

EVIDENCE IN CRIMINAL TRIALS AND WAR CRIMES TRIALS INVOLVING MEMORY OF SEXUAL ASSAULT: CASE STUDY COMPARISONS.

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This paper discusses my Masters Honours Research literature review and research proposal. It covers the topic of memory relating to sexual assault. At the present time the reliability of recovered memories is in question and not automatically admitted as evidence in criminal trials. Using case studies the thesis will examine the way the law of evidence was applied in criminal courts of Australia regarding the memories of victims of sexual assault, comparing these outcomes with War Crimes Tribunal cases involving the memories of victims of sexual assault.

The paper will refer to the phenomenon of 'recovered memories' which emerged during the 1980's and 1990' including an associated surge of satanic ritualistic abuse accusations which have been compared by some academic writers (Goode and Ben-Yehuda, 1994 and Pendergrast, 1996) with that of the Salem witch accusations in 1692. The literature review covers both sides of the debate which emerged regarding the reliability versus the fallibility of 'recovered memories', the latter being referred to by some academics as 'false memories'.

Keywords: Memory, War Crimes, Sexual Assault

RATIONALE AND SIGNIFICANCE OF THE PROBLEM

The concept of repressed memories of traumatic events has been accepted and acknowledged for over 100 years and has been brought into question only in relation to belated allegations of sexual assault. (Cossins, 1997). On the other hand, 'recovered memories' refers to memories which have been repressed and forgotten and which are "unlocked in the course of psychotherapeutic intervention" or remembered after a triggering incident or association.(Freckelton, 1996). These memories are very often 'recovered' many years after the alleged event(s).

THE DISCOURSE

Those engaging in the discourse tend to either strongly believe in the concept of repressed and recovered memories or to view them with skepticism or disbelief.

The issue of memory generally and its credibility or fallibility has been discussed, debated, tested and analyzed by psychologists and others for many years. But something new emerged during the 1980's and 1990's which raised the profile of this discourse to a new level. A considerable number of people who had been receiving therapy or counseling were claiming to have recovered memories of which they had no previous recollection. What raised this to a phenomenon was the fact that so many of these recovered memories included claims of sexual abuse which were alleged to have occurred many years previously when they were small children.

'False memory syndrome' is a term used by people who do not believe in "the legitimacy of repressed memory syndrome". (Freckelton, 1996). He described it as "the phenomenon whereby persons who have not been assaulted come to believe that they have been as a result of dangerous and poor-quality treatment by counselors, psychiatrists and psychologists."

According to Bell, (2000) somewhere between 1923 and 1993 society turned its back on logic and swept away by the 'moral panic' of the day, began to accept 'junk science'. Bell (2000) stated that 'the convictions for satanic sexual abuse of children have no more substance, reason or logic than the convictions for witchcraft during the 400 years of the Inquisition.'

One of the significant difficulties regarding witnesses who allege sexual assault as a result of recovered memories is that they are dogmatic about their memories being real and fail to realize that memories are 'malleable'.(Loftus, 2004).

Each sample of a series of three experiments conducted by Holmes, Waters, and Rajaram, (1998) demonstrated that people can have 'memories' of events which never occurred, accompanied with a very strong belief that their memories are accurate. They found that people's high confidence levels in the accuracy of their memory, were no real indication of the truth of their memories.

Two experiments conducted by Watson, Bunting, Poole and Conway (2005) demonstrated that despite receiving a warning that the test may induce false memories, this did not prevent one group from developing false memories. The other test group also received the warning which reduced but did not eliminate the phenomenon of false memory creation.

In a comment bound to create a response, Freckelton (1996) declared that feminists had recognized the recovered memory phenomenon as an opportunity and indeed a 'political imperative' to 'take action against perpetrators of abuse who had "got away" with their crimes and might continue to molest others unless "outed" and prosecuted.'

Roediger, and Bergman (1998) criticized claims made by Alpert, Brown and Courtois (1998c) that traumatic childhood memories could 'be repressed (or dissociated from other memories)' and could 'be recovered with considerable accuracy many years later'.

Roediger, and Bergman (1998) noted that Alpert et al. (1998a) had conceded that emotional and 'high impact' events tended to result in good memory recall, citing Brown and Kulik (1977) who introduced the term 'flashbulb memory' for significant life moments such as the death of a loved one or public events such as the first man landing on the moon. They also cited Roediger, Wheeler, and Rajaram, (1993) whose study found that people who are forced to recall life events which they had forgotten can produce inaccurate information.

PROPOSED THEORETICAL FRAMEWORK.

It is proposed that this study would be conducted with consideration of feminist jurisprudence, post-modern discourse, critical criminology and current legal theory.

Research design

There will be two sets of case studies. The first set will be cases which were heard within the Australian criminal court jurisdiction. It is proposed that there be 15 cases within this set. The second set of case studies will be cases which were heard within the War Crimes Tribunal jurisdictions. It is proposed that there be 15 cases within this set.

The criteria for all cases is firstly that they relate to a sexual abuse offence or offences and secondly that there was a time delay of five years or more between the crime and the reporting of the matter to police. The victim's memories may be repressed, recovered or remembered.

Method of data collection

The method of finding the sample cases will be by researching recognized case law web-sites, textbooks and other legal archives which are on the public record. It is proposed that if cases selected prove to be numerous for either of the samples then a "sampling interval" will be implemented aimed at providing a distribution of time periods of hearings occurring between 1980 - 2005. (Arber, 2001 in Jennett & O'Mullane, 2004).

CONCLUSION

It is hoped that this research will shed some light into the way in which the laws of evidence have been used to deal with sexual abuse cases involving witnesses relying upon memories of events long past. There are no anticipated outcomes from this proposed study however, if a theme or trend emerges then a further quantitative study may be appropriate to examine these trends. At that stage it may be possible to develop a theory.

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