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HYPNOSIS AND THE LAW

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HYPNOSIS AND THE LAW

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Chairman of the Australian Law Reform Commission

IT IS ALL THERE?

This paper is about memory and whether it can be enhanced, to assist those engaged in the administration of justice, by procedures of hypnotism. A detective trained in hypnosis once asserted:

> It is all there even if you are not aware of it. Everything that has ever happened to you, from birth to death, is recorded on your brain permanently.[1]

This assertion certainly reflects a popular belief. It is a belief borne of a number of commonplace indicia. They include the sudden, unaccountable recollection of things past, particularly amongst the very old who, in vivid detail, can recall things that occurred to them early in their lives, long apparently forgotten. —

Police investigating crime, solicitors scrutinising disputed facts, courts evaluating a clash of testimony, must all work within the limitations of fallible human memory. There are other limitations, particularly on courts. They include the laws of evidence that restrict the capacity of questioners to suggest responses to vulnerable witnesses. They also include, in the case of criminal trials, the accusatory system of justice, by which the Crown normally bears the onus of proving the case. In such matters it is a mistake to believe that the court is searching for the truth. This is the common assumption held in the community about the function of courts. It has an alluring attractiveness. But it is not, strictly, the law's position. That position sets the court primarily upon a search not for whether it is true that the defendant was present and committed the rape or murder but whether the Crown has proved beyond reasonable doubt

that he did. In our system of law, the accused needs normally give no evidence and hence testimony from him, true or otherwise, may not be available to the decision-maker. These points are made at the outset to clear the air. Some naive people feel that our legal system would be infinitely improved if only we could give a witness a shot of the 'truth drug'[2] as he approached the witness box. Then it would not be difficult to resolve a clash of testimony. Science would provide, from the hidden recesses of the mind, the objective truth of the matter and justice would be done. In part, the recent resort to hypnotism in aid of evidence follows similar and earlier efforts to use chemical therapy, such as the so-called 'truth drug' and concurrent efforts to use the polygraph : the so-called 'lie detector'. The techniques are aimed at ensuring that courts and those who operate in disputed fact-finding will have truthful and accurate material upon which to reach a conclusion. The point to be made at the outset is that, quite apart from criticisms of the assumptions upon which faith is placed in these devices, is the criticism of the lack of understanding which they can involve of the nature of the trial process, particularly in the accusatorial criminal trial. In our tradition, the trial process is not simply a search for the truth. Perhaps it should be. But it is not. It is in the nature of a public and ceremonial clash of evidence, conducted in courts for the public resolution of a dispute in society.

POLICE & HYPNOSIS : AUSTRALIA AND THE UNITED STATES

This said, the fact remains that faulty recollections and disputed circumstances bedevil legal disputes. They frustrate the police investigating serious antisocial conduct. This is the principal source of the pressure in Australia and overseas for the use of hypnotism in aid of recollection. This pressure is increasing as a number of recent reports demonstrate. In the United States more than 1 000 policemen have been trained to hypnotise witnesses.[3] In Britain it has been estimated that hypnosis is used informally by police as an aid to investigation between 25 and 30 times per year.[4] Now the reports are coming in of the use of hypnotism by police in Australia and the tender of resulting evidence to courts of law. These reports require us to examine the material available concerning the reliability of the procedures. They also require us to consider precautions by way of law reform that may be required if our courts are to admit such testimony:

- In August 1982 a magistrate at Fairfield, near Sydney, NSW, ruled that a woman, whose memory of an assault had been restored by hypnosis, could give evidence. Mr A J Reason SM said that he knew of no Australian precedent on the subject. The court had been shown a video film of an interview between the complainant and a Manly hypnotist, Mr Les Bulloch. Counsel for the accused claimed that the complainant should not be allowed to give evidence because of questions about the accuracy of allegations made under hypnosis.

