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# Due process and the admission of expert evidence on recovered memory in historic child sexual abuse cases: lessons from America

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*Abstract* This article reviews the decisions of the US state courts on the admissibility of expert testimony on recovered memory in historic child sexual abuse prosecutions. Unlike their English and Irish counterparts, most US courts scrutinise the reliability of expert evidence on recovered memory. In examining the US decisions the article explores the challenges posed to the criminal process by the contested scientific status of recovered memory theory. It sets out due process arguments why expert evidence on the topic should not be admitted in a criminal trial.

*Keywords* Expert evidence; Recovered memory; Due process; Historic child sexual abuse prosecutions; the United States; Ireland; England and Wales; Law Commission

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**T**he admission of expert evidence in a criminal trial allows specialised knowledge to inform the jury's decision, and thereby contribute to the accuracy of the trial verdict. However, when convictions are found to have been based on unreliable expert evidence, the legitimacy of the entire criminal justice system is undermined. The past decade has seen a rash of high-profile miscarriages of justice involving unreliable expert evidence tendered by the prosecution,<sup>1</sup> sparking a debate in academic<sup>2</sup> and political circles<sup>3</sup> about how to prevent junk science and other forms of untested assertions masquerading as expertise from reaching the jury. The main criticism is that the current liberal admissibility test—which merely requires the expert to be qualified and the evidence to be relevant<sup>4</sup>—allows expert evidence of doubtful reliability 'to be admitted too freely with insufficient explanation of the basis for reaching specific conclusions, be challenged too weakly by the opposing advocate and be accepted too readily by the judge or jury at the end of the trial'.<sup>5</sup> The publication of the Law Commission's recent Report on the subject heralds an important move away from the current laissez-faire approach and towards increased scrutiny of the reliability of expert evidence.<sup>6</sup> Similar proposals have been mooted in Ireland.<sup>7</sup> This article resonates with the reliability debate and examines the particular challenges posed to due process by expert evidence on recovered memory in historic child sexual abuse cases.

- 1 *R v Dallagher* [2002] EWCA Crim 1903, [2003] 1 Cr App R 12; *R v Clark (No. 2)* [2003] EWCA Crim 1020, [2003] 2 FCR 447; *R v Cannings* [2004] EWCA Crim 1, [2004] 1 WLR 2607; *R v Harris* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5.
- 2 See, e.g., A. Roberts, 'Rejecting General Acceptance, Confounding the Gate-Keeper: The Law Commission and Expert Evidence' [2009] Crim LR 551. Hartshorne and Miola advocate a specialist gate-keeping panel to decide on the admissibility of expert evidence based on new theories and techniques. J. Hartshorne and J. Miola, 'Expert Evidence: Difficulties and Solutions in Prosecutions for Infant Harm' (2010) 30(2) LS 279 at 289.
- 3 House of Commons Science and Technology Committee, *Forensic Science on Trial*, Seventh Report of the Session 2004–05, HC 96-I 2005.
- 4 C. Fennell, *The Law of Evidence in Ireland*, 3rd edn (Bloomsbury: Dublin, 2009) ch. 7; P. Roberts and A. Zuckerman, *Criminal Evidence* (Oxford University Press: Oxford, 2004) chs 3 and 7. Reliability of expert evidence is not a question of admissibility but rather a matter going to the weight of the evidence: L. Heffernan, R. Ryan and E. J. Imwinkelried, *Evidentiary Foundations* (Tottel: Dublin, 2008) 109.
- 5 Leveson LJ, 'Expert Evidence in Criminal Courts—The Problem', paper presented to the Forensic Science Society, Kings College London, 16 November 2010 at 15.
- 6 Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales*, Law Com. Report No. 325 (2011), available at <<http://www.justice.gov.uk/lawcommission/publications/expert-evidence.htm>>, accessed 22 October 2011.
- 7 The Irish Law Reform Commission has provisionally recommended the introduction of a judicial guidance note outlining 'a non-exhaustive and non-binding list of factors, based on empirical validation' to help the court assess the reliability of the proffered evidence: *Consultation Paper on Expert Evidence* (LRC CP 52-2008) para. 2.390.

In contrast to most historic child sexual abuse prosecutions (where the complainant has always remembered the abuse but could not complain contemporaneously due to feelings of powerlessness),<sup>8</sup> in recovered memory cases the delay in reporting is attributed to a complete lack of access to the memory of abuse. These traumatic memories are said to be completely cut off from consciousness for years, until the memory resurfaces, causing great distress. In cases involving a complainant's recovered memory of childhood abuse, the prosecution may proffer expert evidence to explain the theory of recovered memory. Admissibility tests determine whether expert evidence on recovered memory reaches the jury. Although it has inspired much academic commentary,<sup>9</sup> the reliability of expert evidence on recovered memory has not been the subject of detailed curial comment.<sup>10</sup>

Unlike their English and Irish counterparts, most US state courts scrutinise the reliability of expert testimony on recovered memory. This article looks at the experience of the US state courts in grappling with the evidential challenges posed by expert evidence on recovered memory in criminal cases and considers what lessons may be learned.<sup>11</sup> In particular it considers how the US courts have dealt with the challenges posed to the fact-finding process by the state of scientific knowledge on recovered memory. The article makes no claims regarding the

8 On the difficulties facing defendants in historic childhood sexual abuse prosecutions in Ireland, see S. Ring, 'Beyond the Reach of Justice? Complainant Delay in Historic Child Sexual Abuse Cases and the Right to a Fair Trial' (2009) 9(2) *Judicial Studies Institute Journal* 162.

9 The admissibility of expert evidence in delayed child sexual abuse prosecutions has been the subject of academic comment in England and Wales: P. Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford University Press: Oxford, 2006); P. Lewis, 'Expert Evidence of Delay in Complaint in Childhood Sexual Abuse Prosecutions' (2006) 10 E&P 157; P. Lewis and A. Mullis, 'Supporting Evidence and Illusory Double-counting: Recovered Memory and Beyond' (2001) 5 E&P 111; M. Redmayne, 'A Corroboration Approach to Recovered Memories of Sexual Abuse: A Note of Caution' (2000) 116 LQR 147; M. Redmayne, 'Another Note of Caution' (2001) 5 E&P 121.

10 In *C v DPP* [2009] IEHC 400 where the charges related to a period over 30 years earlier, the complaint first emerged as a direct response to a question from a counsellor. Although the High Court ultimately prohibited the prosecution of the charges on the grounds of incurable prejudice to the defendant's right to a fair trial, it found that the complainant 'credibly [stated] that she sublimated terrible memories of these events' (at [30], *per* Hedigan J). Unfortunately the court offered no guidance on how trial courts should approach the issue of recovered memory. In *NC v DPP* [2001] IESC 54 the Supreme Court halted a prosecution based on a memory of abuse recovered by hypnosis, where the therapist was no longer available to testify and there was considerable uncertainty surrounding the circumstances of the recovered memory. The absence of an effective test or control of the mechanisms of the alleged recovered memory rendered this a situation 'fraught with the risk of unfairness', *per* Hardiman J. In *People (DPP) v McKenna*, unreported, 19 October 2001, Irish Court of Criminal Appeal, Geoghegan J noted that the concept of 'restored memory' was 'allegedly surrounded with major controversy'.

11 Admissibility thresholds are common to both civil and criminal cases. However, the focus of this article is on US state court decisions in criminal cases.

validity of recovered memory theory or the veracity of accounts of abuse that are founded on recovered memories. Instead it focuses on reliability as part of the admissibility determination, and the arguments are firmly located within a legal evidential framework committed to fundamental notions of due process and a fair trial.

### The recovered memory controversy

Over the last three decades a controversy so divisive that it has been dubbed the ‘memory wars’ has emerged in the fields of psychology and psychiatry regarding the phenomenon of recovered memories.<sup>12</sup> In the United States this controversy has become an established feature of the criminal justice landscape, primarily in cases of historic child sexual abuse.<sup>13</sup> Recovered memory cases are those in which adults initially believe they were not sexually victimised as children and later come to believe that they were.<sup>14</sup> They should not be confused with cases where people who always knew they survived childhood abuse remember additional details or instances of abuse. Recovered memories are the product of dissociative amnesia, ‘an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness’.<sup>15</sup> The key concept in recovered memory theory is trauma; the sexual abuse is said to be so traumatic that the victim’s consciousness represses any memory of it in order to cope, leaving the person with no recollection of the abuse until many years later, when the repressed memory surfaces, usually in the form of ‘flashbacks’.<sup>16</sup> There are two opposing views held by psychologists and psychiatrists on the question of whether

12 J. Ost, ‘Review: Seeking the Middle Ground in the “Memory Wars”’ (2003) 94 *Brit J Psychology* 125 at 125. For a detailed examination of the controversy, see A. Piper, R. Kritzer and L. Lillevik, ‘What’s Wrong with Believing in Repression? A Review for Legal Professionals’ (2008) 14(3) *Psychology, Public Policy, and Law* 223; Lewis, above n. 9 at ch. 5.

