

CASE NOTES

R v HAYWOOD*

THE USE OF HYPNOTICALLY ENHANCED TESTIMONY IN CRIMINAL TRIALS

A Introduction

Recollection of stored information is an integral part of legal inquiry. Hypnosis is a technique potentially capable of improving memory and enhancing witness testimony. However, because the reliability of testimony procured through hypnosis is questionable,¹ a fundamental evidentiary issue exists: whether, or under what circumstances, to admit testimony from a witness hypnotised prior to trial for the purpose of refreshing recollection of a crime.²

In the United States, courts have debated the admissibility of 'hypnotically refreshed testimony'³ since the late 1960s.⁴ In contrast, few Australian courts have ruled on the issue.⁵ In the recent case of *R v Haywood*, a *voir dire* hearing arose out of a challenge to the admissibility of evidence from a rape victim who had undergone pre-trial hypnosis to enhance her recollection of the crime. The ruling by Wright J of the Tasmanian Supreme Court stands as Australian authority for the use of flexible guidelines, such as those recommended by the New Zealand Court of Appeal in *R v McFelin*,⁶ for determining admissibility.⁷ This note advocates the approach adopted in *Haywood* and contends that it is in accordance with a commitment to advancing legal inquiry while having regard to

* (1994) 73 A Crim R 41. Supreme Court of Tasmania, Wright J, 27 May 1994 ('*Haywood*').

¹ See below nn 15-26 and accompanying text.

² This note does not discuss the law relating to evidence of out of court assertions made under hypnosis. However, it is worth noting that, as the law presently stands, such statements will ordinarily be inadmissible. Evidence by a psychiatrist, hypnotist or other person of what an accused said while under hypnosis would infringe the rules against hearsay, or if the evidence was not adduced for a hearsay purpose, but for the purpose of enhancing the witness's credibility, it would still infringe the rule against prior consistent statements. See Peter Gillies, *Law of Evidence in Australia* (1987) 158, 280-2. The issue in the present case, however, concerns a previously hypnotised witness seeking to give evidence of purported existing recollections.

³ A number of courts also use the phrase 'post-hypnotic testimony.' Courts use these phrases interchangeably to describe the testimony of a witness who attempts to enhance his or her recollection through pre-trial hypnosis. After hypnosis, the witness testifies as would any witness, seeking to include any new information acquired through the process.

⁴ There are only eight states in the US that have not yet ruled on the issue: see Gary Shaw, 'The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials' (1991) 75 *Marquette Law Review* 1, 15-16, n 79. An American court first considered the use of hypnosis in *People v Ebanks* 49 P 1049 (1897).

⁵ Prior to the 1980s, there had been no reported criminal cases involving the use of hypnosis. There appear to be only four reported criminal cases on point: *The Queen v Geesing* (1986) 39 SASR 111; *R v Horsfall* (1989) 51 SASR 489; *R v Jenkyns* (1993) 32 NSWLR 712 ('*Jenkyns*'); and *Haywood* (1994) 73 A Crim R 41.

⁶ [1985] 2 NZLR 750 ('*McFelin*').

⁷ See also *Jenkyns* (1993) 32 NSWLR 712.

the inherent dangers of hypnosis and the need to preserve the integrity of the fact-finding process.

B *Facts and Holding*

The accused, H, M and R, allegedly participated in a group rape of the complainant. The indictment on which they stood trial, either as principals or accessories, contained several counts of rape, attempted rape and assault.⁸ Counsel for the accused submitted that the whole of the complainant's evidence was not admissible, or alternatively, that evidence of events which she purportedly recalled at or following a hypnosis session was inadmissible.

In statements made to the police prior to hypnosis, the complainant was unable to recount some aspects of the ordeal. Subsequently, a counsellor with a sexual assault service arranged for her to undergo hypnosis in order to enhance her recollection. After the hypnosis, the complainant was able to identify, for the first time, M as the initial rapist. A recollection of digital penetration by R and H also emerged. In relation to the charge of rape against M, the Crown's case was constructed largely upon the post-hypnotic evidence.

