Abstract

Thousands of people have found themselves facing criminal or civil litigation as a result of questionable memories. Sometimes these involve faulty memory of eyewitnesses to crimes. Psychological science has informed the legal system about memory and enabled productive changes in the handling of eyewitness evidence. The chances of wrongful convictions hopefully go down in the process. But sometimes the questionable memories involve allegations of massive repression of horrible brutalization. In these cases, there is enormous controversy, and downright skepticism, over whether such massive repression even occurs. Unless or until better proof becomes available for these types of claims, a reasonable argument exists for keeping these dubious claims out of the courtroom altogether.

Canada has seen its share of problematic, if not downright dangerous, memories being introduced into legal cases. I had a chance to play a role in two such cases. One of them involved the mistaken identification of Thomas Sophonow, described in detail by (Yarmey, this issue). The other involved dubious allegations of repressed memories that forced teacher Michael Kliman to endure three trials before his ultimate acquittal, a case that should probably be considered when evaluating the conclusions drawn by Porter, Campbell, Birt, and Woodworth (this issue). In both of these cases, witnesses came to court to testify based on their memories, and in both cases false or highly dubious memories were accepted by Canadian jurors. For centuries now, we have had experience with people who come to court to testify, and they take the familiar solemn oath. In light of what psychological science has taught us about human memory, I recently proposed that witnesses probably ought to be taking a more realistic oath: “Do you swear to tell the truth, the whole truth, or whatever it is you think you remember?” (Loftus, 2002).

Thomas Sophonow was accused of murdering a young waitress who worked in a donut shop in Winnipeg, Manitoba. Several eyewitnesses testified against Sophonow but there were problems with each one. For example, the photo array shown to a number of witnesses contained a picture of Sophonow, which was significantly different than the other men in the array. For one thing, Sophonow’s picture was taken outdoors while the rest of the men were photographed inside. Sophonow is shown wearing a cowboy hat, unlike most of the other possible suspects. Sophonow was also the only man who was depicted in both the photo and the physical lineup, making it possible witnesses chose him because they had seen his picture before. Moreover, Sophonow was the tallest man shown to witnesses, and the killer had been described as a tall man.

Despite these and other problems with the eyewitness testimony, Sophonow was convicted of murder and spent nearly four years in prison. Eventually, he was declared factually innocent. An official inquiry was established to investigate what went wrong, to determine just compensation for Mr. Sophonow, and to make recommendations about future cases. Commissioner Peter Cory was eloquent in his description of the suffering of this one man, falsely accused:

What has he suffered? …He is psychologically scarred for life. He will always suffer from the core symptoms of post-traumatic stress disorder. As well, he will always suffer from paranoia, depression and the obsessive desire to clear his name. His reputation as a murderer has affected him in every aspect of his life, from work to family relations. The community in which he lived believed him to be the murderer of a young woman, and that the crime had intimations of sexual assault. The damage to his reputation could not be greater. …. His reputation as a murder will follow him wherever he goes. There will always be someone to whisper a false innuendo. In the mind of Thomas Sophonow, he will always believe that people are talking about him and his implication in the murder….

Commissioner Cory was particularly affected by one illustrative incident in Sophonow’s life. Co-workers were uncomfortable with the hiring of Sophonow since they believed that he was a murderer who had gotten off on a technicality. During this time, Sophonow went to a Christmas party with his wife and
two of his children. Not a single co-worker would sit with them. This “cruel treatment” illustrated for the Commissioner the tragic consequences flowing from Sophonow’s reputation as a murderer.

Commissioner Cory awarded damages exceeding $2 million. It was not the largest award given to a wrongfully convicted Canadian citizen. Several years earlier David Milgaard was awarded $10 million (nearly U.S. $7 million) after serving 23 years in prison for a murder he did not commit (New York Times, 1999). The tax-free payments were made by both the Federal and the Saskatchewan governments, and prompted this comment from the justice minister: “It’s very difficult to come up with any amount to deal with 23 years in prison for a crime you didn’t commit” (p. A 5).

