempt to keep the debate centred around concepts of normal memory, the same arguments may not be as readily abstractable to memory of trauma. That traumatic memory is an altogether different phenomenon from normal memory was well captured by Pierre Janet:

[Normal memory,] like all psychological phenomena, is an action; essentially it is the action of telling a story. . . . A situation has not been satisfactorily liquidated . . . until we have achieved, not merely an outward reaction through our movements, but also an inward reaction through the words we address to ourselves, and through the putting of this recital in its place as one of the chapters in our personal history . . . Strictly speaking, then, one who retains a fixed idea of a happening cannot be said to have a "memory" . . . it is only for convenience that we speak of it as a "traumatic memory."<sup>197</sup>

A theory of traumatic memory has strong implications for cases involving recovered memories of childhood sexual abuse. The first and most important question for the courts is whether the concept of traumatic memory is sufficiently accepted by the scientific community to be introduced in expert testimony, in support of claims that the complainant experienced a failure to recall the abuse for a period of time. Once the theory is accepted, the second question is how evidential rules should be developed to take into account issues which are

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<sup>197</sup> Herman, *supra* note 161, at 37, citing P. Janet, *Psychological Healing* (1919), vol. 1, E. Paul & C. Paul, trans. (New York: Macmillan, 1925) at 661-63.

particular to the prosecution of such claims. How the courts have responded and should respond to these questions will be addressed in Chapter Five.



## **CHAPTER 4 FALSE MEMORY**

### **INTRODUCTION**

A *false memory* can be defined as “the recollection of an event which did not occur but which the individual subsequently strongly believes (also called pseudo-memory or illusory memory).”<sup>198</sup> Essentially, recovered memory complainants can be divided into four broad categories:

1. Those who believe they have been abused and in fact have been abused.
2. Those who do not believe they have been abused and yet allege that they have suffered abuse.
3. Those who do not believe they have been abused but in fact have been abused (individuals suffering from repressed or traumatic memory).
4. Those who believe they have been abused but in fact have not been abused (individuals suffering from false memory syndrome).

Although the actual proportion of complainants which fall into each category is unknown, the false memory position suggests that repression is quite rare, or non-existent, and are therefore concerned with complainants falling into the last category, that is individuals who “assume new identities as ‘sexual abuse survivors’.”<sup>199</sup>

Established in 1992, the stated purpose of the False Memory Syndrome Foundation (FMSF) is:

To seek the reasons for the spread of False Memory Syndrome;

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<sup>198</sup> Brandon, Boakes, Glaser & Green, *supra* note 191 at 297 [emphasis added].

<sup>199</sup> False Memory Syndrome Foundation, booklet entitled, “Frequently Asked Questions.”

To work for the prevention of new cases of False Memory Syndrome;

To aid the victims of False Memory Syndrome, and to bring their families into reconciliation.

The Foundation describes the false memory syndrome in its literature as:

[A] condition in which a person's identity and interpersonal relationships are centered around a memory of traumatic experience which is objectively false but in which the person strongly believes. Note that the syndrome is not characterized by false memories as such. We all have memories that are inaccurate. Rather, the syndrome may be diagnosed when the memory is so deeply ingrained that it orients that individual's entire personality and lifestyle, in turn disrupting all sorts of other adaptive behavior. The analogy to personality disorder is intentional. False Memory Syndrome is especially destructive because the person assiduously avoids confrontation with any evidence that might challenge the memory. Thus it takes on a life of its own, encapsulated and resistant to correction. The person may become so focused on memory that he or she may be effectively distracted from coping with the real problems in his or her life.<sup>200</sup>

The theory of false memory syndrome is premised upon two characteristic traits of memory: one, the fallibility of memory; and two, the suggestibility of memory.

Further, the theory asserts that memory suggestibility becomes all the more consequential in therapy, which is argued to be a uniquely suggestible environment because of the techniques employed by therapists to recover memories. Therefore, false memory advocates maintain that memories recovered in therapy cannot be relied upon as having any correspondence to a historical event:

Memory is more than the re-instatement of the original perception; it involves the interpretation of details, judgment, estimates, and the correlation of related incidents. Imagination and suggestion are twin-artists ever ready to retouch the fading daguerrotype of memory.<sup>201</sup>

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<sup>200</sup> *Ibid.*

<sup>201</sup> Gardner, *supra* note 47 at 401.

Moreover, they assert that this lack of historical reliability, mandates that these memories should not be accepted as evidence in courts of law seeking the truth of an alleged event.

This chapter will outline the false memory argument: from the denial or minimisation of repression and dissociation; to a discussion of the two main tenets of the false memory argument, memory fallibility and suggestibility; to concerns about the techniques employed in recovered memory therapy; and finally a consideration of the evidence cited for the existence of false memory. In conclusion, there is a brief reply to the fundamental issues raised by false memory advocates on behalf of the recovered memory camp.

#### **A. NO PROOF FOR REPRESSION (OR DISSOCIATION)**

False memory advocates, generally identified as experimental psychologists, repudiate claims by recovered memory theorists, generally known as clinical psychologists, that repression, dissociation or other mechanisms of traumatic memory sufficiently account for chronicled instances of the absence of memory for certain kinds of traumatic experiences. They contend that these defense mechanisms are nothing more than clinical “anecdotes” or “vignettes” rather than empirically proven theories:<sup>202</sup>

Trying to prove repression is a bit like trying to disprove UFOs – a nearly impossible task. In some measure the best we can do is show that forgetting and remembering can be explained more easily in terms of normal memory processes. But given that the notion of repression has been around for nearly 100 years, hasn’t there been enough time for investigators to produce some solid

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<sup>202</sup> Some false memory supporters have even classified repressed memory as a “myth”. Refer to Loftus & Ketchum, *supra* note 148.

evidence for its existence as a mechanism underlying the forgetting and subsequent remembering of experiences?<sup>203</sup>

Some false memory supporters, who do not categorically deny the possibility that certain individuals may experience a form of amnesia for memories of childhood sexual abuse, nevertheless stress that it is an exceedingly uncommon occurrence. They contend that most victims possess continuous memories of the abuse, implying that it is simply unfathomable one could “forget” such intensely traumatic experiences.

## B. NORMAL MEMORY

False memory advocates do not directly acknowledge the argument that memory may function differently when exposed to trauma, or that traumatic memory may be an entirely different kind of memory altogether. Instead they employ normal memory concepts such as remembering and forgetting in order to explain, not how memory might become inaccessible, but that such an effect is unlikely to occur.

False memory advocates frequently superimpose theories of normal memory onto memory for trauma, largely premising their argument on two related reconstructivist attributes of memory: fallibility and suggestibility. Memory fallibility is the notion that memory is liable to error. Therefore, in the recovered memory context, memories created a considerable time in the past, which have

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<sup>203</sup> Ira Hyman, Jr. & Elizabeth Loftus, “Some People Recover Memories of Childhood Trauma That Never Really Happened,” in Appelbaum, Uyehara & Elin, *supra* note 16, 3 at 18. Similar assertions have been levied at dissociation, see Pope, Hudson, Bodkin & Olivia, *supra* note 185 at 210.

not been accessible to consciousness, and which may have been ‘recalled’ using dubious techniques, multiply the likelihood of error.

Memory suggestibility, often referred to as misinformation suggestibility, is the notion that if an individual is exposed to erroneous information after an event, some of the misinformation will be subsequently incorporated into the individual’s account of the event.<sup>204</sup> The entire theory of false memory is fundamentally premised on this concept, that is, that false memories are capable of being ‘implanted’ due to the inherent malleability of memory.

### C. RECOVERED MEMORY THERAPY

The false memory argument almost exclusively focuses upon memories recovered in therapy, reasoning that because memory is highly suggestible, and therapy is an unusually suggestible environment, memories of abuse recovered in therapy are, more often than not, iatrogenic<sup>205</sup> confabulations. Three elements are thought to contribute to the suggestibility of the therapeutic environment: one, the “social demands” of the therapeutic relationship; two, the trust placed in the therapist as an authority figure; and three, the “constructive nature of remembering” which is further complicated by “the difficulty of reality monitoring in [those] situations.”<sup>206</sup>

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<sup>204</sup> Brown, Scheflin & Hammond, *supra* note 4 at 25.

<sup>205</sup> “Induced inadvertently by the therapist or by the therapeutic procedures employed”; a term commonly used in this debate.

<sup>206</sup> Hyman, & Loftus, *supra* note 203 at 10.

False memory theorists allege that suggestion begins at the outset of the therapeutic relationship when therapists swiftly “diagnose” their patients as suffering from repressed memory on the basis of symptoms they believe to be consistent with childhood sexual abuse:

The main therapeutic error, according to the false memory advocates, is telling the patient during the initial evaluation [or shortly thereafter] that he or she is, or may be, a survivor of childhood sexual abuse. This emphatic statement, from a highly prestigious, credible source, who is presumed to be acting in the patient’s best interests, may be highly persuasive in implanting a *suggestion*, especially if the patient has no memory for the abuse and has never considered that his or her symptoms are in any way associated with abuse.<sup>207</sup>

In particular, they take exception to the “symptom checklists,” provided in the self-help literature, which cite a diverse array of symptoms, such as: depression; suicidal tendencies; self-mutilation and other self-destructive behaviours; nightmares; eating disorders such as anorexia and bulimia as well as overeating; substance abuse; sexual dysfunction, promiscuity, and other intimacy issues; poor body image; phobias, issues of anger, trust, boundaries and abandonment; as well as low self-esteem.<sup>208</sup> They warn that these symptoms are highly variable, over-inclusive, and equally indicative of any number of mental and physical disorders other than repressed memory of childhood sexual abuse. Moreover, they point out, “[w]hile it is generally accepted that childhood sexual abuse may cause certain symptoms in adults, it cannot be readily assumed that such symptoms in adults necessarily imply childhood sexual abuse.”<sup>209</sup>

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<sup>207</sup> Brown, Scheflin & Hammond, *supra* note 4 at 29 [emphasis in original].

<sup>208</sup> See E. Sue Blume, “The Incest Survivors’ Aftereffects Checklist,” in *Secret Survivors: Uncovering Incest and its Aftereffects in Women* (New York: John Wiley & Sons, Inc., 1990), and Ellen Bass & Laura Davis, *The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse* (New York: Harper & Row, 1988) at 33-39.

<sup>209</sup> Brown, Scheflin & Hammond, *supra* note 4 at 28.

Further, they hypothesise that therapists, after making premature diagnoses of repressed memory, prescribe self-help books such as *The Courage to Heal*,<sup>210</sup> and encourage their patients to attend group therapy for survivors of sexual assault. False memory supporters believe that these books are influential, along with the peer pressure environment of group therapy, in encouraging patients to imagine false, yet emotional and detailed narratives of abuse.

In addition to the suggestibility of the therapeutic relationship, false memory supporters decry “recovered memory therapy” as creating a mental environment which is uniquely conducive to the formation of false memories.<sup>211</sup> However, their term “recovered memory therapy,” is not used to describe “the name of a particular therapeutic technique; it is the label for a *class of therapies*”.<sup>212</sup>

This term covers a wide variety of therapeutic techniques which share three assumptions: (a) the patient’s current symptoms are caused by past traumatic experiences, (b) memories of these events have been lost to conscious recollection, and (c) restoration of conscious recollection (or at least acknowledgement that the trauma occurred) is essential to the successful treatment of the patient’s symptoms.<sup>213</sup>

These potently suggestive therapeutic techniques, “based on hand-me-down Freudian thinking,”<sup>214</sup> include but are not limited to “guided imagery, journaling, support groups, hypnosis, sodium amytal interviewing, visiting old home sites,

<sup>210</sup> Ellen Bass & Laura Davis, *The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse* (New York: Harper & Row, 1988).

<sup>211</sup> See Richard Ofshe & Ethan Watters, *Making Monsters: False Memories, Psychotherapy, and Sexual Hysteria* (New York: Charles Scribner’s Sons, 1994), an overwhelming condemnation of “recovered memory therapy”.

<sup>212</sup> John Kihlstrom, “The Trauma/ Memory Argument and Recovered Memory Therapy,” in Pedzek & Banks, *supra* note 166 297 at 299 [emphasis added].

<sup>213</sup> *Ibid.* at 298.

viewing of old photos, dream interpretation, and free association,”<sup>215</sup> as well as age regression, storytelling, and body massage. The following are brief descriptions of some of the techniques targeted by false memory proponents:

**sodium amytal interviewing** – an abreactive drug, when administered in small doses sodium amytal “produce[s] a sense of serenity and well-being with some disinhibition, which enable[s] some to speak easily of intimate thoughts and experiences.”<sup>216</sup> Sometimes referred to as a ‘truth serum’, it has been noted “to lead to disorientation, misidentification, and other errors and hallucinations.”<sup>217</sup>

**age regression** – often used in conjunction with hypnosis, age regression is a therapeutic technique where “[t]he patient is encouraged to regress to an age at which the abuse is thought to have occurred in order that, through both remembering and reliving the experience, some resolution and healing will take place.”<sup>218</sup>

**guided imagery** – this technique “involve[s] the creation of images, often minutely detailed, by a variety of introspective techniques sometimes amounting to self-hypnosis.”<sup>219</sup> The therapist directs the patient to concentrate on an image or a memory, usually of an alleged abusive event, and asks them probing and suggestive questions to attempt to elicit a more comprehensive memory of the alleged event.