Justice Wright followed the guidelines proposed by the New Zealand Court of Appeal in *R v McFelin*.⁹ Testimony as to matters recalled and related prior to hypnosis was ruled admissible because there was clear and convincing evidence that the hypnosis had 'not so affected her memory as to have rendered the pre-hypnotic recollections unreliable or so as to [have] substantially impair[ed] the capacity of ... counsel to cross-examine [her] concerning those recollections'.¹⁰ In this regard, it was significant that all relevant safeguards had been complied with and, upon reviewing the video recorded hypnotic session, that no suggestions to the subject were detectable.¹¹ Considering the post-hypnotic recollections, Wright J ruled that the evidence identifying M, and the evidence relating to the digital penetration by R and H, was inadmissible because the Crown had not established that it would be 'safe' to admit in the particular circumstances.¹² However, allegations of attempted anal rapes by H and M, recalled post-hypnotically, were not excluded as unsafe. Although greater details emerged post-hypnotically, these allegations were shown to have been made in substance prior to the hypnosis¹³ and there was witness testimony confirming them.¹⁴

C *Commentary*

The ruling in *Haywood* raises a number of issues relating to the nature of hypnosis, the adequacy of safeguards in countering the dangers associated with

⁸ *Haywood* (1994) 73 A Crim R 41, 42.

⁹ *McFelin* [1985] 2 NZLR 750.

¹⁰ *Haywood* (1994) 73 A Crim R 41, 50.

¹¹ *Ibid* 46, 50.

¹² *Ibid* 51.

¹³ *Ibid* 49.

¹⁴ *Ibid* 51.

testimony enhanced through hypnosis and the approaches taken in other jurisdictions towards hypnotically refreshed testimony. Each will be dealt with in turn.

1 *The Nature and Inherent Dangers of Hypnosis*

There exists no consensus about a single definition of hypnosis¹⁵ but the medical benefits of the technique are generally accepted.¹⁶ Hypnosis may be used to aid memory recall¹⁷ and proponents of the technique contend that hypnosis may enable victims of, or witnesses to, a crime who suffer memory loss as a result of the experience, to retrieve valuable evidence from their memories that could assist a court in reaching the correct result.¹⁸

There is, however, no general agreement regarding the effect of hypnosis as a means of refreshing memory.¹⁹ There is a common belief that the manner in which the hypnotist conducts the hypnotherapy may affect the quality of the information produced under hypnosis.²⁰ While hypnosis may increase recall, no studies show that hypnosis enhances recall of only accurate information without a corresponding increase in false information.²¹ This has problematic implications for the laws of evidence.

Courts have identified numerous problems that arise from using hypnosis to refresh a witness's memory. The most common include:

- (a) a sharp reduction in critical judgment: the subject may adopt false memories uncritically when in the hypnotic state;²²
- (b) confabulation: the process of filling gaps in memory with inaccurate or fictitious information;²³

¹⁵ Council on Scientific Affairs, 'Scientific Status of Refreshing Recollection by the Use of Hypnosis' (1985) 253 *Journal of the American Medical Association* 1918 ('Council Report'). See Harold Crasilneck and James Hall, *Clinical Hypnosis: Principles and Applications* (2nd ed, 1985) 18-20. This was noted by the US Supreme Court in *Rock v Arkansas* 483 US 44 (1987), 58-9.

¹⁶ *Rock v Arkansas* 483 US 44 (1987), 59. For example, hypnosis can be used to alleviate pain and treat mental disorders: Ernest Hilgard, *Divided Consciousness: Multiple Control in Human Thought and Action* (1977) 163.

¹⁷ Martin Orne, 'The Use and Misuse of Hypnosis in Court' (1979) 27 *International Journal of Clinical & Experimental Hypnosis* 311, 323-4; Robyn Spector and Teree Foster, 'Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?' (1977) 38 *Ohio State Law Journal* 567, 572-4.

¹⁸ Spector and Foster, above n 17, 572-4

¹⁹ Council Report, above n 15, 1919, 1921; Kimbro Stephens, '*Rock v Arkansas*: Hypnosis and the Criminal Defendant's Right to Testify' (1988) 41 *Arkansas Law Review* 425, 438.

²⁰ See generally, Stephen Lynn, Victor Neufeld and Cindy Matyi, 'Inductions Versus Suggestions: Effects of Direct and Indirect Wording on Hypnotic Responding and Experience' (1987) 96 *Journal of Abnormal Psychology* 76.

²¹ *Rock v Arkansas* 483 US 44 (1987), 59; Council Report, above n 15, 1921.

²² Bernard Diamond, 'Inherent Problems in the Use of Pre-trial Hypnosis on a Prospective Witness' (1980) 68 *California Law Review* 313, 316; Mark Belasic, 'Trial by Trance: The Admissibility of Hypnotically Enhanced Testimony' (1986) 20 *Columbia Journal of Law & Social Problems* 237, 240.

