Repressed Memory Evidence in Sexual Cases –A Legal Perspective

by

Mr. David Grace QC

An address delivered at a meeting of the Medico-Legal Society at the Melbourne Club held on 21 March 1997.
The Chairman of the meeting was Her Honour Judge Elizabeth Curtain.

Introduction

Over the past decade the process of recovering memory has been the subject of much controversy among psychiatrists, psychologists, trauma counsellors and lawyers.

In the legal context, "repressed memory syndrome" (RMS), as it has come to be known, has related to the process by which victims of major trauma have been able to recover years later awareness or memory of such trauma where previously there was not awareness or memory.

In recent times, some sexual cases, particularly, have highlighted the controversy concerning the veracity of such recovered memory.

Proponents of the veracity or reliability of recovered memories maintain that many persons tend to repress recollections of trauma until their memories are "exposed" in the course of psychotherapy or other counselling. Opponents of the existence of RMS claim that memories are incapable of being suppressed in this way and that psychotherapy results in instances of unintentional confabulation.[1]

This paper will examine a number of recent sexual cases that have come before the criminal courts in Australia in which the use of recovered memory evidence has been a feature. The issues that have arisen will be highlighted and suggestions made as to how to best test the veracity or reliability of such evidence.

Memory - The Nature of the Problem

Memory is a plastic and complex phenomenon. No medical practitioner or any expert witness can promise that the veracity of a memory is legitimate. One also cannot say that a memory is absolutely false. Memory is plastic and it can be played with. For example, it is very easy to manufacture false memory - we are all able to convince ourselves of different things in everyday life. Hypnosis can be used as a method of implanting memories that are impossible to remove, by making the implanted memory indistinguishable, to the person remembering, from a real memory. Thus it is critical for a therapist or counsellor, or indeed any questioner, when seeking information about something remembered, not to use leading questions, hypnosis, drugs or other memory distorting procedures which are likely to falsify memories.

Technological developments eventually may make it possible to distinguish memories which have been implanted from memories of events that have actually occurred. There already have been a number of studies into the biochemistry of post-traumatic stress disorder in cases of inescapable shock. The suggestion from these studies is that the biochemistry of arousal is distorted in the brain, becomes

hyper-aroused and alert for the next trauma experience. But until technological developments create certainty, the conservative and prudent course at least in the case of alleged recovered memories is to reserve judgment unless independent corroboration exists. It may be even wiser to be sceptical.

The problem of general memory recovery has, of course, not escaped judicial attention. In Longman v The Queen (1989) 168 CLR 107, Justice McHugh of the High Court of Australia, at 107-8, said:

> *"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 person's 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.*
>
> *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 likelihood of error was increased by the circumstances in which the complainant said the incidents occurred. The opportunity for error in recalling, twenty years later, two incidents of childhood which are alleged to have occurred as the complainant awoke, and then pretended to be asleep, are obvious. Experience derived from forensic contests, experimental psychology and autobiography demonstrates only too clearly how utterly false the recollections of honest witnesses can be. Certainly some incident or accumulation of incidents seems to have affected the complainant's attitude to her stepfather. She testified that, because of his conduct towards her in sexual matters, "I don't hate him but I do hate what he's done and the problems it's caused in my life". However, the existence of this feeling towards the applicant increased, rather than decreased, the need to examine carefully whether the complainant's honest recollection of events concerning the applicant was not distorted by this hatred."*

Barrister Ian Freckleton[2], in a recent article published in the Criminal Law Journal, put the issue of repressed memory in perspective when he wrote:

> *"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"*

Repressed Memory Evidence - Admissibility

In the Australian context there is scant legal authority in relation to the admissibility of repressed memory evidence where it has been recovered by therapist intervention.

The method of therapist intervention is likely to become a crucial factor, however, whenever there is a challenge to such evidence.

A number of criminal cases already have provided the forum for discussion of therapeutic methods and the possible effect of these methods upon admissibility. In this context, one is not only talking about the admissibility *per se* of this evidence, but also the exercise of discretion by a trial judge to exclude the evidence on the basis of unreliability or of uncertain provenance.

There have been a number of developments overseas which have provided Australian courts with guidance in this difficult task.

In McFelin [1985] 2 NSLR 750, the New Zealand Court of Appeal held that there should be no inflexible rule that hypnotically induced testimony is inadmissible. The court set out guidelines which were adopted primarily from the California Evidence Code. The court also determined that the onus was upon the party seeking to introduce the hypnotically induced evidence to establish that it is safe to admit that evidence in the particular case. Safety presumably means sufficiently reliable. (It is of interest that Victorian courts are yet to determine this wider issue).

