

# SHATTERED DREAMS: AN OVERVIEW OF THE LEGAL IMPLICATIONS OF DISSOCIATIVE AMNESIA

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## INTRODUCTION

One of today's most complex legal issues involves repressed memory syndrome. "Repression is the act of burying painful or traumatic events deep in the mind in order to forget, avoid, or block the feelings and stresses associated with the memory."<sup>1</sup> Victims of violent crimes and other traumatic events frequently repress all memory of the events. Those memories resurface sometimes, and the victim's first-hand accounts of those traumatic events show up in the form of testimony at trial. During trials, however, the credibility of such testimony is often called into question because of the period of time between the event and the witness's recollection. In other words, defendants and juries tend to question the accuracy of what are often considered to be distant memories.

Arguably, the reasons for questioning the accuracy of such recollections are legitimate to say the least. Repressed memories can directly affect the accuracy of a witness's account of the events that have been seen, witnessed, or otherwise experienced. Oftentimes that effect has manifested itself in the form of faulty eyewitness identifications or recollections, which have been a major cause of wrongful convictions in criminal cases, as well as misplaced liabilities in the civil arena. Frequently, trial lawyers turn to experts for scientific testimony about the accuracy of the proffered recollections in cases involving repression. It is important to note that such expert testimony must satisfy the jurisdiction's test for the admissibility of scientific evidence –

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<sup>1</sup> E.A. Foster, *Repressed Memory Syndrome: Preventing Invalid Sexual Abuse Cases in Illinois*, 21 S. Ill. U. L.J. 169, 171 (1996) (citing Cynthia G. Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 Harv. L. Rev. 551, 599 (1996)).

either the *Frye* or *Daubert* standard – in order to be heard by the jury. Once admitted the determination is to be made by the ultimate trier of fact — the almighty jury.

Testimony based on repressed memories also presents concerns regarding its effect on applicable statutes of limitation. Statutes of limitation have the effect of barring legal action after the expiration of a given timeframe, i.e., they proscribe litigation that falls outside of the time limitation established by the statute. However, courts have used discovery rules, which delay or “toll” applicable statutes of limitations until a victim knows or should know that he or she has been injured and that the injury was wrongfully caused or inflicted, to allow such claims as wrongful death, surveyor negligence, medical malpractice, products liability, defamation, and legal malpractice.<sup>2</sup>

For example, a victim who recently recalled memories of childhood rape (assuming, of course, that the memories are accurate or that their accuracy will be supported by expert testimony) could pursue litigation for the alleged wrong despite the operation of a state statute that affords rape victims no more than three years to bring a criminal suit against an alleged perpetrator by applying an applicable discovery rule. The legal system attempts to address individual concerns and an immense variety of situations by setting forth these exceptions to applicable statutes of limitation because, once a cause of action is barred, the victim is stripped of all recourse. Such results are ostensibly preventable and should be avoided at all costs.

This article was written to present a brief historical overview of repressed memory syndrome’s scientific development, a summation of the reliability concerns often raised by courts of law, a rudimentary analysis of fundamental evidentiary issues

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<sup>2</sup> E.A. Foster, *Repressed Memory Syndrome: Preventing Invalid Sexual Abuse Cases in Illinois*, 21 S. Ill. U. L.J. 169, 174-75 (1996) (citing Cynthia G. Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 Harv. L. Rev. 551, 599 (1996)).

encountered when dealing with testimony based on repressed memories, and an illustration of the context in which these issues arise in cases. With that purpose in mind, the reader should approach the issues set forth with an understanding that they present an introduction to what has become a rather complex legal issue. The underlying debate is relatively simple for purposes of this discussion and can be summarized succinctly as follows: either the memory is genuine and accurate or false and inaccurate. The Discussion will be divided into four sections, which will introduce the reader to the aforementioned concepts. Section A of the Discussion will focus primarily on the evolution of the repressed memory concept and its modern application. Section B of the Discussion will address reliability concerns as related to admissibility under either the *Frye* or *Daubert* standards. In Section C the discussion will turn to the *Frye* and *Daubert* tests in relation to their application as well as the manner and circumstances in which each is applied. The subsequent section, Section D, will attempt to bridge the divide between theory and practice by analyzing these concepts in the context of an actual case. Again, the aim is to provide the reader with an idea of the legal implications of repressed memory syndrome, and the final section of this article concludes that, as lawyers, we must present compelling arguments and solid evidence to support our claims in order to advance client interests and assist the trier of fact in reaching its determination as to the accuracy of testimony based on repressed memories. Oftentimes, the jury's outcome on a witness's testimony will either determine or play a substantial role in the determination of their verdict.

