

Recovered Memories in the Court: implications for therapy, justice and prevention

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Structure of the talk

What is the recovered memory phenomenon?

Why is there a debate?

Explaining recovered and false memories

Other concerns about memory

Role of the expert witness

Guidelines for assessment

The nature of recovered memory experiences

A memory of a specific event(s) the person experienced or witnessed comes to mind that the person had forgotten happened to them

In clinical/legal contexts the memory is usually of a crime such as murder or child sexual abuse

Memories often accompanied by shock and surprise

They may consist of vivid images with little context that are relived in the present, or of properly contextualised autobiographical memories

The nature of recovered memory experiences

The person may in fact have talked about the event, even recently (failure of memory awareness)

The intense emotions that are often experienced at recovery and subsequently need not have been present at the time of the trauma. Other reasons are:

- a) The event is re-appraised
- b) Disbelief that it could have been forgotten
- c) Inconsistency with beliefs about the self

Forgetting may be partial or total

The professional consensus

Professional opinion accepts that whereas some recovered memories may correspond to actual events, they may also be partially or wholly false and that the presence of suggestive influences (such as hypnotic suggestion) would increase the likely unreliability of the memory

Position endorsed by the American Medical Assn, British Psychological Society, American Psychiatric Association, American Psychological Association

Why the debate?

Recovered memories of CSA are not to be believed, say researchers linked to false memory societies

Arguments:

Trauma cannot be forgotten

There is no such thing as repression

Recovered memories are implausible

Therapists know little about memory and are responsible for apparent memory recovery

False memories are easy to create

“Traumas cannot be forgotten”

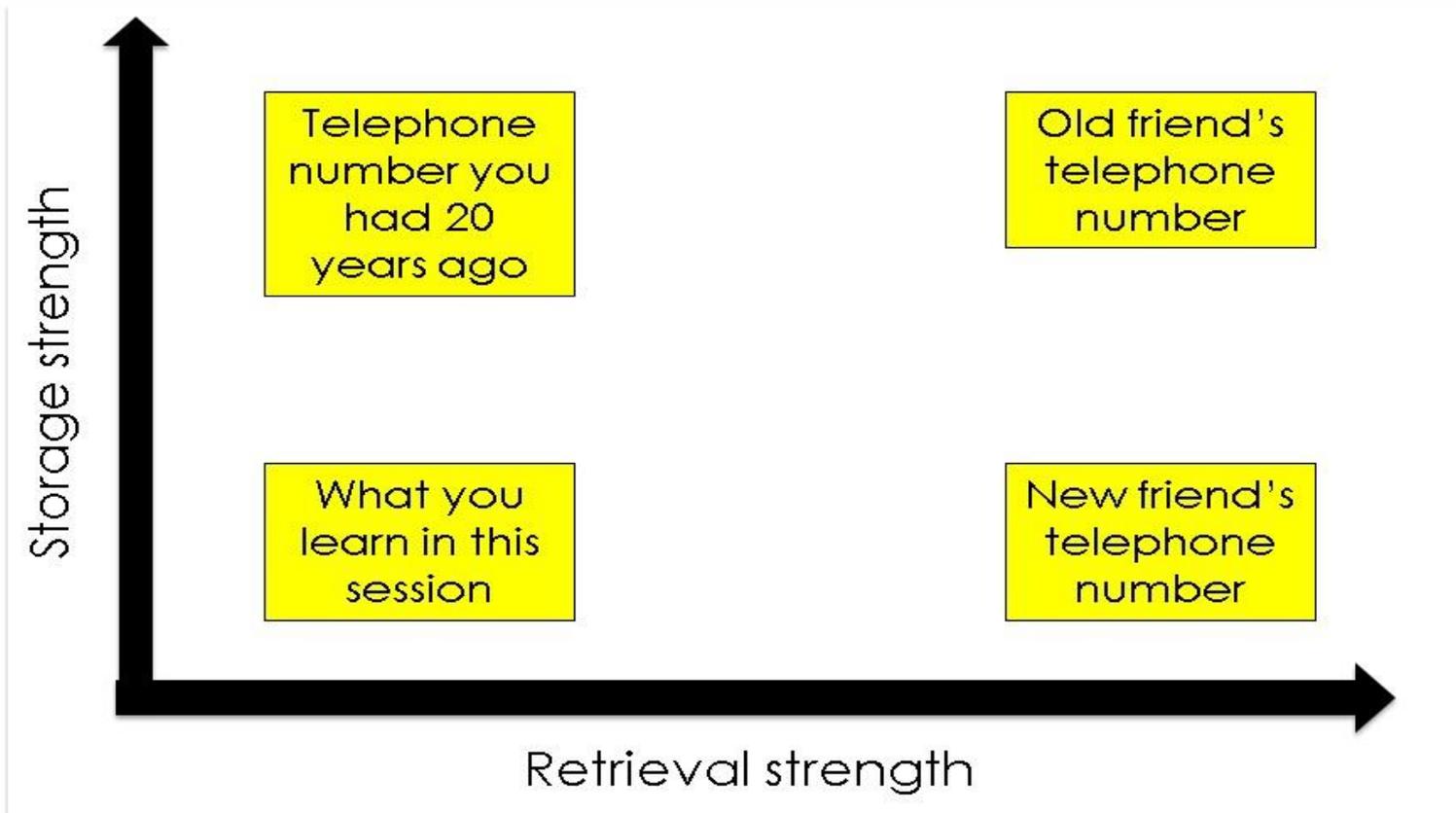
Changing understanding of forgetting:

Decay theory: information decays passively over time unless rehearsed

Interference: new information that is sufficiently similar can block access to old information. In the lab interference can reduce recall dramatically, even of distinctive, emotionally-charged materials such as swear words, with appropriate cues triggering complete recovery (Smith & Moynan, 2008)

New theory of disuse distinguishes storage strength and retrieval strength: if information is learned well enough it will remain in memory permanently although our ability to retrieve it declines, particularly if there are context changes

The (New) Theory of Disuse



From Bjork & Bjork, 1992

“Traumas cannot be forgotten”

In PTSD the existence of amnesic gaps for significant aspects of the trauma is a symptom

But can traumatic events be completely forgotten?

Survey evidence suggests that once the immediate post-trauma period has passed, their recall advantage is modest in healthy populations

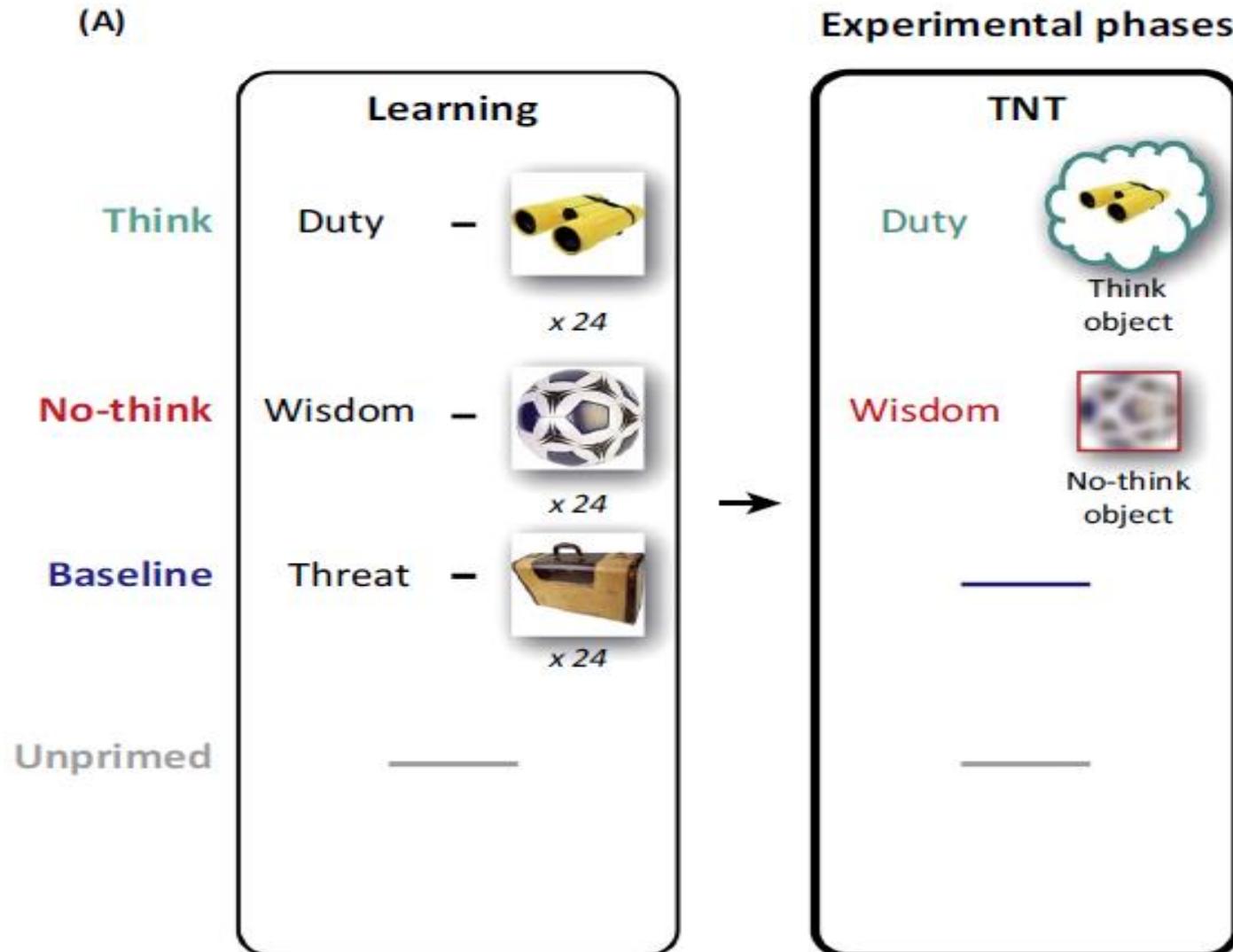
Recall depends on factors that influence retrieval strength: how significant they are for identity and whether they have important consequences