**hypnosis** – not a uniformly defined concept, debates ensue “whether hypnosis is defined as an altered state or in terms of social psychological variables” and whether it “is a facilitator of treatment or a treatment in and of itself.”<sup>220</sup> However, the following excerpt provides a general overview of the process involved:

hypnosis is a phenomenon that is characterized by a *state of attentive, receptive concentration* containing three concurrent features: *dissociation, absorption, and suggestibility*, all three of which need to be present in varying degrees...[alternatively, it can be defined as] a procedure during which changes are suggested in sensations, perceptions, thoughts, feelings, or behavior. A *hypnotic context or state* is usually established through the use of an induction procedure, but may also occur spontaneously. People experience hypnosis differently, some

<sup>214</sup> Hyman, & Loftus, *supra* note 203 at 18.

<sup>215</sup> *Ibid.* at 4.

<sup>216</sup> Brandon, Boakes, Glaser & Green, *supra* note 191 at 300.

<sup>217</sup> Brown, Scheflin & Hammond, *supra* note 4 at 554.

<sup>218</sup> Brandon, Boakes, Glaser & Green, *supra* note 191 at 301.

<sup>219</sup> *Ibid.*

<sup>220</sup> Kluft, *supra* note 153 at 39.

describing it as an altered state of consciousness, others as a relaxed state of focused attention.<sup>221</sup>

The dangers foreseen in such therapy practices by false memory adherents are twofold: “first, they increase the risk of suggestion, and second, patients often come to believe strongly in the truth of therapy-induced false recollections.”<sup>222</sup> In sum, the false memory argument contends that the consciousness-altering techniques employed by recovered memory therapists create false, yet vivid, emotionally-charged and confident memories of childhood sexual abuse. Therefore, it is their staunch position that such memories cannot, and should not, be relied upon for their historical accuracy.

#### **D. PROOF OF FALSE MEMORY**

Although there have been no studies which have documented the creation of false memories of childhood sexual abuse, the most frequently cited study is Elizabeth Loftus’ “Lost in a Shopping Mall” experiment.<sup>223</sup> Heralded as evidence of the ability of suggestion to create false memories of an event, the study enlisted an older family member, to suggest to a younger sibling that they had been lost in a shopping mall at the age of five years old – an event which had never taken place. After having initially denied that the event had happened, the younger sibling voiced a detailed recollection of the incident including his feelings of being lost, and what the man who returned him to his family was wearing, looked

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<sup>221</sup> Brown, Scheflin & Hammond, *supra* note 4 at 288 [emphasis in original] [citations omitted].

<sup>222</sup> False Memory Syndrome Foundation, booklet entitled “Frequently Asked Questions.”

<sup>223</sup> Elizabeth Loftus, “The Reality of Repressed Memories” (1993) 48 American Psychologist 518-537.

like and what he said to him. Loftus concluded that a “false memory” for a moderately traumatic event had successfully been implanted.

In addition to studies documenting the suggestibility of memory, the false memory faction also offers recovered memories of fantastic occurrences such as satanic ritual abuse and alien abductions as evidence that false memory of such events can be created:

The accounts of satanic ritual abuse are the Achilles’ heel of the recovered memory movement. With no supported evidence, most reasonable people will eventually question the validity of satanic ritual abuse stories. . . Repressed memory therapy promoters are boxed in a corner. If they admit that these stories of satanic abuse aren’t true, they would have to admit their therapy methods have produced false accounts that clients have mistaken for memory.<sup>224</sup>

Similarly, they attribute retractions of recovered memories of childhood abuse to the operation of false memory syndrome.

Even if proof of recovered memory was possible, however, it should be noted that false memory proponents do not only seek empirical evidence of the phenomenon, they also demand strict corroboration of alleged instances of recovered memory of childhood abuse as the only means of establishing if such an event had actually occurred.

## **E. A RECOVERED MEMORY REPLY**

A succinct reply on behalf recovered memory would impugn false memory on the following grounds:

[T]he false memory controversy needs to be seen for what it is – more political than scientific, more the dissemination of propaganda than the distribution of

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<sup>224</sup> Ofshe & Watters, *supra* note 211 at 194, paraphrased in Brown, Scheflin & Hammond, *supra* note 4 at 57.

scientific knowledge, and more the strategic use of pseudoscientific arguments as social persuasion to influence public policy and sway juries than the articulation of lasting truths about the human condition.<sup>225</sup>

However, recovered memory adherents have also identified a number of specific flaws in the false memory argument. First, they argue that the false memory argument overstates “[c]laims about a new diagnostic category (FMS) reaching epidemic proportions, the ease with which extensive autobiographical memories about trauma can be implanted, and the large number of therapists engaging in behaviors likely to cause false memories of trauma in their patients”.<sup>226</sup>

Secondly, recovered memory advocates take issue with the manner in which the “falsity” of recovered memories is portrayed as a simple construct of memory suggestibility and memory fallibility - concepts associated with normal memory. They believe that traumatic memory does not fit into these normal memory paradigms, and that false memory theorists employ normal memory terms as a tactic to divert the debate away from the complex effects trauma exerts upon memory. Further, recovered memory advocates have noted that, “[o]ne of the most serious infractions of logic...[has been] linking repression with suggestion [as] part of an overall false memory strategy to promulgate the view that memory is fallible. However, this strategy confounds memory omission errors with memory commission errors,”<sup>227</sup> as well as confusing memory accuracy with memory completeness.<sup>228</sup>

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<sup>225</sup> Brown, Scheflin & Hammond, *ibid.* at 435.

<sup>226</sup> Pope & Brown, *supra* note 2 at 105.

<sup>227</sup> Brown, Scheflin & Hammond, *supra* note 4 at 390.

<sup>228</sup> *Ibid.* at 387.

Memory *accuracy* concerns “whether or not remembered information (output) actually corresponds to the original stimulus event (input),”<sup>229</sup> and has been linked with commission errors, that is errors which occur when a subject “remember[s] items that have no or only partial correspondence to the originally presented stimulus details.”<sup>230</sup> Memory *completeness*, however, concerns omission errors that occur when a subject fails to recall detailed stimulus information at a subsequent reporting of an event.<sup>231</sup> The false memory argument is therefore misleading because “[a]ccuracy and completeness are independent constructs. Terms like memory fallibility simply confuse the distinction and falsely imply that incompleteness means inaccuracy,”<sup>232</sup> inferring that if a recovered memory is incomplete or contains inaccuracies that it is proof the memory in question is historically untrue or ‘false’. False memory theorists fail to acknowledge that a memory may be incomplete yet accurate, or alternatively, that a memory may be complete, yet surprisingly inaccurate.

The false memory account of memory performance, gauged by fallibility and accuracy, places considerable emphasis on detail in memory recall. Recovered memory supporters endorse the view that “[t]he key issue is whether the *memory for the gist* of the past experience, like an abusive act, is accurate, not whether all of the details are accurately recalled.”<sup>233</sup> Moreover, they stress that measures of memory accuracy, or for that matter inaccuracy, are relative –

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<sup>229</sup> *Ibid.* at 81.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.* at 80.

<sup>232</sup> *Ibid.* at 199.

because memories contain both accurate and inaccurate information, the issue is not that a given memory contains inaccuracies but how many inaccuracies will render a memory of an event “fallible”.

Of course the suggestibility of memory is something which cannot be overlooked, particularly in the context of therapy. Although they may acknowledge that false memory advocates have usefully highlighted the need for proper regulation of psychotherapy practices in the area of recovered memories, recovered memory adherents feel that false memory advocates are guilty of “overstating the therapeutic dangers.” Instead of their sweeping attack upon “recovered memory therapy,” they assert that the false memory theorists should focus their attention on:

What type of therapy conducted by what type of therapist matched with what type of patient in what kind of treatment relationship and in what context and using what specific techniques is more, or less, likely to contribute to the generation of false memories for abuse?<sup>234</sup>

For example, they object to false memory’s undiscerning dismissal of hypnosis:

The central point is that the term *hypnosis*, when applied to a diverse array of therapies offered to a variety of individuals, encompasses a very wide and complex domain of phenomena and responses. General statements about hypnosis and its impacts must be regarded with caution. More often than not, when it is alleged that hypnosis has thus and so an effect, the truth is that hypnosis may have such an effect, but that such an effect is not inevitable. Often what is attributed to hypnosis is due to other factors in the treatment situation or in the scientific experiment.<sup>235</sup>

In addition, they allege that false memory theorists fail to acknowledge that individuals differ in their suggestibility and hypnotisability.<sup>236</sup> Although they

<sup>233</sup> *Ibid.* at 390 [emphasis in original].

<sup>234</sup> *Ibid.* at 35.

<sup>235</sup> Kluft, *supra* note 153 at 40 [emphasis in original].

<sup>236</sup> Pope & Brown, *supra* note 2 at 59.

advocate the responsible use of hypnosis, recovered memory proponents argue that the sole issue in a given case is not whether hypnosis or other suggestive therapies were used, but also whether the individual's susceptibility to suggestion has been assessed and considered.

Recovered memory adherents also dispute the 'proof' offered by false memory theorists for the existence of false memories. As example, they question "[h]ow good an analogy is [Loftus'] 'shopping mall' study for the creation of false memories by suggestion during therapy?"<sup>237</sup> They regard the study as "unreal" and not equivalent to the type and intensity of trauma involved in child sexual abuse; that the comparison of an ordinary childhood event, such as being lost, to the extraordinary childhood experience of being sexually abused by a trusted caregiver simply cannot be drawn.<sup>238</sup> They also doubt the validity of comparing the influence of a trusted family member, who claimed to be present when the sibling was lost, as opposed to an authority figure such as a therapist who clearly was not. However, false memory supporters seem to be aware of these discrepancies:

Details versus a whole event, mundane experiment versus emotionally arousing event, uninvolved observer versus involved participant – these are all differences that could conceivably make the introduction of errors more difficult. Certainly these differences limit the ability to make generalizations [for example] between eyewitness memory studies and suggestions of false childhood sexual abuse, unless we can demonstrate that memory errors work in a fashion similar to those involving whole, emotional, self-involving events.<sup>239</sup>

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<sup>237</sup> Mollon, *supra* note 20 at 15-16.

<sup>238</sup> Michael Yapko, "The Troublesome Unknowns about Trauma and Recovered Memories," in Conway, *supra* note 149, 23 at 26.

<sup>239</sup> Hyman & Loftus, *supra* note 203 at 18.

However, what we are left with is each side of the debate offering ‘proof’ which the other side finds unpersuasive. Moreover, obvious ethical considerations limit both recovered memory and false memory researchers in the kind of studies they can undertake to demonstrate the scientific validity of their claims. Consider “[w]hat might well be the only truly ecologically valid study that could satisfy extremists on both sides of the controversy is an experiment that *can never* and *should never* be done:”

The forbidden experiment would simply be this: have a thousand (or more) people seek psychotherapy voluntarily and with the positive motivation typical of therapy clients to obtain relief. Have their symptoms represent those typically included on the common symptoms checklist of incest or abuse survivors published in various recovery literature. All subjects must be magically but accurately certified as having absolutely no sexual abuse anywhere in their individual histories. Expose all subjects to persuasive therapists who are *genuinely* staunch believers that a history of abuse that is apparently repressed *must* be present (despite the subject’s denial) in order to account for their symptoms. Expose the subjects to various memory recovery techniques (for example hypnotic age regression, guided imagery, visualization, etc.) that are regularly and enthusiastically applied in treatment to ‘bring up and resolve’ repressed memories. Following some reasonable length of time in treatment, say six months or a year, determine how many members of the research population are now convinced utterly and completely that they were abused as children and have repressed the memories.<sup>240</sup>

The false memory argument demands a scientific rigorousness that may not be possible for memory for trauma:

One problem is that in order to study the effects of sexual abuse, the most researchers can do is carefully and systematically observe the phenomenon as it occurs naturally; ethical controlled experimentation is not possible. This does not make the study of sexual abuse necessarily less ‘scientific’ (astronomy and paleontology are examples of sciences that also must use methods of observation of natural phenomena), but it does make it less rigorously experimental.<sup>241</sup>

Moreover, false memory theorists seem to apply a double standard:

Another concern within the scope of the problem has to do with how memories are determined to be false. Proponents of the false memory theory are quick to

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<sup>240</sup> Yapko, *supra* note 238 at 26 [emphasis in original].