The police prosecutor said that any 'black and white determination' barring evidence from a person who had been hypnotised would be a 'great injustice'. The magistrate admitted the evidence and, using it, committed the defendant for trial.[5]

- In June 1983 homicide squad detectives in Victoria were reported to have turned to hypnotism to solve the 'baffling Endeavour Hills balaclava murder'. According to a newspaper report, two women were hypnotised by Police Surgeon Dr James McLeod and asked to recall their experiences at the hands of a masked gunman. One of the women, aged 25, escaped the killer after her companion Rodney Mitchell was shot dead on 23 May. The newspaper quotes detectives as saying that the hypnotism sessions 'verified much evidence already given in statements; but they produced no startling new leads'.[6] For present purposes, it suffices to point out that hypnotism for police investigation has arrived in Australia. The question is how far we should let it go?

In the United States, one of the leading proponents of the police use of hypnotism is the Director of the Los Angeles Police Department Behaviourial Science Services, Dr Martin Reiser, a Doctor of Education. In 1980, Reiser wrote:

> Of the approximately 70 cases in the data base at that point [June 1976] it was estimated that in approximately 77%, information elicited under hypnosis of importance to the case investigator that was not previously available on routine interviews.[7]

In 1976 Reiser had established an independent educational training agency called 'The Law Enforcement Hypnosis Institute Inc' with himself as Director. Since then it is estimated that the Institute has trained over 1 000 police officers in the United States and Canada to utilise hypnosis for investigative purposes. All this is done in a 'program of four days consisting of 32 class hours of theory, demonstration and practice'.[8]

Supporters of the technique can refer to a number of dramatic cases where hypnosis has apparently enhanced memory in the forensic setting:

- As long ago as 1889, Pierre Janet described the case of 'Marie'. She had a number of hysterical symptoms, one of which was blindness in the left eye which she believed was congenital. However, it was established that the blindness had begun at the age of six years, when she was obliged to share a bed one night with another 6-year-old who had impetago in the same place. The other child was cured but Marie's monocular blindness persisted.

Using hypnosis, Janet put Marie back with the companion who had 'so horrified her'. He suggested that this child was actually very nice and did not have impetago. She caressed without fear the imaginery child. Sensitivity in the left eye reappeared without difficulty and when she woke up she saw clearly with the left eye.[9]

. In the summer of 1976 in California a school bus driver and 26 children were abducted at gunpoint by masked men. For no apparent reason they were herded into vans and taken to a remote quarry where they were sealed in an underground cavern. Eventually the driver and two older children escaped. The driver was unable to remember the number plates of the vans which he had tried to memorise at the time of the kidnapping. The FBI decided to hypnotise him in the attempt to enhance his memory. He was told to imagine that he was travelling back in time to the afternoon of the abduction and was watching the events unfold, as in a television documentary. Suddenly he called out two licence plate numbers. One of these, except for one digit, turned out to match the number plates of one of the kidnappers' vans. The information helped the police catch the three culprits after one of the biggest manhunts in the history of California.[10]

Cases such as these, in the hands of enthusiasts such as Reiser, inevitably proved seductively attractive to police and others engaged in the difficult, frustrating work of criminal investigation. Can it be said that hypnosis is, after all, a marvellous and readily available means of enhancing human memory and assisting police in their enquiries and courts in their important work? What is hypnosis? How was it discovered and described? Why did it fall into relative scientific decline? How is its approval now to be measured in a world in which increasing numbers turn to this procedure, in medical practice, to cut out smoking, cut down weight or release anxiety? What has been the approach of the law? What should be the approach of the law?

HISTORY OF HYPNOSIS : DECLINE AND FALL?

The dictionary definition of hypnosis is 'a state that resembles sleep but is induced by a hypnotiser whose suggestions are ready accepted by the subject'. The typical features of subjects susceptible to hypnosis include:

- loss by the subject of initiative and desire to make and carry out his own plans;
- redistribution of attention beyond the usual range;
- availability of visual memories from the past and heightened ability for fantasy production;

- reduction in reality testing and a tolerance for persistent reality distortion;
- increased suggestability;
- adopting by the subject of a suggested role and the carrying on of complex activities corresponding to that role;
- (normally) amnesia for what transpired within the hypnotic state.[11]

Whilst there is disagreement about the theories that explain these facts, the verifiable scientific observations of the phenomenon of hypnosis and of the hypnotic state is now generally accepted. There is no doubt that as medical treatment, hypnosis has a legitimate scientific function. In history, something like hypnosis has been practised in many primitive societies where trance-like states were frequently induced with the aid of drugs and toxic chemicals.[12]

The modern study of the phenomenon of hypnosis is normally traced to Franz Anton Mesmer's 'animal magnetism'. A French Royal Commission in the late 18th century denounced Mesmer as a charlatan. However, his technique, if not his description of the passage of 'animal magnetism' by which it operated, became fashionable in England in the 1830s. The word 'hypnosis' was actually coined by James Braid in a medical monograph describing the artificially induced somnambulistic state.[13] The main interest in this 'nervous sleep' in England at the time was as an aid to painless surgery, particularly painless tooth extractions.