Commissioner Cory made a number of recommendations designed to minimize future miscarriages of justice. Citing relevant psychological research, the inquiry report calls for more care in conducting lineups (e.g., use of unbiased instructions, sequential presentation, and blind testing). In several respects the recommendations go beyond those recommended by the U.S. Department of Justice (Technical Working Group, 1999, hereafter, The Guide), which had stopped short of recommending blind testing or sequential presentation of photos when presented for identification. The Guide did comment on sequential lineups, acknowledging the psychological research in the area:

Scientific research indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual lineup members or photographs are shown to the witness sequentially – one at a time – rather than simultaneously. Although some police agencies currently use sequential methods of presentation, there is not a consensus on any particular method or methods of sequential presentation that can be recommended as a preferred procedure; although sequential procedures are included in the Guide, it does not indicate a preference for sequential procedures. (p. 9)

The Guide also commented on blind testing:

…unintentional cues (e.g. body language, tone of voice) may negatively impact the reliability of eyewitness evidence. Psychology researchers have noted that such influences could be avoided if “blind” identification procedures were employed (i.e., procedures conducted by investigators who do not know the identity of the actual suspect). However, blind procedures, which are used in science to prevent inadvertent contamination of research results, may be impractical for some jurisdictions to implement. Blind procedures are not included in the Guide but are identified as a direction for future exploration and field testing. (p. 9)

Just two years later, Commissioner Cory would urge these procedural innovations on law enforcement in Canada. The very first recommendation for conducting lineups: “The third officer who is present with the prospective eyewitness should have no knowledge of the case or whether the suspect is contained in the lineup.” And, with regard to the photo arrays, he said “The photo pack must be presented sequentially and not as a package” (see: http://www.gov.mb.ca/justice/sophonow/eyewitness/recommend.html).

And the same year that Commissioner Cory gave his blessing to sequential lineups and blind testing, the State of New Jersey began requiring sequential lineups and recommended blind testing. As the New York Times reported (Kolata & Peterson, 2001), New Jersey became the first state in the U.S. to give up the familiar mug shot books and adopt the new techniques after being required to do so by John Farmer, Jr., New Jersey’s attorney general. While the exact method of conducting the sequential test has varied in the research studies, New Jersey adopted a specific approach:

Under the new system, victims and other eyewitnesses would be shown pictures one after the other. They would not be allowed to browse. If they wanted a second look, they would have to view all the photos a second time, in a new sequence. Also, the pictures would usually be shown by a person who would not know who the real suspect was. (Kolata & Peterson, 2001)

What is heartwarming to psychologists who have toiled in the research fields all these years, is the acknowledgment that these recommendations grew out of a quarter-century of psychological research. While a number of psychologists have worked on these specific procedural innovations, the primary work has been done by Gary Wells, who spent many years at the University of Alberta and is now at Iowa State University, and by Rod Lindsay, from Queen’s University.

The Sophonow Inquiry report also encourages judges to emphasize to juries the frailties of memory, the tragedies of wrongful convictions, and to readily admit expert testimony on the subject of memory. As for expert testimony, Yarmey (this issue) is correct that psychologists are still occasionally excluded from testifying as experts on the subject of eyewitness identification, both in Canadian and American courts. But progress is being made. A recent United States court case contains some especially promising language
embracing the eyewitness expert (Newsome v. McCabe et al., 2003). Newsome arose out of a murder that occurred at Cohen’s grocery store in Chicago. Three eyewitnesses testified that they saw Newsome in the store, or fleeing. Fifteen years after his conviction, Newsome was pardoned on the ground of innocence. He sued the officers involved in assisting the witnesses to falsely accuse him, and the City of Chicago. An eyewitness expert testified in support of the claim that the misidentifications of Newsome were more likely attributable to deliberate manipulation rather than chance. A jury found that by concealing evidence favourable to the defense, Newsome’s constitutional rights had been violated. They awarded $15 million. The City of Chicago appealed the case claiming the expert should not have been admitted. But the appellate court concluded that it was not an abuse of discretion to admit the expert testimony. Moreover, the Court went further in asserting that the expert testimony “was not a distraction in this civil proceeding but went to an important ingredient of the plaintiff’s claim.” The best lines in this opinion will probably be cited in many future court cases:

Jurors, however, tend to think that witnesses’ memories are reliable...and this gap between the actual error rate and the jurors’ heavy reliance on eyewitness testimony sets the stage for erroneous convictions when (as in Newsome’s prosecution), everything depends on uncorroborated eyewitness testimony by people who do not know the accused. This is why it is vital that evidence about how photo spreads, showups and lineups are conducted by provided to defense counsel and the court. The constitutional violation justifying an award of damages is not the conduct of the lineups, but the concealing of evidence about them.

The expert witness in Newsome, who happened to be Gary Wells, is clearly one of the preeminent experts in the field in eyewitness identification. It is worth knowing that his views are shared by most experts in the field, as evidenced by surveys of eyewitness experts that have been published over the last decade (see Kassin et al., 1989; Kassin et al., 2001). These articles documenting the consensus of experts (even if not universal) have been important for individual experts to use in showing the courts that their views are reasonably widely held in the field. They have assisted in helping attorneys and their clients gain greater acceptance of psychological expert testimony.

So, all in all, the contemporary picture with respect to eyewitness testimony is good and getting better all the time – for the accused, for the legal system, for psychological researchers, and the public. The DNA exonerations helped to bring about the newly acquired appreciation of the problem of wrongful convictions, and to reveal faulty eyewitness memory as the major cause. This set the stage for the legal system to recognize the value of relevant psychological science, as it had not quite done before. As psychologists we can all proudly share in the success story, and hold it high when we are asked “What have you done for us lately?”

Allegedly Repressed Memories
The story is somewhat different for the legal landscape touched in the article by Porter et al. (this issue). A counterpart to the Thomas Sophonow affair is the criminal prosecutions of Michael Kliman, who was a teacher at James McKinney Elementary School in Richmond, B.C. (see Brook, 1998 for a lengthy article about this case). Kliman had taught since receiving his education degree at the University of British Columbia, and was making a rather decent salary as vice-principal. He was even on the short list for principal. His world came crashing down when he was accused of molesting a sixth grade student some 20 years earlier, a student who “recovered” her memories 17 years after the abuse allegedly happened. According to an article in the Vancouver Sun (Brook, 1999): “In 1992, after years of psychiatric treatment, she ‘recovered’ long-lost memories of a year-long series of assaults by Kliman and, encouraged by the Richmond RCMP, laid charges.”

Amongst the woman’s many claims was the “pointer incident.” Kliman had allegedly taken her into the “prep” room for innumerable acts of sexual torture, including one incident in which he pulled down her underpants and thrust the pointer into her vagina. A second student was also dredged up who, after initially saying she had no recollection of any abuse by Kliman, later said she too was regularly abused by him (Brook, 1998, p. 26). Never mind the fact that other teachers talked about making regular use of the “prep” room, which was steps from the cloakroom, washrooms, a water fountain, and the principal’s office. Never mind the fact that no one seemed to notice a student and teacher being gone 15 to 20 minutes, two to three times a week, from September to June of that year. Never mind that the two complainants were friends and talked about how much they hated their teacher. Never mind that another Richmond teacher had sued the investigating officer, and the judge was critical of the methods of questioning in that case. Never mind that the investigating officer’s superiors had to apologize to yet one more Richmond teacher for biased handling of a recovered
memory investigation. Despite the dubious recovered memory testimony, Kliman was convicted of sexual assault in Trial 1 (in 1994), prompting one commentator to remark "it speaks volumes about the susceptibility of juries to trendy thinking" (Brook, 1999). Fortunately for Kliman, his conviction was overturned on appeal; he had a hung jury in Trial 2 (in 1996), and was eventually acquitted in Trial 3 (in 1997). This was one of the most painful and almost certainly egregious prosecutions I have seen in my quarter-century of involvement with the legal system. So moved was I by his plight, that I canceled any outstanding bills after Kliman's final acquittal; after all, he had already spent hundreds of thousands of dollars on top of his years of untold anguish.