13 In the United States the experts who have testified or submitted *amicus curiae* briefs to the courts on the reliability or otherwise of recovered memories include professors of psychiatry and psychology at Harvard (James A. Chu, Daniel Brown, Harrison G. Pope and Richard McNally), a professor of psychology at University of California, Irvine (Elizabeth Loftus) and a professor of sociology at the University of California, Berkeley (Richard Ofshe).

14 D. S. Lindsay and J. D. Read, ‘“Memory Work” and Recovered Memories of Childhood Sexual Abuse: Scientific Evidence and Public, Professional, and Personal Issues’ (1995) 1 *Psychology, Public Policy, and Law* 846 at 847.

15 American Psychological Association, *Diagnostic Statistical Manual*, Fourth Edition (DSM-IV-TR) (American Psychological Association: Washington DC, 2000) 478. The DSM is a diagnostic manual used by American and Canadian psychiatrists and psychologists to diagnose mental illnesses.

16 L. Terr, *Unchained Memories: True Stories of Traumatic Memories, Lost and Found* (Basic Books: New York, 1994); L. Terr, ‘Childhood Traumas: An Outline and Overview’ (1991) 148 *Am J Psychiatry* 10.

accurate childhood memories of sexual abuse can be submerged or repressed, only to emerge intact later in life.<sup>17</sup> The divisions reflect a general disagreement over the fundamental nature of memory as being primarily *reproductive* and therefore generally accurate, or *reconstructive* and at best an inaccurate representation of the past.<sup>18</sup>

Those who argue that repression is a possible consequence of the trauma caused by childhood sexual abuse are predominantly clinician-researchers. They rely on a body of clinical studies demonstrating that traumatic experiences can be forgotten.<sup>19</sup> According to this group, repression of child sexual abuse is more likely relative to other traumatic events, specifically for abuse committed by trusted adults, for more traumatic forms of abuse, and for repeated abuse.<sup>20</sup> They also claim that repressed memories are stored faithfully and, once recovered, can provide a reliable record of the traumatic events and that independent corroboration of recovered memories is often present.<sup>21</sup>

17 Albert et al., *Final Conclusions of the APA Working Group on the Investigation of Memories of Childhood Abuse* (American Psychological Association: Final Report of the Working Group on the Investigation of Memories of Childhood Abuse, 1996).

18 Ost, above n. 12 at 127. For a useful summary of the psychological literature on the recovered memory debate, see P. Lewis, L. Alison and M. Keibell, 'Considerations for Experts in Assessing the Credibility of Recovered Memories in Child Sexual Abuse: The Importance of Maintaining a Case-Specific Focus' (2006) 12(4) *Psychology, Public Policy, and Law* 419.

19 See D. H. Gleaves, S. Smith, L. Butler and D. Spiegel, 'False and Recovered Memories in the Laboratory and Clinic: A Review of Experimental and Clinical Evidence' (2004) 11(1) *Clinical Psychology: Science & Practice* 3; D. Brown, 'Recovered Memories: The Current Weight of the Evidence in Science and in the Courts' (1999) 27(1) *J Psychiatry and Law* 5.

20 D. Brown, D. C. Hammond and A. W. Schefflin, *Memory Trauma Treatment, and the Law* (Norton: New York, 1998); C. Dalenberg, 'Recovered Memory and the Daubert Criteria' (2006) 7(4) *Trauma Violence and Abuse* 274; J. Freyd, *Betrayal Trauma: The Logic of Forgetting Child Abuse* (Harvard University Press: Cambridge MA, 1996).

21 J. Herman, *Truth and Recovery* (Basic Books: New York, 1992); E. Bass and L. Davis, *The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse* (HarperPerennial: New York, 1988); J. A. Chu, L. M. Frey, B. L. Ganzel and J. A. Matthews, 'Memories of Childhood Abuse: Dissociation, Amnesia, and Corroboration' (1999) 156(5) *Am J Psychiatry* 749; and R. Cheit, *The Recovered Memory Project*, <[www.brown.edu/Departments/TaubmanCenter/Recovmem](http://www.brown.edu/Departments/TaubmanCenter/Recovmem)>, accessed 22 October 2010. Leavitt argues that victims of sexual abuse are less suggestible than average subjects because they have a deeply rooted distrust towards authorities: F. Leavitt, 'Suggestibility and Treatment as Key Variables in the Recovered Memory Debate' (1999) 17 *American Journal of Forensic Psychology* 5 at 12–16.

Most sceptics of recovered memory theory are experimental cognitive psychologists.<sup>22</sup> For this group, '[t]he notion that the mind protects itself by repressing or dissociating memories of trauma, rendering them inaccessible to awareness, is a piece of psychiatric folklore devoid of convincing empirical support'.<sup>23</sup> Experimental psychologists argue that the more traumatic an event was when it happened, the more difficult it is to forget.<sup>24</sup> While aspects or details may be forgotten or distorted, the core of the memory—the sexual abuse—is not. Even the meaning of the term 'dissociation' is contested.<sup>25</sup> Sceptics point to the methodological limitations of the studies cited by clinicians, on the ground that the practitioner's inferential task is usually more subjective and therefore more open to error,<sup>26</sup> and that clinical research relies to a significant extent on the self-reporting of the patient. They also argue that claims of repression and accurate memory recovery are rarely independently corroborated.<sup>27</sup> In this context Davies' warning that 'therapists and the courts should view with extreme caution experts who claim to be able to divine truth or falsity from the internal qualities of a recovered memory narrative alone' is crucial.<sup>28</sup>

The binary nature of the recovered memory debate is most obvious in relation to the potential for therapy to elicit true and false memories.<sup>29</sup> While clinicians claim that it is possible to revive 'memories' of long-forgotten events and that such memories are generally correct, experimental psychologists claim that most recovered memories are the result of suggestive therapeutic

22 See E. Loftus and K. Ketcham, *The Myth of Repressed Memory: False Memory and Allegations of Sexual Abuse* (St Martin's Press: New York, 1994); E. Loftus and D. Davis, 'Recovered Memories', *Annual Review of Clinical Psychology*, vol. 2 (2006) 469–98; R. McNally, *Remembering Trauma* (Harvard University Press: Cambridge MA, 2003); R. Ofshe and E. Watters, *Making Monsters* (Scribner: New York, 1994); Piper *et al.*, above n. 9; H. G. Pope, P. S. Oliva and J. I. Hudson, 'Repressed Memories: B. Scientific Status' in D. L. Faigman, D. H. Kaye, M. J. Saks and J. Sanders (eds), *Modern Scientific Evidence: The Law and Science of Expert Testimony*, vol. 1 (Thomson West: St Paul, 2008) 154–95.

23 McNally, above n. 22 at 275.

24 D. Davis and E. Loftus, 'The Scientific Status of "Repressed" and "Recovered" Memories of Sexual Abuse' in J. L. Skeem, K. S. Douglas and S. O. Lilienfeld (eds), *Psychological Science in the Courtroom* (Guilford Press: New York, 2009) 55 at 56; Pope *et al.*, above n. 22 at paras 20:8–20:15.

25 McHugh considers it to be a descriptive metaphor and not a diagnostic or explanatory category. P. McHugh, *Try to Remember: Psychiatry's Clash over Meaning, Memory and Mind* (Dana Press: New York/Washington DC, 2008) 173–5.

26 Davis and Loftus, above n. 22 at 56.

27 For an in-depth review of the retrospective and prospective studies conducted to date on repressed memories, see Pope *et al.*, above n. 22. They conclude: 'Repression in short is a testable hypothesis, but it has not yet been appropriately tested. Pending satisfactory studies, therefore, the most reasonable scientific position is to maintain skepticism' (at para. 20:15).

28 G. M. Davies, 'Is It Possible to Discriminate True from False Memories?' in G. M. Davies and T. Dalgliesh (eds.), *Recovered Memories: Seeking the Middle Ground* (Wiley: New York, 2001) 171.