The California Evidence Code imposes the following requirements upon the admissibility of hypnotically induced evidence:

1. The hypnotically induced 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].
2. The substance of that original recollection must have been preserved in written, audio or video-recorded form.
3. The hypnosis must have been conducted in accordance with the following procedures:
   a. the witness gave informed consent to the hypnosis;
   b. the hypnosis was performed by a person who is experienced in its use and who is independent of the police, the prosecution and the accused;
   c. the witness's original recollection and other information supplied to the hypnotist concerning the subject matter of the hypnosis was recorded in writing in advance of the hypnosis; and
   d. the hypnosis was performed in the absence of the police, the prosecution and the accused, but was video-recorded.

Commenting upon these requirements, Hunt CJ at CL of the Supreme Court of New South Wales in The Queen v Jenkyns (1993) 71 A.Crim. R. 1 at 4 said:

> *"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 an 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 (that is, has subconsciously filled in gaps in his or her memory by guessing or by fantasising); 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 is apparently also known by the somewhat more emotive term "pseudomemory".) These matters must be established to the satisfaction of the trial judge in a voir dire hearing, at which expert testimony is admissible/e as to the reliability of the witness's evidence.

The guidelines put forward by the New Zealand Court of Appeal do not insist upon compliance with every one of those safeguards, but leave it to the discretion of the trial judge as to whether any non-compliance renders the evidence unreliable. The Californian safeguards are, however, to be complied with as far as reasonably possible. It was said that, obviously enough, the greater the compliance with the safeguards the greater the likelihood that the evidence would be admitted. Regard should be had to the strength of the other evidence available to confirm or to support the evidence hypnotically induced, and in practice it is likely to be more difficult to show that the evidence can safely be admitted if the recollection of the witness emerged for the first time during or after hypnosis.

The Court of Appeal also stated that the fact that a witness was hypnotised should be disclosed to the accused, and all relevant transcripts and information provided to the accused on request. In my view, such information (including video recordings) should be made so available well in advance of the trial, to enable the accused to have the assistance of his own expert witnesses in relation to that material.

Finally, the Court of Appeal held that, if the hypnotically induced evidence is admitted into evidence, the trial judge should warn the jury of the special need for caution before placing reliance upon it. The warning need not be in any particular terms, but it should adequately alert the jury to the dangers inherent in the use of hypnotism."

After a lengthy review of the evidence obtained under hypnosis, Hunt CJ at CL came to the conclusion, after reference to the McFelin guidelines, that he was not satisfied that the hypnotically induced evidence was sufficiently reliable as to provide a prima facie reason for admitting it. The evidence was therefore excluded. Amongst the reasons for exclusion were the implied suggestions made to the witness by the hypnotising police officer both prior to and whilst the witness

was under hypnosis. The views expressed in McFelin and by Hunt CJ at CL in Jenkyns have been followed in Tasmania in The Queen v Haywood (1994) 73 A.Crim.R. 41.

In Haywood, a case of aggravated rape, Wright J. of the Supreme Court of Tasmania held that the Crown had not demonstrated that the evidence implicating the accused was sufficiently safe, notwithstanding that the McFelin conditions were substantially fulfilled.

On the issue of the test for "safety" or "sufficient reliability", Wright J, at 50, 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 if any"* and later, *"that 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 and, secondly, it such evidence is admitted, the trial judge should warn the jury of the special need for caution before relying upon such evidence."*

In Horsfall (1989) 44 A.Crim.R. 345, Cox J. of the Supreme Court of South Australia ruled on the admissibility of a child's evidence in a sexual case. The facts were as follows:

> Horsfall was charged with two counts of indecent interference with a girl aged nine. The accused pleaded not guilty. The defence submitted that the girl should not be called, as her evidence was unreliable and this would mean that the accused could not get a fair trial. The defence applied for a voir dire to test the matter, over Crown objections that the evidence should be led, with the defence being free to adduce evidence on credit. The trial judge allowed a voir dire. The defence contended that multiple questioning of the child by various persons prior to trial, and an extended course of hypnotherapy which the child underwent in connection with anxiety symptoms following the alleged assaults, had so contaminated her memory that her evidence should be excluded.

Cox J. held that the child's evidence should be excluded. The multiple questioning alone did not justify this course, but the hypnotherapy did. During the hypnosis sessions, allusion had been made specifically by the doctor conducting them to the alleged assaults on the girl and to her memory about them and to the way she could cope with them. It was significant that the girl was asked out of the hypnosis to say what had happened with the accused and had the question repeated soon

after under hypnosis. That would have indicated to her that the doctor approved of her answer. On another such occasion she added to her account. According to expert evidence, this created a danger that by reason of her experience under hypnosis, her beliefs about the facts became more firmly fixed in her mind and her confidence increased.