<sup>241</sup> Freyd, *supra* note 14 at 34.

point out that, in the absence of evidence or corroboration, a memory cannot be determined to be historically true. What they do not mention as readily, and in fact downplay, is how a memory is determined to be historically false when no corroboration is available for that position. These individuals allege memories to be false without hard evidence; they accept the denial of the accused abuser(s) as more accurate and truthful than the allegation of the [alleged] aggrieved party.<sup>242</sup>

The moderate recovered memory position would not deny that false memories can and do happen; but that memory for trauma can be rendered inaccessible for a period of time and later readmitted into consciousness. Like all memories, recovered memories of traumatic events such as childhood sexual abuse can be complete or incomplete, accurate and inaccurate; and perhaps this is to be expected in memory for trauma:

My thesis is that even when a trauma is historically true, it cannot be narrated with 99.44% purity. The human mental apparatus does not allow for total accuracy of recall. Perception and registration, storage, and retrieval of traumatic memory are all subject to interference. The surprise of traumatic events, the horror, the sadness, the confusion, the intensity, and the humiliation can interfere with human cognition and memory. Because terrible events are capable of creating so much feeling all at once, there is ample opportunity for a memory to become flawed or even absent with time. However, this does not mean that these memories are basically untrue.<sup>243</sup>

## CONCLUSION

Where do these conflicting views of recovered and false memories leave us? How can one make sense of what we know, what we think we know, and what we would like to know? Michael Yapko has helpfully enumerated five “truths”, admittedly poorly defined, that we know regarding memory in this context:

1. We know that child abuse and sexual trauma happen too frequently *no matter what the frequency is.*

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<sup>242</sup> Courtois, *supra* note 151 at 210.

<sup>243</sup> Lenore Terr, “True Memories of Childhood Trauma: Flaws, Absences, and Returns,” in Pedzak & Banks, *supra* note 166, 69 at 71.

2. We know that traumatic memories are formed in some ways that are different from normal memories.
3. We know that dissociation is a capacity that can be used defensively, giving rise to amnesia which may lift at a later time.
4. We know that memory can be highly reliable, we know that memory can be highly unreliable, and we know that memory can be influenced by a variety of factors, including suggestion and misinformation.
5. Regarding suggestibility, we know that people can be influenced by others even to the extreme. We know that misinformation provided by credible authorities with no apparent motive to deceive can be absorbed, and responded to as though it were true.<sup>244</sup>

That memory is fallible as well as suggestible is beyond doubt, that false memories can be created cannot be denied. However, it must be recognised that recovered memory and false memory are not mutually exclusive. With this in mind - how are we to assess claims of recovered memories of childhood sexual abuse? Some advocate that:

Clues to the probable reliability of a recovered memory lie in the circumstances of the recall, the beliefs of the individual, and any external influences, including memory enhancing techniques, the suggestive effects of books, media influence and direct suggestion.<sup>245</sup>

While others caution:

Vivid, affectively charged, and apparently genuine representations of repressed memory do not guarantee authenticity. Similarly, even directly expressed belief and blatantly suggestive questioning do not conclusively invalidate authenticity. We cannot, as yet, discriminate false from genuine recovered memory, either on the basis of process or presentation.<sup>246</sup>

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<sup>244</sup> Yapko, *supra* note 238 at 27 [emphasis in original] [citations omitted].

<sup>245</sup> Brandon, Boakes, Glaser & Green, *supra* note 191 at 303.

<sup>246</sup> B.B. Brenneis, "Belief and Suggestion in the Recovery of Memories of Childhood Sexual Abuse," (1994) 42 Journal of the American Psychoanalytic Association 1027 at 1049.

Without a foolproof way to distinguish between true and false claims of childhood sexual abuse, which is true of any testimony, how is the law to respond? This question is the focus of the next and final chapter.

## **CHAPTER 5      RECOVERED MEMORY: LEGAL & EVIDENTIAL ISSUES**

### **INTRODUCTION**

Like typical cases of child sexual abuse, historical claims of childhood sexual abuse are difficult to prove or disprove for lack of unequivocal corroborating evidence, leaving the jury to decide a credibility contest with only the complainant and the defendant as contestants. In historical cases, these difficulties are compounded by the passage of time between the alleged offence and trial. Physical evidence is lost and memories fade. The important difference in recovered memory cases is that the credibility of the complainant's *memories* will also be on trial.

This chapter will begin by looking at the few occasions where the Supreme Court has had the opportunity to consider the issue of recovered memory. It will then examine a number of evidential issues encountered by the lower courts in recovered memory cases. Although the focus here is on recovered memory in criminal cases, civil cases are also considered where common issues are raised. Moreover, the cases canvassed here concern alleged events which occurred anywhere from approximately ten to over sixty years<sup>247</sup> until the time of trial. Surprisingly, there has been very little discussion concerning the admissibility of recovered memories. The general trend is to address any perceived issues regarding the validity or reliability of recovered memory, in

general and in the context of particular allegations, as matters of weight rather than admissibility.<sup>248</sup> The issues which have featured in these cases and will be discussed in turn, include: corroboration in the form of prior consistent statements, similar fact evidence and hearsay; the credibility of recovered memory complainants and the reliability of their recollections; the legal effect of therapy on recovered memory; expert evidence; and, finally the use of false memory as a defence.

#### **A. RECOVERED MEMORY IN THE SUPREME COURT**

Recovered memory cases made their appearance in Canadian courtrooms in the early 1990's. Since then, the Supreme Court of Canada has given several major decisions which touch upon recovered memory. The first was in *R. v. L.(W.K.)*, which occurred in the context of an appeal against the refusal of a stay of proceedings based on the delay between the commission of the offence and the laying of the charge.<sup>249</sup> In dismissing that appeal the court declared:

For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting.

That delay in reporting sexual abuse is a common and expected consequence of that abuse has been recognized in other contexts.<sup>250</sup>

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<sup>247</sup> For example, in *H.A.W. v. Sisters of Charity of the Immaculate Conception*, [1999] N.B.J. No. 203 (Q.B.), per McLellan J., the alleged events took place between fifty and sixty-three years prior to trial.

<sup>248</sup> *R. v. Kliman* (1996), 107 C.C.C. (3d) 549 (B.C.C.A.) at 569, per Legg J.A. for the Court.

<sup>249</sup> *R. v. L.(W.K.)*, [1991] 1 S.C.R. 1091.

<sup>250</sup> *Ibid.* at 1101, per Stevenson J.

Although recovered memory was never explicitly referred to, the prosecution of claims of childhood sexual abuse, brought by adult complainants, was clearly within the contemplation of the Court.

The second case, *K.M. v. H. M.*,<sup>251</sup> was a civil claim where the plaintiff sued her father for damages arising from incest and for breach of fiduciary duty, over ten years after the sexual abuse had ceased. Once again the main issue concerned delay in the form of the limitations period for bringing such an action.

The Court again affirmed:

While the problem of incest is not new, it has only recently gained recognition as one of the more serious depredations plaguing Canadian families. Its incidence is alarming and profoundly disturbing. The damages wrought by incest are peculiarly complex and devastating, often manifesting themselves slowly and imperceptibly, so that the victim may only come to realize the harms she (and at times he) has suffered, and their cause, long after the statute of limitations has ostensibly proscribed a civil remedy.<sup>252</sup>

Although the plaintiff had continuous memories of her abuse, and the Court did not explicitly refer recovered memory as it is presently known, it did discuss the concepts and theories surrounding recovered memory and attributed them to “post-incest syndrome.” In finding that the doctrine of delayed discoverability applies to cases of incest, the Court was seemingly supportive of recovered memory claims:

The classic psychological responses to incest trauma are numbing, denial, and amnesia. During the assaults the incest victim typically learns to shut off pain by “dissociating,” achieving “altered states of consciousness . . . as if looking on from a distance at the child suffering the abuse.” To the extent that this defense mechanism is insufficient, the victim may partially or fully repress her memory of the assaults and the suffering associated with them: “Many, if not most, survivors of child sexual abuse develop amnesia that is so complete that they simply do not remember they were abused at all; or . . . they minimize or deny

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<sup>251</sup> [1992] 3 S.C.R. 6.

<sup>252</sup> *Ibid.* at 17, per La Forest J.

the effects of the abuse so completely that they cannot associate it with any later consequences." Many victims of incest abuse exhibit signs of Post-Traumatic Stress Disorder ("PTSD"), a condition characterized by avoidance and denial that is associated with survivors of acute traumatic events such as prisoners of war and concentration camp victims. Like others suffering from PTSD, incest victims frequently experience flashbacks and nightmares well into their adulthood.

....  
Although the victim may know that she has psychological problems, the syndrome impedes recognition of the nature and extent of the injuries she has suffered, either because she has completely repressed her memory of the abuse, or because the memories, though not lost, are too painful to confront directly. .... Often it is only through a triggering mechanism, such as psychotherapy, that the victim is able to overcome the psychological blocks and recognize the nexus between her abuser's incestuous conduct and her psychological pain.<sup>253</sup>

It should be noted that this discussion largely corresponds to that concerning recovered memory in Chapter Three. It could be argued that this case exhibits at least the tacit approval of the Supreme Court for recovered memory claims.

In the third case the Supreme Court had the opportunity to consider the issue of recovered memory directly. In *R. v. François*,<sup>254</sup> the complainant brought allegations of sexual assault ten years after it had occurred, claiming that she had blocked out the memory of the abuse for most of that period. A majority of the court, although making their decision, "[w]ithout pronouncing on the controversy that may surround the subject of revived memory amongst experts, ... [found] that the jury's acceptance of the complainant's evidence on what happened to her was not, on the basis of the record, unreasonable."<sup>255</sup> Moreover, in dismissing the appeal and upholding the conviction they found that:

It was open to the jury, with the knowledge of human nature that it is presumed to possess, to determine on the basis of common sense and experience whether

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<sup>253</sup> *Ibid.* at 36, per La Forest J., quoting Jocelyn Lamm, "Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule" (1991) 100 Yale L.J. 2189 at 2194-95 [emphasis added].

<sup>254</sup> [1994] 2 S.C.R. 827.

<sup>255</sup> *Ibid.* at 840, per McLachlin J.

they believed the complainant's story of repressed and recovered memory, and whether the recollection she experienced in 1990 was the truth.<sup>256</sup>

However, suspicious of the complainant's claim of repressed and recovered memory, particularly in light of the inconsistencies in her testimony and her alleged motivations to fabricate her allegations against the defendant, the dissent found that the jury's verdict of guilty was unreasonable and would therefore have allowed the appeal.<sup>257</sup>

There has been no clear approach articulated by the Supreme Court to claims of recovered memory of childhood sexual abuse. However, the general orientation of the courts to recovered memory has been aptly summarised by a trial judge:

1. The one thing we know positively about human memory function is that we do not know very much.
2. Some victims of trauma suffer memory loss as a result but many others do not.
3. The difficulty with extrapolating backwards from a subjective report of no memory to recovered memory of an event is the lack of external validation that the event occurred.
4. Recollections of past events are influenced and can be distorted by a host of factors, consciously and unconsciously.
5. The correlation between one's confidence in a memory and the accuracy of that memory is not as great as may commonly be thought, similar in many ways to the known dangers of eyewitness evidence.<sup>258</sup>

The following evidential issues have been considered by the lower courts as particularly relevant to claims of recovered memory.

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<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.* at 862, per Major J.

<sup>258</sup> *R. v. M.(M.E.)*, [1998] N.W.T.J. No. 50 (S.C.) at para. 20, per Vertes J.

## B. CORROBORATION

Corroboration has traditionally been defined as follows:

[E]vidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only evidence that the crime has been committed, but also that the prisoner committed it.<sup>259</sup>

The common law developed rules requiring corroboration of the testimony of particular classes of witness who were presumed to have a biased interest in the outcome of the case or whose evidence was considered to be doubtful for some reason. In criminal cases, convictions could not be sustained on the testimony of a single witness belonging to one of these classes without corroborative evidence. Historically, the main example of witnesses whose evidence required corroboration was accomplices. This category was later expanded to include sexual assault complainants and children providing unsworn testimony.

However, the law no longer has any strict requirements of corroboration with regard to any type of witnesses. On the matter of this development the Supreme Court has observed that:

These changes are evidence of the decline in importance of the need for corroboration due to the recognition that the trier of fact is competent to weigh the evidence and credibility of all witnesses. It also reflects a desire to overcome technical impediments in the prosecution of offences.<sup>260</sup>

Moreover, they asserted, “this Court has clearly rejected an ultra technical approach to corroboration and has returned to a common sense approach which reflects the original rationale for the rule and allows cases to be determined on

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<sup>259</sup> *R. v. Baskerville*, [1916] 2 K.B. 658 (C.A.) at 667.

their merits.”<sup>261</sup> The question is whether these sentiments apply equally to recovered memory cases.

Although corroboration is not legally required for the testimony of recovered memory complainants, it appears to be regarded by trial courts as a practical necessity for discharging the burden of proof where the substance of a complainant’s allegation is based on recovered memory.<sup>262</sup> This is particularly true, “[g]iven the lack of knowledge in this field [that is both memory in general and recovered memory in particular] and the controversy over the reliability question, … the courts must proceed cautiously in cases like this.”<sup>263</sup> Moreover, it has been asserted that “[t]his is especially so where the memories are a result of controversial therapy, come from a very early age or involve satanic rites or multiple aggressors.”<sup>264</sup> However, the Supreme Court has recognised that, “[s]ince the only evidence implicating the accused in many sexual offences against children will be the evidence of the child, imposing too restrictive a standard on their testimony may permit serious offences to go unpunished and perhaps to continue.”<sup>265</sup> It is unclear whether the law is able to evidence the same commitment to punishing historical child sexual abuse, and to accommodate the testimony of adult complainants in a like manner.

