Pamela Radcliffe examines where memory and the law intersects

In 1994 Professor Richard Ofshe wrote, "We expect that recovered memory treatment will be virtually gone from the American scene within a decade but we anticipate that the journey to its abandonment will be tedious".

His expectation was wrong. Fifteen years on, the terminology may have changed but the central belief underpinning "recovered memory treatment" is still being promulgated in places including the USA, UK, Germany and Australia. The core belief is that a person, usually a woman, may involuntarily banish from consciousness the memory of repeated sexual childhood trauma. This is termed "traumatic amnesia". Proponents argue that it is possible to retrieve these memories therapeutically. The word "believe" is used advisedly. What is being examined is a belief system adhered to by a wide range of professionals and self-styled therapists. Advancement in neuroscience, coupled with a greater understanding of how memory works has led to criticism of this belief system by respected international academics. Professor McNally, of Harvard University, synthesized the research on both sides of the debate in his book Remembering Trauma in 2003. He concluded:

"First, people remember horrific experiences all too well ... Secondly, people sometimes do not think about disturbing events for long periods of time, only to be reminded of them later. However, events that are experienced as overwhelmingly traumatic at the time of their occurrence rarely slip from awareness. Thirdly, there is no reason to postulate a special mechanism of repression or dissociation to explain why people may not think about disturbing experiences for long periods."

This is not an academic controversy confined to learned articles but represents an unresolved issue of fierce debate among those who work and research in the mental health/psychological field. It has been referred to as, "The memory wars". However, notwithstanding the professional dispute, sexual allegations nurtured by
the belief and encouragement of therapists and a large body of self-help literature in the vein of Bass and Davis's, *The Courage to Heal*, promulgating the "traumatic amnesia" theory, are flourishing.

The idea that memories of abuse may have been repressed and that these hidden memories are capable of being accessed after many years are now part of popular culture, but it is not scientifically validated. The danger is that a person may come to genuinely believe that these illusory or pseudo-memories are true in the absence of corroboration and in the face of contra-indicators of abuse. In due course they may make serious sexual complaints against former loved ones or friends which may ultimately lead to criminal charges and trial. Even if the allegations do not result in legal proceedings, destruction of family relationships, mental health and employment problems swiftly follow.

The respective professional regulatory bodies, in various countries have set down guidelines for therapists when conducting therapy in which recovered memories may arise because of the accepted risk of creating illusory or false memories.

**So What is the Problem?**

There are two aspects of concern -- (i) that therapy conducted by both experienced professionals and self-styled therapists who unequivocally support the belief of repression and traumatic amnesia, may further damage the mental health of an existing vulnerable patient/client and create illusory or unreliable "memories" of abuse; and (ii) that this type of therapeutic belief has the potential to generate complaints of serious criminal misconduct which are at best unreliable or at worst, wholly illusory or false, causing manifest distress to the accuser and accused coupled with the risk of imprisonment.

**Where is the Evidence?**

There is no doubt that a belief system in "repressed memories" is prevalent among therapists in this country and that therapy is being conducted that is contributing to the generation of unreliable or false sexual allegations. The magnitude of the problem is unknown. There is a dearth of research on the prevalence of therapeutically assisted sexual complaints or false historical sexual allegations. Professional reports and anecdotal evidence inform the debate. However, legal professionals are sceptical that wholly false sexual allegations may be generated in the manner outlined. Lawyers, as a rule, are not instructed in psychiatry or psychology and so awareness of the issue is limited.

Therapeutic involvement or the use of popular self-help books may not come to light until the preparation of a case is well underway and then its importance may not be appreciated. The accused may have no prior knowledge of therapeutic involvement let alone the issue of illusory memories.

A complainant rarely presents to the police saying that she has been in therapy many years and has finally come to the conclusion she has been sexually abused. Close scrutiny of the therapeutic records, may reveal the genesis of the complaint from an initial position of a feeling of uncertainty by the complainant that something may have happened. The therapist may actively or passively encourage rumination on ideas or suspicions of abuse. Any subsequent "abuse memory" will not be subjected to any reality testing but faithfully accepted. The therapist or the patient may rely upon a list of symptoms regarded as being the "stigmata" of abuse. One such list is found in "The Courage to Heal", infra note 4: Do you have trouble feeling motivated? Can you accomplish things you set out to achieve? Do you feel you have to be perfect? Do you feel taken advantage of? Do you find your relationships just don't work out? Can you say no? Do you often have sex because you want to, or only because your partner wants it? Are you satisfied with your family relationships? Have you ever been rejected by your family?  

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Discussion

Future action that may assist in understanding, detecting and preventing the generation of false or unreliable sexual allegations is outlined as follows.

A Government inquiry to examine and resolve the controversy surrounding the scientific validity of the concept of traumatic amnesia and the reliability of so called "recovered memories" should be established.

It is apparent that the mental health profession is unable to resolve the issue. It is suggested that an independent inquiry be held to receive evidence from all leading experts on both sides of the debate to examine the competing scientific research. In the courts at present decision-making to the courts is occurring on a piecemeal basis. Given the seriousness and implications of such allegations, it is suggested that where the experts cannot resolve the issue, it should not be left to the vagaries of the jury system to determine simply which expert they prefer.

Research should be commissioned to examine the prevalence of sexual allegations that may have been assisted or generated by therapeutic means.

This could be undertaken by an empirical study, questioning therapists and tracking case histories and results in the family and Crown Courts. This may also provide information about the prevalence of a particular species of false or unreliable allegations and the attrition rate pre-charge. Such a study may also provide a paradigm for the police and CPS for identifying and sifting out inherently unreliable allegations at an early stage. This would not be usurping the function of the jury but applying the Code for Crown Prosecutors responsibly and effectively.

