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Please email me or speak to me about any comments you have on this Paper, or any errors appearing in it.

The key themes of this Paper are:

- (1) The reliability of a witness' memory of an event or conversation or other thing can be a critical issue at a trial;
- (2) Be familiar with the key literature on memory;
- (3) Investigate and marshal evidence to support the theory;
- (4) Consider calling (or least consulting) expert witness to support the theory.

**PART 1: THE UNRELIABLE WITNESS AND MEMORY**

In many cases where there are significant factual disputes, a trial lawyer will confront a witness whose perception or recollection of events or a conversation is radically different from your own client's recollection. One approach is to challenge the veracity of the witness' evidence. That may often not be the most effective approach.<sup>1</sup> Even where a witness does give false evidence, it is probably the case

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<sup>1</sup> See the infamous case in the USA of the trial and conviction of George Franklin for the murder of Susan Nason. A vital witness in the prosecution case was his daughter, Eileen Lipsker, who purported to recall an event when she was 8 years old (she was in her 30s when she gave this evidence at the trial) of Franklin crashing a rock down on Susan Nason's head. Lipsker's veracity was challenged heavily during the trial. She apparently had sound reasons to dislike her father. But what was overlooked or poorly understood until after the trial was the process by which Lipsker remembered the acts of her father under therapy. This is analysed in some detail by Richard Ofshe and Ethan Waters in Making Monsters – False Memories, Psychotherapy, Sexual Hysteria (Andre Deutch 1995) chapter 12. This case was one of a spate of cases in the United States and some in Australia based upon alleged repressed memories of sexual abuse including bizarre recollections of satanic rituals. A number of

that more often or not, they believe, or have come to believe that their evidence is true. In those circumstances, it is important for trial lawyers to understand some basic knowledge about how memory works, the fragility of memory and how it can be distorted.

### Judicial recognition of the fallibility of memory

Judges are gradually considering the implications of a significant range of empirical psychological research of the limitations and problems of memory.<sup>2</sup>

In 2006, McClellan CJ at CL wrote:

*“One of the greatest difficulties with eye witness evidence is that fact-finders are reluctant to believe in the fallibility of memory. We rely on our memories on a day-to-day basis and thought that other people’s memories might not be accurate sits uneasily with the faith we have in our own recollections. Of course the reality is that our memories are unstable and malleable.”<sup>3</sup>*

In *Longman v The Queen* (1989) 168 CLR 79 at 107-108, the High Court considered the directions or warnings a judge should give a jury where there has been a significant delay between the alleged offence and the criminal trial. McHugh J noted:

*“The fallibility of human recollection and the effect of imagination, prejudice and suggestion on the capacity to “remember” is well documented. The longer the period between the “event” and its recall, the greater the margin for error. Interference*

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studies including those written by Elizabeth Loftus established the falseness of such repressed memories. See also Richard Guilliatt, Talk of the Devil. Repressed Memory of the Ritual Abuse Witch Hunt (The Text Publishing Company 1996); Laurence Wright, Remembering Satan: Recovered Memory and the Shattering of a Family (1994)

<sup>2</sup> One of the most significant authors in this field is Dr Elizabeth Loftus, who has written articles and books in this area for almost four decades. The Bar Library has just obtained the 4<sup>th</sup> Edition of her excellent book – Elizabeth Loftus, James Doyle and Jennifer Dysart, Eyewitness Testimony – Civil and Criminal (Lexis Nexis 2007). This has some excellent chapters on issues concerning memory. Other good books/articles on the subject are R J McNally, Remembering Trauma (Harvard University Press 2003); D L Schacter, The Seven Sins of Memory: How the Mind Forgets and Remembers (Houghlan Miflan 2001); Justice Peter McClellan “*Who is Telling the Truth? Psychology, Common Sense and the Law*” (2006) 80 ALJ 655; Justice David Ipp “*Problems with Fact Finding*” (2006) 80 ALJ 667; Chief Justice Spigelman “*Truth in the Law*” Sir Maurice Byers Lecture, Winter 2011 Bar News p 99.

<sup>3</sup> “Who’s telling the Truth? Psychology, Common Sense and the Law” (2006) 80 ALJ 655 at 664.

