Repressed Memory Syndrome[1]

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I would like to focus on a topic that is currently a matter of concern within the criminal law, namely, evidence given in sexual cases concerning recovered memory. The issue was highlighted by the Victorian Court of Appeal in 1996 in the case of *Bartlett*[2]. Mr Bartlett, aged 65, was charged in 1995 with indecent assault and other charges arising out of events which had occurred thirteen years earlier. It was alleged that in about 1982 a nine year old girl was assaulted by Mr Bartlett. The young girl, who was twenty two years of age at the time of the trial, gave evidence that her memory of the relevant events had been recovered during counselling sessions. At the trial there was an objection to this evidence and the defence counsel sought to adduce expert evidence from a psychologist to prevent the admission of the evidence. The trial judge refused permission for the defence to call an expert on the grounds that the topic was within the knowledge of a normal lay member of the community and therefore within the knowledge of the jury. Mr Bartlett was convicted and appealed to the Victorian Court of Appeal. The Court of Appeal held that the question of the reliability of a recovered memory is outside the field of knowledge of a lay member of the community and lies within an area suitable for qualified expert opinion.

This case highlights a real problem that has bedevilled the administration of criminal justice over the past decade. There are different views amongst psychiatrists, psychologists, trauma counsellors and lawyers. What is repressed memory syndrome? It is a process by which victims of major trauma are able to recover awareness of memory of the trauma years after the events, where previously there was not such awareness. Proponents of the voracity or reliability of recovered memories maintain that many people repress recollections of trauma until their memories are exposed in the course of psychotherapy or other counselling. Opponents of the existence of repressed memory claim that memories are incapable of being suppressed in this way and that psychotherapy can create unintentional confabulation

One might think that in order to consider this subject properly one has to have an understanding of what memory is. Memory is a plastic and complex phenomenon. No medical practitioner or expert witness can promise that the voracity of the memory is legitimate. Nor can they definitely say that a memory is false. Memory can be manipulated. It is very easy to manufacture false memory. We are all able to convince ourselves of different things in everyday life. How many times have we gone through a traffic light when it is actually yellow and said to ourselves or our passenger, ah, it was green when I actually crossed the line of the intersection but yellow after I entered? That is just a trite example perhaps, but nevertheless an example of how we can convince ourselves of certain states of fact.

Hypnosis can be used as a method of implanting memories and has the effect of making it impossible to extinguish the memory that has been implanted. It does this by making the memory indistinguishable from memories of actual events. Therefore it is critical for a therapist or counsellor or indeed any questioner when seeking information about something remembered, to avoid using leading questions, hypnosis, drugs or other memory distorting procedures which are likely to falsify memories.

There are a number of biochemists, especially in the United States, who are conducting tests and experiments in an attempt to find a method of measuring whether a particular memory is true or false. These scientists hypothesise that the biochemistry of arousal is distorted in the brain when there is trauma and that by measuring those arousals by mechanical or scientific means one can establish whether an event actually occurred. The research is in its early

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1 This article is an edited transcript of a speech delivered at the Law Librarians' Symposium on October 2, 1998.
2 *R v Bartlett* [1996] 2 VR 687

stages and one cannot say whether these tests will ever be developed to the stage where they could be used in a courtroom.

In 1989 the High Court of Australia considered the case of *Longman*[3] which dealt with a claim by a young girl that she had been sexually abused by Mr Longman many years prior. Justice McHugh said this:[4]

> ... the fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to "remember" is well documented. The longer the period between an "event" and its recall, the greater the margin for error. Interference with a person's ability to "remember" may also arise from talking or reading about or experiencing other events of a similar nature or from the persons own thinking or recalling. Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not be genuine. Hunter, *Memory*, rev.ed. (1964) pp. 269-270.
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> No matter how honest the recollection of the complainant in this case, the long period of delay between her formal complaint and the occurrence of the alleged events raised a significant question as to whether her recollection could be acted upon safely.

The High Court recognised that problem and dealt with it by ensuring that in cases where such memories of ancient events were relied upon there would be stringent warnings given to the jury that they should only act upon such memories with the greatest of caution. The court did not go so far as to say that you cannot act on those memories in the absence of independent corroboration.

In an article in 1996 Ian Freckleton, a barrister at the Victorian Bar who has written widely on the subject of expert evidence said:[5]

> The theory of repressed memory serves to explain the delay in complaining and reporting and to rehabilitate what might otherwise be the damaged forensic credibility of the complainant. However, if the improvement in memory occurs in the context of psychotherapeutic intervention which encompasses elements of therapy similar to hypnosis, the question arises of whether such evidence is reliable and, if not, what checks and balances need to be in place before it should be relied upon by courts. In addition, the question of the admissibility of expert evidence of repressed memory syndrome arises because the views of practitioners are so divided on this controversial subject and because expert psychiatric or psychological evidence may not serve to assist the court in its assessment of the facts in issue.