Indeed, this historical fact helps to explain why hypnosis fell into decline for a time. The reasons for the decline can be summed up by reference to a number of developments:

- In the middle of the 19th century the discovery of anaesthesia by the use of ether quickly displaced interest in inducing psychological anaesthesia by procedures of hypnosis.[14]

- Later in that century the development of psycho-analytical theories by Sigmund Freud tended to encourage the use of free association by the patient in the place of precise suggestions by the hypnotist.

- At the turn of the century and early in the 20th century, popular literature began to give hypnotic suggestion an unfavourable image. The character of Svengali in the popular 1894 novel Trilby and the reputed hypnotic powers of the infamous Rasputin, together with lesser theatrical performers, all conspired to bring the procedure into a bad odour.

. In the wake of the Second World War, with its many psychological casualties, came the introduction of sodium amytal, injected as a so-called 'truth serum'. Because this procedure required fewer skills and less experience — to say nothing of less patient co-operation — it tended to displace most of the remaining professional reliance on hypnosis.

In fact, it was only in the middle of the 1950s that hypnosis began to revive again in medical practice. At this time, British and American Medical Associations formally approved its medical use. The scientific literature began to grow again.[15] The odd case began to appear with the use in criminal investigation and the tender of hypnotised evidence to the courts. Doctor Reiser began to stomp the United States, inducing one police service after another to use his Law Enforcement Hypnosis Institute in Los Angeles. Suddenly, forensic hypnosis became a big business in North America. Reiser recently acknowledged in a New York court that his private corporation in which he and his wife are the sole shareholders has grossed roughly $400 000 in the past few years.[16]

THE LAW'S RESPONSE

Initially, courts in the United States and Britain showed reluctance to admit hypnotically induced evidence. In 1897 the California Supreme Court had rejected such testimony entirely on the grounds that the art of hypnosis was not yet a generally accepted scientific technique. That ruling remained the status quo until the decision of the Maryland Court of Special Appeals in 1968. In that case[17] the court ruled that hypnotically elicited testimony in the case of a rape victim could be admitted as evidence and that it was up to the jury to determine its validity. The court held that hypnosis was just one of many valid techniques of memory refreshment, though it noted that care should be exercised since 'fancy can be mingled with fact in some cases'.[18] The trial judge in that case had warned the jury not to give greater weight to the hypnotised evidence than to other testimony. The judge's charge to the jury, and the appeal court's ruling, were criticised in scientific and legal literature. It was urged that the judges should have:

. required an expert witness to testify on the possible dangers involved in hypnosis;
. warned specifically about the danger of distortion and motivation caused by the involvement of police officers in hypnosis; and
. required that the procedure should have been videotaped or otherwise safely recorded so that the fairness of the procedure used could be assessed by the jury.[19]

Encouraged by this decision in the Maryland courts, a number of cases were brought to the State courts in the United States in the 1970s with the object of having admitted testimony in which the witness' memory had been refreshed by hypnosis. The Supreme Court of Minnesota in 1980 ruled against the admissibility of testimony as did a number of other State courts. Generally speaking, these courts relied upon earlier rulings of high authority in the United States, which had excluded the polygraph (lie detector) on the ground that new scientifically based techniques, in order to be admitted in the courts 'must be sufficiently established to have gained general acceptance in the particular field' in which they belong.[20] Many of the State courts in the United States attached importance to the apparent tendency of hypnosis not to refresh memory but to create it. In the forensic situation, with the strong motivation of victims and witnesses to help police combat crime and convict criminals, the danger of fantasy and confabulation, always present in hypnosis, is an aggravated and serious one.