²³ Neil Dilloff, 'The Admissibility of Hypnotically Influenced Testimony' (1977) 4 *Ohio Northern University Law Review* 1, 4; Orne, above n 17, 321. Confabulation results in 'pseudo memories' which the individual believes are his or her true recollections: Belasic, above n 22, 240.

- (c) a heightened state of suggestibility: subtle cues transmitted by the hypnotist or another may implant a fiction in the subject's recollection;²⁴ and
- (d) 'memory hardening': in the post-hypnotic state the subject may experience an exaggerated confidence that his or her recall is accurate, even where such recall is erroneous. Because of this unwarranted confidence, critics argue that hypnosis impedes effective cross-examination.²⁵

These inherent dangers of hypnosis threaten the reliability of the testimony. To complicate matters, neither the subject nor the hypnotist, nor any other expert, is able to tell whether a memory corresponds to the witness's perception of what occurred or is merely fabrication.²⁶ Thus, courts have displayed a reluctance to admit hypnotically refreshed testimony because of the fear that inaccurate recall will taint the trial process.

2 The 'Safety Test'

In *McFelin*²⁷ the New Zealand Court of Appeal, despite an intention not to give a comprehensive ruling, proposed a set of guidelines by which trial courts could determine whether the use of hypnosis rendered the resulting testimony inadmissible.

Under the guidelines:

- (i) If challenged, the evidence should be excluded unless the judge is satisfied that it is safe to admit in the particular circumstances.²⁸
- (ii) In determining whether the evidence is safe to admit, the judge should consider:
 - (a) whether sufficient precautions or 'safeguards' were taken in the hypnotic and associated sessions;²⁹ and
 - (b) the 'strength of any confirmatory or supporting evidence.'³⁰

However, as Wright J noted, it is difficult to know exactly what is meant by 'safe' in this context.³¹ It may involve a balancing of the benefits or probative value of the evidence against the dangers inherent in the hypnotic process, with

²⁴ Diamond, above n 22, 333; Thomas Selman, 'Awakening from the Exclusionary Trance: A Balancing Approach to the Admissibility of Hypnotically Refreshed Testimony' (1982) 61 *Texas Law Review* 719, 720.

²⁵ Shaw, above n 4, 12; Selman, above n 24, 720-1; Deborah Carter, 'The Use of Hypnosis to Refresh Memory: Invaluable Tool or Dangerous Device?' (1982) 60 *Washington University Law Quarterly* 1059, 1072; Kimberley Genua, '*Rock v Arkansas*: An Individual Inquiry Approach to the Admissibility of Hypnotically Induced Testimony' (1988) 37 *Catholic University Law Review* 1171, 1176; Diamond, above n 22, 339-40.

²⁶ *Rock v Arkansas* 483 US 44 (1987), 60; Orne, above n 17, 311, 317-18; Diamond, above n 22, 337; Shaw, above n 4, 23.

²⁷ [1985] 2 NZLR 750 (Cooke J in a specially convened court of five).

²⁸ *Ibid* 754.

²⁹ In this regard, the court advocated the use of procedural safeguards such as those stipulated in the California Evidence Code s 795(a)(2), (3). See below nn 37-43 and accompanying text.

³⁰ *McFelin* [1985] 2 NZLR 750, 755.

³¹ *Haywood* (1994) 73 A Crim R 41, 50. Here, Wright J is referring to Stephen Odgers, 'Trial by Trance: Hypnosis, Witnesses, and the Development of New Rules of Evidence' (1988) 4 *Australian Bar Review* 18.

the judge excluding the evidence when the disadvantages clearly outweigh the probative value.³² Alternatively, 'safe' may mean that the evidence is sufficiently 'reliable.'³³ The latter interpretation appears to be the better view. A criterion of 'reliability' directly raises the issue of whether the hypnotically enhanced recall is correspondent to the witness's actual perception of the event.³⁴ However, the difference may be of little consequence in most cases.³⁵

3 The Procedural 'Safeguards'

To enable assessment of the testimony after hypnosis, and to minimise the risk of suggestions being made to the subject, the New Zealand Court of Appeal in *McFelin* adopted procedural safeguards. 'These are not mandatory ... but indicate standards to be aimed at as far as reasonably possible'.³⁶ Failure to comply with the precautions will not necessarily preclude admissibility if other evidence can be adduced indicating reliability. Nor, however, will complete compliance guarantee admissibility. Rather, these factors are considered by the court in applying the overall flexible test for admissibility — 'safety' in the circumstances of each case.