Contrary to the reports of some who suggest that false allegations of rape are rare, the research of Jo Lovett and others [A Gap or a Chasm? Attrition in Reported Rape Cases (Home Office Research Study 293, February 2005)] suggests it is not. Her findings showed that 80 per cent of rape complaints to the police foun-dered before charge, of which 12 per cent were designated “false allegations” by the police, eight per cent were not proceeded with for “reason unknown” and 21 per cent did not proceed because of “insufficient evidence”.

There is a perceived fear that focusing any attention on false allegations detracts from genuine complaints and may serve to undermine the conviction rate for real victims. This is, however, a short-sighted view. In the long term, such research will assist in encouraging responsible treatment and more effective police investigation from the start.

The introduction of updated guidance and accurate record keeping for all therapists whose methodology may result in the emergence of unreliable memories of sexual abuse. This guidance would apply to all therapists who encourage a patient to explore their innermost thoughts, bodily feelings and fantasy life.

It is proposed that all therapeutic consultations should be audio-recorded and retained as confidential unless sought by a court, ensuring that the therapeutic process is accessible to legal scrutiny. The interviewing and therapy methodology is fundamental in determining reliability. The absence of a full record should weigh heavily in determining at an early stage whether a sexual allegation is proceeded with. Audio-recording is not welcomed by practitioners. However, full recording would better serve the interests of justice as well as protect practitioners from accusations of malpractice.

Formal regulation and training should be introduced for all persons conducting counselling or therapeutic work, whatever their self-styled title.

Given the escalating numbers of those suffering from depression within the UK together with the Government’s endorsement of psychological talking therapies, compulsory regulation is required urgently. This should extend to all those who offer “therapy”. The previous government was committed to compulsory regulation but a command paper [Enabling Excellence -- Autonomy and Accountability for Healthcare Workers, Social Workers and Social Care Workers, Cmnd.8008] makes it crystal clear that the Government will not now proceed with compulsory statutory regulation. It argues that one of the Government’s central policies is to reduce or contain regulatory burden on our society. The problem is, currently any person can style
themselves “a therapist” and practice their individual therapy, with or without formal qualification. It is undoubtedly a situation open to abuse.

There should be core training for those who seek to practice in this field. While the overwhelming majority of psychotherapists and counsellors may indeed practice responsibly and effectively, a minority may not. Vulnerable people are open to exploitation by un-validated pseudo-scientific beliefs. The Council for Healthcare and Regulatory Excellence (CHRE) is now the “super-regulator” and will become the national accrediting body for voluntary professional registers in health and social care. There is no direct statement about the regulation of psychotherapy or counselling in the command paper. It is hoped that the CHRE will provide further guidance on various thorny issues such as professional misconduct, ethical guidelines and third party complaints. It remains to be seen how the CHRE will approach the issue of the self-styled therapists and counsellors currently practising outside any professional net.

The public needs to be educated about the implications of accreditation and non-registration.

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The Way Forward

Falsely accused people consider themselves victims of a pseudo-scientific belief system. Once the illusory or false sexual allegation has entered the portal of the criminal justice system via a formal complaint to the police, consistent criticism is made that the complaint is accepted at face value and there is no rigorous objective forensic investigation. For instance, there may be no exploration of evidence that is inconsistent with the allegation or that might undermine the reliability of the complainant. There is often a failure by the investigator to approach his task objectively. Further, the system is still slow to obtain third party disclosure despite the protocols in existence. However, changes have occurred with more on the horizon. The Criminal Justice Act 2003, s.137 has come into force facilitating the recording of interviews with significant and vulnerable adult witnesses thereby eliminating the problems caused by the handwritten statement. Further, the second edition of Achieving Best Evidence provides guidance to investigators on how to conduct a reliable interview and to explore significant evidential inconsistencies.

It also reminds the interviewer that inconsistencies may be caused by innocent reasons, or because the witness is motivated to fabricate or exaggerate their account, reinforcing an open minded approach.

In the meantime, the judicial approach to the receipt of expert evidence is to be modified by the recent recommendations of the Law Commission report [Expert Evidence in Criminal Proceedings in England and Wales, Law Com No.325] as outlined in the draft Criminal Evidence (Experts) Bill.

The trial Judge will in future take on a gate-keeping role to exclude unreliable expert evidence. The expert will need to demonstrate that their expertise is based upon sound principles, technologies, methods and assumptions drawing on the American case of Daubert v. Merrell Dow Pharmaceuticals 509 US 579 (1993).

An additional trial safeguard that could be considered is a formal jury direction on the need for caution in cases where long-term memory may have been contaminated by therapeutic intervention or self-help aids. Such a warning would provide a counter-balance to the “rape-trauma syndrome” direction.

It would inform the jury that sometimes people make false allegations which they believe to be true, that are not derived from true memory.

The Stern Report (2010) recommended research be conducted into the prevalence of false rape allegations. Falsely accused persons bear a heavy burden.

They are socially and financially penalized even if they are acquitted -- they cannot claim compensation for economic loss that flows from being on remand. Clive Bishop lost his application to the Criminal Injuries Compensation Authority in 2010 after being falsely accused of rape, even though his accuser was prosecuted and imprisoned.
Those who falsely accuse *via* memories constructed from pseudo-therapy are also victims. The problem will not vanish or be resolved of its own accord.

It is time for official intervention, investigation and action.