### A. SCIENTIFIC DEVELOPMENT

An understanding of memory function provides a solid foundation for understanding the concept of repressed memories. Section 9-2 of Paul C. Giannelli & Edward J. Imwinkelried's *Scientific Evidence* provides as follows:

The perception and memory process can be divided into three stages. The first is the acquisition stage, during which the event is perceived and entered in the memory. The second is the retention stage — the time between the event and its recollection. The third stage is the retrieval stage during which the information relating to the event is recalled. Inaccuracies can be introduced at all three stages.<sup>3</sup>

“The concept of repressed memories originated from studies conducted on combat veterans, political prisoners, and battered women.”<sup>4</sup> The American Psychological Association formally recognized repressed memory syndrome as “dissociative amnesia” in 1994.<sup>5</sup> Dissociative amnesia falls into the broader category of “dissociative disorders” that includes dissociative fugue, depersonalization disorder, and dissociative identity disorder, which was formerly Multiple Personality Disorder.<sup>6</sup> “The essential feature of the Dissociative Disorders is a disruption in the usually integrated functions of consciousness, memory, identity, or perception.”<sup>7</sup> The disturbance may be immediate or gradual, transitory or chronic.<sup>8</sup>

The Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”) lists five distinct memory disturbances that have been described in dissociative amnesia. The first is localized amnesia, in which “the individual fails to recall events that occurred during a

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<sup>3</sup> 1 Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* § 9-2, at 428–31 (3d ed. 1999).

<sup>4</sup> Foster, *supra*, note 1, at 174-175.

<sup>5</sup> Camille L. Fletcher, *Repressed Memories: Do Triggering Methods Contribute to Witness Testimony Reliability?*, 13 Wash. U. L.J. & Pol’y 335, 339 (2003).

<sup>6</sup> See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 519 (4<sup>th</sup> Ed. 2000).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

circumscribed period or time, usually the first few hours following a profoundly disturbing event (e.g., the uninjured survivor of a car accident in which a family member has been killed may not be able to recall anything that happened from the time of the accident until 2 days later).”<sup>9</sup>

In the second, selective amnesia, the person “can recall some, but not all, of the events during a circumscribed period of time (e.g., a combat veteran can recall only some parts of a series of violent combat experiences).”<sup>10</sup> The third memory disturbance, which is less common, is generalized amnesia.<sup>11</sup> Generalized amnesia involves an individual’s inability to recall his or her entire life.<sup>12</sup> The fourth and fifth amnesias that have been described in DSM-IV are also less common.<sup>13</sup>

The fourth listed by DSM-IV is continuous amnesia, which is defined as “the inability to recall events subsequent to a specific time up to and including the present.”<sup>14</sup> The fifth, systematized amnesia involves a loss of memory of certain categories of information, e.g., memories relating to one’s family or to a particular person.<sup>15</sup> Those exhibiting the latter three may eventually be diagnosed with more complex forms of dissociative disorders such as dissociative identity disorder.<sup>16</sup>

It is also important to note that “dissociative amnesia is especially difficult to assess in preadolescent children, because it may be confused with inattention, anxiety, oppositional behavior, learning disorder, psychotic disturbances, and developmentally

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<sup>9</sup> See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 520 (4<sup>th</sup> Ed. 2000).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See id.*

<sup>16</sup> *Id.*

appropriate childhood amnesia (i.e., the decreased recall of autobiographical events that occurred before the age of 5).”<sup>17</sup> Moreover, given the nature of the problem, it is doubtful that experts in the field of child psychology will be able to identify or pinpoint symptoms in children with greater accuracy at any point in the near future.

### **B. RELIABILITY**

Questions about the reliability of recently recovered memories usually lead directly to admissibility concerns. It is important to recall that the witness’s recollections may not be seen as credible by a jury. Lay people tend to mix memory failure, such as the lapse in memory that occurs when the witness suffers from dissociative amnesia, with mere forgetfulness. Forgetfulness implies that one fails to remember an event or experience; however, such an explanation is inadequate when evaluating memory function in terms of how that function has been affected by stress and trauma.