The recommended safeguards may be summarised as follows:

- (1) the fact that the witness was hypnotised should be disclosed and all relevant transcripts and information provided on request;³⁷
- (2) the subject's description of the event must have been preserved in written, audio, or video recorded form prior to the hypnosis;³⁸
- (3) the hypnosis session, including the pre-induction and post-hypnosis interviews, should be video tape-recorded for subsequent review;³⁹
- (4) any information supplied to the hypnotist concerning the event must be recorded in writing prior to the hypnosis;⁴⁰

³² A number of US courts adopt this approach, determining admissibility under Rule 403 of the US Federal Rules of Evidence: see *US v Valdez* 722 F 2d 1196 (1984); *US v Charles* 561 F Supp 694 (1983).

³³ This was the view of Hunt CJ in *Jenkyns* (1993) 32 NSWLR 712, 714.

³⁴ See Odgers, above n 31, 47. The balancing test fails to highlight this key issue of whether hypnotic recall is reliable: see Kevin Casey, 'Hypnotically Refreshed Testimony and the Balancing Pendulum' (1985) 4 *University of Illinois Law Review* 921, 954.

³⁵ *Haywood* (1994) 73 A Crim R 41, 50.

³⁶ *McFelin* [1985] 2 NZLR 750, 755; cf *Jenkyns* (1993) 32 NSWLR 712, 715.

³⁷ This information, including video recordings, affords opposing counsel some basis for assessing and challenging the material: see *Jenkyns* (1993) 32 NSWLR 712, 715.

³⁸ A pre-hypnotic record is essential to enable subsequent observers to understand the effect of hypnosis on the subject: Orme, above n 17, 335-6. For instance, significant discrepancies emerging during or post-hypnosis may indicate that the hypnosis rendered the witness's recollection unreliable.

³⁹ Having a record of each contact enables the court to determine the extent to which the subject received information or suggestions from the hypnotist, and those recollections first elicited during or post-hypnosis: *State v Hurd* 432 A 2d 86 (1980), 97. Video taping is recommended because it will record non-verbal cues that might suggest answers to the subject.

⁴⁰ This enables the court to determine the extent of information the hypnotist could have communicated to the witness: *State v Hurd* 432 A 2d 86 (1980), 96; Debra Klebanoff, 'Hypnotically Refreshed Testimony Admissible, Subject to Strict Standards Including Procedural Safeguards' (1982) 55 *Temple Law Quarterly* 489, 501-2.

- (5) the hypnotic session must be conducted by a licensed medical doctor or psychologist experienced in the use of hypnosis;⁴¹ and
- (6) the hypnosis should be performed by an independent hypnotist⁴² in the absence of the police, prosecution or defence.⁴³

These safeguards establish a record of the hypnotic experience, enabling the trial judge to compare the witness's pre and post-hypnotic recollections, and to review the procedures, affording the court some basis for assessing the reliability of the recall. In *Haywood*, there were significant differences between the complainant's pre and post-hypnotic versions. Prior to hypnosis the complainant had not identified M as having had intercourse with her. Under hypnosis the complainant was asked whom the initial rapist *may* have been. She suggested that it was M, based solely upon his weight rather than on any other identifying feature. This identification only became certain after hypnosis. In relation to the alleged digital penetration, there was conflicting medical evidence. Although, in this case, all procedural precautions had been substantially followed, the significant discrepancy between pre and post-hypnotic versions given by the complainant⁴⁴ and the lack of relevant material confirming or supporting the challenged evidence indicated that it would not be safe to admit the post-hypnotic evidence.

4 Confirmatory Evidence as a 'Safeguard'

Under the *McFelin* guidelines, consideration of confirmatory or supporting evidence is especially important in determining whether post-hypnotic testimony can be safely admitted.⁴⁵ The theory is that when hypnotically enhanced recall is supported or confirmed by other admissible evidence, it is more likely that the recall was reliable and not the result of confabulation.⁴⁶

However, this reasoning is problematic in two ways. Firstly, the fact that the other evidence confirms or supports one hypnotically enhanced recollection does not indicate that the other recollections are reliable. The confirmed memory may have been the only part of the total recall not the result of suggestion or confabulation. Secondly, the theory is deficient in practical application. The subject may have been made aware of the other evidence prior to hypnosis and subsequently incorporated that information into the hypnotic recall as a result of

⁴¹ It has been held that a professional is necessary because he or she will be more likely to conduct the procedures so as to obtain accurate recall: *State v Hurd* 432 A 2d 86 (1980), 96. Cf Justice Michael Kirby 'Hypnosis and the Law' (1984) 8 *Criminal Law Journal* 152, 164-5.

