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RECOVERED MEMORY

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Recovered memory

Introduction

1. This article highlights the key issues, cases and articles on the admissibility of expert evidence on recovered memory in a criminal trial for the purpose of a CBA lecture on the topic.

The concept

2. In contrast to most historic child sexual abuse prosecutions (where the complainant has always remembered the abuse but could not complain contemporaneously due to feelings of powerlessness, anxiety or fear), in recovered memory cases the delay in reporting is attributed to a complete lack of access to the memory of abuse. These traumatic memories are said to be completely cut off from consciousness for years, until the memory resurfaces, causing great distress.
3. The core belief is that a person may involuntarily banish from consciousness the memory of repeated sexual childhood trauma. This is termed "traumatic amnesia". Proponents argue that it is possible to retrieve these memories therapeutically¹.

Scientific background

4. While clinicians claim that it is possible to revive 'memories' of long-forgotten events and that such memories are generally correct, experimental psychologists claim that most recovered memories are the result of suggestive therapeutic techniques². The genesis of a recovered memory may be an initial feeling of uncertainty by the complainant that something may have happened that is then ruminated on in therapy³. It is axiomatic that memories can be confabulated, re-interpreted and even apparently vivid or dramatic memories can be false, a risk that is increased, it is submitted when therapists use suggestive techniques.

¹ Recovered memories have been classified as cases in which adults initially believe they were not sexually victimized as children and later come to believe that they were, rather than cases in which people who always knew they survived such abuse as children remember additional details or instances. (Lindsay & Read, 1995, p. 847) (cited in P. Lewis, L. Alison and M. Kebbell, 'Considerations for Experts in Assessing the Credibility of Recovered Memories in Child Sexual Abuse: The Importance of Maintaining a Case-Specific Focus (2006) 12(4) *Psychology, Public Policy, and Law*).

² Due process and the admission of expert evidence on recovered memory in historic sexual abuse cases: lessons from America; IJEP 16 1 (66), Ring, Sinead, 1 January 2012. [71]

³ The Memory Wars; Criminal Law & Justice Weekly (2011) 175 JPN 370, 18 June 2011; Radcliffe, P. [372]

5. The scientific status of recovered memory remains a deeply contested terrain for psychologists. In the *Brandon Report*, the Royal College of Psychiatrists advised psychiatrists to avoid use of RMT or any "memory recovery techniques", citing a lack of *evidence* to support the accuracy of memories recovered in this way⁴.
6. In particular children are susceptible to memory illusions, implanted memories, suggestibility, deception, and impressionism⁵. Importantly, experts are unable to detect, without additional evidence, whether children's reporting of events is accurate or inaccurate, and whether they are describing true or false events⁶.
7. It is reported by the British Psychological Society ("BPS") that generally when gauging the accuracy of childhood memories recalled by adults, and by children older than about 10 years, the following rules of thumb are recommended⁷:
 - Detailed and well-organised memories dating to events that occurred between 7 to 5 years of age should be viewed with caution.
 - Detailed and well-organised memories dating to events that occurred between 5 to 3 years of age should be viewed with considerable caution.
 - All memories dating to the age of 3 years and below should be viewed with great caution and should not be accepted as memories without independent corroborating evidence.

In general the accuracy of memories dating to below the age of about 7 years cannot be established in the absence of independent corroborating evidence.

8. Many experts retain a firmly entrenched perspective either in favour of full amnesia followed by gradual full remembering (true recovered memory) or a false, iatrogenic process of recovery⁸. Unfortunately, a resolution remains remote; science has yet to develop objective measures to discriminate between false and true recovered memories.

⁴ Brandon, S.; Boakes, J.; Glaser, D.; Green, R.; MacKeith, J.; Whewell, P. (1997). "Reported recovered memories of child sexual abuse: Recommendations for good practice and implications for training, continuing professional development and research". *Psychiatric Bulletin* **21** (10): 663–665).