In fact, evidence of the retreat of the wave of enthusiasm and confidence that led to the admission of the evidence by the Maryland Court in 1968 can be seen in the 1982 decision of the same court.[21] In that case, the court made an important distinction between hypnosis used as an investigative tool to obtain leads that can be followed up and verified independently (on the one hand) and hypnotically 'refreshed' memory itself offered as evidence in a trial (on the other). To the latter, the Maryland Court in 1982 applied the ruling on established and accepted scientific procedures, holding quite emphatically:

> The use of hypnosis to restore or refresh memory of a witness is not accepted as reliable by the relevant scientific community and ... such testimony is therefore inadmissible.[22]

At the same time, the court held that hypnosis could be used as an investigative aid. However, it strongly urged the adoption of safeguards, as proposed by a number of writers, notably Dr Martin Orne. These precautions, upheld now by a number of court decisions and consequential police and other instructions, include:

- the use, wherever possible, of independent persons, expertly trained in procedures of hypnosis;
- the provision to such persons of as little information about the detailed facts of the case as possible, in order to prevent suggestion by them of relevant specific facts which may subsequently distort the memory of the subject;

- the full record of the hypnosis procedure, at the very least by stenographic means and desirably by audio or video recording of the interview, so that the judge, jury and opponent will know who was present, questions that were asked and witness responses;[23] and
- notice to the opponent of the intended use of hypnotically induced evidence so that it can be tested by appropriate cross examination and, if so decided, met by competing expert testimony.[24]

THE DANGERS : CONFABULATION AND PSEUDO MEMORIES

There are some who are not satisfied with this list of safeguards and insist upon the total exclusion of any evidence that has resulted in any way from hypnosis.[25] On the other hand, whilst some State courts in the United States have adopted this absolutist position, others have preferred not totally to exclude evidence that may be reliable and relevant — as was the evidence of the suddenly recalled number plates. There are many other such cases, often cited by Martin Reiser and his supporters in aid of the beneficial use of hypnosis in criminal investigation. The scarf which was found by police on the suspect, exactly as described by the victim.[26] The airline pilot who could be taken back to the final moments before a non-fatal crash.[27] The Japanese-American born at the time of Pearl Harbour who, having lost all his Japanese language, could suddenly be taken back to fluency.[28] There are many more remarkable cases reported, some of them in the forensic setting.

But for every apparently beneficial case, there are others that cause concern. Furthermore, modern scientific evaluation of hypnosis is adding to the literature that urges caution.

Take, first, a recent case from the United States. It involved a young 19-year-old named Reece Forney and three other young men in the tiny town of Union Mills, North Carolina. Each has been convicted and faces prison terms from 45 years to three consecutive life sentences for the murder of an 88-year-old woman who was dragged from her home one winter night, beaten, tortured, raped and strangled. There were no witnesses to the crime. There was no physical evidence connecting any of the accused with the crime. The case against them rested on hypnosis. Specifically, the case rested almost solely on stories told when police secured the use of hypnosis on a 19-year-old suspect, Forney, who had an IQ of 74 (on the border of mental retardation). Forney, told a number of confusing, contradictory and partly impossible stories according to the court testimony and review of videotapes of hypnosis, admitted into evidence at his trial. The County Sheriff, Damon Huskey, had no doubt:

> If you've got a good doctor, you're in pretty good shape -- you can get things out you could get out no other way ... There is no doubt about the [convicted men's] being guilty.[29]

The deceased woman was white. All the suspects were black. Crosses were burned twice in Union Mills and there was a shotgun attack on one of the suspects when it first appeared that there was not enough evidence to try him. Finally, four black men were charged with murder. One of them was Forney. The jury selected was entirely white.

I will not go into the sorry details of the case at any length. Suffice it to say that before the accused had seen a lawyer, the police decided to have him hypnotised. A professional hypnotist was brought in. The police told him that they wanted to enhance Forney's memory of what he recollected of the evening in question. Forney was then hypnotised. The session was videotaped as police investigative hypnosis guidelines recommended in North Carolina.