⁴² This safeguards against any bias on the part of the hypnotist which could result in conduct, intentional or otherwise, that suggests a desired answer to the hypnotised subject: *State v Hurd* 432 A 2d 86 (1980), 96.

⁴³ This safeguard is intended to preclude other people who know about the case from intentionally or inadvertently suggesting responses to the hypnotised subject.

⁴⁴ It was also significant that the Crown had entered *nolle prosequi* in respect of the counts of aggravated sexual assault based upon this post-hypnotic recollection: *Haywood* (1994) 73 A Crim R 41, 52-3.

⁴⁵ *McFelin* [1985] 2 NZLR 750, 755.

⁴⁶ *Jenkyns* (1993) 32 NSWLR 712, 724; Shaw, above n 4, 33. The *McFelin* Court's reference to confirmatory and supporting evidence is an attempt to avoid the technical rules associated with categories of evidence requiring formal corroboration.

confabulation.⁴⁷ Further, if the hypnotist is aware of the confirmatory evidence, he or she may inadvertently suggest responses to the subject.⁴⁸ As such, the 'existence of that other evidence' is of little significance.⁴⁹ Rather, only where it would otherwise have been expected that confirmatory evidence would exist, could the *absence* of such evidence be relevant.⁵⁰ Justice Wright expressed agreement on this point. Nevertheless, the lack of confirmatory evidence in the instant case was a significant factor impeding admission.⁵¹ Given that the facts in *Haywood* suggest such evidence could not have been expected to exist,⁵² Wright J's analysis on this point is unpersuasive.⁵³

5 Expert Evidence

Another area of concern is the nature and extent to which expert evidence may be introduced at trial. It appears unlikely that Australian courts will allow expert opinion on the reliability of a particular witness's hypnotically enhanced testimony. In *Haywood*, Wright J observed that the role of the expert was to provide general information on the benefits and dangers of hypnosis, but without specific reference to the hypnotised subject.⁵⁴ If, for instance, the previously hypnotised witness identified the accused as the person who committed the crime, allowing expert opinion on whether the witness's testimony should be believed, may infringe the 'ultimate issue' prohibition.⁵⁵ Indeed, once general expert guidance is given and the jury is equipped with sufficient knowledge, they may be equally able to make an accurate judgment. As discussed, it is beyond the capacity of any expert to verify the truth or otherwise of a particular hypnotically elicited memory.

6 The Standard for Admissibility

A further issue not adequately addressed in *Haywood* is the standard to be applied to pre-hypnotic evidence on the one hand, and the standard applicable to post-hypnotic evidence on the other. In relation to the former, courts are concerned with how to determine the bounds of the pre-hypnotic recollection and how to counter the phenomenon of 'memory hardening'. The danger associated with post-hypnotic evidence, that memory may be distorted by suggestion or confabulation, does not arise when testimony is confined to pre-hypnotic recollections. Dealing with both aspects of the complainant's evidence, Wright J endeavoured to apply the guidelines proposed in *McFelin*. However, the ap-

⁴⁷ Helen Pettinati (ed), *Hypnosis and Memory* (1988) 53; *Jenkyns* (1993) 32 NSWLR 712, 724.

⁴⁸ Diamond, above n 22, 338; *Jenkyns* (1993) 32 NSWLR 712, 724.

⁴⁹ *Jenkyns* (1993) 32 NSWLR 712, 725.

⁵⁰ *Ibid.*

⁵¹ *Haywood* (1994) 73 A Crim R 41, 52.

⁵² The complainant and the three accused were alone at night in a paddock. In such circumstances 'confirmatory evidence of a specific allegation of this kind would be very rare indeed': *ibid.*

⁵³ However, other compelling facts appear to support the decision to exclude the evidence: see above n 44.

⁵⁴ *Haywood* (1994) 73 A Crim R 41, 53.

