should be made public with the trial being identified.

hypnotism in the news

> The Right Honourable gentleman is indebted to his memory for his jests, and to his imagination for his facts.
>
> RB Sheridan

a key to locked memories? It was reported recently in the press that police trying to unravel the deaths of Anita Cobby and Azaria Chamberlain were contemplating the use of hypnotism to jog the memories of witnesses. The use of hypnosis has become a matter of considerable controversy. Hypnotic techniques have 4 distinct applications in relation to law:

- in jury challenge to screen significant prejudices held by jury members (this is used in the United States),
- in the preparation of nervous witnesses for examination in the witness box by means of post-hypnotic relaxation,
- to investigate the mental state of the accused at the time of an alleged crime, and to investigate motives,
- to improve the process of memory of witnesses to a crime or events allegedly related to a crime.

In the United States in particular the admissibility of hypnotically induced evidence has been the subject of a number of judicial pronouncements.

In a 1985 decision (*Fprynczynatyk v General Motors Corporation,* 8th Circuit, August 16, 1985) the issues were canvassed by the 8th Circuit in a products liability action for injuries to R when he lost control of his car, allegedly due to premature brake locking. After the accident, R told an insurance investigator that he did not apply the brakes but under hypnosis admitted that he had been applying them just before the car went out of control. A videotape of R's hypnosis session was tendered in evidence and R also testified as to his memory of the accident, refreshed by hypnosis. The jury returned a verdict against the defendant for $US5 million. The 8th Circuit Court found prejudicial error in admitting the videotape as proof of the facts asserted by R during the session.

Judge Ross noted the danger that suggestions from the hypnotist or 'confabulation' – filling in the blanks – by the subject may have tainted his memory. In the United States some courts admit such evidence, with the fact of hypnosis going to the weight accorded to the testimony. Others have excluded the evidence as not meeting the standard of general forensic acceptance. Judge Ross adopted the position of a third group which allows hypnotically-refreshed testimony provided that the lower court follows certain safeguards to ensure reliability. The trial judge, under this view, is obliged to conduct a pretrial hearing at which the proponent of the testimony must establish compliance with such safeguards as

- using a qualified hypnotist,
- controlling and recording the information given to the hyponotist,
- recording the subject's pre-hypnotic memory,
- recording the hypnotic session by videotape, and
- excluding all others from the session.

If, after determining that in light of the circumstances surrounding the hypnosis, the witness' testimony is unreliable, the court may let the witness testify only to those untainted facts that were in his or her memory prior to hypnosis. If the judge finds the witness reliable, he or she may be asked to testify, but the proponent may not refer to hypnosis. If the opponent attempts to impeach the witness on the basis of the effects of hypnosis, both sides may call experts on the issue and the trial judge may let in the videotaped sessions.

In a recent Australian case (*R v Geesing* (1986) 15 *A Crim R* 297) the issue also arose

for the Supreme Court of South Australia. The accused was charged with the murder and abduction of a young girl and a Crown witness gave evidence that she had received a telephone call from an unknown person. A pyjama top was later found on the witness' front lawn that could have belonged to the abducted child. The witness gave evidence that, under hypnosis, she could recall someone watching her on 2 occasions, but her description of that person did not tally with the accused. She could not recall this without hypnosis. Neither side called any evidence to assist the jury in interpreting or evaluating the evidence. Justice Cox held that the evidence of what the witness recalled under hypnosis was irrelevant to the case because

- it was not a case in which the hypnosis had sparked an independent recollection of the events in question,
- the incidents recalled were unconnected with the telephone call and the finding of the clothing, and
- there was no expert evidence to explain the qualifications and techniques of the hypnotist, to allay the fears of post-hypnotic suggestion or to show relevance.

In the course of its public hearings for the Evidence Reference, the ALRC was urged by Professor Sheahan in Brisbane and Dr Phillips and Professor Walker in Sydney that restrictions both on the use that could be made of hypnotically-refreshed evidence and the circumstances in which the hypnotism took place were essential.

Dr Phillips argued that the Commission should not recommend banning the use of hypnosis in the investigation phase but suggested that the legitimate use of hypnosis is in gathering further leads that cannot be investigated otherwise. The Commission will be addressing the issues raised by the dangers of hypnotically-induced evidence in its Final Report on Evidence expected late in 1986.

jury trial

premptory challenges. A White Paper ('Ciminal Justice: Plans for Legislation') recntly published in Britain proposes abolishing the right of defendants to make peremptory challenges, to dismiss up to 3 potential jurors without cause. The White Paper conedes that there are reasons for peremptory challenges, including the need to adjust the balance of a jury (in terms of age, sex or race) and because occasionally the defence suspects bias on the part of a potential juror but is unable to specify the grounds. However the White Paper argues that peremptory challenges are being used to get rid of 'jurors whose mere appearance is thought to indicate a degree of insight or respect for the law which is inimical to the interests of the defence. This is contrary to the interests of justice as well as offensive to the individual juror.' An article in the Weekly *Guardian* (16March 1986) says that the British Government is concerned by trials involving more than one offender which offer the defence an opportunity for more than 3 challenges.That same issue is known to be causing concern in New South Wales in light of the impending Milperra Massacre trial, which involves a large number of defendants from 2 bikie gangs. The difficulties of jury empanelment are exacerbated in that case not only by the large number of defendants, each with rights of peremptory challenge, but also by the prospect that the trial will be a very long one.

The New South Wales Law Reform Commission has very recently presented a report on jury trials to the New South Wales Attorney-General. Details of its contents are not available at the time that *Reform* goes to press.

The United Kingdom White Paper also proposes

- ending the right to trial by jury in complex fraud cases,
- introducing a statutory right to compensation for criminal injuries (the existing scheme is *ex gratia*),
- extending the maximum sentence for carrying firearms from 14 years to life,