As Commissioner Cory recognized with Sophonow, there are many for whom a declaration of innocence, or even an acquittal for that matter, carries little or no weight. Kliman too knows that there are people who see him and ask themselves, "Did he do it?" (Brook, 1998, p 29).

Porter, Campbell, Birt, and Woodworth (this issue) review some psychological science that might help us think about cases like that of Kliman. Then they go on to make recommendations that might help in cases such as these. Unfortunately, we do not have quite the same success story to tell when we delve into this "repressed memory" area as we did in the case of eyewitness testimony.

Reading the Porter et al. article made me feel like I was on a seesaw. That is, while strongly agreeing with some of their conclusions, I disagreed with others. Here is why. Porter et al. reiterate the widely cited studies that have been used to salvage the repressed memory concept, but give only minimal attention to the highly critical analyses of these studies. They point to the "best-known study cited as evidence," namely, the Williams (1994) study that showed that over a third of women failed to mention the documented episodes of sexual abuse when interviewed 20 years later. (Actually it was 17 years, but more importantly some of these individuals were under the age of three at the time of the "abuse." This is one of many reasons why the abuse might not have been mentioned.) Porter et al. might be interested to know that a more recent study (Goodman et al.) interviewed "abused" individuals who were ages 4 to 17 at the time they were first studied. When interviewed 13 years later, on three occasions, only 8% failed to mention the documented abuse. Less severe abuse was less likely to be disclosed. Given that abuse in this study could include exhibitionism or kissing (as well as rape or intercourse), there may be numerous reasons why even the 8% failed to disclose. One notable conclusion from this study: “These findings do not support the existence of special memory mechanisms unique to traumatic events, but instead imply that normal cognitive operations underlie long-term memory for CSA (child sexual abuse)” (p. 117).

Porter et al. acknowledge that theoretical basis of repression is weak and unconvincing. Moreover, they rightfully assert that the unconscious processes involved in retaining a repressed memory and the potential recoverability of the original memory have not been validated. But they then go on to suggest that the questionable validity of the concept of repression does not negate the possibility that an individual can have a delayed memory in which the cause of the delay is unknown or poorly understood. True enough, but should the Mike Klimans of the Canadian world, and their families, have to endure the kind of agony that they did based on a concept of “questionable validity.”

Porter et al. suggest that expert testimony about relevant findings would prove useful in legal cases involving delayed memory. This may be true, but keep in mind that surveys along the lines of those done by Kassin and colleagues have not been done. Given the divisiveness in this area, one thing seems clear: Who responds to the survey will strongly influence what gets concluded. Prominent psychiatrist Paul McHugh, long-time chair of the prestigious Johns Hopkins Psychiatry Department, recently concluded that “The Memory Wars are over” (McHugh, 2003). Why ended?

According to McHugh,

The wars are ending for several reasons. The memories reported by many patients became absurd. Satanic cults were imagined, and even alien abduction. Many psychiatrists were rebuked for malpractice—sometimes professionally, sometimes in civil court. And most importantly, patients after discharge gradually began to doubt their memories, recanting their accusations and rejoining their parents.

The wars may be winding down in the U.S., but if more Michael Klimans are prosecuted in Canada, the wars will continue for some time to come.

Porter et al. propose that when the repressed memory cases get into the courts, a number of guidelines might be followed. For example, they suggest that the use of suggestive techniques to recover memories should raise suspicions about the validity of the allegations, and that therapy notes and police interview notes would be useful for this assessment. I agree. However, this suggestion will be met with opposition when one thinks for a minute about the long-simmering debate over how to protect the privacy rights of
victims of sex crimes while upholding the rights of the accused to a fair trial. My colleagues and I considered this issue extensively and recommended that at the very least an in-camera inspection of those materials should be allowed (Loftus, Paddock, & Guernsey, 1996).