Inherent in the trial judge's ruling is the adoption of the McFelin guidelines.

So far, there has been reference to cases involving hypnosis. However, the recovery of memory has also involved other processes. The technique of Eye Movement Desensitisation and Reprocessing (EMDR) is one such process. Mathews J. of the Supreme Court of New South Wales discussed the history of EMDR in Jamal (1993) 69 A.Crim.R. 544 at 548:

> *"EMDR was serendipitously discovered by a 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 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.*
>
> *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 patient's eyes move rapidly from side to side. At the same time the patient is asked to focus on a particularly 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.....*
>
> *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 underwent traditional therapy and half of whom underwent 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.....

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 those parts of the brain which deal with short-term and long-term memory.

All these hypotheses remain in the area of speculation.

The absence of any theoretical base for EMDR leads a number of people to be very sceptical about it. Dr. Jonathan 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. Whilst EMDR lacks a firm scientific basis, it is generally a useful tool for the therapy of patients experiencing symptoms linked with post-traumatic stress. It is a simple technique and requires no particular skills or level of scholarship. It is a novel technique and carries with it a touch of magic. It is a fashionable form of therapy at the present time.

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 its 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 the psychiatric armamentarium."

In Jamal, there was a challenge to the admissibility of the evidence of a key Crown witness who had little recall after a crime due to his injuries. About a year after the incident, the witness underwent EMDR treatment. His therapist gave evidence that during this treatment he began to relive the assault upon him. He then made a statement to police containing much more detail about the assault. The defence contended that the witness's memory was so tainted by the EMDR process as to render his evidence inadmissible. Mathews J. 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. There was insufficient evidence to establish that this had occurred because the therapist had omitted to take any notes during the session. Her Honour did comment, however, that if it had been possible to demonstrate that the improvement in the witness's memory was due wholly or substantially to his EMDR session, there would be serious concerns as to the reliability of the evidence. As to the relationship between EMDR and hypnosis, Her Honour had this to say:

> *"The relationship between EMDR and hypnosis is significant for a number of reasons. One of the possible explanations for the effectiveness of EMDR is that it induces a hypnotic-type trance. And whilst even the experts cannot fully explain the phenomenon of hypnosis, it has been with us for long enough to have produced a great deal of debate about its efficacy as a memory retriever. There is the rea/ question, arising from the particular circumstances of this case, as to whether Mr. Thompson himself might have been in a hypnotic trance during his EMDR session.*
>
> *The word "hypnosis" is derived from the Greek word "hypnos" meaning sleep. This in a sense is misleading, for a hypnotic trance is not a sleep state as we understand it. Hypnosis has a long history, and the trance-like state it induces has been described in ancient religions and cultures. But notwithstanding the antiquity of the phenomenon, there is no unanimity as all as to what it is - lack of agreement which apparently reflects the diversity of theoretical explanations for it. As Dr. Vaughan says, one of the main problems with hypnosis is that people do not understand what a hypnotic trance is. If you measure the brainwaves of the hypnotised subject there is no abnormality revealed. As*

a result, Dr. Vaughan says, hypnosis is a disappointing area for people of a scientific background. To use his words:

> *"Hypnosis is, as you approach it, it appears to kind of dissolve... People who use hypnosis all the time are often reluctant to commit themselves as to what it actually".*

As to hypnosis and EMDR: the inability to find a precise definition or a generally accepted theoretical basis for either procedure makes comparison between them very difficult. However, Drs. Vaughan and Hampshire and Mr. Miletic all say that the two procedures are entirely different. Indeed Dr. Hampshire says that EMDR is the exact opposite of hypnosis. To quote Dr. Hampshire:

> *"In hypnosis, firstly, you are asking a patient to vacate their mind or think of calm scenes or imagine something relaxing, whereas in EMDR you do the opposite, you ask the patient to imagine as richly as they can the most traumatic thought or memory or image they have. And secondly, in hypnosis you then guide the patient and are very much involved in controlling the thoughts that they think of. Whereas in EMDR you really try to do the opposite, you try to get right out of your patient's thoughts and allow their own thoughts to flow one to another in an almost automatic way."*

According to Dr. Vaughan, EMDR is not accompanied by the enhanced suggestibility which characterises a hypnotic trance. Indeed there is no trance at all in the EMDR process, according to both Dr. Vaughan and Mr. Miletic. The subject is totally at liberty to discontinue the therapy, and this not infrequently happens when the session becomes too distressing.