⁵⁵ For a discussion of the 'ultimate issue' prohibition, see *R v Wright* [1980] VR 593-4, 597; *Samuels v Flavel* [1970] SASR 256, 261-2. Many exceptions to the 'ultimate issue' rule have been recognised: Gillies, above n 2, 607.

proach is not entirely clear. Justice Wright appears to be applying two distinct tests. For post-hypnotic evidence, the 'safety' test was applied.⁵⁶ Yet, in determining whether the witness could testify to recollections present prior to hypnosis, Wright J apparently took the view that the court should consider the guidelines incorporated in the California Evidence Code s 795 (a)(1)-(4). These stipulate, *inter alia*, that testimony is admissible provided there is 'clear and convincing evidence that the hypnosis [did] not so affect [the witness] as to render the pre-hypno[sis] recollection unreliable or ... to substantially impair the [ability] ... to cross-examine the witness'.⁵⁷ This standard, as applied in some United States jurisdictions, creates a heavy burden⁵⁸ and so it cannot necessarily be interpreted as a more lenient test commensurate to the reduced dangers associated with pre-hypnotic testimony.

Justice Wright gives no explanation for this distinction and it appears that a more cogently expressed approach is possible. It is submitted that the safety test, as a general standard, is appropriately applied in determining the admissibility of both pre and post-hypnotic evidence. This approach obviates any concern which may arise over the difference between the 'clear and convincing' standard, and the 'safety' test proposed in *McFelin*.⁵⁹

7 Alternative Options for Hypnotically Refreshed Testimony

In the US, state and federal courts have developed three basic approaches in deciding whether hypnotically refreshed testimony is admissible in a criminal trial: (i) hypnotically enhanced testimony is admissible as a matter of law;⁶⁰ (ii) hypnotically enhanced testimony is '*per se*' inadmissible;⁶¹ and (iii) hypnotically enhanced testimony is admissible dependent upon compliance with procedural safeguards.⁶² In analysing the approach in *Haywood* and the appropriateness of the 'safety' test adopted, it is worth considering the alternative approaches that have been used in United States courts.

(a) Admissible as a Matter of Law

Under the *McFelin* test hypnotically refreshed evidence is *prima facie* inadmissible, but may be admitted if the proponent of the evidence establishes that it is 'safe.' In *Haywood*, the Crown contended that such an approach would be erroneous in Australia and rather, that the testimony was admissible as a matter of

⁵⁶ *Haywood* (1994) 73 A Crim R 41, 51.

⁵⁷ *Ibid* 50.

⁵⁸ See Shaw, above n 4, 27; Klebanoff, above n 40, 517. For example, this standard applies in New Jersey: *State v Hurd* 432 A 2d 86 (1980); and in New York: *People v Hughes* 453 NE 2d 484 (1983).

⁵⁹ See *People of California v Shirley* 31 Cal 3d 18 (1982), 40 (discussing complications which may arise in applying the clear and convincing standard of proof); Andrew Callari, 'Rock v Arkansas: Hypnotically "Refreshed" Testimony' (1988) 74 *Cornell Law Review* 136, 164.

⁶⁰ *Harding v State* 246 A 2d 302 (1968).

⁶¹ *State v Mack* 292 NW 2d 764 (1980).

⁶² *State v Hurd* 432 A 2d 86 (1980). For an analysis of this 'tripartite regime', see Michael Beaudine 'Growing Disenchantment with Hypnotic Means of Refreshing Witness Recall' (1988) 41 *Vanderbilt Law Review* 379.

law.⁶³ Thus, the fact that the witness was previously hypnotised would not affect the admissibility of the testimony, but would go to the credibility of the witness and the weight the jury would give that testimony. The argument is based on first principles of evidence and has some support in US jurisdictions.⁶⁴

While as a general proposition one of the best methods for discovering truth is to admit all relevant evidence for jury assessment, this approach fails to account for the special problems associated with hypnosis. A hypnotised witness gains increased subjective certainty in memory, and authorities have noted that there exists a high degree of public belief in the efficacy of the technique to restore memory.⁶⁵ Thus, two dangers are the jury's potential inability to accurately assess the credibility of hypnotically developed testimony and the jury's potential misconceptions about the reliability of hypnosis.

These factors may cause the jury to accord the testimony undue weight. In theory this danger can be mitigated by the use of cross-examination and the introduction of expert testimony. However, because witnesses who have confabulated under hypnosis do not know that the testimony is false, but may actually acquire increased confidence in their memories, cross-examination may prove futile as an aid for the jury's analysis.⁶⁶ Further, if each party is allowed to have an expert testify at trial to the reliability of the hypnotic process, then there is a danger that the trial will deteriorate into a battle of expert witnesses.⁶⁷ Given these difficulties, and the public's general misunderstanding of hypnosis, there is no reason to believe that a jury instruction will in itself be adequate to prevent the jury from being misled.⁶⁸

This is not to deny that courts frequently admit potentially unreliable testimony. For example, eyewitness identification testimony is regularly admitted as evidence despite the fact that it can be unreliable. Even witnesses suffering from mental illness may testify; the mental illness affects the credibility, not the admissibility, of the testimony.⁶⁹

However, the argument fails. Problems with evaluating memory in normal circumstances arise from the fallibility of human memory, which is a known quantity within the lay person's experience.⁷⁰ Jurors expect this fallibility and

⁶³ *Haywood* (1994) 73 A Crim R 41, 51.