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."[ My underlining]

*Longman* and the line of authorities which have considered that decision tend to focus on the nature of the warning to be given to a jury in sexual assault cases where the allegations are 'old'. However, the judicially recognised concept of 'interference' with a person's ability to remember has implications far wider than old sexual assault cases. The term "interference" picks up detailed research on memory conducted by reputable psychologists such as Dr Elizabeth Loftus.

Spigelman CJ in a lecture entitled "Truth and the Law" delivered in May 2011<sup>4</sup> referred to some of the key literature on the topic of the fallibility of memory.

In *United States v Smith* 736 F2d, 1103 (1984), the US Court of Appeal (6<sup>th</sup> circuit) held that a trial Judge's refusal to admit the evidence of a psychologist, Mr Fulero was in error.<sup>5</sup> Smith was convicted of robbing a bank after three bank tellers identified Smith after being shown a photo spread of photographs. Smith was an African American and the three tellers were white. Mr Fulero analysed the reliability of eyewitness identification in a hypothetical factual situation identical to this case. In the hypothetical, three witnesses were shown a line up containing the defendant and four months later they were shown a photo spread containing the same defendant. The defendant was the only "common" element in each showing. Mr Fulero expressed the opinion that the later line up was not "independent" of the earlier photo spread and the eye witnesses incorrectly transferred the familiar figure from one procedure to the next. What they identified was the picture of the defendant at the earlier photo spread not the figure of him at the Bank. He also gave an opinion about the possibility of cross racial misidentification. He also stated that the existence of the weapon of the bank and the stress would decrease the possibility of proper identification by the three bank tellers. The US Court of Appeal

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<sup>4</sup> Winter 2011 Bar News p 99at p 110

<sup>5</sup> The appeal was nevertheless dismissed because the exclusion of the evidence was not "prejudicial to the defendant". A concept which is the equivalent of the no substantial miscarriage of justice test.

held that such evidence was admissible. The Court described (at 1106) Dr Fulero's science as having gained reliability over recent year and that his discipline contains "the exactness, methodology and reliability of any psychological research" The Court held (at 1105) that Dr Fulero's testimony would have provided insight into an eyewitness' general inability to perceive and remember what is seen under a stressful situation "*moreover his testimony would not only "surpass" common sense evaluation, it would question common sense evaluation*"<sup>6</sup>.

In *United States v Russell* 532 F.2d 1063 (Sixth Circuit) 1976 the Court of Appeal also accepted expert evidence about the unreliability of identification evidence and specifically how "*the construction of memory is greatly influenced by post experience suggestion*".

The evidence of an eyewitness identifying a person as the perpetrator of a crime is evidence of what the witness remembers about the event and the person. If expert evidence, presented in admissible form, can be admitted on identification evidence, it can also be admitted on other matters concerning the fallibility (or reliability) of memory. There is now a body of knowledge in this area which is or likely will be recognised by the courts as "specialised knowledge" within the meaning of section 79 of the Evidence Act. This topic is discussed in more detail below.

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<sup>6</sup> 1106

## Learning about memory

Memory has been defined as “our capacity for acquiring, retaining and using information”<sup>7</sup> Although this paper deals with the fallibility of memory, it should be remembered as McNally observes<sup>8</sup>:

*“Memory for the gist of many experiences is retained with essential fidelity, and this is essentially true for events having personal, emotional significance. The paradox of memory, as Daniel Schacter has said, lies in its ‘fragile power’. Although subject to distortion, memory usually serves us well. It provides the core of personal identity and the foundation of cognition”*

The notion that memory is like a videotape, which stores all memory of past events, which just needs to be accessed, has been largely discredited. Furthermore, the idea, behind the repressed memory movement, that repeated traumas, particularly by children, are often forgotten, is largely discredited. McNally states<sup>9</sup>: *“The notion flies in the face of everything we know about how repetition affects memory”*

However, even if memory is robust, it is also fragile and most significantly, malleable<sup>10</sup>.

Daniel Schacter, a prominent cognitive psychologist, who has written extensively in the area, identified in his book *The Seven Sins of Memory: How the Mind Forgets and Remembers*, seven distinct problems with memory. They were:

1. Transience - the weakening or loss of memory over time;

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<sup>7</sup> A useful explanation in layman’s language for how memory works is contained in chapter 2 of Richard McNally’s *Remembering Trauma*. See p 28ff. The literature refers to different types of memory – one crucial distinction is between short term (‘working memory’) and long term memory. Schacter is helpful in describing the relationship between the function of various parts of the brain and different problems with memory and describes the neuro-imaging tool such functional magnetic resonance imaging which has helped scientists understand how certain regions of the brain are critical to remember certain information. Parts of the frontal lobe for example play a role in the transience of memory.