At his trial, much play was made by the prosecution of the fact that Forney, under hypnosis, described seeing a 'rake' at the scene of the crime. The prosecution pointed out that no mention had been made of the rake by any report in any of the newspapers. To know about the rake, it was suggested, Forney had to have been at the scene. The trial ended before it was discovered that Forney did not mention the rake until after the following occurred whilst he was under hypnosis:

FORNEY:	[describing walking home after the crime]. Seems like I grabbed something and ran back to ... I walked most of the way because I was so tired.
HYPNOTIST:	[handed a note by the policeman which instructed him to ask about a rake]. What did you grab?
FORNEY:	Base of something. Base of something.
HYPNOTIST:	Was it a rake?
FORNEY:	I don't know. It could have been.
HYPNOTIST:	Where did you get the rake from?
FORNEY:	I think I got it from the yard of a house. I was so mad. ...
HYPNOTIST:	What are you doing with the rake?
FORNEY:	Running down at them ... Seems like I was fighting them.
HYPNOTIST:	Did they take the rake from you?
FORNEY:	Yeah.
HYPNOTIST:	And what did they do with it?
FORNEY:	I don't know. ...

I say nothing about the other unsatisfactory features of the case. As it happens, an appeal is pending to the State Appeals Court of North Carolina. Against the standards of Australian criminal justice, there is much that can be said in criticism:

- the failure to afford proper warnings and legal independent advice to a suspect;
- the submission of a suspect to hypnotism, without proper advice and in apparent breach of the accusatorial system of criminal trials;
- the inherent need for special care in the case of an accused of such limited intelligence, with a known history of mental instability;
- the existence of numerous objective facts, too detailed to mention here, which tended to contradict the involvement of the accused.

The point for present purposes is the great care that must be taken in the use of hypnosis because of its tendency to plant ideas and information into the mind and language of the subject. Clearly, the 'rake' referred to by the accused was put into his mind by a precise question asked by the hypnotist. In fact the accused never actually used the word 'rake' himself. Yet it was subsequently built up as proof positive of his involvement at the scene of the crime. This instance, replicated many times in like cases, shows the wisdom of the cautious approach of the common law of evidence when it comes to the admission of evidence of memory, induced by hypnotism.

In addition to such anecdotal material, the heightened use of hypnosis by police in North America has now led scientists to attempt evaluative investigation. True it is, the value of hypnosis in the real-life situation may be greater than that in the artificial circumstances of scientific trials. Nonetheless, it is important and useful to be familiar with this growing literature:

- In October 1983, writing in the journal Science, Dwyan and Bowers described a hypermnesic procedure. Subjects tried for a week to recall 60 previously presented pictures. They were then either hypnotised or not and encouraged to recall even more pictures. Most of the newly recalled material was incorrect. This was especially true for highly hypnotisable subjects in the hypnosis condition. According to the investigators such errors of recall can have profound implications for forensic investigations. They concluded that their experiments called into question the increasing use of hypnosis in the forensic setting.30

. In November 1983, writing in the same journal, Laurence and the distinguished Australian psychologist Professor Campbell Perry (now of Concordia University in Canada) described an experiment in which a pseudo-memory of having been awakened by loud noises during a night of the previous week was suggested to 27 highly hypnotisable subjects during hypnosis. Post-hypnotically, 13 of them stated that the suggested event had actually occurred. According to the investigators, this finding too has implications for the investigative use of hypnosis in the legal context. Their conclusion was that 'the utmost caution should be exercised whenever hypnosis is used as an investigative tool'. The 'recall' resulting from post-hypnotic suggestion could, they concluded, lead to a false but positive identification of criminal suspects with all the legal consequences that this can imply. A pseudo-memory of a trivial event that has become inadvertently connected with the events of a crime is more likely to persist in permanent memory storage and not to decay in the manner of a post-hypnotic suggestion. According to Laurence and Perry, the procedure of hypnosis, in at least a number of cases, contaminated the memory of the witnesses, thereby modifying their recollection unsuspectingly through the use of hypnosis. In such circumstances, far from being a useful 'refreshment procedure' the suggestions made during hypnosis would actually distort the witness' recall, if subsequently required to be stated in a court of law.[31]