“There is no such thing as repression”

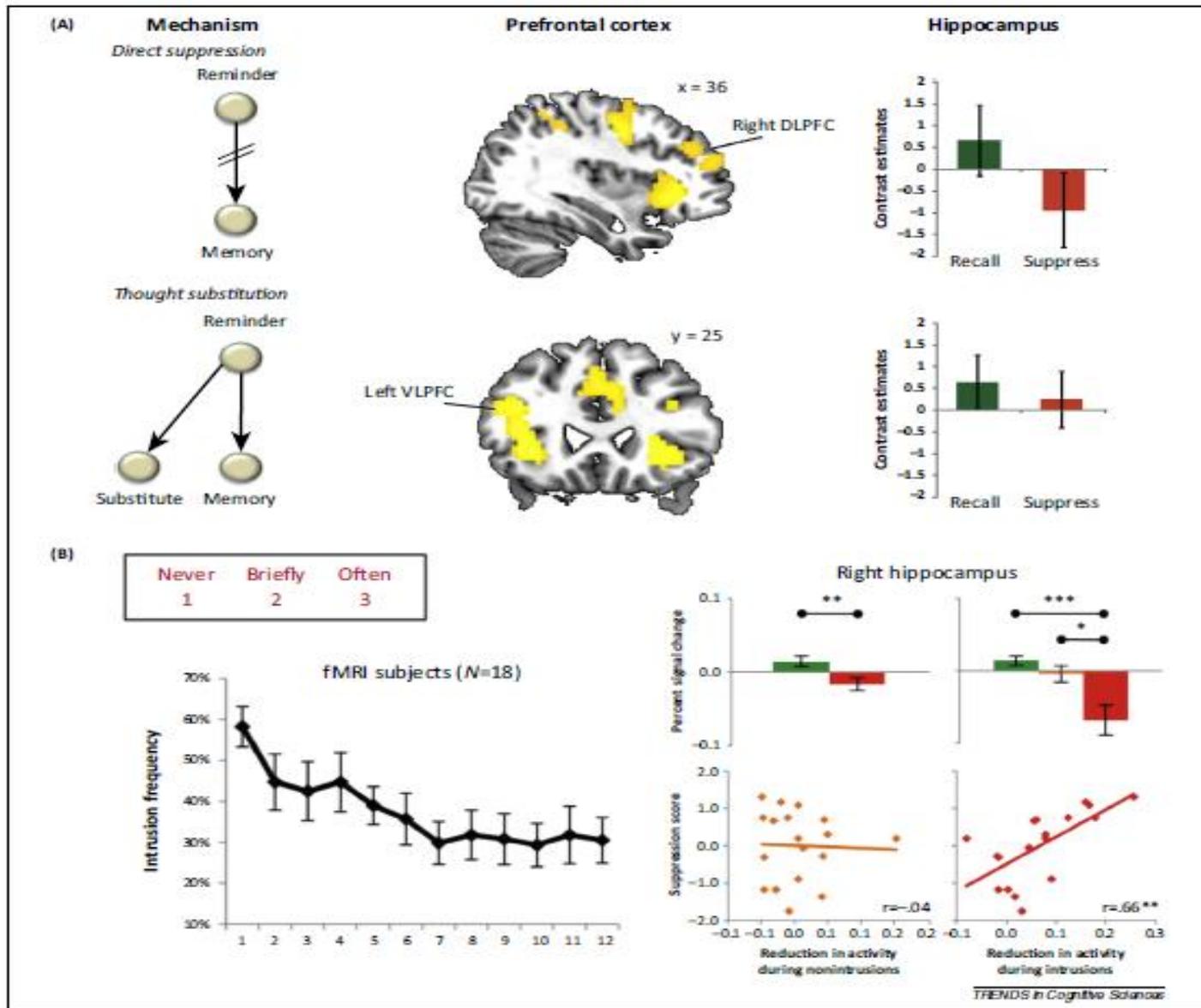
Such statements ignore the well-established distinction between unconscious repression and deliberate repression (suppression)