⁵ Guidelines on Memory and the Law; Recommendations from the Scientific Study of Human Memory; British Psychological Society Research Board (April 2010). (Section 4)

⁶ Ibid (Section 3)

⁷ Ibid (section 3ii)

⁸ Lewis, Alison and Keibell; as cited above, at 419-420. Note Lewis, Alison and Keibell argue for a case-specific approach to cases of recovered memory.

9. Therefore, neither science nor the courts have recourse to an external marker or validation for recovered memories. The unverifiable nature of recovered memories poses evidential challenges for courts when these memories are proffered as providing the basis for an allegation of historic child sexual abuse.

How to approach cases involving recovered memory

Introduction

1. The theory of recovered memory is that a person may involuntarily banish from consciousness the memory of repeated childhood trauma. This is termed "traumatic amnesia". Proponents argue that it is possible to retrieve these memories therapeutically.
2. Opponents of the theory argue that most "recovered memories" are the result of suggestive therapeutic techniques. Memories, even apparently vivid or dramatic memories, can be confabulated and re-interpreted. As such, the memories can be false (often referred to "false memory syndrome").
3. Many experts retain a firmly entrenched perspective either in favour of full amnesia followed by gradual full remembering (true recovered memory) or a false process of recovery. Unfortunately, a resolution remains remote: science has yet to develop objective measures to discriminate between false and true recovered memories.
4. In the absence of settled expert opinion, both prosecution and defence practitioners are faced with difficulty:
 - a) If prosecuting, can you argue that evidence gleaned from recovered memory is admissible? If so, how?
 - b) If defending, in what circumstances should you instruct an expert? In those circumstances, how do you argue the admissibility of that expert evidence?

Identifying the type of memory

5. From either perspective, it is important to attempt to identify and classify the type of memory evidence in issue. The law draws distinctions between *recovered memories*

and *continuous memories*. Commonly in cases of historic sexual abuse, allegations are made based on memories of abuse occurring many years previously. *Lewis*⁹ categorises these memories as category 1 cases; where the complainant has always remembered the abuse but has been psychologically unable to complain because of feelings of betrayal, powerlessness, or guilt. So-called category 1, or *continuous memory*, cases are distinct from recovered memory (category 2) cases in which the abuse was forgotten but subsequently recovered.

6. Because it is arguable that some recovered memories involve false memories it is important to distinguish between the two. In *R v Bernard V*¹⁰ three siblings alleged historic sexual abuse by their adopted father. Through appeal, the defendant was allowed to obtain an expert report about the development of false memories in therapy. However, the Court of Appeal held that this was not a case of recovered memory, but a case of continuous memory and recollection. As such, any review of the evidence in the report was inadmissible, as this trespassed upon the remit of the jury. Had the memories been triggered through therapy, then the report would have been admissible.
7. In practice, it may be difficult to separate the two. There is a danger that a complainant may attempt to characterise recovered memories as continuous memories if that will be considered more reliable or if they come to believe, incorrectly, that they have always remembered the abuse¹¹.

From the prosecution perspective

General principles of admissibility of expert evidence

8. There is no specific test for the admissibility of recovered memory. Therefore the ordinary principles of admissibility of expert evidence apply; briefly:

⁹ Lewis, Alison and Kebell; as cited above, at 419-420. Note Lewis, Alison and Kebell argue for a case-specific approach to cases of recovered memory [428]

¹⁰ [2003] EWCA Crim 3917

¹¹ Lewis (above) [429]

a) Necessary assistance. According to the case of *Turner*¹², an expert's opinion:

[I]s admissible to furnish the court with ... information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.

b) Relevant expertise. The individual claiming expertise must have acquired by study or experience sufficient knowledge of the subject to render his opinion of value¹³.

c) Impartiality. These principles are now reinforced in Rule 33 of the Criminal Procedure Rules.

d) Evidentiary reliability. In *Reed*¹⁴ the Court of Appeal held at [111] that while "expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury" there is "no enhanced test of admissibility for such evidence" (or "formal assessment of reliability", see *Clarke*¹⁵).

Is recovered memory potentially admissible?