. Writing also in late 1983 in Canadian Psychology, the same authors provide a useful survey of clinical and experimental data bearing on the efficacy of hypnosis as a means of memory enhancement. They identify more clearly than any other analysis I have seen the two main problems associated with the use of hypnosis in the legal investigative context. These problems are confabulation and the creation of pseudo-memories. They analyse a number of recent cases in the United States and Canada and emphasise the need for stringent safeguards in any use of hypnosis as a tool to enhance memory in the forensic setting.[32]

Typical of the case of confabulated memory is the instance of The People v Kempinski mentioned in this work. A young man was arrested in Joliet, Illinois, solely on the basis of a description given a police artist by an eye witness to a murder, who had been hypnotised by a police officer. The prosecution case was ultimately dismissed because of testimony that the witness had been 250 feet away from the murder in conditions of semi-darkness. An expert opthalmologist testified that positive identification would not have been possible beyond 25 feet under the prevailing light conditions. It is important to note that the police had accepted the hypnotic 'recall' on face value. They had therefore made no attempt to obtain independent corroboration, merely using the hypnosis as an

investigative tool. The reason proposed for this error is that hypnotic age regression is quite often a highly convincing phenomenon. In the police video of the hypnotic interview leading to Kempinski's arrest, the eye witness stated with convincing certainty 'I know him'. In response to a question about the accused's face he stated 'I don't forget things like that'. According to Perry and Laurence:

> A more fundamental reason for overlooking the impossibility of the eye witness testimony in these cases is that police officers have been trained to believe that confabulation is not a problem; but because it is supposedly akin to deliberate lying, and because victims and witnesses are motivated to help police by telling the truth, it cannot happen. Human nature is such that we do not look for problems in areas where assurances have been made by an authoritative figure that they do not exist.[33]

UNDER OUR LAW

A number of problems exist under Australian evidence law in the way of admitting evidence of statements given under hypnosis. In fact, the admissibility generally depends on whether the 'hypnotised' individual who made the statements later gives the evidence in court and, if so, whether he can recall the relevant details. Previous statements given under hypnosis cannot be used, normally, to elaborate evidence because such statements merely have the status of previous consistent statements and are deemed irrelevant. This is because of the adherence of the English trial system, which we have inherited, to oral testimony given in open court. Statements made by the same person earlier are considered irrelevant and therefore inadmissible unless they are inconsistent or fall into various other limited classes of special reliability warranting admission of out of court statements into evidence as exceptional cases.

In 1980 two distinguished commentators[34] on the English law of evidence urged that statements given under hypnosis should be judged to be new exceptions to the general rule which excludes previously made consistent (or self-serving) statements. These commentators claimed that such evidence was in the same class as a long-established exception which permits the admission into evidence of spontaneous utterances made in the so-called circumstances of res gestae. The normal explanation given by the law for admitting these last mentioned utterances is that they are more likely to be true because made, suddenly and spontaneously, in the heat of the moment. The commentators proposed that statements given under hypnosis would fall into the same category and be likely to be closer to objective truth than ordinary statements given in a state of full consciousness.

The anecdotal material and the more recent scientific experiments mentioned above cast doubt upon this hypothesis. In this regard, at least at this stage of scientific knowledge, I can only agree with Dr Graham Wagstaff who, writing in the Criminal Law Review in 1983, concluded:

> There is no evidence to suggest that statements given under hypnosis are closer to objective truth and consequently there are no grounds for accepting statements given 'under hypnosis' from the rule excluding previous consistent statements. ... There is no conclusive evidence to support [the view that hypnosis is effective in improving the accuracy of memory]. Thus there seems to be no reason for excluding statements given by a subject 'under hypnosis' [to a hypnotist] from the hearsay rule.[35]

A further problem standing in the way of the admission of such evidence under Australian evidence law is the difficulty of permitting 'expert' hypnotists to assess the truthfulness of what the defendant is saying. Such a procedure could lead to 'trial by hypnotist' and could amount to a denial of the right to silence and a usurpation of the evaluative role of the court, whether constituted by a judge, magistrate or jury in deciding truth telling.[36]