Evidence for unconscious repression: murderers may spontaneously forget their crime

Much experimental evidence that deliberate forgetting works (Bjork: directed forgetting; Anderson: thought suppression vs. substitution)



from Anderson & Hanslmayr, 2014



from Anderson & Hanslmayr, 2014

Say, is there Beauty yet to find?
And Certainty? And Quiet kind?
Deep meadows yet, for to forget
The lies, and truths, and pain?....oh! yet
Stands the Church clock at ten to three?
And is there honey still for tea?

Rupert Brooke (1918)

“The Old Vicarage, Grantchester”

“Recovered memories are implausible”

Survey data repeatedly indicate:

Recovered memories may involve many different kinds of traumatic event

Sexual abuse memories are sometimes from a very young age or involve an increasing number of perpetrators, but not typically

Corroborative evidence for the original event is often available

“Therapists cause recovered memories”

Survey data repeatedly indicate:

Recovered memories may occur in the absence of any therapy

Even in therapy they may occur spontaneously in the absence of any therapeutic suggestion

Almost all practitioner psychologists now accept the reality of false memories and have views that are consistent with professional guidelines

Less qualified therapists are still a source of concern

“False memories are easy to create”

Many claims are based on studies that just use word lists (the Deese-Roediger-McDermott paradigm) not actual autobiographical events

Another technique is called “imagination inflation” – practising imagining a childhood event very slightly increases the belief the event occurred (but does not lead to a memory)

“Memory implantation” involves false information from a trusted source and repeated imagining

Table

Leg

Seat

Soft

Desk

Arm

Sofa

Wood

Cushion

Rest

Stool

“False memories are easy to create”

Proper false memories of childhood events, in which the person has a detailed image they believe corresponds to a real event, can be created in the laboratory but this is difficult to do, relies on procedures such as deception that make it different from therapy, and only a minority of people (probably less than 15%) appear susceptible. Most ‘false memories’ are vague, not believed, or not held with any conviction

Explaining recovered memory

‘Forgetting’ can involve either the storage strength or retrieval strength of memories

Trauma memories are likely to have high storage strength but may have low retrieval strength:

- Because they relate to a specific period in the past

- Because they are not relevant to current goals and plans

- Because the person does not encounter reminders

- Because they are not part of the person’s identity

Explaining recovered memory

The argument that trauma is always remembered implies a consistent, unitary identity

Social psychology research supports the general existence of multiple identities, with additional identity fragmentation associated with child abuse

Social factors (family recognition, legal proceedings versus punishment and secrecy) and cognitive factors (especially deliberate forgetting) may also help to make trauma memories less accessible

Explaining false memory

How can we explain false memories if they are hard to implant, and often occur outside a context where the person is exposed to prolonged suggestion?