⁶⁴ At present, five state and two federal circuits have so held: see *US v Kimberlin* 805 F 2d 210 (1986); *US v Awkard* 597 F 2d 667 (1979); *State v Goutro* 444 So 2d 615 (1984), *State v Comeau* 438 A 2d 454 (1981); *State v Brown* 337 NW 2d 138 (1983); *State v Glebock* 616 SW 2d 897 (1981); *Chapman v State* 638 P 2d 1280 (1982). This is known as the 'per se' admissibility approach, and is one limb of the 'tripartite regime' of judicial treatment of hypnotically enhanced testimony in the US. Many subsequent decisions have rejected this approach, noting that it fails to address the problems attributable to the hypnotic process: *People v Shirley* 31 Cal 3d 18 (1982), 36. See cases cited in *Genua*, above n 25, 1178-9 n 85.

⁶⁵ *Odgers*, above n 31, 47; *Shaw*, above n 4, 40; *Casey*, above n 34, 939; *Council Report*, above n 15, 1921.

⁶⁶ See above n 25.

⁶⁷ *Haywood* (1994) 73 A Crim R 41, 51, 'there is "a risk of the jury's attention being diverted to a trial of hypnosis techniques,"' citing *Cox J in R v Horsfall* (1989) 51 SASR 494.

⁶⁸ See *United States v Valdez* 722 F 2d 1196 (1984), 1202; *Casey*, above n 34, 960 n 244.

⁶⁹ *Sinclair v R* (1946) 73 CLR 316, 323

⁷⁰ See *Commonwealth v Smoyer* 476 A 2d 1304 (1984), 1306.

understand how to compensate for it. On the other hand, where the witness is testifying to hypnotically enhanced recall, problems of accuracy arise not only from the fallibility inherent in all normal recall, but may also arise from the defects inherent in the hypnotic process.⁷¹ In effect, hypnotically enhanced recall adds another layer of inaccuracy. Similarly, it may be contended that a juror is more readily able to comprehend that a witness suffering from a mental illness may be unreliable than one who has undergone hypnotic memory enhancement. As Wright J reasoned, 'evidence of the present kind is in a somewhat special or unique category,' confounding even the experts.⁷²

Holding post-hypnotic testimony admissible as a matter of law does foster the important goal of admitting potentially valuable evidence otherwise lost, but it also entails a high cost: insufficient checks on the misuse of such testimony. Recognising this drawback, Wright J held that the onus is on the party seeking to adduce the evidence to establish that it is safe to admit.⁷³

(b) *Other United States Case Law*

In what has been categorised as a 'majority view',⁷⁴ many jurisdictions have adopted a '*per se*' rule of inadmissibility.⁷⁵ These courts rely on some version of the test established in *US v Frye*.⁷⁶ Under *Frye*, before evidence derived from a scientific technique may be admitted, there must be a 'general acceptance' of the technique as valid and reliable 'in the particular field in which it belongs'.⁷⁷ Reasoning that hypnosis cannot meet this threshold requirement of 'general acceptance', these jurisdictions exclude hypnotically enhanced testimony in every case. Some courts applying this analysis have held that a previously hypnotised witness will be incompetent to testify on any matter raised during the hypnotic session.⁷⁸ This may preclude the witness from testifying even as to pre-hypnotic memories. However, most jurisdictions adopting a '*per se*' inadmissible rule still allow the witness to testify to recollections demonstrably preceding the hypnosis.⁷⁹

Other jurisdictions adopt a middle ground, applying a rule of admissibility conditioned upon either (a) mandatory compliance with strict procedural guide-

⁷¹ See above nn 22-6 and accompanying text.

⁷² *Haywood* (1994) 73 A Crim R 41, 51.

⁷³ *Ibid*; *Jenkyns* (1993) 32 NSWLR 712, 714.

⁷⁴ *Zani v State* 758 SWW 2d 233 (1988), 240 fn 5; *State v Tuttle* 780 P 2d 1203 (1988).

⁷⁵ At present, twenty-three states have adopted this approach. In addition one federal circuit has so held: see cases cited in *Shaw*, above n 4, 16 n 83.