Porter et al. also hint that various guides to assessing the credibility of the content of a report might be used in these cases. This is a dangerous idea at the present time. We are so far away from being able to take a single memory and reliably classify it as real versus unreal that any efforts to do this before a trier of fact are sure to lead to miscarriages of justice. Although it might be true that statistically speaking real memories are more vivid or detailed or emotional than false ones, we know that false memories, especially with repetition, can be vivid, detailed, and expressed with great emotion. Recent work by Richard McNally from Harvard shows that even memories for alien abduction can be described with confident, vivid details, and expressed with an emotion that is equivalent to that felt by those who are describing true traumas.

One place where Porter et al. make good sense is on their emphasis on corroboration. “Corroboration will add credibility to the memory and lack of it may raise doubts about the allegations,” they assert. For years, experts have been pointing out that without independent corroboration, there is virtually no way to reliably distinguish a real memory from one that is a product of imagination, suggestion, or some other process. But law enforcement in the Kliman case managed to find something that on the surface of it looked like “corroboration”; however, it came in the form of a second dubious memory. Should this count as corroboration?

In thinking about Porter et al.’s review of the literature, and guidelines for the legal system, perhaps we should be contemplating a slightly different question. Assume, as I do, that Goodman et al. are right that there is no special memory mechanism for child sexual abuse. Assume, as I think the evidence warrants, that normal cognitive operations underlie memory for sexual abuse, as they also underlie memory for other unpleasant or even traumatic experiences. What would happen if the accuser of Kliman came forth and said, “22 years ago you repeatedly stole money from me” or “Two decades ago, you week after week slapped me, and I have now recovered the memories.” If Mike Kliman had been the object of such accusations, would we subject him to three criminals trials to have the claims judged? One might be tempted to say that the question is not fair. That sex abuse is different from other crimes like theft, or repeated physical abuse. There is one important way in which this is true, as Pulitzer Prize winner Dorothy Rabinowitz recently noted in the Wall Street Journal. Rabinowitz has been covering dubious sex abuse prosecutions for many years, and has repeatedly faced a line of hostile questioning that implied that she fails to recognize that child sex abuse exists and is a series problem. She found this hostile questioning to be quite strange: “The discussion of no other crime would require such a disclaimer. Journalists who have written about false murder charges are seldom asked to provide reassurances that they know murder is a bad thing, and it really happens” (Rabinowitz, 2003). Society ought to be thinking, then, about why we treat one criminal accusation differently from other, and whether doing so is truly justified by psychological science or any other evidence.

Final Remarks

Probably the best thing about thinking about psychological studies of memory in the context of legal cases, is that new research ideas have been spawned in the process. Many exciting studies of memory have been conceived and published, including studies by the authors of these two articles. We know much more about how memories get distorted, how false beliefs and memories are created, and who might be more susceptible to memory contamination than we ever knew before. Our work in this area can and does make a difference to important societal concerns. But as legal controversies come and go, these research results have even more than their applied impact. They will live on as contributions to the field of psychological science. It is something in which we can all feel a pride of accomplishment.

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Résumé

Des milliers de personnes ont dû faire face à des litiges criminels ou civils en raison de l’évocation de souvenirs contestables. Parfois, ces souvenirs supposent une mémoire défectueuse de la part des témoins oculaires d’un crime. La science de la psychologie a informé le système juridique de ses connaissances sur la mémoire et a contribué à mettre en place des changements productifs permettant de traiter les preuves provenant de témoins oculaires. Heureusement, le risque de voir se produire, au cours du processus, des déclarations de culpabilité erronées diminue. Mais il arrive parfois que des souvenirs...
contestables laissent croire à des allégations de gestes extrêmement brutaux qui auraient été profondément refoulés. Dans ces cas-là, la controverse est vive et le scepticisme entier, lorsque vient le temps d’établir si un tel refoulement profond intervient ou pas. Jusqu’au jour où nous aurons des preuves plus convaincantes qui étayeront ces deux types d’hypothèses, nous devons nous tenir à l’argument raisonnable voulant que ni l’une ni l’autre de ces hypothèses non fondées n’a sa place dans les salles d’audience.

References