<sup>8</sup> Ibid p 39

<sup>9</sup> Ibid page 36

<sup>10</sup> Loftus et al. (2007) p 59

2. Absent mindedness – the breakdown of the interface between attention and memory because a person may not have focused upon a particular matter which is later sought to be recovered;
3. Blocking - the failure to retrieve information for some reason (e.g. unable to put a name to a face);
4. Misattribution, involving a process of assigning memory to a wrong source;
5. Persistence, which involves persistently remembering negative events, which the person would prefer to forget;
6. Bias which reflects the inferences of current knowledge and belief on how we remember the past involved editing or rewriting previous experiences in the light of what a person now knows or believes;
7. Suggestibility, referring to memories implanted as a result of leading questions, comments or suggestions.

In my opinion, the most useful analytical tool for trial lawyers in dealing with issues of memory is contained in Loftus (2007).<sup>11</sup> She identifies three stages of perception and memory:

1. The acquisition stage – the period of time during which some event occurs and some information is entered into a witness' memory system;
2. The retention stage – the period of time after the event is over or after acquisition;
3. The retrieval stage – the period of time from which the witness tries to retrieve a situation/conversation from memory. That can mean answering questions, telling in his/her own words what happened, or making an identification of someone who may have been seen before.

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<sup>11</sup> *supra* p 393

Experimental psychologists identify and study various psychological (or other) factors which come into play at each of these three stages that affect the quality of the final memory.

### ACQUISITION STAGE FACTORS

There are certain physical factors, which may appear obvious, but are nevertheless important, which affect the acquisition of information. They include lighting, distance, opportunity etc.

Less obvious is the impact of stress in acquiring information. This is an area where a properly qualified expert can give evidence about the specialist knowledge on this area.

The Yerkes-Dodson law is named for the two psychologists who conducted experimental studies in 1908<sup>12</sup>, which established that, as a general rule, performance increases with physiological or mental stress, but only up to a point. When levels of arousal or stress are too high, performance decreases. This principle has been applied in experimental studies in memory.

An extreme example of this principle is an air steward called Vesna, who was involved in an incident involving a Yugoslav airline DC-9 which exploded after a bomb was planted on it by Croatians. Vesna fell over 30,000 feet from the disintegrating aircraft and survived suffering extremely serious injuries. However, within two years she had almost fully recovered. All she could remember was stepping on to the plane to start the flight. From then on her memory was completely blank until the time she woke up in a hospital.<sup>13</sup>

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<sup>12</sup> There is a typographical error in Loftus 2007 at p 395 where she refers to the discovery of this principle in 1980 rather than 1908.

<sup>13</sup> Loftus pp 31-32

Other studies indicate that in conditions of high stress, there is a narrowing or focussing of attention on specific items and consequently people pay less attention to other matters. A well known example of this principle is when a witness is confronted with a gun or knife. The witness' attention focuses on the weapon – the barrel of a gun or the blade of a knife. His ability to remember other details of the crime including the identity or facial features of the perpetrator or other physical descriptions of the perpetrator can be significantly reduced.<sup>14</sup> There have also been studies that witnesses significantly overestimate the duration of stressful events.

The acquisition stage is also influenced by how the memory of something is encoded or registered. Where there is greater elaboration of the information during encoding, it is more likely that the information will be accurately retrieved later. For example, if a person is given a list of words to remember including “lion, CAR, table and TREE”. For half of the words, the person is asked to state whether the words refer to a living or non living thing and for the other half asked to state whether they are upper case or lower case letters, all other factors being equal, the person will later remember many more of the words for which living/non living judgments are made compared to words of upper or lower case judgements. Thinking about whether word refers to a living or non-living thing allows a person to elaborate on the word in terms of what they already know about it, but making an upper or lower case judgement does little to link the word with what the person already knows.

Similar experience has shown that subsequent memory improves when people generate sentences or stories that tie together familiar facts and associations. For example a person may remember the experiment which I have referred to below about what people remember in their work day life one day or one week before the event because they can identify or are familiar with such an example.