Against this, Dr. Phillips considers that there are a number of similarities between the two procedures. Both techniques, he says, require an empowered therapist and a willing patient. Both are characterised by some alteration in the patient's state of consciousness. Both techniques, he says, lead to a high level of suggestibility in the subject.

Mr. Taylor also disagrees with Dr. Hampshire's assessment that EMDR and hypnosis are opposites. Dr.

Clark, whilst not commenting on this matter himself, quotes Dr. Shapiro as saying that one cannot rule out the possibility that what is happening with EMDR is a quick induction of a trance state.

I must regard as significant the fact that there is a clear divergence of opinion between practitioners who regularly use EMDR on the one hand and those who do not on the other. All the opinions to the effect that EMDR and hypnosis are similar come from people who have never practised EMDR or have done so only rarely. Those who regularly use it as a therapeutic tool say that it is completely different from hypnosis. Accordingly, although one could never be dogmatic on a subject such as this, I would have to say that the weight of evidence indicates that the state of consciousness induced by EMDR is quite different from a hypnotic trance. It is likely that the subject is less suggestible, and almost certainly has more control over his or her situation than does a hypnotised subject".

Nevertheless, Her Honour was of the view that the McFelin guidelines be adopted in relation to the use of EMDR as a possible memory recovery technique.

Jamal's case went on appeal to the Court of Criminal Appeal of New South Wales (Unreported 1st September 1995) which held that the McFelin and Jenkyns guidelines should apply to EMDR. The Court found that EMDR exhibited "the same or similar changes" to those exhibited by hypnosis and determined (at 73-74 per Grove J.):

"Each may be used for therapeutic purposes or for psychotherapy. Each may apparently be 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 Thorne, (Unreported 9th June 1995), the Court of Criminal Appeal of the Supreme Court of Victoria considered an appeal by a man convicted of serious sexual assaults upon his stepdaughter who complained 16 to 27 years after the events in question. Before going to police, the complainant had been to a series of counsellors. These counsellors had undertaken a number of procedures, including one described as "listening to the inner child", after which the complainant got "flashbacks" which allowed her to feel what was happening in her body at the time. She maintained that the "flashbacks" were memories.

Another counsellor used a technique described as Rapid Eye Movement (presumably EMDR) to assist her with her feelings of fear and panic. The therapy allowed her to fill in details of some incidents which she had forgotten, but she could not say to what extent the memories resulted from the counselling or occurred naturally. Ashley J. (in dissent) found that *"there is a serious risk that the recollection she ultimately averred was not a recollection of incidents that had been perpetrated upon her, but rather a recollection which reflected an amalgam of external influences to which she was subjected over a protracted period. "*

The majority of the Court held that the assessment of that evidence was a matter for the jury. The appeal, however, was successful on other grounds.

Previously, in 1994 in Bunbury, Western Australia, the jury in the famous Jumeaux case in which two daughters made allegations of sexual abuse against their father, considered the fact that each daughter claimed their memories had been repressed. The memories were recovered by various forms of counselling and psychotherapy. Seaman J. cautioned the jury (who ultimately could not agree on a verdict) in relation to the possibility that false evidence had been produced by means of suggestion.

On the general issue, Freckleton[3] comments that:

> *"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 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. In the New South Wales case of R v CPK one of the complainants at age 22 allegedly "recovered" her memories of penetrative abuse at the hands of her father some 10 - 11 years before by the assistance of a "kiniesiologist", "laying a hand upon her head in a certain manner."*

These comments mirror, in essence, the note of caution highlighted by Mathews J. in Jamal (at 564):

> *"And 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."*

Enough has been written on the subject of recovered memory to highlight the inherent dangers of convicting on the basis of such evidence, if not excluded in the exercise of discretion. A rule of practice, if not of law, is required to be developed that requires a warning to be given to a jury in the strongest possible terms to look for independent evidence of corroboration of the complainant's version of events before accepting it. Such a rule will at least have the potential of eliminating the great risk of miscarriages of justice occurring where the sole evidence against an accused is that of the complainant who has recovered memory. Of comfort in this regard is the view now accepted by the Australian Psychological Society that repressed memories cannot be regarded as accurate without external corroboration.

The adoption of the McFelin and Jenkyns guidelines throughout Australia, will also provide the necessary safeguards as a precursor to the admission of such evidence.

The role of the Expert

There is scant legal authority in Australia in relation to the admissibility of expert evidence concerning the efficacy of methods or processes to recover memories.

Jamal's case provided an example of the great divergences of opinion as to EMDR. Overseas guidance may once again provide useful assistance to Australian Courts.