9. The difficulty that a prosecutor faces is the absence of a settled body of opinion in the area of recovered memory. If there is recovered memory, a prosecutor should consider whether expert evidence is required to explain it. A court may decide that an expert cannot provide the requisite necessary assistance and/or evidential reliability. Despite this difficulty, it is not impossible:

10. In *R. v. H. (J.R.) (Childhood Amnesia)*¹⁶, it was said that childhood amnesia usually existed until the age of seven, so that if a witness gave a detailed narrative account,

¹² [1975] QB 834 [841]

¹³ *Leo Sawrij v North Cumbria Magistrates' Court* [2009] EWHC 2823 (Admin); [2010] 1 Cr App R 22

¹⁴ [2009] EWCA Crim 2698

¹⁵ [1995] 2 Cr. App. R. 425

¹⁶ [2006] 1 Cr. App. R. 10

particularly if it contained extraneous detail of events occurring before that age, a judge should direct the jury to treat such evidence with caution; and whilst childhood amnesia was a proper subject of expert evidence, it would only be in most unusual circumstances where such evidence would be relevant.

11. In a recovered memory case the prosecution should assess whether a witness has given an account that is more detailed than one would expect from someone of that age (i.e. an unrealistic recollection). It is reported by the British Psychological Society (“BPS”) that generally when gauging the accuracy of childhood memories recalled by adults, and by children older than about 10 years, the following rules of thumb are recommended¹⁷:

- a) Detailed and well-organised memories dating to events that occurred between 7 to 5 years of age should be viewed with caution.
- b) Detailed and well-organised memories dating to events that occurred between 5 to 3 years of age should be viewed with considerable caution.
- c) All memories dating to the age of 3 years and below should be viewed with great caution and should not be accepted as memories without independent corroborating evidence.
- d) In general the accuracy of memories dating to below the age of about 7 years cannot be established in the absence of independent corroborating evidence. (Thus consistent with *R v H (J.R.) (Childhood Amnesia)*).

12. In *R. v. S.; R. v. W.*¹⁸, it was said that expert evidence would only be admissible in those rare cases in which a witness provided a description of early events containing an unrealistic amount of detail and that expert evidence would be inadmissible where it sought to analyse the accuracy or otherwise of a statement made by the witness. It was the evidence that the witness gave at the trial that mattered: issues as to the accuracy and truthfulness of the allegations were critically for the jury,

¹⁷ Ibid (section 3ii)

¹⁸ [2007] 2 All E.R. 974

upon careful reflection on a claimed memory of distant childhood events. The court added that save where there was evidence of mental disability or learning difficulties, attempts to persuade the court to admit such evidence should be scrutinised with great care.

13. As to those “rare cases” where a witness provides an unrealistic amount of information, it follows that recovered memory evidence is potentially admissible. “Unusual circumstances” was not defined in the *Childhood Amnesia* case, but it may be argued that unusual circumstances is analogous to those “rare cases” where a witness provides an unrealistic amount of information. The absence of expert evidence in most recovered memory cases (or childhood amnesia cases) would be problematic for the prosecution as a court would require an explanation for any unrealistic recollection. In the case of *R v GJB* [2011] EWCA Crim 867, the Court of Appeal rejected assertions that a good recollection of the appellant’s bedroom was due to childhood abuse as “amateur psychology”.

14. In *R v Evans (John Derek)*¹⁹ (a case where the defendant claimed to have suffered from recovered memory to support grounds for a fresh appeal), the Court of Appeal was prepared to accept that “there can be cases where after genuine amnesia, there can be truthful and reliable recovered memory”. The Court of Appeal accepted that although there is no “objective test” to determine whether such memories are accurate, that is a matter for the court.

15. Another scenario where the prosecution may seek to adduce expert evidence is to rebut the defence’s allegation that the complainant has false memories. In *HM Advocate v A* [2005] SCCR 593 two girls alleged sexual offences against the defendant. A consultant psychiatrist who had considered the statements along with the complainant’s medical records concluded that the complainant had false memory syndrome secondary to significant mental illness. The prosecution sought to lead evidence from a consultant clinical psychologist who did not support the

¹⁹ [2009] EWCA Crim 2243; [2010] Crim. L.R. 491 at 58

concept of false memory syndrome but rather supported that of the repression of memory (i.e. continuous memory) as a method of dealing with traumatic memories.