29 Using techniques such as hypnosis, age regression, facilitated communication, visualisation, guided imagery and the use of sodium amytal.

techniques.<sup>30</sup> Researchers criticise what they see as the retreat by clinicians away from a verifiable, 'historical' truth to a narrative truth, where the therapist searches for a past that may not have occurred but that may be useful for therapeutic purposes.<sup>31</sup> However, proponents of recovered memories argue that to suggest that claims might be false merely represents another way for society to deny the reality of childhood sexual abuse.<sup>32</sup>

There are some points of consensus, for example that most people who suffer traumatic events have continuous memories of the trauma, and that certain therapeutic practices, like hypnosis and guided imagery, are particularly troubling.<sup>33</sup> Nevertheless, the scientific status of recovered memory remains a deeply contested terrain for psychologists. Many experts retain a firmly entrenched perspective either in favour of full amnesia followed by gradual full remembering (true recovered memory) or a false, iatrogenic process of recovery.<sup>34</sup> Unfortunately, a resolution remains remote; science has yet to develop objective measures to discriminate between false and true recovered memories.<sup>35</sup> Therefore, neither science nor the courts have recourse to an external marker or validation for recovered memories. The unverifiable nature of recovered memories poses evidential challenges for courts when these memories are proffered as providing the basis for an allegation of historic child sexual abuse. The next section examines various approaches taken by state courts in the United States to expert evidence on recovered memory, treating them as illustrative of the various approaches which may be adopted by other jurisdictions.

30 Loftus and Davis, above n. 22 at 58–80. They claim that memories are open to many transformations at several levels—encoding, storage and retrieval—so that not only are most memories not a direct match of the original events, but many things can be 'recovered' that never happened.

31 Ost, above n. 12 at 132.

32 See, e.g., J. Freyd, 'Science in the Memory Debate' (1998) 8 *Ethics and Behavior* 101.

33 D. W. Schuman and A. McCall Smith, *Justice and the Prosecution of Old Crimes: Balancing Legal, Psychological and Moral Concerns* (American Psychological Association: Washington DC, 2000) 95; Lindsay and Read, above n. 14.

34 Lewis *et al.*, above n. 18 at 419–20. Lewis *et al.* argue that these views reflect a lack of consideration of the details of each individual case. They say that this can result in an oversimplified presentation of a case in court, in which an expert fails to give due consideration to the range of factors and subtleties that should inform the decision to admit the evidence (at 420).

35 The DSM states that '[t]here is currently no method for establishing with certainty the accuracy of such retrieved memories in the absence of corroborative evidence'. DSM-IV, above n. 15 at 480–1.



## The admissibility of expert evidence on recovered memory in the United States

For most of the 20th century the standard for evaluating expert evidence was that established in *Frye v US*.<sup>36</sup> The test asks whether a scientific theory is 'generally accepted' by members of the relevant scientific community.<sup>37</sup> Today, however, the majority of state courts apply a formal admissibility test based on the seminal US Supreme Court decision in *Daubert v Merrell Dow Pharmaceuticals, Inc.*<sup>38</sup> that trial judges are gatekeepers with responsibility to assess the reliability of the expert opinion.<sup>39</sup> *Daubert* was a response to the 'austere' general acceptance standard, which excluded scientific theories about which there was no consensus.<sup>40</sup> Nevertheless, *Daubert* imposes a rigorous standard for admissibility. It requires courts to evaluate scientific evidence based on the methodology used and not the conclusions derived by the researcher.<sup>41</sup> Reliability is not to be bundled up in the jury's determination as to the weight to be given to the expert testimony, instead it is a question for the judge in her role as gatekeeper. The proponent of the evidence must demonstrate that it is the product of sound scientific methodology, and this is determined according to a non-exclusive list of factors that scrutinise the reliability of the methodology underlying the proffered evidence.<sup>42</sup> These include falsifiability, peer review/publication, potential/known error rate and general acceptance. Most US states apply a *Daubert* or similar test or include *Daubert* factors in their tests.<sup>43</sup>

In general there are two approaches taken by the US courts to cases involving expert evidence on recovered memory: (a) in the minority of states that continue to apply the *Frye* 'general acceptance' test, expert evidence on recovered memory is viewed as exceptional and is *per se* admissible; and (b) in the majority of states, where *Daubert* is used, expert evidence on recovered memory is subjected to an

36 293 F 1013 (DC Cir 1923).

37 *Ibid.* at 1014.

38 509 US 579 (1993).

39 The trial judge's gatekeeper function was later extended to all expert testimony, with the Supreme Court emphasising the trial court's ability to become sophisticated consumers of science: *Kumho Tire Co. v Carmichael*, 526 US 137 (1999).

40 The court in *Daubert* held that *Frye* was an 'austere standard' that would be at odds with the 'liberal thrust' of the Federal Rules of Evidence (at 588). FRE r. 702 was later amended to require an assessment of reliability.

41 The US Supreme Court admonished judges to focus 'solely on principles and methodology, not on the conclusions they might generate' (at 595).

42 These factors include falsifiability, peer review/publication, potential/known error rate and general acceptance.

43 Sixteen states apply a 'general acceptance' test, and four states have developed their own tests for the admissibility of expert evidence: see A. Lustre, 'Post-*Daubert* Standards for Admissibility of Scientific and Other Expert Evidence in State Courts' (2001) 90 ALR 5th 453.

admissibility test. In those states where *Daubert* is used, many criminal courts seem to subject both expert evidence on recovered memory *and* complainant testimony based on recovered memory to an admissibility test. Both forms of evidence are generally deemed insufficiently reliable to be admitted. The notable exception to this exclusionary trend is the recent Massachusetts case of *Commonwealth v Shanley*.<sup>44</sup>

### Expert evidence on recovered memory is *per se* admissible

Under this approach the courts scrutinise testimony based on a ‘new scientific technique’.<sup>45</sup> However, testimony based on recovered memory is deemed not to be based on complex science and therefore is exempted from an admissibility test.<sup>46</sup> The exception has been justified on the basis that jurors can ‘temper their acceptance of [the expert’s] testimony with a healthy scepticism born of their knowledge that all human beings are fallible’.<sup>47</sup> The best example of the problems associated with the rule in the context of expert evidence on recovered memory comes from an Arizonan civil case. In *Logerquist v McVey*<sup>48</sup> the Arizona Supreme Court refused to adopt any test beyond basic relevancy for experience-based testimony on the phenomenon of recovered memories.<sup>49</sup> This was because experience-based testimony was based on inductive reasoning and therefore did not require any threshold test. This reasoning was denounced by two dissenting judges and has been the subject of severe criticism by scholars.<sup>50</sup>

### Admissibility test

As noted earlier, in evaluating expert testimony, the majority of state courts apply a formal admissibility test, based on the decision in *Daubert*.<sup>51</sup> While there does not appear to be any case where a court has held that spontaneously recovered

44 SJC-10382, 455 Mass 752, 919 N E 2d 1254 (2010), discussed below.

45 *Frye v US*, 293 F 1013 (DC Cir 1923); *People v Kelly*, 17 Cal 3d 24, 130 Cal Rptr 144 (1976).

46 A recent example of this approach is *Phillips v Gelpke* 190 NJ 580, 921 A2d 1087 (2007) Supreme Court of New Jersey. Of course, even if the court concludes that the complainant’s testimony as well as that of the expert on the topic should be admitted the court may still exclude it on the grounds that it is more prejudicial than probative under FRE r. 403 or a similar state rule.

47 *People v McDonald*, 37 Cal 3d 351, 208 Cal Rptr 236 (1984).

48 196 Ariz 470, 1 P 3d 113 (2000).

49 In the context of recovered memory evidence, these requirements of relevance and competency can be crucial. In *Frangipane* the Supreme Judicial Court of Massachusetts reversed the defendant’s conviction on the grounds that a Commonwealth social worker’s testimony about the loss and recovery of a traumatic memory through dissociation was beyond her expertise and should not have been admitted. *Commonwealth v Frangipane*, 433 Mass 527 (2001). See also *Smith v Commonwealth* 2004 WL 535975 (Ky).

50 See ‘Symposium: *Logerquist v McVey*’ 3 Ariz St LJ 40 (2001) and T. N. Stevens, ‘The Admissibility of Expert Testimony on Repressed Memories of Child Sexual Abuse in *Logerquist v. McVey*: Reliability takes a Backseat to Relevancy’ (2001) 46 VLLR 385.

51 509 US 579 (1993).

memories are *per se* inadmissible,<sup>52</sup> many US courts have used admissibility thresholds to scrutinise not only expert evidence on recovered memory, but also complainant testimony based on recovered memory.