In Australia we are at the early stage of developing the jurisprudence in this area but there have been a number of developments overseas which may provide Australian courts with some guidance. In 1985 the New Zealand Court of Appeal, in the case of *McFelin*[6], held that there should be no inflexible rule that hypnotically induced testimony is inadmissible. The Court basically adopted the principles that had been enshrined in legislation in California.

In California the *Evidence Code* provides in relation to hypnotically induced evidence that:

- the evidence must be limited to matters which the witness had recalled and related prior to the hypnosis, in other words, evidence will not be allowed where its subject matter was recalled for the first time under hypnosis or thereafter;

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3 *Longman v R* (1989) 168 CLR 79

4 Id at 107.

5 Freckleton, Ian "Repressed memory syndrome : counterintuitive or counterproductive?" (1996) 20 *Criminal Law Journal* 7 at p. 8

6 *R v McFelin* [1985] 2 NZLR 750

- the substance of the original recollection must have been preserved in written, audio or video recorded form; and,
- there are a list of procedures that have to be followed by the therapist before the evidence could be admitted.

In the 1993 decision of *Jenkyns*[7] Chief Justice Hunt of the Supreme Court of New South Wales said:[8]

> In my view, these procedures are designed:
> (1) to avoid the generally accepted dangers of hypnosis that, in the heightened level of susceptibility to suggestion which is characteristic of a person in a hypnotic state, the witness may subconsciously be influenced by suggestions or cues planted intentionally or otherwise during the hypnosis, and
> (2) to assist the trial judge in determining whether there is any likelihood that:
> (i) the witness was merely confabulated; or
> (ii) the witness has acquired a stronger and artificial confidence in his or her original recollection; or
> (iii) the ability of the accused to cross-examine the witness concerning that original recollection has been impaired

Confabulation has often been described in the psychological literature as pseudo memory. The guidelines put forward by the New Zealand Court of Appeal do not insist upon compliance with all the safeguards that California imposes. They leave it to the discretion of the trial judge to ascertain whether there has been substantial compliance as a matter of fairness, with the appropriate safeguards.

In *Jenkyns* the New South Wales Court of Appeal stated that the fact a witness had been hypnotised should be disclosed to an accused person and that all relevant transcripts and information concerning that hypnosis should be provided. Further, that if such evidence is admitted the trial judge should give a very careful warning to the jury as to the dangers inherent in the use of hypnotism. In fact in *Jenkyns* Chief Justice Hunt refused to admit the evidence on the basis that he was not satisfied sufficiently as to its reliability.

In the 1994 Tasmanian case of *Haywood*[9], a case of aggravated rape, Justice Wright of the Supreme Court held that the Crown had not demonstrated that similar type of evidence was sufficiently reliable to be admitted. This was despite the fact that the conditions set down in the New Zealand decision of *McFelin* had basically been complied with. On the issue of the test for safety, or sufficient reliability, Justice Wright held that the trial judge should compare the post hypnotic version of events with any evidence available as to the earlier versions, both from the hypnotised subject and other witnesses. Before admitting post hypnotic evidence the trial judge should pay particular regard to the strength or presence of any confirmatory or supporting evidence to be called by the Crown. Further, if such evidence is admitted, the trial judge should warn the jury that there is a special need for caution before relying on such evidence.

A similar result occurred in the 1989 South Australian case of *Horsfall*[10]. Justice Cox of the Supreme Court of South Australia refused to admit evidence given by a child, aged nine at the time of the offence, on the basis that the evidence was unreliable and it would be impossible for the accused man to get a fair trial. Prior to the trial the child had been questioned by various persons, she had undergone an extended course of hypnotherapy in connection with anxiety symptoms following the alleged assaults, and as a result those sessions had so contaminated her memory that her evidence was unreliable.

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7 *R v Jenkyns* (1993) 32 NSWLR 712
8 Id at 715
9 *R v Haywood* (1993) 73 A Crim R 41
10 *R v Horsfall* (1989) 51 SASR 489

It was not the fact of multiple questionings that was the decisive factor in the finding of unreliability but the sessions of hypnotherapy. During those sessions the hypnotherapist had made some suggestions or allusions to the girl about such events and as to ways she could cope with them without first eliciting from the girl what her actual memory of the events was.

So far I have focused on hypnosis. However, the recovery of memory can involve other processes. One recently discovered process is eye movement desensitisation and reprocessing (EMDR). It involves a therapist moving his or her hand in front of the eyes of the person in therapy at a very rapid pace and asking the person to focus on the hand and remember events that have traumatised them in the past.