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<sup>14</sup> Loftus pp 34-35



## RETENTION FACTORS – THE LENGTH OF THE RETENTION PERIOD

In 1885, a philosopher, Hermann Ebbinghaus, published the results of what is reputed to be the first scientific experiment on the loss of memory over time. Ebbinghaus tested himself six different times after studying lists of nonsense syllables, ranging from 1 hour to 1 month. He noted a rapid drop off in retention during the first few tests. Nine hours after he studied a list of nonsense syllables, he had forgotten approximately 60% of the list. The rate of forgetting then slowed down considerably. After a month's delay, he had forgotten just over 75% of what he had learnt initially which was not much worse than the amount of forgetting after a nine hour delay.

Ebbinghaus' conclusion that most forgetting occurs during early delays and then slows down later ones has been repeated in many laboratory experiments. For example, a study was done of employees working in an engineering division of a large manufacturer. There was a dramatic difference in what the employees recalled about the work they did the day before as compared to the work they did a week earlier. Schacter concludes:<sup>15</sup>

*“.....with the passing of time, the particulars fade and opportunities multiply for interference – generated by later, similar experiences – to blur our recollection. We thus rely evermore on our memories for the gist of what happened, or what usually happens and attempt to reconstruct the details by inference or even sheer guess work. Transience involves a general switch from reproductive and specific recollections to reconstructive and more general descriptions.”*

Studies have also shown that, generally, a person's memory deteriorates from mid forties. By the time people reach their sixties and seventies, transience is more marked and consistent. This is even more so in those who are less educated people.<sup>16</sup>

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<sup>15</sup> P16

<sup>16</sup> Schacter pp 20-21

## RETRIEVAL FACTORS

Exposure to new information or external influences interferes with or distorts or supplants earlier memory. Loftus describes this process as “interference”, which is where a witness is exposed to new information after witnessing an important event.<sup>17</sup> Schacter describes the problem of “suggestibility” as the most dangerous problem of retrieving accurate memory because it is insidious.

A number of experiments have shown that information provided to witnesses after an event affects how the latter remember it. Studies have shown that persons who fall prey to misleading information consciously remember witnessing things they have not seen. They hold these false memories with great confidence.<sup>18</sup>

A cargo plane crashed into an apartment building near Amsterdam, 193 people were asked whether they had seen television footage of the plane striking the building. In fact, the crash had not been captured on film. Nevertheless, 55% claimed to have seen it on television. Two thirds of a group of law students claimed to have seen this crash footage and some of them provided details about what they had seen.<sup>19</sup>

One well known experiment established that false memories could be induced, and that the person affected could not tell the difference between their false recollection and their true memories. An undergraduate called James Coan (a student of Dr Loftus’ cognitive psychology class at the University of Washington) successfully implanted a false memory in the mind of his fourteen year old brother Chris. The memory was a mildly traumatic one. James had implanted the memory by providing Chris with a book which contained four stories that purported to have been events that had happened to Chris in the past. Three of the stories were true and one was false. James asked Chris to write something about each story every day for six days. In the false story, the five year old Chris got lost in a shopping mall. Over the next six

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<sup>17</sup> Loftus et al (2007) p 58. This is the concept picked up by McHugh J in *Longman*

<sup>18</sup> McNally *Remembering Trauma* page 68.

<sup>19</sup> Justice Ipp (2006) 80 ALJ 667 at 668.

days, Chris remembered quite a lot about the fictional story, even “remembering” details that had not been suggested. James Coan interviewed his brother, Chris, on tape. Chris confidently described the false event at some length. His brother Chris was informed that the memory was false. Even five years later Chris thought that the memory was real.<sup>20</sup>

There is strong evidence that suggestive or leading questions can mould or distort a person’s memory. Suggestive questions in an identification parade are known to produce false retrieval of a person’s memory of the identity of an offender. The impact of suggestive questioning is far wider than identification evidence.

Spigelman CJ in his Truth and the Law lecture made this important observation (at 110):

*“The common law rejection of leading questions is well supported by psychological research, which clearly establishes that answers to such questions are less likely to be believed. There is, however, no control of leading questions in the procedures for police investigations or by lawyers preparing the written statements of evidence that have become ubiquitous in legal proceedings.*

*The stilted legal drafting, in words which the witness would never use, too often using the same formulation for all relevant witnesses, is an impediment to truth finding. The process props a false witness, but a truthful witness will more readily concede a discrepancy in cross-examination and look the worse for the honest concession.*

*An observation, variously attributed to Lord Buckmaster or Lord Justices Bowen and Chitty is that “truth may sometimes leak out from an affidavit, like water from the bottom of a well”. Even if ethical restraints on witness coaching are complied with, the conduct of a lawyer taking a statement or preparing a witness may give clues on what evidence may be useful.”*

This observation highlights the importance in certain cases of exploring **the process** by which a witness’ statement or affidavit has been taken..