16. The Defence objected on the basis that the evidence of the Crown's witness was plainly designed to bolster that of the complainant, which was an issue for the jury. That contention was not accepted. It was held that whether the complainant suffered from an objective medical condition was likely to be outside the jury's experience and therefore met the common law admissibility test.
17. Admissibility to one side, where a witness is subject to hypnosis refers to new information on the issues of a case, even where that evidence does not form part of the witnesses' evidence at trial, the interview and transcription should nonetheless be disclosed to the defence (*R v Browning* [1995] Crim LR 227).

Summary of prosecution approach

18. The memory evidence should be properly classified as either continuous memory or recovered memory. Expert evidence is not normally admissible in continuous memory cases as the memory evidence in those cases should properly be left to the jury.
19. The authorities support that potentially, evidence of recovered memory is admissible.
20. The details of the memory should be assessed by the prosecution to consider whether it is realistic. If there is an unrealistic recollection, then in the absence of corroborating evidence, it appears that the prosecution has little option but to explain the recollection through expert evidence rather than amateur psychology (*R v GJB*).
21. Expert evidence may not be necessary to the prosecution in recovered memory cases, for example, where corroborating evidence exists or the memory recovered is not unrealistic. However, where the defence alleges false memories by way of expert

evidence, then expert evidence to rebut that evidence may be admissible and may provide an opportunity to support the credibility of the witness.

From the defence perspective

22. In theory, the test of admissibility of expert evidence applies to the defence in the same way it applies to the prosecution. As stated above, the defence should first distinguish continuous memory from recovered memory.

Strategy when faced with recovered memory evidence

23. If the prosecution presents evidence of recovered memory, then the defence have four options, that are not mutually exclusive:

- a) Argue that on the facts, there is no recovered memory: for example, evidence that there was no amnesia prior to the purported recovery. In this regard, no expert evidence should be necessary.
- b) Argue that as the memories are unrealistic, the prosecution requires expert evidence.
- c) If the prosecution adduce expert evidence, to use that evidence to attack the credibility of recovered memory.
- d) Challenge the evidence by instructing an expert.

Challenging recovered memory as false memory

24. The authorities indicate that it is difficult for the defence to adduce evidence of false memory syndrome. Therefore, attacks on recovered memory should be handled with considerable care.

25. In *R v Colin Ian J*²⁰ the contention of false memory was merely advanced as a possible explanation for the evidence being given by the complainant, but there was no independent evidence of any kind to support the contention that the witness was suffering from this problem. It was held that it would have been mere speculation for a jury to have concluded that the complainant was exhibiting it in the absence of any evidence to support it.
26. In *R v JP*²¹ it was held that there was no evidence that the complainant had undergone any dubious counselling, as alleged and the allegation was prejudicial to the complainant's credibility.
27. It follows from this case that in order to allege false memory (to challenge purported recovered memory), evidence of false memory is necessary, for example counsellor's notes. If there is evidence of false memory, then potentially, expert evidence is admissible.
28. However, the expert evidence should be a proponent of false memory syndrome. In *R v B(T)*²², the daughter of a murder victim alleged the defendant had been responsible twenty two years after the event. The Defence sought leave on appeal to adduce on an expert in memory research which set out, inter alia, the general unreliability of memories of children of 5 years at a distance of 20 years or more. The expert made a number of observations:

"The memories from below about seven years in age were formed during the period in which the brain, the self, memory, comprehension, language, and the emotions were all undergoing rapid and intense development. Memories from this time are likely to contain errors and in some cases will be entirely wrong. This is the case for everyone, there is nothing unusual about it and it simply reflects the fact that, in humans more so than in any other animal, cognition develops after birth. It means, however, that memories from this period, when the individual was aged five to seven years or less should be treated with caution. As a memory researcher I would not rely on the

²⁰ [2005] EWCA Crim 176

²¹ [1999] Cr L.R. 401

²² [2006] EWCA Crim 417

accuracy of such memories unless there was additional, independent, corroborating evidence.”