The Supreme Court of New Hampshire has led the way in the US in establishing a rigorous approach to the admission of recovered memory testimony and expert evidence. In *State v Hungerford*, the Supreme Court of New Hampshire recognised that the issue of recovered memory straddles *both* the admissibility of the expert testimony and the question of the admissibility of the complainant's recovered memory.<sup>53</sup> It found that a memory recovered in therapy cannot be separated from the process, if any, which facilitated the recovery.<sup>54</sup> Therefore, when challenged, testimony that relies on recovered memories must satisfy a pre-trial reliability determination.<sup>55</sup> The court envisaged a pre-trial admissibility assessment based on a threshold standard that scrutinises the reliability of the theory of recovered memory. Following *Daubert*, the court held that in determining the reliability of a recovered memory, the trial court should consider the following factors: (1) the level of peer review and publication on the phenomenon of repression and recovery of memories; (2) whether the phenomenon has been generally accepted in the psychological community; (3) whether the phenomenon may be and has been empirically tested; (4) the potential or known rate of false recovered memories.<sup>56</sup>

Applying these criteria to the theory of recovered memory, the court found that the level of peer review was high, but that the debate over methodology and the meaning of results was such that it could not state that the theory had gained general acceptance in the psychological community.<sup>57</sup> Furthermore, ethical considerations precluded psychological testing of the impact of traumatic events on memory, i.e. whether or not trauma makes memory disappear. The court also noted that it was difficult to estimate the rate of 'false' recovered memories.

However, *Hungerford* envisages a reliability assessment that goes beyond the narrow focus on the methodologies underpinning recovered memory theory. In addition to inquiring into the methodology and principles underlying recovered

52 Lewis (Oxford University Press: 2006), above n. 9 at 157.

53 *State v Hungerford* 142 NH 110, 697 A 2d 916 (1997). *Hungerford* was referred to by Hardiman J in the Irish case of *JL v DPP* [2000] 3 IR 122.

54 In *Hungerford* the trial judge held a two-week admissibility hearing and heard from seven eminent psychologists and psychiatrists as well as the treating therapists and the two complainants.

55 '[T]estimony that relies on memories which previously have been partially or fully repressed must satisfy a pretrial reliability determination' (at 921).

56 These four factors are taken from *Daubert*, above n. 38.

57 *State v Hungerford* 142 NH 110, 697 A 2d 916 at 925-7 (1997).

memory theory, the court should also consider other relevant factors relating to the complainant's testimony. These other factors are: (5) the age of the witness at the time the event(s) occurred; (6) the length of time between the event and the recovery of the memory; (7) the presence or absence of objective, verifiable corroborative evidence of the event; and (8) the circumstances surrounding the recovery of the memory, i.e. whether the witness was engaged in therapy or some other process seeking to recover memories or likely to result in recovered memories.<sup>58</sup> The admissibility of the expert evidence on recovered memory and the recovered memory testimony could be assessed in light of these indicia of reliability.<sup>59</sup> The court noted that the complainants' ages and the length of time elapsed between the alleged abuse and the recovery of the memory bore in favour of reliability.<sup>60</sup> However, it deferred to the trial judge's finding of a lack of corroborative evidence. This was despite the fact that the therapist of one of the complainants testified and one complainant's sister made similar allegations of abuse against the defendant. Indeed, while the therapist's evaluation of the concerns of members of staff at the therapy centre and the testimony of the defendant's wife offered 'some enlightenment', they were not sufficiently corroborative.<sup>61</sup> The court was also worried about the problematic nature of therapeutic techniques used to recover memories. However, it was the nature of the unreliability of the phenomenon of recovered memories that was the real concern:

The phenomenon of recovery of repressed memories has not yet reached the point where we may perceive these particular recovered memories as reliable ... The indicia of reliability present in the particular memories in these cases do not rise to such a level that they overcome *the divisive state of the scientific debate on the issue*.<sup>62</sup>

Therefore the court refused to overturn the trial judge's finding that the complainants' recovered memories were inadmissible. Since *Hungerford* the US courts continue to highlight the importance of an admissibility threshold in recovered memory cases.<sup>63</sup>

58 697 A 2d 916 at 925.

59 Ibid.

60 The time elapsed between the alleged abuse and the recovery of the memory was one and a half years for one complainant and three years for another: 697 A 2d 916 at 929, *per Brock CJ*.

61 Ibid.

62 Ibid. at 930, *per Brock CJ* (emphasis added).

63 *Smith v Commonwealth of Kentucky* 2004 WL 535975 (Ky), 2007 WL 2812597 (Ky App); *Commonwealth of Kentucky v Smith* 2007 WL 2812597 (Ky App).

The recent decision of the Supreme Judicial Court of Massachusetts in *Commonwealth v Shanley*<sup>64</sup> is a notable exception to the general exclusionary trend in relation to the admissibility of recovered memories in criminal cases.<sup>65</sup> In a judgment delivered in January 2010 the court made a number of important findings in relation to expert testimony in cases involving alleged recovered memories.

The prosecution's case centred on the complainant's recovered memories of sexual abuse which was alleged to have taken place over a six-year period in the 1980s when he was attending religion classes at the church where the defendant served as a priest.<sup>66</sup> The memories did not surface until 2002, when the complainant learned of abuse allegations against Shanley. The case and the subsequent appeal against conviction turned on whether the evidence based on the recovered memory should have been admitted.<sup>67</sup>

The trial judge held an admissibility hearing regarding the expert testimony on recovered memory. The test used was that established in the Massachusetts case of *Lanigan*. Under *Lanigan* the core question is the reliability of the theory or process underlying the expert's testimony.<sup>68</sup> At first glance, this would seem to be identical to the *Daubert* test. However, unlike *Daubert*, the *Lanigan* test contains no reference to specific factors to scrutinise the reliability of the methodology on which the evidence is based. As will be seen, the vagueness of the *Lanigan* test contributed to a confusing analysis here in *Shanley*.

Among the experts called by the prosecution were Daniel Brown and James A. Chu, both leading experts in the field of clinical psychology and proponents of

64 *Commonwealth v Shanley*, SJC-10382, 455 Mass 752, 919 NE 2d 1254 (2010).

65 Some US courts have not followed the *Hungerford* approach and have admitted the complainant's testimony and the expert testimony describing the theory of recovered memories. However, these decisions are mostly lower court decisions in civil cases. *Isley v Capuchin Province*, 877 F Supp 1055 (ED Mich 1995); *Shahzade v Gregory*, 923 F Supp 286 (D Mass 1996). See Stevens, above n. 50 at 399.

66 The case formed the epicentre of a scandal uncovered by the *Boston Globe* newspaper involving a litany of abuse within the Boston Catholic Archdiocese. See M. A. Hamilton, 'The "Licentiousness" in Religious Organizations and Why It Is Not Protected under Religious Liberty Constitutional Provisions' (2010) Wm and M Bill of Rights J 953.

67 He also appealed on the grounds that the six-year period under the statute of limitations had expired. While the court found that the trial judge had given an erroneous instruction to the jury on this issue, it did not give rise to a miscarriage of justice. *Shanley*, above n. 44 at 1277-8, per Cordy J.

68 *Commonwealth v Lanigan*, 419 Mass 15, 641 NE 2d 1342 (1994). A judge's decision to admit expert testimony is subject to review only for abuse of discretion. *Canavan's Case*, 432 Mass 304, 733 NE 2d 1042 (2000).

recovered memory theory.<sup>69</sup> In addition, the trial judge also considered an affidavit by Elizabeth Loftus for the defence, who testified as to the existence of false memory syndrome.<sup>70</sup> The trial judge concluded that the diagnosis and theories behind recovered memory were generally accepted in the relevant scientific community. This was a surprising conclusion for two reasons: first, because the trial judge held a *Lanigan* admissibility hearing, and so should have been concerned with the principles underlying the expert opinion rather than the level of acceptance in the psychological community. Secondly, a finding of general acceptance is extremely difficult to justify given the debate that still rages in the psychological literature on this issue.<sup>71</sup>

The Supreme Judicial Court dismissed Shanley's appeal against conviction. The decision's focus on the admissibility of the expert evidence on recovered memory is interesting; unlike *Hungerford*, the admissibility of the complainant's testimony based on recovered memory is not mentioned. The focus is on the reliability of the expert testimony. Indeed, the court was at pains to demonstrate its concern with reliability—the first seven pages of the judgment rehearse the opinions offered by the various experts regarding the existence of dissociative amnesia (repression). The court held that expert evidence is sufficiently reliable if the underlying theory or methodology is either (1) generally accepted in the relevant scientific community<sup>72</sup> or (2) it satisfies the requirements adopted in *Lanigan*, i.e. that the theory or process underlying the complainant's testimony is reliable. It held that the trial judge did not abuse his discretion in finding that the expert testimony on dissociative amnesia and recovered memory was sufficiently reliable to go to the jury. The court deferred to the trial judge's finding that Dr Brown's testimony constituted sufficient and reliable peer review for the purposes of general

69 Dr Brown is assistant professor of clinical psychology at Harvard Medical School. He has testified in judicial proceedings regarding dissociative amnesia in five states and has testified before the International War Crimes Tribunal on memory and trauma. He co-authored a leading text in the area *Memory Treatment and the Law*, above n. 18. Dr Chu is also a leading protagonist in the recovered memory debate. He was a member of the task force set up in the 1990s to review the dissociative disorder diagnosis for the DSM.