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<sup>20</sup> McClellan CJ at CL at 662-663.

## Bias

Also relevant in influencing the retrieval of information is *“current knowledge or beliefs, and feelings [which] can influence our recollections of past, and shape our impressions of people and objects in the present”*<sup>21</sup>. Schacter concludes:

*“...how our theories about ourselves can lead us to reconstruct the past as overly similar to or different from the present. Hindsight bias reveals that recollections of past events are filtered by current knowledge”*.

Schacter also observes:

*“...recalling past experiences of pain is powerfully influenced by current pain level. When patients afflicted by chronic pain are experiencing high levels of pain in the present, they are biased to recall similarly high levels of pain in the past. When present pain isn’t so bad, past pain experiences seem more benign too.”*<sup>22</sup>

Studies have been made of married and dating couples regarding their recollection of how happy they were in a particular relationship. They were asked similar questions twice over a period of eight months or four years. Those men and women whose feelings had changed over time tended to mistakenly remember that they had always felt the same way. When asked to remember what they felt four years ago, four out of five people whose feelings remained stable showed accurate recall, but only one in five of those whose feelings had changed recalled accurately *“the way they were”*. Results were even more dramatic when couples recalled how they felt eight months earlier. 89% of women and 85% of men whose feelings remained stable accurately remembered their initial impressions, but only 22% of women and 15% of men whose feelings had changed showed accurate recall. In other words *“what I feel now is what I’ve always felt”* – regardless of whether they had or not<sup>23</sup>.

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<sup>21</sup> Schacter supra p 160

<sup>22</sup> Ibid p 139

<sup>23</sup> LA Kirkpatrick and see C Hazan *“Attachment Styles and Close Relationships: A four year perspective study personal relationships” (1994) Personal Relationships Vol 1 pages 123-142.*

## PART 2: INVESTIGATING FACTS

Loftus states that the implications arising from the research about memory are crucial for effective investigations leading up to the trial. She observes:

*“Judges and jurors need to appreciate a point that can’t be stressed enough: true memories cannot be distinguished from false without corroboration.”<sup>24</sup>*

It is essential to turn your attention early on to carrying out factual investigations which will either support your own case or undermine your opponent’s case.

Assume that you have been served by your opponent with a statement or affidavit from A, a critical witness in your opponent’s case. A’s recollection of events is opposed to your case. You decide to explore the reliability of A’s testimony.

First, be familiar with the essentials of the literature on issues of memory and/or perception.

Secondly, compare A’s statement with any relevant contemporaneous statement including in particular any of A’s contemporary records – that may include diary notes (including electronic diaries), mobile phone records, electronic mail, messages left on social media, Subpoena your opponent and witness A for all draft statements in their possession of witness A’s statement. Find out if any of A’s testimony or statements have been videotaped or electronically recorded.

Thirdly, analyse the issue through the lens of acquisition, retention and retrieval of information and/or through the lens of Schacter’s seven sins of memory and work out whether any of those factors **could** apply to A. For example, on issues of misattribution, investigate any media reports relating to the incident which the testimony concerns.

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<sup>24</sup> Elizabeth Loftus “Memory Faults and Fixes: Research has revealed the limits of human memory; Now the Courts need to incorporate these findings into their procedures” (2002) 18 Issues in Science and Technology 41.

Consider issuing a subpoena to the lawyer who has taken A's statements the in relation to materials or documents that were shown to witness A in the preparation of his statement, which was used to try to revive witness A's memory.<sup>25</sup>

You need to be aware of the broad range of the court's powers to assist you in investigating the case. Those powers can be found in the Supreme, District or Local Court Rules, the Evidence Act, various other statutes and the common law.

Always bear in mind tactical considerations. In undertaking investigations, you may tip your opponent off to gaps in their case. You may unearth facts fatal to your case, which then come to the attention of your opponent. In criminal cases, you may unearth facts which ruin your best weapon – surprise.