<sup>260</sup> *R. v. B.(G.)*, *supra* note 88 at 15.

<sup>261</sup> *Ibid.* at 26.

<sup>262</sup> See *S.(T.K.) v. S.(E.B.)* (1995), 9 B.C.L.R. (3d) 201 (C.A.) at 210, where the court declares, “[t]here is no general rule of corroboration but, given the special characteristics of recovered memory, trial judges will often see the need for independent confirmation.”

<sup>263</sup> *Ibid.* at 209-210.

<sup>264</sup> *A.J. v. Cairnie Estate*, [1999] M.J. No. 176 (Q.B.) at para. 82, per Monnin J. This passage seems to suggest that courts should be vigilant of corroboration where the claims involved are particularly unbelievable.

Corroboration may confirm that the accused committed the act in question; or confirm a key aspect or aspects of the witness's testimony; or more generally, substantiate the trier of fact's belief in the veracity of the witness's testimony.<sup>266</sup> The following has been suggested as possible corroborative evidence of recovered memory allegations:

Corroboration can be found in medical and school records, as well as diaries and old pictures, which may document signs of abuse, such as symptoms of stress and other unusual behaviour. It is also valuable to interview family, friends, and teachers about their observations of the victim's behaviour around the time of the abuse. In addition, it is significant if the victim is aware of unusual genital markings or knows of other personal information about the abuser or if the victim has atypical sexual knowledge for her age. In addition, newspaper files, court records, and media attention may prove to be corroborative if they reveal other victims.<sup>267</sup>

One court has even made a distinction between corroboration in a strictly legal sense, and confirmatory evidence, which in that case seemed to constitute a form of circumstantial evidence which corresponded with the complainant's version of the events.<sup>268</sup> Although not strictly "corroboration" this evidence was used to support convictions on some counts. However, it is debatable whether certain kinds of evidence, such as the existence of certain symptoms and expert evidence, should be used as confirmation of the complainant's allegation of childhood sexual abuse.

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<sup>265</sup> *R. v. B.(G.)*, *supra* note 88 at 28.

<sup>266</sup> For a comprehensive discussion of the historical development of the requirement of corroboration, and its definition, refer to *R. v. B.(G.)*, *ibid.*

<sup>267</sup> Wendy Murphy, "Legal Rights of Trauma Victims," in Appelbaum, Uyehara & Elin, *supra* note 16, 425 at 437.

<sup>268</sup> *R. v. H.(E.F.)*, [1994] O.J. No. 452 (Gen. Div.) at paras. 75-76, 199.

In *K.M. v. H.M.*, it is unclear whether the Supreme Court endorses the use of symptomology as corroboration, although the Court did quote the following passage with approval:

The most commonly reported long-term effects suffered by adult victims of incest abuse include depression, self-mutilation and suicidal behavior, eating disorders and sleep disturbances, drug or alcohol abuse, sexual dysfunction, inability to form intimate relationships, tendencies towards promiscuity and prostitution and a vulnerability towards revictimization.<sup>269</sup>

Moreover, they observed that “[t]he evidence presented at trial shows the appellant to be a *typical* incest survivor. Her experiences as a child and later in life correspond closely to the symptoms of post-incest syndrome.”<sup>270</sup> Trial courts appear to have taken the above passage to mean that symptoms consistent with childhood sexual abuse “may be viewed as some form of corroboration.”<sup>271</sup>

As discussed in Chapter Four, psychologists argue that symptoms should not be used to diagnose childhood sexual abuse because such symptoms are inconclusive, non-specific, and highly variable. Given that psychologists do not endorse the use of symptoms as a diagnostic tool, it is concerning that it may be used by the courts as a form of corroboration that abuse did in fact occur. However, the Supreme Court’s comments at least endorse the view that symptoms may confirm that a complainant suffers from physical and mental conditions *consistent with* childhood sexual abuse, whether the memory of it is recovered or not. However, a danger exists that the trier of fact may use such symptoms

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<sup>269</sup> *Supra* note 251 at 28, per La Forest J., quoting Carolyn Handler, “Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle” (1987) 15 Fordham Urb. L.J. 709 at 716-17.

<sup>270</sup> *Ibid.* at 48 [emphasis added].

<sup>271</sup> See for example *A.J. v. Cairnie Estate*, *supra* note 264 at para. 98, per Monnin J.

improperly. Although the symptoms presented by a complainant may be indicative of childhood sexual abuse, are therefore corroborative of recovered memory, it must be emphasised that these symptoms do not corroborate that the accused, and not another party, was the perpetrator of the abuse.<sup>272</sup>

Similarly, expert evidence may be accepted by a trial judge as corroborative of the complainant's testimony. The appeal court in *R. v. Norman* noted that “[t]he Crown at trial and the trial judge appear to have treated the Crown's psychiatric testimony and particularly the evidence of two therapists as corroborative of the validity of the memories recalled by the complainant through the counselling process.”<sup>273</sup> The Court was concerned that the trial judge viewed such testimony as confirmatory of the *validity* or *reliability* of the memories in question, in effect endorsing the accuracy or truthfulness of the recollections contained therein. Corroboration by experts in this instance is based on the same rationale as corroboration by symptomatology, and ought to be subject to the same caveats.

#### PRIOR CONSISTENT STATEMENTS

Generally, the courts tend to exclude evidence which is solely intended to bolster the credibility of a witness:

There is a general exclusionary rule against the admission of self-serving evidence to support the credibility of a witness unless his or her credibility has

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<sup>272</sup> In the civil case of *M.E.D.K. v. Delisle*, [1996] A.J. No. 1364 (Q.B.) at paras. 15, 25, per Berger J., although the trial judge held that “such evidence may be relied upon by the Court to decide whether the abuse complained of has been made out,” he also found that it did not prove causation, that is, the symptoms do not serve to prove who the harm was perpetrated by, as in the case the plaintiff also alleged abuse at the hands of others.

<sup>273</sup> (1993), 16 O.R. (3d) 295 (C.A.) at 306, per Finlayson J.A. for the court.

been made an issue. The rule is generally applied to prior consistent statements of the witness. Although contradictory statements can be used against a witness, “you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony.”<sup>274</sup>

However, prior consistent statements may exceptionally be admitted into evidence for limited purposes which do not include the proof of the truth of their contents.

Two recognised categories of exception are particularly applicable to recovered memory complaints: one, where the purpose of the evidence is to rebut an allegation of recent fabrication; and two, where the evidence helps explain the general narrative of the complaint or how the allegations of childhood abuse unfolded.

In cases involving historical sexual crimes where there has been significant delay in complaint, allegations of recent fabrication are directly implicated by defences which are based on false memory arguments. If accepted as necessary by the trial judge, evidence which tends to rebut the allegation, for example by providing an explanation for the delay in making a complaint, would be admissible for that purpose and that purpose only.<sup>275</sup> In one civil case, however, the court considered that an assertion of false memory by the defence did not necessarily assert recent fabrication:

[T]he theory of the defence of false memory rests on more than one foundation including, but not confined to, concoction, confusion, delusion, therapeutic memory implant, mistake, and mental illness. Recent fabrication has not been suggested.<sup>276</sup>

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<sup>274</sup> Sopinka, Lederman & Bryant, *supra* note 54 at 313.

<sup>275</sup> In *R. v. Norman*, *supra* note 273 at 308, the court was concerned that the trial judge used the evidence of two of the complainant’s therapists “as corroborative in the sense that they were prior consistent statements. [When] [t]hey were not, however, admissible for that purpose.”

<sup>276</sup> *M.E.D.K. v. Delisle*, *supra* note 272, at para. 13.

However, it is exactly the delay in complaint due to the repression of the memory (often in addition to the fact that the complainant in question had sought therapy) which triggers the defence contention that the memory may be false. A prior consistent statement could be used effectively to rebut the typical allegation of therapeutic fabrication; or, in the event that a statement was in fact made at a time prior to the complainant “forgetting” the abuse, to rebut the suggestion that the memories are false.

Trial courts have been receptive to prior consistent statements in some circumstances. One court accepted prior consistent statements, along with prior inconsistent statements, in the form of “utterances made to therapists by the plaintiff”:

To allow the trier of fact, perhaps with the assistance of expert testimony, to understand the process and dynamics whereby the plaintiff's memory is said to have been recovered. To exclude consistent utterances made to therapists would deprive the Court of a complete and unedited narrative.<sup>277</sup>

The purpose of admitting prior consistent statements under the narrative exception has been described as follows:

To qualify as narrative, the witness must recount relevant and essential facts which describe and explain his or her experience as a victim of the crime alleged so that the trier of fact will be in a position to understand what happened and how the matter came to the attention of the proper authorities. In all cases where evidence is admitted under the rubric of prior consistent statements, the trial judge is obliged to instruct the jury as to the limited value of the evidence. The fact that the statements were made is admissible to assist the jury as to the sequence of events from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness. However, the jury must be instructed that they are not to look to the content of the statements as proof a crime has been committed.<sup>278</sup>

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<sup>277</sup> *Ibid.* at para. 15.

<sup>278</sup> *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont.C.A.) at 476, per Finlayson J.A., cited in *M.E.D.K. v. Delisle*, *ibid.*

Moreover, one trial judge has even devised three “conditions precedent” to the admissibility of prior consistent statements in recovered memory cases, where their purpose is to rehabilitate the credibility of the complainant:

- i. the cause of the action alleges childhood sexual or physical abuse;
- ii. there is on the evidence, an arguable air of reality to the contention that the memory of that abuse was repressed but later recovered;
- iii. the defence position is that the memory is false, and the focus and thrust of cross-examination is, *inter alia*, to highlight utterances made to therapists and said to be inconsistent either with the stated recovered memory or *inter se*.<sup>279</sup>

Therefore, prior consistent statements may evolve into a very meaningful form of evidence in recovered memory cases. Little or no adaptation of the case law is required, and the evidence will serve a useful purpose.

### **SIMILAR FACT EVIDENCE**

Similar fact evidence has been described as:

where the Crown or a party proffers evidence of discreditable conduct of the accused or opposite party on other occasions as evidence of the probability that he or she did or did not perform the act for which he or she is charged. ... [C]haracter in this context means the disposition or tendency to act or not to act, to be motivated or not be motivated, to think or not to think in a particular way. . . . The Supreme Court has held that the “similar fact rule” is an exception to the general exclusionary rule prohibiting the Crown or a party from leading evidence of the bad character of the accused or opposite party.<sup>280</sup>

However, this type of evidence receives a cautious reception from the courts and it can often be difficult to establish an acceptable foundation for its admissibility.<sup>281</sup> Generally, to gain admittance, the evidence proffered must be

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<sup>279</sup> *Ibid.*

<sup>280</sup> Sopinka, Lederman & Bryant, *supra* note 54 at 523-25.

<sup>281</sup> For a succinct statement of the current approach of the law to similar fact evidence see *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717 at 734-35, per McLachlin J. In addition, *R. v. Makarenko*, [1994] O.J. No. 2367 (Gen. Div.) at paras.75-81, per Platana J., provides a particularly good review of the law on this subject.

relevant to an issue other than just the disposition or character of the accused. In addition, admission of the evidence will be subject to a determination of whether its probative value outweighs its prejudicial effects.

In recovered memory cases, similar fact evidence could be admitted for a variety of purposes. First, it can generally be applied to the issue of credibility, in particular that of the complainant.<sup>282</sup> Secondly, when admitted, similar fact evidence can, like prior consistent statements, help provide a narrative for the matters in question or, thirdly, to aid in the understanding of the nature of the relationship between the complainant and the accused.<sup>283</sup> Fourthly, similar fact evidence can be employed to demonstrate an accused's disposition to commit a specific type of act, namely that the accused has acted in a strikingly similar manner on other occasions (*modus operandi*). However, it must be acknowledged that this last use of similar fact evidence is highly controversial.

In one case it was suggested to the trial judge that the evidence of each of the complainants could be admitted on counts involving other complainants, as a form of similar fact evidence:

I recognize that there are seldom any witnesses when a child is sexually abused. For that reason, similar fact evidence has been held to be admissible on the basis, either that it is relevant to the issue of credibility of the complainant, or that it is relevant to understanding the nature of the relationship between the accused and the victim.<sup>284</sup>

In that case the trial judge reasoned that considerable evidence of that nature had already been admitted as part of the narrative, and therefore similar fact evidence,

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<sup>282</sup> *R. v. Makarenko*, *ibid.* at para. 72.

