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THE AUSTRALIAN BROADCASTING CORPORATION

THE SCIENCE SHOW, MARCH 1984

HYPNOTISM & LAW : FRANQUIN ARE YOU LISTENING?

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Hon Justice MD Kirby CMG
Chairman of the Australian Law Reform Commission

FROM THEATRE TO COURTROOM

Do you remember the hypnotist Franquin? He was the accomplished performer of the Australian stage in the '50s who submitted volunteers from the audience to hypnosis — all in an evening's entertainment. I am sure he gave Dame Edna the idea of audience participation. Well, now the hypnotists are at work in the courtroom — in the police station and the lawyers' office. So the question is posed — is this technique reliable? Is it an acceptable aid to memory. Should our laws of evidence allow it in courts?

SPECTACULAR SUCCESSES

There have been spectacular successes :

- . The scarf which was found by police on the suspect, exactly as described by the victim.
- . The airline pilot who could be taken back to the final moments before a non-fatal crash.
- . The Japanese-American born at the time of Pearl Harbour who, having lost all his Japanese language, could suddenly be taken back to fluency.

Now, take this case :

- . 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.

AN AUSTRALIAN CASE

In August 1982 hypnosis reached the Australian courts:

- A magistrate at Fairfield, near Sydney, NSW, ruled that a woman, whose memory of an assault had been restored by hypnosis, could give evidence. The magistrate 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. 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.

There are other cases and the numbers are increasing. What is hypnosis? Dictionaries tell us it is a state that resembles sleep but is induced by a hypnotiser whose suggestions are readily accepted by the subject. How can one person make suggestions that so influence another? No-one seems to know how it happens. But that it is a scientifically verifiable phenomenon 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. But does it have a place in our courts?

HYPNOSIS : IN AND OUT OF VOGUE

The modern study 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 became fashionable in England in the 1830s — mainly as a form of psychological anaesthesia for painless tooth extractions.

But then it fell into decline. In part this decline can be attributed to the invention of ether. Then came Sigmund Freud's psycho-analysis which encouraged 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 a somewhat unfavourable image. The character of Svengali in the popular 1894 novel Tribby 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 our century there was a lull. In the wake of the Second World War, with its many psychological casualties, came the introduction of sodium amytal. This was the so-called 'truth serum'. Because the injection of this drug 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. Hypnosis was left to Franquin and the stage. An interesting and embarrassing spectacle for entertainment.

It was only in the middle of the 1950s that hypnosis began to revive again in legitimate medical practice. The odd case began to appear with the use in criminal investigation and the tender of hypnotised evidence to the courts. Enthusiasts began to stomp the United States, inducing one police service after another to use forensic hypnosis. At last count, more than a thousand United States police officers had learned the technique.

AMERICAN CASES

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 case¹⁷ 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 decision, though it was criticised in the legal and scientific literature, opened the floodgates. Hypnosis became a new vogue in criminal and in civil cases.

More recently court cases in the United States and scientific experiments have begun to raise nagging doubts — despite the occasional spectacular successes:

Take the case of 19-year-old Reece Forney in the tiny town of Union Mills, North Carolina. Late last year he was convicted of murder. There were no witnesses to the crime. There was no physical evidence connecting him with the crime. The case against him rested on hypnosis, namely on stories told when police secured the use of hypnosis on Forney, who had an IQ of 74 (on the border of mental retardation). The police brought in a professional hypnotist. They told him that they wanted to enhance Forney's memory of what he recollected of the evening in question. Forney was then hypnotised apparently with his consent.

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.
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. ...

An appeal is pending.

In addition to this material a number of scientific experiments have now been carried out, responding to the rapid increase in the training of police in hypnosis and tender of such evidence in court.

PSYCHOLOGISTS EXPERIMENT

In November 1983, for example, a distinguished Australian psychologist now working in Canada, Professor Colin Perry, did this experiment.

Under hypnosis a pseudo-memory of having been awakened by loud noises during a night of the previous week was suggested to 27 highly hypnotisable subjects. Post-hypnotically, 13 of them stated that the suggested event had actually occurred. They were quite sure of it. 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. 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.

A number of problems already exist in the Australian legal system for the admission of evidence secured by hypnosis. I will not trouble you with them. The Australian Law Reform Commission is examining reform of the laws of evidence in Federal courts. Should the new law encourage or discourage, facilitate or prevent evidence gathered after hypnosis?

MINIMUM SAFEGUARDS

In the United States a number of minimum safeguards have now been laid down by court decisions in criminal cases. They include:

- . the use of a professional hypnotist independent of the court;
- . absence of the police from the room when the hypnosis is achieved, in case they influence the procedure;
- . provision to the hypnotist of the minimum possible information on the events — to guard against suggestibility and so-called confabulation;
- . videotaping (or at least sound recording) of the whole of the questioning under hypnosis; and
- . notification to the opponent that hypnosis will be used — so that he can be ready with experts to answer and scrutinise the testimony.

THE CHOICE TO BE MADE

But are these protections enough? Do the dramatic successes — the remembered number plate — outweigh the problems of pseudo memory and confabulation — the suggested rake?

Is hypnosis an essential aid to enhancing fallible human memory in the combat against crime. Or is it a dangerous interference in the subconscious that should be banned from police stations and courtrooms in Australia?

Franquin — are you listening? We would welcome your submission. Meanwhile, back to the hypnotic Robyn Williams.