CONCLUSIONS

Recently, the Home Office in England was asked to produce official guidelines for police officers in the use of hypnosis in criminal investigation. The then Home Secretary, in a written answer in the House of Commons, said that there was growing interest in the forensic use of hypnosis. But he conceded that it had clear limitations and even drawbacks, as the value of evidence gained through hypnosis was itself open to question. Reference was made to the experience of the United States and to the controversy that had surrounded the admission of hypnotised evidence, post-hypnotised evidence or hypnotised-resulting evidence. Dr David Waxman, Chairman of the British Society of Medical and Dental Hypnosis, declared that a person does not necessarily tell the truth under hypnosis. But he did not rule out the use of hypnosis, provided rigorous safeguards were applied. But can there be safeguards and procedures stringent enough to protect courts from subsequently confabulated evidence of perfectly sincere witnesses whose memory has become confused, supplemented and distorted by suggestions made during the course of hypnosis? The experimental evidence seems clear. Such suggestions can leave their mark on the recollection of perfectly honest witnesses striving to do their best to recall circumstances and highly motivated to aid police in their difficult, stressful and vitally important work of solving crime.

How should Australian law respond to the growing use of hypnosis by police? In France, for almost a century, hypnotically elicited testimony is prohibited and will not be admitted into evidence in the courts.[37] Some modern commentators in the common law tradition have urged a similar approach, regarding the hypnotised witness as one who has been rendered incompetent to testify because of the dangers of confabulation and pseudo-memory.[38] A second approach is that taken by the American FBI and other US Federal agencies of the Defence Services. They believe that hypnosis has a limited value in investigative work but must be attempted only under strict conditions by professionally trained personnel such as physicians, psychiatrists and psychologists who have had formal training in hypnosis. Other preconditions have already been mentioned (such as video or sound recordings and the exclusion of bias in questioning). A further revision of the guidelines has included the proposal that during the hypnotic interview, all persons other than the interviewer and the subject should be excluded from the room to avoid inadvertent bias being communicated to the subject.[39] The Society for Clinical and Experimental Hypnosis and the International Society of Hypnosis have concluded strongly against the direct involvement of police officers in the use of this technique:

> Police officers typically have limited technical training and lack the broad understanding of psychology and psycho-pathology. Their orientation is to obtain the information needed to solve a crime rather than a concern focusing on protecting the health of the subject who was either witness to, or victim of, a crime. Finally, police officers understandably have strong views as to who is likely to be guilty of a crime and may easily inadvertently bias the hypnotised subjects' memories, even without themselves being aware of their actions.[40]

There is no doubt that some police would regard this stance as little more than a self-serving statement by well meaning professionals, keen to preserve their own professional bailiwick and rarely placed in the acute position of police, sworn to pursue criminals by every legitimate means, including those enhanced by science. For these people there is the third position. This is the view expressed by Dr Reiser that hypnosis is safe and an often effective method of eliciting recall of memories that will not otherwise be uncovered by standard, patient non-hypnotic police interviews. Reiser declares that confabulation amounts to deliberate lying and distortion and does not believe that it is a real problem in the investigative situation.[40] He asserts that the law should adapt to accepting hypnotised evidence, leaving it to the jury to decide the weight to be given to it when stacked up against other evidence in the case.

Especially if procedural safeguards are followed, such evidence may be useful in combatting crime and should not be excluded from the decisdion-making process of society by an excessively tender concern whether coming from psychologists, lawyers or others.

This, then, is the debate. Recent news reports suggest that police in Australia are now turning to hypnosis, as their brothers in the United States, Canada and Britain have already done. We should be ready for this development in the courts, in the psychiatric and psychological community and in law reform commissions. The Australian Law Reform Commission has a major project on the reform of Federal laws of evidence. In developing its final proposals on this subject and in recommending the response of the Federal legal system in Australia to hypnotised evidence, the Law Reform Commission will be looking to psychologists, psychiatrists and police for assistance in the approach that should be proposed and the safeguards that should be imposed.

FOOTNOTES

* The author wishes to acknowledge the special assistance he received in the preparation of this paper from Professor Campbell Perry of the Department of Psychology, Concordia University, Montreal, Quebec, Canada. Professor Perry, an Australian-born psychologist, is now a leading authority on the subject of hypnosis and testimony.

1. J Putnam, Hypnosis and Distortions in Eye Witness Memory, 27 International J Clin & Exp Hypnosis, 437, 439 (1979). Referred to and discussed in D J Carter, 'The Use of Hypnosis to Refresh Memory : Invaluable Tool or Dangerous Device?, 3 Washington Uni LQ 1059, 1066 (1982).