<sup>283</sup> *Ibid.* at para. 74.

if admitted, would only be applicable to the credibility of the complainants. The trial judge ruled that on the facts of the case, admitting the evidence for that purpose was more prejudicial than probative and refused its admission.<sup>285</sup> However, in other cases similar fact evidence provided by other witnesses at trial has been admitted.<sup>286</sup> An additional consideration, where similar fact evidence is tendered in the form of testimony of other witnesses, is whether there has been collusion between the witnesses concerning their testimony. However, collusion has been typically held to be an issue of weight, rather than admissibility, to be assessed by the trier of fact.<sup>287</sup>

In recovered memory cases, similar fact evidence relating to incidents contemporaneous with the alleged abuse will be directly relevant to whether the historical abuse did in fact occur. However, on this point it may be argued that the admission of such evidence, after such a long passage of time, would be profoundly prejudicial to the accused.<sup>288</sup> Nonetheless, where the acts in question bear striking similarities or sufficient correspondence to the acts alleged and/or to the accused, and the facts of such occurrences can be established to an acceptable

<sup>284</sup> *R. v. N.B.*, [1998] O.J. No. 2294 (Gen. Div.) at para. 11, per Valin J.

<sup>285</sup> *Ibid.* at para. 12, setting out the reasons for the finding that the prejudicial effect outweighed the probative value.

<sup>286</sup> For example: *R. v. J.E.T.*, [1994] O.J. No. 3067 (Gen. Div.) at paras. 93-95, per Hill J. admitting some but not all of the proffered similar fact evidence; *R. v. Makarenko*, *supra* note 281 at paras. 88-91; and *D.M.M. v. Pilo*, [1996] O.J. No. 938 (Gen. Div.) at paras. 461, 470, 473, per Lissaman J., who admitted similar fact evidence in the form of testimony of a number of other witnesses sharing eleven “common characteristics” of the plaintiff, noting that such evidence had a “considerable impact” on the outcome of the case.

<sup>287</sup> *R. v. J.E.T.*, *ibid.* at para. 68.

<sup>288</sup> *R. v. Huot* (1993), 16 O.R. (3d) 214 (C.A.), for a discussion of the effect of time on the admissibility of similar fact evidence.

degree of certainty,<sup>289</sup> their probative value will be undeniable and may represent an essential, albeit inferential, tool in legally reconstructing the past.

### **HEARSAY**

As defined in Chapter Two, hearsay is a statement made out of court, and is generally inadmissible when tendered in court for the proof of the truth of its contents. However, such evidence may be admissible under the broad exception to the hearsay rule fashioned in *R. v. Khan*.<sup>290</sup> Under this exception, a *voir dire* is conducted by the trial judge to address the reasonable necessity and reliability of the proposed statement. The first requirement, necessity, has been widely construed to include situations where: the witness who made the statement is physically unable to testify due to death, illness, or is geographically unavailable; the witness is testimonially incompetent such as in the case of young children; the witness refuses to testify, or because of problems with memory or communication cannot testify to the events in question; as well as the situation where the evidence cannot otherwise be obtained and is essential to fulfil the truth-finding function of the court and properly dispose of the matter.

The focus of the inquiry, rather than considering the type of statement involved, instead centres on the nature of the circumstances in which the statement was made in order to assess the reliability of the statement. These

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<sup>289</sup> See *R. v. J.E.T.*, *supra* note 286 at paras. 33-36, for a review of the case law considering the burdens of proof which may apply to similar fact evidence including: beyond a reasonable doubt; some evidence; evidence supporting a reasonable inference; a preponderance of evidence; and, what Hill J. concludes is the correct standard, proof on a balance of probabilities.

<sup>290</sup> *Supra* note 56.

circumstantial guarantees of trustworthiness are examined to mitigate any perceived dangers the hearsay may contain. If the trial judge determines that the proposed hearsay is reasonably necessary and sufficiently reliable, the evidence is admissible for the truth of its contents. However, whether or not the evidence is given that interpretation is decided by the trier of fact, and is not assessed apart from other evidence in the trial. Where the trier of fact is a jury, the trial judge is required to provide a limiting instruction on the dangers of hearsay, the factors contributing to and detracting from the statement's reliability, as well as how the jury is to evaluate the hearsay witness and their testimony.

In one recovered memory case, for example, the notes of a therapist treating the accused were ruled admissible under the hearsay exception.<sup>291</sup> In these notes the therapist had recorded the accused's admission to some of the alleged abuse. The trial judge ruled that the hearsay statements contained in the notes were of a "type" and "nature" which were reliable, as it is traditionally recognised that self-incriminating statements to third parties presumptively satisfy the reliability requirement of the hearsay exception.

#### **CAUTIONING THE TRIER OF FACT**

Another way the common law addressed the problem of unreliable evidence was to warn the jury of the dangers of convicting on uncorroborated testimony. At one stage this was a mandatory requirement in relation to

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<sup>291</sup> *A.J. v. Cairnie Estate*, *supra* note 264 at para.101.

children's evidence.<sup>292</sup> However, the modern trend towards the inclusion of evidence has lead to the repeal of many statutory provisions requiring corroboration. Further, the Supreme Court has firmly set out a rule that a warning regarding uncorroborated evidence ought to be given only where the judge deems it necessary. In *R. v. Vetrovec*,<sup>293</sup> Dickson J. writing on behalf of a unanimous Court, reviewed the law of corroboration:

Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact.<sup>294</sup>

Although a *Vetrovec* caution has not yet been explicitly invoked regarding recovered memory complainants, such a warning seems to have been implied by the minority in *R. v. François*, who found the jury's verdict unreasonable because of the "vital inconsistencies" in the complainant's testimony on central issues of the case.<sup>295</sup> Although, they did not take exception with the trial judge's instructions indicating the frailties of the complainant's testimony, the minority may have found a more pointed warning of the *Vetrovec* description more persuasive of the reasonableness of the jury's verdict. However, in the recovered memory case of *R. v. Kliman*, the British Columbia Court of Appeal held that the trial judge's warning, "which was no more than a repetition of the usual

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<sup>292</sup> See Chapter Two for a more detailed discussion.

<sup>293</sup> *Supra* note 96.

<sup>294</sup> *R. v. Vetrovec*, *ibid.* at 831.

<sup>295</sup> *Supra* note 254 at 862, per Major J.

instruction on the weighing of testimony," was inadequate in that it "did not point out any of the frailties of [the complainant's] evidence."<sup>296</sup>

Without adequate corroboration, regardless of its form, recovered memory cases will be reduced to a credibility contest between the complainant and the accused, like most litigation concerning offences of a sexual nature. Therefore it is necessary to consider issues of credibility specific to recovered memory complainants, and the approach of the courts in dealing with the issues.

### C. CREDIBILITY VS. RELIABILITY

The Supreme Court has described the issue of credibility as follows:

It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.<sup>297</sup>

Credibility is an assessment by the trier of fact of the witness's believability or truthfulness. Reliability, on the other hand, is the trier of fact's assessment of the evidence provided by the witness. In recovered memory cases, trial judges unremittingly stress the distinction between the credibility of the recovered memory complainant and the reliability of their purported recollections or

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<sup>296</sup> *R. v. Kliman* *supra* note 248 at 570. Interestingly, the trial judge's warning was not even raised as a ground of appeal.

<sup>297</sup> *White v. R.*, [1947] S.C.R. 268 at 272, per Estey J., quoted in *R. v. Norman*, *supra* note 273 at 314.

memories.<sup>298</sup> The distinction in these cases is perceived as paramount because “the *appearance* of honesty and integrity on the part of such witnesses ... gives us little assistance in assessing the reliability of their testimony ... these witnesses believe in what they are saying, whether it is accurate or not.”<sup>299</sup> On this subject the lower courts frequently cite the following dicta of the Ontario Court of Appeal:

[A] therapeutically induced memory recall process may or may not elicit real memories of what actually occurred. In either case, the patient is convinced of the truth of what he or she is recalling. Honesty of recall is not a factor, the concern is instead the reliability of the recall.<sup>300</sup>

Moreover, one judge observed in making this distinction that “[r]ecovered memories are *inherently unreliable* since it is very difficult to distinguish true memory from false memory.”<sup>301</sup>

#### **CREDIBILITY OF THE WITNESS - ADULT OR CHILD?**

One question which arises in recovered memory cases is how to assess the credibility of the recovered memory complainant who, as an adult, is testifying to events experienced as a child. The following is a seemingly logical approach proposed by one trial judge:

I am prepared to accept for the purposes of this judgment that the evidence given by the Plaintiff with respect to the details about the abuse she suffered as a child should be examined with a less exacting standard than that usually applied to the testimony of an adult ... I am also prepared to accept ... that if the Plaintiff suffered the abuse as a child, and repressed it when she was a child, it is only

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<sup>298</sup> *S.(T.K.) v. S.(E.B.)* *supra* note 262 at 208. For example, in *A.J. v. Cairnie Estate*, *supra* note 264 at para. 80, Monnin J. asserted that “... the plaintiff may very well be telling the truth as she perceives it. I must, however, also assess the reliability of her perceived truth.”

<sup>299</sup> *R. v. Norman*, *supra* note 273 at 310.

<sup>300</sup> *Ibid.* at 309.

<sup>301</sup> *L.H. v. W.U.*, [1998] B.C.J. No. 1132 (S.C.) at para. 82 [emphasis added], per Stromberg-Stein J.

logical that she would retrieve and recount her memories in the same way a child may have recounted an incident immediately after it had occurred.<sup>302</sup>

In adopting this approach, the trial judge likened the evidence of recovered memory complainants to children's evidence, and referred to the Supreme Court's position on how to properly assess the evidence of children put forth in *R. v. B.(G.)*:

[T]he judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses ... [A] flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. . . While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.<sup>303</sup>

However, recovered memory complainants are not children, and their recollections may not be child-like. The recovered memory witness's original perception and understanding of the alleged event will necessarily be overlaid by their adult interpretation of their memory.<sup>304</sup>

Often the assessment of the complainant's credibility in these cases focuses inconsistencies identified in their testimony. These inconsistencies are argued by the defence to be "the hallmark, or at the very least, an indicia of false memory syndrome ... [and by the prosecution] to be expected in a case of recaptured memory."<sup>305</sup> It is not inconceivable that there will be inconsistencies in the version of the events put forward by the complainant, the accused's, as well as

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<sup>302</sup> *M.E.D.K. v. Delisle*, *supra* note 272 at para 6.

<sup>303</sup> *Supra* note 88 at 54-55, quoted in *M.E.D.K. v. Delisle*, *ibid.*, at para 7.

<sup>304</sup> Moreover, an expert in one case observed that "by the age of 12 years of age, one is essentially talking about adult recollections and that there is very little difference between one's recollection

other witnesses, and most will be simply attributed to the passage of time. Inconsistencies in recollections which are recovered have been explained by one expert witness as “script memory”:

Where there has been a series of like events, the memory of them tends to blend; the “core details” remain but the peripheral details vanish. The difficulty with this in a criminal trial is that effective cross-examination often focuses on peripheral details, because of the unlikelihood that an untruthful witness can be tripped up as to core details. It is in the examination of the peripheral details that inconsistency and untruthfulness can sometimes be revealed.<sup>306</sup>

Many courts appear to be sensitive to this aspect of recovered memory,<sup>307</sup> including a majority of the Supreme Court:

Considering the alleged inconsistencies in the complainant’s versions of events at different times *in the light of her explanation of repressed and recovered memory*, I can find no basis for concluding that the jury’s verdict of guilty was unreasonable.<sup>308</sup>

Contrary to this recognition, however, the minority held that the inconsistencies were sufficiently consequential, admittedly in addition to other problems with the complainant’s evidence, to render the jury’s verdict unreasonable. The dissent however, did distinguish between inconsistencies regarding central matters and those relating to peripheral details, intimating that peripheral inconsistencies may be less determinative.<sup>309</sup>

The assessment of the credibility and reliability of the recollections of recovered memory complainants typically revolves around the manner in which

<sup>304</sup> for childhood events or retrospective events, once a person hits 12 years of age.” *R. v. V.T.*, [1996] O.J. No. 4896 (Gen. Div.) at para. 39.

<sup>305</sup> *M.E.D.K. v. Delisle*, *supra* note 272 at para. 18.

<sup>306</sup> *R. v. Kliman*, [1998] B.C.J. No. 49 (S.C.) at para. 18, per Fraser J.

<sup>307</sup> *R. v. V.T.*, *supra* note 304 at para. 73.

<sup>308</sup> *R. v. Francois*, *supra* note 254 at 840, per McLachlin J. [emphasis added]. Contrary to this recognition, however, the minority held that the inconsistencies in that case were sufficiently consequential, admittedly in addition to other problems with the complainant’s evidence, rendered the jury’s verdict unreasonable.

<sup>309</sup> *Ibid.* at 861-862, per Major J.

the memories purportedly returned or were recovered. Basically, this assessment classifies memories in two categories- those recovered within therapy and those recovered outside of therapy.