In Canada, the Court of Appeal of Ontario in Norman (1993) 87 CCC (3d) 153 held that expert evidence may be of considerable importance in recovered memory cases, especially sexual assault cases.

In New Zealand, a trial Judge in the case of The Queen v R (1994) 11 CRNZ 402, allowed (over objection) expert evidence to be given on behalf of the Crown in relation to RMS to explain the mental processes which may in certain circumstances allow memories to be recovered. The trial Judge held that the evidence was designed simply to give to the jury a means of understanding how the human memory works and is affected by certain circumstances, that such understanding was

outside the "common knowledge" of the layman, and was therefore admissible.

The last word on the subject, however, was the decision of the Court of Appeal of the Supreme Court of Victoria in 1996 in Bartlett (Unreported 26th June 1996).

In that case, the complainant complained to the police of sexual assaults ten years after the events were alleged to have occurred. During the trial the accused applied to the trial Judge for leave to call an expert witness to give opinion evidence upon the question of the reliability of testimony which was the product of recovered memory. The Complainant agreed in her evidence that her memory of the relevant events had been revived during counselling sessions from therapists when the memories came to her in the form of what she described as "flashbacks". Some of these were events for which she previously had no memory. She said they were intermingled with recollections of violence inflicted upon her in early childhood by her stepfather (not the subject of charges).

The Crown opposed the calling of expert evidence and after listening to the expert's evidence on a voir dire the trial Judge refused to allow the testimony on the basis that the subject matter towards which the testimony was directed, was one on which persons without instruction or experience in the area of knowledge concerned would be able to form a sound judgment without expert assistance. On appeal that ruling was challenged. Winneke P., with whom the other two members of the court agreed, held (at 20):

> *"that questions of whether there is such a phenomenon as "suppressed memory" and, if so, whether it is likely to provide accurate recall; or whether recall of events suppressed for many years are likely to be affected or displaced by other similar events, are questions which must surely be outside the ken of the lay person. Quite clearly, as His Honour noted, they had been the subject of much research which has produced a division of expert opinion. The learned Judge seemed to think that because there was such a division of opinion it was a matter which could be used to exclude the evidence. In my view, that cannot be right. The fact that experts speaking in a field which is truly an "expert's field" do not speak with one voice cannot, in my view, assist in determining whether such opinions are admissible in evidence. "*

Later (at 22), His Honour concluded that:

> *"The reliability of a "recovered memory" is within a field of knowledge which is outside that of the lay member of the public and lies within an area suitable for qualified expert opinion."*

That this was His Honour's conclusion is not surprising and the finding will provide authoritative guidance to courts throughout Australia on this issue.

Conclusion

This paper has attempted to present an overview of the nature of the problem of repressed memory evidence in sexual cases and the issues highlighted by the small number of cases that have been decided by courts to date. The corruption of the memory process may often be difficult to determine. The methods and processes used for the recovery of memories need to be closely examined in each case. It often may be difficult to determine that confabulation has occurred. In cases where memories of sexual abuse have been recovered as a result of therapeutic intervention, the onus should be on the party who seeks to call the evidence to establish that the memory has been recovered in circumstances where the methods or processes used have not affected the veracity or reliability of those memories. The great problem, highlighted in the cases examined in this paper, is that the nature of the therapeutic process used often corrupts the veracity of such recovered memories.

The dangers of miscarriages of justice are clear where the only evidence is that of the complainant who has recovered memory through therapeutic intervention. Independent corroboration of guilt should be a necessary element prior to any conviction being recorded. At least in Victoria and New South Wales the use of the expert in such cases has now been approved.

I have not touched upon the United States experience in this area which has been wide-ranging. There is no doubt that RMS has assumed an extraordinary importance in contemporary psychotherapy. The question is how reliable is it. The United States experience has been that multiple injustices have been perpetrated by the use of repressed memory evidence. These injustices which have been corrected on appeal have led to the phenomenon that the proponents of the existence of RMS pose a threat to the victims of genuine sexual abuse, who may now once again find themselves disbelieved. It also threatens many psychotherapists and counsellors who conscientiously pursue treatment

of their patients.

The jury is still out on the existence of RMS. Until there is further research and a great deal more of experience upon the subject, courts should treat the use of repressed memory evidence with extreme caution.

ENDNOTES

1 E. Loftus and K. Ketcham: "The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse (St. Martin's Press, New York, 1994)

2 Ian Freckleton: "Repressed Memory Syndrome: Counterintuitive or Counterproductive?" Volume 20 No. 1 Criminal Law Journal: February 1996 at 7

3 Ian Freckleton, op cit at 18