### **PART 3 – PRESENTING EXPERT TESTIMONY ON MEMORY**

Numerous studies have revealed that jurors have a faith in accuracy of eye witness testimony which is unjustified. Other studies have demonstrated that the more confident a witness is the more they are likely to be believed. One goal of expert testimony is to challenge jurors' erroneous assumptions about how memory works and their misplaced confidence in the accuracy of a witness' assertion of what he claims to remember. Loftus concludes:

*“Many psychologists would say that jurors, despite their enormous experience in everyday life, believe wildly erroneous things about the eyewitness identification process and are likely to apply these misconceptions in interpreting the importance of an eyewitness' testimony. For once the common sense we rely on in jurors is simply wrong”.*

Similar misconceptions apply in relation to memory.

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<sup>25</sup> Evidence Act - section 122(6)

If care is taken to connect the expert evidence with specific facts in issue in the case and present it in admissible form, courts will admit certain expert evidence on psychological factors which affect the accuracy of memory.

Although not precisely on point, the High Court decision in *HG v The Queen* (1999) 197 CLR 414 provides some pointers to how expert evidence on memory could be admitted. The Court by a three-two majority held that a trial Judge did not err in failing to adjourn a trial in refusing an application by the appellant's counsel to enable him to have available, as a witness for the defence, a Psychologist, Mr McCombie. It was the unanimous opinion of the Court that the evidence was inadmissible pursuant to section 409B of the *Crimes Act*. The majority also held that Mr McCombie's evidence was inadmissible as expert opinion evidence in that it failed to comply with the requirements of section 79 of the Evidence Act. The minority held that the inadmissible evidence was severable from the admissible part of the expert testimony. I am concerned only with the ruling as it relates to questions of the admissibility of expert opinion<sup>26</sup>.

The trial concerned an allegation that the appellant had been convicted of two offences relating to sexual intercourse with a girl under the age of ten. The forensic purpose for which trial Counsel sought to use the evidence of Mr McCombie was his expert opinion that the sexual assault upon the complainant was committed, not by the appellant, but by her natural father, some years before the time of the events alleged in the charges.

Mr McCombie's report contained the following mixture of facts and opinions:

- The complainant C had been exposed to sexual assault;
- C's behaviour following a month with her natural father changed her behaviour significantly and there were obvious signs of emotional disturbance;

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<sup>26</sup> The High Court did not explore whether the evidence would have been excluded as it infringed the credibility rule in section 102 of the Evidence Act. An exception to the credibility rule under section 108C of the Evidence is evidence given by persons with specialised knowledge, which includes specialised knowledge of child development and child behaviour including the impact of sexual abuse on children and their behaviour during and following the abuse.

- The behaviour disturbance continued at a lower level after the family moved in with the appellant. However the night terrors and sleep disturbance ceased;
- C did not report any signs of exposure to trauma after the alleged assault by the appellant;
- McCombie would have expected some significant increase in behaviour and emotional disturbance as a result of this trauma. However this was not reported by either C or her mother;
- The assault happened during her time with her natural father. The behaviour change she showed after her visit with him was consistent with this;
- C accused the appellant of sexual assault in response to her resentment of his attempt to help her mother manage her behaviour and in response to the lecture on sexual assault and stranger danger which she had also attended just before the accusation was made;
- The memory of her sexual assault had been buried in response to the trauma of it;
- The memory of her trauma had been resurrected by both the stranger danger lecture and by her resentment of the appellant's attempt at controlling her in the home;
- There were inconsistencies in C's retelling of her story. This was a response to her confused memories about her past experience.

It is hardly surprising at least parts of this report were rejected. Some of the report contained a combination of speculation, inference, personal and second hand views as to the credibility of the complainant, the reasoning process was inadequate, and the process of reasoning went well beyond his field of his expertise as a Psychologist.

For present purposes, the significance of *HG* is the dicta concerning the evidence that **would** have been admissible had McCombie given evidence.

Gaudron J, in the minority, held that the field of psychological study amounted to "specialised knowledge". She held at [48] that relevant expert evidence is admissible with respect to matters about which ordinary persons are unable to

*"form a sound judgement ... without the assistance of those possessing special knowledge or experience ... which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience"*.

She held at [59, 65] that McCombie's opinion concerning the behavioural patterns of children who have been the victims of trauma or sexual abuse is a sufficiently recognised body of knowledge to be accepted as specialised knowledge.