#### **D. MEMORY RECOVERY & THERAPY**

Unfortunately, recovered memories of childhood sexual abuse are often, undiscerningly and in accordance with false memory theory, looked upon as though they are all *therapeutically* recovered and thus produced by therapy. This, however, is not the case. Memories may occur prior to, during, and after therapy. Moreover, this may be true for a single complainant. On this question a court has pondered, “[i]s it possible to revive these repressed memories by a [given] therapy, or is it the therapy that ‘creates’ the memories?”<sup>310</sup>

The mere attendance of the recovered memory witness at therapeutic sessions should not inherently raise concerns about the veracity of her evidence. Yet the assumptions engendered by defence attacks on therapy and therapists are to the effect that influence must not only be suspected, it ought to be assumed. They suggest that the trier of fact must conclude that the recall of memories in therapeutic situations renders it likely that the therapy created the memories.

How are the courts to deal with therapeutically-recovered memories? The fact of the matter is that therapy, particularly therapy involving suggestible practices such as hypnosis or drugs, is regarded with deep suspicion. To some

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<sup>310</sup> *A.J. v. Cairnie Estate*, *supra* note 264 at para. 77.

degree this must be correct, for the allegation of suggestion ought to be investigated. This necessitates the production of therapeutic records, discussed in more detail later in the chapter:

Access to detailed information regarding the therapy itself would be desirable for the expert's opinion. Even if there is no completely accurate way of determining the validity of reports in the absence of corroborating information, understanding why an accusation of abuse has been brought forward could then decrease the chance of convictions on faulty grounds.<sup>311</sup>

Ideally, for the prosecution of recovered memory claims, it would be hoped that the memories in a given case would be recovered under unimpeachable circumstances. However, care must be taken not to set the benchmark too high. While on the one hand "the fact a memory is recovered spontaneously and not as a result of hypnosis or suggestible therapy is an important consideration,"<sup>312</sup> on the other the courts ought not to precipitately draw an adverse inference where memories are recovered in the course of therapy. This is a distinct problem and complainants will often feel the need to distance themselves from the suggestion that therapy was involved in their memory recovery.<sup>313</sup>

It must be recognised that most if not all cases of recovered memory involve therapy of one form or another. At the very least, complainants will have

<sup>311</sup> Isabelle Coté, "Adult Recollections of Childhood Trauma" (1994), paper presented to the Ontario Psychological Association Annual Meeting 1994, and to the Canadian Appellate Court Seminar 1994, quoted in *L.H. v. W.U.*, *supra* note 301 at para. 93, and in *S.(T.K.) v. S.(E.B.)*, *supra* note 262 at 210.

<sup>312</sup> *L.H. v. W.U.*, *ibid.* at para. 89.

<sup>313</sup> In *L.H. v. W.U.*, *ibid.* at para. 5, Stromberg-Stein J. observed that "[t]he position of the plaintiff is that the allegation of false memory syndrome can be refuted because the plaintiff's memories were recovered prior to therapy. The plaintiff claims no memory enhancement techniques were used, such as hypnosis or suggestible therapy, to affect the reliability of her recovered memories."

sought therapy to come to terms with the recollections.<sup>314</sup> Interestingly, while therapy in the criminal context acts to discredit recovered memory; in the civil context (for the purpose of limitation statutes) it is identified as the point in time when the causal connection between the abuse and the psychological trauma of the complainant was reasonably discoverable.<sup>315</sup>

In determining how to deal with the issue of therapy in this context, the British Columbia Court of Appeal has advocated a moderate approach, namely “that recovered memories can be valid assuming nothing was done to induce or alter them.”<sup>316</sup> Therefore the techniques employed during therapy in a given case will also be an important consideration for the courts.

### **THERAPEUTIC TECHNIQUES**

Therapeutic techniques may include, as already noted, drug-based interviewing and hypnosis, as well as directed questions, all aimed at improving the subject’s recollections. The courts may even look at whether the complainant has attended suggestive support groups, or read self-help books such as *The Courage to Heal*,<sup>317</sup> often prescribed by their therapists. The courts are extremely interested in and discriminating of the techniques used in therapy. Evidence of the

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<sup>314</sup> In *K.M. v. H.M.*, *supra* note 251 at 48-49, La Forest J. stated: “[I]f the evidence in a particular case is consistent with the typical features of [post-incest] syndrome, then the presumption will arise,” namely that “certain incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy.” However, both Sopinka and McLachlin J.J., although concurring in the body of the judgment, dissented in relation to the creation of such a presumption.

<sup>315</sup> *H.A.W. v. Sisters of Charity of the Immaculate Conception*, *supra* note 247. See also *K.M. v. H.M.*, *ibid.*

<sup>316</sup> *S.(T.K.) v. S.(E.B.)*, *supra* note 262 at 204.

circumstances in which the memory was “recovered” is regarded as “critical”.<sup>318</sup>

The main concern is that certain therapeutic methods may “contaminate” or “taint” memories. In one such case the court accepted memories recovered early in the therapy but not the memories recovered later when techniques such as hypnosis were employed:

It would appear that the trial judge observed a progressive deterioration in the reliability of the memories as the retrieval process went on. The memories recovered at the early stage could be accepted but not those at the later stages where memories may have been contaminated by the suggestions of well-meaning but overzealous therapists and counsellors.<sup>319</sup>

However, on appeal, the court found that:

The trial judge’s method for separating the reliable memories from unreliable ones is logical but, unfortunately, it does not accord with the evidence. . . The plaintiff did not move from sound to questionable therapies; they were unsound from the beginning of the retrieval process.<sup>320</sup>

The focus on the point at which a memory is recovered and on the therapy involved seeks to ascertain whether the inevitable allegations of suggestion have any substance or foothold. This also accords with the position statement of the Canadian Psychiatric Association, who advocate that therapists must be extremely careful in the techniques used in therapy:

Psychiatrists should take particular care ... to avoid inappropriate use of leading questions, hypnosis, narcoanalysis, or other memory enhancement techniques directed at the production of hypothesized hidden or lost material.<sup>321</sup>

The issue of evidence obtained through the use of hypnosis and sodium amytal interviews has previously been considered by the courts in other contexts.

<sup>317</sup> *R. v. H.(E.F.)*, *supra* note 268 at para. 198, dismissed on appeal to both the Court of Appeal and Supreme Court [1997] S.C.C.A. No. 256. See text accompanying note 210.

<sup>318</sup> *L.H. v. W.U.*, *supra* note 301 at para. 80.

<sup>319</sup> *S.(T.K.) v. S.(E.B.)* *supra* note 262 at 211.

<sup>320</sup> *Ibid.* at 212.

The approach of the courts has been to first address the admissibility of the evidence in a *voir dire*, determining “(1) the expertise of the person who administered the treatment; (2) the reliability of the technique employed, as well as (3) the conditions under which this technique was used.”<sup>322</sup> If the evidence is then admitted, the above three factors are admissible for the purpose of assessing the credibility of the witness and the weight to be given to the evidence. It has been argued in the recovered memory context that where therapies involving “extraordinary process[es]” have been used on a witness a *voir dire* should be held to determine the admissibility of that witness’s evidence.<sup>323</sup> This reasoning was followed in *R. v. H.(S.C.)*, where the trial judge held that such considerations were a “threshold test for admissibility”.<sup>324</sup> In that case the hypnotherapist was not called, and therefore the jury was unable to assess her qualifications, and the techniques she used, as well as whether there was any implication of suggestion regarding the techniques used upon the complainant.

#### **PRODUCTION OF THE COMPLAINANT’S THERAPEUTIC RECORDS**

Because the therapeutic techniques employed in the recovery of the complainant’s memory are a predominant concern of the defence, the

<sup>321</sup> Canadian Psychiatric Association, *Position Statement on Adult Recovered Memories of Childhood Sexual Abuse*, March 25, 1996.

<sup>322</sup> *R. v. Taillefer* (1995), 100 C.C.C. (3d) 1 at 16-17 (Qué. C.A.). See also *R. v. Savoy*, [1997] B.C.J. No. 449 (C.A.) at para. 53, per Macfarlane J.A.

<sup>323</sup> Peter McWilliams, *Canadian Criminal Evidence*, looseleaf, v.1, 3d ed. (Aurora: Canada Law Book, 1999) at para. 9:10600. Also refer to the sample submission to oppose admissibility prepared by Alan Gold, “Admissibility of Evidence of ‘Repressed’ or ‘Recovered Memories’ presented on March 19, 1998 to the National Judicial Institute Criminal Law Seminar, ADGN/RP-059.

<sup>324</sup> [1995] B.C.J. No. 237 at paras. 24-25, per Thackray J. Although it must be noted this was not a recovered memory case.

complainant's therapeutic records will obviously be an issue. Generally, where the therapeutic records are within the possession of the Crown, they must be disclosed to the defence according to the rules of disclosure established in *R. v. Stinchcombe*.<sup>325</sup> However, where the records are not within the Crown's reach, and the complainant refuses to consent to their production, the defence will have to apply to the court to determine "whether and under what circumstances an accused is entitled to obtain production of sexual assault counselling records in the possession of third parties," according to the two step procedure instituted in *R. v. O'Connor*,<sup>326</sup> later enacted in what is now ss.278.1-278.7 of the *Criminal Code*.<sup>327</sup>

The first stage of the *O'Connor* test, was designed to act as an initial threshold, and requires the accused to establish the likely relevance of the records to warrant the trial judge's consideration of the issue. Likely relevance, in the context of production, is defined as "a reasonable possibility that the information is logically probative *to an issue at trial or the competence of a witness to testify*."<sup>328</sup> Although considered significant, the *O'Connor* majority, conscious that requiring an accused to establish likely relevance without ever having seen the records may create a Catch-22 situation which could compromise an accused's

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<sup>325</sup> [1991] 3 S.C.R. 326. However, the legislation applies to all records, regardless of who exercises control over them, including the Crown, unless the subject of the records has expressly waived the application of the procedure: s.278.2(2).

<sup>326</sup> *R. v. O'Connor*, *supra* note 31 at 427, per Lamer C.J.C. and Sopinka J.

<sup>327</sup> The legislation does vary from the majority decision of the Supreme Court, and in fact took its cues from the minority judgment. Moreover, on this precise point, the legislation has been declared unconstitutional by some lower courts. Clarification will likely come when the Supreme

rights, directed that likely relevance threshold was not to be applied as an onerous burden.

The Supreme Court majority seemed to be in contemplation of recovered memory and the possible negative influences of therapy on such memories, when they alluded that records may be produced where they “may reveal the use of therapy which influenced the complainant’s memory of the alleged events.”<sup>329</sup> Therefore, the method by which a complainant’s memories were recovered or resurfaced would directly be in issue and the likely relevance standard will presumptively be easy to satisfy in most of these cases. A conclusion that is perhaps contrary to the minority’s assertion that “it cannot be *assumed* that such records are likely to be relevant, and if the accused is unable to show that they are, then the application for production must be rejected as it amounts to nothing more than a fishing expedition.”<sup>330</sup>

At the second stage, the records in question are produced to the court, and it is at this stage that the judge examines the records “to determine whether, and to what extent, they should be produced to the accused.”<sup>331</sup> The majority outlined the test to be considered by the judge in deciding whether to allow or refuse production:

Court revisits the issue and declares upon the legislation’s constitutionality in *R. v. Mills*, [1997] A.J. No. 1036 (Q.B.), granted leave to appeal.

<sup>328</sup> *R. v. O’Connor*, *supra* note 31 at 436 [emphasis in original].

<sup>329</sup> *Ibid.* at 441.

<sup>330</sup> *Ibid.* at 496-97 [emphasis added].

<sup>331</sup> *Ibid.* at 441, 502. However, the legislation, like the minority, takes another view of this second stage: if the application has complied with the procedural requirements of s.278.3(2) to (6), and

in making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence.<sup>332</sup>

Moreover, after the judge has had an opportunity to vet the records it is presumed that actual relevance replaces likely relevance as the prevailing standard.

In essence, the judge is to balance the privacy interests of the complainant on one hand and the right of the accused to make full answer and defence on the other. The court enumerated the following factors to be taken into consideration when undertaking this balancing:

- (1) the extent to which the record is necessary for the accused to make full answer and defence;
- (2) the probative value of the record in question;
- (3) the nature and extent of the reasonable expectation of privacy vested in that record;
- (4) whether production of the record would be premised upon any discriminatory belief or bias;
- (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question.<sup>333</sup>

In striking a balance between the complainant and the accused in a given case, the judge has three options: refuse production; allow production; or edit the records for partial production to the accused.

In the following cases (two prior to *O'Connor* and the current legislation), the defence sought production of the complainants' therapeutic records alleging that the complainants' memories were a product of false memory syndrome. In

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the accused has established the likely relevance of the records, s.278.5 requires the judge to undertake a balancing *prior* to ordering production of the records to the court for review.