70 *Commonwealth v Shanley*, SJC-10382, 455 Mass 752, 919 NE 2d 1254 at 1262 (2010). Dr Loftus is Professor of Psychology at University of California, Irvine. She has published 18 books and more than 250 scientific articles and has served as an expert witness or consultant in hundreds of trials. She is a past president of the American Psychological Society. In February 2011 Loftus was awarded the American Association for the Advancement of Science Scientific Freedom and Responsibility Award. For an intriguing personal account of the admissibility hearings in *Hungerford* and in other recovered memory cases, see McHugh, above n. 25.

71 Davis and Loftus, above n. 24.

72 See *Frye v US* 293 F 1013 (DC Cir 1923).

acceptance,<sup>73</sup> and stressed that a ‘relevant scientific community’ must be defined to include a sufficiently broad sample of scientists so that the possibility of disagreement exists.<sup>74</sup>

Unfortunately, this analysis fails to encompass the nuances and complexity of the recovered memory debate in the psychological field and sidesteps any real scrutiny of the methodology underlying the expert testimony. Indeed, the court seems to have confused the general acceptance test and the *Daubert/Lanigan* scrutiny of methodology test. This confusion is evident in the court’s finding that the lack of scientific testing *did not make unreliable* the theory that an individual may experience dissociative amnesia.<sup>75</sup> In one fell swoop, the court rejected the defendant’s contention, often made by critics of recovered memory, that the theory of recovered memory is invalid because there is no scientific method to test for its existence in certain individuals, nor are there known error rates or standardisation. In so doing it adopted a definite ‘side’ in the recovered memory debate—that of the proponents of the theory. By sidestepping the reliability question, the court has effectively forced juries in future cases to choose between options in a debate that is so deeply divided that the experts themselves cannot agree, even about the existence of the phenomenon. Such a result is unacceptable in a criminal justice system that claims to be based on evidence and not opinions.

### Reliability and due process

The laissez-faire approach of a minority of US state courts, similar to the admissibility test employed in England and Wales and in Ireland, will permit expert evidence on recovered memory as long as it is relevant and not patently unreliable. However, a more rigorous admissibility test than relevance is required if the defendant is to be afforded due process. The liberal approach creates the potential for unfounded speculations and assertions masquerading as expertise to enter the jury’s decision-making process. The expert’s testimony may have a certain aura of scientific objectivity or infallibility which, when combined with the frailties of human decision-making, is likely to cause them to give too much

73 Dr Brown testified that recovered memory was generally accepted in the field. He relied on six studies to that effect, which the court cited. ‘According to those surveys (taken collectively), eighty-nine per cent of those surveyed accepted the validity or possible validity of dissociative amnesia’ (at 1265, *per Cordy J*).

74 The court declined to rule out overturning a conviction in a future case where the only evidence is based on repressed memories; *Commonwealth v Shanley*, SJC-10382, 455 Mass 752, 919 NE 2d 1254 at 1270 (2010).

75 *Ibid.* at 1266 (emphasis added). The court held that this conclusion was supported in the record, ‘not only by expert testimony but by a wide collection of clinical observations and a survey of academic literature’.

weight to the expert's opinion.<sup>76</sup> The risk of unquestioning jury deference gives rise to particular concerns about a fair trial if there are unresolved questions about the reliability of that expert evidence.<sup>77</sup> Furthermore, in an area such as recovered memory, where there is fundamental disagreement among professionals about *whether* traumatic memories can be repressed and later successfully recovered, a basic relevance inquiry risks an unfair conviction.

In recognition of the need to protect juries from unreliable opinions, the clear preference of the majority of US state courts in relation to admissibility of expert evidence on recovered memory has been to pass the expert testimony through an additional evidentiary filter beyond relevance.

The *Hungerford* approach applies an admissibility threshold to both the expert evidence on recovered memory *and* the complainant's testimony. It would seem to offer the courts a way of combining rigorous scrutiny of the methodology underlying the expert evidence with a contextualised assessment of the complaint. The first four factors are taken from *Daubert* and require the judge to ensure that only reliable expert evidence reaches the jury. As noted earlier, the court in *Hungerford* found that the theory of recovered memory failed to satisfy this reliability test. The final four factors, or indicia of reliability, are a laudable attempt to establish the reliability of the complainant's memory on grounds external to the memory itself and to the theory of recovered memory. At first glance this approach seems compelling; however, closer examination reveals that it promises far more than it can deliver. Remember that in *Hungerford*, the indicia of reliability could not overcome the divisive state of the scientific debate on recovered memory, and both the expert evidence and the complainants' testimony were deemed inadmissible. Unfortunately, therefore, it appears that even though *Hungerford* offers a potentially useful way to contextualise the admissibility test, it is clear that even in the very case where the indicia of reliability were developed, they failed to surmount the evidential problems caused by the lack of scientific agreement and lack of a scientific method of testing the reliability of recovered memories. Indeed the dissension within scientific circles regarding the reliability of recovered memories has proved fatal in later cases applying *Hungerford*,<sup>78</sup> even where the

76 See L. Hand, 'Historical and Practical Considerations Regarding Expert Testimony' (1901) 15 Harv LR 40; M. Redmayne, *Expert Evidence and Criminal Justice* (Oxford University Press: Oxford, 2001) 125.

77 Leveson LJ, above n. 5 at 6.

78 In *Quattrocchi* the court applied the *Hungerford* factors and excluded the expert evidence on recovered memory on the grounds that the status of dissension within the scientific community rendered potential expert testimony of little assistance to the trier of fact: *State v Quattrocchi*, 1999 WL 284882 (R I Super); III 2001 WL 100373 (R I Super).



interval between the alleged abuse and its recollection is relatively short.<sup>79</sup> This leaves courts looking for guidance in a difficult position: if the indicia of reliability are not enough to carry the case beyond the scientific reliability concerns in the very case in which they were formulated, when will they be sufficient to do so? Furthermore, does this mean that complainant testimony based on recovered memory must also be excluded? The notion of supporting evidence has been mooted as a way of avoiding the Scylla of unfair convictions based on unreliable expert testimony and the Charybdis of preventing all prosecutions based on recovered memories from proceeding.

### Supporting evidence

Lewis has suggested that recovered memory testimony may be admitted where there is supporting evidence and that the jury should be warned of its potential unreliability.<sup>80</sup> If the evidence were deemed corroborative, it would be admitted to the jury along with the recovered memory testimony. In the absence of such supporting evidence the case would be withdrawn from the jury. The approach can be compared to that adopted in England and Wales in relation to prosecutions following a cot death.<sup>81</sup> According to Lewis, the evidence should corroborate the actual abuse alleged, and not just be part of the complainant's story, or the occurrence of sexual abuse.<sup>82</sup> There are two kinds of evidence that might be proffered as corroborating a recovered memory: evidence of bad character and physical evidence.

#### *(i) Evidence of bad character*

The general rule is that evidence of the bad character of an accused person is inadmissible in the course of a trial. There are exceptions to this rule, most important for present purposes being where evidence of bad character may be introduced as so-called 'similar fact evidence'. Any bad character evidence must be more probative than prejudicial before it may be admitted.<sup>83</sup> The main objection to bad character evidence is the devastating prejudice it inevitably wreaks for the defence given 'the capacity [of the evidence] to unfairly predispose the triers of fact toward a particular outcome'.<sup>84</sup> Bad character evidence might

79 *State v Walters* 142 NH 239, 698 A 2d 1244 (1997) Supreme Court of New Hampshire.

80 Lewis, above n. 9 at ch. 7 and the articles by Lewis and Mullis, above n. 9. A similar approach has been developed by the Supreme Court of Carolina in a leading civil case: *Moriarty v Garden Sanctuary Church of God* 341 SC 320, 534 SE2d 672 (2000). For a critique of this approach, see the articles by Redmayne, above n. 9.

81 *R v Cannings* [2004] EWCA Crim 1; [2004] 1 WLR 2607.

82 See Lewis (Oxford University Press: 2006), above n. 9 at 170–1.

83 *People (DPP) v BK* [2000] 2 IR 199 (Irish Court of Criminal Appeal); *DPP v P* [1991] 3 All ER 337.

84 M. Damaska, *Evidence Law Adrift* (Yale University Press: New Haven, 1997) 15.

include a pre-trial admission, a confession by the defendant<sup>85</sup> or similar allegations against the defendant made by another witness. If, for example, another person alleges similar offences by the same defendant, there is an argument that this evidence is indicative of the reliability of the complainant's recovered memory. This argument becomes stronger in cases where the other person is also a complainant and the behaviour alleged is strikingly similar and unusual; in other words, that it is so unusual that it could not be the 'stock in trade' of child sexual abuse.<sup>86</sup> In such cases, the probative value of the evidence would perhaps outweigh its prejudicial effect and might count towards the admission of recovered memory testimony.