“The essential feature of dissociative amnesia is an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness.”<sup>18</sup> As previously discussed, the accuracy of recovered memories or recollections has been disputed time and time again in the civil and criminal arenas. In other words, juries must be presented with some way of assessing the credibility of time-delayed testimony. Once testimony based on dissociative amnesia or repressed memory syndrome has been admitted by a court of law, however, the focus shifts to the relevance of the proffered expert testimony explaining how the current memory could have been forgotten and accurately recalled later.

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<sup>17</sup> See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 521 (4<sup>th</sup> Ed. 2000).

<sup>18</sup> See *id.*

### C. ADMISSIBILITY STANDARDS — FRYE & DAUBERT

The foundation for admitting expert opinion testimony involves analysis under either the *Frye* or *Daubert* tests. The *Frye* analysis is used in a minority of states while *Daubert* is utilized in both federal courts and the majority of states. The *Frye* test is a “general acceptance” test, which typically applies only to “scientific expertise.” It requires that: (i) the witness be qualified as an expert by knowledge, skill experience, training, or education<sup>19</sup>; (ii) the opinion will “assist” the trier of fact to understand evidence or determine a fact in issue (the “relevance” requirement); (iii) the evidence is reliable, i.e., scientists generally accept the technique or theory as reliable (the “general acceptance” test); and (iv) the evidence is admissible under Rule 403 of the Federal Rules of Evidence.

The *Daubert* Trilogy typically applies to all expert opinions. It requires that: (i) the witness be qualified as an expert by knowledge, skill experience, training, or education<sup>20</sup>; (ii) the opinion will “assist” the trier of fact to understand evidence or determine a fact in issue (the “relevance” requirement); (iii) the testimony satisfies the “*Daubert* Trilogy” requirements, i.e., the testimony is based upon *sufficient* facts or data (quantitative as opposed to qualitative analysis), the testimony is the product of *reliable* principles and methods, and that the expert has *applied* principles and methods *reliably* to the facts of the case (e.g., courts ask whether other experts in the field would reach the same conclusion); and (iv) the evidence is admissible under Rule 403 of the Federal Rules of Evidence.

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<sup>19</sup> Fed. R. Evid. 702.

<sup>20</sup> *Id.*

#### D. CASE STUDY

In *Shahzade v. Gregory*, a case involving allegations of non-consensual sexual touching that occurred over forty-seven years prior to the filing of the complaint, the District Court of Massachusetts held that evidence relating to repressed memories was admissible.<sup>21</sup> The plaintiff was between the ages of approximately twelve and seventeen at the time of the alleged touching and the defendant was her cousin.<sup>22</sup> The plaintiff claimed that the episodes had been completely blocked out and that she had no memory of them until she recovered the “repressed memories” during psychotherapy.<sup>23</sup> After a lengthy segment on dissociative amnesia and repressed memories as provided in DSM-IV, the court went on to mention the value of such findings as they related to the evidence and testimony presented at trial.<sup>24</sup> The court also stressed an important point – that its role is quite different from the trier of fact, i.e., “it is not the role of the Court to rule on the credibility of [a] plaintiff’s memories, but rather on the validity of the theory itself.”

#### CONCLUSION

The legal ramifications of each courtroom decision that involves testimony based on repressed memories seem only to add sediment to turbid waters. This persists despite the seemingly *reliable* approach to the admissibility of expert testimony regarding witness testimony based on newly recovered memories. Unlike the *Shahzade* court, many do not consider it “folly” for the law to reject diagnostic categories “generally accepted by those who practice the art and science of psychiatry.”<sup>25</sup> The issue commonly involves many variables (e.g., the method of recovery), and additional concerns such as

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<sup>21</sup> *Shahzade v. Gregory*, 923 F. Supp. 286, 287 (Mass. Dist. Ct. 1996).

<sup>22</sup> *Id.* at 287.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 290.

<sup>25</sup> *Id.*

the degree of complexity involved in assessing and diagnosing young children only serve to complicate matters further. In the end the facts of each case, the trial court's view on the admissibility of nontraditional psychological and social evidence, and the jury's appreciation and determination and of the issues presented decide each particular outcome respectively. Consequently, lawyers have learned that getting to the truth can be far more difficult than expected when repressed memories are involved, and the so-called "battle of the experts" embodies an issue of greater significance – the inexorable progression of our legal system. "Rules of law are not petrified in the past but flow with the current of expanding knowledge."<sup>26</sup>

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<sup>26</sup> *Shahzade v. Gregory*, 923 F. Supp. 286, 290 (Mass. Dist. Ct. 1996).