<sup>332</sup> *Ibid.* at 441-442.

one case, production was refused as the trial judge found no evidence that the complainant's "allegations arose only after therapeutic intervention," and therefore there was no "foundation for disclosure of [the] records on the basis of 'false memory syndrome'."<sup>334</sup> Similarly, where a complaint is made prior to therapy, production orders may not be forthcoming.<sup>335</sup> In another case, production was ordered, with the trial judge asserting that the issue of false memory had sufficiently been raised "when one considers the time of the allegations and the age of the complainant compared with when initial disclosures were made by the complainant," and further that "the issue of past memory recalled requires the production of the requested records under the circumstances of this case."<sup>336</sup> Moreover, in *R. v. Kliman*, the British Columbia Court of Appeal held that the complainant's therapeutic records should have been produced to the defence because of their relevance to the accuracy and reliability of the complainant's memories.<sup>337</sup>

Not all courts look upon memories recovered in and around therapy with equal suspicion:

<sup>333</sup> *Ibid.* at 442, 504.

<sup>334</sup> *R. v. Hudkins*, [1995] N.W.T.J. No. 62 (S.C.) at paras. 20-22, per Vertes J. This case did not concern recovered memory but delayed disclosure, the complainant never alleged to have "forgotten" the sexual abuse experienced as a child. In addition, where the complaint is made prior to therapy, production orders may not be forthcoming.

<sup>335</sup> This was the reasoning of the Nova Scotia Court of Appeal in *R. v. B.(R.J.)* (1997), 6 C.R. (5th) 183 at 191, per Hallet J.A. in a case of delayed disclosure. The Court found that although the complainant had sought therapy, the case was not one "of the memory of the complainant to a sexual assault having been recovered, created or suggested by a psychiatrist or a psychologist." See also *R. v. Paar (H.P.)* (1995), 104 Man. R. (2d) 312 (Q.B.) at 316, per Hewak C.J., denying production to the defence.

<sup>336</sup> *R. v. Allen*, [1995] O.J. No. 150 (Prov. Div.) at paras. 22, 30, per Vaillancourt Prov. J.

<sup>337</sup> *Supra* note 248 at 561-63.

There is a popular trend whereby some seek to characterize memories revived by a therapist as inherently unreliable or as part of false memory syndrome. ... Such an approach is neither appropriate nor helpful. The existing techniques for assessing credibility at trial continue to be apt to determine the reliability of memory. Therapeutically-recovered memory is not inherently or facially suspect. Rather, it is one factor, among many, which bears on the reliability of memory and, in some circumstances, must be assessed with care.

First, any memory that describes an event which occurred eleven years earlier must be examined with care whether or not that memory was revived with the aid of a therapist, or was remembered during therapy, or was spontaneously remembered. . . Second, the nature of the therapeutic relationship must be considered so as to determine any degree of suggestibility, bearing in mind it is not necessarily the function of the therapist to determine factual reality. Third, other matters which may affect memory must be considered such as the use of drugs or alcohol at the time of the event.<sup>338</sup>

However, the question of memories recovered in or around therapy is intrinsically bound up with the question of suggestibility. In addition, it is arguable that putting the recovery of the memories into issue, claims of recovered memory will also implicate the nature and quality of the recollections claimed, thereby establishing the relevance of all of the available records. No immediate conclusions can be drawn; but the current approach of the courts is to investigate the circumstances under which the memories were recovered in order to reveal any potential evidential problems derived from the therapeutic context and/or the techniques employed in a given case. Therapeutic records will therefore be an indispensable tool in this investigation, and production orders are to be expected.

## **E. EXPERT EVIDENCE**

In recovered memory cases, there are essentially two types of expert witness: "(1) a professional therapist who treated the victim, or (2) a forensic expert hired for the specific purpose of testifying about the way memory works in

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<sup>338</sup> *Colquhoun v. Colquhoun*, [1994] O.J. No. 681 (Gen. Div.) at paras. 74-75, per Corbett J.

general and how it likely worked in the case at issue. Such experts are apt to be either scientists/researchers, clinicians with experience treating victims of sexual abuse, or a combination of both.<sup>339</sup> In general, when admitted, the evidence of a psychological expert is intended to assist the court in understanding the behavioural aspects of the case; any expert actually professionally involved with the complainant by definition cannot give unbiased evidence, although obviously he or she can give evidence relating to the therapeutic techniques used.<sup>340</sup>

Before the expert can give evidence, however, he or she must be qualified – in a legal sense – to do so. The requirements for qualifying an expert witness are set out by Sopinka J. in *R. v. Mohan*; the court must ascertain:

- (1) relevance;
- (2) necessity in assisting the trier of fact;
- (3) the absence of any exclusionary rule;
- (4) a properly qualified expert.<sup>341</sup>

In recovered memory cases, it is the second requirement which the courts pay most lip-service to in accepting expert evidence.

On this point, a majority in *R. v. Bell*, made it clear that necessity should be generously interpreted:

The expert evidence would provide, to borrow terminology from the majority judgment [of the Supreme Court] in *R. v. R.(D.)*, an “evidentiary basis” upon which the complainant’s credibility could have been judged. Holding expert testimony admissible on the basis of its potential usefulness in making an informed assessment of the complainant’s credibility accords with the concept

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<sup>339</sup> Murphy, *supra* note 267 at 440.

<sup>340</sup> See *L.H. v. W.U.*, *supra* note 301 at para. 75 where the trial judge gave little or no weight to the evidence of the psychiatrist who treated the complainant: “Clearly, as the treating psychiatrist, Dr. Yeung formed a therapeutic alliance with the plaintiff and as such should have refrained from giving expert evidence in this case.”

<sup>341</sup> *Supra* note 135 at 20.

of necessity provided, as *Marquard* states, it concerns factors relevant to veracity.<sup>342</sup>

It is clear from numerous cases just how helpful and indeed necessary the evidence of an expert is. Expert evidence is first and foremost helpful in bringing about an understanding of recovered memory, and overcoming incorrect assumptions and attitudes:

Expert evidence is of considerable value in these cases. The trier of fact is unlikely to be familiar with such phenomena as the child sexual abuse accommodation syndrome ... Without such assistance, the failure of the complainant to come forward with an allegation of a rape said to have occurred so many years ago might well be incomprehensible to the trier of fact.<sup>343</sup>

In one recent civil case, the court bemoaned the lack of instruction from experts on the phenomenon of repressed/recovered memory and expressed its inability to adequately assess, in the absence of such information, the complainant's claim that her memory of the alleged event had not been accessible by her for ten years only to resurface in her dreams or nightmares.<sup>344</sup>

Further, the expert must show that he or she is sufficiently qualified in the particular field, establishing their educational background, academic and professional credentials, practical experience and research, as well as publications, appointments, and even previous experience as a witness. In recovered memory cases, experts tend to be specialised in the fields of memory, psychological trauma, and child sexual abuse.<sup>345</sup> The factual basis for the expert's

<sup>342</sup> (1997), 115 C.C.C. (3d) 107 (N.W.T. C.A.) at 116-17, per Vertes and Schuler JJ.A.

<sup>343</sup> *R. v. Norman*, *supra* note 273 at 312.

<sup>344</sup> *A.J. v. Cairnie Estate*, *supra* note 264 at para. 38.

<sup>345</sup> In *R. v. R.(W.D.)* (1994), 95 C.C.C. (3d) 190 (Ont. C.A.) at 191, the Court overturned the trial judge's decision to not allow an expert to give evidence because he did not have clinical experience in the area of recovered memory or child sexual abuse, nor had he written any articles on these subjects. In finding that his evidence should have been admitted, the Court felt that his

opinion must also be established, setting out the source of his or her familiarity with the complainant and her case.

The main limit on or concern with expert evidence is that he or she must not express an opinion as to the ultimate issue to be decided by the trier of fact; in recovered memory cases this is typically whether or not the recollections of the complainant are reliable and accurate, or more generally whether the complainant is worthy of belief:

Credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis. The expert who testifies on credibility is not sworn to the heavy duty of a judge or juror. Moreover, the expert's opinion may be founded on factors which are not in evidence upon which the judge and juror are duty bound to render a true verdict. Finally, credibility is a notoriously difficult problem, and the expert's opinion may all too readily be accepted by a frustrated jury as a convenient basis upon which to resolve its difficulties. All these considerations have contributed to the wise policy of the law in rejecting expert evidence on the truthfulness of witnesses.<sup>346</sup>

However, something of an exception has been carved out where there are unusual factors beyond the ken of the trier of fact:

[T]here is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact.<sup>347</sup>

For example, in *R. v. H.(S.C.)*, the expert was allowed to outline his method of assessing the credibility of allegations based on recovered memory, but was not

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knowledge in these areas was greater than the trier of fact's, and therefore useful. An deficiencies in his qualifications as an expert would go to weight rather than admissibility.

<sup>346</sup> *R. v. B.(G.)* (1988), 65 Sask. R. 134 (C.A.) at 149, per Wakeling J.A., quoted in *R. v. Markman*, [1998] O.J. No. 5632 (Gen. Div.) at para. 47, per Sedgwick J.

<sup>347</sup> *R. v. Marquard*, *supra* note 124 at 249 per McLachlin J.

allowed to express his opinion of the credibility of the complainant in that case based upon those methods.<sup>348</sup>

However this form of expert testimony undoubtedly affects the manner in which the trier of fact assesses the complainant's credibility. A number of cases have skirted this boundary, for example through the use of 'hypothesised' facts similar to the facts in issue.<sup>349</sup> Admittedly, the technique of presenting hypothetical facts, closely resembling those in issue, to the expert for their consideration and opinion is acceptable in many circumstances. However, the use of this technique in the context of recovered memory should be used with caution because the trier of fact may be particularly susceptible to its persuasive influence.

Moreover, experts should not be able to provide an opinion on such factual matters as what could amount to corroboration on the facts of a given case.<sup>350</sup>

It is one thing to permit an expert to express opinions as to the behaviour and symptomology of child victims of sexual abuse and even to describe given behaviour as being consistent therewith, it is another to permit the drawing of factual inferences or conclusions therefrom by the expert.<sup>351</sup>

It has even been argued that "the expert goes too far to conclude that the complainant has been sexually abused, for that is an element of the offence. It

<sup>348</sup> [1995] 9 W.W.R. 9 at 9, per Thackray J., who found that the expert's opinion of the complainant's credibility would have touched the "ultimate issue".

<sup>349</sup> *R. v. Norman*, *supra* note 273 at 310.

<sup>350</sup> In one case the expert not only concluded on "the consistency of the medical records with the allegation of repressed memory," on the basis of clinical notes of the plaintiff's treating physicians, she also asserted that "some of the medical evidence could amount to corroboration." *A.J. v. Cairnie Estate*, *supra* note 264 at paras. 69-70.

would be better to limit the opinion to saying that her conduct is consistent with having been sexually abused at some time.”<sup>352</sup> Therefore, the trier of law must carefully keep the ultimate question beyond the expert’s reach.

A final concern specific to repressed memory is the objectivity of the expert given the intensity of the debate outside the courtroom. There is an “obligation for expert witnesses to give objective and neutral testimony – and not to operate as an advocate.”<sup>353</sup> The primary fear is “that the result may turn on the testimony of expert witnesses who are more aligned with a political position than they are familiar with the evolving and complex scientific literature and clinical practice.”

But from the cases reviewed, the controversy surrounding recovered memory and false memory seems to be somewhat sedate in Canadian courtrooms, at least in comparison to the American experience. Although judges are quite aware of the debate raging in the psychological community, they are steadily attempting to forge a path which acknowledges both the phenomenon of recovered memory, and the concerns expressed about the possibility of the creation of false memory. The following summary of the evidence of one expert appears to accord with the view of many trial judges:

- (i) Where a person has been subjected to a traumatic experience or a series of traumatic experiences, the ordinary response of the memory is not to forget or lose memory of it but to remember in greater than usual detail. This is known as hypermnesia;

<sup>351</sup> McWilliams, *supra* note 323 at para. 9:10500.

<sup>352</sup> *Ibid*.

<sup>353</sup> *R. v. A.W.*, [1998] O.J. No. 5852 (Gen. Div.) at para. 12, per Farley J.

- (ii) Conversely, repeated childhood sexual abuse can be forgotten;
- (iii) The more frequent the alleged abuse is said to have occurred, the less likely it is that it could be forgotten;
- (iv) No condition is diagnostic of previous sexual abuse;
- (v) It is appropriate in dealing with persons who claim to have retrieved memories of sexual abuse to evaluate their allegations with care because these persons are often "highly suggestible";
- (vi) The context in which memory is alleged to have been recovered is "an important concern". The use of suggestive interviewing techniques, including leading questions, can create concern about the memory;
- (vii) Where there is more than one source for the description of a past event, there is a possibility that the sources may be confused;
- (viii) Therapists or others who tell someone that, "If you don't remember being abused, but you think maybe you were, then you probably were" are making a suggestion that "really ought to be avoided". The position Dr. Yuille criticizes apparently is advanced in a book, *The Courage To Heal*.
- (ix) There are such things as "created" memories, i.e., memories of events which did not in fact occur [i.e. "false" memories].<sup>354</sup>

This approach allows the court to admit the evidence and consider its faults, properly I submit, as a matter of weight rather than admissibility based on prejudicial assumptions.