The process was described by Justice Matthews in the New South Wales Supreme Court decision of *Jamal*[11] in 1993. Justice Matthews said:[12]

> EMDR was serendipiously discovered by Californian psychologist, Dr Francine Shapiro in 1987. Dr Shapiro happened to be moving her eyes rapidly from side to side whilst she was thinking of a traumatic event in her past. Afterwards she unaccountably felt better. Accordingly she embarked on a series of clinical tests which confirmed that the process of moving one's eyes from to side to side whilst focusing on a traumatic event, had the effect of isolating the memory of the event from the distressing emotions which had previously accompanied it.
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> In a typical session of EMDR the therapist will move a finger or an object horizontally in front of the patient's face, so that the patients eyes move rapidly from side to side. At the same time the patient is asked to focus on a particular distressing emotion or event in his or her past. A standard session of EMDR will include many of these "rounds" of eye movements, interspersed by discussion between the therapist and the patient as to how the patient is coping with it. Often the experience is a highly cathartic one with the patient reliving the traumatic event, sometimes in a very dramatic way.
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> There is, as yet, no theoretical explanation for the effectiveness of EMDR. Despite this, and despite its beguiling simplicity, which to some smacks of quackery, it appears to be very effective indeed in many cases of post-traumatic stress disorder. Two of the psychiatrists who gave evidence on the voir dire Dr Kevin Vaughan and Dr Robert Hampshire, use EMDR regularly as a therapeutic tool. Dr Vaughan, the Director of the Post Traumatic Stress Disorder Clinic at Hornsby Hospital, has conducted a controlled study of 36 patients, half of whom under went traditional therapy and half of whom under went EMDR. Admittedly the sample was not large. Nevertheless, the results indicated that, at least in the short term, the patients who had undergone EMDR were significantly more improved than those who had not.
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> A number of possible theoretical bases have been posited for EMDR. One possibility is that it is akin to hypnotism. This is very relevant to this case and I shall be discussing it in more detail later. Another theory is that EMDR is associated with REM (rapid eye movement) sleep. Dr Hampshire hypothesises that the eye movement might open a shunt between the parts of the brain which deal with short-term and long-term memory.
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> All these hypotheses remain in the area of speculation.

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11 *R v Jamal* (1993) 69 A Crim R 544

12 Id at 548

The absence of any theoretical base for EMDR leads a number of people to be very sceptical about it. Dr Jonathon Phillips, who uses it rarely himself, comments as follows:

> "To this point in time there is no satisfactory rationale for EMDR. It is purported, however, that there is a neurophysiological link between eye movement and the laying down and retrieval of memory. ... A word of caution is necessary. Psychiatry has been bedevilled by "miracle treatments". Many have come and gone. Each new treatment has brought with it devotees and ever willing and compliant patients. The new treatments have worked wonderfully in their earlier days but have been found wanting with the passage of time. It is too early to know whether EMDR will find an enduring place in psychiatric armamentariums."

Since 1993 the situation has not advanced to any significant extent, as far as I am aware. In *Jamal* there was a challenge to the admissibility of the alleged victim's evidence. He had little recall after the crime due to his injuries, his only recall occurred after EMDR treatment and the defence contended that the witness' memory was so tainted by the EMDR process that the evidence ought not be admitted. The judge held that it was theoretically possible for EMDR to revive or enhance a person's memory of a traumatic event in his or her past, however, in the case in question it was held to be unlikely that EMDR produced a distorted memory.

Her Honour did comment, however, that if it had been possible to demonstrate the improvement in the memory was due wholly or substantially to EMDR there would be serious concerns as to the reliability of the evidence. Her Honour went on to describe the relationship between EMDR and hypnosis, the dangers that courts have experienced with hypnosis in the past and consequently that there are great dangers in the acceptance of EMDR by a jury.

Jamal's case went on appeal to the Court of Criminal Appeal of New South Wales in September 1995 and the court in effect found that EMDR exhibited the same or similar changes to those exhibited by patients under hypnosis. Further, each may be apparently used for investigative or forensic purposes, both techniques may make a witness more certain of a false memory, both procedures can retrieve, revive or enhance memory and the memories revived are not necessarily true.

In 1995 the Victorian Court of Criminal Appeal considered yet another case concerning recovered memory. In *Thorne*[13] there was a split decision by the Court, two judges were of one view and one judge, Justice Ashley was of a different view. Justice Ashley said:[14]

> It should be added for the sake of completeness, that there is controversy whether early childhood memories of sexual abuse can be recovered by therapists. Believers refer to "repressed memory syndrome"; non-believers to "false memory syndrome". There is a great deal of literature on the subject. It does not speak with one voice. Different responses of courts to aspects of the problem are revealed ...