The recovered memory may be entirely false or, more likely, it consists of some true and some false elements that have become associatively linked in a new image. Real emotions linked to the true elements become part of the new image

Explaining false memory

Vivid and emotional memories are in general more likely to correspond to actual events, so there is a tendency to assume they are true. As a result apparent recovered 'memories' of traumatic events are convincing, as well as disturbing, further increasing emotional arousal

This contributes to the person making a source monitoring error, confusing the product of their imagination with an actual event

Summary

Memory is highly complex and not subject to universal laws. Much of the experimental data are limited by the type of material and the type of people who are tested.

What is clear is that information high in storage strength can remain in memory for very long periods even though for long periods it is hard to retrieve

Retrieval strength can change over time when the context changes or the person encounters strong reminders

Summary

‘Repression’ involves two separate theoretical mechanisms, neither of which is essential to explaining recovered memories of trauma

There is nothing about observations of recovered memories in the clinic that contradicts scientific knowledge about memory

There is no evidence that recovered memories are any less accurate than continuous memories

Like ordinary memories, they may be accurate in whole or in part, or completely false

Where are we now?

Initial framing of debate: exclusive focus on child sexual abuse, contrasting clinicians believing in repression with scientists dismissing it

Second phase: most mental health disciplines adopted warnings and where necessary changed their training, beliefs and practice

Now: false memories more likely to arise with honestly mistaken people who have either not been treated or are treated by therapists who do not educate them about memory fallibility

More concerns about memory

“The determinative evidence that jurors must weight then, often consists of memory reports – but memory is fragile and fallible”

“Decades of experimental and field research have shown that memory is fallible and that this recollective imperfection can exert disastrous consequences in the legal arena”

“Psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved”

Mr Justice Leggatt (Gestmin SGPS v Credit Suisse EWHC 3560)

How reliable is memory in general?

In the absence of suggestion or deception what people can easily remember tends to have a high degree of accuracy

Memory is increasingly prone to error as people attempt more detailed recall

Adult recall of significant adverse childhood events generally reliable (Brewin et al 1993; Hardt & Rutter 2004) - errors of omission greatly exceed false positive reports

Presence of psychopathology does not reduce reliability

Memory for early judgments and evaluations is poor

How reliable is memory in general?

Emotion increases the accuracy of recall, but what is recalled is selective – some details will be remembered better but this may be at the expense of other details

Consistency is not the same as accuracy – recall can theoretically be inconsistent but still 100% accurate if it is sampling from alternative elements of a complex experience. Equally it can be 100% consistent but still inaccurate

Conclusion: within its capacity limits, memory is fallible but not unreliable

Limitations of human memory research

The majority of memory research has used experimental stimuli that are purposefully selected as being meaningless

In most cases only one opportunity to recall is offered

Even when important events are studied (e.g. flashbulb memories for the assassination of Olof Palme) they rarely have a direct impact on the individual

Almost all research is concerned with single events whereas many important experiences occur a number of times

Almost all research is concerned with voluntary memory

Roediger (2008): No empirical law withstands manipulation across types of subjects, kinds of events to be remembered, manipulation of encoding conditions, and variations in test conditions

Role of the expert witness

In UK the expert witness pronouncing on recovered/false memory typically appears in a criminal trial. Under our adversarial system the witness appears for the prosecution or defence. The overriding duty is to the Court, and experts may be asked to prepare a joint statement setting out agreements and disagreements

U.K. Appeal Court judges have accepted the principle that there can be cases where after genuine amnesia there is truthful and reliable recovered memory (R v Evans, [2009] EWCA Crim 2243)

Role of the expert witness

“Absent exceptional circumstances, the question of the plausibility of a child's account and the extent of detail he or she provides are all matters for a jury. Experts should not be used so as to usurp the function of a jury” (R v. E, [2009] EWCA Crim 1370)

“Exceptional circumstances” includes testimony about the extent of childhood amnesia where allegations relate to incidents occurring under the age of 4-5 years

Role of the expert witness

Despite this, expert reports are often sought by defence lawyers seeking to argue allegations of historic sexual abuse are based on false memories, and sometimes by the police or prosecution to advise on the strength of the evidence

The expert can draw attention to issues that may not be clear in witness statements, such as whether memories are continuous or recovered, and indicate what aspects might affect the jury's decision, justified by citation of the relevant scientific evidence

Guide to assessment of historic CSA accounts for defence and prosecution

Do the allegations involve single or repeated events?