⁷⁶ 293 F 1013 (1923) ('*Frye*').

⁷⁷ *Ibid* 1014. In Australia, courts have yet to adopt the *Frye* approach. It has been criticised and rejected in a growing number of US jurisdictions as setting an inappropriately prohibitive standard: see Edward Cleary (ed), *McCormick on Evidence* (3rd ed, 1984) 606-7.

⁷⁸ *People v Shirley* 641 P 2d 775 (1982); *People v Guerra* 690 P 2d 635 (1984).

⁷⁹ See *State ex rel Collins v Superior Court* 644 P 2d 1266 (1982); *People v Quintanar* 659 P 2d 710 (1982); *People v Jackson* 319 NW 2d 613 (1982); *State v Blanchard* 315 NW 2d 427 (1982); *State v Patterson* 331 NW 2d 500 (1983); *People v Hughes* 453 NE 2d 484 (1983); *Commonwealth v Taylor* 439 A 2d 805 (1982). Indeed, in California the legislature tempered the effect of its absolute exclusion position by adding a provision to the Evidence Code permitting testimony of a properly proven pre-hypnosis memory: California Evidence Code s 795.

lines,⁸⁰ or (b) a case by case assessment. Some courts employing this latter analysis utilise an approach similar to that proposed in *McFelin* — admissibility contingent upon showing reliability, with consideration of procedural safeguards a relevant factor in the inquiry.⁸¹

D Recommendations

In formulating an approach to deal with the testimony of a previously hypnotised witness, the principal issue faced by the law of evidence is whether the testimony corresponds with the witness's perception or experience of the event. The risks inherent in the hypnotic process threaten this. However, distortion does not occur in every case. Indeed, hypnosis is recognised as being able to enhance the ability of an individual to recall past events now forgotten.⁸² Given that a witness forgetting crucial details — whether over time or through shock, trauma, or intoxication — is a recurring problem,⁸³ hypnosis is a recollection device through which the legal system may gain valuable evidence. It is therefore useful to the criminal law. The '*per se*' exclusion of hypnotically refreshed testimony could prevent valuable evidence from being considered by the trier of fact. The uncertainty associated with the accuracy of the process indicates, however, that checks specifically directed at establishing the reliability of the enhanced testimony are required. Courts must impose standards for admissibility commensurate with the dangers, limitations, and benefits of hypnotically refreshed testimony.

It is submitted that an appropriate test would be similar to that suggested in *McFelin*: 'safety' in all the circumstances of the case. This would require the court to consider compliance with procedural safeguards, to review the hypnotic session itself, and to compare the witness's pre and post-hypnotic recollections. Thus, the court would have some basis for assessing reliability. The ruling in *Haywood* demonstrates the flexible nature of the approach.

The standard set forth is strict and comprehensive. Requiring a proven level of reliability compensates for the jury's difficulty in effectively weighing the evidence, helping to ensure that they are not likely to be misled by relying on it.⁸⁴ A flexible approach for determining admissibility of testimony from a previously hypnotised witness should enhance the fact finding process by increasing the

⁸⁰ The leading case is *State v Hurd* 432 A 2d 86 (1981). The procedural 'safeguards' required are similar to those discussed above. Several state and federal courts have adopted this approach; see *Sprynczynatyk v General Motors Corp* 771 F 2d 1112 (1985), 1122-3; *Brown v State* 426 So 2d 76 (1983), 85-90; *House v State* 445 So 2d 815 (1984), 826-7; *State v Weston* 475 NE 2d 805 (1984), 813.

⁸¹ *State v Iwakiri* 682 P 2d 571 (1984); *State v Johnston* 529 NE 2d 898 (1988); *People v Romero* 745 P 2d 1003 (1987). This approach was advocated by a majority of the Supreme Court of the United States: *Rock v Arkansas* 483 US 44 (1987). However, the holding was based on constitutional rights and expressly limited to criminal defendants: 58.

⁸² See Spector and Foster, above n 17; Casey, above n 34, 934-5; Klebanoff, above n 40, 516; Orne, above n 17, 318; Mark Callister, '*Chapman v State*: Hypnotically Refreshed Testimony — An Issue of Admissibility or Credibility' (1983) *Utah Law Review* 381, 390.

⁸³ See Spector and Foster, above n 17, 585.

⁸⁴ Odgers, above n 31, 48.

amount of potentially valuable evidence that may be admitted, while minimising the dangers inherent in the process of hypnosis.

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