2. B L Diamond, 'Inherent Problems in the Use of Pre-trial Hypnosis on a Prospective Witness', 68 California L Rev 313, 320. (1980)

3. This figure is stated in G Vines and M Barnes, 'Hypnosis on Trial', New Scientist, 6 January 1983, 12, 13. See also the Australian, 18 April 1983, 12 ('Forensic Hypnosis Alarming Doctors').

4. As reported in the Times (London), 24 November 1982.

5. As reported, Sydney Morning Herald, 25 April 1982, 1 (Re Speechley).

6. Melbourne Herald, 17 June 1983, 3.

7. M Reiser, Handbook of Investigative Hypnosis, LA, 1980, xv. There is an interesting review of this book by C Perry and J-R Laurence in 30 International J Clin & Exp Hypnosis, 443 (1982) where the reviewers seriously question and criticise Reiser's theses.

8. Reiser, xvi.

9. This case is described by H F Ellenberger, 'The Discovery of the Unconscious : The History and Evolution of Dynamic Psychiatry', NY, 1970. Cited C Perry and J-R Laurence, 'The Enhancement of Memory by Hypnosis in the Legal and Investigative Situation', Canadian Psychology, 1983, 24:3, 155, 157.

10. This case is described in Vines and Barnes, 12.

11. E Hilgard, The Experience of Hypnosis, 1968, 6. Cited Diamond, 316.

12. Diamond, 317.

13. J Braid, Neurhypnology, Or The Rationale of Nervous Sleep, London, 1843.

14. Diamond, 318.

15. In 1972 standard bibliographies listed well over 1 000 references, most of these dating from post-World War II. See Diamond, 321.

16. Vines and Barnes, 16.

17. Harding v The State of Maryland, 5 Md App 320, 346A. 2d 302 (1968). This is discussed in Campbell Perry and Laurence, n.9 above, 164.

18. ibid, 312.

19. T S Worthington, The Use in Court of Hypnotically Enhanced Testimony. 27 International J Clin & Exp Hypnosis, 402, 406 (1979). Discussed Perry and Laurence, n.9, 164.

20. The rule is stated in Frye v United States, 293 F 1013, 34 ALR 145 (1923).

21. Collins v The State of Maryland, Md Spec App No 1583. Discussed Perry and Laurence, n.9, 164.

22. ibid, 20-21.

23. United States v Adams, 581 F 2d 193 (1978). Cert denied. This case is discussed in Diamond, 326.

24. Diamond, 324.

25. See eg Chapman v State of Wyoming, 638 P 2d 1280 (1982).

26. This case is described in Vines and Barnes, 16.

27. V B Raginsky, Hypnotic Recall of Air Crash Cause, 17 International J Clin & Exp Hypnosis 1 (1969). Discussed in Perry and Laurence, n.9, 158.

28. E Fromm, 'Age Regression and Unexpected Reappearance of a Repressed Childhood Language', 18 International J Clin & Exp Hypnosis, 79 (1970). Discussed Perry and Laurence, 158.

29. As reported from the Washington Post in Valley News 21 November 1983, 17ff.

30. J Dywan and K Bowers, 'The Use of Hypnosis to Enhance Recall' in Science, Vol 222, 14 October 1983, 184-5.

31. J-R Laurence and C Perry, 'Hypnotically Created Memory Among Highly Hypnotisable Subjects' in Science, Vol 222, 4 November 1983, 523-4.

32. C Perry and J-R Laurence, n.9 above.

33. ibid, 161.

34. L Hayward and A Ashworth, 'Some Problems of Evidence Obtained by Hypnosis', [1980] Crim LR 469.

35. G F Wagstaff, 'Hypnosis and the Law : A Critical Review of Some Recent Proposals' [1983] Crim LR 152, 156.

36. Wagstaff, 156.

37. Perry and Laurence, n.9, 156.

38. Diamond, 349.

39. M T Orne, cited Perry and Laurence, n.9, 156.

40. Society for Clinical and Experimental Hypnosis, Resolution (adopted October 1978), 27 International J Clin & Exp Hypnosis 45 2 (1979).

41. Reiser, n.7.