Repeated events result in a gist memory of what usually happened, typically with a small number of specific and more memorable instances recalled in more detail

How might repetition affect the level of detail remembered?

Age from which memory is recalled

Is account consistent with what could reasonably be expected to be remembered from that age?

Hardly any memories are retained from before age 2; memories aged 2-7 are likely to be very sketchy with little detail

Did the events continue beyond these ages?

Guide to assessment of historic CSA accounts

Are memories continuous or recovered, or a mixture?

What were the circumstances of memory recovery?

- Sleep and dreams

- Presence of reminders

- Involvement in therapy: focus of therapy, techniques used

- Reaction to recovery

What form did the memories take?

- Fully contextualised autobiographical memories

- Flashbacks, single images, video sequence

Guide to assessment of historic CSA accounts

Did the memory develop further?

Further details of same incident? Multiple incidents?
Multiple situations or perpetrators?

Other suggestive influences on memory?

Friends, religious leaders

Evidence of critical appraisal

Disorders that might affect memory presentation?

Vivid, fragmented, disorganised memories common in
PTSD

Disorders that might compromise memory reliability?

Practical issues in assessment

Apparent recovered memories

- check all medical notes/witness statements for evidence of early/prior disclosures

- review videotaped evidence

- interview complainant

- Are accounts consistent or inconsistent/contradictory?

Where therapy implicated

- check medical notes/witness statements for disclosures before therapy

- check therapists' credentials, clinical notes for suggestive memory recovery techniques such as regression or hypnosis

What conclusions should the expert come to?

NOT about directly about the truth or reliability of memories (no scientific grounds for this)

BUT about the presence or absence of factors that the scientific literature says might impact on the confidence one can have in memories

YES, there are factors present (contradiction, implausibility, suggestive influences, etc.) that suggest the memories should be treated with caution (or extreme caution)

NO, factors which might diminish confidence in the person's memories are not present

A typical report - Living with ambiguity

“In summary, many of the features associated with false memory (impossibly early age, serious pre-existing mental disturbance, sustained suggestive influences, bizarre allegations, and an uncritical attitude towards mental experiences) are all absent. At the same time there is a vagueness and incompleteness to the oral sex allegation that reflects LM’s description of his memory as consisting of a series of separate film clips. He has linked these images together in a narrative account that he believes is correct, similar to his other (corroborated) memory”.

Living with ambiguity

“He was not warned about false memory creation prior to therapy and has been exposed to some mild suggestive influences. The scientific literature does not provide a basis for coming to conclusions about whether the narrative account he has provided is an accurate one. It is possible to conclude, however, that there is relatively little positive evidence for the presence in this case of the factors which have been found empirically to enhance the risk of false or unreliable memories. At the same time there are some features that tend to reduce confidence in his memories and the possibility that his memories are false cannot be ruled out”.

The challenge in practice

- Experts for the defence may have little expertise concerning childhood abuse or trauma
- They may misrepresent the literature on human memory, making exaggerated claims concerning the unreliability of memory
- They may not discuss the limitations of the research or its applicability to the specific case
- They may not have interviewed the complainant
- They may make explicit statements about the unreliability of the complainant's testimony, based on their opinions rather than evidence

Points to consider when faced with another expert report

Have they justified their opinion by citing studies?

Are these studies relevant to the case?

Are these studies described accurately?

Have they considered the limitations of the studies
(e.g. in the experimental material, procedures,
participants)

Have they considered alternative explanations?

Have they drawn unjustified conclusions?

Have they usurped the function of the jury?

Democracy is more valuable for
what it prevents than for what it
achieves

Albert Camus

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