While the use of supporting evidence would be in line with recent changes in England and Wales in relation to bad character evidence,<sup>87</sup> the limits on the use of bad character evidence as corroboration in a recovered memory case would have to be extremely narrowly construed to avoid any infringement of the presumption of innocence. It would need to implicate the accused and be independent of the evidence that makes the corroboration desirable and be credible.<sup>88</sup> When these considerations are coupled with the prejudicial effect of a prior record of offences a jury would likely view as abhorrent, and the court's duty to guard against unfounded assumptions entering the jury's decision-making process, it is difficult to see how a court could admit such evidence as corroborative of a complainant's recovered memory.<sup>89</sup> It would seem, therefore, that the number of cases where there is evidence capable of constituting corroboration would be extremely small, and would probably only include cases where there are similar allegations made by another complainant, or where there is a pre-trial admission or confession by the defendant.

85 Although as Lewis notes, confessions must be treated with caution because of evidence of false memories in this context. See Lewis (E&P 2006), above n. 9 at 169.

86 In *DO'S*, where the assaults described by the other witnesses were unusual and contained similarities regarding the location, timing and the manner in which they were carried out, the probative value of the evidence was found to outweigh its prejudicial nature: *People (DPP) v DO'S* [2004] IECCA 12. However, see the criticism of this approach by Fennell, above n. 4 at para. 10.74.

87 In England and Wales the rules governing the admissibility of evidence of bad character have been extended to include previous allegations in respect of which the defendant has been tried and acquitted, allegations which were never tried or other complaints that never reached the police (such as accusations made by a pupil to the headmaster but never reported to the police) (Criminal Justice Act 2003, s. 98). It also extends to evidence of the defendant's 'disposition towards misconduct'. This could include evidence that a person has expressed sexual attraction towards children.

88 *People (DPP) v Gilligan* [2006] 1 IR 107 at 143, *per* Denham J.

89 The Irish Supreme Court has criticised cross-examination that made assertions as to the disposition of the accused to sexually abuse children, in a case where counsel suggested that the defendant's involvement with the Boy Scout movement was part of the 'profile' of a sexual deviant or pervert: *People (DPP) v DO* [2006] 3 IR 57.

**(ii) Physical evidence**

This might include medical and school records, plans of the building(s) where the abuse is alleged to have occurred, photographs of the location of the alleged abuse and photographs or recordings of the abuse.<sup>90</sup> However, the likelihood of such evidence being corroborative of the defendant having committed the abuse alleged, as opposed to merely consistent with the complainant's account, is very low. In this context Redmayne's point that corroborating evidence does not increase the probative value of the corroborated evidence is crucial.<sup>91</sup>

**Due process issues**

In *JL v DPP*, Hardiman J of the Irish Supreme Court noted that the recovered memory controversy affects vital procedural points such as the persuasiveness of an application for prohibition on the grounds of delay: 'If the memory is viewed wholly or partly as a repressed one its validity as a factor excusing delay depends on the view taken of the reality of repression as a phenomenon.'<sup>92</sup> Its impact on evidence is more obvious; an important issue, should a complainant's testimony be admissible in the absence of expert testimony, is the jury's ability to assess credibility based on demeanour. Unfortunately, where the complainant claims to have recovered the memory of abuse, cross-examination is unlikely to be as effective a tool as it is with other kinds of witnesses, since the witness honestly believes she is telling the truth. Indeed, even patently false recovered memories are characterised by the witness's belief in the authenticity of the experience she describes.<sup>93</sup> To compound matters, recovered memories have a more tenuous connection with the person's other recollections than do ordinary memories, meaning that gaps in recollection (which would ordinarily cast doubt on the reliability of the memory) may be explained by saying that the recovered memory was developed through therapy, whereas others were not.<sup>94</sup> The capacity of the powerful instrument of cross-examination to identify inconsistencies in a complainant's testimony is so limited as to be practically useless.

Furthermore, there are two sets of recovered memories of which the courts should be especially wary. First, if the event is alleged to have occurred very early in childhood, the court should be extremely sceptical of the testimony, because

90 Lewis (E&P 2006), above n. 9 at 171.

91 Redmayne (LQR 2001), above n. 9 at 152.

92 [2000] 3 IR 122 at 151. On the Irish case law on prohibition in historic child sexual abuse prosecutions see Ring, above n. 8.

93 Davies, above n. 28 at 167.

94 The example is taken from M. Karlsson, 'Time Out of Mind: Sexual Abuse and the Statute of Limitations' in J. Bjarup and M. Blegvad (eds.), *Time, Law, and Society* (Franz Steiner Verlag: Stuttgart, 1995) 49.

scientists generally agree that people do not remember the first few years of life.<sup>95</sup> Secondly, memories recovered in therapy pose particular difficulties, since the therapeutic goal is not to determine the historical truth, but rather to heal the patient.<sup>96</sup> Along with the problems of suggestibility and the influence of the therapist this raises serious questions about the reliability of such memories.<sup>97</sup>

The twin goals of the criminal trial are to accurately determine the accused person's guilt or innocence and to do so fairly.<sup>98</sup> In seeking to achieve these goals, a primary function of the rules of evidence and procedure is to ensure that reliable evidence is produced which can form the basis of an effective trial.<sup>99</sup> The importance of safeguards to protect against unreliable evidence entering the jury's decision-making process is founded on the law's respect for the 'principled asymmetry' of State-citizens' interactions in the criminal context.<sup>100</sup> Respect for rights is a concomitant aim of the criminal process—not merely a side-constraint on the pursuit of accuracy, but an objective to be attained while pursuing that aim.<sup>101</sup> This is obvious when one considers the role of admissibility tests in reinforcing the legitimacy of the jury verdict.<sup>102</sup> Fundamental criminal due process rights are therefore inseparable from the pursuit of accurate jury verdicts—values of fairness and due process require that only reliable evidence reaches the jury. Expert evidence on recovered memory raises a number of concerns in relation to the potential of such evidence to undermine the factual accuracy of the jury's decision and the law's commitment to fairness and due process. While some of these concerns are common to all cases involving expert evidence, there are particular factors pertaining to recovered memory prosecutions that mean the consequences for due process are much more serious.

95 J. Briere and J. R. Conte, 'Self-reported Amnesia for Abuse in Adults Molested as Children' (1993) 6 *J Traumatic Stress* 21.

96 M. Wesson, 'Historical Truth, Narrative Truth and Expert Testimony' (1995) 60 *Wash LR* 331.

97 G. Ernsdorff and E. Loftus, 'Let Sleeping Memories Lie? Words of Caution about Tolling the Statute of Limitations in Cases of Memory Repression' (1993) 84(1) *Journal of Criminal Law and Criminology* 129 at 158–62.

98 A. Ashworth and M. Redmayne, *The Criminal Process*, 3rd edn (Oxford University Press: Oxford, 2005) 22.

99 *Ibid.* at 23.

100 Roberts and Zuckerman, above n. 4 at 19.

101 Ashworth and Redmayne, above n. 98 at 45.

102 See earlier discussion on the problems with not scrutinising expert evidence. The limits placed on the admissibility of expert evidence in criminal trials are based on the so-called 'jury control' theory of evidence which holds that exclusion of unduly prejudicial or unreliable evidence and formal directions on how certain kinds of admissible evidence should be used are the tools employed to control the natural reasoning processes of the jury. J. D. Jackson, 'The Function of the Criminal Trial in Legal Inquiry' in A. Duff, L. Farmer, S. Marshall and V. Tadros (eds.), *The Trial on Trial: Volume 1, Truth and Due Process* (Hart: Oxford, 2004) 121 at 135–7.

First, the jury's task in recovered memory cases is much more difficult than in other kinds of cases involving competing experts. In most trials involving 'opposing' experts, the jury is expected to critically evaluate different interpretations of a particular set of data. The jury must then integrate that evaluation into their assessment of the rest of the evidence at trial, giving the expert evidence appropriate weight.<sup>103</sup> Commentators have pointed out that the jury's ability to choose between competing experts is often extremely limited. Hence, while jurors may accept or reject the witness's conclusions, neither acceptance nor rejection will be based on rational reasons.<sup>104</sup> Instead the choice will be based on factors such as credentials, qualifications, performance or who seemed to be favoured in the judge's summing up.<sup>105</sup> This lack of epistemic competence raises real due process concerns about the risk of an unfair conviction based on unscrutinised expert testimony.<sup>106</sup> These concerns are underscored by the inscrutability of the jury verdict, and the minimal possibility of reconsidering factual issues on appeal.<sup>107</sup>

In recovered memory cases the due process problems posed by the jury's lack of epistemic competence are even more serious than in other kinds of prosecutions. The difference between complex expert evidence generally and expert evidence on recovered memory is that the two sets of expert testimony conflict, not merely on issues of the interpretation of data, but at a fundamental level, that is, on the very *existence* of recovered memory as a scientifically valid phenomenon. This conflict between experts is irreconcilable given the uncertain state of the knowledge upon which the experts have based their opinions, a problem made all too clear by the absence of a scientific method for testing the accuracy of recovered memories.<sup>108</sup> To require non-expert jurors to evaluate and distinguish

103 J. Fordham, 'Illuminating or Blurring the Truth: Jurors, Juries and Expert Evidence' in B. Brooks-Gordon and M. Freeman (eds.), *Law and Psychology*, Current Legal Issues, vol. 6 (Oxford University Press: Oxford, 2006) 338 at 339.