#### **F. A FALSE MEMORY DEFENCE?**

Finally it is necessary to consider what role false memory should play in prosecutions based on recovered memory. Does it constitute a true and full defence? False memory does appear to be an automatic rejoinder to recovered memory allegations, and is noted in most, if not all recovered memory cases surveyed here. Moreover, false memory has been extended by the defence in some cases to apply to situations where the complainant, although claiming

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<sup>354</sup> *R. v. Kliman*, *supra* note 306 at para 14.

consistent memories of the alleged events, has nevertheless sought therapeutic counselling, enabling the defence to claim that her memories were creations or fabrications induced by that therapy.<sup>355</sup>

When raising false memory as a defence it will often be argued that recovered memory is generally unreliable, and that due to the suggestibility of memory (which is particularly acute in relation to these complainants) and the suggestibility of the memory recovery techniques employed in the given case, render it just as, if not more, likely that the recollections in question are false memories rather than accurate ones. This reasoning process is intended to create a reasonable doubt about the reliability of the complainant's memories.

It has been argued that false memory does not provide a true defence but is simply a poorly disguised attack on the complainant's credibility.<sup>356</sup> Nicholas Bala has responded to this contention:

There are certainly cases where abusers are using false memories as a smokescreen to attempt to hide their guilt. But there are other cases where false memories are raised as a bona fide defence, even though some therapists and advocates may regard them as cases of valid memories.

Although the weight of evidence clearly suggests that loss and recovery of valid memories of abuse is a more widespread problem than is the creation of false memories, both problems are very serious. For both the complainants and accused involved in the justice system, generalizations cannot decide individual questions.<sup>357</sup>

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<sup>355</sup> *R. v. Markman*, *supra* note 346 at paras. 34-36, 47, essentially rejecting the defence in finding that "I am not satisfied that the evidence of the complainant was a memory recovered in the course of psychiatric therapy and as a result of that therapy."

<sup>356</sup> Susan Vella, "Recovered Traumatic Memory in Historical Childhood Abuse" (1998) 32 U.B.C.L. Rev. 91.

<sup>357</sup> "False Memory 'Syndrome': Backlash or *Bona Fide* Defence?" (1996) 21 Queen's L.J. 423 at 456.

It cannot be denied that the notion of false memory raises legitimate concerns about the suggestibility and process of recovery of childhood memories of sexual abuse. To be fair, it is the defence's responsibility to raise such issues on behalf of their client, and that in doing so, it will necessarily be regarded as a strategic defence to recovered memory claims. This cannot be avoided. As a defence however it must be kept in context – it should not be accepted as a comprehensive, coherent and accepted theory masquerading as a defence. Moreover, false memory should be subjected to the same scrutiny as that applied to recovered memory.

## CONCLUSION

An adequate foundation has been laid in Canadian courts for the concept of recovered or traumatic memory, namely that memories of childhood traumatic events can be repressed and later recovered; as well as the proposition that memories can be falsely created and that therapeutic processes may be implicated in the construction of false memories. The following quotation well-summarises the orientation of the courts to recovered memory and recovered memory complainants:

[A] witness should not be disbelieved only because he or she claims to have repressed, then recovered, memory of a past event or series of events. On the other hand, there are added layers of concern in assessing such testimony.<sup>358</sup>

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<sup>358</sup> *R. v. Kliman*, *supra* note 306 at para. 19. See also *R. v. N.B.*, *supra* note 284 at para. 51 [emphasis added], where Valin J. asserts “*A recovered memory case is like all other cases; it is still a memory case.* ... The testimony of a witness claiming to have recovered a memory of a distant event must be considered in the light of all the evidence that tends to either confirm or to contradict the memory.”

Canadian courts have appropriately addressed the issue of recovered memory on a case-by-case basis. The jurisprudence resulting from this practice indicates the following conclusions:

1. corroboration, regardless of its form and although not legally required, is deemed a practical necessity where allegations are based primarily on recovered memory;
2. a sharp distinction is made between the *credibility* of the recovered memory witness and the *reliability* of the recollections of that witness;
3. courts are more scrutinous of memories recovered in and around therapy, and will closely examine the type of therapy used and the perceived influence it may or may not have had on the memories so recovered;
4. therapeutic records are an important source of evidence and will likely be produced to the defence where memories are purported to have been recovered during or after therapy;
5. expert evidence has been favourably received by the courts as helpful to the trier of fact in assessing the credibility of recovered memory complainants and their recollections; and
6. it is to be expected that the defence will raise false memory concerns regarding recovered memory allegations, and that the courts will address these concerns where they are validly raised.

The only problem I wish to discuss with the above approach concerns the distinction drawn between the credibility of the witness and the reliability of their recollections, and the dubious effect this distinction may have on the trier of fact.

While it may be theoretically possible and seemingly logical to sever these two issues, can they be realistically assessed by the trier of fact in isolation from one another? The pointed separation of credibility and reliability inherently places a premium on corroboration, and encourages the trier of fact to *not* rely on, but

conversely doubt, their impressions of the complainant's credibility, thereby taking credibility out of the equation altogether. Traditionally, triers of fact have been instructed that reliability of a witness's testimony is to be assessed against a background of the witness's credibility as they perceive it. This is likely and should be no different in recovered memory cases, where triers of fact will question: (1) whether the complainant is lying or being truthful, having regard to the possibility that the witness may honestly be mistaken; and (2) whether they believe the complainant's account of the events, having regard to all the evidence in the case including the complainant's explanation concerning how their memory was recovered, expert evidence on that subject, and the presence or absence of corroborating evidence either supporting the complainant's or the accused's version of the events. Artificial distinctions, although seemingly helpful, tend to obscure rather than clarify how decisions are actually made in difficult cases such as those involving recovered memory. They need only appreciate that confidence in one's memories is not determinative of the truth of those memories.

## **CONCLUSION**

This thesis concerns the interface between psychology and law on the issue of recovered memory. It has attempted to demonstrate how existing psychological concepts and theories of memory inform and determine how science approaches, analyses, and ultimately pronounces upon the validity of new concepts and theories in the same field. The law works in a similar way, and perhaps even more so considering the law's traditional reliance upon precedent, and its tendency to look for both similarities and distinctions when presented with novel fact scenarios. Specifically, this thesis has focused upon the theoretical and practical challenges presented to psychology and the law by recovered memory and, to a lesser degree, false memory.

The psychological concepts and theories outlined in Chapter One were intended not only as a foundation for the discussion of recovered memory and false memory, but also to demonstrate psychology's conventional orientation to the study of memory. The modern paradigm of memory exposes its dynamic and reconstructive nature. It involves perception, encoding, storage and retrieval processes with a multitude of factors affecting the efficiency and accuracy of memory composition at each stage. Moreover, once encoded and stored, memories are not static but subject to ongoing synthesis and reinterpretation in light of new information and experiences. This understanding of the manner in which memory is thought to function allowed for a contextual analysis of the recovered memory/ false memory debate presented in subsequent chapters. In

addition, the chapter was designed to illuminate the correspondence, or lack thereof, between psychological theories of memory and both legal conceptions and expectations of memory.

The second chapter discussed the law's search for the truth, or less idealistically, its attempt to garner the facts necessary to balance the probabilities of truth. This pursuit is necessarily premised upon memory as a primary source of evidence. In many regards the law's search for the truth functions similarly to memory. It too is a reconstructive process, dependent upon the recollections of witnesses to provide narrative which incorporates the physical and other evidence tendered in a given case. Moreover, like memory, the law interprets these narratives and forms inferential links in the evidence in order to construct a coherent and comprehensive account of a past event. Ultimately, it is this depiction which tips the balance in favour of one version of the probable truth.

In recognition of its reliance on memory, the law has developed a variety of means, in the form of evidential rules and practices, to test the reliability and quality of testimonial evidence. Cross-examination is widely regarded as the oldest and most distinguished truth-finding instrument; it is the primary method of challenging witnesses and their recollections of events, and the opportunity to cross-examine is therefore prized as an integral aspect of the right to make full answer and defence and the notion of a fair trial. Its value is not absolute, however; in some instances it will be outweighed by other rights and interests where the fairness warranted by cross-examination is replaced by other factors.

Hearsay is one such instance, when cross-examination may be pre-empted if it is shown that the evidence cannot be obtained in any other fashion and the proposed hearsay statements exhibit circumstantial guarantees of reliability.

The chapter also questioned the law's assumptions about memory, particularly as these assumptions pertained to the ability of witnesses to provide evidence. While it is difficult to discern the law's overall conception of memory, the law often reveals something of its true expectations where the reliability of memory is in issue. One key to understanding this is the way the law has dealt with certain categories of witnesses, such as eyewitnesses and children. Traditionally, the eyewitness has been revered as the key to discovering "what happened". Psychological studies have, however, conclusively demonstrated the significant fallibility of eyewitness memory. In an attempt to accommodate these concerns, and due to the sheer practical necessity of such evidence, the law has developed a practice of allowing expert testimony on eyewitness memory, as well as providing judicial instructions to the jury advising them to take care in evaluating the evidence of eyewitnesses.

In effect, these steps have little appreciable effect on the triers of fact, both judge and jury, who are encouraged to rely on their own common sense which is largely informed by their own experience of memory. That experience suggests that those who have personally witnessed an event and are confident in their recollections will likely be accurate. The result is that the evidence of eyewitness fallibility seems to have had little meaningful impact on the law.

In the case of children, however, psychological findings have been extremely influential in bringing about reform in the area of children's evidence. It must be recognised, though, that the acceptance of the psychological conclusions about children's memory has been hastened by the political motives concerned with enabling the prosecution of child sexual abuse. Historically, children's evidence was regarded with deep suspicion by the law, which required corroboration and warnings to the trier of fact about convicting upon a child's testimony. In contrast, the contemporary approach to children's evidence recognises that children can provide essential, valuable, and above all reliable evidence. The abrupt reform of statutory and common law requirements and attitudes is nothing less than remarkable.

The lessons learned from the reform of children's evidence can be applied directly to recovered memory and its cautious reception by the legal system. With respect to the crime, there are similarities of victim, offender, and the nature of the allegations. There are also many similarities in the problems of proof. The difference lies in the lapse of time between the offence and the complaint, and the inaccessibility of the memory during that time.

Chapters Three and Four set out the dimensions of the psychological controversy surrounding recovered and false memory. To reiterate, the theory of recovered memory essentially posits that traumatic memories formed in childhood can be consciously inaccessible for a period of time and later recovered with

therapeutic assistance or of their own accord. In contrast, false memory theory asserts that the phenomenon and mechanisms of recovered memory lack empirical support, and subsist upon clinical conjecture. Moreover, the notion of false memory stresses the fallibility and suggestibility of memory, emphasising in particular the enhanced suggestibility engendered in therapy. Such memories should not therefore be admitted or relied upon by the law for their historical accuracy.

The first four chapters serve as a framework for the final chapter's contextual analysis of recovered memory of childhood sexual abuse in Canadian law. Surveying the cases which have taken place in our courtrooms over the last ten years, the predominant evidential issues encountered during the litigation, both criminal and civil, were identified and discussed. In turn, these issues were corroboration, the legal effect of therapy upon the assessment of such memories, the distinction between witness credibility and the reliability of their recollections, expert evidence, and the use of false memory as a defence to such claims.

The discussion demonstrated that in Canada, recovered memory faces some significant, but not insurmountable, legal hurdles. The courts have tended to be cautious yet open-minded, accommodating the phenomenon of recovered memory while cognisant of the accused's interests and parallel difficulties of defending against such claims. The only concern to note is the somewhat artificial distinction between a recovered memory complainant's credibility and the reliability of their recollections.

The future of recovered memory will depend in large part on developments in the psychology of recovered memory. Political attitudes will also play a role. A salutary warning can be taken from the backlash recovered memory has experienced in the United States and the United Kingdom. The current legal attitude to recovered memory is also precarious, in that the approach is not well defined or resolute. Furthermore, the Supreme Court's only pronouncement on recovered memory was clearly divided, and any predictions to how the Court may address recovered memory in the future remain moot. Nevertheless, overall Canadian courts appear to have struck an appropriate balance, but it is difficult to avoid the feeling that they are simply in a holding pattern, dealing with recovered memory as best they can while the phenomenon is further investigated. Recovered memory cannot be described as fully accepted or completely rejected, and in the current conditions, it is difficult to predict whether it will wax or wane.

This thesis also began, at least in Chapters One and Two, with a query about the assumptions made by law about memory. Although a proper examination of the normative foundations of law and memory was beyond the scope of this thesis, the examination of traumatic memory has provided some glimpses of where such an enquiry might be embarked upon. Certainly suggestions have been raised that the law subscribes to many assertions about memory which have been debunked by psychology; and that the law continues to subscribe to these assertions in spite of appearing to take account of the

psychological evidence. More importantly, the law appears to be vulnerable to the criticism that it hears only what it wants to hear from psychology. Moreover, there is some indication that the full challenges of psychology could potentially confront the testimonial basis of our legal system. A thorough examination and review of these fundamental assumptions, must however, await another occasion.



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