Gummow J, in the minority, held at [124] that section 79

*“would not have excluded opinion evidence led from Mr McCombie that the complainant was not sexually assaulted on the occasions alleged in the Indictment”.*

The majority Justices - Gleeson CJ, McHugh and Hayne JJ - differed both with the minority and between themselves as to admissibility of parts of McCombie’s report.

McHugh J held at [96] that if

*“called as a witness Mr McCombie could certainly have given expert evidence that sexual assault always produces some change in a child’s behaviour. If the evidence at trial established that no change in the behaviour of the complainant was observed after the time of the alleged assaults, his opinion would have provided some evidence to support the appellant’s case that he had not sexually assaulted the complainant”.*

Hayne J held that it was critical what precise opinion was being expressed in order to be able to determine whether that opinion was wholly or substantially based on a specialised knowledge that the witness had. His Honour held at [140]

*“.. for McCombie to say that a child who has been sexually assaulted will (or will usually) exhibit certain behavioural changes is an opinion that might be linked to Mr McCombie’s training as a psychologist or his study of published literature in the field, or his experience in examining young victims of sexual abuse (or some combination of these factors). By contrast for Mr McCombie to say that in the complainant’s case had been assaulted by her natural father as opposed to some third party is an opinion that, on its face, appears not to be based at all on any specialised knowledge of Mr McCombie.”[my underlining]*

In this, Gleeson CJ agreed at [42].

Interestingly, no opinion was offered on the admissibility of McCombie’s opinion about the suppression of the traumatic memory or how that memory had been revived.

McCombie’s report does not appear (at least from the reported judgment) to be based upon any published scientific research.

The law on the admissibility of expert evidence is beyond the scope of this paper. However, there are some pointers which can assist in admitting expert evidence on this topic.<sup>27</sup> First, the trial litigator must overcome court's disinclination to accept as "scientific" the opinions of psychiatrists and psychologists. Eighty years ago, Sir Owen Dixon in a speech entitled "Science in judicial proceedings" offered this observation:

*"..... it is not when medical or scientific conceptions are intricate, but when they are vague, that the process is troublesome. It is, perhaps, for this reason that scorn of the law is more widespread among psychiatrists than anatomists."*<sup>28</sup>

Scorn shown by courts for the evidence of psychiatrists and psychologists is well known to those who appear in Courts in this State.

One antidote to that scorn is to ensure that your expert sets out the general knowledge in the area by reference to published studies/experiments on the specific factor which affects memory relevant to the issue upon which the expert testimony can be offered. Loftus' book *Eyewitness Testimony Civil and Criminal* is a gold mine of useful information on that subject.

Furthermore, the specific psychological factors said to affect memory must be connected to specific relevant facts in issue<sup>29</sup>. As Loftus reports expert evidence

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<sup>27</sup> This paragraph is based upon Loftus 2007 Chapter 13 "Presenting Expert Testimony".

<sup>28</sup> Sir Owen Dixon, *Jesting Pilate* The Law Book Company (1965) p 18

<sup>29</sup> In *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, the plurality in the High Court confirmed the need for a party to identify the fact in issue the party asserts the opinion proves:

*".....the opinion rule [in section 79] is expressed as it is in order to direct attention to why the party tendering the evidence says it is relevant. More particularly, it directs attention to the finding which the tendering party will ask the tribunal of fact to make. In considering the operation of s 79(1) it is thus necessary to identify why the evidence is relevant: why it is "evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the*

which simply relies on the general significance of psychological findings rather than on connecting specific psychological factors to specific factual issues in the cases are usually held to be inadmissible.<sup>30</sup>

In *F* (1995) 83 A Crim R 502, the Crown Prosecutor sought to lead evidence from Dr Packer, a Specialist Paediatrician in child sexual abuse concerning general questions about Accommodation syndrome – a psychological theory on abused children that purported to explain delay in complaint and inconsistencies in complaint. One of the (many) problems in Dr Packer’s evidence was that she was that *“she was simply permitted to give evidence about a syndrome that was the subject of literature in the field of psychiatry or psychology, without specifically relating it to the complainant.”*<sup>31</sup> This evidence should be contrasted with the expert tendered in *United States v Smith* 736F 2d 103 (1984) where the expert analysed the reliability of eye witness identification in a hypothetical factual situation identical to this case.