104 R. J. Allen, 'Expertise and the *Daubert* Decision' (1994) 84 *Journal of Criminal Law and Criminology* 1157.

105 P. Roberts, 'Science, Experts, and Criminal Justice' in M. McConville and G. Wilson (eds.), *The Handbook of the Criminal Process* (Oxford University Press: Oxford, 2002) 272.

106 On the epistemic competence of juries, see S. Brewer, 'Scientific Expert Testimony and Intellectual Due Process' (1998) 107 *Yale LJ* 1535.

107 Damaska, above n. 84 at 65.

108 See above. This is a problem that resonates with issues around the admissibility of scientific evidence in general. In *Daubert*, the US Supreme Court attempted to lay down tests to determine whether the proffered scientific evidence had been subjected to a scientific methodology. However, those philosophers of science whom the court invoked in order to demarcate genuine and reliable science from other forms of knowledge did not claim that their theories could distinguish between reliable and unreliable evidence. Jackson, above n. 102 at 143.

between the competing arguments and methodologies in the recovered memory debate is not only to over-estimate wildly their abilities as fact-finders, but also risks an unfair conviction based on a deeply contested and ultimately unverifiable opinion.

Secondly, expert evidence in favour of the existence of recovered memory should be understood, to borrow Redmayne's description of confession evidence, as 'outcome-determinative'.<sup>109</sup> The existence of the phenomenon is so fundamental to the complainant's credibility and to the whole prosecution case that if the jury accepts the prosecution expert's evidence, there is arguably no leap to be made to find the complainant credible. In short, if the jury accepts the theory of recovered memory as explained by the expert, it will almost certainly also accept the complainant's story as credible. This sidelining of the jury's role in critically assessing the complainant's credibility undermines the juror's role as arbiter of the facts.<sup>110</sup> Indeed, the Court of Appeal has called for special caution in cases where expert opinion evidence is fundamental to a prosecution.<sup>111</sup> Furthermore, as Hartshorne and Miola note, there is a stronger case for caution than there is with confession evidence, because, with expert evidence, 'the jury is being asked to decide upon the reliability of material that is beyond its ordinary knowledge and experience; in contrast, in many cases involving disputed confessions, the jury should need no assistance in determining whether the defendant was truthfully confessing'.<sup>112</sup> The challenges posed by the outcome-determinative nature of expert testimony on recovered memory are exacerbated by the uncertain status of recovered memory as a psychological phenomenon. The issue is a clear due process one; if verdicts in child sexual abuse cases are to be legitimate it is essential that it is the jury and not the experts who have the ultimate responsibility for the verdict.

Finally, a few points relating to the potential for juror prejudice in the assessment of complainant credibility. The duty to minimise the potential for unfounded assumptions entering the jury's decision-making process is especially important in recovered memory cases because of the lack of surrounding physical and circumstantial detail. Vidmar has identified different types of juror prejudice, two

109 Redmayne, above n. 76 at 122.

110 The objection to expert testimony on the grounds that it is an impermissible comment on the credibility of a witness is the objection that is most likely to succeed for either the prosecution or the defence: C. L. Bennett and A. C. Goldbach, *Trying Sex Offense Cases in Massachusetts*, 2nd edn (Massachusetts Continuing Legal Education: 2009) ch. 13, section 13.3.2.

111 *R v Holdsworth* [2008] EWCA Crim 971 at [57], per Toulson LJ.

112 Hartshorne and Miola, above n. 2 at 288.

of which are relevant to the present discussion.<sup>113</sup> Generic prejudice involves the transferring of pre-existing attitudes, beliefs and stereotypes about the person to the trial setting. It can be directed against people accused of certain crimes, such as child sexual abuse,<sup>114</sup> where the repulsive nature of the charges against the accused may of itself give rise to an inference of truth.<sup>115</sup> ‘Conformity’ prejudice involves the juror feeling pressure to reach a verdict consistent with community feelings. Without wishing to overstate the point, it is at least arguable that in recovered memory cases, the jury’s assessment of the complainant’s credibility may be tainted by these forms of prejudice. In this context it is worth noting that Hardiman J of the Irish Supreme Court has voiced concerns in relation to jurors’ ‘presumptive credence’ of complainants in historic child sexual abuse.<sup>116</sup> Indeed, the risk of ‘presumptive credence’ may be further heightened by the fact that the theory of recovered memory is based on the idea of trauma,<sup>117</sup> a culturally potent notion that authenticates suffering by linking present suffering to past violence.<sup>118</sup>

The problem of ‘presumptive credence’ and jury prejudice is particularly relevant to cases where (as happened in *Shanley*) the defence expert introduces the notion of false memories. In these cases jurors must not only consider whether or not the theory of recovered memory is valid, but they must also grapple with testimony to the effect that false memories can be created in adults. Since the choice is one between competing experts, it is effectively a simple binary one so that the jury must choose between either agreeing that the recovered memory is true and credible (the prosecution case) or deciding that the recovered memory is false (the defence case). This polarity may encourage jurors to fit the complainant’s story within one of these two alternatives without any reference to their individual

113 The other two types are interest prejudice (where jurors have an interest in the outcome of the trial) and specific prejudice (where jurors hold attitudes that prevent them from being impartial): N. Vidmar, ‘Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation’ (2002) 26(1) *Law and Human Behavior* 73.

114 N. Vidmar, ‘Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials’ (1997) 21(1) *Law and Human Behavior* 5.

115 See E. Smith-Lee, ‘Recovered Memories of Childhood Sexual Abuse: Should Long-Buried Memories be Admissible Testimony?’ (1996) 37 *Boston College Law Review* 591 at 637.

116 *PD v DPP* [2008] IESC 22, per Hardiman J, dissenting. He also noted this presumptive credence on the part of judges.

117 See the references above n. 20.

118 D. Fassin and R. Rechtman, *The Empire of Trauma* (Princeton University Press: Princeton, 2009); J. Brunner, ‘Trauma and Justice: The Moral Grammar of Trauma Discourse from Wilhelmine Germany to Post-Apartheid South Africa’ in A. Sarat et al. (eds.), *Trauma and Memory* (Stanford University Press: Stanford, 2007); S. Cohen, *States of Denial, Knowing about Atrocities and Suffering* (Polity Press: Cambridge, 2001).

credibility as a witness or other evidence, effectively sidelining the presumption of innocence, the burden of proof and the option of an acquittal.

As questions of admissibility of expert evidence on recovered memory become ever more pertinent we would do well to remind ourselves of the values underpinning the criminal trial and to exercise careful vigilance as to what assumptions and values are being woven into the normative framework of the criminal trial. In light of the fundamental unreliability and unverifiability of expert evidence regarding recovered memory, unquestioning deference to experts offends criminal due process.

The court in *Hungerford* held that the complainants' recovered memory should also be subjected to an admissibility threshold. Although the court was concerned with memories recovered in therapy, the principles apply to all cases involving recovered memory. This approach is remarkable, given that the sole criterion for eyewitness evidence has traditionally been personal knowledge of the relevant information.<sup>119</sup> However, the court was alert to the need to ensure that only reliable evidence reached the jury. The court's attempts to ameliorate the harshness of an absolute exclusionary rule by supplementing the reliability inquiry with an assessment of other factors that might indicate reliability failed. This fundamental problem of unreliability is at the heart of all recovered memory cases—essentially the complainant's testimony is based on a theory that is not robust enough to withstand scrutiny of its methodology.

Similarly, the supporting evidence approach is also incapable of overcoming this unreliability problem. When this is coupled with the ineffectiveness of cross-examination in this context, it would seem that the supporting evidence approach would be of no probative use in all but the most exceptional cases,<sup>120</sup> and to admit it along with the complainant testimony would be to risk an unfair trial.

Finally a caveat: none of the foregoing is to say that every case involving recovered memory should be prevented from proceeding to trial. If the supporting evidence on its own—that is, without the recovered memory testimony—is such that a reasonable jury properly charged could convict, then of course that evidence should go to the jury. For example, the Supreme Court of New Hampshire has

119 R. Zoltek-Jick, 'For Whom does the Bell Toll? Repressed Memory and Challenges for the Law—Getting beyond the Statute of Limitations' in P. S. Appelbaum, L. A. Uyehara and M. R. Elin (eds.), *Trauma and Memory: Clinical and Legal Controversies* (Oxford University Press: New York, 1997) 470.