You might say that Justice Ashley was stating the obvious and the jurisprudence at the time Justice Ashley made those comments is unchanged in its effect from today. We are no further advanced and we encounter problems on a regular basis in the criminal courts, not only in Victoria but throughout Australia, as to how to deal with this sort of evidence.

We also have disputes between experts. On occasions you have the prosecution calling an expert to explain the veracity of a recovered memory. In the same case you will have the defence calling an expert to give evidence about all the defects in the process.

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[13] *R v Thorne* (unreported, Court of Criminal Appeal, Vic, 9 June 1995)
[14] Id at 32

How is a jury or a judge meant to deal with these problems? It is almost an impossible task. The suggestion that I make is this. In the past there was a requirement in particular types of cases, sexual cases being one of them and let me say that recovered memory is not just restricted to sexual cases, it can apply across the board to any crime. But there was a requirement in respect of certain crimes that there be independent corroboration for an allegation. Independent corroboration means supporting evidence from an independent source, untainted from any connection with the actual witness alleging the crime.

To a large extent the need for corroboration has been whittled down in recent years, particularly in respect of sexual allegations. This is understandable in cases where there are allegations of sexual abuse or rape as often there are no independent witnesses and therefore no independent corroboration. However this is a different issue and in cases where we are dealing with great lengths of time between dates of alleged offence and the date of the court case I suggest that there should be a special rule. This rule should be a requirement for independent corroboration because the danger of someone being convicted erroneously as a result of the process of recovered memory is too great.

The courts, especially appeal courts are recognising this phenomena In Bunbury, Western Australia in 1994 there was a case called *Jumeaux*[15], in which two daughters made allegations of sexual abuse against their father. The jury considered evidence that the daughter's memories had been repressed. The memories were recovered by various forms of counselling and psychotherapy. Justice Seaman of the Western Australian Supreme Court cautioned the jury in the strongest possible terms about the dangers of accepting the evidence When he cautioned the jury he was not saying that these girls were being dishonest or that they were deliberately confabulating. He was saying that the fact the girls honestly believed that these events had occurred did not mean that they did occur The dangers were exposed in the expert evidence that was called during the trial and the possibility of false evidence being produced by suggestion was highlighted by that evidence.

Mr Freckleton comments that:[16]

> The recovery of repressed memories is often sought to be achieved by a cocktail of alternative therapies, a number of which, like EMDR, have the potential to induce states similar to hypnosis On some occasions drugs such as sodium amytal or other forms of barbiturates, are used by therapists to assist recovery of memory. The dangers of such drugs have been recognised for some time in the context of their reliability and the misimpression that their administration may give to juries The use of such drugs carries with it well- documented dangers of inducing suggestibility and there is much to be said for the proposition that such evidence should be treated similarly to evidence that is subsequent to hypnosis. In a now notorious Seattle suit a therapist helped a woman to "recover" her memories of sexual abuse with methods such as age regression, bioenergetics, psychodrama, trance work, visualisation and guided imaging.[17] In the New South Wales case of *R v CPK*,[18] one of the complainants at age 22 allegedly "recovered" her memories of penetrative abuse at the hands of her father some 10 to 11 years before by the assistance of a "kiniesiologist", laying a hand upon her head in a certain manner

This was the evidence given at the trial. As Justice Matthews said in *Jamahl*:[19]

> . . there is much to be said for the proposition that any therapeutic process which serves to entrench a prospective witness's memory is so inherently dangerous that the rejection of post-therapy evidence should not be dependent upon proof that the memory was a distorted one The risk factor should be assumed, at least on a prima facie basis.

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15 *R v Jumeaux* (unreported, Supreme Court, WA, 23 September 1994)
16 Freckleton, Ian "Repressed memory syndrome : counterintuitive or counterproductive?" (1996) 20 *Criminal Law Journal* 7 at p 18
17 *Mateu v Hagen* (King County Superior Court, 91-2-08053-4)
18 (unreported, Court of Criminal Appeal, NSW, 21 June 1995)
19 *R v Jamal* (1993) 69 A Crim R 544 at 564

In my view enough has been written now on the subject to highlight the inherent dangers of convicting on the basis of such evidence. The role of the expert is an area that is constantly under review. There are great divergences of opinion between experts on the subject and courts in Australia and overseas are grappling with the problem regularly. There are reported cases in Canada, many cases in the United States and in New Zealand and England. In time a clear set of guidelines and rules for the admissibility of this evidence will be developed as will appropriate warnings to juries and standards that will govern admissibility of the evidence in the first place.

The issue of repressed memory syndrome is a complex one. I have sought to highlight some of the problems that are encountered and the dangers of miscarriages of justice in certain circumstances. We as a community should be concerned not only that proper cases of sexual abuse or other crimes be brought before the courts and the perpetrators punished but also that miscarriages of justice not occur because of an acceptance of evidence which has an uncertain foundation.