29. The expert said that it was not impossible for a child aged five-and-a-half to remember her mother being murdered. He added most people remember three or four “hot spots” in their early life. However he said research shows that the memory of early events is recalled out of order and with inaccuracies as to the detail of the event or events. In his opinion the only way to test the accuracy of such evidence is by looking at independent reliable evidence which supports it. He said that in his opinion it was not possible for an adult to relate accurately conversations heard under the age of seven.
30. Generally the expert was sceptical about false memory syndrome. He said it was a hypothesis for which there was no proper evidence. He was asked in cross-examination if much of what he was saying was simple common sense. He said he did not really know. Finally towards the end of his evidence he said that childhood memories are likely to be accurate as a theme, but may be coloured by inaccuracies.
31. The Court of Appeal held that this evidence was on the very borderline of admissibility. Essentially the expert's evidence of the results of research into memories went little further than commonsense and well within normal human experience. The expert had accepted that a traumatic event occurring when a person is under the age of seven can be recalled by that person in adulthood. Moreover, rejecting, as he does, false memory syndrome it would not have assisted the defence case.
32. In *R v Nicholson* [2012] EWCA Crim 1568 the defendant alleged that the four complainants coming round from anaesthetic all had false memories of sexual abuse by a hospital nurse. The Defendant unsuccessfully tried to use expert to run “false memory” defence. It was held that the jury were just as entitled, when considering the evidence of any one of the complainants, to have regard to the unlikelihood of a cluster of false memories as they would have been entitled, if the defendant's assertion had been that they were lying, to have regard to the unlikely coincidence

that they were all liars. However, before the jury could be entitled to have regard to the unlikelihood of a cluster of victims of false memory, there would have to be expert evidence that the coincidence was indeed unlikely, because that was not a matter about which the jury would have experience.

33. The case demonstrates the difficulty in alleging false memories. However, the case suggests that if there was a body of expert opinion or knowledge regarding clusters of victims and the unlikelihood of a cluster having recovered memory, then such evidence might be admissible. The case demonstrates not only the need for the defence to discern matters that require expertise and matters that are best left to the jury; but the need to scrutinise an expert's evidence to ensure that the expert has the requisite expertise that may support the defence. Merely to allege false memory appears to be insufficient. Expertise on why the evidence is false is more likely to be admissible.

34. As seen in *HM Advocate v A* [2005] above, there is a danger that if the defence adduces expert evidence alleging false memories, then the prosecution may adduce expert evidence to counter such claims, which may have the practical effect of bolstering the credibility of the complainant.

Summary of defence approach to experts

35. In defending cases where recovered memory is adduced in evidence, there are a number of pitfalls.

36. The start point of a defence is to question whether the evidence can properly be classified as recovered memory. Evidence of amnesia/memory prior to the alleged recovery should be sought. Next, the prosecution evidence should be scrutinised to ensure that unrealistic memories are supported by expert evidence. In the absence of expert evidence, it may be appropriate to make a half-time submission.

37. If there is expert evidence, then it should be scrutinised robustly, as there is no settled body of opinion that supports recovered memory. In challenging the evidence itself, expert evidence may not be required if it goes little further than

commonsense and human experience (*R v B(T)*). If alleging false memory through expert evidence, it is important to consider the expert's view on false memory: it would be problematic if the expert was not a proponent of it. Even if the expert is a proponent of false memory, the authorities suggest that the courts take a somewhat cynical view and require factual evidence to support false memory. It is important that the expert can provide evidence beyond the knowledge of the jury, to support any assertions.

Reform

38. The Government has proposed the Criminal Evidence (Experts) Bill. The Law Commission recommended the introduction of a statutory admissibility test for expert evidence to replace the current test²³. The Commission's proposed test requires trial judges to carry out a *reliability determination* in deciding whether the expert opinion is 'soundly based'²⁴. This report is a move towards the increased scrutiny of the reliability of expert evidence.

²³ Law Commission, Expert Evidence in Criminal Proceedings in England and Wales, Law Com No 325, 21 March 2011

²⁴ *Ibid* para 5.17