In *Smith* (2000) 116 A Crim R 1, the NSW Court of Criminal Appeal considered whether a new trial should be ordered due to fresh evidence related to psychological research into eyewitness identification undertaken by a professor psychology. The appeal was dismissed on this ground because it was held that the evidence would have been excluded under section 135(c) of the Evidence Act in that it would cause or result in an undue waste of time. The problem with the evidence was its lack of specificity in grappling with the facts of the case. Smart J held [at 46] :

*60 There is also the difficulty that while the research materials might point to some general conclusions and to what is generally the position, the question remains whether they apply to the particular case. For example, did the presence of a weapon affect the accuracy of the complainant's identification? Even though the complainant only saw the robber face on for several seconds and very close to her (less than one metre away) but at night was she able to gain and retain a sufficiently accurate picture of him to identify him with certainty 2 days later. Was she significantly*

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*proceeding" That requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving”.*

<sup>30</sup> Loftus page 364

<sup>31</sup> Page 107

*influenced by the similarity of the clothing worn by the robber and the man whom she saw about 38-40 hours later. Much depends on the person identifying the robber. The complainant insisted that she was looking directly at the robber, could see quite clearly and had no difficulty in seeing him. She said that as a journalist she always took the details in and was consciously thinking that she would have to remember what happened. She denied that she identified the robber by the similarity of his clothing on 16 February 1998. She said that "the immediate thing was the way he was standing and his whole presence." She mentioned his physical build, his distinctive stance and physical presence.*

*61 The report of Professor Thomson does not capture the strength of the complainant's evidence and his purported application of stated general research conclusions to her and her evidence goes further than is permissible. He would, however be able to state the results of his research and the general state of learning and answer questions based on assumptions. It would be for the tribunal of fact to decide whether they applied in the present case. That is upon the assumption that his evidence was not otherwise excluded.*

*63..... General considerations and research have their value but they do not supplant the particular inquiry and assessment that has to be made in each case. In the present case the complainant insisted that she kept her eyes on the appellant and the knife. She did not feel he would use the knife unless she struggled. She said, that when the incident happened she was "sort of frozen," it was so sudden and that she did not have time to react except by looking. The re-action comes afterwards.*

I query whether *Smith* was correctly decided. Psychological research usually cannot permit an expert to say whether factors affecting the reliability of memory had any specific impact on the witness. Furthermore, if eyewitness testimony was a critical issue at the trial, a properly qualified expert opinion's evidence about experiments which demonstrate that a particular factor may cause that evidence to be unreliable cannot reasonably be said to cause an undue waste of time. It is clear that what *Smart J* was concerned about was the floodgates argument that such an application would cause a flood of similar applications which would lengthen trials. Such a fear is unfounded if Part 53 Rule 10 of the District Court Rules were more strictly complied with and issues concerning admissibility of expert reports were dealt with prior to trial. This is now happening in the case management of Supreme Court jury trials.

In *R v Dupas* [2011] VSC 180, the trial judge admitted expert evidence of Dr Richard Kemp relating to the ways that memory can be affected by post event information.

However, the judge did not permit Dr Kemp to provide an opinion as to the reliability of the named witness' evidence, or the likelihood that his memory would have been affected by post-trial information.

### DISCUSSION EXAMPLE

Assume the following facts in a criminal trial against Dr X.

1. A alleges that during a consultation on 1 January, X, her regular medical practitioner (whom she has consulted on 10 previous occasions) inserted his fingers in her vagina during a clinical examination for a pap smear, and during that examination inserted his fingers in and out of her vagina several times and rubbed her clitoris for 3 minutes.
2. A has kept a contemporaneous electronic journal, which records on the evening of 1 January, and refers in positive terms about the doctor, but makes no mention of the rubbing of the clitoris.
3. Six months later, A, who has experienced significant psychological problems over the last 12 months, consults a psychologist, P. P tapes all his consultations. During the first consultation, A discloses that she suspects that X is sexually attracted to her, and has asked her inappropriate questions about her personal life. P comments that such questioning is totally inappropriate and asks A whether she has reported X to the Medical Board. During the second session, P asks a number of questions to A: "why did X examine you?" "How long did he put his fingers in your vagina?" "what did he do with his fingers in your vagina?" "Did he touch your clitoris?"

Philip Strickland SC

Maurice Byers chambers

12 September 2011