120 Such as where there is a pre-trial admission or confession by the defendant or where there are similar allegations made by another complainant.



upheld convictions in a case involving both repressed and continuous memories.<sup>121</sup> Although the recovered memories were inadmissible under *Hungerford*, the court was clear that the complainant could distinguish between her recovered memories and her continuous memories of assaults. The decision is to be welcomed for its vindication of the complainant's ability to recount only the admissible parts of her story. Furthermore, given the uncertainty surrounding the meaning of repression, and given the cultural meanings attached to trauma beyond the therapeutic and psychological fields,<sup>122</sup> it is highly possible that some victims who claim to have recovered memories have simply begun thinking about events that they avoided thinking about for years. The reasons for complainant delay in historic child sexual abuse cases range from fear arising from a relationship of dominion to societal disbelief of victims.<sup>123</sup> In recovered memory cases it is entirely plausible that the complainant has rationalised her inability to complain in terms of repression rather than avoidance.<sup>124</sup> Indeed, the Irish case law shows that the court<sup>125</sup> or the expert psychologist may do the same.<sup>126</sup> In a further twist, a leading researcher at Harvard University has suggested that ordinary memory mechanisms may be operating in cases of alleged recovered memory.<sup>127</sup> Clearly, therefore, courts must be alert to the need to identify whether repression is in fact an issue.

## Conclusion

Criminal trials of historic child sexual abuse take place in a landscape disconnected from the normal matrix of physical and circumstantial detail.<sup>128</sup> In

121 *State v Gibson*, 897 A 2d 957 (2006).

122 See above n. 118.

123 *H v DPP* [2006] 3 IR 575; [2006] IESC 55. In *P v DPP* [2005] IEHC 33 the complainant reported aged nine, but no action (apart from two medical examinations) was taken until some 13 years later when the complainant reported the abuse again. The High Court granted an order prohibiting the trial on the grounds of the risk of an unfair trial. See Ring, above n. 8.

124 Redmayne, above n. 9 (2001).

125 In *PC*, which involved an application by the accused for an order halting the prosecution of the charges on the grounds of delay, Denham J in the Supreme Court described a continuously remembered memory as repressed, on the grounds that 'rational consideration of abusive events is frequently suppressed for complex personal, family and social reasons. Unless there is counselling the victim may not be able to complain formally': *PC v DPP* [1999] 2 IR 25.

126 In *W v DPP*, unreported, 21 March 2002, High Court, which involved an application to halt the trial, the prosecution's psychologist conceded under cross-examination that insofar as the complainant had engaged in a conscious mechanism to push material from his mind that this was the act of 'suppression' and not 'repression' and that her use of the term repression to describe the former activity was incorrect.

127 McNally, above n. 22.

128 *R v DPP* [2009] IEHC 87, per O'Neill J.

recovered memory cases this difficulty is compounded by the state of scientific knowledge on the phenomenon.

The currently liberal admissibility test applied to expert evidence in England and Ireland creates a huge potential for unfair trials in historic child sexual abuse prosecutions based on recovered memories of abuse. There are indications of a trend in favour of increased scrutiny of expert evidence in criminal cases,<sup>129</sup> including recent dicta from the Court of Appeal suggesting a willingness to ensure that unsupported assertions about the nature of memory do not reach the jury.<sup>130</sup> The Law Commission has recommended the introduction of a statutory admissibility test for expert evidence to replace the current test. The Commission's proposed test requires trial judges to carry out a reliability determination in deciding whether the expert opinion is 'soundly based'.<sup>131</sup> The draft Bill that accompanies the Report sets out factors which could ground a finding of unreliability, including that the expert opinion is based on a hypothesis which has not been subjected to sufficient scrutiny or that the opinion is based on an unjustifiable assumption.<sup>132</sup> This is a welcome move towards confirming judges in their duty to shield jurors from expert evidence lacking a reliable scientific foundation. However, the courts must not be complacent. The decision in *Shanley* is a powerful reminder of judicial willingness to defer to experts without subjecting their testimony to rigorous scrutiny. It is to be hoped that in scrutinising the reliability of expert evidence on recovered memory, the English and Irish courts will have regard to the importance of ensuring due process, an emphasis which in general<sup>133</sup> suggests that expert evidence on recovered memory should not be admitted in a criminal trial. The adoption of a general rule to that effect would

129 See, e.g., *R v Atkins* [2009] EWCA Crim 1879.

130 In *R v GJB* [2011] EWCA 867, the Court of Appeal rejected as 'amateur psychology' the assertion that the complainant had a good recollection of the appellant's bedroom because he had been abused in it at the age of five. The court noted that there was no expert evidence before the jury to support the suggestion that an incident as distressing as a rape or buggery would enhance a child's memory of his surrounds when it happened.

131 Law Commission, above n. 6 at para. 5.17. The Irish Law Reform Commission has provisionally rejected the *Frye* general acceptance test, in favour of a judicial guidance note outlining 'a non-exhaustive and non-binding list of factors, based on empirical validation' to help the court assess the reliability of the proffered evidence: above n. 7 at paras 2.390 and 2.394.

132 Section 4(2) of the draft Bill. The Bill also lists generic factors to be taken into account when determining reliability, including, if the opinion relies on the use of any method, whether that opinion takes proper account of matters, such as the degree of precision or margin of uncertainty affecting the accuracy of the results (draft Bill, Sched. 1, para. 1).

133 Perhaps expert evidence could be admitted in exceptional cases where there is strong corroborative evidence, such as a pre-trial admission by the defendant or similar allegations made by other complainants. See below.

perhaps run counter to the common law rule that there are no closed categories where expert evidence may not be placed before a jury.<sup>134</sup> However, in an area as controversial as this, values of fairness and due process require such an exceptional category.

Furthermore, where the sole prosecution evidence is the complainant's recovered memory, the only outcome consistent with the presumption of innocence is the exclusion of recovered memory testimony. The Supreme Court of New Hampshire has suggested putative indicia of reliability that would enhance the admissibility of recovered memory testimony. However, even these indicia fail to overcome the unsatisfactory state of scientific knowledge on recovered memory. While supporting evidence may be useful in cases where there is evidence external to that of the complainant's recovered memory, the number of such cases where there is evidence capable of constituting corroboration is extremely low. In light of the unverifiability of recovered memory testimony and the minimal probative value of much supporting evidence, as well as the ineffectiveness of cross-examination in recovered memory cases, in general complainant testimony based on recovered memories should not be admitted. To expect jurors to assess the reliability of recovered memories when experts in the field cannot do so is to establish an opinion-based system of adjudication and risks a miscarriage of justice.

A blanket exclusionary approach would mean that the criminal justice system would be deaf to complainants alleging historic childhood sexual abuse on the basis of recovered memories. It may therefore follow that some child abusers would escape conviction. However, the values of fairness and due process in criminal trials require that only reliable evidence should reach the jury.<sup>135</sup> Due process protections must be jealously protected if we are to remain faithful to the moral foundations of the criminal justice system.<sup>136</sup> If we regard the verdict in a criminal trial as being given on behalf of the community at large, not only the legal basis but the evidential basis of the conviction must be presented in terms that the lay public, and the jury as its representatives, can understand and

134 *R v Clarke* [1995] 2 Cr App R 425.

135 That these concerns are not unfounded is illustrated by the Irish case *People (DPP) v Wall and McCabe* [2005] IECCA 140, where memories recovered during counselling at a psychiatric hospital were the basis for a rape conviction. Ms Wall was subsequently granted a certificate of a miscarriage of justice based on a finding of prejudice arising from the evidence of the complainant's flashbacks and recovered memories, which was not supported by any scientific evidence, and the fact that the defence had no prior notification of the provenance of these memories.

136 R. Dworkin, *Taking Rights Seriously* (Harvard University Press: Cambridge MA, 1977) 8–13.

rationality accept.<sup>137</sup> Unfortunately, therefore, until science can offer better evidence of the reliability of recovered memories, there is no other option available consistent with the defendant's right to due process, the presumption of innocence and the principled asymmetry at the heart of the criminal justice system.<sup>138</sup>

137 T. Ward, 'Experts, Juries, and Witch-Hunts: From Fitzjames Stephen to Angela Cannings' (2004) 31(3) *Journal of Law and Society* 369 at 386.

138 'In accordance with the values on which our system of justice rests, the acquittal of the guilty is not of the same order of injustice as the conviction of the innocent': *Fitzgerald v DPP* [2003] 3 IR 247 at 258, *per* Keane J.